WOMEN'S ACCESS TO LAND IN UGANDA

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A DOCTORAL THESIS SUBMITTED IN FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF THE DEGREE OF DOCTOR OF LAWS (LLD) IN THE FACULTY OF LAW AT THE UNIVERSITY OF THE WESTERN CAPE

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2022

Abstract.

The thesis analysed the Ugandan policy and legal framework on women's land rights vis-à-vis the regional and international legal and policy framework, to identify the gaps, progress and the way forward.

Four objectives were framed in handling the research problem. First, there was an analysis of the regional and international legal framework on the rights of women to land. Secondly, the study examined and analysed the legal framework on the women's land rights in Uganda. The third objective was the analysis of women's land rights in East Africa. The study also reviewed the nexus between women's land rights and financial inclusion. Lastly, the study proposed policy and strategic reforms for advancement of the rights of women to land in Uganda.

The thesis was structured into six chapters. Chapter 1 laid down the background and context of the study, the problem statement, aims and objectives of the study and the significance of the study. The research methodology was also highlighted and so were the limitations of the study. Chapter 2 discusses the regional and international legal and policy framework on women's rights to land. Chapter 3 has an analysis of the legal framework on women's land rights in Uganda. Chapter 4 discusses the link between women's land rights and financial inclusion. Chapter 5 narrowed the discussion to women's land rights in the East African region with particular focus on Kenya and Tanzania. In Chapter 6, there is a summary of the findings and recommendations.

Doctrinal research involving the analysis of both primary and secondary data were used in this research. A summary of the findings is presented for every chapter.

The study noted that Uganda has made progressive constitutional, legislative and judicial processes in the advancement of women's land rights. The reforms are, however, time and again stifled by long-standing discriminatory cultures, customs, practices and pieces of legislation that continue to restrict women from owning or inheriting land. Cultural practices and norms continue to override formal law in Uganda. Succession and inheritance of family or marital land is heavily influenced by a patriarchal culture that favours male lineage.

In conclusion, the study recommended the domestication of the MAPUTO Protocol that provides for women's right to inherit in equitable shares the parent's properties as men. There is also need for a complete overhaul of the legal system in Uganda on women's land rights. This should be coupled with the building of a functional institutional framework for addressing women's land rights. There is so urgent need for enactment of a law that defines what constitutes matrimonial property and the formulae to apply in the sharing of the matrimonial property at the dissolution of the marriage. There should be serious awareness campaigns against women discrimination in land matters and other areas.

List of Acronyms.

AAS - The Uganda Bureau of Statistics Annual Agriculture Survey.

ACHPR -African Charter on Human & Peoples Rights.

ACRWC -African Charter on the Rights and Welfare of the Child.

AFI-Alliance for Financial Inclusion.

African Commission-African Commission on Human and Peoples Rights.

BOU- Bank of Uganda.

BPA- Beijing Platform for Action.

CB- commercial banks.

CEDAW- Convention on all Forms of Discrimination against Women.

CEFROHT . Centre for Food and Adequate Living Rights.

CGAP- Consultative Group to Assist the Poor.

CIDA- Canadian International Development Agency.

Cis- credit institutions.

COHRE- Centre on Housing Rights and Evictions.

CRC- Convention on the Rights of the Child.

DFS- Digital Financial Services.

ECHR- European Convention on Human Rights and Fundamental Freedoms 1950.

ECOSOC- UN Economic & Social Council.

EOC- Equal Opportunities Commission.

FAO- Food and Agriculture Organisation.

FI-). Financial inclusion.

FIDA-U- Uganda Association of Women Lawyers.

FII- Financial Inclusion Insights.

FSDU-Financial Sector Deepening Uganda.

IACHR- Inter-American Commission on Human rights.

ICCPR-International Covenant on Civil & Political Rights.

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

ICJ- International Court of Justice.

ICTs- Information and Communications Technologies.

IFC- International Finance Corporation.

IHRDA-Institute for Human Rights and Development in Africa.

IMF-International Monetary Fund.

KYC- Know Your Customer.

LSLB-Large scale land-based investments.

Maputo Protocol - African Union Protocol on the Rights of Women in Africa.

MDGs -The 2000 UN Millennium Development Goals.

MDIs- Microfinance deposit-taking institutions.

MFIs- Microfinance institutions.

MNO- Mobile Network Operator.

NDPII -Uganda Second National Development Plan.

NGO- Non-Governmental Organisation.

NLUPC- Tanzania National Land Use Planning Commission.

NPS- National Payment System.

NRM- National Resistance Movement.

ROSCAs-Rotating Credit and Savings Association.

RTA- The Registration of Titles Act.

SACCO's- Savings & Credit Cooperative Organizations.

SDGs-2030 Agenda for Sustainable Development.

UBS- Uganda Bureau of Statistics report (2020)5.

UCB- Uganda Commercial Bank.

UCC-Uganda Communications Commission.

UDHR -The Universal Declaration of Human Rights.

ULC- Uganda Land Commission.

UMRA- Uganda Microfinance Regulatory Authority.

UNAIDS- United Nations Programme on HIV/ AIDS.

UNHCHR United Nations High Commissioner for Human Rights.

UN-United Nations.

VSLAs-Village Savings and Loan Associations.

Statement of Original Authorship

I, MOSES GODFREY BYARUHANGA, do hereby declare that the work contained in this thesis has not been previously submitted to meet requirements for an award at this or any other higher education institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made.

Signature:

Date: 22nd /March 2023.

Dated at Cape Town this…….day of……2023.

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Professor Jamil Ddamulira Mujuzi.

Supervisor:

Acknowledgements

I would like to register my sincere and profound gratitude to the following persons who without their support, this study would not have come to fruition.

I would like to thank my supervisor Professor Jamil Mujuzi for the invaluable and formidable guidance that he gave me throughout this study. You made my work a lot easier than I had anticipated. Without you, my long desired quest to obtain a doctorate would have been a lot more complicated. I owe you a debt of gratitude.

I would like to thank my former Dean and current 1st Deputy Vice Chancellor of Makerere University Professor Umar Kakumba. You were very instrumental in my enrolment for this PhD study. Your unselfish support to me in being admitted and ensuring that I am able to complete this study without any financial hiccups is something I will cherish forever.

I would also like to acknowledge the support of Professor Godfrey Akileng, the current Dean School of Business, Professor Peter Turyakira, the head Department of Marketing and Management and Dr Erick Nzibonera, head Department of Accounting and Finance, School of Business, Makerere University and all my colleagues in the School of Business.

Dedication

I dedicate this study to my late grandmother Esteri Segujja, my mother Mrs Florence Magezi, my wife Sarah Abaasa Byaruhanga and my children.

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Chapter 1:
Introduction

1.1 Introduction

This thesis analyses the rights of women in accessing, owning and controlling land in Uganda. The projected total population of Uganda by mid-2020 was 41.6 million people, with women constituting the majority at 51 per cent, and men at 49 per cent.[1] A 2018 survey indicates the backbone of Uganda's economy is in agriculture, employing over 81.2 per cent of the total labour, but the percentage increases further to almost 90 per cent when focused solely on the population of women engaged in agricultural activities.[2] The survey further reveals disparities between men and women when it comes to tenure rights over agricultural land, with men controlling 48.7 per cent of the agricultural land in Uganda compared to women at 31.1 per cent.[3] Women form the biggest labour force in the agricultural sector, yet control less land. Another report shows that only 27 per cent of registered land is owned by women.[4] The majority of women therefore are engaged in production on land where they have limited power and control. The study analysed the reasons for this imbalance.

The following issues are dealt with in this chapter: the background of the study, the research problem, the research focus, the overall aim and objectives of the study, the significance of the study, the research methods and analysis, literature review, potential problems and limitations of the study, and a brief outline of the rest of the chapters of the thesis.

1.2 Background

To understand the situation of the rights of women to land in Uganda, the study analysed in detail provisions in the various international instruments on women's land rights. It also analysed the legal framework in Uganda on women's land rights as contained in the Constitution, the Land Act and other domestic legislation. The legal regimes in the East African region on women's land rights were also analysed. Through this thorough analysis, gaps were identified, and areas for reform pointed out.

[1] Uganda Bureau of Statistics report (2020) 5.
[2] The Uganda Bureau of Statistics Annual Agriculture Survey (AAS) (2018) 3.
[3] AAS (2018) 4.
[4] Uganda Second National Development Plan (NDPII) (2015/16 – 2019/20) 74-75.

Uganda is a member of the United Nations (UN) and the African Union (AU). As a member of the UN, Uganda must adhere to the provisions of the Universal Declaration of Human Rights (UDHR)[5] on the rights of everyone to own property either alone or in association with others.[6] The UN Commission on Human Rights has also passed several resolutions on equal access, ownership and control of land by women.[7]

Uganda ratified several UN human rights conventions that contain provisions on the rights of women and women's rights to land. The UN Conventions that Uganda ratified have binding commitments and standards which have to be strictly adhered to. Uganda ratified the CEDAW,[8] which has provisions on the equal treatment of women. It also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR),[9] which has provisions for the equal treatment of women in economic, social and cultural rights.[10] Uganda is signatory to the Beijing Declaration and Platform for Action 1995,[11] which has provisions for women's empowerment and the promotion of women's rights to land by governments through the elimination of all obstacles to women's access to land.[12] Uganda is signatory to the Istanbul Declarations on Human Settlement and Habitat Agenda 1996 which contains state obligations regarding women's access to land and inheritance rights. At the regional level, Uganda ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[13] The Protocol has provisions that explicitly aim at promoting women's rights to land. The provisions on women's land rights in the various international and regional instruments, as highlighted above, are discussed in detail in chapter 2 of the thesis.

The Universal Declaration of Human Rights (UDHR) was proclaimed by General Assembly Resolution 217 A of the UN General Assembly at its sitting in Paris, France, on 10 December 1948. The UDHR lays down the universal fundamental human rights to be observed and protected by all countries.

[6] Article 1 of UDHR.

[7] The UN Commission on Human Rights passed the resolutions during its 56th, 57th, 59th and 61st sessions.

[8] CEDAW was adopted by Resolution 34/180 in the General Assembly of the UN on 18 December 1979. CEDAW entered into force on 3 September 1981. Uganda ratified CEDAW on 22 July 1985. CEDAW is the first globally recognised and comprehensive legally binding international treaty aimed at the elimination of all forms of sex- and gender-based discrimination against women.

[9] CESCR was adopted and opened for signature, ratification and accession by Resolution 2200A (XXI) of the UN General Assembly on 16 December 1966. CESCR entered into force on 3 January 1976, in accordance with article 27. Uganda ratified the CESCR on 21 January 1987.

[10] Article 3 CESCR.

[11] The Beijing Declaration and Platform for Action was a landmark UN 4th World Conference on women. It was held in Beijing, China in 1995. The Platform for Action is meant to guide governments in setting agendas for women's equality and advancement. It is also meant to guide governments in setting up programs that promote inclusive, equitable and sustainable development.

[12] Paragraphs 58, 60 and 61 of the Beijing Platform for Action.

[13] The Maputo Protocol is the main legal instrument for protection of women and girl rights in Africa. It entered into force in November 2005 on being ratified by 15 countries. Uganda ratified it on 22 July 2010.

At the domestic level, Uganda has enacted numerous legal and policy instruments that contain provisions on women's rights to land. These provisions are contained in the Constitution, the Uganda Land Policy, the Land Act, and the Succession Act as amended.

1.2.1 Women's rights to land under the Constitution of Uganda

Land in Uganda belongs to the citizens of Uganda,[14] and is owned under four land-tenure systems: customary, freehold, *mailo* and leasehold.[15] The Constitution grants every person the right to own property either individually or in association with others.[16] By granting everyone the right to own land, the Constitution is the first formal legal document to explicitly recognise women's rights to own land in Uganda individually or in association with others.

Prior to the promulgation of the 1995 Constitution, there had been a 1993 High Court decision that had created a judicial precedent subordinating women's land rights to the man as the head of the household. The pivotal case was *Bariguga v Karegyesa & 2 others (*unreported*),*[17] where three sons sued their father over land on which their late mother had farmed for many years prior to her death. The issue before the court was whether a woman could claim exclusive control over land given to her by her husband to the point that, upon her death, it would become the property of her children. Karokara J stated that there was no custom that deprived a man of his land simply because the wife had been using it. The court was of the view that the deceased woman had simply used the land in trust for her own and her husband's benefit, and on her death her interest ceased and the land remained exclusively for the use of her husband. The implication of this decision is that a woman has no proprietary interest in land during marriage.

With the promulgation of the 1995 Constitution, men and women were accorded equal status. The Constitution guarantees gender equality in objectives VI[18] and X1[19] of the National Objectives and Directive Principles of State Policy. In objective XV, the state shall recognise the prominent role women play in society. In *Nyakaana v National Environment Management*

[14] Article 237 Constitution of Uganda, and section 2 of the Land Act, Ch.227 as amended.
[15] Article 237(3) Constitution of Uganda.
[16] Article 26(1) Constitution of Uganda.
[17] *Bariguga v Karegyesa & 2 others*, District Register, High Court of Uganda at Kabale, Civ. App. MKA, 13/93. Arising from Civ. App. MKA 48/90 (unreported).
[18] Objective VI provides that the state shall ensure gender balance and fair representation of marginalised groups on all constitutional and other bodies.
[19] Objective XI (iii), the state shall ensure that it creates equal opportunities in the acquisition, ownership, use and disposition of land and other property, in accordance with the Constitution.

Authority and Others,[20] Katurebe CJ stated that the National Objectives and Directive Principles of State Policy are meant to 'guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society'.[21] The learned judge was further of the view that the National Objectives and Directive Principles of State Policy have gone beyond merely guiding the courts in interpreting the Constitution but may also be justiciable in their own right due to the weight added to them by article 8A of the Constitution, which provides that 'Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directives principles of State policy'.[22] The High Court has echoed the same guidance in *Centre for Food and Adequate Living Rights (CEFROHT) v Attorney General,*[23] where the court stated that the National Objectives are no longer merely guiding, but are justiciable themselves.[24]

Gender equality is mainstreamed throughout the Constitution. Several chapters in the Constitution contain provisions related to women's equal rights to land. Women are guaranteed equal rights to men. Article 21 of the Constitution provides that 'all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law'. Discrimination on grounds of sex, colour, tribe, birth, religion, creed, race, ethnic origin, economic or social standing, disability or political opinion is prohibited.[25] Discrimination is defined under the Constitution to men:

> [G]iving different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.[26]

[20] *Nyakaana v National Environment Management Authority and Others* (Constitutional Appeal No. 05 of 2011) [2015] UGSC 14 (20 August 2015).
[21] *Nyakaana v National Environment Management Authority and others* (2015) 38.
[22] *Nyakaana v National Environment Management Authority and others* (2015) 41.
[23] *Centre for Food and Adequate Living Rights (CEFROHT) v Attorney General* (MISCELLANEOUS CAUSE NO. 75 OF 2020) [2020] UGHCCD 157 (4 June 2020); 28.
[24] Centre *for Food and Adequate Living Rights (CEFROHT) v Attorney General* (2020) 28.
[25] Article 21(2), Constitution of Uganda.
[26] Article 21(3), Constitution of Uganda.

The Constitution is the supreme law of Uganda and has binding force on all authorities and persons throughout Uganda, and any law or any custom inconsistent with any provisions of the Constitution is null and void to the extent of its inconsistency with the Constitution.[27] The courts in Uganda have invoked the constitutional supremacy and equality provisions in the Constitution in deciding many cases where discriminatory legislation and practices have been declared unconstitutional and inconsistent with the Constitution, and hence null and void. A few cases are discussed.

In *Uganda v Peter Matovu,*[28] the court was confronted with an old colonial rule that was to the effect that it was dangerous to convict a man on a sexual offence against a woman based on the uncorroborated evidence of the woman since women tend to be liars. The court found the rule discriminatory and inconsistent with Uganda's international obligations in article 1 of CEDAW and article 21 of the Constitution which prohibit discrimination against women, and inconsistent with article 2 of the Constitution inasmuch as that any law or practice inconsistent with any provisions of the Constitution is null and void.[29] In *Kwizera Eddie v Attorney General,*[30] the question before the Constitutional Court was whether article 80(4) of the Constitution, which requires all public officers or any person employed in a government agency or department or any entity where government has a controlling interest to resign 90 days before the nomination date for parliamentary elections, was inconsistent with and in contravention of articles 1(4), 21(1) and 38(1) of the Constitution in so far as other people, specifically political leaders, were not required to resign too. The court held that article 80(4) was indeed inconsistent with article 21 of the Constitution, which safeguards equality and freedom from discrimination. The court was of the view that article 21 of the electoral process is meant to level the playing field by barring anyone from differential treatment during an electioneering period.[31] The fact that the political class could employ state machinery as well as enjoying social, and financial muscle and protection which was denied to other contenders was clearly discriminatory. Article 80(4) was thus found irreconcilable and inconsistent with article 21(1).[32]

[27] Article 2(1), Constitution of Uganda.
[28] *Uganda v Peter Matovu* (Criminal Session Case No.146 Of 2001)) [2002] UGHC 72 (19 October 2002).
[29] *Uganda v Peter Matovu* (2002) 4.
[30] *Kwizera Eddie v Attorney General* (Constitutional Petition No. 14 of 2005) [2006] UGCA 2 (25 August 2006).
[31] *Kwizera Eddie v Attorney General* (2006) 8.
[32] *Kwizera Eddie v Attorney General* (2006) 9.

In *Okupa v Attorney General & 3 others,*[33] the matter before the court was whether the government's failure to disarm the Karamojonj community was illegal and discriminatory and thus led to the violation of the fundamental rights of the applicants. The court invoked the foundations of article 21 of the Constitution of Uganda, found in several international legal instruments that preceded the 1995 Ugandan Constitution, namely article 2(1) of the Universal Declaration of Human Rights, article 18 of the International Covenant on Civil and Political Rights, article 12 of the American convention of Human Rights 1969, article 9 of the European Convention on Human Rights and article 8 of the African Charter on Human and Peoples' Rights, which provide for equality before the law and freedom from discrimination. The court ruled that the policies of government that permitted the Karamajonj to own firearms illegally were a violation of the applicant's fundamental rights and freedoms under the Constitution.[34]

This constitutional supremacy ensures that any law, practice, custom or norm that violates women's equal rights is unconstitutional, null and void. The courts in Uganda have indeed found several historically existing cultural and other discriminatory practices that were denying women equal rights to land as men offensive to human dignity. In *Ebiju & Anor v Echodu,*[35] the second appellant (the widow) had been inherited by the respondent following the death of her husband. She decided to sell part of the land left to her by the deceased husband to the first appellant who was her son in law. The respondent objected to the sale, arguing that from the moment he inherited the second appellant as his wife, he had inherited her land too according to Teso customs.[36] The court invoked article 32(2) of the Constitution and article 5 of CEDAW that prohibits customs, cultures and traditions that are against the dignity, interests or welfare of women, and observed that a custom that denies widows proprietary rights on land held under customary tenure is discriminatory, and that, as death leads to dissolution of marriage, the widow had obtained proprietary rights on her deceased husband's estate together with her children,[37] and that the suit land could not devolve to the deceased brother who had inherited the widow. The court ruled that the custom of inheriting a widow by a late husband's brother could not grant proprietary interests of the deceased estate to the new husband, and that the widow had all rights to deal and dispose of the land as she wished.[38]

[33] *Okupa v Attorney General & 3 Ors* (Misc. Cause No. 14 of 2005) [2018] UGHCCD 10 (31 January 2018).
[34] *Okupa v Attorney General & 3 Ors* (2005)16.
[35] *Ebiju & Anor v Echodu* (Civil Appeal No. 43 of 2012) [2015] UGHCCD 122 (17 December 2015).
[36] *Ebiju & Anor v Echodu* (2015) 2.
[37] *Ebiju & Anor v Echodu* (2015) 6.
[38] *Ebiju & Anor v Echodu* (2015) 7.

In *Peter Otikor & Ors v Margaret Anya,*[39] the appellants and respondent belonged to different clans. The respondent had inherited her grandfather's land, which she had received as a donation. The respondent's grandfather had not produced a male child. It was the appellant's contention that, in the absence of a male child to continue the lineage, the land would revert to the clan of the original donor to which the appellant also belonged and not pass to the respondent, who was female.[40] The court held that the argument that land is inherited through male descendants is contrary to article 32(2) of the Constitution of Uganda and article 5 of CEDAW.[41]

The decision in *Peter Otikor & Ors v Margaret Anya,*[42] was re-echoed by the court in *Bran Dehya v Khemisa Karala,*[43] the respondent, who had inherited land from her late father, left the disputed land in the hands of a caretaker during the war in northern Uganda. On her return, it was found that the appellant, a cousin to the respondent, had forcefully encroached on the land. During cross-examination, the appellant in reference to the respondent stated: ' You were left in my hands, the dowry paid for you was handed over to me and you have no right to land since you were married away'.[44] The court observed that a custom that locks girl children out of their fathers' estate because they will be catered for by their husbands is unconstitutional, and that the attempt by the appellants to deprive the respondent of her land on account of her sex as shown by the appellant's demeaning attitude towards her was illegal.

The Constitution recognises the rights of women, and the court must enforce those rights, otherwise women will never benefit from the new constitutional order.[45] In *Lapid & 2 others v Acadong,*[46] the appellants attempted to forcefully take land the respondent had inherited from her late husband on grounds that land belonged to the clan, and that, on the death of the respondent's husband, the land reverted to the clan, and the appellants as clan brothers of the respondent's husband were entitled to the land.[47] The court agreed with the observations of the

[39] *Otikor & Ors v Anya* (Civil Appeal No. 38 of 2012) [2016] UGHCLD 10 (5 May 2016).
[40] *Otikor & Ors v Anya* (2012) 3.
[41] *Otikor & Ors v Anya* (2012) 4.
[42] *Otikor & Ors v Anya* (Civil Appeal No. 38 of 2012) [2016] UGHCLD 10 (5 May 2016).
[43] *Bran Dehya v Khemisa Karala* (Civil Appeal No. 0012 of 2015) [2017] UGHCLD 83 (15 June 2017).
[44] *Bran Dehya v Khemisa Karala (*2015*)* 13.
[45] *Bran Dehya v Khemisa Karala* (2015) 14.
[46] *Lapir & 2 Others v Acadong* (Civil Appeal No. 37 of 2019) [2020] UGHC 107 (22 May 2020).
[47] *Lapir & 2 Others v Acadong* (2019) 14.

lower court and ruled that an Acholi custom that bars widows from inheriting their husbands' land is discriminatory and contrary to articles 32(2) and 33(1) of the Constitution of Uganda.[48] The court ruled that the disputed land could not devolve to the appellants as clan brothers of the respondent's husband, and that the land had instead devolved to the respondent who had survived her husband.[49]

In *Kolya v Kolya,*[50] the man had in his will left the matrimonial home to his heir with the clause in the will stating 'that my land and main house … I give it to the heir but my wife has to stay there until she dies or unless when she marries, then the heir is free to own the whole property'.[51] The court found that a will that exalted the heir above the widow was part of a cultural practice that grants heirs rights over the matrimonial home and denies widows property rights, which is discriminatory and inconsistent with article 32(2) of the Constitution of Uganda and article 5 of CEDAW.[52] The court concluded that it was unlawful for the man to bequeath the matrimonial property to his heir without the wife's permission, and that the same could not devolve to the heir when the widow has survived him. The court granted the matrimonial home to the widow with rights to deal with it as she wished.[53]

The cases discussed above tend to show how the courts in Uganda have tried to be progressive in promotion of women's rights to land. The cases though are indicative of a persistent pattern of denial of women's rights to land due to cultures and customs that still favour the male child. Many women are unable to access legal services and the court system because of the financial implications of challenging many still-existing discriminatory cultures and customs. Research shows that women's access to, and ownership and control of, land is still heavily influenced by a patriarchal culture, and that the institutional framework for addressing women's property rights is deficient and does not function at all.[54]

To stop discrimination against women based on historical, cultural and patriarchal practices, the Constitution emphasises the promotion of affirmative action through policies and strategies in favour of groups historically marginalised because of custom, tradition, disability, age or

[48] *Lapir & 2 Others v Acadong* (Civil Appeal No. 37 of 2019) [2020] UGHC 107 (22 May 2020) 6.
[49] *Lapir & 2 Others v Acadong* (2019) 16.
[50] *Kolya v Kolya* (Civil Suit No. 150 of 2016) [2020] UGHCFD 4 (3 July 2020).
[51] *Kolya v Kolya* (2016)7.
[52] *Kolya v Kolya* (2016)7.
[53] *Kolya v Kolya* (2016) 8.
[54] Kabahinda (2017) 828–838.

gender.[55] Equally, customary practices, laws, or traditions that discriminate against women are prohibited.[56] It is, however, important to note that the right to freedom from discrimination is not absolute. In *Carolyne Turyatemba & 4 Ors v Attorney General & Anor,*[57] the Constitutional Court ruled that discrimination may be allowed under article 21(4) of the Constitution in some instances as long as it is not offensive to human dignity.[58]

To promote equality in all spheres in line with the Constitution, Parliament has since established the Equal Opportunities Commission.[59] The Commission was established

> [T]o ensure that laws, policies, plans, state or private individuals or communities are compliant with equal opportunities and the promotion of affirmative action in favour of groups marginalised on the basis of race, sex, colour, ethnic origin, tribe, creed, religion, social and economic understanding, political opinion, disability, gender, age or any other reason created by tradition, history or custom.[60]

The jurisprudence and practice of the Equal Opportunities Commission in tackling discrimination and the rights of women to land are dealt with in chapter 3.

1.2.2 Rights of women to land under the Land Act

When it comes to ownership of land, the principal land law in Uganda is the Land Act.[61] The Land Act, just such as the Constitution, recognises four land-tenure systems in Uganda: *mailo*; freehold; leasehold; and customary land-tenure systems.[62]

The Act defines customary land tenure as the system of land ownership regulated by customary rules which are limited in their operation to a particular description or class of persons.[63] In

[55] Article 32 of the Constitution of Uganda.
[56] Article 33 of the Constitution of Uganda.
[57] *Carolyne Turyatemba & 4 Ors v Attorney General & Anor* (Constitutional Petition No. 15 of 2006) [2011] UGCC 13 (8 August 2011).
[58] *Carolyne Turyatemba & 4 Ors v Attorney General & Anor* (2006) 20-24.
[59] This was established by the Equal Opportunities Commission Act 2007.
[60] Section 14 of the Equal Opportunities Commission Act 2007.
[61] Land Act, Ch. 227, as amended by the Land (Amendment) Act 2004.
[62] Section 2 Land Act, Ch. 227.
[63] Section 1(I) Land Act, Ch. 227.

Kampala District Land Board & Anor v Venancio Babweyaka & others,[64] the Supreme Court gave guidance on what amounts to customary land in the question of whether land occupied by the respondents and bought in 1998 from previous occupiers who had acquired it as far back as 1970 could have been held under customary tenure. The court observed that, in order to prove that land is held under customary tenure within the provisions of section 27 of the Land Act, the party alleging this has to bring evidence to show the kind of customs or practices under which the land was held. He or she must also adduce evidence to the effect that the said custom or practice is recognised and regulated by a particular group or class of persons living in the area.[65]

The Land Act recognises the use of culture, customs and practices in relation to customary land as long the said cultures, customs or traditions are not used to deny women their right to customary land. It provides that

> [A]ny decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally shall be in accordance with the customs, traditions and practices of the community concerned, except that a decision which denies women or children or persons with a disability access to ownership, occupation or use of any land or imposes conditions which violate articles 33, 34 and 35 of the Constitution on any ownership, occupation or use of any land shall be null and void.[66]

The above provision, contained in section 27 of the Land Act, was a step in the right direction in promoting women's rights on customary land. It is, however, worth noting that the Act had provided for the establishment of Parish Land Committees to advise the District Land Board on ascertainment of rights to land.[67] These Parish Land Committees have never been established and, in the absence of these committees, women may find it difficult to prove their rights on mostly unregistered customary land. Secondly, some customs, as seen for instance in the case of *Bran Dehya v Khemisa Karala,*[68] still view women as people who will marry into

[64] *Kampala District Land Board and Another v Venansio Babweyaka and Others* (Civil Appeal No.2 of 2007) [2008] UGSC 3 (11 February 2008).
[65] *Kampala District Land Board and Another v Venansio Babweyaka and Others* (2007) 18.
[66] Section 27 Land Act, Ch. 227.
[67] Section 64 Land Act, Ch.227.
[68] *Bran Dehya v Khemisa Karala* (Civil Appeal No. 0012 of 2015) [2017] UGHCLD 83 (15 June 2017).

another clan or tribe and should not be inheriting their fathers' land. Other customs, as in the case of *Ebiju Justine Wilson & Angwedo Mary v Echodu Surubaberi,*[69] also discussed above, believe that the widow is inherited by the deceased husband's brother or clan brothers, with the assumption that inheriting the widow automatically translates into inheritance of her land. This leaves a woman with no land or proprietary rights over her deceased husband's land.

The Land Act has also provisions for the direct participation of women in various local or district land institutions, and at least one-third of the members of the District Land Board and the Communal Land Associations shall be women.[70] The District Land Board is responsible, among other things, for allocating any land in the district that is not owned by any person or authority, and also facilitates the process of registration and transfer of interests in land.[71] Communal land associations, on the other hand, are associations or groups of individuals meant to secure and promote communal ownership and management of land held under customary tenure or otherwise.[72]

The involvement of women in the management of the various land institutions is a positive affirmative action. However, it has been pointed out in one study that women's participation in these institutions has its potential weaknesses, as one-third allocation leaves women as minorities in these institutions, and quite often their views are suppressed by the majority.[73] Secondly, the basic land management structure, which is the Area Land Committee, works with a culturally traditional institution of elders, most of whom are still strongly influenced by a patrilineal ideology.[74]

The 2004 amendments to the Land Act[75] further address women's rights to land by giving a spouse the right of occupancy on family land as well as requiring prior spousal consent on any transaction involving family land.[76] Every spouse shall enjoy security of occupancy on family

[69] *Ebiju & Anor v Echodu* (Civil Appeal No. 43 of 2012) [2015] UGHCCD 122 (17 December 2015).
[70] Sections 16 and 57(3) Land Act, Ch. 227.
[71] Section 59 Land Act, Ch. 227.
[72] Section 15 Land Act, Ch. 227.
[73] Acidri (2014) 195.
[74] Acidri (2014) 196.
[75] The Land (Amendment) Act, 2004.
[76] Sections 38A and 39, Land (Amendment) Act, 2004.

land.[77] Security of occupancy means the right to have access to and live on family land.[78] Family land is defined as

> [L]and where the ordinary residence of the family is situated or land which has the ordinary of the family and from which the family derives sustenance or land which the family voluntarily agrees that it shall be treated as family land according to the norms, culture, customs, traditions or religion of the family.[79]

To understand the impact of the security of occupancy provision in the Land Act on the rights of women to land in Uganda, a few cases are discussed. In *Tumwebaze v Mpeirwe & Anor,*[80] the respondent mortgaged off family land without the consent of the wife. The respondent's contention was that he had only mortgaged the banana plantation, which he had apportioned off the homestead, and that the mortgaged banana plantation was therefore not part of family land.[81] The court observed and stated that

> [T]he argument that the banana plantation had been demarcated from the homestead would be to defeat the stipulation of 'land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance'; for it is inconceivable that a homestead without the banana plantation in this case would provide the sustenance contemplated by the law.[82]

The court ruled that the banana plantation formed part of the land where the family ordinarily resides and derives sustenance and was therefore family land where spousal consent was mandatory.

[77] Section 38A Land (Amendment) Act 2004.
[78] Section 38A (1), Land (Amendment) Act, 2004.
[79] Section 38 A (4), Land (Amendment) Act, 2004.
[80] *Tumwebaze v Mpeirwe & Anor* (HCT-05-CV-CA-0039-2010) [2013] UGHCLD 9 (8 February 2013).
[81] *Tumwebaze v Mpeirwe & Anor* (2010) 2.
[82] *Tumwebaze v Mpeirwe & Anor* (2010) 5.

In *James Baryamureeba v Kabakonjo Abwooli & 6 others,*[83] the couple had been together for more than 35 years and had seven children. The man wished to sell part of the land where the family had lived for all those years to pay his medical bills. The wife and the children objected to the sale. The question before the court was whether the suit land was family land within the meaning of section 38(A) of the Land Act. The court found that the suit land not only had a homestead, but that there were cows, burial grounds and plantations. For all intents and purposes, the family ordinarily resided on the suit land. It was evident that the suit land met the definition of family land in the Land Act, as it was land where the family resided and indeed from which it directly or indirectly derived sustenance and livelihood.[84]

Prior to the enactment of section 38(A) of the Land Act on right of occupancy by spouses, women's rights to family land were unclear and with little protection. This was evident in the case of *Kulabiraawo v Nalubega.*[85] In this case, the appellant, husband to the respondent, had sold the *kibanja* which the family had cultivated for many years. The respondent did not grant her consent to the sale and her repeated protests were ignored too. The court in this case distinguished a right in land and an interest. Interest goes with ownership whether legal or equitable, but rights are associated with the use of land for cultivation or other purposes with no exact protection. The court concluded that the fact that the respondent had used the land for cultivation, whether for sale or home consumption, did not create an interest in her favour and the husband did not need her consent before the sale.[86]

With the enactment of section 38A of the Land Act, no transaction can be performed regarding family land by one spouse without the prior written consent of the other spouse.[87] In *Lanyero Ketty v Okene Richard & Anor,*[88] the appellant had been married to the respondent for many years, with five children. After a marital disagreement, the respondent abandoned the family and married another woman and, without the knowledge of the appellant, went ahead and sold the marital land to another person. The court held that section 39(1) (b) of the Land Act required prior written spousal consent for any transaction involving family land. The court also referred to the exception in section 38A (5) of the Land Act where spousal consent is not needed where

[83] *Baryamureeba v Kabakonjo & 6 Others* (Civil Suit No. 20 of 2013) [2020] UGHCCD 27 (17 January 2020).
[84] *Baryamureeba v Kabakonjo & 6 Others* (2013) 26-27.
[85] *Kulabiraawo v Nalubega* (Civil Appeal No.55/02) [2005] UGCA 6 (28 February 2005).
[86] *Kulabiraawo v Nalubega* (2002) 8.
[87] Section 38A (2) and Section 39 of the Land (Amendment) Act 2004.
[88] *Lanyero V Okene & Anor* (Civil Appeal No. 0029 of 2018) [2018] UGHCLD 61 (27 September 2018).

spouses are legally separated. In the instant case, because the spouses were not legally separated, the sale of the family land without spousal consent was declared void.[89] This was also the decision in *Sheila Butsya v Percy Paul Lubega & Anor,*[90] where the court found that spousal consent was required about a family property even when the husband and wife were not living together but were not legally separated.[91]

In *Tiperu Nusura v Bank of Baroda & Ors,*[92] the court observed that it is the mortgagee's duty to take due diligence to ascertain the marital status of the mortgagor and whether the property is matrimonial property or not. The first respondent had an obligation to find out whether the second respondent was married and obtain a declaration to that effect, which was not done. The spousal consent was to be obtained irrespective of whether the land was matrimonial property or not.[93]

While the highlighted provisions of the Land Act on security of occupancy and spousal consent are important provisions in the advancement of women's rights to land, women still face significant challenges in enforcement of their rights to land. The law did not establish a specific body or authority to verify or approve the prior spousal consent before any land transactions. Quite often land is sold without spousal consent, and women are often powerless to stop the sale. It is also important to note that the Land Act makes no mention of the land rights of women in cohabitation, widows and divorcees.

1.2.3 The Uganda National Land Policy 2013

Besides the legal provisions highlighted in the Constitution of Uganda and the Land Act on the rights of women to land, the passing of the Uganda National Land Policy[94] was also meant, among other things, to provide a basis for necessary legislative reforms to tackle obstacles to women's rights to land. The policy states that government shall 'by legislation protect the right to inheritance and ownership of land for women and children' and shall 'ensure that both men

[89] *Lanyero v Okene & Anor* (2008) 15.
[90] *Sheila Butsya Lubega v Percy Paul Lubega & Anor* (HCT-00-CC-CS-292-2016) [2018] UGCOMMC 16 (6 June 2018).
[91] *Sheila Butsya Lubega v Percy Paul Lubega & Anor* (2016) 6.
[92] *Tiperu v Bank of Baroda & Anor* (Misc. Application No. 834 of 2017) [2018] UGCOMMC 36 (10 August 2018).
[93] *Tiperu v Bank of Baroda & Anor* (2017) 7.
[94] The National Land Policy was developed by the Ministry of Water, Lands & Urban Development, and adopted by the Parliament in 2013.

and women enjoy equal rights to land before marriage and at succession without discrimination'.[95] In the case of *Muhindo & 3 Ors v Attorney General,*[96] the court took judicial notice of the objectives of the Land Policy as one meant 'to streamline/harmonise the complex land tenure regime in Uganda for equitable access to Land and security of tenure; reform/streamline land rights administration, ensure efficient, effective, equitable delivery of land services and to harmonise all land related laws'.[97]

In section 3.10 of the Policy, entitled 'Land Rights of Women and Children', the Policy recognises the long-standing inherent cultural and discriminatory practices that continue to restrict women from owning or inheriting land. The Policy also recognises the failure by formal law to override cultural practices and norms denying women equal access to and ownership of land.[98] The Policy is however silent on measures to be taken to protect women's land rights *vis-à-vis* cultural practices and norms. The Policy calls for comprehensive reforms to stop discrimination concerning land, but without proposing measures. The Policy concedes that attempts to outlaw cultural and customary practices that hinder women's access to land, and the requirement for spousal consent for any transaction involving family land in the Land Act, have been ineffective in enforcement of women's rights to land due to failure in enforcement and implementation.[99]

1.2.4 Women's rights to land during marriage and at the dissolution of the marriage

As mentioned previously, sections 38A and 39 of the Land Act are important provisions in the protection of women's rights to land during the existence of the marriage, albeit with challenges. The biggest challenge is the lacuna in the laws on women's land rights at the dissolution of marriage. The Land Act law is silent on the rights of women to land at the dissolution of marriage.

Article 31(1) of the Constitution of Uganda provides that men and women have the right to marry and to found a family as long as they are 18 years old and above. Spouses are also entitled

[95] Uganda National Land Policy (2013) Chapter 4.10, article 65.
[96] *Muhindo & 3 Ors v Attorney General* (Miscellaneous Cause No.127 of 2016) [2019] UGHCCD 3 (25 January 2019).
[97] *Muhindo & 3 Ors v Attorney General* (2016) 5.
[98] Uganda National Land Policy (2013) 27.
[99] Uganda National Land Policy (2013) 27.

to equal rights in marriage, during marriage and after its dissolution. Article 31 is however silent on the formulae to be applied in the distribution of property at the dissolution of the marriage, and there is no legislation on the matter. Uganda recognises five types of marriages: civil, church, Hindu, Islamic, and cultural or customary marriages. Each of these five marriages is regulated under a different law.[100] The different marriage laws in Uganda are silent on division of property at the dissolution of marriage. Division of property at the dissolution of marriage has therefore been left to the discretion of courts, albeit sometimes with inconsistent decisions.

The courts in Uganda have made several decisions on the division of matrimonial property at the dissolution of marriage. Although matrimonial property includes every property acquired by spouses including cars, gifts, and so on, for purposes of this study, matrimonial property shall refer exclusively to real property. A few cases are discussed. A landmark 2007 High Court decision ruled that a woman's non-monetary contribution should be considered when computing her share in the estate at divorce.

The pivotal case is *Kagga v Kagga,*[101] where Mwangusya, J. observed that in distribution of the properties of the divorced couple, it is immaterial that one spouse was more financially endowed than the other. The court will take into consideration each couple's contribution, and the contribution may be direct, that is monetary, or indirect, where the other spouse offers domestic services.

This was re-affirmed by the Supreme Court, the highest court in Uganda, in *Julius Rwabinumi v Hope Bahimbisomwe.*[102] In this case, the Supreme Court held that property acquired solely by a spouse before marriage does not became joint property upon marriage.[103] Each couple is entitled to keep the properties he or she acquired before the marriage. That proprietary right cannot pass from one person to another at marriage. The court observed that, although the Constitution recognises the equality between man and woman during marriage and at divorce,

[100] These are the Marriage Act Cap 211, 1904 Laws of Uganda, the Hindu Marriage and Divorce Act, Cap 250, 1961 Laws of Uganda, the Divorce Act Cap 249, 1904 Laws of Uganda, the Marriage and Divorce of Mohammedans Act, Cap 252, 1906 Laws of Uganda (regulating marriages and divorces between Muslims) and, finally, the Customary Marriages Registration Act Cap 248, 1972 Laws of Uganda (this recognized customary marriage as a legal marriage in Uganda, and all polygamous marriages as long as they are customary.
[101] *Kagga v Kagga, High* Court Divorce Cause No. 11 of 2005 (unreported).
[102] *Rwabinumi v Bahimbisomwe* (Civil Appeal No. 10 of 2009) [2013] UGSC 5 (20 March 2013).
[103] *Rwabinumi v Bahimbisomwe (2009) 9.*

the framers of the Constitution did not take away the right of married people to own property in their individual names, as article 26(1) guarantees the right to own property individually or jointly with others.[104] The court was of the view that the framers of the Constitution did not intend to take away a married person's right to own separate property in his or her own individual names, otherwise they would have explicitly stated so;[105] that a spouse can only have a share in property acquired by the other spouse before marriage if he or she proves contribution towards improvements on the property;[106] and that for a spouse to have a share in the property solely acquired during marriage, evidence must be led to show that he or she contributed to the acquisition of the said property, either through direct monetary or non-monetary contribution, or through indirect contribution which enabled the other spouse to acquire or develop the property in question.[107] Direct monetary or non-monetary contribution includes making payment(s) towards the purchase price or mortgage instalments or payments towards development of the property, whereas indirect contribution includes payment of other household bills and other family requirements including child care and maintenance, growing food for feeding the family, and generally payments towards the enhancement of the welfare of the family.[108] As for the property jointly registered in both couples' names or jointly acquired, it is jointly owned property to be shared in equal proportions (50 per cent share per spouse) unless the other spouse proves that he or she is entitled to a larger share.[109] In *Namukasa v Kokondere,*[110] the court followed the precedent in *Julius Rwabinumi v Hope Bahimbisomwe*. There was irrefutable evidence that there were properties acquired individually or jointly throughout the marriage and that, irrespective of the type of ownership, the properties were acquired out of the proceeds from the business on which they had both expended time and effort.[111] In view of that, the court ordered all properties in their joint names to be shared in equal proportions. For the properties acquired individually by the man, the woman's non-monetised contribution was recognised and she was granted shares in the said properties.[112]

[104] *Rwabinumi v Bahimbisomwe (2009)* 14.
[105] *Rwabinumi v Bahimbisomwe (2009)* 21.
[106] *Rwabinumi v Bahimbisomwe (2009) 10.*
[107] *Rwabinumi v Bahimbisomwe (2009) 12-13.*
[108] *Rwabinumi v Bahimbisomwe (2009) 21.*
[109] *Rwabinumi v Bahimbisomwe (2009)* 22.
[110] *Namukasa v Kakondere* (Divorce Cause No. 30 of 2010) [2015] UGHCFD 49 (10 April 2015).
[111] *Namukasa v Kakondere* (2010) 9.
[112] *Namukasa v Kakondere* (2010) 10.

In *Ayiko v Lekuru,*[113] *quoting with approval the English case of Pettitt v Pettitt*[114] and the Kenyan case in *Kamore v Kamore*[115] the court reiterated the principles of distribution of property at divorce:

> [W]here property is acquired during the course of marriage and is registered in the joint names of both spouses, the court in normal circumstances must take it that such property is a family asset to be distributed in equal shares in the absence of rebuttable evidence and where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property.[116]

In *Katuramu v Katuramu,*[117] following earlier precedents, the court stated that the property a couple chooses to call a home will be considered joint matrimonial property, together with property either of the spouses contributes to, and the contribution may be direct or indirect monetary contribution, and non-monetary.[118] In *Kayhul v Kayhul,*[119] the court held that the matrimonial home, although having been bought solely by the man, had be shared in equal shares, as the woman had proved her indirect contribution towards the improvement of the welfare of the family.[120]

The approach taken by courts in Uganda, as discussed in the cases above, has been lauded as a positive step towards equitable distribution of marital property at the dissolution of marriage, indirectly achieving what some delegates during the Constitution-making process had wanted.[121] This legal precedent is a step forward in the promotion of women's rights to land. The challenge before the courts, however, is that there is no clear formula for assessing a woman's non-monetary contribution and putting a value on it. As per the authorities,

[113] *Ayiko v Lekuru* (Divorce Cause No. 0001 of 2015) [2017] UGHCFD 1 (17 February 2017).
[114] *Pettitt v Pettitt* [1969] 2 WLR 966, at Page 991 Paragraph H.
[115] *Kamore v Kamore* [2000] 1 EA 81.
[116] *Ayiko v Lekuru* (2015) 21.
[117] *Katuramu v Katuramu* (Hct – 01 – Cv – Ma No. 026 Of 2017) [2018] UGHCLD 55 (10 September 2018).
[118] *Katuramu v Katuramu* (2017) 7.
[119] *Kayhul v Kayhul* (Divorce Cause No. 123 of 2016) [2020] UGHCFD 7 (3 July 2020).
[120] *Kayhul v Kayhul* (2016) 11.
[121] Mujuzi (2019) 212.

unquantifiable non-monetary contribution by a wife will not entitle her to a share of property. It is the responsibility of the woman to prove her quantifiable contribution towards the purchase of the property. The woman must prove that 'she engaged in activities that generated real or substantial contribution whether directly or indirectly, for instance direct cash payments or material contribution or by way of indirect expense substitution, quantifiable in monetary terms so as to enable the property to be acquired'.[122] The court has observed that the lack of a clear formula in assessing the woman's indirect contribution towards the acquisition of the property in dispute creates an imbalance between men and women regarding property rights,[123] which has an indirect negative impact on women's land rights. This imbalance is outside the realm of judicial interpretation, and it can only be a matter of parliamentary legislation. At the moment, the courts determine each case according to its circumstances, determining which property is individual property or marital property, and whether it should be shared in equal shares or different proportions.

The uncertainty surrounding the quantification of a women's contribution for her to have a share in a property at the dissolution of marriage was echoed by the Supreme Court in *Julius Rwabinumi v Hope Bahimbisomwe,*[124] where it observed that, in divorce cases where disputes arise in the ownership or sharing of property, each case will be determined on its own facts, based on the Constitution of Uganda, and the applicable marriage and divorce law in force in order to determine whether the property in dispute is marital property or individual property acquired before or during the marriage, and whether it should be distributed in equal shares or otherwise.[125] To solve this uncertainty, Kisaakye JSC strongly urged Parliament to enact a law based on article 31 of the Constitution that would define what constitutes marital or matrimonial property, as opposed to the individually held property of married persons, and the principles courts should follow in resolving disputes of division of property at divorce.[126]

1.2.5 Women's rights to land through succession and inheritance

The Constitution of Uganda provides for equality between men and women. Article 31(2) empowers Parliament to pass appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses. Until April 2022, succession and

[122] *Ayiko v Lekuru* (2015) 28.
[123] *Ayiko v Lekuru* (2015) 27.
[124] *Rwabinumi v Bahimbisomwe* (Civil Appeal No. 10 of 2009) [2013] UGSC 5 (20 March 2013).
[125] *Rwabinumi v Bahimbisomwe* (2009) 22.
[126] *Rwabinumi v Bahimbisomwe* (2009) 23.

inheritance in Uganda were governed by the old colonial Succession Act.[127] The Act had several discriminatory provisions based on sex and did not give equal treatment in the division of property between men and women.

First, it defined a legal heir as a male heir to the exclusion of female heirs.[128] The implication of this section was that only men could inherit and own property, yet the Constitution of Uganda under article 26 gives the right to all citizens to own property. It was not clear what would happen if the deceased had only daughters or female descendants. Upon marriage, a woman acquired the husband's domicile, yet there were no provisions for a man to acquire the wife's domicile.[129] Secondly, on the death of a man, the residential holding went to the legal heir. Although the Act gave a widow a right of occupancy of the matrimonial home and to continue cultivating land adjourning the residential holding, this right was not explicit because the matrimonial home was controlled by the legal heir.[130] The widow's tenancy therefore was subject to the whims of the legal heir. The widow's right to stay in the marital home and to use of the adjoining land was limited in scope and enforceability.

The practice of leaving the matrimonial home to the heir as opposed to the widow was a contention in the case of *Kolya v Kolya,*[131] already highlighted, where the court ruled that leaving the matrimonial home to the heir when the widow was still alive was unlawful, discriminatory and inconsistent with article 32(2) of the Constitution of Uganda, as the said practice denied widows proprietary rights over land. Upon re-marriage, a woman lost the right to occupy the principal residential property, but the Act was silent on men who re-married.[132] The Act had only provisions for the distribution of the estate of a male who had died intestate.[133] The Act contained no provisions for the distribution of the property of a woman who had died intestate. The law automatically presumed that all land or property in the marriage belonged to the man, who automatically acquired everything on the death of the wife.

[127] The Succession Act Ch.162 as amended by Succession Act (Amendment) Decree 22/72 of 1972.
[128] Sections 2(n) (i) and (ii) of the Succession Act Ch.162 as amended by Succession Act (Amendment) Decree 22/72 of 1972.
[129] Sections 14 & 15 of the Succession Act Ch.162 as amended by Succession Act (Amendment) Decree 22/2 of 1972.
[130] Section 26 of the Succession Act Ch.162
[131] *Kolya v Kolya* (Civil Suit No. 150 of 2016) [2020] UGHCFD 4 (3 July 2020).
[132] Sections 26 and 29 of the Act and Rules 1, 7, 8, and 9 of the Schedule to the Succession Act Ch.162 as amended by Succession Act (Amendment) Decree 22/ 72 of 1972.
[133] Section 27 of the Succession Act Ch.162 as amended by Succession Act (Amendment) Decree 22/ 72 of 1972.

It is also worth noting that in the distribution of the property of the deceased intestate, women were given a very small portion of the estate. Only 15 per cent of the estate was given to the surviving wife or wives.[134] It is important to note that the formula for distribution of the deceased intestate did not take into account the woman's contribution to the family wealth. Women in Uganda therefore faced significant hurdles when it came to inheriting marital property, especially in cases where the man had died without a will. Even in cases where the man had left a will, traditional practices and norms prevented women from inheriting the majority of the husband's property due to pressure from the husband's family.

It was because of the above -discriminatory provisions that a constitutional petition was filed in *Law and Advocacy for Women v Attorney General,*[135] and the Constitutional Court declared the provisions as highlighted in the Succession Act and Penal Code[136] as unconstitutional as they were discriminatory against women. Section 154(2) of the Penal Code provided that a married woman had committed adultery if she was involved in sexual intercourse with any man who was not her husband, yet a man would only commit adultery if found having sex with a married woman who was not his wife. In other words, a man only committed adultery if found having sex with a married woman, yet a woman committed adultery if found having sex with any man who was not her husband. The court found the above provision discriminatory on grounds of sex, and hence unconstitutional.[137] The court sections 2(n)(i)[138] and (ii),[139] 14,[140]

[134]Section 28 of the Succession Act (Amendment) Decree 22/ 72 of 1972.
[135]*Law & Advocacy for women in Uganda v Attorney General* (Constitutional Petition No. 8 of 2007) [2010] UGCC 4 (28 July 2010).
[136]Penal Code Act, Ch. 120 as amended by the Penal Code (Amendment) Act, 2007.
[137] *Law & Advocacy for women in Uganda v Attorney General* (2007) 11.
[138] The section defined the legal heir to mean a living relative nearest in degree to the intestate. Under Section 20 of the Act, a man's father or son is related to him in the first degree, his grandfather or grandson in the second degree and his great grandfather or great grandson in the third degree. There was therefore a preference for male heirs rather than female ones.
Section 2 reiterated the preference for a male rather than a female in determination of the legal heir.
Section 14 provided that upon marriage, the woman acquired the domicile of the husband, yet the man could not acquire the wife's domicile.

15,[141] 26,[142] 27,[143] 29,[144] 43,[145] 44[146] of the Succession Act as amended by the Succession Act (Amendment Decree) 1972 and rules 1, 7, 8, and 9[147] of the second schedule of the same Act as inconsistent with and in contravention of articles 21(1),[148] (2),[149] (3),[150] 31,[151] and 33(6)[152] of the Constitution of Uganda and were declared null and void.[153] This ruling created a lacuna in the Succession Act that had to be addressed. The courts in *Sutton v Sutton*[154] and in *Namukasa v Kakondere*[155] took judicial notice of the lacuna created by Parliament's failure to pass new laws that reflected the ruling of the Constitutional Court as creating uncertainties in judicial rulings.[156]

In April 2021, the Parliament of Uganda passed a Bill amending the Succession Act entitled the Succession (Amendment) Act, 2021. The Act introduces new provisions that are meant to align the law with article 21 of the Constitution on equality of all, article 32 on affirmative

[141] The section provided that the wife could only stop being attached to the man's domicile after being separated by a sentence of a competent court.
[142] The section also placed ownership of the principal residence in the hands of the legal heir. This meant that a wife had no proprietary interests in the matrimonial home except the rights of occupation granted in second schedule to the Act.
[143] The section makes provisions on distribution of the property of a male who has died interstate. The section was found discriminatory as the Act did not contain provisions for distribution of a female intestate. The provision also did not take into account the woman's contribution in the building of the family wealth.
[144] This section provided that all lineal descendants, wives and dependant relatives were entitled to share their proportion of the deceased intestate's property in equal shares. This section, for instance, disregarded a woman's contribution to the family wealth.
[145] The section provided that only a father could by will appoint a guardian or guardians for his child during minority. This meant that a woman could not appoint guardian(s) for her child during the child's minority.
[146] This section provided that where an infant's father had died without appointing a guardian or guardians for the infant, or if the appointed guardian had died or refused to act, appointment of the infant's guardians would in priority come from the infant's deceased fathers' lineage and not the infant's mother's lineage.
[147] The section granted rights of occupancy the intestate's residential holding to the wife or husband, male children under 18 years and female children under 21 years, and to the unmarried and those resident with the intestate prior to his or death. The rights of occupancy were however subject to the rights of the legal heir, or any existing covenants, conditions and encumbrances.
[148] The article provides for equality of all persons before and under the law in all spheres and the enjoyment of equal protection of the law.
[149] Discrimination of all kinds on grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability is prohibited.
[150] 'Discrimination' is defined to mean giving different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.
[151] The article provides for the right of a man and woman of 18 years and above to freely enter into a marriage, and once in the marriage, both spouses shall enjoy equal rights during the marriage and at the dissolution of the marriage, including the right to inherit the property of the deceased spouse.
[152] This article prohibits laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status.
[153] *Law & Advocacy for women in Uganda v Attorney General* (2007) 14.
[154] *Sutton v Sutton* (Divorce Cause No. 63 of 2013) [2015] UGHCFD 22 (6 July 2015).
[155] *Namukasa v Kakondere* (Divorce Cause No. 30 of 2010) [2015] UGHCFD 49 (10 April 2015) 5.
[156] *Namukasa v Kakondere* (2010) 4.

action in favour of marginalised persons, article 33 on the rights of women, and the constitutional court rulings that declared several provisions of the Succession Act as discriminatory and unconstitutional, as already highlighted. The new amendments that touch on women's land rights are as follow.

First, the Amendment introduces gender neutral language. Whereas the previous Act used discriminatory words like customary heir,[157] the Amendment introduces 'customary heiress'.[158] It inserts immediately after the word 'his', the words 'or her', after 'father' the words 'or mother', for 'grandfather' the words 'or grandmother', for 'uncle' the words 'or aunt', for 'son' the words 'or daughter, for 'brother' the words 'or sister',, and so on.[159] This makes the provisions gender-neutral. Whereas the Principal Act made no provision for distribution of the estate of a female intestate, the Amendment makes no distinction on grounds of sex. Upon marriage, a person may acquire the domicile of his or her spouse and can acquire any domicile of choice upon the dissolution of marriage or upon judicial separation.[160] A woman therefore no longer follows the husband's domicile. Whereas the residential holding was left to the legal heir under the Principal Act, with the widow given only occupancy rights, under the Amendment, the residential holding devolves to the surviving spouse and lineal descendants,[161] and their occupation shall not be taken into account when assessing their share(s) in the property of the interstate to which they are entitled.[162] A surviving spouse, lineal descendant or dependant relative entitled to occupy the residential holding cannot be evicted and anybody who attempts to evict them commits an offence and is liable to a fine or imprisonment or both.[163] This provision is intended to stop the eviction of widows from their matrimonial homes, a practice which is rampant in many parts of Uganda, as discussed in the subsequent chapters. Where a surviving spouse passes on, the residential holding shall devolve to the lineal descendants equally, who shall hold it as tenants in common.[164] This is also an important provision in women's land rights as it ensures that daughters have an equal stake in the residential holding.

[157] Section 2(e) of the Succession Act Ch.162 as amended by Succession Act (Amendment) Decree 22/ 72 of 1972.
[158] Clause 1(c) (e) of the Succession (Amendment) Act, 2021.
[159] Clause 12 of the Succession (Amendment) Act, 2021 amends Section 23 of the Succession Act Ch.162.
[160] Clause 14 of the Succession (Amendment) Act, 2021.
[161] Clause 13 of the Succession (Amendment) Act, 2021.
[162] Clause 16 of the Succession (Amendment) Act, 2021.
[163] Clause 13 (b) of the Succession (Amendment) Act, 2021.
[164] Clause 13 (b) of the Succession (Amendment) Act, 2021.

Under the Principal Act, a surviving wife (or wives) were entitled to only 15 per cent of the estate,[165] but under the Amendment, a spouse is entitled to 20 per cent, and lineal descendants get 75 per cent in equal shares. Where the intestate leaves no lineal descendant, the surviving spouse is entitled to 50 per cent. Where the intestate is survived by no children or dependant relatives, the surviving spouse is entitled to 99 percent of the estate.[166] This honours a spouse's right to own property after the death of a beloved one. The increase of the percentage of the estate that a spouse is entitled to in distribution of the estate is an important step in increasing women's access to land. Lineal descendants, spouses or dependant relatives shall share their entitlement to the estate in equal shares.[167] This is vital in the promotion of the land rights of daughters.

Very important in the promotion of women's land rights is a provision that grants rights in the distribution of the estate of the intestate to a spouse who has remarried as long as he or she remarried before the estate was distributed.[168] A surviving spouse shall not take part in the sharing of the estate of the intestate if that spouse was separated from the intestate as a member of the same household at the time of his or her death, except where intestate was the one who had separated from the surviving spouse as a member of the same household at that time. This provision protects married women's land rights where the husband has left her to marry another woman. The Succession (Amendment) Act, 2022 is an important legal instrument in the promotion of women's land rights.

1.3 Research problem

Considering the background above, one can deduce that there are inherently long-standing discriminatory cultures, customs, practices and pieces of legislation that continue to restrict women from owning or inheriting land. Formal law has failed to override cultural practices and norms denying women equal access to and ownership of land. Comprehensive reforms are needed to stop discriminations in regard to land. Women's access, ownership and control of land is still heavily influenced by a patriarchal culture, and the institutional framework for addressing women's land rights is lacking. The requirement for spousal consent for any

[165]Section 28 of the Succession (Amendment) Act, Decree 22/72 of 1972.
[166] Clause 14 b) of the Succession (Amendment) Act, 2021.
[167] Clause 15 (1) of the Succession (Amendment) Act, 2021.
[168] Clause 14 (7) of the Succession (Amendment) Act, 2021.

transaction involving family land in the Land Act has been ineffective in the enforcement of women's rights to land due to failures in enforcement and implementation. Often land is sold without spousal consent, and women are often powerless to stop the sale. Furthermore, the Land Act makes no mention of the land rights of women in cohabitation, widows and divorcees. There is also lack of a clear formula for distributing the property of couples at the dissolution of marriage. The lack of a clear formula in assessing the woman's indirect contribution towards the acquisition of the marital property continues to create an imbalance between men and women regarding land rights, which has an indirect negative impact on women's land rights.

1.4 Research aims and objectives

The overall aim of the research was to analyse women's land rights in Uganda. There is need for new policies and strategies that can help expand and promote gender equality in access and ownership of land in Uganda.

Objectives of the research:

1 To analyse the regional and international legal framework on the rights of women to land.
2 To examine the legal framework on the rights of women to land in Uganda.
3 To examine and make a comparative analysis of women's land rights in the East African Region.
4 To review the nexus between women's land rights and financial inclusion in Uganda.
5 To propose policy and strategy reforms for the advancement of the rights of women to land in Uganda.

1.5 Research questions.

The study will attempt to answer the following research questions.

1. What is the legal framework on women's land rights in Uganda?
2. How does the Ugandan legal framework on women's land rights compare with the regional and international legal framework on women's land rights?
3. Is there a direct link between women's land rights and financial inclusion?
4. What could be the strategic reforms that Uganda should adopt to enhance and strengthen women's land rights?

1.6 Research focus

Women in Uganda do not have the same protection as men in owning land. There is a lack of clear statutory protection for women's rights to land during marriage and upon the dissolution of the marriage. There is similarly a lack of clear laws on women's land rights after they have been widowed or separated from their spouses or those who are cohabiting. Women and men in Uganda do not own land on an equal basis. There is a lack of clear statutory laws to address gender equality in ownership of land. This has an impact on women's well-being, and on their social and economic rights. These persistent discriminatory practices in land ownership have an overall effect on the country's development. A World Bank report confirms that societies with gender discrimination have seen slower economic growth, lower standards of living, and pay the cost of greater poverty and weaker governance.[169] Women consequently continue to be disadvantaged by the persistent and prevailing gender inequalities in land ownership.

1.7 Significance of the study

Uganda has adopted Vision 2040, aimed at achieving middle income status by 2040 through the promotion of gender equality and reduction of inequalities among other things. Vision 2040 cannot therefore be attained while half of the population, the women, still face significant barriers to the ownership of and access to land. This research is therefore important in Uganda's quest to achieve middle-income status.

A 2012 World Bank Report reviewing the evidence on gender and development notes 'that gender equality can enhance productivity, improve development outcomes for the next generation, and make institutions more representative'.[170] Women's access to and ownership of land therefore has a direct link with economic empowerment, food security and poverty reduction, and generally overall growth and development of society. An inclusive and functioning equitable system in ownership of land and real property helps to mobilise savings; this facilitates the channelling of funds to productive areas and potential investments.

Uganda, as a member of the UN, has an obligation under Goal 5(a) of the 2030 Agenda for Sustainable Development to ensure that there is gender equality in the ownership of land and

[169] World Bank (2001) 1-8.
[170] World Bank (2012) 18.

other productive areas.[171] Unless Uganda achieves gender equality in the ownership of and access to land and other vital areas, it will be unable to meet its targets under the 2030 Sustainable Development Goals. The 2030 Agenda is meant to achieve sustainable development across the world by the reduction of poverty and promotion of equality in all spheres of life. Uganda therefore needs policy reforms that allow inclusive access to and ownership of land. Equality in ownership and access of land is central to a country's growth, stability and poverty-reduction.

This research is therefore important in proposing strategies and policies for the promotion and realisation of women's rights to land, which is in line with Uganda's quest to achieve middle-income status under Vision 2040, and the achievement of its targets under 2030 Agenda for Sustainable Development.

The research is also relevant in providing a platform for further research into the pursuance of strategies for strengthening women's land rights, not only in Uganda, but in the East African region. It is anticipated that this thesis will appeal to researchers, academics, NGOs involved in land and gender issues, policy-makers in governments, donors, parliaments and other oversight institutions. The thesis was written by selecting insights from international instruments on women's land access rights. The research also made comparisons and selected experiences from East African countries, particularly Kenya and Tanzania, on how women's land rights are being promoted, and challenges thereto.

1.8 Literature review

The importance of women's access and control of land cannot be over-emphasised. Land is the basis for shelter, food production, and economic activities. In Uganda, it is the most important employer of women's labour, with almost 90 per cent of rural women engaged in agricultural activities.[172] Therefore, access to, ownership, and use of land by women is a key aspect in the development process of the country. When women are denied access to land, it means that their societal obligations and responsibilities for production and reproduction are curtailed. This may lead women to seek alternative livelihoods outside of agriculture where they are prone to exploitation, for instance as sex workers, maids and waitresses. It is therefore important for the

[171] The New Global Sustainable Development Goals were adopted by the Heads of State and High Representatives, sitting at the UN, September 2015.
[172] The Uganda Bureau of Statistics Annual Agriculture Survey (AAS) (2018) 3.

state to ensure that women attain full access to land. Yet the available literature so far indicates that women in Uganda have a long way to go in achieving full access to and ownership of land. One study applauds the progressive provisions in the Land Act which nullify customary practices that discriminated against women.[173] These progressive measures were undermined, however, by the lack of an implementation and dissemination programme. The failure to appoint land committees responsible for ascertaining rights to land was a major blow in ascertaining women's rights over customary land,[174] and this is coupled to the government's failure to establish low-cost surveys and land management systems in traditional areas where most women live. This would have allowed them to obtain certificates of customary ownership as envisaged by the Land Act.

Another study is opposed to one-size-fits-all solutions in addressing challenges to women's access to and ownership of land in Uganda.[175] Different categories of women face different vulnerabilities in access to and ownership of land, depending on their status as widowed, separated, divorced, cohabiting, or married under customary laws. The study is opposed to the view that customary laws discriminate against women when it comes to access to and ownership of land. The customs indeed protect women in access and ownership of land.[176] The study recommends that, instead of fighting the customs, policy-makers should identify a range of culturally appropriate solutions within the customs that can successfully defend, strengthen and protect women's land rights. This argument is echoed in another study which finds that customary practices are not obstacles to the realisation of women's land rights,[177] and that the struggle for women's land rights should be based on gender analysis rooted in the local culture right in the village. The study proposes sensitising and supporting cultural leaders about women's land rights.

Other measures that have been recommended in achieving women's land rights include marking boundaries, registration and titling of land and, if possible, drawing simple maps showing sizes and location of family land, signed by family members, neighbours and the area land committee.[178] The problem with registration and titling is that in most cases titling is done

[173] Klaus et al. (2006) 10.
[174] Klaus et al. (2006) 11.
[175] Adoko et al. (2011) 1.
[176] Adoko et al. (2011) 6.
[177] Cooper (2011) 9.
[178] Adoko (2011) 5.

in the man's name, and this may not grant women independent access and ownership. A 2020 report on the pilot projects on granting title to customary land in Northern Uganda however revealed that this was instead eroding the protective measures women had over use and access of land under the local customs.[179] The study reveals that there was no or little input from vulnerable groups, especially women, during the granting of titles. The land was normally registered in the names of the male head of the household, which would in effect expunge the occupancy and user rights to the land granted to the women by custom, as use and access was now at the whims of the title holder.[180] Culturally, by contrast, there was a minimum threshold of land that a woman was granted within the household, anchored on either kinship or marriage; this minimum threshold evaporates with the granting of title, leaving women in a very perilous situation as the traditional role of the clan system is land allocation is removed.[181] Measures that are intended to achieve women's land rights should be transformational, empowering women and shifting gender relations within households and the social, economic and political spheres in their favour.

Another study has recommended the documentation of customs, and the use of traditional arbitration institutions using family elders, clan members and community leaders in settling disputes over land involving women.[182] This is in view of the predominance of customary tenure in large parts of Uganda. The problem with this measure is that many traditional leaders are scarcely sensitised about women's land rights and their decisions have no enforcement power but are respected only out of societal pressure – this approach tends to exclude women as the customary adjudicatory panel is normally composed of men. Traditional leaders should therefore be sensitised on women's land rights. Women should also be encouraged and empowered to become part of these local dispute committees.

Another study has pointed out women's lack of means for seeking redress where their land rights have been infringed, coupled with the lack of information and knowledge about legislation such as the Land Act that grants women rights of occupancy on family land, and the requirement for spousal consent on any transaction involving family land.[183] There should have been extensive dissemination and translation of the Land Act into local languages and, as one

[179] Rugadya (2020) 13.
[180] Rugadya (2020) 16.
[181] Rugadya (2020)19
[182] Irene (2012) 42.
[183] Kindi (2010) 9.

study has pointed out, this could have resulted in behavioural change if households had been aware of the laws.[184] The lack of awareness of existing legislation by women concerning their land rights, and the lack of access to mechanisms to enforce the laws, are routinely pointed out as a hindrance to women's land rights.[185] Many women, for instance, are not aware of the spousal consent provision in the Land Act. The consent might also be obtained through violence or through forgery, since there is no one to verify its validity. It is also important to note that the power to consent does not restore proprietary rights and, as pointed out,[186] consenting when there is no ownership defeats the purpose of the law. It is still very difficult in Uganda for women to assert their land rights, as stated in the literature above. There are still complex social, legal, political and cultural issues that need to be addressed. This study will try to come up with new and innovative solutions.

1.9 Research methodology

The study analyses the rights of women to land in Uganda. Data was mainly accessed from the internet. The study reviewed both primary and secondary sources related to women's rights to land. Uganda is party to several regional and international legal instruments that have provisions for promotion of equality, freedom from discrimination and the promotion of women's rights to land. The primary sources reviewed included treaties and conventions, resolutions, declarations, UN reports on women's rights to land, state party reports to the UN, and other regional and international instruments. At the domestic level the study reviewed the domestic laws and policies in Uganda on women's rights to land these include the Constitution of the Republic of Uganda, Acts of Parliament, pending bills, Parliamentary Hansard and government reports on women's rights to land. Case law in Uganda on women's access to, control over and ownership of land was also reviewed. Regional and international bodies such as the Committee on the Convention on all Forms of Discrimination against Women, the African Commission, and the East African Community Court have made significant rulings and decisions on women's rights to ownership to land. Some of the decisions were also reviewed.

The secondary sources reviewed included information in selected books, journal articles, magazines, reports, newspaper articles and so on. The study monitored emerging developments

[184] Klaus et al. (2006) 11.
[185] Acidri (2014) 195.
[186] Acidri (2014) 196.

on women's rights to land in Uganda and at the regional and international level. Content and thematic analysis methods were employed to determine the most appropriate and relevant documents to the study, using both deductive and inductive reasoning.

1.10 Expected limitations

There was little up-to-date data for bringing out an accurate and comprehensive understanding of women's access to land issues. Another challenge faced during the study was accessing relevant and up-to-date case law, as most judgments in Uganda, especially from the lower and up-country courts, are not reported on time. Also, access to the latest statistics and government documents was a problem.

1.11 Thesis outline

The research has six chapters, as summarised here.

Chapter 1 sets out the background and context of the study, the problem statement, the aim and objectives of the study, and the significance of the study. The chapter also discusses the research methods, limitations of the study and gives a brief thesis outline.

Chapter 2 presents an overview of both the regional and international legal and policy frameworks on women's rights to land.

Chapter 3 gives an overview on the rights of women to access and ownership of land in Uganda. There is a discussion on the legislative and policy frameworks on rights of women to land from the 1900 Buganda Agreement to the present. There is also a review of selected case law on the rights of women to land.

Chapter 4 discusses the link between women's land rights and financial inclusion in Uganda.

Chapter 5 provides an analysis of women's land rights in the East African region, with particular focus on Kenya and Tanzania.

Chapter 6 presents the conclusion of the study and makes recommendations. Areas for further research are also identified.

Chapter 2:
International and Regional Legal and Policy Framework on Women's Land Rights

2.1 Introduction

This chapter discusses the international and regional legal and policy instruments on women's land rights. Women's rights to use, access, own, control and make decisions concerning land are enshrined in different regional and international treaties and other relevant instruments.[187] These are mainly in declarations, guidelines, principles, UN General Assembly resolutions, agendas and platforms for actions. The discussion of these instruments is juxtaposed with the actual situation in Uganda in order to examine Uganda's adherence to them.

It is worth noting that the right to land has no explicit recognition in the international legal instruments. First, it should be mentioned that there is no human right to land. Of the nine core international human rights treaties,[188] land rights are marginally mentioned in one convention in relation to women's rights in rural areas.[189] Land rights instead continue to receive attention only in the general discussion of property rights. This is reflected in the UDHR, which guarantees the right to own property alone or in association with others.[190] So, whereas property rights are strongly affirmed in the UDHR, the explicit connection to land rights is not clear. In other words, right to property under the UDHR includes all existing possessions and is not restricted to the right to acquire possessions in land.

[187] Under article 6 of the UN Convention on the Law of Treaties, signed at Vienna, 1969, every state has the capacity to conclude treaties. Under article 12, consent by a state to be bound by a treaty is expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by any other means if so agreed.

[188] The nine core human rights treaties in relation to women land rights are: the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the Convention on the Rights of the Child; the International Convention for the Protection of All Persons from Enforced Disappearance; and the Convention on the Rights of Persons with Disabilities.

[189] Article 14 of CEDAW, dedicated to the rights of rural women, provides that women should 'have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes'.

[190] Article 17 of the UDHR.

As there is no explicit definition or recognition of land rights in the core international legal instruments, it becomes obvious that the term 'women's land rights' does not have a definition either. However, UN Women has a working definition of 'women's land rights:'

> [T]he ability of women to own, use, access, control, transfer, inherit and otherwise take decisions about land and related resources, as well as women's rights to land tenure security (including community, customary, collective, joint and individual tenure). It also entails rights to meaningfully participate in discussions and decision-making on land law, policy and programming throughout the cycles of assessment and analysis, planning and design, budgeting and financing, implementation and monitoring and evaluation.[191]

As this chapter discusses the international, regional legal and policy framework on women land rights, the UN Women's working definition of women's land rights has been employed to determine how the core international human rights instruments have incorporated provisions on how women can use, own, access, control, and inherit land, and take decisions and meaningful participation in land matters and policy.

2.2 International legal instruments on women's land rights

The international instruments on women's land rights are discussed below in order of their adoption and entry into force, beginning with the earliest ones.

2.2.1 The Universal Declaration of Human Rights (UDHR)

Though not a treaty, the UDHR[192] is considered the foundation of the international legal system on human rights, as reaffirmed in the preamble of the Vienna World Conference on Human Rights 1993, which culminated in the Vienna Declaration and Programme for Action.[193] Because of this recognition, many consider the UDHR to have binding force as part of

[191] UN (2020) 9.
[192] The UDHR was adopted by UN General Assembly Resolution 217A (III) at the General Assembly's 3rd Session on the 10/12/1948.
[193] Vienna Declaration (1993) Preamble, para. 3. Vienna Declaration was adopted on the 25 June 1993 by the World Conference on Human Rights.

international law.[194] The International Law Association has observed that many of the rights in the UDHR, if not all of them, are now widely recognised as constituting part of customary international law.[195] It forms part of the International Bill of Rights, together with the International Covenant on Civil & Political Rights (ICCPR),[196] its optional protocol,[197] and the ICESCR.[198]

The UDHR provides that the rights and freedoms provided for in the Declaration shall be enjoyed by everyone without any discrimination on grounds of race, sex, colour, and the like.[199] Women and men shall enjoy equal rights during marriage, before and at its dissolution.[200] Everyone has a right to own property individually or jointly with others, and the arbitrary deprivation of property is prohibited.[201] As property includes land, the right to own property in person or jointly with others is intrinsically linked to women's equal rights to own land individually or in association with others.[202] This provision was domesticated in article 26 of the 1995 Constitution of Uganda. The UDHR therefore recognises women's land rights.

The courts in Uganda have in various cases and petitions invoked the provisions of the UDHR in determining cases of human rights violations. The Constitutional Court in *Centre for Health, Human Rights & Development & Anor v Attorney General*[203] was guided by the provisions of article 1 of the UDHR in its constitutional interpretation of the rights of persons with disabilities under the Ugandan Constitution.[204] The High Court of Uganda in *Mukoda alias Naigaga v International Aids Vaccine Initiative & 11 Ors*[205] similarly invoked article 5 of the UDHR in

[194] Patrick Thornberry, in 'International law and rights of Minorities' (1991) 237-238, has concluded that there is strong evidence suggesting that the UDHR is part of customary international law and that it is the most valid and significant interpretation of the human rights and freedoms that members of the UN have pledged to promote.
[195] Resolution adopted by the International Law Association as reprinted in International Law Association, Report of The Sixty-Sixth Conference, Buenos Aires, Argentina 1994 (forthcoming 1995).
[196] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966. Entry into Force: 23 March 1976, in Accordance with Article 49.
[197] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966. Entry into Force: 23 March 1976, in Accordance with Article 9.
[198] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 Entry into Force: 3 January 1976, in Accordance with Article 27.
[199] Article 2 of UDHR.
[200] Article 16 of UDHR.
[201] Article 17 of UDHR.
[202] Article 1 of UDHR.
[203] *Centre for Health, Human Rights & Development & Anor v Attorney General* (Constitutional Petition-2011/64) [2015] UGCC 14 (30 October 2015).
[204] *Centre for Health, Human Rights & Development & Anor v Attorney General* (2015) 8.
[205] Uganda in *Mukoda alias Naigaga v International Aids Vaccine Initiative & 11 Ors* (Human Rights Petition-2017/305) [2020] UGHCCD 88 (08 May 2020).

deciding a petition on whether the petitioner's rights to life, health and freedom from torture, cruel and inhuman and degrading treatment had been violated.[206] As the courts in Uganda have made reference to or sought guidance from the UDHR in making decisions, the recognition of property rights and the right to freedom from discrimination in the UDHR are important in the recognition of women's land rights in Uganda.

2.2.2 The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR[207] recognises the equality between men and women in the enjoyment of their civil and political rights.[208] Uganda has since acceded to the ICCPR.[209] Discrimination of any kind on grounds of sex, race, colour, language, religion and property, inter alia, is prohibited.[210] Before the courts and tribunals, men and women should enjoy equal rights.[211] State parties must ensure that spouses have equal rights in marriage and at the dissolution of the marriage.[212] The ICCPR, under part IV, creates a Human Rights Committee[213] which, among other things, monitors implementation of the Covenant by state parties. State parties file periodic reports on the steps being taken in implementing their obligations under the Covenant. The Committee is also charged with interpreting provisions of the Covenant by issuing reports and general comments.[214]

In General Comment No. 28,[215] the Committee interpreted article 3 on the equality of rights between men and women. The Committee observed that the enjoyment of the rights and freedoms in the Covenant must be on equal basis and in their totality if there is to be equality between men and women.[216] Men and women are entitled to full and equal treatment in the enjoyment of their rights under the Covenant. The Committee noted that discrimination against women is normally rooted in traditional, cultural and religious attitudes, and states must ensure that legislation is passed and measures taken to overcome such discrimination.[217] There should

[206] Uganda in *Mukoda alias Naigaga v International Aids Vaccine Initiative & 11 Ors* (2020) 13.
[207] The ICCPR was adopted by UN General Assembly Resolution 2200 (XXI) on the 16/12/1966. Entry into force on 23/3/1976.
[208] Article 3 of the ICCPR.
[209] Uganda acceded to the ICCPR on 21 June 1995.
[210] Article 2 (1) of the ICCPR.
[211] Articles 14 & 16 of the ICCPR.
[212] Article 23 (1) of the ICCPR.
[213] ICCPR (1966) article 28.
[214] ICCPR (1966) article 40 (4).
[215] General Comment No. 28 (2000) interpreting article 3 of ICCPR on the equality of rights between men and women was adopted by the Human Rights Committee at its 68th Session on 29 March 2000.
[216] General Comment No. 28 (2000) para. 2.
[217] General Comment No. 28 (2000) para. 5.

be legal recognition of women everywhere as persons before the law, and any impediment to the enjoyment of that legal recognition must be eradicated.[218] This right is associated with women's capacity to own property in their own names, enter into contracts and exercise all civil rights, without any discrimination based on marital status or otherwise. It also means that women are not property or objects to be inherited by her deceased husband's family together with the property of the deceased husband. This interpretation is important in the promotion of women's land rights as it is common practice in Uganda, as seen already in chapter one of this thesis, for women to be inherited by the deceased husband's brother or clan member, together with the property left behind by the deceased husband. States must issue measures that ensure that widow inheritance is consensual and that there is no automatic inheritance of a deceased husband's property upon inheritance of the widow. The Committee recommends the enactment of legislation that creates a matrimonial regime where married women have equal rights in the ownership and administration of matrimonial property whether it is common property or property in the sole ownership of one spouse, and at the dissolution of marriage there should be equality in the distribution and sharing of property.[219] The Committee also recommends that the grounds for divorce or annulment of a marriage should be the same for both spouses, as should be decisions on the distribution of property at divorce, and that women should have the same inheritance rights as men when the marriage is dissolved by the death of one of the spouses.[220] This interpretation touches on women's land rights. The right of women to own property and enter into contracts is upheld. Equally emphasised are women's co-ownership rights of matrimonial property and equality in distribution, inheritance and sharing of property at the death of a parent, husband or close relative.

The Optional Protocol to the ICCPR[221] allows individuals from state parties to submit a complaint to the Human Rights Committee if the individual believes that his or her rights, enshrined in the Covenant, are being violated.[222] The Committee has dealt with communications dealing, inter alia, with the right of women to own property. For example, in *Graciela Ato Del Avellanal v Peru,*[223] the plaintiff, a woman, challenged article 168 of the

[218] General Comment No. 28 (2000) para. 19.
[219] General Comment No. 28 (2000) para. 25.
[220] General Comment No. 28 (2000) para. 26.
[221] The Optional Protocol to the ICCPR was adopted by the UN General Assembly resolution 2200A (XXI) on 16 December 1966. Entry into force 23 March 1976.
[222] Article 1 of the Optional Protocol to the ICCPR.
[223] *Ato Del Avellanal v Peru,* Merits, Communication No 202/1986, delivered on the 28th October 1988, UN Human Rights Committee [CCPR].

Peruvian Civil Code on the grounds that it discriminated against women and was therefore in breach of Peru's obligations under the ICCPR. The alleged article was to the effect that once a woman is married, only the husband may represent matrimonial property in the court. As result of the impugned article, the plaintiff had lost a suit over unpaid rent due to her from her own apartments, because article 168 prevented her from filing a suit over matrimonial property in court while she was married. The Human Rights Committee found the said article in violation of Peru's obligations under articles 14 and 26 of the ICCPR and called on Peru to remedy those violations.[224]

In Uganda, the courts have emphasised the importance of Uganda's observance of her obligations under the ICCPR. In *Opio v Obote & 2 Ors,*[225] the court stated that, although not domesticated, by virtue of the law of state responsibility for international treaties to which Uganda is a signatory, the ICCPR is arguably part of the Ugandan law; alternatively, until the municipal law is changed to accommodate the Covenant because of its binding provisions, at the very least it serves as a source of persuasive standards that ought to influence the interpretation and application of legislation.[226] In *Muhindo & 3 Ors v Attorney General,*[227] the court was alive to the fact that Uganda, having ratified the International Covenant on Civil and Political rights (ICCPR) and ICESCR, must uphold its obligations under the said international human rights instruments.[228]

2.2.3 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR [229] has its foundations in the UN Charter and the UDHR, in so far as they provide for the observance of the inherent, equal and inalienable rights of all human beings.[230] The ICESCR provides for the equal enjoyment of economic, social and cultural rights by everyone without any discrimination.[231] Discrimination of all kinds based on sex, colour, religion,

[224] *Graciela Ato Del Avellanal v Peru* (1988) paras 10.2 and 12
[225] *Opio v Obote & 2 Ors* (Miscellaneous Civil Applications No. 0081 and 0082 of 2018(Consolidated)) [2018] UGHCCD 39 (24 August 2018).
[226] *Opio v Obote* (2018) 13.
[227] *Muhindo & 3 Ors v Attorney General* (Miscellaneous Cause No.127 OF 2016) [2019] UGHCCD 3 (25 January 2019).
[228] *Muhindo & 3 Ors v Attorney General* (2019) 17.
[229] ICESCR was adopted at the 21st Session UN General Assembly Resolution 2200 (XXI) on the 16/12/1966. Entry into force on 3/1/1976.
[230] ICESCR (1966) preamble, para.1.
[231] ICESCR (1966) preamble, para.3.

property, and so on is prohibited.[232] States must ensure that there is equality in the enjoyment of economic, cultural and social rights as enshrined in the covenant.[233] The covenant provides for the right to an adequate standard of living, and specifies rights that are indispensable in the realisation of this right to include adequate food, clothing and housing.[234] Whereas the specific right to land was not articulated in this particular article, there is no doubt that the right to food and housing cannot be fully realised without adequate access, use and control of land.

The issue of whether land rights are implicitly covered under the ICESCR was brought before the International Court of Justice (ICJ) in a complaint submitted before the ICJ in the dispute over Israel's annexation of Palestine territory.[235] The complaint was on the construction of a wall by Israel that led to the *de facto* annexation of land in the occupied Palestine territory of the West Bank. The question before the ICJ was whether Israel's actions were a violation of the provisions of the ICESCR. The court observed that the wall's construction had become an impediment to the enjoyment of the right of movement, the right to education, work, health and adequate standard of living for all enshrined in the ICECSR.[236] To the ICJ, rights are interlinked, and an impediment to the enjoyment of one rights indirectly affect's the enjoyment of other rights. Israel was therefore under an obligation to return all the lands and all property seized during the construction of the wall. It was also ordered to compensate all persons, natural or legal, who suffered any form of tangible damage during the construction of the disputed wall.[237] The decision settled the issue of whether land rights are covered under the ICECSR. Thus, although land rights are not directly covered under the covenant, the several economic, social and cultural rights enshrined in the covenant cannot be enjoyed in the absence of land, apart from its environmental and ecological functions. Land is therefore an inherent subject in the covenant, and any discrimination or impediments to the use and access to land and security of tenure indirectly impedes the full realisation of the economic, social and cultural rights under the covenant. Land rights of women are therefore intrinsically covered under the ICECSR, as the covenant emphasises the equality of men and women in the enjoyment of economic, cultural and social rights. It is also important to note that the covenant mandates states to use

[232] ICESCR (1996) article 2 (2).
[233] ICESCR (1996) article 3.
[234] ICESCR (1996) article 11(1).
[235] International Court of Justice: *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory* (9 July 2004).
[236] ICJ: (2004) para. 134.
[237] ICJ: (2004) para. 153.

maximally all the available resources at their disposal to ensure a full realisation of rights under the covenant.[238]

The Committee on Economic, Social and Cultural Rights (CESCR)[239] is established under the ICESCR to monitor states' implementation of their obligations under the Covenant. The Optional Protocol to ICESCR [240] gives the Committee power to receive and consider communications from individuals complaining of violations of rights under the Covenant.[241] The CESCR also considers interstate complaints.[242] The Committee may also in certain circumstances undertake inquiries on its own volition where there are allegations of grave or systematic violations of any of the rights set forth in the Covenant.[243] The Committee equally interprets provisions of the covenant by issuing General Comments and Concluding Observations.

In CESCR General Comment No. 7[244] on the right to adequate housing and the right against forced evictions enshrined in article 11(1) of ICESCR, forced eviction is interpreted as the permanent or temporary removal of individuals, families and communities against their will from the homes and lands which they occupy, without proper access to legal or other means of protection.[245] Whereas the forceful eviction of women from land by husbands, in-laws and siblings is not explicitly mentioned in General Comment No. 7, states are required to ensure that forced evictions by third parties are prohibited.[246] The expression 'third parties' could include husbands, men and anyone involved in forced eviction of women from land which they occupy or claim any rights to, whether marital or through inheritance, and the state must ensure that such evictions are stopped and perpetrators are prosecuted. States are under additional obligations to put in place appropriate measures that ensure that where evictions occur, there is no discrimination, especially against women, bearing in mind their vulnerability as a result of pre-existing and historical discrimination, whether statutory or otherwise, that women suffer in their pursuance of property rights, including home ownership and access rights to property

[238] ICESCR (1996) article 2 (1).
[239] Established by the UN Economic & Social Council under ECOSOC Resolution 1985/17 of 28 May 1985.
[240] Adopted by Resolution 8/2 of the Human Rights Council on 18 June 2008. Entry into force on 5 May 2013.
[241] Article 2 of the Optional Protocol to ICESCR.
[242] Article 10 (1) A of the Optional Protocol to ICESCR.
[243] Article 11 (2-8) of Optional Protocol to ICESCR.
[244] The General Comment was issued on 20 May 1997.
[245] *General Comment No.7* (1997) para. 3.
[246] *General Comment No. 8* (1997) para. 8.

and accommodation, and the subsequent vulnerabilities to violence and sexual abuse when they are rendered homeless.[247]

In *SSR v Spain*,[248] a communication was submitted to the Committee by a disabled woman against her eviction from her continued occupation of an apartment that had been previously abandoned and was owned by a bank, when she had no legal title. Her communication was premised on article 11(1) of the covenant on the right to housing. It was the state party's submission that the author was informed of available benefits and remedies but she refused to take any of them.[249] The state party urged that unlawful occupation or tenancy and return of the building to the rightful owner does not constitute forced eviction under the covenant. Further, it was held that the prohibition against forced evictions as laid down in paragraph 3 of General Comment No. 7 (1999) on forced evictions does not apply to evictions carried out in accordance with the law and in conformity with the provisions of the international human rights covenants. Unlawful occupation is one of those cases where eviction is justifiable and no-one has a right to forcefully occupy someone else's dwelling, as this would take away the right to property enshrined in other international human rights instruments.[250]

The Committee agreed with the state party's submission that the communication did not fall within a tenancy protected under article 11 of the tenancy nor was it a forced eviction, and that the Committee therefore had no jurisdiction. The Committee noted, however, that even when an eviction is justified (for instance in cases of unlawful occupation or persistent non-payment of rent), it must be carried out in accordance with domestic law compatible with the covenant and the international human rights covenants, and must ensure that the affected person has access to appropriate legal remedies.[251]

CESCR General Comment No. 12 (1999)[252] on the right to adequate food recognises that the availability of adequate and nutritious food is indispensable and recommends the adoption of national strategies that prohibit discrimination in access to food or resources to obtain food;

[247] *General Comment No. 8* (1997) para.10.
[248] Decision adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 51/2018.
[249] SSR v Spain (2018) 3.
[250] SSR v Spain (2018) 4.
[251] SSR v Spain (2018) 7.
[252] Adopted on the 12 May 1999 at the Twentieth Session of the Committee on Economic, Social and Cultural Rights.

this should include a guarantee of full and equal access to resources, with special attention to women, including the right to inheritance and ownership of land.[253] In CESCR General Comment No. 14 (2000)[254] on the right to the highest attainable standard of health, the right to health is linked to land. The General Comment points out how many of the development-related initiatives that have led to the displacement of indigenous people from their traditional and ancestral lands have resulted in loss of nutrition and the symbiotic relationship with their lands and this has had a dangerous effect on their health.

In CESCR General Comment No. 15 (2002)[255] on the human right to land, no household should be denied the human right to water and states must ensure that indigenous communities are provided with resources to design, deliver and control their own water resources; this can only be done if they have the design and control of the related land access. CESCR General Comment No. 16 (2005)[256] on the equal right of men and women to the enjoyment of all economic, social and cultural rights requires that in implementing articles 3 and 11(1) of the covenant, women must have rights to own, use and control housing, land and property on an equal basis with men, and must have access to all necessary resources covering all means of production including land.

It is important to note that Uganda ratified the CESCR.[257] Uganda has gone ahead and submitted a report to the CESCR on its efforts to implement its obligations under the covenant.[258] The CESCR in its concluding observations proposed a multi-pronged approach to Uganda in dealing with women's land rights to include the following. Land laws are to be harmonised and consolidated to come up with a coherent and consistent legal and policy framework that protects women's land rights and production resources.[259] Uganda must ensure that indigenous people's rights to traditional lands are recognised, that there are prior consultations with indigenous people with respect to any planned development on their ancestral lands, and that their free, prior and informed consent must be obtained.[260] Uganda

[253] CESCR *General Comment No. 12 (1999)* para. 26.
[254] CESCR *General Comment No. 14 (2000)* para. 27.
[255] CESCR *General Comment No. 15 (2002)* paras. 16 (c) and (d).
[256] CESCR *General Comment No. 16 (2005)* para. 28.
[257] Uganda ratified the ICESCR on 21 January 1987.
[258] CESCR considered the initial report of Uganda (E/C.12/UGA/1) on the implementation of ICESCR at its 36th to 38th meetings (E/C.12/2015/SR36-38) held on 10 and 11 June 2015, and adopted, at its 50th meeting held on 19 June 2015.
[259] CESCR Concluding Observations on Uganda, 2015, para. 12.
[260] CESCR Concluding Observations on Uganda, 2015, para. 13.

must also adopt a comprehensive non-discrimination law that eliminates all kinds of discrimination against women, including the historical traditional stereotypes. This could include awareness campaigns against sexual discrimination in land matters and other areas, and building the capacity of institutions involved in the promotion of women's land rights.[261]

It is also worth noting that Uganda is a dualist state and, as such, all international instruments that it ratifies or adopts do not apply automatically or directly in its territory unless they have been domesticated under article 123(1) of the Constitution of Uganda and the Ratification of Treaties Act.[262] The ICESCR, such as the ICCPR, is therefore not automatically enforceable in Uganda. This notwithstanding, the courts in Uganda have frequently used the guidance of, or made reference to, several provisions of these international covenants. It is also worth noting that Chapter IV of the Ugandan Constitution provides for economic, social and cultural rights and that these are enforceable. Other economic, social and cultural rights provided in the covenant are highlighted in the National Objectives and Principles of State Policy in the Ugandan Constitution, but these have no enforceability mechanism.

2.2.4 The Convention on Elimination of all forms of Discrimination against Women (CEDAW)

CEDAW,[263] often described as the international bill of rights for women, has its foundations in the UN Charter and the UDHR. The convention is critical in the full realisation of equal rights of women in land matters in a number of ways. Discrimination of all kinds against women in all forms and manifestations is prohibited.[264] 'Discrimination against women' is defined as

> [A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on basis of equality of men and women, of human rights and fundamental freedoms in the political, social, cultural, civil or any other field.[265]

[261] CESCR Concluding Observations on Uganda, 2015, para. 18.
[262] Ratification of Treaties Act, Ch. 204, Vol.8, Laws of Uganda 1998.
[263] CEDAW was adopted and opened for Signature, Ratification and Accession by General Assembly Resolution 34/180 of 18 December 1979: Entry into Force: 3 September 1981, in accordance with article 27(1).
CEDAW (1981) preamble.
[265] CEDAW (1981) article 1.

States must condemn discrimination against women in all forms, should incorporate equality principles in national constitutions and all pieces of legislation, and must, without any delay undertake all means, legislative or otherwise, to modify or abolish all existing laws, customs, practices and regulations that continue to discriminate against women.[266] State parties must also undertake in all political, economic, social and cultural spheres all appropriate measures including legislative reforms that ensure full development and advancement of women, so that they can exercise and enjoy human rights and fundamental freedoms on an equal basis to men.[267] All appropriate measures must be taken to modify any social and cultural patterns that discriminate between men and women, and to eliminate prejudices, or customary and other practices based on the inferiority or superiority of either of the sexes, or on stereotyped roles of men or women.[268] All appropriate measures must also be taken to end discrimination against women in rural areas and to ensure that women have meaningful participation on an equal basis to men and can take part in implementation of development planning at all levels, in addition to having equal access to agricultural credit and loans, appropriate technology and marketing facilities. They should enjoy adequate living conditions.[269] Women should be accorded equal rights to men in concluding contracts and administering property.[270] Lastly, appropriate measures should be taken to eliminate discrimination against women in all marriage and family matters and to ensure that spouses are accorded equal rights in respect to the acquisition, ownership, administration, management and disposition of property, whether for free or for some consideration.[271]

Implementation of the convention by states is monitored by the Committee on the Elimination of Discrimination against Women (CEDAW Committee).[272] The Committee does also issue interpretations or clarifications of the articles in the Convention called General Recommendations.[273] The General Recommendations that touch on women's land rights include the following.

[266] CEDAW (1981) article 2.
[267] CEDAW (1981) article 3.
[268] CEDAW (1981) article 5.
[269] CEDAW (1981) article 14.2.
[270] CEDAW (1981) article 15.
[271] CEDAW (1981) article 16(1) (h).
[272] CEDAW (1981) article 17.
[273] CEDAW (1981) article 21.

In CEDAW Committee General Recommendation No. 3(1987),[274] on the role of education and public information campaigns, states should promote education and public awareness campaigns that reduce stereotyped representations against women. In General Recommendation No. 9 (1989),[275] on statistical data concerning the situation of women, state parties should ensure that their national statistical institutions that plan national censuses and other social and economic surveys formulate questionnaires in such a way that data is disaggregated according to gender, so that any interested user can easily get data on the situation of women in a particular sector. In General Recommendation No. 21 (1994),[276] on the equality of marriage and family relations, state parties should ensure that restrictions on women from entering contracts or accessing financial credit or that hamper their ability to own and acquire property in their own names, or legal management of their own business, are eliminated as this affects their ability to provide for themselves and their dependants.[277] States should also ensure that women are able to acquire, enjoy own and dispose of property as critical to their financial independence and ability to earn a livelihood and to provide adequate housing and nutrition for themselves and their families.[278] States must also ensure that they eliminate any custom or practice that gives men a bigger share in the distribution and sharing of property at the end of marriage or death of a family relative, as this affects women's decision and judgement to divorce their husbands and to be able to live afterwards as dignified and independent persons.[279] The concept of head of household should be abolished as well, in favour of legislation promoting joint co-ownership of land by spouses.[280] The principle of equal ownership of property acquired in marriage should be upheld and applied in the inheritance of property, and any or all laws and practices against the said principles should be abolished.[281]

In General Recommendation No. 29 on economic consequences of marriage and family relations and their dissolution, states are to make provisions that promote equality in the division of property by spouses at divorce or separation.[282] States are also to adopt laws that allow for the automatic inheritance of property by the surviving spouse.[283] Indirect and

[274] CEDAW Committee *General Recommendation* No. 3 (1987).
[275] CEDAW Committee *General Recommendation* No. 9 (1989).
[276] CEDAW Committee *General Recommendation* No. 21 (1994)
[277] *General Recommendation No. 21* (1994) para. 7.
[278] *General Recommendation No. 21* (1994) para. 21.
[279] *General Recommendation No. 21* (1994) para. 27.
[280] *General Recommendation No. 21* (1994) para. 31.
[281] *General Recommendation No. 21* (1994) para. 35.
[282] *General Recommendation No. 29* (2013) para. 46.
[283] *General Recommendation No. 29* (2013) para. 49.

sometimes non-financial contribution by one spouse in the acquisition of property during marriage should be recognised. States are to adopt laws that ensure that in the making of wills, men and women have equal rights as testators, heirs and beneficiaries.[284] States should also criminalise land-grabbing together with the abolition of the practice of forced widow inheritance with the subsequent customary inheritance of the deceased husband's land.[285] Customary practices that hinder the equal access of land by women must be abolished, together with adopting legislation that ensures rural women have the same access to land as men.[286]

In General Recommendation No. 34[287] on the rights and the protection of rural women, the land rights of rural women are upheld, together with those regarding other natural resources, as fundamental human rights, and states must ensure that barriers and other discriminatory practices that prevent rural women from owning, using or accessing land are abolished.[288] Indigenous women in rural areas should have equal access to possession, ownership and control over land.

Lastly, in General Recommendation No. 37[289] on the effect of climate change and natural disasters on gender equality and women's rights, it is stated that women's equal rights to land and other natural resources in the context of disasters and climate should be upheld and guaranteed.

The Optional Protocol to CEDAW[290] allows individuals from state parties to file a complaint with the CEDAW Committee if the individual believes that his or her rights enshrined in the Convention are being violated. In *Cecelia Kelly v Canada,*[291] the CEDAW Committee received a communication from Kelly, an aboriginal woman, in which she claimed that Canada had violated her obligations under article 1, under 2 (d) and (e) article 14 2(h) article 15 1–4, and article 16(1) (h) of CEDAW by failing to prevent her eviction from a house she had obtained

[284] *General Recommendation No. 29* (2013) para. 52.
[285] *General Recommendation No. 29* (2013) para. 53.
[286] *General Recommendation No. 29* (2013) para. 59.
[287] *General Recommendation No. 34* was issued on 4 March 2016.
[288] *General Recommendation No. 34* (2016) para. 56.
[289] CEDAW Committee *General Recommendation* No. 37 (2018)
[290] The Optional Protocol to the CEDAW was adopted by the UN General Assembly Resolution 54/5 (A/RES/54/4) on 6 October 1999. It entered into force on 22 December 2000.
[291] *Cecelia Kelly v Canada*, CEDAW/C/51/D/19/2008. Communication adopted at its 51st Session on 13 February – 2 March 2012.

from a housing scheme earmarked for the indigenous population.[292] The Committee observed that Canada had indeed violated its obligations under article 2(d) and article 16.1(h) by failing to prevent her eviction from her house by her partner although she was the eligible rightful holder, as the land was earmarked for the aboriginal community and her husband was not a member of the said community. Canada was ordered to her give monetary compensation for the damages in general, material and moral commensurate in gravity with the violations of her rights; she should also be provided with alternative housing commensurate to the size, quality and location to the one she was evicted from. Canada's legal aid system was also to be reviewed to ensure that more aboriginal women have easy and effective access to justice, coupled with the extensive training and recruitment of more aboriginal women to provide legal aid to women from their communities on property rights and domestic violence.[293]

Uganda has demonstrated its commitment to adhere to the provisions of CEDAW by submitting status reports to the CEDAW committee.[294] The Committee has raised several issues on the status of women's land rights in Uganda. It has recommended the repealing of legislation, and customary laws and practices on land ownership and inheritance that discriminate against women.[295] The Committee has also recommended the quick enactment of the Marriage and Divorce Bill and the Muslim Personal Law bill.[296] The former is meant to consolidate laws related to marriage, separation, cohabitation and divorce; the latter, on the other hand, is meant to cater for Muslim marriages and the rights of Muslim women during and at the dissolution of the marriage.

The courts in Uganda have also invoked the provisions of CEDAW and the Committee's interpretation in outlawing several practices that deny women their land rights. The practice of widow inheritance with automatic inheritance of her deceased husband's land has been outlawed, for instance, in *Ebiju & Anor v Echodu,*[297] where the court ruled that a custom of inheriting a widow by the late husband's brother could not grant proprietary interests in the

[292] *Cecelia Kelly v Canada (*2008)15.
[293] *Cecelia Kelly v Canada (*2008)18.
[294]The Committee considered the initial and second periodic reports of Uganda (CEDAW/C/UGA/1-2 and Add.1) at its 270th and 273rd meetings, on 23 and 26 January 1995.
[295]Uganda later submitted a combined omnibus report ((CEDAW/C/UGA/7) in 2009. The report was considered by the pre-session working group in October 2010.
[296]The Committee made its concluding observations on Uganda's implementations of CEDAW in its report (CEDAW/C/SR.954 and 955) at its forty seventh session in October 2010.
[297] *Ebiju & Anor v Echodu* (Civil Appeal No. 43 of 2012) [2015] UGHCCD 122 (17 December 2015).

deceased estate to the new husband and that the widow had all rights to deal and dispose of the land as she wished. In other cases, such as *Namukasa v Kokondere,*[298] following the Supreme Court precedence in *Julius Rwabinumi v Hope Bahimbisomwe,*[299] the courts in Uganda have recognised a women's non-monetised contribution in the acquisition of marital property.

2.2.5 The Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)

Under this Convention,[300] indigenous people have rights to make decisions over land which they have traditionally occupied or used.[301] This should include indigenous women. Indigenous traditions, customs and norms that are not incompatible with international human rights should be recognised.[302]

2.3 International policy instruments on women's land rights

The UN has adopted several policy instruments on women's land matters. Below is a discussion of the major policy instruments in order of their adoption by the UN.

2.3.1 The Rio Declaration on Environment and Development

Under this Declaration,[303] women, indigenous people and local communities were recognised as vital in environmental management and development and should be involved in all policies and decision-making,[304] that states should ensure that women's interests, identity and culture are preserved, and that women should be involved in the achievement of sustainable development.[305] The Declaration was, though, not very explicit in its recognition of women's land rights. However, Agenda 21, also adopted at the same Conference, had some objectives for recognising women's tenure rights by ensuring that attention is paid to women and other indigenous people in land use and physical planning to ensure that there is access to land for

[298] *Namukasa v Kakondere* (Divorce Cause No. 30 of 2010) [2015] UGHCFD 49 (10 April 2015).
[299] *Rwabinumi v Bahimbisomwe* (Civil Appeal No. 10 of 2009) [2013] UGSC 5 (20 March 2013).
[300] Adopted in 1989 by the International Labor Organization (ILO) and entered into force in 1991.
[301] Articles 7 & 14 of the Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169).
[302] Article 8(2) of the Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169).
[303] Adopted at the conclusion of UN Conference on Environment and Development held from the 3-14th June 1992 in Rio de Janeiro -Brazil. According to the preamble, the conference aimed at creating a new and equitable global partnership in protection of the environment in the unprecedented development era.
[304] Rio Declaration on Environment and Development (1992), principle 20.
[305] Rio Declaration on Environment and Development (1992), principle 22.

all households and, where appropriate, to ensure that there is collective and communal ownership and management of land.[306] Governments were to establish appropriate land-tenure systems that provided security of tenure for all land users with women, indigenous people, rural people, local communities and urban poor dwellers given special attention.[307]

At the 10th Anniversary of the Rio Declaration, the *Johannesburg Declaration on Sustainable Development 2002* and the *Johannesburg Plan of Implementation* were adopted.[308] Under this plan, the promotion of sustainable development and local community involvement was emphasised, as was ensuring that people living in poverty are given priority in the development process by increasing access to productive resources, particularly land, water, credit, employment opportunities and the like.[309] Policies that eliminated all forms of discrimination against women were to be enacted to ensure that women and the girl child have full and equal access to land, economic opportunities, credit, health services, and the like.[310] Governments were to ensure that people living in poverty, especially women and indigenous communities, have access to agricultural resources and appropriate land tenure that recognises their land and property rights.[311] Lastly, women's involvement and participation at all levels in decision-making was to be stressed, especially in programmes and policies to do with land, water rights and land-tenure reforms.[312] Although the Plan of Implementation over-emphasised the involvement of women in decision-making and access to productive resources, it was not particularly strong on women's land rights.

Later, at the *RIO+20 Conference on Sustainable Development,*[313] Heads of States resolved to undertake immediate legislative and administrative reforms that would accelerate the promotion of equality between men and women in pursuance of economic opportunities, including access to and ownership of land and other forms of property.[314]

[306] Agenda 21 of the UN Conference on Environment and Development (1992) para. 28 of chapter 7.
[307] Agenda 21 of the UN Conference on Environment and Development (1992) para. 30 (f) of chapter 7.
[308] Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August- 4 September 2002.
[309] *Johannesburg Plan of Implementation* (2002) para. 7 (c).
[310] *Johannesburg Plan of Implementation* (2002) para. 7 (d).
[311] *Johannesburg Plan of Implementation* (2002) para. 7 (h).
[312] *Johannesburg Plan of Implementation* (2002) para. 40 (f) & (I).
[313] RIO+20 held in Rio-de Janeiro-Brazil from 20-22 June 2012 to review progress under the Rio Declaration on Environment and Development of 1992.
[314] RIO+20 (2012) para. 240 of the Report.

2.3.2 The Vienna Declaration and Programme for Action 1993

Though not explicit on women's land rights, the Vienna Declaration[315] expressed concerns about the forms of discrimination that women continue to be exposed to throughout the world.[316] Governments were tasked to ensure explicit recognition of the human rights of women and the girl child as an inalienable, integral and indivisible part of human rights, by ensuring that all discriminations on grounds of sex are eliminated.[317] Governments were to eradicate conflicts arising out of the contradiction between the enjoyment of women's rights and certain harmful cultural practices and traditional prejudices and religious extremism.[318] This was an important provision in women's enjoyment of land rights, as seen already in this thesis: women's enjoyment of their land rights has been curtailed by discriminatory traditional and cultural practices.

2.3.3. The Cairo Declaration at the International Conference of Parliamentarians on Population and Development 1994

The Cairo Declaration[319] re-emphasised gender equality and women's land tenure rights. It underscored the importance of gender equality, advancing women's empowerment and eliminating discrimination against women.[320] Specific to women's land rights, governments were to ensure that existing barriers and inequities against women would be eliminated and that women would have full and equal access to productive resources, including the right to equal and full access to and ownership of land, and full rights to inherit property.[321] Women were also to have the same rights as men in buying, owning and selling property and land, and to be able to negotiate contracts in their own name and on their own behalf.[322] Since women form the majority of the poor, they were to be involved in all decisions regarding urban planning and land management and to promote programmes that would enable easy

[315] Adopted at the World Conference on Human Rights in Vienna, Austria 1993 Vienna Declaration. The preamble re-emphasised the continued efforts in promoting equality of men and women as enshrined in the UN Charter.
[316] Vienna Declaration (1993) preamble, para 10.
[317] Vienna Declaration (1993) paras. 18, 36 and 39.
[318] Vienna Declaration (1993) para. 38.
[319] Adopted at the International Conference of Parliamentarians on Population and Development held in Cairo-Egypt in September 1994.
[320] *Cairo Programme for Action* (1994) principle 4 and objective 3.16.
[321] *Cairo Programme for Action* (1994) para. 3.18.
[322] *Cairo Programme for Action* (1994) para. 4.6.

accessibility to land by the poor, both in urban and rural areas, to mitigate the effects of rapid urbanisation.[323]

2.3.3 The Copenhagen Declaration on Social Development 1995

The Copenhagen Declaration on the other hand, resolved to ensure that all impediments to ownership of property or means of production by men and women should be abolished.[324] Governments resolved to establish policies and programmes to enable women to have full and equal access to economic opportunities, productive resources, land ownership and the right to inheritance.[325] To address rural poverty, the equality of rights of men and women in land reform programmes, land ownership and security of land tenure was to be upheld at all times.[326]

2.3.4 The Beijing Declaration and Platform for Action 1995

The Beijing Declaration was adopted with some of the comprehensive set of principles and policy commitments made by states on women's land rights. The Beijing Declaration was in effect an attempt to speed up the implementation of the *Nairobi Forward-Looking Strategies to the Advancement of Women*[327] which had proposed urgent action in the elimination of all obstacles to gender equality by ensuring women's equal, active and full participation in all spheres of life[328] and their equal access and control over productive resources, including land, property, credit and capital.[329] With the Beijing Declaration, governments committed to removing all obstacles to gender equality and eliminate discrimination of all kinds against women and the girl child.[330] Equal access to productive resources and women's economic independence and empowerment were to be made the principal agenda for the participating countries.[331] As productive resources include land, states in effect committed to making equal access to land a top priority. The commitment to the equal rights and inherent human dignity of men and women was re-affirmed.[332] There was also a recognition that poverty would not be

[323] *Cairo Programme for Action* (1994) para. 9.8.
[324] *Copenhagen Programme of Action* (1995) para. 14(c) (j).
[325] *Copenhagen Programme of Action* (1995) para. 26(e) & (g).
[326] *Copenhagen Programme of Action* (1995) para.29 (a).
[327] Adopted at the World Conference to Review and Appraise the Achievements of the UN Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985.
[328] Beijing Declaration and Platform for Action (1995) para.1.
[329] Beijing Declaration and Platform for Action (1995) para. 166(c).
[330] Beijing Declaration and Platform for Action (1995) para.24.
[331] Beijing Declaration and Platform for Action (1995) paras. 26 and 35.
[332] Beijing Declaration and Platform for Action (1995) paras. 8 and 36.

eradicated unless people-centred sustainable development is promoted, involving the equal and full participation of women and men as agents and beneficiaries.[333]

The following *Beijing + 5 Conference*[334] adopted further measures to promote women's land rights by mandating participating countries to initiate strong awareness campaigns and educational programmes on women's land ownership and inheritance rights.[335] Measures to ensure that women do not lose land, homes and properties when their husbands die were to be put in place.[336] Pieces of legislation that eliminate all obstacles to women's equal rights to access affordable housing and property ownership were to be enacted.[337] A Uganda government report[338] on the implementation of the Beijing Platform for Action identified traditional and customary practices of ownership of land and other assets that favour the male gender and which are predominant in the rural areas as a key hindrance to women's access and ownership of land.[339]

2.3.5 The Istanbul Declaration on Human Settlements (Habitat 11) 1996

This Declaration[340] tasked governments to promote gender equality in all programmes and policies related to shelter and human settlements[341] and to ensure that women have equal rights to men in access to economic resources, including equal rights to inheritance and ownership of land,[342] and security of tenure and equality in accessing land by all people, including women and all those living in poverty.[343] A subsequent UN world summit 2016 (*Habitat 111)*[344] adopted a New Urban Agenda[345] that envisages the building of cities and other human settlements with gender equality being a fundamental consideration and closer attention being paid to women's security of land tenure as key to their empowerment.[346]

[333] Beijing Declaration and Platform for Action (1995) para. 16.
[334] Adopted at the 23rd Special Session of the UN General Assembly in June 2000.
[335] *Beijing + 5 Conference* (2000) para.78 (b).
[336] *Beijing + 5 Conference* (2000) para.78 (g).
[337] *Beijing + 5 Conference* (2000) para.78 (c).
[338]National Report on implementation of the Beijing Platform for Action (1995) and the outcome of the Twenty Third Special Session of the UN General Assembly (2000).
[339]National Report on implementation of the Beijing Platform for Action (1995) 32.
[340] Adopted at the UN Conference on Human Settlements (Habitat II), held in Istanbul Turkey from 3-14 June 1996.
[341] Istanbul Declaration (1996) para.7.
[342] Istanbul Declaration (1996) para.27.
[343] Istanbul Declaration (1996) para. 40 (b).
[344] Adopted at the UN Conference on Sustainable Urban Development held in Quito-Ecuador on 20 October 2016.
[345] Endorsed and adopted by the UN General Assembly at its 71st Session on 23 December 2016.
[346] New Urban Agenda (2016) para. 35.

2.3.6 The 2000 UN Millennium Development Goals (MDGs)

Although not specifically mentioning women's land rights, the UN Millennium Development Goals[347] has the promotion of gender equality and women empowerment as a key target. This indirectly covers women's equal land rights.[348] The UN Task Force on Gender has identified the equal rights to access, control and own property as a key component of gender equality.[349] At the World Summit 2005[350] to review progress under the MDGs 2000, Heads of State resolved to accelerate efforts that promote women's right to own and inherit property,[351] including the right to access equally productive resources and assets including land, credit and technology.[352]

2.3.7 The 2030 Agenda for Sustainable Development (SDGs) 2015

The 2030 Agenda[353] has also the achievement of gender equality and promotion of women's land rights as one of the principal goals of the Agenda.[354] Governments committed to making reforms that grant women equal rights when accessing economic resources including equal rights to access, control over and ownership of land and other forms of property, inheritance, financial services and natural resources in accordance with national laws.[355] The land rights of women are further covered in Sustainable Development Goal 1, which aims to end poverty for all, and the related target 1.4 that seeks to ensure that men and women, by 2030, in equal measure have equal access to basic services, ownership and control over land, other forms of property, natural resources, inheritance, appropriate new technologies, and financial services including microfinance. Sustainable Development Goal 2, which seeks to end poverty and achieve improved nutrition, food security and sustainable agriculture, also has a provision on women's land rights in target 2.3, where countries commit that, by 2030, they shall have doubled the incomes and food production of small-scale producers, particularly women, indigenous people, farmers and pastoralists. To achieve this target, there must be secure and

[347] Adopted at the UN Conference on Sustainable Urban Development held in Quito-Ecuador on 20 October 2016.
[348] Millennium Development Goal 3.
[349] Levine, R et al (2003) 25.
[350] Millennium Development Goals Report (2005).
[351] Millennium Development Goals Report (2005) para. 58 (b).
[352] Millennium Development Goals Report (2005) para. 58 (e).
[353] The 2030 Agenda for Sustainable Development was adopted by the UN General Assembly at the 70th Anniversary of the UN held in New York from 25 -27 September 2015.
[354] The Sustainable Development Goals (2015) goal 5.
[355] The Sustainable Development Goals (2015) goal 5, target 5a.

equal access to land for all, other productive resources, knowledge, inputs, markets and financial services, and opportunities for value addition.

Other goals and targets relevant to the achievement of women's land rights are contained in SDG 10, where states commit to ensure that they reduce inequalities by ensuring equal opportunity for all, including elimination of all discriminatory laws and policies, by introducing new reforms and legislations in that regards.[356] Pertinent also to the achievement of women's land rights are the targets in Sustainable Development Goal 16 that seeks to achieve peaceful and inclusive societies for sustainable development. Under target 16.3, states commit to promoting the rule of law at national and international levels, including ensuring that there is equal access to justice for all.

There have also been some key principles, guidelines and resolutions adopted or passed under the auspices of UN with the objective of promoting the land rights of women. They will be highlighted here according to the year in which they were adopted or passed.

The Guiding Principles on Internal Displacement 1998,[357] although never approved by the General Assembly through intergovernmental process or UN agencies, are cited by a growing number of governments across the globe, NGOs, and some regional organisations, as a basis for laws, policies and programmes for internally displaced people.[358] In making decisions on relocation and management of internally displaced people, authorities shall as far as possible involve the affected, especially women,[359] and all property and possessions left behind by internally displaced people must be protected against destruction or illegal use, occupation or appropriation.[360]

The Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security 2004,[361] developed by the Food and Agriculture

[356] The Sustainable Development Goals (2015) goal 10, target 10.3.
[357] UN, Commission on Human Rights, the Guiding Principles on Internal Displacement (1998).
[358] The Uganda National Policy for Internally Displaced Persons (2004) has its foundations in the Guiding Principles on Internal Displacement (1998). Paragraph 3 of the Preamble, Uganda National Policy for Internally Displaced Persons (2004).
[359] The Guiding Principles on Internal Displacement (1998) principle (6) (2) d.
[360] The Guiding Principles on Internal Displacement (1998) Principle 21(1) & (3).
[361] Approved and adopted at the 127th Session of the Council of the Food & Agriculture Organization of the UN in November 2004 sitting in Rome-Italy.

Organisation (FAO), also have provisions on the protection of women's land rights. States are to protect the rights of individuals with respect to resources, such as land, forests, fisheries, livestock and water, without discrimination.[362] Land reforms must be consistent with human rights obligations and in strict observance with the rule of law to secure efficient and equitable access to land. States shall take all steps to ensure that marginalised and vulnerable groups have access in equal measure to economic resources and opportunities so that they can fully participate in the economy.[363] States must also introduce gender-friendly legislation that enables women to have equal and full participation in the economy, including the right to inherit and possess land and other property. Women should have secure and equal access to, and control over, productive resources such as land, credit, water and appropriate technologies.[364] Women's rights to security of land tenure must be protected by introducing legislation that gives women full and equal right to own land and other property, including the right to inherit.[365]

The *Principles on Housing and Property Restitution for Refugees and Displaced Persons 2005,*[366] otherwise known as the Pinheiro Principles, are designed to protect the property rights of refugees and displaced persons as well as recognising gender equality,[367] and have an effect on women's land rights. The Principles re-emphasise the equality of man and women, prohibiting discrimination on basis of sex.[368] States must recognise the equal rights of men and women, boys and girls, to safely and voluntarily return to their lands and live in dignity, including legal security of tenure, right to property ownership, equal rights to inheritance as well as the right to have the use, control of and access to housing, land and property.[369]

[362] FOA (2004) guideline 8.1.
[363] FOA (2004) guideline 8.2.
[364] FOA (2004) guideline 8.6.
[365] FOA (2004) guideline 8.10.
[366] Endorsed at the 56th Session of the UN Sub-Commission on the Promotion and Protection of Human Rights on 28 June 2005.
[367] In Columbia, Constitutional Court: Judgement T-821/07 (5 October 2007) the complainant had been forcefully evicted and displaced from her home and land by armed forces in 2006. The court sought guidance of the Pinheiro principles and concluded that the right to restitution was available regardless of the tenure status at the time of eviction and displacement.
[368] Economic & Social Council (ECOSOC) (2005) principle 3.1.
[369] Economic & Social Council (ECOSOC) (2005) principle 4.1.

The International Guidelines on HIV and Human Rights 2006,[370] developed after calls by countries that needed guidance on how best to protect and promote human rights in the context of the HIV/AIDS epidemic, also touch on women's land rights. States are to enact or reform legislation on women's equal rights to property, on women's equal rights in marital relations and the equal access to employment and economic opportunities. Governments must ensure that laws that promote or facilitate discriminatory limitations against women owning or inheriting property are removed, coupled with women's free and voluntary right to enter into contracts and marriage, and that at divorce or separation, women have equitable rights in the sharing of assets and retain custody of children.[371]

The Basic Principles and Guidelines on Development-Based Evictions and Displacement 2007,[372] developed to address human rights implications in an era of unprecedented displacement and eviction of people in rural and urban areas, make specific reference to women's land rights and gender equality. They recognise the effect of forced evictions on the vulnerable, especially women, children and indigenous people.[373] States must ensure that men and women are protected in equal measure against forced evictions, and that there is equality in the enjoyment of the fundamental human right to housing and security of tenure.[374] States must also carry out immediate reviews of legislation on inheritance and cultural practices that lead to or facilitate forced evictions of the vulnerable, including women.[375] The equal treatment of men and women in the enjoyment of their right to adequate housing shall be promoted by putting in place measures that ensure that titles to housing and land are conferred on women as well.[376] States must carry out impact assessments using disaggregated data to find out the impact of forced evictions on women and the marginalised.[377] When designing and implementing development projects, there has to be sufficient training incorporating international human rights norms, and the said training should emphasise women-specific concerns pertaining to housing and land.[378] All alternatives to evictions must be explored and

[370] The Guidelines were first adopted in September 1996 at the Second International Consultation on HIV/ AIDS and Human Rights under the office of the UN High Commissioner for Human Rights (OHCHR) and the Joint UN Programme on HIV/ AIDS (UNAIDS). They were consolidated in 2006.
[371] OHCHR and UNAIDS (2006) para. 22 (f), guideline 4.
[372] The Guidelines were developed and presented in the Report of the UN Special Rapporteur on Adequate Housing in February 2007.
[373] UN Human Rights Council (2007) guideline 7.
[374] UN Human Rights Council (2007) guideline 15.
[375] UN Human Rights Council (2007) guideline 24.
[376] UN Human Rights Council (2007) guideline 26.
[377] UN Human Rights Council (2007) guideline 33.
[378] UN Human Rights Council (2007) guideline 34.

all affected persons, including women and indigenous people, shall be fully consulted and involved in the entire process; in the event of disagreement, there should be recourse to an independent body such as a court of law or tribunal to mediate, arbitrate or adjudicate.[379]

The *Voluntary Guidelines on the Responsible Governance of Tenure of Lands, Fisheries and Forests 2012*[380] developed by the FAO to guide member countries in the governance of land tenure, fisheries and forests, with the overall aim of achieving national food security, touches on women's land rights by firstly re-emphasising the inherent, equal and alienable human rights of all individuals without discrimination.[381] Women and girls shall have equal tenure rights and full access to land, fisheries and forests, irrespective of their marital status.[382] States are mandated to prohibit discrimination in all forms related to tenure rights, and women should have equal tenure rights to men, including the right to bequeath or inherit these rights.[383] Legislation protecting tenure rights over land, fisheries and forests should be enacted, including the right to enter into contracts concerning the tenure rights.[384]

The *Guiding Principles on Security of Tenure of the Urban Poor 2013,*[385] developed to help improve the security of tenure of the vulnerable, the marginalised and those living in poor urban settlements, mandate states to strengthen women's security of tenure regardless of their age, social status, and marital status. States are also required to adopt measures that facilitate the registration of women's tenure rights. States must also adopt measures that recognise women's customary and religious tenure rights in consultation with communities, and with due regard to the rights of indigenous people and religious freedoms. States must also enact legislation protecting women's inheritance rights in case of death of father, husband, brother, son or any other male household member, to ensure that they continue residing in the family home. In periods of humanitarian crises, states must ensure that women and girls can safely return at appropriate time, and be able resettle safely in the family home, regardless of whether they were married or not or whether their names are recorded in the tenure documentation.[386]

[379] UN Human Rights Council (2007) guideline 38.
[380] Adopted by the FAO Council in 2012.
[381] FAO (2012) guiding principle 3B.
[382] FAO (2012) guiding principle 3B (4).
[383] FAO (2012) guiding principle 4.6.
[384] FAO (2012) guiding principle 5.4.
[385] Developed by the Special Rapporteur on Adequate Housing under the Office of the Human Rights Commissioner for Human Rights in 2013.
[386] UN Human Rights Council (2013) guiding principle 6.

The UN Secretary General has also issued a *Guidance Note on Land and Conflict 2019* to provide much needed guidance on human rights and gender-sensitive approaches to land and conflict.[387] The Note emphasises the importance of the UN's assistance in national dialogues and land reform activities and initiatives in ensuring that gender-responsive approaches are incorporated in the promotion of women's rights to control, own, access and inherit land.[388] The UN support could include domesticating gender-responsive land-related international approaches and standards into national laws. The UN should also, in its planning and assessment, incorporate specific land aspects related to women's ownership, access to and control of land, inheritance and family law on death and divorce.[389]

The UN General Assembly has also adopted a number of resolutions aimed at promoting the land rights of women. Resolution 50/165[390] invites member states to undertake all necessary measures to ensure that rural women have full and equal access to productive resources, including the right to ownership and the inheritance of property. Resolution 1997/19[391] mandates states to legally recognise, among other matters, women's rights to land, property, inheritance and security of tenure by fully complying with the state's international and regional commitments and obligations. Resolution 2005/15[392] requires governments to comply with the obligations under the Universal Declaration of Human Rights and the ICESCR to ensure that women enjoy land tenure and the right to own, have access to and to control property, land and housing.

The discussion above has covered the major international legal instruments on women's land rights. The discussion below will now consider the regional legal instruments on women's land rights.

[387] UN 2019.
[388] UN (2019) 8.
[389] UN (2019) 10
[390] General Assembly, Resolution 50/165 A/RES/50/165 (1995) adopted by the General Assembly at its 50 Session on 22 December 1995.
[391] Sub-Commission Resolution 1997/19, Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted on 27 August 1997.
[392] Human Rights Resolution 2005/15, Commission on Human Rights adopted on 15 April 2005.

2.4 Regional legal and policy instruments on women's rights to land

2.4.1 The African Charter on Human and Peoples' Rights (ACHPR)

The ACHPR[393] does not have explicit provisions on women's land rights. However, it lays down the inalienable fundamental human rights that every human being should enjoy, irrespective of sex. Every person is entitled to enjoy the rights and freedoms laid down in the Charter without any distinction of any kind.[394] The equality of all before the law is recognised, as is the right to equal protection before the law.[395] The family is recognised as the natural unit and basis of society, the custodian of morals and traditional values that needs to be protected.[396] Specific to women, 'every' discrimination against women must be eliminated and the rights of women and children protected.[397] The Charter allows the preservation of 'positive' African cultural values in the spirit of tolerance, dialogue and consultation.[398] It should be noted that the Charter, in article 18(2) and (3), prohibits all discrimination against women, which implies that it is only those African cultural values and norms that do not discriminate against women that can be preserved.

In a communication before the African Commission on Human and Peoples Rights (African Commission), concerning *The Social and Economic Rights Centre & the Centre for Economic & Social Rights v Nigeria,*[399] among the questions before the African Commission was whether the ACHPR covered land rights, including rights to food and housing that are not explicitly stated in the Charter. The case involved the forced evictions of Ogoni people in the Niger Delta Region of Nigeria by government forces and a transnational oil company to pave way for oil production. The Commission ruled that the right to food is implied in article 4 of the Charter that provides for the right to life.[400] The right to adequate housing is implied in article 14 that provides for the right to life, article 16 on the right to health and article 18(1) that provides for the right to protection of the family unit.[401] The destruction of the families and homesteads of the affected communities was found to be in violation of the right to housing or shelter under

[393] Adopted at the 18th Assembly of the Heads of State and Government of the Organization of African Unity on 17/6/1981. Entry into force on 21/10/1986.
[394] ACHPR (1981) article 2.
[395] ACHPR (1981) article 3.
[396] ACHPR (1981) article 1(1).
[397] ACHPR (1981) article 18(2) & (3).
[398] ACHPR (1981) article 29(5).
[399] *The Social & Economic Rights Centre and the Centre for Economic & Social Rights v Nigeria* African Commission on Human & Peoples Rights, Communication No. 155/96 (27 May 2002)
[400] *The Social & Economic Rights Centre and the Centre for Economic & Social Rights v Nigeria (*2002) para. 64.
[401] *The Social & Economic Rights Centre and the Centre for Economic & Social Rights v Nigeria (*2002) para. 63.

the Charter.[402] It was also the Commission's view that the right to housing, as implied in the Charter, includes the right to protection from forced evictions.[403] The right to food implied by the right to life was found to be inseparably linked to the dignity of the human being, and is therefore essential to the enjoyment of all other rights; as such, at the bare minimum, the Nigerian government, having failed to improve food production and access, should at least not destroy or contaminate food sources or prevent people's efforts to feed themselves.[404] Although not explicit on women's land rights, it is not in doubt that the right to life, right to food and adequate housing and the protection of the family unit as discussed in the case are inter-linked with the right to property and women, land rights.

In *Centre on Housing Rights and Evictions (COHRE) v Sudan,*[405] the communication involved the mass evictions and destruction of homes, food and water resources during the conflict in Darfur region of Sudan. Among the legal questions before the African Commission was whether the forced eviction and displacement of non-indigenous peoples from lands where they had settled was a violation of article 14 of the African Charter on the right to property. The question of whether legal title was a necessary element in the right to property was also before the Commission. The Commission sought the guidance of the Pinheiro Principles as emerging principles in international human rights, specifically principle 5, where states must ensure that there is prohibition of forced evictions, destruction of agricultural areas, and the arbitrary confiscation and expropriation of lands as a method of war or as a punitive measure.

It concluded that there had been violations of article 22 of the African Charter on the collective right to social, economic and cultural development. There had also been a violation of article 16 on the right to the attainment of the highest standard of health, which implicitly included the right to water as the access to the land to obtain water was denied.[406] The Commission observed further that it did not matter that they victims did not have legal title to the lands. The fact that they were denied access to lands where they had derived their livelihoods for generations was a deprivation of their right to property under article 14 of the Charter.[407] The

[402] *The Social & Economic Rights Centre and the Centre for Economic & Social Rights v Nigeria (*2002) paras. 66 & 67.
[403] *The Social & Economic Rights Centre and the Centre for Economic & Social Rights v Nigeria (*2002) para.64.
[404] *The Social & Economic Rights Centre and the Centre for Economic & Social Rights v Nigeria (*2002) para.65.
[405] African Commission on Human and Peoples Rights: *Centre on Housing Rights and Evictions (COHRE) v Sudan,* Communication No.296/2005 (29 July 2010).
[406] *Centre on Housing Rights and Evictions (COHRE) v Sudan* (2010) para. 203.
[407] *Centre on Housing Rights and Evictions (COHRE) v Sudan* (2010) para. 205.

Commission observed that victims of human rights violations should be protected, coupled with the rehabilitation and the development of the social and economic infrastructure to enable the safe return of the internally displaced people and refugees.[408]

In *Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,*[409] among the questions before the Commission was whether the forced eviction of the Endorois community by Kenyan government forces to make way for a game reserve was in violation of the rights under the African Charter for Human and Peoples Rights. The Commission ruled that the eviction of the Endorois people from their ancestral lands was in violation of the religious freedoms under article 8 of the Charter.[410] Furthermore, the forced eviction from indigenous lands was a violation of the right to property and the right to free disposition of natural resources covered under articles 14 and 21, respectively, under the Charter. The Endorois people were therefore entitled to restitution or to be given other lands of equal extension and quality.[411]

The African Charter, despite its progressiveness in the promotion of gender equality, was widely criticised for not having been explicit on women's equal rights. An additional *Protocol on Women's Rights* was negotiated and the African Union Protocol on the Rights of Women in Africa (Maputo Protocol) was adopted.[412] The Protocol defines 'discrimination against women' as any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, of human rights and fundamental freedoms in all spheres of life, regardless of their marital status.[413] Under the Protocol, states must eliminate discrimination of all kinds against women by taking corrective and positive actions in all those areas where discrimination against women still exists in law or fact.[414] On women's rights to property, the Protocol recognises the equal rights of women in the equitable sharing of joint property at separation,

[408] *Centre on Housing Rights and Evictions (COHRE) v Sudan* (2010) para. 209.
[409] *Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* African Commission on Human & Peoples Rights, Communication No. 276/2003 (4 February 2010).
[410] *Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2010) para. 173.
[411] *Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2010) para. 209.
[412] Adopted at the General assembly of the African Union sitting in Maputo Mozambique on 11 July 2003.
[413] *African Union Protocol on the Rights of Women in Africa* (2003) article I (f).
[414] *African Union Protocol on the Rights of Women in Africa* (2003) article 2(1).

divorce or annulment of marriage.[415] It is worth noting that the Protocol uses the phrase 'equitable sharing' and not equal sharing. States must ensure increased effective representation and participation of women at all levels of decision-making.[416] In Uganda, for instance, gender balance and fair representation of all marginalised groups on all constitutional and other bodies are enshrined in the Constitution.[417] The African Court on Human and Peoples' Rights has since handed down landmark decisions upholding women's land rights under the Maputo Protocol.

In *Association Pour Le Progrès Et La Défense Des Droits Des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Mali,*[418] the communication challenged the Family Code of Mali as being in violation of the right to consent to marriage, right to inheritance as provided in article 21(2) of the Maputo Protocol and articles 3 and 4 of the African Charter on the Rights and Welfare of the Child (ACRWC), respectively. The case also challenged the failure by the state to eliminate traditional practices and conduct harmful to the rights of women and children as mandated under articles 2(2) of the Maputo Protocol and article 5(a) of CEDAW and article 1(3) of ACRWC. Specific to women's land rights, the impugned law in article 751 enshrined religion and customs as the applicable regime in matters of inheritance, and the Family Code would only apply where religion or custom could not be established by testimony, either in writing or by experience or common knowledge. The applicants contended that in Mali, Islamic law gives women half of what a man receives and by adopting the impugned law, the state would be in violation of article 21 of the Maputo Protocol that gives widows and girls equitable sharing of their husbands' or fathers' property.[419] The impugned article also denied children born out of wedlock an automatic right of inheritance. The court ruled that the impugned law was in violation of article 21 of the Maputo Protocol in as far as it provides for the application of Islamic law and customary practices in matters of inheritance. The law was also in violation of articles 3 and 4 of the Children's charter as the superior interests of the child at inheritance were not

[415] *African Union Protocol on the Rights of Women in Africa* (2003) article 7(d).
[416] *African Union Protocol on the Rights of Women in Africa* (2003) article 9(2).
[417] Objective VI of the Uganda Constitution; National Objectives and Directive Principles of State Policy.
[418] *Association Pour Le Progres Et La Defense Des Droits Des Femmes Maliennes (APDF) And the Institute for Human Rights and Development in Africa (IHRDA) v Mali.* African Court of Human and Peoples' Rights, Application No. 046/2016 (11 May 2018).
[419] *Association Pour Le Progres Et La Defense Des Droits Des Femmes Maliennes (APDF) And the Institute for Human Rights and Development in Africa (IHRDA) v Mali* (2018) para. 97 & 100.

considered.[420] The State of Mali was therefore found in violation of its obligations under the international instruments and was ordered to amend forthwith the challenged law and harmonise it with the international instruments, and to take appropriate measures to bring an end to the violations established. In outlawing sections of the Mali Family Code that allowed discriminatory practices in marriage and inheritance, the African Court on Human Rights was in effect promoting women's rights to land in marriage and through inheritance.

Uganda has not domesticated the Maputo Protocol but has enacted numerous legal and policy instruments that contain provisions on women's rights to land. Provisions on women's rights to land are contained in the Constitution, the Land Act and the Land Policy already highlighted in chapter 1. A study on Uganda's implementation of the Maputo Protocol found that women's access to and control of land is hindered by lack of implementation and streamlining of the laws and policies on women's land rights, coupled with the persistent poverty levels among women, marginalisation and negative cultural perceptions.[421]

2.4.2 The African Charter on the Welfare and Rights of a Child (ACWRC)

The ACWRC[422] was adopted to promote and protect the rights and welfare of a child, and has provisions that have an indirect impact on girls' access to land. The Charter enshrines traditional human rights such as the right to non-discrimination contained in international instruments.[423] The African Committee of Experts on the Rights and Welfare of the Child is established under Charter drawing its mandate from articles 23-46 of the Charter to monitor implementation of the Charter by member states.

The African Commission has adopted several resolutions, guidelines and principles aimed at promoting the land rights of women. The *African Union Solemn Declaration on Gender Equality in Africa 2004,*[424] where Heads of States committed to ensuring that they aggressively promote the gender equality principle enshrined in article 4(1) of the Constitutive Act of the African Union. They also committed to accelerating all efforts to promote gender equality at all levels. They were also to implement legislation that guarantees women's rights to land,

[420] *Association Pour Le Progres Et La Defense Des Droits Des Femmes Maliennes (APDF) And the Institute for Human Rights and Development in Africa (IHRDA) v Mali* (2018) para. 113-115.
[421] Uwonet (2017) 12.
[422] The ACWRC was adopted by the African Union on 11 July 1990. Entry into force on 29 November 1999.
[423] ACWRC (1990) art. 3.
[424] Passed by the African Union on 6 July 2004, adopted on the 27 May 2005.

property, and inheritance, including their rights to housing. The courts in several African countries have upheld the gender equality principle enshrined in the declaration in the promotion of women's land rights. One such case was the South African Constitutional Court in *Bhe v Magistrate Khayelitsha & Ors.*[425] The case challenged the customary laws on succession, and section 23 of the Black Administration Act that favoured male succession and precluded women from inheriting land from a close male relative, and children from an extra-marital relationship from being heirs. Under the inheritance laws, the property of a male who had died intestate would pass to a male relative. The Constitutional Court observed that the impugned law, the customary law that prevented women from enjoying their equal right to inheritance because of their gender, was discriminatory and incompatible with the right to equality enshrined in section 9(3) of the Constitution of South Africa and the African Union Solemn Declaration on Gender Equality in Africa.[426] The court declared the customary law on inheritance as null and void to the extent that it excludes or hinders women and extra-marital children from inheriting property.

Other guidelines and principles that have an impact on women's access to land include *The Framework and Guidelines on Land Policy in Africa 2009,*[427] which call for the strengthening of land rights of women by eliminating gender discrimination in the access to land resources, as well the enactment of a variety of new legislation that allows women to have documented claims to land whether in marriage or outside of marriage. The equal rights of women to inherit and bequeath land should be promoted as should co-ownership rights of registered land by spouses. Women's active participation in land administration structures must be actively promoted. The policy also calls for public discussion of women's land rights rather than keeping this as a private discussion within marriages and family.[428]

The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights 2010[429] recognise gender equality and the equal rights of women to property and land. States must ensure that vulnerable and disadvantaged groups have access to and use of land, and the right to claim their ancestral

[425] *Bhe v Magistrate Khayelitsha & Ors.* 2005(1) BCLR 1 (CC), South Africa, Constitutional Court: 15 October 2004.
[426] *Bhe v Magistrate Khayelitsha & Ors (*2005) para. 91.
[427] Adopted by the African Union in 2009.
[428] African Union (2009) para. 3.1.4.
[429] Adopted at the 48th Session of the African Commission on Human Rights in November 2010.

rights. Traditional land ownership must be protected while ensuring gender equality.[430] States have an obligation to ensure that women have equitable and non-discriminatory access, acquisition, control, ownership and inheritance of land and housing. This includes putting in place measures that modify or prohibit harmful cultural and other practices that prevent women and other vulnerable groups from enjoying their right to property particularly land and housing.[431]

The Nairobi Action Plan on Large-scale Land-Based Investments in Africa 2011[432] calls on states to ensure that the increased investment opportunities in agriculture respect and uphold women's land rights. Land policies and use must ensure that there is equitable access, and secure land rights for women. There must be gender equality in land governance to enjoy the benefits of large-scale land-based investments. The Action Plan resulted in the adoption of the *Guiding Principles on Large-scale Land Based Investments in Africa 2014*.[433] The Guidelines have four fundamental principles, but key to women's land rights is the fourth principle, that large-scale land-based investments (LSLBI) must ensure that women's land rights are respected, women's voices must be heard, and that the investments must generate meaningful opportunities for women alongside men. The African Commission on Human and Peoples Rights, in its 2013 Resolution,[434] has urged states to repeal all discriminatory laws and sanction all customary practices that have a negative impact on women's use of, access to and control over land and other productive resources. States are to ensure that women's rights to land and property are promoted and ensure that women have equal treatment in rural development, land distribution and social housing projects, and that women enjoy legal protection against forced evictions and dispossession of land by public and private actors. A widow's right of inheritance of her husband's movable and immovable property is emphasised, and so is the widow's right to continue living in the matrimonial home irrespective of the matrimonial regime.

The *African Union's Declaration on Land Issues and Challenges in Africa 2017* mandates member states to strengthen security of land tenure for women and ensure that land laws

[430] African Commission on Human & Peoples Rights (2010) para. 55(VI).
[431] African Commission on Human & Peoples Rights (2010) para. 55(viii).
[432] Adopted at the High-Level Forum on Direct Investments in Africa held in Nairobi, Kenya from the 4-5 October 2011.
[433] The Guidelines were developed by the Land Policy Initiative of the African Union, the Economic Commission for Africa and the African Development Bank.
[434] Resolution 262 on Women Rights to Land and Productive Resources- ACHPR/Res. 262 (LIV) 2013. Adopted on 5 November 2013, Banjul – Gambia.

provide for women's equitable access to land and related resources. Member states resolved also to allocate 30 per cent of documented land rights to women and ensure that there is improvement in the promotion of women's land rights through legislative reforms and other mechanisms.[435]

Having ratified the ACHPR, Uganda is obliged, in accordance with article 62 of the African Charter, to submit periodic reports on its implementation of the Charter. Uganda has so far submitted five reports.[436] In the Concluding Observations and Recommendations on Uganda's 5th Periodic State report,[437] the African Commission commended Uganda's efforts in implementing the African Charter, including the establishment of the Equal Opportunities Commission[438] and the establishment of the Land Protection Unit within the Uganda Police Force to stop illegal evictions of land occupants.[439] The Commission was, however, concerned by Uganda's failure to fully domesticate the Maputo Protocol, which has been an impediment to women's full realisation of their rights under the Protocol.[440] There was also concern over the failure to enact the Marriage and Divorce Bill which has been pending in Parliament for many years. The passing of the Marriage and Divorce Bill and the full domestication of the Maputo Protocol would have great impact in the promotion of the land rights of women especially regarding women co-ownership of property during and after marriage.

In Europe, the main legal instruments providing for women's land rights are the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR), the European Social Charter 1961 and the Charter of Fundamental Rights of the European Union 2000. These will be discussed in accordance with the year of their adoption beginning with the older ones.

[435] African Union (2017) para. 29.
[436] The 1st Report was considered during the 27th Ordinary Session of the African Commission on Human and Peoples' Rights (the Commission), held from 27 April-11 May 2000, in Algeria. The 2nd Report was considered during the 40th Ordinary Session of the African Commission held from the 15-29 November 2006 in Banjul, The Gambia. The 3rd Report was considered during the 45th Ordinary Session of the African Commission held from 13-27 May 2009 in Banjul, The Gambia. The 4th Report was considered during the 49th Ordinary Session of the African Commission, held from 28 April to 12 May 2011 in Banjul, and the 5th report considered during the 56th Ordinary Session of the African Commission, held from 21 April-7 May 2015, in Banjul, The Gambia.
[437] The 5th Report was considered during the 56th Ordinary Session of the African Commission, held from 21 April-7 May 2015, in Banjul, The Gambia.
[438] Concluding Observations and Recommendations on Uganda's 5th Periodic state report (2015) para. 20.
[439] Concluding Observations and Recommendations on Uganda's 5th Periodic state report (2015) para. 25.
[440] Concluding Observations and Recommendations on Uganda's 5th Periodic state report (2015) para. 52.

2.4.3 The European Convention on Human Rights and Fundamental Freedoms (ECHR)

Under the ECHR,[441] the right to a home is recognised.[442] Discrimination of all kinds is prohibited.[443] The rights of women to land, housing and property are not explicitly stated in the convention. However, Protocol No. 1 to the convention provides for everyone's' right to the peaceful enjoyment of his or her possessions[444] and that no-one shall be deprived of his or her possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law. The convention establishes the European Committee of Human Rights that observes state parties' implementation of the obligations under the convention and the Protocols thereto.[445]

In the case of *Dragon & Ors v Turkey,*[446] the applicants had been forceful evicted and displaced from their homes as a result of the armed conflict in Turkey, and were later denied the right to return to those homes and lands. Part of the land in question did not legally belong to the applicants but they had used the same for generations. Before the European Court of Human Rights was whether title to property was a necessary element within the provisions of article 1 of Protocol No.1 of the ECHR. The court held that the applicants had used the lands unchallenged and earning a living from breeding livestock and tree felling deriving economic resources and revenue from the contested lands, and this to the court qualified as 'possession' within article 1 of Protocol No.1 of the convention.[447] Although the question of women's land rights was not explicitly before the European Court, women were among those displaced from their homes and ancestral lands, and the decision touched indirectly on women's rights to housing and their land rights on ancestral lands. In *Ucci v Italy*,[448] the case dealt with the forceful expropriation of agricultural land by the Italian government without compensation. The court recalled its broad definition of 'possession' in article 1 of Protocol No. 1of the ECHR to include housing and real property such as land, and that the interference must be for public purpose and carried out in strict observance with the national law and general principles of

[441] Better known as the European Convention on Human Rights (ECHR), the ECHR was adopted by the Council of Europe on 4 November 1950.
[442] ECHR (1950) article 8.
[443] ECHR (1950) article 14.
[444] Protocol No. 1 to the ECHR (1952) article 1.
[445] ECHR (1950) article 19.
[446] *Dragon & Ors v Turkey*: European Court of Human Rights; Applications Nos. 8803-8811/02, 8813/02 and 8815-8819/02 (29 June 2004).
[447] *Dragon & Ors v Turkey* (2004) para. 145.
[448] European Court of Human Rights: *Ucci v Italy*, Application No.213/04 (22 June 2006).

international law. The court found the government's actions to be in violation of the applicant's right to possession.

2.4.4 The European Social Charter 1961

The Charter[449] provides for the promotion of the economic, social and legal protection of family life, and this includes housing.[450] States must ensure that people are protected from poverty and social exclusion including effective access to housing.[451] Discrimination of all kinds is prohibited.[452] The Charter's implementation is overseen by the European Committee of Social Rights,[453] whose decisions, recommendations and conclusions must be respected by member states through the passing of legislations and case law.

In *European Roma Rights Centre v Greece,*[454] a question before the Committee was whether the rights of a family to social, economic and legal protection accorded under article 16 of the Charter related to protections over land and housing. The complaint related to the forced eviction of Roma Communities from lands they had used for nomadic activities and temporary housing. The Committee observed that human rights are interdependent on each other, indivisible and interrelated with the right to housing.[455] The Committee concluded that the right to housing extends to security from forced or unlawful eviction from land.[456] As the Charter prohibits discrimination of all kinds, such decisions, as in *European Roma Rights Centre v Greece,* would imply that equal rights of women to housing which extends to security from forced or unlawful eviction from land were upheld.

[449] Adopted in 1961 and revised in 1966.
[450] European Social Charter (1961) article 16.
[451] European Social Charter (1961) article 30(a).
[452] European Social Charter (1961) part V, article E.
[453] The European Committee of Social Rights was established pursuant to articles 25 and 25 of the European Social Charter 1961.
[454] European Committee of Social Rights: *European Roma Rights Centre v Greece,* Communication No. 31/2005 (18 October 2006).
[455] *European Roma Rights Centre v Greece* (2006) para. 24.
[456] *European Roma Rights Centre v Greece* (2006) para. 25.

2.4.5 Charter of Fundamental Rights of the European Union 2000

The charter[457] recognises the right to property.[458] The equality of man and woman is recognised.[459] The right to social and housing assistance is also recognised.[460] The Commissioner of Human Rights of the Council of Europe has since given a recommendation on the Implementation of the Right to Housing 2009. Member states, in implementing the right to housing, have an obligation to ensure that all people have peaceful enjoyment of their possessions; that there is no interference with private property without justification; that women have equal access to credit and finance, equal rights in the inheritance of land and other property; and that gender-biased customs and traditions are abolished.[461] It is apparent that in Europe the right to housing is closely inter-linked with the right to land and property.

2.4.6 The American Convention of Human Rights 1969

In the Americas the main legal instrument touching on women's access to land is the American Convention of Human Rights. The Convention[462] does not explicitly provide for women's land rights but has an interrelated body of rights. Discrimination by reason of economic status is prohibited.[463] States have a duty to re-align domestic legislations to give effect to those rights.[464] There is a right to the use and enjoyment of property, and nobody shall be deprived of the use of his property except upon payment of just compensation.[465] There is a right to equality before the law and equal protection of the law.[466] Equal rights to, during and at the dissolution of marriage are also recognised.[467] The Convention establishes the Inter-American Commission on Human Rights[468] to oversee the implementation of the Convention by member states. It issues interpretations on the provisions of the Convention and receives complaints regarding the application of provisions of the Convention in the member states.[469]

[457] Adopted in 2000 with a declaratory status only.
[458] Charter of the Fundamental Rights of the European Union (2000) article 17.
[459] Charter of the Fundamental Rights of the European Union (2000) article 23.
[460] Charter of the Fundamental Rights of the European Union (2000) article 34(3).
[461] Council of Europe Commissioner for Human Rights (2009) para. 4.3.6.
[462] Adopted at the Inter-*American* Specialized Conference on *Human Rights*, San José, Costa Rica, 22 November *1969.*
[463] The American Convention of Human Rights (1969) article 1(1).
[464] The American Convention of Human Rights (1969) article (2)
[465] The American Convention of Human Rights (1969) article 21.
[466] The American Convention of Human Rights (1969) article 24.
[467] The American Convention of Human Rights (1969) article 17.
[468] The American Convention of Human Rights (1969) article 34.
[469] The American Convention of Human Rights (1969) article 62.

In *Maria Eugenia Morales De Sierra v Guatemala,*[470] the petitioners challenged the Guatemala Civil Code on grounds that it was discriminatory in as far as it created distinctions in marriage by defining the role of each spouse, which was in violation of the American Convention. Article 109 of the Code conferred the power to represent the marital union to the man. Under article 131, administration and management of marital property was conferred on the man, and under article 255, the primary responsibility to represent the children of the union and administer their property was conferred on the man. The Commission concluded that the challenged gender-based distinctions, as established in the articles, could not be justified as they were indeed in violation of the American Convention.[471]

In *Mary v Carrie Dann v USA,*[472] the case involved the forced eviction by the United States government of the Western Shoshone, an indigenous people, from their ancestral lands to pave way for gold prospecting activities. The Inter-American Commission on Human Rights was in this communication confronted with a legal question on the weight to be given to the emerging international norms on the rights of indigenous people and their traditional/ancestral lands. The Commission found it pertinent to give weight to the emerging international norms and principles on indigenous people and the analysis of those norms and principles would indicate that they encompass distinct human rights considerations relating to the use, occupation and ownership of traditional lands by these indigenous communities;[473] and that central to the emerging norms and principles is the recognition of the special historical, social, cultural and economic situation and experience of indigenous people and their ancestral lands. The recognition must extend to the acknowledgment of the special connection indigenous communities have with lands and resources they have traditionally used and occupied, which warrant special protection measures.[474] The Commission observed that the connection between the indigenous communities and the land they have used and occupied traditional is not just a question of occupation or possession, but one that has material and spiritual connection that must be fully enjoyed in order to preserve their cultural legacy and heritage and one that is passed on to future generations.[475]

[470] *Maria Eugenia Morales De Sierra v Guatemala;* the Inter-American Commission on Human Rights, Case No. 11.624, Report on the Merits No.4/2001.
[471] *Maria Eugenia Morales De Sierra v Guatemala (*2001) para. 39.
[472] *Mary v Carrie Dann v USA,* Inter-American Commission on Human Rights: Case No.11.140, Report No. 75/02 (27 December 2002).
[473] *Mary v Carrie Dann v USA* (2002) para. 124.
[474] *Mary v Carrie Dann v USA* (2002) para. 128.
[475] *Mary v Carrie Dann v USA* (2002) paras. 128 & 129.

In another case, *Indigenous Community Yakye Axa v Paraguay,*[476] the State of Paraguay declined to give official and legal recognition to the communal land rights of the indigenous community of Yakye Axa, which resulted in their forced displacement from their traditional lands. The court observed that where indigenous people are displaced from their traditional lands, they must be safely returned and, if not possible, be given alternative lands of quality and legal status equal to the lands they previously occupied, and where there is a preference for compensation in money or in kind, the compensation must be by consensus following consultations and in accordance with their values, customs and customary law.[477] In *Sawhoyamaxa Indigenous Community v Paraguay,*[478] among the questions before the Inter-American Court of Human Rights was whether an indigenous community that had long been displaced or evicted from their traditional lands could still claim property rights of the said lands. Building on earlier precedents, the court observed that possession of traditional lands by indigenous people is no different from state granted property titles; that traditional possession should be legally recognised and property title granted; and that indigenous people who have lost ancestral and traditional lands unwillingly still maintain property title even though they have no legal title, unless the land has been transferred to third parties in good faith. In case the land has been transferred to innocent third parties, the members of the indigenous community who lost the land unwillingly are entitled to restitution thereof or alternative land of equal extension and quality.[479] As already stated, indigenous people include indigenous women; the protection of traditional lands held by indigenous people under the convention includes the protection of traditional lands held by indigenous women and so upholds women's land rights.

There have also been resolutions passed under the Inter-American system upholding the land rights of women. These include *The Quito Consensus 2007*[480] of the Latin America and Caribbean States, which identified key elements that states should undertake to ensure that women are free from discrimination and have full and proper access to land and other

[476] *Indigenous community Yakye Axa v Paraguay,* Inter-American Court of Human Rights: Series C No. 125 (17 July 2005).
[477] *Indigenous community Yakye Axa v Paraguay* (2005) paras. 150 & 151.
[478] *Sawhoyamaxa Indigenous Community v Paraguay,* Inter-American Court of Human Rights: Series C No. 146 (29 March 2006).
[479] *Sawhoyamaxa Indigenous Community v Paraguay* (2006) para. 128.
[480] The Quito Consensus was issued at the conclusion of the 10th Regional Conference on Women in Latin America and the Caribbean states, convened by the Economic Commission for Latin America and the Caribbean and held in Quito, Ecuador from 6- 9 August 2007.

productive resources, including that states must initiate, formulate and implement policies that ensure that women have sustainable access to land ownership, access to water and other productive resources, and that their diversity in economic activities and contributions should be recognised, with particular emphasis on rural women, indigenous women and women of African descent.[481]

The *Brasilia Consensus 2010*[482] was a follow-up on the Quito Consensus, where member states agreed, among other things, to ensure that women both in urban and rural areas have access to productive assets that include land, natural resources and productive credit.[483] States were also to adopt economic, tax, fiscal, and agrarian reforms, and access to land ownership policies that correspond with ethnicity, race and gender, to ensure that there is equal distribution of wealth.[484]

The Inter-American Commission on Human rights (IACHR) has also since prepared a report entitled *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights 2011*,[485] with recommendations on how member states should address discrimination against women and ensure that women's economic, social and cultural rights are promoted and respected.[486] The IACHR observed that women's access to and control of land has many benefits, including improving women's bargaining position, contributing to their empowerment, and having a back-up position and improved productivity gains and welfare benefits that may include the health and education of their children.[487] States were to ensure that immediate reforms are carried out that enable women have full access to and control over productive resources including land and inheritance within or outside marriage, and unencumbered by any form of discrimination.[488] Domestic violence was recognised as having direct implications for women's full enjoyment of their economic and social rights, especially with regard to their access to and control over resources. States were

[481] Quito Consensus (2007) resolution xviii.
[482] The Brasilia Consensus, issued at the conclusion of the 11th Regional Conference on Women in Latin America and the Caribbean states, convened by the Economic Commission for Latin America and the Caribbean, was held in Brasilia, Brazil from the 13-16 July 2010.
[483] The Brasilia Consensus (2010) resolution I.
[484] The Brasilia Consensus (2010) resolution g.
[485] Adopted by the Inter-American Commission on Human Rights in November 2011.
[486] IACHR (2011) executive summary, para. 7.
[487] IACHR (2011) para. 296.
[488] IACHR (2011) para. 331(i).

to ensure that they put in place measures that punish, prevent and eradicate domestic violence and which ensure the availability of quick legal remedies to victims of domestic violence.[489]

2.4.7 The Arab Charter on Human Rights 2004

The Charter[490] provides for equality before the law and for everyone's right to protection from the law without discrimination.[491] States are mandated to undertake all necessary measures to ensure that there is effective equality between men and women.[492] Every person has a guaranteed right to own private property and that a person shall not any under circumstances be arbitrary or unlawfully divested of his property.[493] Although the |Charter provides for equality between men and women before the law, existing research shows that women in the Arab world have also less secure land rights as men. In the MENA (Middle East & North Africa) Countries, women are less able to own land as men due to a set of social and legal constraints. According to the Rockefeller Foundation, women in the MENA countries have insecure land rights due to lack of statutory and constitutional rights, limited access to formal land tenure (most women are unable to get land title), limited freedom of movement and due to cultural norms that prevent women from owning land. [494] According to FAO, MENA out of the eight classified world regions, has the lowest rate of women owning agricultural land showing. For instance in Saudi Arabia, the percentage of women owning agricultural land was recorded at 0.8 percent, 3 percent in Jordan, approximately 4 percent in Morocco and Algeria with Jordan recording the highest at 7.1 percent.[495] When it comes to inheritance, although Shari 'a inheritance laws in the MENA countries guarantee women a share in all of the deceased property including land, women however, find themselves unable to inherit land due socio-cultural issues and high levels of illiteracy with hinders women's access to information and family pressure.[496] In other countries like Jordan, women and girls are placed under the legal guardianship of their fathers or husbands and this prevents them from making basic decisions about their lives.[497] In some parts of Morocco, Egypt and Tunisia, women are forced to cede

[489] IACHR (2011) para 333(v).
[490] Adopted by the Council of the League of Arab States in 2004.
[491] The Arab Charter on Human Rights (2004) article 11.
[492] The Arab Charter on Human Rights (2004) article 3.
[493] The Arab Charter on Human Rights (2004) article 31.
[494] Rockefeller Foundation (2013) 10.
[495] FAO (2018) 25.
[496] Adnane, Souad. (2018) 97.
[497] World Bank (2013) 69-70.

their inheritance rights to their brothers in order to keep family relations and maintain the family support and protection.[498]

2.5 Conclusion

Women's rights to land as seen already is inter-linked to women's enjoyment of other fundamental rights and the promotion of women's right to adequate standard of living. While gender inequality in land rights still persists, there have been important advances spearheaded under the auspices of the international legal and policy instruments on women's land rights, as elaborated. It is also true that a discussion on the women's land rights cannot be divorced from the broader context of globalisation. Many countries have indeed amended their constitutions and reformed national legislations to reflect the international regime on gender equality in land rights. This chapter has therefore given an overview of the international and regional legal and policy instruments relevant to women's land rights. In the discussion, there were a few highlights of the actual situation in Uganda, and how it adheres to the international norm. The discussion on the legal regime on women's land rights in Uganda is expounded in chapter 3. A juxtaposition of the international framework on women's land rights as discussed in this chapter, and the legal framework in Uganda discussed in chapter 3, will help in identifying gaps and areas for reform.

[498] FAO (2015) 28.

Chapter 3:

The Legal Framework for Women's Land Rights in Uganda

3.1 Introduction

This chapter begins with the historical evolution of land tenure in Uganda from pre-colonial times. In the evolution of land tenure and property rights in land, there will be a discussion of how women's property rights to land have evolved, and the security of land tenure accorded to women in the evolution and development of the property rights in the land issues: Section 3.2 highlights the land-tenure systems in Uganda during the pre-colonial period. It shows that land tenure in Uganda during this period was largely communal with some variations in the different ethnic groups. Section 3.3 addresses the changes in land tenure systems in Uganda following the colonialization of Uganda (1900-1962) through a series of legislative processes and the effect on women's land rights in the country. Section 3.4 0addresses land tenure after Uganda's attainment of independence (1962-1995). Women's rights to land during this period will also be highlighted. Section 3.5 looks at land tenure in Uganda following the National Resistance Movement's (NRM) takeover of the government. This discussion will cover the period between 1995 and 2020. The provisions of the 1995 Uganda Constitution and 1998 Land Act on land tenure in Uganda and women's land rights will be discussed. Other statutory processes post-1995 that are aimed at promoting and strengthening women's rights over the access to, control over, and ownership of land in Uganda will also be highlighted. Section 3.6 concludes the chapter. The conclusion compares the Ugandan legal framework on women's land rights and the international legal and policy framework as discussed in chapter two, to identify progress, gaps and the way forward.

3.2 Pre-colonial land rights and tenure in Uganda

Before the British colonised Uganda, land in Uganda was communally owned under the customary tenure system.[499] Different customary tenure regimes existed before colonialism among the different ethnic groups that existed in Uganda, with each group having its own distinct unwritten

[499] Batungi & Rüther (2008) 116-128.

customary rules and norms on land ownership and use, which were passed from generation to generation.[500] Land relations in Uganda prior to colonialism can be categorised in two ways.

First there were relations based on feudalism in the kingdom areas of Buganda, Bunyoro, Busoga and Tooro, which operated in such a way that land was under the control of an oligarchy, and access to land was through continuous loyalty to the oligarch who in most cases had to be paid tribute in form of produce and gifts.[501] Before the British colonised Uganda, available literature shows that land tenure in Buganda had started evolving, with a very strong Buganda Kingdom operating a semi-feudal government.[502] However, the land still belonged to the community even with the changing tenure system, except for the Kabaka who had unrestricted rights to land.[503] Literature shows that rights over land in Buganda had evolved into four categories.[504]

First were *Obutongole estates.* These were lands granted by the Kabaka to chiefs who occupied political offices. This was in effect a reward for service being rendered. It is important to note that the chiefs controlled these lands while still in office but would lose control upon death or on leaving office.[505] They never owned the land but owned the peasants who stayed on and used the land, and the peasants would in turn give free labour and tribute in form of crops to the chiefs. These lands could not be transferred or inherited since they were attached to a political office.[506] Second were *Obutaka estates.* These were lands occupied by a clan after the clan had lived on that land unchallenged for more than a generation, or the said clan had been granted the land by the Kabaka. Occupiers of the land would pay rent and tribute to the clan head.[507] Third were the *Obwesengeze estates.* These were private estates granted to individuals by the Kabaka. Once granted, individuals would have full ownership of the land and so these estates were alienable and inheritable.[508] Last were *Bibanja.* Some peasants enjoyed occupancy or user rights on Obutongole, Obutaka or Obwesengeze estates. These lands occupied by the peasants came to be known as

[500] Mabikke (2016) 157.
[501] Nakirunda (2011) 23.
[502] Batungi & Rüther (2008)
[503] Wabineno & Mono (2014) 134-148.
[504] Mukwaya (1953) 7.
[505] West (1965) 3.
[506] Wabineno & Mono (2014) 5.
[507] West (1965) 2.
[508] Wabineno & Mono (2014) 5.

bibanja. The peasants had to provide free labour and pay rent and tribute to the owners of the estates. The *bibanja* holders could not sell or lease the land although inheritance was allowed.[509] For the rest of Uganda, there was territorial control of land through a community, and access to land was through the customs of that community.[510] Although customary tenure regimes over land varied from place to place, whatever the differences in ownership and use, there was no individual ownership of land, but there were individual rights to use the land subject to permission of the family, clan or community.[511] Thus no-one, male or female, owned land individually. Land was communally owned, with women tasked with planting food, tilling, harvesting and controlling the produce for their households.[512]

3.3 Emergence of land tenure rights in the colonial period (1900-1962)

In 1894, as a result of a treaty signed between the Kabaka of Buganda and the British Crown, Uganda was declared a British Protectorate.[513] It is worth noting that although the treaty was between the Kabaka of Buganda and the British Crown, the Uganda Protectorate was gradually expanded to include other territories of Uganda.[514] In July 1899, Sir Harry Johnston was appointed as Special Commissioner of Uganda with instructions to restore order, civil administration and ensure that Uganda was self-sustaining by ensuring that there was a land settlement as early as possible.[515] To achieve this, the British began negotiations with the different kingdoms in Uganda. Six years after Uganda was declared a British Protectorate, the Buganda Agreement (Uganda Agreement) was signed on 10 March 1900 between the Chiefs of Buganda acting on behalf of the Kabaka (who was a minor at that time) and Sir Harry Johnston acting on behalf of the Queen of England.[516] The agreement created a landmark relationship between the British government and Uganda. Some scholars have observed that, of all treaties between the British and native authorities during the period of colonialization, few have as momentous consequences as this one.[517] It is

[509] Wabineno & Mono (2014) 5.
[510] Nakirunda (2011) 23.
[511] Rugadya (1999).
[512] Olanya (2011) 3.
[513] London Gazette 19 June 1894.
[514] Mugambwa (1987) 243-274.
[515] West (1965) 8.
[516] West (1965) 9.
[517] Low & Pratt (1960) 4.

worth noting that the greater part of the agreement dealt with political governance, and only articles 15-17 dealt with land matters.

With the signing of the 1900 Buganda Agreement, land tenure in Uganda went through fundamental changes. It has been noted that at no time during the negotiations was the customary tenure system that prevailed in Buganda and the rest of the country given any consideration.[518] The British were only interested in granting freehold estates to individuals, akin to England, moving away from the traditional customary ownership of land.[519] The British believed that large-scale commercial farming as opposed to small-scale farming associated with communal land ownership was vital for Uganda in achieving economic viability and sustainability, and this could only achieved by alienating large pieces of private land to foreigners who were already practising large-scale commercial farming. This necessitated the introduction of formal private land ownership.[520]

Allocations were also seen as reward by the colonial government to the collaborators in Buganda who had assisted the British in their drive to colonise Uganda and advance their interests.[521] That is why the allocation included the lost counties of Bunyoro (Buyaga and Bugangaizi) that were allocated to people in Buganda who had helped the British in defeating the Kingdom of Bunyoro's resistance to British rule. These *mailo* owners of land in Bunyoro came to be known as 'absentee' landlords because they were not residents of Bunyoro.[522] Under the 1900 Buganda Agreement, all land in Buganda Kingdom, estimated at 19,600 sq. miles (inclusive of the lost counties of Buyaga and Bugangaizi), was divided into large chucks of square miles (hence the word *mailo*) amongst the Kabaka, his chiefs, the royal family and the Protectorate government as follows:[523]

- 958 sq. miles to the Kabaka and other members of the royal family as official *mailo*;
- 8,000 sq. miles was given to 1000 Buganda chiefs and other private land owners as private *mailo* with each individual getting an average of 8 sq. miles;

[518] West (1965) 8.
[519] Wabineno & Mono. (2014) 6.
[520] Batungi (2008) 15.
[521] Kemigisha (2021) 116-133.
[522] Okuku, J.A. (2006) 1-26.
[523] Article 15 of the 1900 Buganda Agreement.

- 50 sq. miles as land for existing government stations;
- 92 sq. miles to three missionary societies;
- 1,500 sq. miles for forest reserves;
- 9,000 sq. miles, considered waste and uncultivated land, were vested in the Queen of England and referred to as 'crown land'.
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The 1900 Buganda Agreement is believed to be the foundation of individualised property rights to land in Uganda and perhaps of all present-day land issues in Uganda.[524] Because of this allocation of large chunks of *mailos* of land, people previously living on the land and using the land on a customary basis became tenants of the new landlords. In other words, they became legal tenants on private property owned by the new landlords.[525] As some scholars have noted, Sir Harry Johnston, the architect of the 1900 Buganda Agreement, believed that the 1900 Agreement would formalise and preserve the traditional rights and privileges in land, only to find out later that the Agreement had created a fundamental shift from the traditional system.[526]

In the allocation, *mailo* land was divided into two categories: *official mailo* land given to the Kabaka, members of the royal family and high-ranking officials, and *private mailo* that was allocated to the collaborators, mostly chiefs.[527] It is worth noting that the allocation of land under the 1900 Buganda Agreement to the Kabaka, members of the royal family and other high-ranking chiefs, either as official or private estates, included the *Namasole*, princesses, sisters and relations of the Kabaka, making it perhaps the first official allocation of land to women in colonial Uganda.[528] This notwithstanding, the allocation of land under the 1900 Buganda Agreement did not take into account the peasants and women who were occupying and using the land. Instead, these peasants were automatically turned into tenants over land they had used for generations, rendering them landless. They had to pay ground rent for using the land, in the form of *busulu* and *envujo.* This would be rendering part of the produce of the cash crops that they had grown to the

[524] Onyango (1997) 27.
[525] Bikaako & Ssenkumba (2003) 15.
[526] Mukwaya (1953) 20.
[527] Mabikke (2016) 153-171.
[528] Article 15 of the 1900 Uganda Agreement.

landlords.[529] Emerging also from the 1900 Buganda Agreement was a dominant male force controlling huge chunks of land and with greater autonomy in decisions involving land use, control and access, rendering women's use and access rights less than in the pre-colonial times.[530]

In Buganda, land allocation under the 1900 Buganda Agreement consolidated the economic and political power of the chiefs and the *mailo* land owners, while at the same time leaving peasants at the mercy of the new landlords. Outside Buganda, where all the unappropriated land was declared crown land, peasants and the general population lost access to the unappropriated land, while at the same time, a new elite group, comprising mainly collaborators, emerged with a lot of land and power through colonial backing.[531] The evolution of the land-tenure systems that resulted in individualisation in land ownership following the 1900 Buganda Agreement ultimately had an impact on women's land use and control rights. Women during the pre-colonial era enjoyed some autonomy in land use and had secure user rights under the customary tenure systems that existed. Colonisation, with its policies of creating individual land ownership and commercial farming, exerted pressure on customary land use, and this ultimately altered women's land rights.[532]

Following the 1900 Uganda Agreement, a series of legislative processes on land followed, and these all had an effect on women's property rights in land in Uganda. The British, following the signing of the 1900 Buganda Agreement, introduced the *mailo*, freehold and leasehold land-tenure systems.[533] Below is a discussion on the legislative processes that ensued on land matters following the signing of the 1900 Buganda Agreement until independence, and how the said instruments had an effect on women's property rights concerning land.

3.3.1 The Crown Land Ordinances of 1903 and 1922

As already seen above, 9,000 sq. miles described as wasteland and uncultivated land in Buganda were declared crown land under the 1900 Buganda Agreement and vested in the Queen of England, to be managed by the Uganda Administration. Crown land in Uganda included the 1,500 sq. miles

[529] Barrows, Richard et al. (1990) 280.
[530] Tukahirwa (2002) 26.
Retrieved June 17, 2021, from http://www.lucideastafrica.org/publications/tukahirwa_Lucid_WP17.pdf
[531] Okuku (2006) 8.
[532] Wabineno & Mono (2015) 12.
[533] Olanya (2011) 4.

of forest reserves. Outside Buganda, crown land was defined by the *1902 Order in Council* as 'all public land subject to the control of His Majesty by virtue of any treaty, agreement or convention or all land acquired by His Majesty for public service or otherwise whatsoever'.[534]

This Order in Council of 1902 was followed by the *Crown Land Ordinance 1903.* The Ordinance declared all land in Uganda as Crown Land. This Ordinance is noted as being the forerunner of public land policies in Uganda, and was meant to provide a clear manner on how crown land holdings emerged.[535] In other words, all land in Uganda was vested in the British Crown. Crown land however did not include the land allocated to the Kingdoms of Buganda, Ankole, Tooro and Bunyoro.[536] Customary land tenure that had existed prior to the declaration of Uganda as a protectorate was still recognised under the Ordinance, but within limits. Indigenous Ugandans could still occupy and utilise land without prior consent in accordance with their customary law, as long as that land had not been allocated under the 1900 Buganda Agreement, or was land that had not been granted by the Crown to anyone in freehold or leasehold.[537] However, that land could be taken away at will by the government without prior consent of the customary users.

The Crown Land Ordinance 1903 would later be reinforced by the *Crown Lands (Declaration) Ordinance 1922,*[538] which converted all the land outside Buganda with no documentary proof of ownership into Crown land, to be managed and administered by the government of Uganda. The effect of this ordinance was that all land outside Buganda not held under title became Crown land.[539] Furthermore, the government could issue freehold or leasehold titles on this land, and all existing customary users and occupiers of these lands without proof of ownership could be evicted at will, or remain as tenants with no tenure security.[540] In effect, the *Crown Lands (Declaration) Ordinance 1922* did not recognise the rights of anyone who had occupied any land under the customary tenure system, and who had no proof of ownership.

[534] Private Sector Foundation Uganda (2010) 15.
[535] Okuku (2006) 8.
[536] Olanya (2011) 4.
[537] Section 24(4), Crown Land Ordinance 1903 (repealed).
[538] Laws of Uganda Protectorate, Vol.11, 1923, Cap 100, p.800.
[539] Private Sector Foundation Uganda (2010) 15.
[540] Batungi & Rüther (2008) 116-128.

It has been observed that the land rights women had enjoyed under the customary land-tenure system were taken away by the *Crown Lands (Declaration) Ordinance 1922,* as the land could be taken at will and allocated by the government through freehold or leasehold to another person. Moreover, women did not have the resources to apply for the freehold or leasehold titles.[541] At independence, the 1962 Independence Constitution, under article 118, vested all the Crown land alienated under the *Crown Lands (Declaration) Ordinance 1922* and the 1900 Buganda Agreement to the Uganda Land Commission and land boards at the district and federal state level.

3.3.2 The Possession of Land Law 1908

It should be noted that article 15 of the Buganda Agreement did not indicate the manner in which a private or official estate was to be held. It did not define the nature of tenure that had been granted to the Kabaka, the chiefs and collaborators. The character of the grant was unclear, and it is not even clear either what form of land ownership Johnston had in mind while granting these estates. What the agreement was preoccupied with was the question of the acreage or size of the land. Initially, the allottees received certificates of claim indicating that they had obtained an estate in fee simple, but this was later withdrawn and substituted with a provisional certificate for *mailo* land, which recognised ownership under the regulation, whatever it might be, under which the land would be held.[542] A law was needed to regulate the tenure of these *mailo* estates. It was not until 1908 that *mailo* tenure was actually defined in the Buganda Possession of Land law, 1908. Under section 2 thereof, the word *mailo*, which is derived from the English word 'mile', was, for the first time, used to refer to land which the government had surveyed and recognised as belonging to someone.

The Possession of Land Law 1908,[543] passed by the Buganda Lukiiko with the approval of the British Governor, was the first to describe the land allocated under the 1900 Buganda Agreement as *mailo* land, and defined the tenets of *mailo* land.[544] The main aim of the law was to regularise and legalise the rights of the *mailo* land owners and to differentiate it from the freehold land-tenure

[541] Kemigisha (2021) 7.
[542] West (1965) 13.
[543] Revised Laws, 1951, vol. viii p.1219.
[544] Mukwaya (1953) 20.

system in England.[545] Under the Land Law 1908, a person could not own more than 30 sq. miles of land except with the special consent of the Governor.[546] The *mailo* owner could transfer land by sale or gift or by will to a person of the Protectorate but could not transfer or lease the land to a person who was not of the Protectorate without special permission from the Lukiiko and the Governor.[547] Where a *mailo* owner died intestate without heir, the land was vested in the Governor and the Lukiiko in trust for the people of Buganda.[548] For the first time, all transactions concerning *mailo* land were to be in recorded in duplicate, with one copy staying with government and the other with the *mailo* owner.[549] The law conferred proprietary interests in perpetuity on *mailo* owners unlike previously, where proprietary interests had been associated with political functions and chiefs. The law also freed peasants from any more obligations to the land owner, except where it was a landlord-tenant relationship.[550]

Although the Land Law did not discriminate against women as *mailo* owners, very few women were allocated land under the 1900 Buganda Agreement. Research, for instance, shows that only nine women owned land in Buganda in 1920. Of these, two had inherited small estates totalling 55 acres, while seven were original registered owners. But these seven were all in the Busiro area, which was notable for several palaces of the kings and also royal princesses and other powerful women who had political power and some estates under their control.[551] Between 1920 and 1950, the number of women owning land increased from 9 to 70, but women's ability to own land was hampered by inheritance customs that favoured men and the fact that women did not have money to buy land.[552] It has been noted that this is the first law in East Africa that reduced to statutory form a land-tenure system that evolved from political and economic changes.[553]

[545] Mukwaya (1953) 21.
[546] S. 2(a) the Land Law 1908.
[547] S. 2(b) of the Land Law 1908.
[548] S.5 of the Land Law 1908.
[549] S. 2(j) of the Land Law 1908.
[550] Mukwaya (1953) 16.
[551] Mukwaya (1953) 36.
[552] Mukwaya (1953) 36.
[553] West (1965) 14.

3.3.3 Registration of Titles Ordinance 1908

Prior to the Registration of Titles Ordinance 1908, the Registration of Titles Ordinance 1904 was the one regulating land transactions. Section 4 provided for the compulsory registration of all documents conferring title, right or interest in immovable property. Section 11 provided for the registration to be done at the registry of the district where the property was situated. Following the enactment of the Possession of Land Law 1908 that defined *mailo* land and its tenets, a law was necessary to protect the proprietary interests and guarantee the indefeasibility of title. A short Registration of Titles Ordinance 1908 was passed as a provisional measure which prescribed the form of certificate of *mailo* title. The Ordinance was based on the Torrens system of registration of title, where the person named in the title is the absolute owner of the land with indefeasibility of title, and with the principle that once land has been registered under the Ordinance, it must be identifiable by a proper plan.[554] Indeed the first *mailo* land certificate of titles, issued on 2 January 1909 by Sir Hesketh Bell, then Governor of Uganda, was issued under the Ordinance.[555]

In 1922, the comprehensive Registration of Titles Ordinance (now Registration of Titles Act, 1924) was enacted, based on the principles of the Torrens system, such as the 1908 ordinance. The 1922 Ordinance provided that 'all land included in any final *mailo* certificate shall after the commencement of this Ordinance be subject to the operation of this Ordinance and shall be deemed to have been registered thereunder'.[556] All the transactions on *mailo* land were to be recorded in duplicate, the primary or original title retained by the Governor (now Uganda government) and the duplicate title issued to the owner of *mailo* land.[557] Under the Registration of Titles Act (RTA) 1924, certificate of titles is conclusive evidence of ownership of land.[558]

It is also worth noting that the Act does not recognise or regulate land held in customary tenure system unless the land is converted into freehold. Section 2(2) of the RTA states that the Act shall not be construed to limit or abridge any provisions of any law in Uganda in force relating to the property of married people. Since the RTA deals with only registered land, and in the absence of

[554] Mukwaya (1953) 18.
[555] Thomas (1928) 8.
[556] Section 9 (2) of the Registration of Titles Ordinance 1922.
[557] Batungi & Rüther (2008) 121.
[558] Section 59 of the Registration of Titles Act, Ch. 230 (Laws of Uganda).

any law in Uganda relating to the property of married people, it is not clear how the RTA would assist a spouse who does not appear on the certificate of title. Even in situations where both spouses are registered on the title, it is not clear how such property would be divided at the dissolution of marriage. The Registration of Titles Ordinance 1908 and its successor the Registration of Titles Act have not been helpful in the protection of the land rights of women either in marriage or at the dissolution of the marriage.

3.3.4 The Busulu and Envujjo Law 1928

Following the allocation and distribution of huge parcels of sq. miles under the 1900 Buganda Agreement, the relationship between the new *mailo* owners and the peasants who had been living on the land was not defined under the Agreement. There was little or no consideration given to the occupational rights and the rights of the *Bataka* who traditionally used to control land.[559] The position of the peasants in the new arrangement was unclear for quite a long time. The peasants had continued to enjoy the same feudal relationship with the new *mailo* owners as it had been under the old kinship arrangement or political chiefs,[560] with the new *mailo* owners dispensing justice in the traditional manner and with the peasants in return offering same type of services and dues to the new landlords as occurred in pre-1900 Buganda Agreement.[561]

However, following the end of the First World War (1914-1918), and the subsequent increase in the price of cotton that had been introduced as a peasant economic crop, the peasants started making economic gains from the sale of cotton. This led the *mailo* owners to start exploiting the peasants by forcing them to provide manual customary labour for cotton production on the *mailo* owners' land, or by peasants remitting a substantial portion of their cotton produce or its equivalent in monetary terms to the *mailo* owners.[562] This discontent between the peasants and the new *mailo* owners reached its peak in 1921, leading to the Bataka-led protests under the Bataka movement.[563] The Bataka chiefs had been clan heads and custodian of clan lands prior to the 1900 Buganda Agreement and were aggrieved by the 1900 Buganda Agreement allocation of their clan lands to

[559] West (1965) 19.
[560] Mukwaya (1953) 20.
[561] Mukwaya (1953) 20.
[562] Mabikke (2016) 162.
[563] Thomas (1928) 248.

other chiefs and private owners as *mailo* estates.[564] The protests demanded the return of control of land to clan heads, 'the Butaka tenure' an ancient and traditional customary clan control of land systems.[565] The Busulu and Envujo Law 1927[566] was therefore enacted to regulate the relationship between the customary tenants/native occupiers and the *mailo* owners by guaranteeing their security of tenure and regulating the payment of rent (busulu) and tribute in kind tenvujo). The law fixed an annual payment to the *mailo* owner in form of busulu at ten shillings per annum,[567] and created an additional levy (*envujo*) per acre of cotton.[568] The 1927 law guaranteed security of tenure of peasants/tenants as they could not be arbitrarily evicted except by a court order, and for public purpose or good or sufficient cause.[569]

The effect of the Busulu and Envujo Law 1927 on women's land rights is not clear, save for the fact that it partly restored women's customary rights of tilling the land without fear of eviction. These peasants/occupiers still lacked formalised and recognised security of tenure.

3.4 Land Tenure and rights in the postcolonial period (1962-1995)

3.4.1 The Land Reform Decree 1975

Following Uganda's attainment of independence in 1962, for almost a decade there was no radical changes in land tenure save for the Public Lands Act 1969. The Public Lands Act 1969 under section 22(2) upheld the rights of those holding land under customary tenure providing protection of customary land rights on any un-alienated public land, but the said land could be given away by a controlling authority in leasehold or freehold as long as the customary tenant was moved to another area or compensated.[570]

In 1975, Idi Amin, then President of Uganda, introduced a radical change in respect of land tenure and property relations in Uganda by issuing the Land Reform Decree 1975.[571] All land in Uganda

[564] Hanson (1997) 110.
[565] Hanson (1997) 110.
[566] Revised Laws, 1951, vol. vii, p.1238 (repealed).
[567] Section 2 of the *Busulu and Envujo Law, 1927.*
[568] Section 5 of *Busulu and Envujo Law, 1927.* See also Hunt, Diana (2004) 173-191. Available at SSRN: https://ssrn.com/abstract=513450, accessed 10 July 2021.
[569] S.11, *Busulu and Envujo Law, 1927.*
[570] Section 22(1) of the Public Lands Act 1969 (repealed).
[571] The Land Reform Decree (Decree No. 3 of 1975.

was vested in the state to be held in trust for the people of Uganda and to be administered by the Uganda Land Commission.[572] All public land in Uganda was to be held under leasehold tenure.[573] All freeholds in land, absolute ownership and *mailo* tenure system were abolished and converted into leaseholds except where these were vested in the state in which case these were transferred to the Land Commission. Customary tenure on public land was recognised as tenants on sufferance.[574]

The Decree thus reduced the land-tenure systems in Uganda from four (leasehold, customary, *mailo* and freehold) to two (leasehold and customary). The *mailo* system of land tenure was abolished and converted to leasehold of 99 years in case of individuals, and 199 years in case of public bodies, religious organisations and other charitable organisations.[575] Furthermore, the Busulu and Envujo Law, the Ankole Landlord and Tenant law, and the Tooro Landlord and Tenant law were abolished and tenancies under the said laws could continue on the land but as customary tenants on sufferance on public land.[576]

The abolition of the Busuulu and Envujo Law on paper appeared to have freed the customary tenants and peasants from the obligations of paying rent and tribute. However, it destroyed the social bond between the tenants and the landlords. Because the landlords were deprived of any benefits from their land, they resorted to massive evictions of the tenants and, as one scholar noted, once the Decree had enabled Amin to grab the land in Bombo which he was interested in to settle his tribemates, he never cared further about the ensuing land wrangles.[577] The Decree in effect abolished the security of tenure that customary tenants had enjoyed under the Busulu and Envujo Law. This had a negative effect on women's land rights. It has been noted that the Decree had limited impact as majority of Ugandans were unaware of it, and it remained largely unimplemented.[578]

[572] Section 1 of the Land Reform Decree (Decree No. 3 of 1975).
[573] Section 2(1) of the Land Reform Decree (Decree No. 3 of 1975).
[574] Section 3 (1) of the Land Reform Decree (Decree No. 3 of 1975).
[575] Section 2 (3) of the Land Reform Decree (Decree No. 3 of 1975).
[576] Section 3 (3) of the Land Reform Decree (Decree No. 3 of 1975).
[577] Nsibambi (1987) 3.
[578] Okuku (2006) 11.

3.5 Land tenure and rights under the 1995 Constitution and 1998 Land Act (1995-2020)

The 1995 Constitution and the 1998 Land Act tried to address the gender gap in land use by putting in place a gender-responsive legal and policy framework to strengthen and promote women's rights to land. Chapter 4 of the Constitution (and in particular articles 31–33) provides for equality between men and women, including in matters of acquisition, use and ownership of land. The principles of affirmative action provided for in articles 21, 32 and 33 reinforce the equality provisions. The Uganda Constitution (1995) is guided further by international legal and policy human rights instruments that enshrine the equal rights of women to land. These include the UDHR which prohibits discrimination based on sex in the enjoyment of rights it guarantees, and article 3 of the ICESCR that calls on states parties 'to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant', and prohibits discrimination based on sex.

Specific to women's land rights, the 1995 constitution provides for the following:

3.5.1 Right to own property

Article 26 of the Constitution provides for the fundamental right to own property and not to be arbitrarily deprived of property. Specifically, article 26(1) gives everyone the right to own property individually or in association with others. Under article 26(2), no person shall be compulsorily deprived of property or any interest or right to property. On the basis of article 26, women can acquire and own land on an equal basis to men. Article 31 prescribes the rights to family. It provides that men and women of 18 years and above have a right to marry and found a family and are entitled to equal rights in the marriage, during the marriage and at its dissolution. Under article 31(2), Parliament is mandated to enact a law that ensures that widows and widowers have rights to inherit the property of their deceased spouses.

3.5.2 Land ownership

The 1995 Constitution of Uganda repealed the Land Reform Decree 1975 and provides that 'all land belongs to the people of Uganda' and shall vest in them in accordance with the land-tenure

systems as provided for in the Constitution.[579] By doing that, the Constitution shifted land ownership from the state and vested it in the citizens of Uganda. The state no longer holds title to land in Uganda and can only acquire it for public purposes under article 237 of the Constitution. However, under article 237(2) (b), the government retained control over natural resources but also in trust for the people of Uganda.

The Constitution and the Land Act restored the historical four land-tenure systems – *mailo*, freehold, leasehold and customary land-tenure systems[580] – whose specifications are described as below. The *mailo* land-tenure system, described earlier, has its roots in the allotment of land pursuant to the 1900 Uganda Agreement and subject to statutory qualifications, the details of which are described in section 3 of the Land Act Chapter 227 (Laws of Uganda).[581] An important feature of the *mailo* land-tenure system is that the owner of the land (landlord) has a certificate of title, owns the land in perpetuity and in freehold, but most of the land is used by tenants (lawful or bona fide occupants) with limited tenure security.[582] Under section 3(4) of the Land Act, the *mailo* owner holds the land in perpetuity and in freehold, but subject to the interests of the tenants by occupancy. More occupiers of *mailo* land are tenants than landlords. The *mailo* owner holds the land in freehold but the difference with the freehold tenure system is that the *mailo* tenure is held subject to the statutory and customary rights of the *bona fide* and lawful occupants.[583] It can therefore be described as a hybrid system of traditional customary tenure and modern freehold.

Under section 33 of the Land Act, the *bona fide* and lawful occupants can apply for a certificate of occupancy from the *mailo* owner. This has created dual interests on the land and this is amplified in sections 34 and 35 of the Land Act, where neither the *mailo* owner nor the tenant by occupancy can carry out any lawful transaction on the land without the consent of the other. The full rights of ownership granted to the *mailo* owner exist therefore on paper and not the ground. The *bona fide* occupants are statutory tenants of the registered proprietor, with their only obligation being to pay annual ground rent not exceeding Uganda shillings one thousand.

[579] Article 237(1) of the Constitution.
[580] Article 237(3) of the Constitution and Section 2 of the Land Act 1998 (as amended).
[581] Section 1(t) of the Land Act, Ch. 227 laws of Uganda.
[582] Section 3(4) of the Land Act, Ch. 227 laws of Uganda.
[583] Wabineno & Mono (2015) 11.

This dual claim over the land has led to massive confrontations between the registered owner and the statutory tenant as the landlord cannot sell or use the land, and the tenants cannot develop the land they are occupying because they have no title. This conflict has led to massive confrontations and evictions of the peasants by the *mailo* owners and in most cases, it is the women who are affected. A 2018 World Bank study reveal massive land related disputes on land under *mailo* tenancy. Of these conflicts, 25 per cent are due to ownership issues, unclear boundaries account for 37 per cent of the conflicts, 12 per cent of the conflicts are due to sale of the land by either the landlord or the statutory tenant without the consent of the other, and non-payment of the annual nominal ground rent (*busuulu*) account for 7 per cent of the conflicts. The conflicts were reported to be with neighbours (35 per cent), landlords (35 per cent), and relatives (18 per cent). More revealing was the fact that the statutory tenants or *bibanja* owners expected a potential land dispute on land under *mailo* tenancy in next five years on almost 23 per cent of the land parcels under *mailo* tenancy.[584] To solve the rampant evictions of these *bibanja* holders, amendments to the Land Act were enacted in the Land (Amendment) Act, 2004,[585] and Land (Amendment) Act, 2010.[586]

The leasehold land-tenure system, on the other hand, involves the holding of land for a given period of time from an agreed date of commencement subject to the terms and conditions as agreed

[584] Daniel Ali & Marguerite Duponchel (2018) 3.

[585] Section 39 of the Land Act 1998, Ch. 227 put restrictions on the transfer of family land without the consent of both spouse and dependent children. The Land (Amendment) Act, 2004 amended section 39 of the Land Act and repealed the consent of children on sale of family land in favour of a spouse only. Section 30 of the Land Act was also amended to include provisions protecting tenants from eviction, thus increasing their security of tenure. Equally, the Land (Amendment) Act, 2004 amended section 31 of the Land Act by imposing limits on the amount of ground rent that could be charged by landlords, hence strengthening the security of tenure of the vulnerable.

[586] The Land (Amendment) Act 2010 sought to enhance the security of tenure and occupancy of lawful and bona fide occupants due to the rampant evictions and land-grabbing that had engulfed the country. At the height of the evictions and land-grabbing, the Chief Justice of Uganda had to issue a Practice direction on evictions, Practice Direction No 1 of 2007 (Legal Notice No. 1 of 2007), which provided a mandatory visit of the *locus in quo* in all matters that may end up in evictions. Secondly, all land cases were to be heard in presence of all parties, their witnesses and lawyers if any, and lastly, in the event of eviction orders being given, the affected person was to be given adequate time to prepare and be given a definite date when the demolition was to take place. The Land (Amendment) Act, 2010 enhanced the security of tenure of lawful and *bona fide* occupants by amending section 32 of the Land Act by introducing section 32 A that asserted that lawful or *bona fide* occupants could only be evicted with a court order and only for non-payment of ground rent, and that where a court issues an eviction order, the order could only be enforced six months from the date of issuance of the order. Section 38 of the Land Act was also amended to include a provision that the change of ownership of the title by the registered owner of the land through a sale, grant or succession shall not affect the lawful rights of the bona fide and lawful occupants and the new owner shall respect those existing rights.

between the lessor and lessee.[587] The leasehold tenure system is created by contract or by operation of the law and the landlord/lessor will give a tenant/lessee exclusive possession of the land for a given specified period of time, usually with the tenant in return paying a rent to the landlord called a premium or both rent and premium and subject to any other terms and conditions as agreed.[588]

Freehold tenure system is the land-tenure system where the owner of the land has a certificate of title and holds the land in perpetuity subject to statutory and common law qualifications.[589] Because the land is held in perpetuity, the owner of the land subject to the law has full powers of ownership and has powers to develop the land for lawful purpose, sell, lease, mortgage, pledge, sub-divide and create rights and interests for other people in the land, create trusts of the land or dispose of it by will to any person.[590]

[587] Section 1(s) of the Land Act.
[588] Section 3(5) of the Land Act.
[589] Section 1(p) of the Land Act.
[590] Section 3(2) of the Land Act.

Graphic 1. Land tenure in Uganda

Tenure System	Features
Customary Tenure system	A system of land tenure that is normally regulated by customary rules and norms. It is the predominant land tenure in land forming almost 80% of the land in Uganda. It is normally administered and regulated by a clan leader or elders. It is usually in form of individual or communal ownership. Individual ownership usually involves a whole community recognising an individual's exclusive ownership and user rights of a particular piece of land. Proof of ownership is normally not in the form of paper but through verbal agreements and community recognition.
Freehold Tenure	Owner of the land has a certificate of title. The land is held in perpetuity subject to statutory and common law qualification. Owner of the land, subject to the laws of the land, has full powers of ownership and has powers to develop the land for lawful purpose, sell, lease, mortgage, pledge, and subdivide and create rights and interests for other people in the land, create trusts of the land or dispose it off by sale or will to any person.
Leasehold Tenure	Land is held for a given period of time from an agreed date of commencement subject the terms and conditions agreed between the lessor and lessee. It is created by contract or by operation of the law and the landlord/lessor will give a tenant/lessee exclusive possession of the land for a given specified period of time. Tenant usually pays in return rent to the landlord called a premium or both rent and premium and subject to any other terms and conditions as agreed.

Mailo Tenure system	This tenure has its origins in the allotment of land pursuant to the 1900 Uganda Agreement and subject to statutory qualifications, the incidents of which are described in section 3 of the Land Act Chapter 227 (Laws of Uganda). The owner of the land (landlord) has a certificate of title, owns the land in perpetuity and in freehold but subject to the interests of the tenants (lawful or bona fide occupants).

3.5.3 Legal recognition of customary land-tenure system

It should be noted that the 1995 Constitution is the first legal document to give the customary tenure system statutory recognition.[591] The customary land-tenure system prior to the 1995 Constitution had been outside the realm of the law as customary tenants were considered as simply occupiers of crown land and tenants at sufferance.[592] Customary land ownership involves the communal 'ownership' and 'use' of land.[593] In *Atunya v Okeny*,[594] customary tenure was described as:

> [C]haracterised by local customary rules regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of land, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any persons acquiring any part of that specific land in accordance with those rules.

Therefore, a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules. The

[591] Mabikke (2016) 162.
[592] Nakirunda (2011) 26.
[593] Section 3(1) (f) of the Land Act, Ch. 227 (laws of Uganda).
[594] Atunya v Okeny (Civil Appeal 51 of 2017) [2018] UGHCLD 69 (06 December 2018)

onus of proving customary ownership begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character, and thereafter evidence of acquisition in accordance with those rules, of a part of that specific land to which such rules apply.[595]

The Land Act, however, recognises that in even communal land, some parcels of land may be recognised as belonging to certain individuals, families or traditional institution.[596] The notion is that the community has allocated land to its members for private use. This is reinforced by section 22(1) of the Land Act that recognises that even in communally owned land, part of the land may be used or occupied by individuals and families for their own benefit and purposes as long as the customary law of that area permits it. The land is therefore still owned by the community with the individual members of the community enjoying user rights. Non-members of the community are excluded from using the common areas, except with permission of the community. This implies that limited private ownership rights may exist in even communal customary tenure systems, in accordance with the customary law of that area. This position was re-stated by the court in *Ocan v Okeny*[597] where communal land was recognised as the entire land in a particular community which includes those parcels that have been set aside for exclusive use by individuals, family or group, but under usufruct rights.[598]

The Constitution, in article 237(4), allows all Ugandans owning land under customary tenure to apply for and acquire certificates of customary ownership of the land or to apply to convert land held under customary tenure to a freehold land-tenure system. The certificate of customary ownership issued covers both communally owned lands and parcels allocated for exclusive private use to the members of the community. By making provision for the grant of a certificate of customary ownership, the Constitution guaranteed security of tenure on land to the majority of Ugandans, as almost 80 per cent of land in Uganda is held under the customary land-tenure

[595] *Atunya v Okeny* (2018) 6.
[596] Section 3(1) (g), Ch. 227 (laws of Uganda).
[597] *Ocan v Okeny* (Civil Appeal-2018/19) [2018] UGHCCD 59 (11 October 2018).
[598] *Ocan v Okeny* (2018) 8.

system.[599] As has been observed, this was also meant to strengthen the land rights of women, as the majority of the women in rural areas are on customary land.[600]

The Land Act 1998 as amended in sections 4-9 has similar provisions on acquisition of a certificate of customary ownership and conversion of customary tenure to freehold tenure. The certificate of customary ownership is conclusive evidence of customary ownership of land[601] and the holder of the certificate, subject to limitations, conditions and restrictions on the certificate, can undertake any transactions on the land including selling, leasing, subdividing, mortgaging, transferring the land or disposing of it by will.[602]

In *Kinyera v SBI International & Anor,*[603] the plaintiff had inherited the suit land from his father in 1982; the father had also inherited the same from his forefathers. In 2004, the defendant, through its workers, agents or employees, unlawfully and without the plaintiff's consent entered the land, excavated marram from the land for which the plaintiff sought compensation. Prior to the unlawful trespass on the land by the defendant, the plaintiff had made an application for a lease over the suit land and the application was pending. One of the issues before court was whether the plaintiff owned the land under customary tenure when he did not possess a certificate of customary ownership. It was held that it is not only possession of a customary certificate that would prove ownership of a customary tenure; that once the party proves occupation and possession of the land under customary practices of the area, in absence of proof of any other claims by a third party, ownership is proved; and that it is not mandatory that every customary tenure be evidenced by presentation of a certificate of customary ownership.[604] All persons holding land under customary ownership on former public land can also apply for and acquire certificates of customary ownership.[605]

[599] World Bank (2015) 48.
[600] Deininger, et al. (2007) 3.
Available at https://openknowledge.worldbank.org/handle/10986/7266 License: CC BY 3.0 IGO.
[601] Section 8(1) Of the Land Act, Ch. 227 (as amended).
[602] Section 8(2) of the Land Act, Ch. 227 (as amended).
[603] *Kinyera v SBI International & Anor* (Civil Suit-2006/) [2016] UGHCLD 53 (6 December 2016).
[604] Kinyera v SBI International & Anor (2016) 3.
[605] Section 4 of the Land Act, Ch.227 (as amended).

Research is needed on the impact of the reintroduction and recognition of the customary land-tenure system on women's land rights. There is still insecurity of tenure as land is collectively owned and managed through clan heads who are usually male.[606] The Land Act does not delineate individual rights from communal rights. It is therefore not clear how women's land rights on communal land have been strengthened.

Secondly, whereas acquiring a certificate of customary ownership could help in ascertaining some security of tenure, this provision has its ambiguities. The Land Act does not, for instance, ascertain the status and value of the certificate of customary ownership *vis-à-vis* other certificates of title/title deeds and the rights/benefits a holder of the certificate of customary ownership is entitled to.
Thirdly, there are also issues with conversion of customary land to freehold. The people occupying customary land are mostly women, illiterates and peasants who are bound to find the process complicated, confusing and costly, coupled with the fact there was little public education on the Act.[607]

It is also worth noting that, although the certificate of customary ownership is an important step in ascertaining customary tenure rights, it still does not change the land-tenure system, which is still customary. As noted, the customary law in Uganda is still male-based, and looks at men as the owners of the land and other property.[608] These concerns, if addressed could strengthen women's land rights on customary land. The Land Act, however, in a special way, prohibits any decisions with respect to customary land that denies women access to ownership, occupation or use of the land.[609]

3.5.4 Recognition of the statutory tenancy

Another radical provision introduced by the Constitution 1995 and the Land Act was the recognition of the security of occupancy of the lawful and *bona fide* occupants on *mailo*, freehold or leasehold land.[610] Lawful occupant is defined as a person occupying land by virtue of the Busulo

[606] Okuku (2006) 13.
[607] Okuku (2006) 14.
[608] Kemigisha (2021) 15.
[609] Section 27 of the Land Act, Ch.227 (as amended).
[610] Article 237(5) of the Constitution.

and Envujo Law 1928, the Tooro Landlord and Tenant Law 1937, the Ankole Landlord and Tenant Law 1937 or someone who has entered the land with the consent of the registered owner including a purchaser, whereas a *bona fide* occupant is defined as a person who before the coming into force of the constitution in 1995 had occupied, settled, utilised or developed land unchallenged by the registered owner or his agent for a period of 12 years or had been settled on the land by government or an agent of government.[611] In *Kampala District Land Board and Anor v National Housing and Construction Corporation,*[612] the respondent had a lease title of land registered under a piece of land (Plot A) on which it had built a block of flats. Adjacent to this land was another piece of land (the suit land) which the respondent had utilised since the 1970s to facilitate construction on its land and on which it had later built toilets and a children's park. In 1999, the respondent learnt that the suit land had been granted as a lease by the 1st appellant to the 2nd appellant. One of the issues before the Supreme Court was whether the respondent was a *bona fide* occupant. It was held that the respondent having been in occupation or possession of the suit land for more than 12 years before the 1995 Constitution, with the respondent not only occupying but utilising the land with no challenge from the 1st appellant, the respondent was a *bona fide* occupant entitled to enjoy occupancy under article 237(8) of the Constitution and section 31(1) of the Land Act as long as the suit land was registered land.[613]

These provisions in effect give security of tenure and occupancy to trespassers on land to the detriment of landowners.[614] These tenants by occupancy can even apply for a certificate of occupancy from the registered owner,[615] and cannot be evicted from the land except through court for non-payment of the nominal annual rent that should not exceed Uganda shillings one thousand.[616] In *Byatike v Kikonyogo*,[617] the respondent sued the appellants, the administrators of the estate of Late Nnaalinya Ndagire, claiming that he was the rightful *kibanja* owner having bought the *kibanja* from a former *kibanja* holder. The appellants, the administrators of the estate of the late Nnaalinya Ndagire and the registered proprietor contended that the respondent was

[611] Section 29(1) and (2) of the Land Act, Ch. 227 (as amended).
[612] *Kampala District Land Board and Anor v National Housing and Construction Corporation* (Civil Appeal-2004/2) [2005] UGSC 20 (25 August 2005).
[613] *Kampala District Land Board and Anor v National Housing and Construction Corporation* (2005) 12.
[614] Joireman & Sandra (2007) 470.
[615] Section 33 of 4 of the Land Act, Ch.227 (as amended).
[616] Section 32A (1) of the Land (Amendment) Act, No.1 2010.
[617] *Byatike v Kikonyogo* (Civil Appeal 3 of 2014) [2015] UGHCLD 14 (14 May 2015).

neither a *kibanja* holder nor a lawful nor *bona fide* occupant, as the person who had sold the *kibanja* to the respondent did so without the consent of the registered owner.

Referring to sections 34(3) and (9) of the Land Act on the necessity of obtaining the registered owners consent, the court held that there was no proof that this essential step was taken prior to purchasing the *kibanja*, and the purported sale was therefore unlawful. The respondent was not a lawful occupant since there was no evidence that the previous vendors had occupied the land with the consent of the registered owner, neither were they customary tenants at the time the registered owner obtained the leasehold title. The respondent was not a *bona fide* occupant either under section 29(2) (a) of the Land Act because the time between the occupation of the land by the respondent and purported challenge from the appellants was below 12 years.[618]

The provisions on security of occupancy in effect recognised informal land rights on registered land, leading to calls for the integration of these informal land rights into the formal property system.[619] However, the provision that the statutory tenant can have a certificate of occupancy and the available or absentee landlord has the certificate of title has its ambiguities, as it creates overlapping claims over the land with negative consequences for security of tenure.[620] The recognition of the rights of tenants by occupancy in a way indirectly covers the land rights of women, as surveys show that only 27 per cent of registered land is owned by women.[621] It is worth noting, however, that under section 31(6) and (7) of the Land Act, where a statutory tenant fails to pay the non-nominal ground rent for a period exceeding three years, the registered owner may apply to the land tribunal to terminate the tenancy. As observed by some scholars, this clause is ambiguous and creates uncertainty and insecurity, as this shows that the statutory tenant does not have concrete property rights over the land he or she is occupying.[622]

[618] *Byatike v Kikonyogo* (2015) 15.
[619] Hunt (2004) 15. Available at SSRN: https://ssrn.com/abstract=513450.
Accessed 4 July 2021.
[620] Deininger et al. (2007) 3.
[621] Uganda Second National Development Plan (NDPII) (2015/16 – 2019/20) 74-75.
[622] Okuku (2006) 15.

- **Spousal consent**

Sections 38A(1) and (2)[623] of the Land Act gives women security of tenure on family lands, and this means the right to access and live on the family land. Under section 38A (3), a spouse has a right to use family land, which includes the right to consent to any transaction, be it a sale, mortgage, pledge, transfer or lease of the family land.[624] Family land is defined in section 38A(4) as land where the ordinary residence of the family is situated, land where the family derives sustenance, or land which is treated as family land according to the customs, norms, traditions, culture or religion of the family. Section 39 reinforces section 38A by prohibiting any transactions on family land, be it a sale, lease, mortgage, transfer of family land without the prior written consent of the other spouse. Under section 39(4), any transaction on family land without prior written consent of the other spouse is void. In *Tumwebaze v Mpeirwe & Anor,*[625] the respondent mortgaged off family land without the consent of his wife. The respondent's contention was that he had only mortgaged the banana plantation which he had apportioned off the homestead and that the mortgaged banana plantation was therefore not part of family land.[626] The court observed that the banana plantation formed part of the land where the family ordinarily resides and derives sustenance and was therefore family land where spousal consent was mandatory.[627] In *James Baryamureeba v Kabakonjo Abwooli & 6 others,*[628] the parties had cohabited for more than 35 years with seven offspring. The man wished to sell part of the land where the family had lived for all those years to pay his medical bills. The wife and the children objected to the sale. The question before the court was whether the suit land was family land within the meaning of section 38A of the Land Act. The court found that the suit land not only had a homestead, but that there were cows, burial grounds and plantations. For all intents and purposes, the family ordinarily resided on the suit land. It was evident that the suit land fits within the definition of family land in the Land Act as it was land where the family resided and indeed directly or indirectly derived sustenance and livelihood.[629]

[623] Land (Amendment) Act, 2004.
[624] Section 39 of the Land (Amendment) Act, 2014.
[625] *Tumwebaze v Mpeirwe & Anor* (HCT-05-CV-CA-0039-2010) [2013] UGHCLD 9 (8 February 2013).
[626] *Tumwebaze v Mpeirwe & Anor* (2010) 2.
[627] *Tumwebaze v Mpeirwe & Anor* (2010) 10.
[628] *Baryamureeba v Kabakonjo & 6 Others* (Civil Suit No. 20 of 2013) [2020] UGHCCD 27 (17 January 2020).
[629] *Baryamureeba v Kabakonjo & 6 Others* (2020) 26-27.

To reinforce the requirement of prior written consent, a spouse can lodge a caveat on a certificate of title, certificate of customary ownership or certificate of occupancy of family land when he or she notices that there is a transaction about to happen without her consent, and the said caveat under section 39(8) does not lapse if the spouse's security of occupancy subsists. Although the consent provisions were lauded from a human rights perspective as important in strengthening women's land rights,[630] is not clear whether this consent clause has actually and effectively promoted women's rights to land. These provisions only recognise a woman's right to and participation in transactions on family land as long as the marriage persists, but they are silent on the woman's land rights when the marriage has ended. They are equally silent on the land rights of widows, divorcees and women in cohabitation. For instance, in *Tumwesigire v Tushemereirwe*[631] it was held that the land in dispute, though obtained during the existence of the marriage, could not form part of the matrimonial property since it was acquired by the husband while the parties were separated.[632] In *Lanyero Ketty v Okene Richard & Anor,*[633] the appellant had been married to the respondent for many years with five children. Amidst a marital disagreement, the respondent abandoned the family and married another woman and, unbeknownst to the appellant, went ahead to sell the marital land to another person. The court held that section 39(1) (b) of the Land Act required prior written spousal consent for any transaction involving family land. The court also referred to the exception in section 38A (5) of the Land Act where spousal consent is not needed where spouses are legally separated. In the instant case, because the spouses were not legally separated, the sale of the family land without spousal consent was declared void.[634]

It is also important to view consent in the context of the gender-based violence prevalent in Uganda, and to consider whether the consent is obtained by agreement or through violence.[635] It has been observed that the consent clause may have little impact in rural areas where most women have little formal education and husbands can easily pressure them to give their consent.[636] Furthermore, under sections 39(5) and (6) consent should not be unreasonably withheld, and the

[630] Nakirunda (2011) 21.
[631] *Tumwesigire v Tushemereirwe* (Miscellaneous Application No. 140 of 2013) [2013] UGHCCD 38 (12 March 2014).
[632] *Tumwesigire v Tushemereirwe* (2014) 6.
[633] *Lanyero v Okene & Anor* (Civil Appeal No. 0029 of 2018) [2018] UGHCLD 61 (27 September 2018).
[634] *Lanyero v Okene & Anor* (2008) 15.
[635] Nakirunda (2011) 30.
[636] Diana. H (2004) 185.

spouse aggrieved by the withholding of the consent may appeal to the land tribunal. Some scholars have pointed out that tribunals may be influenced by political and social factors to give the husband a go-ahead.[637] These lacunae in the Land Act call for transformation of the consent clause to strengthen the land rights of women.

- **Decentralisation of land administration**

The Constitution and the Land Act have also decentralised land management in Uganda to a range of institutions in which the involvement of women is emphasised. The Uganda Land Commission (ULC),[638] which was established to manage any land in Uganda vested in or acquired by the government of Uganda,[639] shall have a chairperson and four other members one of whom shall be a woman.[640] At least one-third of the membership of the district land board shall be women.[641] For each parish, gazetted urban area or division in a city, there shall be a land committee consisting of four people one of whom must be a woman,[642] and the committee shall advise the district land board on matters relating to land including ascertaining rights to land.[643] The Land Act allows the formation of communal land associations responsible for communal land ownership and management, whether under customary law or otherwise,[644] and upon incorporation, one-third of the officers of the association shall be women.[645]

The incorporation of women in the leadership structures of the committees and organs mentioned above shows that in principle gender issues are brought to the fore, but the question, however, is whether this has translated into the promotion and strengthening of women's land rights. As one scholar has noted, power relations determine property rights and it is therefore important to understand the conditions under which these bodies or institutions are being created and what interests they are serving.[646] Secondly, in a patronage-based political economy like Uganda,

[637] Rugadya et al. (2004).
[638] Established under article 238 of the Constitution 1995.
[639] Article 238 of the Constitution 1995.
[640] Section 47 of the Land Act, Ch. 227 (as amended).
[641] Section 57(3) of the Land Act, Ch. 227 (as amended).
[642] Section 65(2) of the Land Act, Ch. 227 (as amended).
[643] Section 64(1) and (2) of the Land Act, Ch. 227 (as amended).
[644] Section 15(1) of the Land Act, Ch. 227 (as amended).
[645] Section 15(4) (b) of the Land Act, Ch. 227 (as amended).
[646] Okuku (2006) 19.

appointments to these bodies are mostly likely on ethnic or political grounds, disregarding merit and capability, and this may have negative effects in the advancement of security of tenure rights.[647] It should also be noted that these institutions or bodies are marred by inefficiencies, understaffing, corruption and costly and lengthy land dispute handling mechanisms by the court system, and that these create additional barriers against women being able to fully exercise and use their land rights.[648]

- **Equal Opportunities Commission**

It is also worth noting that in 1995 the Constitution of Uganda tasked Parliament under articles 32(3) and (4) to enact a law establishing an equal opportunities commission, whose main role is to implement the state's constitutional mandate of eliminating discrimination and inequalities against an individual or groups of persons on account of their sex, colour, race, age, tribe, ethnic origin, creed, religion and so on. Parliament has indeed gone ahead and established the Equal Opportunities Commission (EOC).[649] The main function of the Commission is to ensure that laws, policies, plans, practices, activities, customs, norms and cultures of state or private individuals or communities are compliant with equal opportunities and the promotion of affirmative action in favour of groups marginalised on the basis of race, sex, colour, ethnic origin, tribe, creed, religion, social and economic understanding, political opinion, disability, gender, age or any other reason created by tradition, history or custom.[650]

In carrying out its mandate of ensuring that there is equal opportunity for everyone and promoting affirmative action in favour of marginalised groups, the Commission has powers to receive and dispose of any complaints from any person or group of persons that alleges that any action, practice, custom, plan, policy programme being practiced by anybody, person, institution public or private or business organisation amounts to marginalisation, discrimination or undermines equal opportunities.[651] The Commission has received and disposed of several complaints with decisions aimed at promoting and strengthening women's land rights. The jurisprudence and practice of the

[647] Okuku (2006) 20.
[648] Kemigisha (2021) 14.
[649] Established by the Equal Opportunities Commission Act, 2007.
[650] Section 14 of the Equal Opportunities Commission Act 2007.
[651] Section 23 of the Equal Opportunities Commission Act 2007.

Equal Opportunities Commission in tackling the right of women to land is seen in some of the highlighted cases below.

In *Lugemwa Stephen v Busulwa,*[652] the complainant's mother had inherited land from her late father. Upon her death, the family members refused to pass on the land to the complainant and his siblings on ground that the children from the maternal side could not inherit land because they belonged to a different clan. The issue before the Commission was whether a woman married to a man from a different clan can legally pass on property to her children. It was the ruling of the Commission that to prevent women married into a clan other than their own from passing on property to her children is not only discriminatory, but unconstitutional.[653]

In *Florence Byaruhanga v Amb. Stephen Katenta Apuuli,*[654] the complainant had been given land in the early 1980s by the respondent after they had two sons together. The land had been encroached on by squatters but the complainant amicably compensated the squatters and starting using the land for cultivation. Later in 2017, the respondent, using local council officials, attempted to grab the land back from the complainant, hence the complaint before the Commission. In a settlement under section 14(3) of the Act, it was agreed that the respondent retains possession of the land, but would in turn compensate the complainant for her developments on the land during the many years she had been on the said land by buying her an alternative piece of land of one acre or more in a suitable location within six months from the date of ruling.

In *Asiimwe Joy v EnergoProjekt Niskoradnja Joint Stock Co. Ltd,*[655] the complainant, an elderly woman, made a complaint to the Commission alleging that during the construction of the Nakasongola–Gulu highway, the respondent company that was constructing the said highway, while rock-blasting, severely damaged the complainant's 12 residential units. In the mediation before the Commission, the matter was settled amicably, with the respondent agreeing to effect repairs on all the units damaged by its rock blasting activities.

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[652] *Lugemwa Stephen v Busulwa;* Equal Opportunities Commission Complaint, EOC REF No. EOC/LS/076/2014.
[653] *Lugemwa Stephen v Busulwa* (2017) 6.
[654] *Florence Byaruhanga v Amb. Stephen Katenta Apuuli;* Equal Opportunities Commission Complaint No. EOC/CR/077/2017 (Unreported).
[655] *Asiimwe Joy v EnergoProjekt Niskoradnja Joint Stock Co. Ltd;* Equal Opportunities Commission Complaint No. EOC/WR/018/2017 (Unreported).

In the *Banyabindi Community of Kasese v Attorney General & Kasese District Local Government,*[656] among the complaints before the Commission was the fact that government had failed to resettle the Banyabindi community of Kasese after their lands had been taken over by government to conserve forests, national parks and use by government institutions, yet other affected communities were resettled. They sought compensation for loss of their ancestral lands and resettlement. They further sought affirmative action as a marginalised group to enhance their development. The Commission found unequal treatment by the government towards the complainants in that other affected communities such as the Basongora who were also living in Queen Elizabeth national park were resettled yet the complainants were not. The state was ordered to institute effective machinery that would deal with the displacement of the complainants to ensure that they return to their normal lives.[657]

In *Kigizi Adrine v Nyesiga Micheal & Ors,*[658] the complainant, a widow, inherited land by will from her deceased husband. She loaned part of the land to the first respondent, a neighbour, for grazing. The respondent, conniving with the local council officials, instead encroached on the land and started grazing on more land that he had been loaned, claiming instead he had bought the disputed additional land from the respondent's son who was known to have a history of mental disturbances. By mutual consent before the Commission, the first respondent agreed to hand back the land to the complainant, subject to the complainant refunding six million shillings that had been paid to his son.

The cases above show a progressive attempt to strengthen women's land rights. The effectiveness of the Commission in promoting these rights is still a matter of research.

[656] *Banyabindi Community of Kasese v Attorney General & Kasese District Local Government;* Equal Opportunities Commission Complaint No. EOC/WR/014/2017 (unreported).
[657] *Banyabindi Community of Kasese v Attorney General & Kasese District Local Government* (2017) 16-17.
[658] *Kigizi Adrine v Nyesiga Micheal & Ors;* Equal Opportunities Commission Complaint No. EOC/KA/018/2014 (Unreported).

3.6 Conclusion

From the discussion above, literature shows that women in the pre-colonial era had secure user rights on land. Although there is a variety of literature on how land was managed, what is not disputed is that land was communally owned, served the whole community, and was a bedrock of strong social ties. However, following the colonisation of Uganda by the British, land tenure went through a transformation, with the British moving the tenure from what they considered as the 'backward' communal system to an individualised freehold system. The colonialists introduced the *mailo* tenure system where large pieces of *mailos* of land were given to individuals, leaving the former communal occupants/peasants as tenants of the new landlords. Whereas these peasants still had legal rights to cultivate the land, their rights were only protected if they paid rent and gave part of their produce to the new landlords. With the introduction of the *mailo* tenure system, akin to freehold, women's land rights were diminished as the new system resulted in the emergence of a powerful few individuals, most of whom were men, owning huge pieces of land. The legislative processes during the colonial period and even after independence did little to promote women's land rights. The promotion of the individualised land ownership system diminished the customary and social laws and norms that had protected women's land rights.

The period 1986–2020, following the NRM's take-over of government, saw women being brought into the political structure through the allocation of a third of all positions at the village, parish, sub-county, division, municipality and district levels. Although this change brought women into the public sphere, there is well-founded criticism that this was more symbolic than transformational. For instance, women's struggle for spousal co-ownership of land has served as an example of their inability to promote their land rights through politics and the law. This was evident in the debates leading to the passing of the Land Act 1998, where the spousal co-ownership of land clause was dropped at the last minute, apparently due to procedural irregularity.[659]

[659] McDonald (2011) 17.

Chapter 4:
Women's Land Rights and Financial Inclusion

4.2 The idea of Financial Inclusion

This chapter establishes the link between women's land rights and financial inclusion. It begins with a background on financial inclusion (section 4.1). Section 4.2 deals with the regulatory and policy framework on financial inclusion in Uganda. Section 4.3 examines the state and status of women's financial inclusion in Uganda using the Fin Scope Uganda survey studies. The surveys indicate a persistent gender gap in favour of men in access to finance. Section 4. 4 examines the barriers to women's financial inclusion in Uganda. Section 4.5 discusses the link between women's land rights and financial inclusion. The issue of whether women's land rights lead to financial inclusion or actually increased debt is also discussed. Finally, paragraph 4.6 gives the conclusions of the chapter.

Financial inclusion (FI) has been defined as 'the full access and use of affordable financial services like savings, loans, investment, insurance and pensions, to all persons regardless of their income levels'.[660] Financial inclusion ensures that everyone in a given society, regardless of gender, is able to access formal financial services and in every way.[661] To the World Bank, financial inclusion is a process in which businesses and households, irrespective of income levels, are able to access finance and effectively use appropriate financial services and products which they may need to improve their lives.[662]

Financial inclusion helps the vulnerable, weak and low income segments of a society access credit in a timely way and at an affordable cost.[663] Financial inclusion begins with someone having some sort of a transitional account, which he or she frequently uses for savings, and receiving and making payments. This account must be with a recognized and regulated financial institution, or through a mobile money service provider.[664] Financial inclusion therefore includes: (i) owning an

[660] Demirguc-Kunt, Asli et al. *(*2012) 2.
[661] Africa Development Bank Group (AfDB) (2012) 25.
[662] World Bank (2018) 24.
[663] Anupama & Sumita (2013)15-20.
[664] Demirguc-Kunt, Asli et al. (2017) 4.

account in a formal financial institution (ii) using the said account to make savings and deposits, and (iii) frequently using the said account, at least making three or more account transactions per month.

Formal financial institutions include commercial banks (CB), microfinance deposit-taking institutions (MDIs), credit institutions (Cis), and some Savings and Credit Cooperative Organizations (SACCO's). Foreign exchange bureaus, money transfer services like Western Union and MoneyGram, and mobile banking done through commercial banks or credit institutions are also considered as formal financial institutions.[665] These services have to be availed in a responsible way and in a secure and regulated environment.[666]

Financial inclusion encompasses three main dimensions: the financial outreach, financial usage, and the quality of financial services being offered. Outreach refers to the physical ability of consumers to easily reach a point of financial service. The usage dimension refers to the frequency and usage of financial services, and the quality dimension measures the extent to which the needs of consumers accessing financial services are being addressed.[667]

The Consultative Group to Assist the Poor (CGAP)[668] gives a more detailed working definition of financial inclusion:

> [A] situation where all adults of working age can effectively access credit, make payments and savings and access insurance services from formal service providers, 'effective access' involves responsible and convenient access to financial services at an affordable cost to the customer and at a cost sustainable to the provider; 'formal institution' refers to financial service providers and entities with recognized legal status, that is financial service institutions and individuals that are under some form of external regulatory oversight.[669]

[665] Allen, Franklin et al. (2012) 5.
[666] Demirguc-Kunt, Klapper, et al. (2015).
[667] Amidžić, Goran et al. (2014) 8. Available at SSRN: https://ssrn.com/abstract=2407529
[668] CGAP is an independent think tank whose aim is to empower poor people to capture opportunities.
[669] Global Standard-Setting Bodies and Financial Inclusion for the Poor: *Toward Proportionate Standards and Guidance (2011)*. A White Paper Prepared by Consultative Group to Assist the Poor (CGAP) on Behalf of the G-20's

Financial inclusion therefore involves the bringing of those who are financially excluded (that is, those that do not have access or are under-served) from informal options to formal financial services.

To create financial inclusion, there has to be increased uptake and usage of financial services with entities that offer a full range of financial services – deposits, savings, investments, insurance, loans, money transfers, and so on. In Uganda, financial inclusion has been measured by the percentage/number of adults (15+ years old) who report having at least one account in their names with a formal financial institution offering a full range of financial services, which is under some form of government oversight or regulation.[670] Those with accounts in institutions not offering full services, for instance accounts in credit-only microfinance institutions (MFIs), or those with accounts not in their names are considered financially excluded.[671]

Policy-makers, financial sector players and researchers see financial inclusion as a vital cog in a country's development due to a growing literature highlighting the vital role that increased access to finance plays in society and as a potential tool in initiating economic and social development and political empowerment. For instance, at the 2009 Pittsburgh Summit of the G20, increasing financial access to the poor and the promotion of financial inclusion was indicated as one of the main pillars for restarting the global economy following the 2008 financial crisis.[672]

The objectives of financial inclusion are said to include promotion of equitable growth, mobilising savings and investments, eradicating poverty, and the promotion of peace and stability in society.[673] Available literature indicates that it is important to promote equality in accessing finance because it has the potential to unlock resources and create economic opportunities for a large segment of society. This fosters growth by unleashing a virtuous spiral of economic development.[674]

Global Partnership for Financial Inclusion Available at: http://gpfi.org/knowledge-bank/white- papers/global-standard-setting-bodies-and-financial-inclusion-poor.

[670] The Financial Inclusion Insights (FII) Uganda Wave 5 Report (2018) 6.

[671] The Financial Inclusion Insights (FII) carries out national representative surveys on populations and qualitative research studies program. It has carried out population surveys in Bangladesh, India, Indonesia, Kenya, Nigeria, Pakistan, Tanzania and Uganda by basically gathering timely demand-side data. It also carries out research and practical insights into digital financial services (DFS) including mobile money.

[672] Cull, Ehrbeck (2014) note 92.

[673] Sharma & Kukreja (2013) 15-20.

[674] Agyemang-Badu, Albert, et al. (2018) 20.

The Canadian International Development Agency (CIDA) sees financial inclusion as a vital cog in a country's development process and states that easy access to finance is an important element in spreading equal opportunities to tap into the full potential of an economy.[675] Financial inclusion promotes inclusive growth and development by enabling the efficient and effective distribution of scarce resources for the well-being of society.[676] Financial inclusion enables households to mobilise savings, allowing them to have capital for investments, unleashing a class of entrepreneurs.[677] It also enables the easy flow of money in the economy so that both rich and poor can easily access it.[678]

A World Bank report confirms that societies where there is gender discrimination in access to finance have seen slower economic growth, lower standards of living and weaker governance.[679] Although research linking financial inclusion and economic development is not conclusive, what cannot be doubted is that financial inclusion allows many people to carry out financial transactions safely and efficiently. Research shows that gender inequalities in access to finance breed slow economic growth and development, because access to finance and the use of the formal financial system allow people to engage in investments and take on financial risk management options.[680]

Equal access to finance by the vulnerable and women is a now a global priority for policy-makers. In many countries, including Uganda, the Central Bank is taking an active role in promoting financial inclusion with various initiatives. Financial inclusion is a top priority agenda for many Central Banks.[681] Governments and central banks are being assisted by international organisations such as the World Bank, the IMF, Alliance for Financial Inclusion (AFI), the Consultative Group to Assist the Poor (CGAP), and the International Finance Corporation (IFC), with funding and strategies for promoting financial inclusion. These organisations are also collecting cross-country data on

[675] CIDA) (1999) 5.
[676] Martinez (2011) 5.
[677] Central Bank of Nigeria (2018) 4.
[678] Damodaran (2013) 54-59.
[679] World Bank (2001) 1-8.
[680] Demirguc-Kunt, Asli et al. (2017) 8.
[681] John Rwangombwa (2021) 142.

financial access and inclusion, and making proposals to improve financial inclusion.[682] The challenge remaining is how to create an efficient regulatory environment that is safe and reliable, allowing innovations that appeal to both men and women in equal measure, and an adequate financial infrastructure that allows as many people as possible to easily access basic financial services by allowing even small transactions that are economically viable to both genders. Governments must therefore initiate and implement policies that promote the expansion of financial services to the excluded.

This chapter reviews the link between easy access to land by women and the uptake of formal financial services. Already discussed in chapter 3, it is clear that, save for the few progressive reforms introduced by the 1995 Constitution and the 1998 Land Act, the legal and policy framework in Uganda on women's land rights has been slow in advancing women's land access rights. Women in Uganda continue to face more significant disparities in access to land than men. The discussion in this chapter brings out the nexus between women's land rights and financial inclusion in Uganda. The chapter therefore attempts to find out whether a strong pro-active legal framework that promotes women's land rights and easy access to land would increase financial inclusion in Uganda. Research indicates how easy access to financial services by women enables them to participate in economic activities and production which has a positive impact on a country's growth.[683]

4.2 The legal and policy framework on financial inclusion in Uganda

Uganda's financial industry started evolving in the 1990s following several policy reforms that involved liberalization of the financial sector. Prior to the reforms, Uganda's economic and financial sectors were described as inward-looking with the heavy involvement of the state in the financial sector by having a dominant share in the existing financial institutions (notably Uganda Commercial Bank (UCB) and the Cooperative Bank, with the state using the same institutions for financial outreach, especially to the rural poor and women.[684] Uganda's financial sector was

[682] The World Bank, with the help of the Bill & Melinda Gates Foundation, in 2011 launched the Global Findex Database. This database has the world's most comprehensive country-by-country data on the usage of formal and informal financial services. The data has also been used to track progress of the UN Sustainable Development Goals.
[683] Aslan, Goksu, et al. (2017) 7.
[684] Ayoki (2014) 2.

therefore highly regulated with a few banks serving a small population. Notable however is that these state-controlled financial institutions did not provide much-needed credit to the poor as was anticipated, and research shows that fewer than 15 per cent of rural farmers were able to access formal credit largely due to high transactional costs and poor repayment by those who had received credit.[685]

On seizing power, the Museveni-led government begun a series of economic, structural and financial reforms under the guise of the so called 'Washington Consensus'.[686] The government began financial reforms through the enactment and implementation of the Bank of Uganda Act 1993[687] and the Financial Institutions Act 2004. Although these financial sector reforms brought much needed macroeconomic stability in Uganda, there is no evidence pointing to enhanced financial access by the broader population as revealed by the Fin Scope Surveys on financial inclusion discussed later in this chapter.

4.2.1 The Bank of Uganda Act 1993 and the Financial Institutions Act 2004 on financial inclusion in Uganda

With the enactment of the Bank of Uganda Act, the Bank of Uganda was established as an independent regulator tasked with maintaining the monetary policy besides supervising, controlling and disciplining all financial institutions in Uganda.[688] The Financial Institutions Act, 2004, on the other hand, introduced a series of developments in the banking sector aimed at increasing financial access and financial inclusion in Uganda. The Act introduced a tiered regulatory framework of financial institutions in Uganda comprised of formal, semiformal and informal institutions all involved in providing financial services.

[685] Ayoki (2014) 2.
[686] The term 'Washington Consensus' was coined by Economist John Williamson in 1989. This was in reference to a set of 10 market-oriented policies that revolved around fiscal discipline, open trade and investment. These policies were popular in the late Eighties and early Nineties among the Washington-based institutions as the best prescriptions to restart economic development and growth in Latin American countries. In Africa, the Washington Consensus was the precursor to market-based reforms including privatisation and liberalisation under the so-called Structural Adjustment Programmes of the World Bank and IMF.
[687] Bank of Uganda Act (2004) Ch. 51.
[688] Bank of Uganda Act (2004) section 4(1) & (2).

The formal institutions include banks, credit institutions (CIs)[689] and microfinance depository institutions (MDIs). Under the Second Schedule of the Act, banks belong to the first tier of the financial system and provide, among other things, acceptance of call, demand, savings and time deposits, withdrawals by cheque or otherwise, provide short- to mid-term loans, give overdrafts, provide foreign exchange facilities, participate in inter-bank clearing systems, give investment and financial advice, and so on. CIs belong to the second tier respectively and their services all almost akin to the bank only that they do not engage in forex trading, except with the express permission of the Bank of Uganda.[690]Microfinance depository institutions (MDIs) belong to the third tier, and are governed under the Micro-finance Deposit-Taking Institutions Act, 2003. Banks (tier i), CI's (tier ii) and MDI's (tier iii) are regulated and controlled by the Bank of Uganda.[691]

The semi-formal financial institutions belong to the fourth tier and include Savings and Credit Cooperative Organizations (SACCOs), non-deposit taking micro-finance institutions, community based micro-finances and self-help groups, and these are governed under the Tier 4 Microfinance Institutions and Moneylenders Act, 2016.[692] These are not regulated by BOU. Large and medium-sized SACCOs and all non-deposit taking MFIs under Tier 4 are under the supervision of the Uganda Microfinance Regulatory Authority (UMRA).[693] The Authority is expected to restore consumer confidence in the micro-finance industry whose reputation was in tatters as result of rampant fraud in SACCO's, and unethical practices from money lenders.[694]

The Act also requires the periodic monitoring of smaller SACCOs by the Department of Cooperatives.[695] The informal institutions are: Rotating Credit and Savings Association (ROSCAs), Village Savings and Loan Associations (VSLAs), and burial societies.[696] They are not regulated or supervised by the Bank of Uganda, but self-regulated. Formal institutions tend to

[689] Banks and Credit Institutions are companies licensed to carry on financial institution business in Uganda as specified respectively in the Second Schedule of the Financial Institutions Act, 2014 as amended.
[690] 2nd Schedule of the Financial Institutions Act 2004 as amended by the Financial Institutions (Amendment) Act 2016.
[691] Section 4(2) (j). The Bank of Uganda has powers to supervise, regulate, control and discipline all financial institutions in Uganda.
[692] Tier 4 Microfinance Institutions Act and Moneylenders (2016) s 4 & 8.
[693] Tier 4 Microfinance Institutions Act and Moneylenders (2016) s 8, 33-38 & 62.
[694] Source
[695] Tier 4 Microfinance Institutions Act and Moneylenders (2016) s 109.
[696] Seibel, H. D. (2001) 87.

avoid rural areas and are concentrated in urban centres. The informal institutions are important drivers of financial access in rural areas serving approximately 12 per cent of the rural population.[697] A range of non-bank financial institutions also offer financial services. These include insurance companies, forex bureaus, pension funds, securities industry, mortgage institutions and development banks.

The impact of this tiered financial institution approach to financial inclusion in Uganda is worthy of study. As of July 2020, there were 25 licensed commercial banks in Uganda.[698] Although the increase in financial institutions should translate into improved financial access, it has been noted that Uganda's financial system is still a shallow one, credit to the private sector is very low compared to the neighboring countries, only a small proportion of the population has access to formal credit, financial outreach services to the rural population is very weak, and agricultural finance is almost non-existent in most rural areas of Uganda.[699] The majority of the rural people, especially women, have little access to formal credit, they have no savings account and mostly rely on informal sources to access credit. This is revealed in the Fin Scope Uganda Survey 2007[700] which shows a gap standing at 8 per cent when it comes to access of formal credit (66 per cent of the women unserved, compared to 58 per cent for men).[701] Of adult men, 21 per cent had bank accounts, compared to women at 11 per cent. Fin Scope 2007 survey came out three years after the enactment of the Financial Institutions Act, 2004 that reformed and liberalized the financial sector in Uganda. But even with these reforms and considerable financial outreach, including the

697 Kironde (2015) 18-19.
698 BOU (2020).
699 Ayoki (2014) 21.
700 FinScope Uganda Survey Report, 2007. It should be noted that until around 2006, in Uganda and Africa in general, there was little data on financial inclusion. There was little information on the extent of financial inclusion and the degree of financial exclusion for groups such as the women, youth or the poor. There were no indicators or systematic research on the reach of the financial sector in many African countries. This began to change following the launch of the Fin Scope surveys. The Fin Scope survey is a national survey (geographic and demographic) with data showing the demand, use and access of financial services in selected African economies. It was launched in Uganda in 2006, the latest being that of 2018. The Fin Scope surveys carry out a comprehensive survey showing the demand, usage and access to financial services, both formally and informally. It gathers data from all types of financial institutions, from commercial banks to village groups. The World Bank has also since launched the Global Financial Inclusion (Global Findex) database. The Global Findex has the world's most comprehensive data set on usage of financial services. It has data on how adults globally save, borrow, make payments, and manage risk. The Fin Scope Studies juxtaposed with the Global Findex database can now give a more accurate and balanced view of the status of financial access and financial inclusion in Uganda.
701 Fin Scope Uganda (2007) 14.

rural areas, formal financial inclusion was not apparent. The view therefore that financial deepening may led to financial inclusion may be ambiguous. Thus, although there is an increase in financial institutions in Uganda both in quantity and in depth, research shows that finance access has not been inclusive. A follow- up 2009 Fin Scope Uganda Survey[702] aimed at finding out the changes or impact that had been achieved in the financial sector in Uganda in the preceding three years, considering the notable increase in the number of banks in Uganda and branches found no evidence either to suggest that there had been increased financial inclusion in Uganda.[703] In comparison to the 2007 Survey, where only 38 per cent of Ugandans had access to financial services whether formally or informally, the 2009 report revealed an increase in access by 42 per cent to 70 per cent, with the percentage of the excluded reduced from 62 per cent in 2007 to 30 per cent.[704] In spite of the overall increase in access to finance, results indicated that more men (31 per cent) than women (26 per cent) were formally served, and more males (24 per cent) than females (17 per cent) were banked.[705] A gender gap of 7 per cent in accessing finance through formal means was reported in favor of men. Women, just as in the 2007 report, were more likely to access finance through the informal institutions, and 31 per cent of the female respondents reporting being financially excluded, compared to 28 per cent of the male respondents.[706] Thus, in spite of the considerable increase in financial access, a persistent gender gap in access to formal finance was recorded, with women reportedly accessing finance through informal institutions.

There is also no evidence either that having an account with a formal financial institution leads to increased financial usage. For instance, a 2014 study revealed that although 27.8 per cent of Ugandans had an account with a formal financial institution (which was far below the world

[702] Fin Scope Uganda (2009) Final Report.
[703] Because of the new realities, the 2009 financial access strand was reconstructed into four categories: (i) the banked, including all the financial institutions under the direct supervision and regulation of Bank of Uganda. These were commercial banks (CBs), credit institutions (CIs), microfinance deposit-taking institutions (MDIs), and mobile banking if under commercial banks or credit institutions; (ii) Non-bank Formal that included SACCOs, other microfinance institutions, foreign exchange bureaus, money transfer services such as Western Union, MoneyGram and mobile money services, formally registered insurance companies and NSSF; (iii) Informal. This involves access to finance from money lenders, rotating savings and credit associations (ROSCAs), Accumulating Savings & Credit Associations (ASCAs), Village Savings and Loan Associations (VSLAs), NGOs, investment clubs, savings clubs, services by employers and other village groups like burial societies and welfare funds and lastly; (iv) The financially excluded, including those who have no access to finance.
[704] Fin Scope Uganda (2009) 28.
[705] Fin Scope Uganda (2009) 28.
[706] Fin Scope Uganda (2009) 29.

average of 50 per cent), only 15.7 percent were able to obtain credit or a loan from a formal financial institution.[707] Thus, having an account does not translate into financial usage, and the notion that deeper financial outreach leads to financial inclusion lacks research.

Hence, the government of Uganda's financial inclusion policies, focused on increasing financial depth as a way of increasing use of financial services, appear to have had mixed results on financial inclusion. The view therefore that financial inclusion is easily achievable when the financial system is deeper or highly capitalized may not hold water going by the results of the Uganda Fin Scope Surveys. Government interventions to increase financial outreach have largely disregarded historical and behavioral constraints on financial inclusion.[708] It is therefore important to note that policies designed to achieve financial inclusion will not work in certain communities unless they take into consideration the household needs in the local context. It also goes without saying that, for many years, Ugandan financial policies aimed at addressing poverty alleviation and constraints to development but, in recent years, the policies are now related to political interests.[709]

Bank of Uganda has also spearheaded the amendment of the Financial Institutions Act to allow for Agent banking[710] and Islamic banking,[711] among other services. It has gone on to develop Agent banking[712] and Islamic banking Regulations.[713] A number of licences have been issued to a number of banks that have embraced agent banking. The Financial Institutions (Islamic banking) Regulations, 2018 have been issued by the Bank of Uganda to operationalise Islamic Banking in the country. The impact of agency banking on financial inclusion should be a study of interest.

The Ugandan Government, through Bank of Uganda, has also taken further bold steps to foster financial inclusion. Bank of Uganda has now been a member of the Alliance for Financial Inclusion (AFI) since 2011. The AFI is a network of regulators involved in financial inclusion and Bank of Uganda sits on six working groups of the AFI.[714] Bank of Uganda is signatory to the Maya

[707] Otchere (2016) 18.
[708] Ayoki (2014) 12.
[709] Ayoki (2014) 13.
[710] The Financial Institutions (Amendment) Act (2016) s 131.
[711] The Financial Institutions (Amendment) Act (2016) s 115A.
[712] The Financial Institutions (Agent Banking) Regulations, 2017 (under sections 4(2b) and 131(lb) of the Financial Institutions Act, Act 2 of 2004).
[713] The Financial Institutions (Islamic Banking) Regulations, 2018.
[714] Alliance for Financial Inclusion (AFI) (2019) 6.

Declaration (the Alliance for Financial Inclusion, IFA, initiative to encourage national commitments to financial inclusion).[715] Uganda is also a party to the Denarau Action Plan of the IFA, which sets out to promote gender inclusive financial access.[716]

Bank of Uganda has also issued significant policy instruments and guidelines to foster financial inclusion and has issued, inter alia: (i) the Financial Institutions (Credit Reference Bureaus) Regulations, 2005.[717] These regulations help in giving financial institutions and MDIs information on their clients' repayment history and current debt profiles, which helps determine a consumer's credit-worthiness. Lack of credit history is seen as a hindrance to financial inclusion. (ii) The Financial Consumer Protection Guidelines, 2011 for all financial institutions, particularly on the issuance of a key facts document. These guidelines ensure that consumers of the financial products are protected, and that there is fairness, transparency and equitable provision of financial services.[718] The guidelines further ensure that consumers are protected from unfair, deceptive and aggressive practices by the financial services provider. The guidelines have an impact on financial inclusion, and research shows that design of financial products and their marketing have an effect on access.[719] The extensive due diligence and documentation to identify the customer when opening bank accounts otherwise known as 'Know Your Customer' (KYC) also have an effect on formal inclusion, as does the voluminous documentation involved when accessing credit from a financial institution which is seen to have an effect on trust and to appeal for formal inclusion.[720] It is therefore pertinent that financial products and services are tailored in a simple, plain and clear language with little documentation to distract those excluded from formal inclusion.

[715] The Maya Declaration is a set of commitments reached at the Global Policy Forum 2011 in Mexico Riviera Maya by the policy-makers and institutions (Central Banks and Financial Regulatory Institutions) from developing and emerging economies. These commitments aim at unlocking the social and economic potential of the world's poor through financial inclusion.
[716] The Plan is a set of Commitments from members of the IFA aimed at increasing financial inclusion among women. It was adopted at the 2016 Global Policy Forum in Fiji.
[717] Section 78(1) and 131(1)(k) and (m) of the Financial Institutions Act, No.2 of 2004 gives powers to Bank of Uganda to licence and regulate Credit Reference Bureaus.
[718] Section 4 of Bank of Uganda Financial Consumer Protection Guidelines, 2011. The above section lays down the objectives of the Guidelines.
[719] Demirguc-Kunt, Leora, et al. (2017) 22.
[720] World Bank (2018) 28.

The Government of Uganda formulated the National Financial Inclusive Strategy 2017 – 2022, with the vision that 'all Ugandans have access to and use a broad range of quality and affordable financial services which helps ensure their financial security'.[721] The strategy identifies five areas to increase financial inclusion, namely: (i) Reduce Financial Exclusion and Access Barriers to Financial Services; (ii) Develop the Credit Infrastructure for Growth; (iii) Build Out the Digital Infrastructure for Efficiency; (iv) Deepen and Broaden Formal Savings, Investment and Insurance Usage; and (v) Empower and Protect Individuals with Enhanced Financial Capability.[722]
The strategy identifies gaps in financial inclusion and proposes initiatives to close the gaps.

4.2.2 Micro Finance and Financial Inclusion

The extension of microfinance under the Microfinance Deposit Taking Institutions Act, 2003 is also an area of some study. Prior to the enactment of the Act, micro-financers were only taking compulsory savings from the borrowers, but could not take voluntary deposits, although a few micro-financers were actually illegally taking deposits.[723] A regulatory framework was therefore necessary, and this led to the enactment of the Microfinance Deposit Taking Institutions Act, 2003. The microfinance business is defined under the Act as the business of taking deposits and availing those deposits by way of credit or short-time loans to the depositors, small or micro-income enterprises and low-income households.[724] Fundamentally, micro-finance entails giving credit in small amounts and for a short-time and usually with no collateral. The Micro-Finance Deposit Taking Institutions (MDIs) licensed under the Act mobilize money through deposits, and lend out those deposits under the supervision of Bank of Uganda.[725] MDIs do not operate cheque accounts neither do they engage in forex trading, derivatives, underwriting and placement of securities among other things.[726] MDI's follow the key principles of banking while incorporating the unique and specific features of micro-finance business.

[721] The Republic of Uganda National Financial Inclusion Strategy 2017-2022.
[722] The Republic of Uganda National Financial Inclusion Strategy 2017-2022 (2017) 21-23.
[723] Ayoki (2014) 5.
[724] Micro-Finance Deposits Taking Institutions Act (2003), section 2.
[725] Micro-Finance Deposits Taking Institutions Act (2003), sections 4, 55 & 56.
[726] Micro-Finance Deposits Taking Institutions Act (2003), section 19.

Modern micro-finance seems to have its origins in Bangladesh, with Mohammed Yunus building a network of small-scale lending that eventually culminated in the Grameen Bank in 1983.[727] Initially there was a lot of excitement around the world about the impact of micro-finance and micro-credit as they were seen a modern way of introducing formal financial institutions to replace the exploitative informal credit arrangements such as traditional money lenders.[728] The concept of peer monitoring and group lending, where a few peers would club themselves into small groups to receive micro-credit without collateral, each member ensuring that he or she watches over his or her peer to prevent defaulting, was seen as the safest way of finally achieving financial inclusion in the rural areas especially among the vulnerable, particularly women.[729]

Studies show, however, that the proponents of micro-finance were misguided. Micro-finance has not increased financial inclusion, and neither has it helped in poverty eradication but has instead increased financial instability and increased vulnerability among the poorest from the moment the micro-finance model turned into a profit oriented business emphasizing full cost recovery.[730] A 2010 empirical review of literature on the impact of micro-finance concluded that the international enthusiasm for microfinance as a global development prescription had no empirical basis, and was rather built on a foundation of sand.[731]

Other scholars have concluded that micro-finance has nothing to do with poverty eradication and has instead turned into a powerful institution and a barrier against sustainable social and economic development.[732] Microcredit given out in form of small loans for a short period on very high interest rates, with excessive and harsh recovery methods, cannot lead to poverty eradication or financial inclusion. It has also been noted that micro-financers could not understand the needs of poor households who receive these loans under the guise of enterprise, and instead divert them into cover their household and social needs like buying food, paying school fees, medical emergencies, and so on.[733]

[727] Jayati (2013) 4.
[728] Jayati (2013) 5.
[729] Stiglitz (1990) 351–66.
[730] Jayati (2013) 3.
[731] Duvendack, Maren et al. (2011).
[732] Bateman & Chang (2012) 13.
[733] Hulme (2000) 27.

A study in Uganda on the impact of microfinance on the clients, their households and enterprises found that, although there had been some expansion of enterprise using micro-finance loans, many people were dropping out of the microfinance programmes due to lending strategies that were exploitative and prohibitive.[734] For all its limitations, microfinance can still be used to extend credit to those outside the coverage of the formal financial institutions, especially in the rural areas and to the benefit of women who are otherwise at the mercy of the local money lenders. Not-for profit microfinance can be reinvented by government through subsidies coupled with other broader financial inclusion strategies, such as supporting local credit cooperatives and community banks.[735]

4.2.3 Mobile Money and Financial Inclusion

Uganda's financial system has undoubtedly been influenced by rapid developments in information and communications technologies (ICTs), especially the emergency of mobile money services over the past decade. The spread of mobile money services has created a platform for the spread of financial services to women, poor people, and other groups traditionally excluded from the formal financial system. Sub-Saharan Africa today is the global leader in the use of mobile money services. In Kenya, 73 per cent of adults have a mobile money account, as well as in Uganda and Zimbabwe, where about 50 per cent do.[736] Sub-Saharan Africa has 10 economies, Burkina Faso, Chad, Côte d'Ivoire, Gabon, Kenya, Mali, Senegal, Tanzania, Uganda, and Zimbabwe, where more adults have a mobile money account rather than an account in a financial institution.[737] This widespread expansion of mobile banking in sub-Saharan Africa may have been spurred by the rigorous regulatory and customer due diligence requirements by banks and other financial institutions, such as the need for a passport, driving permit, or utility bills before an account is opened. Many people in these underdeveloped countries do not have such documents.[738] This is in addition to the low transactional costs, easy access and friendly compliance requirements, and the

[734] Morris, Gayle et al. (2005) 52.
[735] Chandrasekhar (2010) 12.
[736] Demirgüç-Kunt, Asli, et al. (2018) 20.
[737] Demirgüç-Kunt, Asli, et al. (2018) 21.
[738] Mugarura (2019) 314.

fact that transactions are carried out in a familiar environment such as at home or a nearby mobile booth within the community.[739]

Mobile money services in Uganda were first introduced by MTN (U) Ltd in March 2009,[740] following the issuance of a no-objection letter from Bank of Uganda. Following MTN were other mobile network operators (MNO), Airtel Uganda in June 2009, M-Sente in March 2010, Warid Pesa in December 2011 and others.[741] Non-MNO mobile payments providers including Wave, Smart Money, Ezee-Money and Mcash have also joined the fray and are now providing mobile money services.[742] Mobile money has played a big role in driving digital financial inclusion in Uganda. In August 2016, MTN Uganda introduced a micro-saving and micro-loan service in partnership with the Commercial Bank of Africa, called Mokash.[743] This platform allows MTN customers to apply for short-term loans normally not exceeding one million shillings (credit limit is dependent on the customers usage of MTN services, that is, data, voice and mobile money) at an interest of 9 per cent for 30 days with a further 9 per cent penalty for default.[744]

The mobile money industry in Uganda is regulated by the Bank of Uganda (BoU) and the Uganda Communications Commission (UCC).[745] Bank of Uganda issues a no-objection letter to the commercial banks. The commercial bank has to partner with the mobile network operator (MNO) to provide mobile money services. The process requires the bank to hold customers' deposits held in the mobile wallet in an escrow account.[746] To strengthen financial inclusion through the use of mobile money services, Bank of Uganda issued the Bank of Uganda Mobile Money Guidelines, 2013, coming into force on October 1, 2013.[747]

Because mobile money services are channelled through the mobile network operator (MNO), that puts the industry under some oversight of the Uganda Communications Commission under the

[739] Mugarura (2019) 315
[740] Macmillan (2016) 91.
[741] Ggombe (2014) 6.
[742] Bank of Uganda (BoU) (2015). Annual supervision report: Issue No. 6.
[743] The Observer (2016, August 12).
[744] Dignited Newspaper (16 August 2016).
[745] UCC is established under the Uganda Communications Commission Act, 2013.
[746] Macmillan & Paelo, et al. (2016) 95.
[747] Objective 3 of the Bank of Uganda Mobile Money Guidelines, 2013 is to promote financial inclusion.

Uganda Communications Act.[748] However, UCC has not been so directly engaged in the regulation of the mobile money market. One of UCC's core functions under the Act is 'to promote competition, including the protection of operators from acts and practices of other operators that are damaging to competition, and to facilitate the entry into markets of new and modern systems and services'.[749] This section grants UCC extensive powers to regulate harmful competition among the mobile network operators in the provision of their different mobile money services. The Uganda Communications Act prohibits 'activities, which have, or are intended or are likely to have, the effect of unfairly preventing, restricting or distorting competition in relation to any business activity relating to communications services'.[750] It further prohibits abuse of a dominant position, including abuse 'which unfairly excludes or limits competition between the operator and any other party'.[751]

UCC therefore has powers to investigate unfair competition among the operators in the provision of their services and may impose orders and fines and may declare agreements among the operators as uncompetitive and therefore null and void. These enforcement actions from the UCC may be helpful in the regulation of mobile money services by mobile network operators, although there is no evidence that they have been used before.

There is no doubt that the mobile money industry in sub-Saharan Africa grew much faster than its regulation, and policy-makers have had regulatory challenges on issues of security of the technology, the effect of the mobile money industry on financial stability, fraud, competition, and so on. Policy-makers and regulators have had challenges identifying which mobile money issues fall under the financial regulator and the ones under the communications regulator, but as has been suggested, the general consensus is that there should be coordination between the two regulators as well as with the consumer and competition protection regulators.[752]

[748] Act No. 1 of 2013.
[749] Section 5(1) n, Uganda Communications Act, No. 1 of 2013.
[750] Section 53(1), Uganda Communications Act, No. 1 of 2013.
[751] Section 53(2), Uganda Communications Act, No. 1 of 2013.
[752] Macmillan, Paelo, et al. (2016) 96.

Already mentioned, a mobile money service was launched in Uganda in 2009 and within 10 years, 80 per cent of Ugandan adults had a mobile money account. Since one of the determinants of financial inclusion is having an account with a formal financial institution or a mobile money account, it would seem that Uganda has achieved complete financial inclusion. Some studies in Uganda challenge this view. A 2019 large-scale study[753] in the South Western Kabarole District found that mobile money services penetration had increased financial inclusion for a significant number of micro-entrepreneurs in the area. However, roughly 40 per cent of the study population and active users of mobile money services were neither banked formally or semi-formally, showing therefore that mobile money penetration had failed to enable full financial inclusion.[754] The study found that active users of mobile money services tended to be educated, young and male but women and other disadvantaged remained excluded from active mobile money services.[755] Some of the reasons for exclusion included high charges associated with mobile money services, high levels of financial illiteracy and low educational levels, associated more with rural women, and insufficient access to mobile money services associated with few or scattered mobile money agents, coupled with the poor network coverage.[756]

The study recommended the expansion of network coverage in rural areas, which is a barrier to mobile money service availability, adoption of policies by regulators to promote competition among mobile money providers that would lead to reduced mobile money charges, increased financial literacy, and the adoption of measures aimed at targeting groups that less frequently use money mobile services, that is, women, older people and those with lower socio-economic status.[757]

There is therefore a growing ambiguity on the actual impact of mobile money transfer services on financial inclusion, especially regarding the rural poor and women. Although financial access in Uganda is being driven by the mobile money industry, evidence seems to suggest that it is not just having a mobile money account, or expanding financial outreach, or having an account with a

[753] Jana & Lehmann, et al. (2021) 2.
[754] Jana & Lehmann, et al. (2021) 3.
[755] Jana & Lehmann, et al. (2021) 3.
[756] Jana & Lehmann, et al. (2021) 4.
[757] Jana & Lehmann, et al. (2021) 15.

financial institution that leads to financial inclusion, but that what you actually do with the account is what matters.[758] Researchers continue to question how mobile money services can provide affordable access to finance to the poor, considering the high transactional costs involved in situations where the cost of sending and withdrawing is sometimes more expensive than the cost of public transport in delivering the money.[759]

Due to the increased use of electronic payment systems, and particularly the significant use of mobile money, the government came up with the National Payment System (NPS) Policy Framework[760] aimed at ensuring the safe and easy access of electronic payments; this was meant to ensure that the system operates in an efficient and secure manner. This policy is an important step in the promotion of financial inclusion in Uganda, since broadening access to payment systems is one of the policy's principal objectives.[761]

The National Payment System (NPS) Policy Framework was a precursor to the enactment of a national payment systems law. Although Uganda had several pieces of legislation touching on payment systems, such as the Bank of Uganda Act[762] that regulates the operations and activities of the Central Bank, the Financial Institutions Act,[763] that regulates activities of the financial institutions in Uganda, the Electronic Transactions Act,[764] that regulates and facilitates electronic communications and transactions, the Computer Misuse Act,[765] that regulates the safe and secure use of electronic transactions and information systems, and so on, none of these pieces of legislation provided an enabling environment to support the operation or development of the new payment systems, and especially the rapid embracing of mobile money services, an important enabler in the widening of financial access and inclusion in Uganda.

[758] Ayoki (2009) 24.
[759] Milton (2009) 34.
[760] Approved by Cabinet on 22 December 2017.
[761] Objective 3, NPS (2017) 21.
[762] Bank of Uganda Act, 2000, Ch. 51.
[763] The Financial Institutions Act, 2004 as Amended.
[764] The Electronic Transactions Act, 2011 (Act. 8 of 2011).
[765] The Computer Misuse Act, 2011 (Act 2 of 2011).

In 2020, the National Payment Systems Act[766] was passed by the Parliament of Uganda to regulate, among other things, the issuance of electronic money and to provide a framework for a safe, efficient and secure payment system in Uganda.[767] The Act therefore aims at promoting financial inclusion by facilitating the safe and secure use of electronic payments in Uganda.

4.3 Women and the status of financial inclusion in Uganda

Financial inclusion is seen as a vital cog in the promotion of sustainable growth and progress, and in the reduction of poverty and income inequalities.[768] Access to finance can unlock resources and create economic opportunities for a big segment of society, and this can unleash a virtuous spiral of economic development.[769] Easy access to financial services by women enables them to participate in economic activities and production.[770] Moreover, easy access to finance reduces the financial vulnerability of the poor.[771] If women were given the opportunity to be the decision-makers in the home, they would enhance household savings and improve home welfare by using available resources appropriately.[772] Enabling easy access to formal finance for women would enable them to invest more in productive activities such as business and education.[773]

Various studies and survey reports reveal persistent gender gaps in women's access to formal finance, yet research tends to describe women as active agents of change and vital contributors in household savings because of their ability to use available resources effectively.[774]

The state and status of financial inclusion in Uganda is periodically measured by the Fin Scope Uganda Survey studies. When the first Fin Scope Uganda Survey 2007[775] was released, it revealed

[766] National Payment Systems Act, No. 15, 2020.
[767] National Payment Systems Act, No. 15 (2020) s 3.
[768] Swamy (2014) 1-15.
[769] Agyemang-Badu, Albert, et al. (2018).
[770] Aslan, Goksu, et al. (2017)7.
[771] Tita & Aziakpono (2017) 2157-2172.
[772] Swamy (2014) 1-15.
[773] Demirgüç-Kunt, Klapper, et al. (2013) 279-340.
[774] Muravyev, Talavera, et al. (2009) 270-286.
[775] FinScope Uganda Survey Report, 2007. It should be noted that until around 2006, in Uganda and Africa in general, there was little data on financial inclusion. There was little information on the extent of financial inclusion and the degree of financial exclusion for groups such as the women, youth or the poor. There were no indicators or systematic research on the reach of the financial sector in many African countries. This began to change following the launch of the Fin Scope surveys. The Fin Scope survey is a national survey (geographic and demographic) with data showing the demand, use and access of financial services in selected African economies. It was launched in Uganda in 2006,

that only 38 per cent of Ugandans were financially served by formal, semi-formal or informal financial institutions/groups.[776] The remaining 62 per cent had no access to financial services, whether formal or informal. The survey further revealed that women were somehow more likely to be 'unserved' than men, with the gap standing at 8 per cent (66 per cent of the women unserved, compared to 58 per cent for men).[777] Of adult men, 21 per cent had bank accounts, compared to women at 11 per cent. As of 2006, a gender gap of 10 per cent in favor of men accessing finance through the bank, otherwise known as the formal access of finance, was recorded. There was, however, no gender gap when it came to financial access through the informal institutions (around 10 per cent of men and of women accessed informal institutions).[778] Thus, men were more likely to have formal financial access than women, but when it came to informal access, there was no gap between men and women. This 2007 Fin Scope survey came out three years after the enactment of the Financial Institutions Act and Bank of Uganda Act, 2004. These Acts reformed and liberalized the financial sector in Uganda. But even with these reforms and considerable financial outreach, including the rural areas, formal financial inclusion was not apparent. The Fin Scope 2013 Uganda III Survey[779] revealed that financial access and usage of financial services had increased to 85 per cent of the adult population in Uganda.[780] That meant the level of financial exclusion was at 15 per cent. This compares with 70 per cent in 2009, with those excluded being 30 per cent. The results of the survey were confirmed by the 2014 Bank of Uganda maiden report[781] on financial inclusion in Uganda. The BOU report showed significant access to financial services. Of the adult population aged 16 years and above, 85 per cent were financially included. In 2009,

the latest being that of 2018. The Fin Scope surveys carry out a comprehensive survey showing the demand, usage and access to financial services, both formally and informally. It gathers data from all types of financial institutions, from commercial banks to village groups. The World Bank has also since launched the Global Financial Inclusion (Global Findex) database. The Global Findex has the world's most comprehensive data set on usage of financial services. It has data on how adults globally save, borrow, make payments, and manage risk. The Fin Scope Studies juxtaposed with the Global Findex database can now give a more accurate and balanced view of the status of financial access and financial inclusion in Uganda.

[776] The formal institutions at 2007 were the deposit-taking institutions licensed and regulated by the Bank of Uganda (BOU) and these are Tier I (commercial banks), Tier II (credit institutions) and Tier III (microfinance deposit-taking institutions). The semiformal ones, also known as Tier IV financial institutions, included SACCOs, NGOs, and Non-profit Micro-finance Institutions (MFIs). The informal institutions included Rotating Savings and Credit Associations (ROSCAs), Village Savings and Loan Associations (VSLAs) and burial societies.

[777] Fin Scope Uganda (2007) 14.

[778] Fin Scope Uganda (2007) 14.

[779] Uganda Fin scope III, Survey Report Findings, 2013.

[780] Uganda Fin scope III (2013) 9

[781] BOU 2014.

the percent of the financially included stood at 70 per cent and 38 per cent in 2006.[782] The increase in formal inclusion from 2009 was mainly driven by mobile money financial services.[783] The share of the adult population that accessed formal institutions increased by almost two-fold from 28 per cent in 2009 to 54 per cent in 2013.[784] This is attributed mainly to usage of mobile money services.[785] Notable however is that there are no significant differences between the proportion of the adult population accessing formal bank institutions between 2009 and 2013. As such, the non-bank formal services, excluding mobile money, accounted for about 3 per cent, whereas the mobile money services accounted for 31 per cent. This meant that the contribution of non-bank institutions, excluding mobile money services, to the provision of financial services remained very low.[786] Thus, even with the increased penetration of banks and other financial institutions in rural Uganda, there was no translated increase in financial usage, and increase in financial access was due to mobile money penetration.

Considering gender, the 2013 survey observed that access through the formal banking system was more pronounced in males (24 per cent) than in females (17 per cent).[787] Similarly, just as in the 2009 report, the 2013 survey indicated more females using informal services (34 per cent) than male (27 per cent).[788] This meant that men were still accessing formal banking/financial services with the same gender gap of 7 per cent as in the previous 2006 and 2009 Fin Scope Surveys. Again, more women were accessing informal services than men, with the almost same gender gap as in previous surveys. Seven years after the first Fin Scope Survey, more men were still accessing formal financial services than woman, with a persistent gender gap at 7 per cent. The Fin Scope 2018 Uganda Survey[789] reveals an increase in financial inclusion through savings, credit, insurance and payment services with 14.4 million Ugandan adults, equivalent to 78 per cent, being financially served. 4.2 million adult Ugandans, equivalent to 22 per cent are financially excluded.[790] The increase in financial inclusion is mostly driven by mobile money services.

[782] BOU (2014) 5.
[783] BOU (2014) 21.
[784] Uganda Fin scope III (2013) 9.
[785] Uganda Fin Scope III (2013) 10.
[786] Uganda Fin Scope (2013) 10.
[787] Uganda Fin Scope III (2013) 12.
[788] Uganda Fin Scope III (2013) 12.
[789] Fin Scope Uganda, Top-line Findings 2018 Report.
[790] Fin Scope Uganda (2018) 28.

However, the uptake is heavily skewed towards males. Of adult males, 63 per cent are formally served compared to adult women, at 54 per cent.[791] This as it stands, there is a persistent gender gap in Uganda when it comes to formal financial access in favour of men. This calls for new strategies and policy reforms.

4.4 Barriers to women's financial inclusion in Uganda

There has been many studies on the reasons for the gender gaps in formal access to finance. An IMF study,[792] investigating what is driving women's financial exclusion and barriers using micro-level information from the Findex 2012 survey, found that attitudes and social norms relating to women, as well as legal restrictions, are strongly related to women's use of financial services.[793] The study suggested introducing laws that protect women in labor markets; for instance, strong laws against harassment would increase women's productivity and allow them to make optimal economic choices. More productivity and empowerment would result in more equal access to financial services which would lead to increased economic welfare, lower income inequality, and higher economic diversification.[794]

The Financial Sector Deepening Uganda (FSDU) 2018[795] study on women and financial exclusion in Uganda noted the significant barriers to financial inclusion among women on the supply-side perceptions, with nearly a third of excluded women believing that financial services are too expensive, 7 per cent believing services are situated too far from where they live, 6 per cent seeing no value in the proposition and 4 per cent believing the services on offer are not relevant to their needs.[796] Less than half of the excluded women cite demand-side barriers to inclusion (15 per cent do not trust others with their money. Another 13 per cent have no specific reason for being excluded, others tend to have less capacity to meet bank documentation otherwise known as Know Your Customer (KYC) requirements than those who currently access financial services and others are less likely to own a mobile phone or have access to the internet.[797]

[791] Fin Scope Uganda (2018) 20.
[792] Corinne & Monique (2018) 4.
[793] Corinne & Monique (2018) 5.
[794] Corinne & Monique (2018) 17.
[795] FSDU (2018) 34.
[796] FSDU (2018) 36.
[797] FSDU (2018) 37.

Thus attitudes, traditional discrimination and social norms relating to women as well as legal restrictions are strongly related to women's use of formal financial services.[798] The traditional way of treating women as home-makers and housewives has also deprived women of vital formal finance associated with the formal market economy.[799] Women face also supply-side discrimination from financial institutions that treat credit applications from women differently from those of men even when their credit-worthiness is almost similar.[800]

There is therefore extensive research in developing countries on disparities in access to credit with mostly low-income households being excluded from the formal financial and banking sector. Often cited also is the lack of collateral and the fact that much of the rural or urban land is untitled.[801] Studies show inequality in land ownership and property access as a big hindrance to financial inclusion.[802] According to the Food and Agriculture Organization (FAO), women in most developing countries not only have less access to land than men but are quite often are subjected to secondary land rights: meaning that their claim and entitlement to land is mainly through male family members, and they risk losing their entitlement in cases of death of husband, divorce or husband's migration because their claim was through the said male relations.[803] A 2010 global agricultural census data shows that women own less than 20 per cent of the global agricultural land.[804]

A 2017 study[805] attempted to examine the gender gaps in access to finance using the 2011 Global Findex database suggested policies aimed at addressing inequalities in women's access to property rights. Guaranteeing property rights for women increases their creditworthiness and their ability to secure collateral for a formal loan.[806] The study noted that although in many countries, laws tend to guarantee the same rights to men and women in owning and administering property, there

[798] Aterido, Beck, et al (2013) 102-120.
[799] Aterido, Beck, et al (2013) 102-120.
[800] Muravyev &Talavera (2009) 270-286.
[801] Deininger, Klaus, et al (2009) 233-266.
[802] Chibba (2009) 213-230.
[803] FAO, 2010.
[804] FAO (2010) 20.
[805] Hanan & Hoda (2017) 17.
[806] Hanan & Hoda (2017) 19.

are implementation gaps related to some customary, traditional or religious practices that discriminate against women. There should not be mere amendments of laws, but also an increase in social awareness of women's rights and the enforcement of existing regulations. There is need to introduce solutions and facilities tailored for women to improve credit access, e.g., public credit guarantee schemes, or lower collateral requirements for women-owned SMEs.[807]

There has also been a problem of overlapping land rights. Uganda for stance has the problem of statutory tenancy existing alongside registered land owners.[808] Consistent with this notion, governments in developing countries have embarked on land reform programmes, among which are land titling programmes considered critical in increasing access to finance among the poor and vulnerable.[809] A study in Ugandan[810] on the effect of overlapping land rights on agricultural investment in Uganda revealed that secure land rights protected the poor and vulnerable, especially women, from eviction and provided them with assurances that they would be able to enjoy the fruits of their hard labour. This allowed women to use the land in a more sustainable way and encouraged them to make long term investments. Furthermore, secure land rights allowed peasants to easily liquidate such an investment, allowing labour to move from agricultural to non-agricultural pursuits in a broader economic development context.[811] Finally, being able to identify land ownership without having to make enquiries and land inspections reduces red tape around acquiring credit, thereby reducing the transactional costs in obtaining credit. The study, however, found out that there are many obstacles to the full operationalisation of the financial markets in Uganda and even though for small rural farmers having a land title may change their capital structure, capital access and their total capital does not change.[812]

However, despite the fact that documented or titled collateral is vital in securing finance, the viability of these instruments in transforming the property rights especially over smallholdings into viable instruments that can be used to obtain commercial credit is an area of great debate as discussed below.

[807] Hanan & Hoda (2017) 19.
[808] Deininger, Klaus & Ali, Daniel (2007) 14.
[809] Deininger, Klaus & Ali, Daniel (2007) 15.
[810] Deininger, Klaus et al (2008) 869-882.
[811] Deininger et al (2008) 14.
[812] Deininger et al (2008) 15.

4.5 Women's access to land and financial inclusion

There is a big debate in the academic and political circles on the correlation between women's land ownership and formal financial inclusion. The lack of secured land tenure rights over land by women is seen a significant barrier to financial inclusion. This part highlights the data on the link between women's land rights and formal access to financial services. The review will attempt to find out whether securing and strengthening of women's land rights would translate into an equivalent or automatic increase in women's access to formal and basic financial services, such as opening bank accounts, increase their borrowing and saving culture, and remittance behaviors.

A 2008 World Bank Policy Research Report on Finance attempted to link access to finance with development. [813] According to the report, a well-functioning financial services sector must be at the core of any country's development agenda with the report trying to link easy access to finance with reduction of income inequalities, reduction of poverty and the promotion of economic development.[814] The report, however, noted that there was still no empirical and concrete evidence linking broader access to finance with development outcomes. [815]

The 2008 World Bank Policy Research Report on Finance was not the first time the World Bank had empathized financial sector development and inclusive finance. The emphasis on encouraging financial sector development had been a feature of earlier policy statements from the World Bank. The most significant previous discussion of this topic appeared in its Policy Research Report on Land published in 2003.[816] The report had strongly advocated for the development of secure land rights as a precursor for broader economic development through facilitating trade and economic growth.[817] The report tried to link access to land with the ability to access financial markets by the poor and increased investments and urging for the enacting of policies that would transform land from a dead asset into an economically viable resource that can be used to access credit. [818] It was argued that a well secured and developed property market regime gives greater incentives to

[813] World Bank (2008) 25.
[814] World Bank (2008) 21.
[815] World Bank (2008) 22.
[816] Deininger, Klaus. 2003) 15.
[817] Deininger, Klaus (2003) 17.
[818] Deininger, Klaus (2003) 19.

individuals to invest, engage in trade and increased efficiency in resource allocation leading to development of a strong financial system.[819] The report was able to make a conclusive linkage between land titling and credit. Easy access to credit by the poor and the marginalised, mostly women, promotes financial inclusion. There is literature linking titling of land which is one component of land tenure to easy access to credit and that these two are intrinsically connected to development prescriptions for developing countries.[820] The ability to use land as collateral for credit will definitely transform it from a dead asset into an economically viable asset.

One of the most acclaimed proponents of the theory linking land rights to financial access is Hernando De Soto.[821] De Soto drew international recognition and the attention of national governments with his grand theory that if small businesses and informal dead land assets were brought into the legal sphere through legalisation, these assets could turn into capital.[822] According to De Soto, it is only a small capitalist group in developing economies that has been able to get capital by converting their resources into legal rights and the rest of the society keep their possessions in legally defective forms that cannot pull capital. [823] They have land/ houses with no titles, crops with no deeds, businesses with no statutes of incorporation and this keeps these assets as dead capital as they can only be traded within their small circles, cannot be used as collateral for a loan or to create investments.[824] According to De Soto, whereas the majority of residents in developing economies own property/ land, most of these properties are informally secured. Citing his observation of the urban dwellings in the cities of Cairo, Manilla, Lima, Mexico City and Port-au-Prince, De Soto concluded that the poor in these urban dwellings have tangible assets but the lack of formal title prevents them from obtaining a full value of their assets because they cannot be used to secure credit. To him, the lack of titled property is the main cause of the failure of capital markets. Because of the lack of capital markets, capital is misallocated as property cannot be used as collateral and this prevents the capital embedded in this asset from being unlocked. To De Soto, the failure to unlock this capital from dead assets is the single stumbling block to growth and

[819] Haggard, Stephan et al. (2008) 206-207.
[820] World Bank, Policy Research Report (2008), ix.
[821] De Soto, H. (2000) 16.
[822] His work was recognized by George Bush Sir, the President of US in his 1989 Presidential Speech. May 1999 Time Magazine issue named him as one of the top leading Latin American innovators of the Century. The Economic Magazine 2006 honored him with the Social and Economic Innovation Award.
[823] De Soto (2000) 6.
[824] De Soto (2000) 7.

development in the developing world.[825] Further according to De Soto, the failure to have titled property means that the informal ownership through the community or organizations makes ownership of such property more secure because the seizure of such property by the bank is very difficult.[826] De Soto further urges that with a properly functioning property registration system, trading is no longer restricted to small known circles, people can trade with strangers because anybody who fails to pay for goods and services can be easily identifiable, his property confiscated, fined or charged interest and his credit rating downgraded.[827]

De Soto's ideals and advocacy efforts on the Law and Property were the precursor to the establishment of the Commission on Legal Empowerment of the Poor by the United Nations Development Program (UNDP).[828] In its 2008 Report, the Commission having incorporated many of De Soto's ideas arrived at 'four pillars' as the cornerstone of legal empowerment, economic development and growth for developing economies. These were; (i) promotion of land rights, (ii) promotion of business rights that would involve turning businesses into legal entities through incorporations and registrations, (iii) labour rights and (iv) access to justice and promotion of the rule of law. [829]

Despite worldwide acclaim, De Soto's works have met stiff criticism from land practitioners, academics and activists. One scholar described De Soto's book as one whose style is certain to frustrate academics as it gives the illusion of rigorous study while providing almost no detail.[830] Woodruff criticized De Soto's ideas as devoid of evidence and experience from previous titling programs urging how these registration and titling programs have been ongoing on in developing countries in recent decades without any success citing the titling program in Peru spearheaded by De Soto himself which failed too. Woodruff urges that titling alone cannot unleash capital markets but must instead be followed by a series of reforms among others judicial reforms, restructuring

[825] De Soto (2000) 16.
[826] De Soto (2000) 62.
[827] De Soto (2000) 55.
[828] This was an independent international organization, of the United Nations Development Programme (UNDP), established in 2005 as the first global initiative focusing on the link between exclusion, poverty, and the law. It was co-chaired by De Soto and Madeleine Albright, former US Secretary of State.
[829] UNDP (2008) Volumes I and II.
[830] Woodruff, C. (2001) 1221.

capital and financial markets, reforming banking and bankruptcy regulations etc.[831] Otto compared De Soto's ideas to a legal engineering that cannot work in developing economies because of corruption, legal uncertainties, weak legal and administrative institutions and the fact that people prefer their informal settings due to a variety of factors ranging from social, economic and political reasons.[832] The formalisation and legalisation of informal assets may therefore not lead to increased access and use of formal credit. F. von Benda-Beckmann urges that De Soto's ideas were completely devoid and ignorant of local and social settings of various communities that have seen land registration and titling programs fail.[833] Another author has compared De Soto's ideas to the post-colonial policies of integration, modernisation, liberalisation and unification which did not fare any better and completely failed.[834]

Intrigued by De Soto's works, a number of country and case studies have been carried out to determine the extent to which land registration programs have contributed to land tenure security and broad economic advantages like easy access to credit. A study in the South Nyanza District of Western Kenya concluded that there is indeed no empirical link between land titling and access to credit. The study revealed that seven years after 896 titles had been issued, only 3 percent of the title holders had used their titles to obtain credit. [835] Another study in the Embu District of Eastern Kenya showed that only 15 percent of people holding titled land had used the land titles for collateral within 25 years of obtaining the title.[836]

Another study attempted to examine the influence of women's ownership of land on inclusion into the financial markets. The study found a significant relationship between land ownership and access to formal and informal credit.[837] Women will most likely fail to get credit when they do not own land. The study found however, that women who own land alone tended to formally open accounts and make savings but were likely to be deprived of formal or informal access to credit.[838] Women owning land alone faced more credibility issues when applying for credit than in cases

[831] Woodruff, C. (2001) 1223.
[832] Otto, Jan. (2009) 178.
[833] F. von Benda-Beckmann (2003) 187-191.
[834] Otto, Jan. (2009) 179.
[835] Musembi, Celestine. (2007) 1457-1478.
[836] Shipton (1989) 24.
[837] Balasubramanian et al. (2019) 51-69.
[838] Balasubramanian et al. (2019) 64.

where women owned the land jointly with a family member. Thus, loan applications by women were considered in a more positive way if backed by a family member, especially if that family member was a man.[839] However, it is also worth noting that policies aimed at increased access to finance may also have a disproportionate effect on women. History shows that a household's indebtedness places a big burden on women. Evidence from the USA shows that women borrowers suffer disproportionately from predatory and unfair lending practices.[840]

Thus while land reforms, for instance land registrations aimed at increasing women's security of tenure come with many advantages, for instance, the easy transferability of land through a sale and being able to transfer the proceeds from agricultural to non-agricultural activities, thereby increasing investment incentives, there are a lot of imperfections in the credit markets in developing countries that have the potential to limit the expansion of credit to poor farmers in rural areas, many of who are women. These imperfections include politically or socially motivated restrictions on the ability of lenders to foreclose readily and dispose of the collateral.[841] It may thus be unrealistic to expect large-scale credit-related benefits from the land related reforms aimed at promoting land rights. There is also the fact that farming in rural areas is prone to many risks, such as unpredictable weather patterns and other natural phenomena. This hinders banks from lending to these rural farmers, many of whom are women, even when using registered land. This is because any bad weather that destroys crops means that many farmers will not be able to pay back their loans. This reduces the value of land as collateral; the ability to use land as collateral for credit may thus be limited to large land owners.[842] That is why some scholars have vehemently urged that the link between land formulation and commercial credit is exaggerated urging that there is little evidence that land formalization has a likelihood of increasing appetite for credit.

Other scholars like D. Hunt argue that agricultural expansion has taken place even when people had no title or credit but purely through self –financing and microcredit.[843] Hunt argues that there is a variety of reasons why land registration programs may not translate into increased access to

[839] Balasubramanian et al. (2019) 57.
[840] Dyal-Chand (2007) 15.
[841] Deininger et al. (2009) 246.
[842] Deininger et al. (2009) 246.
[843] Hunt (2004) 173.

credit ranging from institutionalized biases by commercial lenders and view of the lender/ commercial banks on small agricultural borrowers and the fact that having a title could not change that perception.[844] He also observed that people were aware of the risks associated with commercial loans and were more attracted to micro credit than commercial loans. Hunt further expounded on this view urging that agricultural expansion has been happening in Uganda without commercial credit or title.[845] This was also seen another study in Paraguay on the impact of property rights on credit supply indicated that land titling may only have a credit supply function to large land holders. Farmers owning at least a minimum of 15 hectares of land were the ones benefitting from land tenure reforms that included land titling, implying that small rural income householders, many of whom were women, at best experienced a muted set of benefits from land reforms.[846]

A study in China on financial inclusion and the effect of vulnerable and poor farmers having land title[847] expounds on this view. The study found that land collateral was a favorite of financial institutions in developing countries, because it showed the liquidity and credit-worthiness of the applicant.[848] However, the same study showed that, although land title was a favorite collateral for credit from formal financial institutions, and made poor titled farmers ask for more loans than non-titled farmers, it did not make formal financial institutions give more credit to titled poor farmers. Instead, more credit went to titled non-poor farmers.[849] Thus, although land titling has the effect of increasing financial inclusion for some farmers, barriers to obtaining credit by poor farmers, most of whom are women, are not necessarily solved by having a land title. It should, however, be emphasized that research showing that the muted benefits of land titling on financial inclusion should not be an argument against land titling, but rather a suggestion that land reform policies should be carefully studied and sequenced, with prior or simultaneous attention to credit market reforms.[850]

[844] Hunt (2004) 59.
[845] Hunt (2004) 58.
[846] Carter & Olinto (2003) 173–186.
[847] Jiang et al (2020) 257-273.
[848] Jiang et al (2020) 258.
[849] Jiang et al (2020) 264.
[850] Carter & Olinto (2003) 185.

A study[851] in Peru attempted to analyse lenders' responses to the grant of formal ownership rights, in which more than 1.2 million urban households were granted property rights as a result of the government nation-wide titling program. The study found more lending to the title owners through public sector banks than through the private sector banks. This was partly due the interest on loans in the public sector banks being regulated by government.[852] In the private sector banks, titling had no effect on the interest rate, and the programme only had the effect of increasing the value of the property but never increased the fractions of the loans accessed using the titled collateral.[853] This was partly explained by the high transactional costs associated with processing collateral, verification, resale and foreclosure, and these costs were higher than the average size of the requested loans. There was also an issue of political interference when it comes to foreclosures, very common in developing economies, coupled with mistrust among the lenders on the validity of documents presented.[854]

The upshot of these studies is that land tenure reforms, which include land titling and secure tenure rights for women, aimed at increasing women's land rights, may not necessarily translate into increased financial access by women. A recent 2022 study[855] in the Eastern Indian State of Odisha on the effect of land titling for slum dwellers completely debunks De Soto's ideas. The State of Odisha under the Odisha Land Rights to Slum-Dwellers Act 2017 (OLRSD) was tasked with implementing a state wide land titling program among the slum dwellers to improve their land tenure security. Every landless person occupying a slum was to receive a 'limited rights land title' which could be passed on by inheritance or used to obtain a facility in the bank but could not be sold. The study found that the land titling program had indeed improved housing conditions in the households but this was due to slum upgrading programs of the state.[856] The study found further that the titles created some confidence among the self-help groups, private lenders and relatives to lend to the title holders and loans could be helpful in as far as they were granted at low interest.[857] However there was little or direct correlation between the titling program and access to formal

[851] Field et al (2011) 17.
[852] Field, Erica et al (2011) 23.
[853] Field, Erica et al (2011) 5.
[854] Field, Erica et al (2011) 3.
[855] Shobha Rao P et al (2022) 349-367.
[856] Shobha Rao P et al (2022) 356.
[857] Shobha Rao P et al. (2022) 356.

credit. Despite receiving the titles, the study found that banks were not willing to serve the title holders. This was because of the banks' perceptions that viewed the issued titles as low value to qualify as collateral.[858] There was also the banks' perception that having title without proof of formal employment or stable income kept the residents in the high risk category of borrowers. The banks viewed the titles as those that could not be foreclosed and even if they were to foreclose, this would create more vulnerability to the poor by losing the stability that having a house provides.[859] With no prospects getting of loans from the banks, the poorer households were forced to obtain loans from relatives, friends and private lenders sometimes at exorbitant and exploitative interest rates exposing them to uncertainties and vulnerabilities.

Adding to the global empirical evidence, the study adds to the growing research that land titling does not unlock the dead capital of the poor as claimed by De Soto. De Soto's assumption that titling would automatically and seamlessly unlock credit from commercial banks was wrong. Instead, the case study in the Indian State of Odisha adds to growing evidence that titling may instead create more vulnerability and over-indebtedness when accessing commercial/ formal credit.

Some authors have compared international efforts to promote property and land registration and formalization to the subprime crisis in the US that led to the financial crisis. Manji demonstrates this by showing how the home ownership model, where women, the poor and the vulnerable were encouraged to obtain debt to acquire homes was at the heart of the subprime crisis in the US. This home ownership model was motivated by ideas of social and financial inclusion.[860] This home ownership and property formalization model did not lead to better welfare outcomes for the poor and vulnerable in the US and it is doubtable whether it can lead to the opposite in the third world. Thus efforts to lead the same model to the third world are bound to fail. History shows that it is the poor and vulnerable mostly women who suffered the worst effects of individual debt during the financial crisis in the US.[861] Thus development efforts of property registration as a means of encouraging the poor to obtain credit will place the poor under great debt burden and this may

[858] Shobha Rao P "et al." (2022) 357.
[859] Shobha Rao P "et al." (2022) 357.
[860] Manji, A. (2010). 1001.
[861] Dyal-Chand, Rashmi (2007) 15.

aggravate poverty among the poor particularly women similarly to what was experienced during the American subprime crisis. The evidence of wide spread foreclosure particularly among the vulnerable and women during the subprime crisis could serve as warning of the risks associated with placing individual debt burdens on the vulnerable. It is also worth-noting that using the evidence from the United States where women as borrowers faced very disproportionately lending practices that were unfair and predatory, women in the third world suffer even worse borrowing terms because they are considered a more risky group due to their lack of credit histories and the fact that they are more involved in the informal sectors.[862] They will therefore get loans on more unfavourable terms as men.

4.6 Conclusion

This chapter has given an overview of the legal framework on financial access and inclusion in Uganda. The World Bank research reports indicate that a well-functioning financial system is vital for a country's economic development and therefore a country must re-emphasise the access to finance dimension which should be at the core of the economic development agenda.[863] Access to finance therefore has a link to the economic development of the country, coupled with poverty alleviation. Access to credit by the poor, broadening financial inclusion, reduces income inequalities.[864] Some research indicates secure access to land and property as one component of increasing financial inclusion. This chapter therefore reviewed literature on whether secure land rights for women would translate into their increased access to finance. In many discussions on financial inclusion, insecure property and land rights are seen as significant barriers to financial inclusion. Other reports give secure property rights as a pre-condition for economic development as these properties, in this case land, can be used by the poor and by women to access credit by using them as collateral. This credit can be used to make investments which may led to poverty reduction.[865] Land collateral is considered a tangible asset by financial institutions because, in most cases, it maintains value and is immobile. A secure land right may signify liquidity and the credit-worthiness of a person.[866]Land therefore is not just for providing livelihood and shelter, but can

[862] Manj, A. (2010) 1002.
[863] World Bank (2008) 10.
[864] Cammack (2001) 193.
[865] Trebilcock & Davis (2009) 28.
[866] Wang, et al. (2018) 281-290.

also be transformed from a ‘dead asset’ to an economically viable asset by being used to access credit. On the other hand, there is also growing literature showing that land reforms guaranteeing secure land tenure rights to women may not necessarily increase women’s financial access. The failure of De Soto’s assumptions demonstrates that there is need for new arrangements or strategies between banks, governments and the poor/ women that would facilitate access to credit based on the poor/ women’s capacity to pay back while leaving their collateral/ property safe.

Chapter 5:
A Comparative Review of the Laws on Women's Land Rights in East Africa

5.1 Introduction

This chapter gives an overview of the legal framework on women's land rights in the East African region.[867] Emphasis is placed on women's land rights in Kenya and Tanzania.[868] The overview of the legal framework focuses on women's land rights under the respective national constitutions and statutory laws. Women's land rights in marriage, inheritance and succession in the respective countries are part of the review.

Land rights in East African countries, just as in most African countries, were forged through historical transitions. In pre-colonial Tanzania, land was held communally with elders, chiefs and herdsmen holding rights to land in trust for the greater community, and with each tribe (approximately 120) having different land tenure arrangements for its members based on their cultures and traditions.[869] Following the colonisation of Tanzania by the Germans (1884-1916), the Germans declared all land crown land vested in the empire[870] except the land that was documented and had ownership claimed by private individuals, chiefs and native communities. The German colonialists converted the land into crown land through a series of Decrees. The Germans first declared all land ownerless unless private ownership was proved through documentary evidence.[871] Freehold grants over the 'ownerless' land were granted to mostly commercial foreign settlers, and through this, they ended up alienating almost 1,300,000 acres of the country's most fertile land.[872]

[867] Traditionally, the East African Region was composed of Uganda, Kenya and Tanzania. The Horn of Africa, on the other hand, was composed of Somalia, Djibouti, Eritrea and Ethiopia.
[868] Land tenure reforms in Kenya, as in Uganda and Tanzania, can be traced back to the 1895 Berlin Conference. Uganda, Kenya and Tanzania have many things in common, not only having been British colonies but enjoying close links as neighbours and original members of the East African Community.
[869] Tanzania National Land Use Planning Commission (NLUPC) (2005) 1.
[870] Chidzero (1961) 114.
[871] Okoth-Ogendo (1969) 62.
[872] Tanzania National Land Use Planning Commission (NLUPC) (2005) 4.

With the defeat of Germany by the allied forces in World War 1, Britain assumed trust powers over Tanzania but this came with little mandate over land, as the League of Nations mandate under which Britain assumed control of Tanzania obliged the new occupiers to protect the land rights of the indigenous inhabitants.[873] Because of this requirement, Britain changed tactics and declared all land in Tanzania occupied or unoccupied public land, vested in the Governor in trust for the native people with the British recognising rights of occupancy which could be granted (statutory) or deemed (title or use of this land belonged to a native community in accordance with native customs and norms).[874] With Tanzania attaining Independence in 1960, then President Julius Nyerere introduced a new legal system based on African Socialism, otherwise known as 'Ujamaa' or 'Unity'.[875] Under Ujamaa, all land vested in the government (President) on behalf of the people, customary land rights and statutory rights were retained, but the customary land rights were transferred from the chiefs, elders and herdsmen to elected village councils.[876] It has been noted that this transfer of customary land rights to elected village councils enabled women to gain improved access and security over land,[877] notwithstanding the fact that the Ujamaa approach came up with new land challenges and disputes that necessitated a new approach to land. In 1991, Al Hassan Mwinyi, then Tanzania president, instituted a Commission of Inquiry on Land, which, after extensive consultations, produced the 'The Shivji Report 1993'.[878] This Report has since formed the basis of land reforms in Tanzania, embodied in the 1995 Tanzania National Land Policy, and later codified in the Land Act[879] and the Village Land Act 1999.[880] These legislations contain the core land tenure legislative framework in Tanzania with provisions on women's land rights as discussed later in this chapter.

Land tenure in pre-colonial Kenya can also be described as communal but scholars writing on pre-colonial land tenure in Africa find it difficult to generalise or identify a particular system that existed.[881] What is obvious, though, is that different communities had different land management

[873] Andrew Coulson (2013) 126-132.
[874] Okoth-Ogendo (1969) 65.
[875] USAID (2011) 1-2.
[876] Ingunn Ikdahl "et al." (2005) 36.
[877] Ingunn Ikdahl "et al." (2005) 37.
[878] Marjolein Benschop (2002) 106.
[879] The Land Act, Ch. 113.
[880] The Village Land Act, Ch. 114.
[881] Kibwana (1990) 25.

systems in accordance with their traditions and norms.[882] What is not in doubt is that the customary land tenure somehow protected and safeguarded women's user rights over land for agricultural production until colonialism, with its so-called modern notions of individual ownership of land, replaced the traditional/communal arrangements. Land tenure reforms in Kenya, like in Uganda and Tanzania are traced back to the 1895 Berlin Conference that declared Kenya a British Protectorate. From then on, what followed was a series of proclamations and ordinances alienating large tracts of land from the indigenous people.[883]

First was the 1897 Proclamation, an ambiguous proclamation declaring all 'waste and unoccupied land' in Kenya as Crown Land, hence vested in the imperial power.[884] On the advice of the Law Officers of the Crown, that ambiguity was removed and all land in Kenya was declared crown land on the argument that once Kenya was declared a protectorate, all land was assumed to the imperial power on assumption of jurisdiction.[885] With this, the imperialists started issuing out freeholds, transforming Kenya into a territory of large individual private estate owners. This was effected through a series of ordinances.

First issued was the 1901 East African (Lands) Ordinance-In-Council, which vested all crown land in the Commissioner and Council-General in trust for Her Majesty.[886] Under this Ordinance, the Commissioner could grant or make leases on crown land on any terms as he or she thought was reasonable subject to the instructions of the Secretary of States.[887] This Ordinance paved a way for European settlement in Kenya, with Europeans being granted large chunks of land for agriculture.[888] Next was the 1908 Crown Land Ordinance, which gave powers to the Commissioner to grant leases of 99 years to the European settlers. The Crown Land Ordinance 1915 empowered the Commissioner to carve out and reserve any crown land which in his opinion was required for use by the colony.[889] With this Ordinance, the complete disinheritance of land from the Kenyans

[882] Davison J. (1987) 5.
[883] Wanjala & Musyimi (1989) 16.
[884] Okoth-Ogendo (1999) 3
[885] Okoth-Ogendo (1991) 16.
[886] East African (Lands) Ordinance- in-Council (1901) s1.
[887] East African (Lands) Ordinance- in-Council (1901) s 4.
[888] Okoth-Ogendo (1999) 3.
[889] East Africa Royal Commission Report (1953-1955) 350.

by the imperialists was complete, and all other future land policies by the colonialists owe their origin and basis to this period.[890]

What followed was systematic pressure from the settlers on the colonial government demanding the imposition of English Property Law with regard to leases, mortgages and transfers.[891] Their demands resulted in the enactment of the Transfer of Property Act of India and the Registration of Titles Ordinance.[892] The settlers further demanded that all land considered likely to be suitable for their future use or occupation should be curved out and set aside exclusively for them and that Africans be grouped and settled in lands far removed from European settlements and far from any lands likely to be opened up for European settlements.[893] This alienation of land was followed by the creation of African reserves meant to provide cheap labour to the settlers' agricultural plantations, and this had far reaching consequences on the indigenous people.

The indigenous people were removed from their ancestral lands, and previously agricultural and pastoral communities. Because of this, they struggled to adopt to new ecological conditions.[894] They were affected by severe famine, and new diseases and plagues due to new conditions.[895] Secondly, due to the creation of reserves for African settlement, communities could not expand their agricultural and pastoral activities which resulted in land fragmentation, soil exhaustion and erosion, low crop yields, overstocking and diminished livestock herds, landlessness, and severe discontent among communities.[896] The discontent and resultant land disputes among communities gave the colonialists a change of heart, first by attempting to improve conditions in the African reserves to avert a major political upheaval.[897] A new landed class of Africans was created to assist in producing more, but more importantly, this individualisation would create a new middle class that would be used to defeat Kenyan nationalism, as it would act as a buffer between the settlers and the landless.[898] The colonialists realised also that the problem with African land tenure was

[890] Wanjala & Musyimi (1989) 18.
[891] Sorrenson (1968) 9.
[892] Registration of Titles Act (Cap. 281).
[893] Okoth-Ogendo (1976) 133.
[894] Journal of African Administration (1956) para 19. Is this an article in the journal?
[895] Okoth-Ogendo (1979) 150.
[896] Okoth-Ogendo (1979) 151.
[897] Mwaniki (1975) 10.
[898] Kibwana (1970) 237.

communalism, and the solution in the eyes of the colonialists would be individualisation of land tenure.[899] This individual private land-tenure system was to be relentlessly pursued by the colonial government throughout the colonial period. This individualism obviously had an effect on women's land rights in contrast to the rights previously enjoyed under the communal customary land tenure.

5.2 Analysis of women's land rights in Tanzania

The Constitution of Tanzania and other written laws recognize women's equal rights to land. The laws covering women's land rights are the 1995 Tanzania National Land Policy; the 1999 Land Act; the 1967 Land Acquisition Act; the 1971 Law of Marriage Act; the 1999 Village Land Act; and the Mortgage Financing (Special Provisions) Act of 2008 (amending the Land Act of 1999 to require additional safeguards for spouses in the mortgage context). This was echoed by the court. In *The Board of Trustees of the Free Pentecostal Church of Tz v Asha Seleman Chambanda & Anor,*[900] the High Court of Tanzania stated that

> [I]n our jurisdiction, the laws pertaining to land matters are many including but not limited to; Constitution of United Republic of Tanzania (Article 24) which deals with right to property and proper compensation in case of acquisition; The Land Act; The Village Land Act; The Land Acquisition Act; and customary law as recognized under section 180(1) of Land Act and section 20(1) of Village Land Act.[901]

Tanzania has ratified without reservations a raft of international instruments/conventions that uphold land rights for women and girls, to wit: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights; the CEDAW; the Convention on the Rights of the Child (CRC); the African Charter on Human and Peoples' Rights; the African Charter on the Rights and Welfare of the Child; and the Protocol to

[899] Swynnerton Plan (1954) 13.
[900] *In the Board of Trustees of the Free Pentecostal Church of Tz v Asha Seleman Chambanda and Another* (Land Appeal 19 of 2019) [2020] TZHC 4637 (27 November 2020);
[901] *In the Board of Trustees of the Free Pentecostal Church of Tz v Asha Seleman Chambanda and Another* (2020) 15.

the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). The provisions in the respective international instruments on women's land rights are discussed in chapter 2.

5.2.1 Women's land rights under the 1977 Constitution of Tanzania

The 1977 Constitution of the United Republic of Tanzania as amended guarantees the equal right to own property by every person which shall be protected in accordance with the law and it shall be unlawful for one to be deprived of his or her property for nationalization or other purpose without fair and adequate compensation.[902] The Constitution explicitly guarantees equality of everyone before the law, sex-based discrimination is prohibited, and any law that is discriminatory in nature is null and void.[903] As noted already, legal reforms on the promotion of women's land rights in East Africa and several African countries quite often meet resistance from the deeply rooted African cultures and traditions, and Tanzania is no exception. The Tanzania Constitution has no explicit direction on the conflict between customary laws and women's land rights. This is covered in detail in the Village Land Act that is discussed later in this Chapter Women's land rights under the Land Act (1999).

Under the 1999 Land Act, all land in Tanzania is public and vested in the President in trust for all the citizens of Tanzania.[904] The Commissioner of Lands under the powers vested in him/her by the President can grant rights of occupancy on land for a period not exceeding 99 years. Land is divided into: (i) general land (this is directly controlled by the state and includes urban land; (ii) village land (this is controlled by the villages); and (iii) reserved land (this is designated for national parks, game reserves, conservation areas, and public utilities).[905] In part 11 of the Act, entitled 'Fundamental Principles of Land Policy', a number of principles are laid down to safeguard women's land rights including the right to equal distribution of land and access to land.[906] All citizens are required to participate in decision-making on all matters concerning the occupation and use of their land,[907] and to ensure that all adult women have the same rights and

[902] Constitution of the United Republic of Tanzania (1977) article 24(1) & (2).
[903] Constitution of the United Republic of Tanzania (1977) article 13.
[904] Land Act (1999) s 3(1) (a).
[905] Land Act (1999) s 4(4).
[906] Land Act (1999) s 3(1) (c).
[907] Land Act (1999) s 3(1) (h) i.

restrictions as men when acquiring, using, holding and dealing with land, among other things.[908] With respect to any other law that is inconsistent or in conflict with the Land Act on matters of land law, the Land Act prevails.[909] Women's land rights under the Village Land Act (1999).

The Village Land Act regulates village land, which includes communal village land, all land used or occupied by a family, individual or group of persons under customary law and all that land allocated for individual or communal occupation by the village council.[910] Management of village land is the responsibility of the village council, as a trustee managing property on behalf of the beneficiaries,[911] but in the allocation or grant of customary right of occupancy on village land, the village council shall seek prior consent of the village assembly.[912]

In order to uphold and promote women's land rights, the Village Land Act upholds customs, practices and traditions in all matters concerning land held under customary law, but all such customary rules shall be null and void to the extent to which they deny children, women and persons with disability lawful access, ownership, use or occupation of customary land.[913] The Act further permits any group of persons, family unit and any individual recognized as such under customary law to apply for a customary right of occupancy on village land from the village council, and so may any divorcee having left his or her spouse at least two years prior and who was a villager prior to the marriage.[914] This provision touches on women's land rights. Further, an application for a customary right of occupancy on village land shall, if made by a family unit, be signed by at least two persons from that family unit.[915] The assumption here is that when the application is from a family, both spouses must sign. All applications for a customary right of occupancy on village land shall be treated equally regardless of the gender of the applicant and all discriminatory practices or actions against women applying for a certificate of customary right of occupancy shall be forbidden.[916] The law further upholds women's land rights by ensuring that the Village Adjudication Committee treats women the same as men in all applications for use,

[908] Land Act (1999) s 3(2.)
[909] Land Act (1999) s 181.
[910] Village Land Act (1999) s 7(1).
[911] Village Land Act (1999) s 8(1).
[912] Village Land Act (1999) s 8(5).
[913] Village Land Act (1999) s 20(2).
[914] Village Land Act (1999) s 22(1).
[915] Village Land Act (1999) s 22(3) (b) (ii).
[916] Village Land Act (1999) s 23(2) (c).

occupation or interest in land.[917] Moreover, the Act prohibits the village council from allowing an assignment of the right of occupancy if it interferes with any woman's rights to occupy the said land under the customary right of occupancy.[918] In granting a derivative right over village land, the village council must ensure that the special needs of the women living on the village land are and will continue to be adequately met.[919] Moreover, where there is a breach of right of occupancy on village land, the village council may temporarily assign the right of occupancy to the spouse who lives and works on the land.[920]

The Village Land Act has also some provisions safeguarding women's land rights on customary land. In cases where a spouse occupies land under the certificate of customary right of occupancy and wishes to surrender his or her right or wishes to abandon the property, the commissioner of lands shall not accept that surrender if that surrender has been designed to defeat the other spouse's right to share or obtain part of the land. In cases of village land, any attempts to surrender customary rights of occupancy that would harm or deprive the spouse occupying the land is void[921] and spouses must consent to any surrender[922] and where it has been surrendered, the village council must ensure that the other spouse has the first option before it is re-granted by the village council.[923] Where someone with a customary right of occupancy abandons or deserts the land for at least five years or fails to pay rent for a minimum of two years or has left the country without a responsible steward for the land and the village council was never notified, that land may be declared abandoned by the village council, but only if there is no spouse or dependents using the land.[924] Looking at the above provisions, one would assume that Tanzania has a very strong legal framework on women's land rights but, as will be seen later, the practice is different. In matters like succession and inheritance, there still exist discriminatory and conflicting laws that lack clarity and because of this, there is still a strong reliance on customs and traditions that tend to harm women's land rights.[925] This was indeed observed by the court *In the Board of Trustees of the Free*

[917] Village Land Act (1999) s 57(2).
[918] Village Land Act (1999) s 30(4) (b).
[919] Village Land Act (1999) s 33(1) (d).
[920] Village Land Act (1999) s 43(9).
[921] Village Land Act (1999) s 35(2).
[922] Village Land Act (1999) s 35(7).
[923] Village Land Act (1999) s 36.
[924] Village Land Act (1999) s 45.
[925] Geo. J. Gender (2006) 604.

Pentecostal Church of Tz v Asha Seleman Chambanda and Another, where the learned Judge stated, 'land has become a parable that is profoundly intertwined with customary law and legislative laws. Due to its dual existence, land has resulted into endless conflicts not only between individuals, but also between nations'.[926]

5.2.2 Women's land rights in marriage

Marriages in Tanzania are regulated by the 1971 Law of Marriage Act, which applies to all religious, civil and customary marriages.[927] For marriage to be valid, there must be free consent of the parties, it being a voluntary union of man and woman[928] of minimum age, 18 years for men and 15 for girls, but the court can at its discretion permit marriage at 14 years.[929] Both monogamous and polygamous marriages are recognized in Tanzania.[930] The Act has an interesting provision in the advancement of women's rights in that, where a man and woman have lived together for two years or more in such circumstances as to have acquired a reputation of wife and husband, there is a rebuttable presumption that they were married.[931] Cohabitation therefore of two years or more creates a rebuttable presumption of marriage. In *Elizabeth Mtawa v Hassan Mfaume Risasi,*[932] the appellant had two children with the deceased and they had lived together for almost 9 years before his death. At his death, the family of the deceased wanted to distribute the estate in accordance with Islamic law with the intention of denying her a share of the estate. On appeal, the High Court of Tanzania held that the appellant and deceased's relationship fell under a presumption of marriage and through her contribution through domestic work and welfare of the family entitled her to a share of the estate. The deceased's house was divided equally between the appellant and her children.

Married women have the same rights as men to acquire, hold or dispose of property, whether movable or immovable,[933] and the property and other assets that a woman has acquired

[926] *In the Board of Trustees of the Free Pentecostal Church of Tz v Asha Seleman Chambanda and Another* (2020) 3.
[927] Law of Marriage Act (1971) s 10 & 25.
[928] Law of Marriage Act (1971) s 9(1).
[929] Law of Marriage Act (1971) s 13(1) & (2).
[930] Law of Marriage Act (1971) s 10(a) & (b).
[931] Law of Marriage Act (1971) s 160(1).
[932] *Elizabeth Mtawa v Hassan Mfaume Risasi*; In the High Court of Tanzania at Dodoma (Pc) Civil Appeal No. 12 of 2001(From the Decision of the District Court of Dodoma at Dodoma in Civil Appeal No. Of 2001.
[933] Law of Marriage Act (1971) s 56.

individually belong to her in person.[934] In cases of property acquired jointly between the husband and wife, there is a rebuttable presumption that it will be shared equally if the marriage dissolves.[935] Similar to the spousal consent provisions in the Land Act of Uganda, the Law of Marriage Act of Tanzania prohibits a spouse from alienating his or her interest or estate in the matrimonial home by way of sale, gift, lease or mortgage without the prior consent of the other spouse.[936] Where one spouse goes ahead to alienate his or her interest without the consent of the other spouse, the interest or estate so acquired shall be subject to the right of the non-consenting spouse who shall continue to reside in the matrimonial home until the marriage is dissolved or a separation or maintenance order is issued by court.[937] The only exception is if the person who acquired the interest had no notice of the spouse whose consent was not sought and could not be stablished through reasonable due diligence. The spousal consent requirement is reinforced by the provisions of the Mortgage Financing (Special Provisions) Act of 2008 that requires lenders/mortgagees to take all reasonable steps to notify spouses where one spouse has applied for a mortgage in addition to the mortgagor's responsibility to provide information about his or her spouse(s), and any false information on the existence of a spouse is punishable under the law by fine or imprisonment.[938]

In *Lyidya P. Julius Swai v the Manager, International Commercial Bank (T) Ltd and Others*,[939] the applicant objected to the sale of the suit property on grounds that it was matrimonial property where spousal consent must be obtained as required by section 59(1) of the Law of Marriage Act,[940] and section 112(3) of the Land Act.[941] The court observed that in order to successfully claim such rights, the applicant ought to have proved existence of a marriage and the failure to prove existence of a marriage makes the applicant incapable of claiming any right over the suit property as a spouse.[942]

[934] Law of Marriage Act (1971) s 60.
[935] Law of Marriage Act (1971) s 114.
[936] Law of Marriage Act (1971) s 59(1).
[937] Law of Marriage Act (1971) s 59(2).
[938] Mortgage Financing (Special Provisions) Act of 2008, section 8.
[939] *Lyidya P. Julius Swai v the Manager, international Commercial Bank (T) Ltd and Others* (Misc. Land Application 834 of 2018) [2021] TZHC Land Division 714 (28 May 2021)
[940] Chapter 29 R. E. 2019.
[941] Chapter. 113 R. E. 2019.
[942] *Lyidya P. Julius Swai v the Manager, international Commercial Bank (T) Ltd and Ors* (2021) 8.

As for women married customarily, it is worth noting that, unlike in Kenya as will be seen later, there is no requirement for registration of customary marriages in Tanzania, and this leaves women at a great risk of losing land upon death of the husband, or after divorce.

It has been observed that women married customarily in Tanzania tend to have limited land rights as most of these customary marriages are patrilineal and patrilocal,[943] where women's access to land is through a male relation.

5.2.3 Women's land rights through inheritance under formal and customary law

Currently four legal regimes govern inheritance in Tanzania: these are (1) the Indian Succession Act, 1865; (2) the Hindu Wills Act, 1870; (3) Customary law; and (4) Islamic Law. Islamic law applies to persons professing the Islamic faith. Although Islamic law does not directly discriminate against women in the administration of estates, it does not provide a procedure for selecting administrators who in most African societies tend to favor men. The Hindu Wills Act applies to a small Hindu community in Tanzania. The Indian Succession Act of 1865 provides for inheritance in Tanzania of Christians and Tanzanian residents of European origin. The Act makes no distinction between male and female when a person has died intestate. The amount of land or property that a spouse can inherit depends on whether the deceased male or female has left lineal descendants.[944] *In Re: Estate of the Late John Peter Silveira and In the Matter for Grant of Probate of the Late John Peter Silveira by Francisca Haruweru Silveira and In the Matter of Caveat by Gerald Francis Silveira and Solomon John Silveira,*[945] on application for letters of probate, the court was confronted with a key question of which law would be applicable: civil law under the Indian Succession Act, 1865 or customary law? The deceased died a practising Christian although he was married to three different women. He even left a copy of his Will in the church premises. The court held that what dictates the law to be applicable to the probate and administration of the deceased's estate is rather the lifestyle and intention of the deceased during his survivorship and in

[943] Marjolein Benschop (2002) 106.
[944] The Indian Succession Act, 1865, s 26.
[945] *In the Matter for Grant of Probate of the Late John Peter Silveira by Francisca Haruweru Silveira and In the Matter of Caveat by Gerald Francis Silveira and Solomon John Silveira* [2021] TZHC 7650.

his testamentary than none. In this case, it was apparent that the deceased was a practising Christian and the civil law would take precedence over the customary law.[946]

In Tanzania, customary law applies to all Tanzanians of African descent.[947] Customary law is recognized as having a force of law, and customary inheritance law and practices shall apply to all people of African origin irrespective of their religious affiliation unless proof is furnished showing that the deceased person intended to have his estate administered and inherited in accordance with Islamic or Christian law.[948] Customary rules are therefore in most of the cases the default regime for intestate succession for people of African descent.[949] Customary law must, however, be consistent with the constitution and statutory law and not be repugnant to principles of natural justice.[950]

The Land Act provides for equality between men and women in land matters, which includes inheritance and any custom or law that discriminates against women in land matters is null and void to the extent of its inconsistency with the Land Act.[951] It has been noted that Tanzania is generally a patrilineal society that discriminatorily favors male heirs, and inheritance of property follows the male bloodline.[952] Customary inheritance law in Tanzania continues to apply even when it is in violation of statutory order.[953] It is also worth noting that quite often, the courts have also resisted the application of statutory law in favor of customary law. In the matter of *George Kumwenda v Fidelis Nyirenda*,[954] the deceased's wife wanted to inherit a house under statutory law, but the deceased brother wanted customary law to apply so that the wife could not inherit the house. The primary court invoked customary law and on appeal, the District court relied on the

[946] *In the Matter for Grant of Probate of the Late John Peter Silveira by Francisca Haruweru Silveira and In the Matter of Caveat by Gerald Francis Silveira and Solomon John Silveira* [2021] 4 &5.
[947] S.88(1) of the Probate and Administration of Estates Act, 2002 provides that an estate of a deceased person who has died intestate shall be administered in accordance with the law of the tribe which the deceased belonged to, unless proof is furnished showing the deceased intended to have the estate administered in accordance with Islamic or Christian law.
[948] Marjolein Benschop (2002) 128.
[949] Section 61(3) of the Tanzania Land Act provides that customary law shall apply to dispositions of land held under customary rights of occupancy.
[950] The Tanzania National Land Policy, 1997.
[951] Land Act (1999) s 181.
[952] Amanda Ellis et al. (2007) 53.
[953] Hunton & Williams (2004) 125, footnote 447.
[954] *George S/O Kumwenda v Fidelis Nyirenda [1981] TLR 211.*

same decision. On appeal, the High Court ordered a trial, but the court still re-emphasised that original jurisdiction in such matters rests with a Primary Court. It is the Primary Courts that have jurisdiction to entertain land matters (whether or not registered) if that inheritance falls under the application of customary or Islamic laws.

The push towards customary rules in intestate succession creates obstacles to women's land rights as it is common knowledge that inheritance under customary law tends to favour the male heir.[955] Where there is a male heir, customary rules normally prevent women from inheriting their father's or husband's lands for fear that they would be transferred to the new marriage. In fact, the Local Customary Law (Declaration) (No.4) Order, which codified customary law in Tanzania, specifically provides that inheritance in Tanzania shall follow the patrilineal side.[956] The same Order provides that women can inherit except for clan land which they can only use through their life time without selling it. The customary practices that limit women's inheritance of land to only life-time use violate women's equal right to own and acquire property individually or in association with others and to be able to dispose of it in accordance with the international human legal instruments, the Tanzanian Constitution, the Land Act and Part IV of the Law of Marriage Act, no. 5 of 1971.

The Local Customary Law (Declaration) (No.4) Order further provides that women can only inherit clan land if that clan had no male survivors. Inheritance under the Order is in three degrees, first, second and third degrees. The first degree is for the first son of the most senior wife, the second degree for other sons and the third is for the daughters. A widow under the Order has no right to inheritance if the deceased husband left relatives of his clan, and her share is catered for by her children. It is only when the deceased has left no son that the eldest daughter from the first wife can be made heir. Further, under Order 4, the widow with no children is only entitled to half of the property she acquired in the course of the marriage, but this inheritance right is only valid if she does not marry outside of the husband's family. If a widow marries a man outside the husband's family, she loses her inheritance rights. Effectively and in practice, widows who do not

[955] The Tanzania National Land Policy (1997) s 4.2.5
[956] Schedule 2, Local Customary Law (Declaration) (No. 4) Order, Government Notice (GN) 436/1963, Schedule 2, Laws on Inheritance.

marry their husband's relatives are evicted and dispossessed of their deceased husband's lands. Widow inheritance is therefore common and where the widow has refused, she is evicted from the land and her property grabbed.[957]

In *Ephraim v Pastory,*[958] the High Court of Tanzania declared customs restricting women's rights to inherit clan land as oppressive, discriminatory and unjust laws of the past, and in violation of Tanzania's international human rights obligations. In this case, Pastory, the first respondent and a woman inherited some clan land from her father by a valid will. As she grew older and started becoming senile with no-one to take care of her, she decided to sell the land to the second respondent, a non-clan member. The appellant, a nephew of the first respondent filed a suit challenging the sale on grounds that females under the Haya customary law had no power to sell clan land. The first court agreed with the appellant and declared the sale void and ordered the first respondent to refund the purchase price, stating:

> [T]hat it is not for courts to overrule customary law, that any variations in the customary law must be initiated by the very community where the custom originates and that if a custom makes a discriminatory distinction between men and women in matters of this nature, it is not for the courts to rule that such a custom is inappropriate to modern development.[959]

In effect, the ruling meant that women under the Haya clan could inherit clan land but could not sell it in their lifetime. This was different from men who could inherit and even sell without the permission of clan members. The matter was eventually referred to the Tanzania High Court for interpretation on the constitutionality of a discriminatory customary practice on women's inheritance of clan land in light of the provisions contained in the Tanzanian Bill of Rights and the African Charter on Human and People's Rights, also ratified by Tanzania, which both prohibited discrimination against women. The court was very clear that a custom that bars daughters from inheriting clan land and sometimes their father's estate has outlived its usefulness. That the age of

[957] Tamar Ezer (2006) 610-611.
[958] *Ephrahim v Pastory* (2001) AHRLR 236 (TzHC (1990); High Court of Tanzania at Mwanza, 22 February 1990 (Civil Appeal No. 70/1989).
[959] *Ephrahim v Pastory* (2001) 2, para. 13.

discrimination based on sex is long gone and the world is now in the full stage of equality of all human beings irrespective of their sex, race, creed and colour.[960] The court observed that Tanzania had ratified the African Charter on Human and Peoples' Rights, CEDAW, and the International Covenant on Civil and Political Rights, which all prohibit discrimination based on sex. That the principles enshrined in the said documents are a standard below which any civilised nation would be ashamed to fall and that the challenged customary law flies in the face of the standards in Tanzania's Bill of Rights and the international conventions to which Tanzania is signatory. The High Court's ruling in effect rendered the provisions of the Local Customary Law (Declaration) Order that prohibited women from inheriting and selling clan unconstitutional; but unfortunately, the Order has neither been repealed nor amended.

The decision in *Ephraim v Pastory* has been followed by recent case law that shows progressiveness in the advancement of women's land rights even under customary law. In *Rahel Simon & others v Solomon Simon,*[961] the appellants, all sisters, brought an appeal against the decision of the Ward Tribunal for recovery of land from the respondent on grounds that the said land had been bequeathed to them through oral Will by their late father when he was sick in hospital. The appeal was dismissed for being time-barred. The claim was instituted 18 years after the death of their father. This is contrary to Rule 2 of The Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules that requires that such claims under customary law be instituted within 12 years of the date when the claim arose, the claim having arisen in 1997 when their father passed on.[962] Although this suit was dismissed for being time-barred, it appears that the appellants' claim could have been entertained based on customary law had they instituted the suit within the time period allowed under the Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules. In *Amos Mduzi v Christina Faustine,*[963] the parties had been living together as man and wife. On a petition for divorce, the lower court concluded that the parties had not been married, were only living in a concubine relationship, and there was no marriage to be declared irretrievably broken down. The court proceeded to make orders for the division of the assets jointly acquired in the relationship. On appeal, the court was satisfied with the formula

[960] *Ephrahim v Pastory* (2001) 4, para. 8.
[961] *Rahel Simon & others v Solomon Simon* (Misc. Land Appeal 31 of 2017) [2018] TZHC 2205 (17 August 2018).
[962] *Rahel Simon & others v Solomon Simon* (2018) 9.
[963] *Amos Mduzi v Christina Faustine (PC Matrimonial Appeal 6 of 2016) [2019] TZHC 2107 (25*

applied by the lower court, albeit under the wrong law, the Law of Marriage Act. The court maintained the division but declared that, although the formula was correct, the right law to use should have been the Judicature and Application of Laws[964] and the Local Customary Law (Declaration) Order.[965] This decision shows that customary law can be used in the equitable distribution of property by couples on separation or on dissolution of marriage.

Tanzania's patrilineal inheritance laws have been challenged before the CEDAW Committee. In *E.S & S.C. v. United Republic of Tanzania,*[966] a communication was submitted before the Committee on Elimination of Discrimination against Women (Committee) in 2012. The case involved two widows in Tanzania (E.S. and S.C.) who under Tanzania's customary patrilineal inheritance law, were denied the right of inheriting or administering their respective late husband's estates. They were afterwards, together with their minor children, evicted from their homes and lands by their late husbands' relatives. The communication alleged that millions of women in Tanzania experience the same violations in form of discriminatory and patrilineal customary practices that deny women equal rights to land and property, just such as the two widows. The CEDAW Committee held that Tanzania, by condoning discriminatory customary inheritance practices had violated articles 2(c), 2(f), 5(a), 13(b), 15(1), 15(2), 16(1) (c) and 16(1) (h) of CEDAW, which provide equality of everyone before the law, the equality of spouses in respect to administration, management, ownership and enjoyment of property.[967] The Committee also considered a number of its general recommendations, particularly General Recommendation No. 29, which specifically prohibits disinheritance of the surviving spouse. The Committee criticised the customary inheritance practices of Tanzania and urged for the repeal or amendment of the said customary laws on inheritance, to bring them into full compliance with CEDAW.[968] The customary practices that limit women's inheritance of land to only life-time use violate women's equal right to own and acquire property individually or in association with others, and being able to dispose it in accordance with the international human legal instruments, the Tanzanian Constitution, the Land Act and Part IV of the Law of Marriage Act, no. 5 of 1971. Quite often, women will lose

[964] Chapter 358 R.E.2002.
[965] General Notice No.279 of 1963, 1st Schedule, sections 94 and 95.
[966] *E.S & S.C. v United Republic of Tanzania, CEDAW/C/60/D/48/2013 Communication No. 48/2013.*
[967] *E.S & S.C. v United Republic of Tanzania* (2013) para 7.6.
[968] *E.S & S.C. v. United Republic of Tanzania* (2013) para 9(ii).

rights to customary land upon the death of the father or husband as the customary law heavily discriminates against women; there is also rampant eviction of widows.[969]

5.2.4 Women and land administration in Tanzania

The United Republic of Tanzania, in a bid to promote women's land rights, has taken affirmative action in ensuring that women are involved in land administration. Women are involved in decision-making in land governance institutions. Women are involved in decisions to do with allocations of customary land and decisions related to the planning and use of village land.[970] In the appointment of members of the National Land Advisory Council, which is responsible for providing advice to the Minister of Lands on National Land Policy and the organizational structures of institutions involved in land matters, the Minister must ensure a fair balance of men and women when making the appointments.[971]

Affirmative action was also introduced at the District Council, Township Authority, and the Village Council.[972] A quota for women at the village council was seen as an important step in altering land allocations by the village council, which frequently was in favor of men. The seven-member village council must have at least three women.[973] The seven members of the village council are approved by the village assembly which is composed of both men and women of 18 years and above. The Village Council also assists in settling disputes on village land. Mediation at the village council is optional, and a party dissatisfied with the outcome of the mediation or who rejects the village council mediation service can appeal or seek redress in the court with appropriate jurisdiction, namely, the Ward Tribunals, the District Land and Housing Tribunals, the High Court, and the Court of Appeal.[974] It should be noted that the Ward Tribunals, and the District Land and Housing Tribunals are also comprised of a certain number of women.[975] The nine member Village

[969] Yefred Myenzi (2009) 10.
[970] Carpano (2010) 12-13.
[971] Land Act (1999) s 17(2).
[972] This was done in 2000 through the amendment of the Local Government (District Authorities) and Local Government (Urban Authorities) Acts of 1982. At the District council, women now constitute one-third of the members and at the Township Authority and Village Council, women must constitute one-fourth.
[973] Village Land Act (1999) s 60(2).
[974] Land Act (1999) s 167(1).
[975] Section 11 of the Court (Land Disputes Settlements) Act of 2002 provides that in the composition of the Ward-level Tribunal, which is 4-8 members, three of women must be women. The Ward-Level tribunal is the court of first

Adjudication Committee, responsible for adjudicating village land conflicts and promoting women's land rights, is comprised of at least four women.[976]

5.2.5 Women's land rights in the compulsory acquisition of land

The President of Tanzania under the Constitution, the Land Act (1999), and the Land Acquisition Act (1967) can compulsorily acquire land for public interest or public purposes. The Land Acquisition Act of 1967 and the Land Act of 1999 govern compulsory acquisition. The Land Acquisition Act does not have specific mention of women or spouses in the land acquisition process. It however provides that notice of compulsory acquisition must be given to all persons interested or claiming an interest in the land.[977] The inclusion of a 'valid interest' could be helpful in protecting women's land rights, as this interest could include the existing occupancy rights by a woman on the land, existing customary use like gardening, existence of a matrimonial home, and so on.

5.3 Analysis of women's land rights in Kenya

Kenya's legal framework on land, women's rights and property rights has been going through a comprehensive overhaul because of the changes introduced following the promulgation of the 2010 Constitution. New legal frameworks on women's land rights have been developed and others are in the process, to ensure that they conform to the provisions of the Constitution. Reviewed in this part on women's land rights in Kenya are the Kenya National Land Policy,[978] Kenyan Constitution 2010, the Land Act 2012,[979] the Land Registration Act 2012,[980] the National Land Commission Act 2012,[981] the Matrimonial Property Act, 2013[982] and the Marriage Act, 2014.[983] The customary practices on women's land rights in Kenya are also discussed.

instance in local land disputes. Anybody dissatisfied with the decision of the ward tribunal can appeal to the District Land and Housing Tribunal, which is composed of up to seven assessors, three of whom must be women.

[976] Village Land Act (1999) s 53(2).
[977] The Land Acquisition Act (1967) section 6.
[978] National Land Policy (Sessional Paper No. 3 of 2009).
[979] The Land Act, 2012 (No.6 of 2012).
[980] The Land Registration Act, 2012 (No. 3 of 2012).
[981] The National Land Commission Act, 2012 (No. 5 of 2012).
[982] The Matrimonial Property Act, 2013 (No. 49 of 2013).
[983] The Marriage Act, 2014 (No.4 of 2014).

It is also worth noting that general rules of international law are part of the laws of Kenya, and so is any treaty or convention that has been ratified by Kenya.[984] Kenya has ratified a number of treaties and international conventions that contain provisions on women's equal land rights: these include, the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; and the African Charter on Human and People's Rights (1981). The provisions on women's land rights in the treaties/conventions on the subject were discussed in chapter 2 of this thesis.

5.3.1 Women's land rights under the Kenyan Constitution

The Kenyan Constitution in chapter 4 has a Bill of Rights that contains several equality provisions. Equal treatment of everyone before the law is upheld. The Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.[985] Men and women shall enjoy equal treatment and equal opportunities in the political, economic, social and cultural spheres, and discrimination of any type on grounds of sex, race, pregnancy, belief, culture, religion, ethnic or social origin, and so on. is prohibited.[986] To give full effect to the realization and enjoyment of the rights guaranteed under the Constitution, the government is mandated to make legislative reforms and other affirmative action programmes and policies that redress historical imbalances and disadvantages suffered by individuals and groups of people because of past discrimination.[987] It is worth noting that historical imbalances in access to land were and are still a result of customary rules and practices in many communities in Kenya. Customary practices still regulate women's access to land in the majority of communities in Kenya. The Constitution recognizes culture as a foundation of the Nation.[988] However any customary rule or practice that is inconsistent with the provisions of the Constitution is void to the extent of its inconsistency with the Constitution.[989] This legally gives women in Kenya some protection against discriminatory customary rules and practices. In the resolution of disputes, the courts and tribunals in Kenya can employ alternative methods of dispute resolution, including traditional dispute-resolving mechanisms, as long as they are not repugnant to justice and morality,

[984] Kenya Constitution (2010) art. 2(5) & (6).
[985] Kenya Constitution (2010) art. 27(1).
[986] Kenya Constitution (2010) art. 27(4) & (5).
[987] Kenya Constitution (2010) art. 27.
[988] Kenya Constitution (2010) art. 11(1).
[989] Kenya Constitution (2010) art. 2(4).

do not contravene the Bill of Rights and are not inconsistent with the Constitution or any other written law.[990]

With specific regard to women's land rights, the Constitution guarantees everyone's right to own or acquire property individually or in association with others, and a person can only be deprived of his rights or interests in land or property after due process, and in accordance with the Constitution or any Act of Parliament.[991] The state retains the rights to regulate the use of land in the interest of public defence, security, order, public planning, and so on.[992] The Constitution provides for the equitable access of land by everyone, guarantees the security of land rights and prohibits gender discrimination by law, customs and practices concerning land.[993] The Constitution recognizes family as a natural and foundational unit of society which must be recognized and protected, and parties to a marriage shall enjoy equal rights at marriage, during marriage and at the dissolution of marriage.[994] This provision in effect gives married women equal rights to property and land as their husbands.

Land under the Constitution is categorized into three types: private, public and community land.[995] Private land is that land held under leasehold or freehold tenure or any other declared as private land by an Act of Parliament. Private land guarantees absolute and exclusive proprietorship except in cases of compulsory acquisition under sections of 107-120 of the Land Act, 2012. Community land includes community forests, grazing areas, shrines, and so on held by communities in accordance with their cultures and ethnicity. In *Fatuma Adan Dullo & 4 others v Cabinet Secretary Ministry of Lands and Physical Planning & 2 others,*[996] the court referred to article 63 of the Constitution of Kenya where community land is the land that is vested and held by communities on the basis of their ethnicity, culture or similar community of interest and includes under article 63(2):

[990] Kenya Constitution (2010) art. (159)(2) & (3).
[991] Kenya Constitution (2010) art. 40(1) (2) & (3).
[992] Kenya Constitution (2010) art. 66(1).
[993] Kenya Constitution (2010) art. 60.
[994] Kenya Constitution (2010) art. 41(1) & (3).
[995] Kenya Constitution (2010) art. 61(2).
[996] *In Fatuma Adan Dullo & 4 others v Cabinet Secretary Ministry of Lands and Physical Planning & 2 others* [2020] eKLR.

(a) all land lawfully registered in the name of group representatives under the provisions of any law; (b) land lawfully transferred to a specific community by any process of law; (c) any other land declared to be community land by an Act of Parliament; and (d) land that is (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under article 62(2).

The court observed that the definition of community land under the Constitution is broad, and a more elaborate definition of what amounts to community land and the tenure rights over community land is in the Community Land Act and the Land Adjudication Act.[997]

Public land on the other hand includes land owned or occupied by the state, minerals, lakes, government forests, rivers, other water bodies, and so on.[998] It is worth noting that the provisions of the Constitution on land and women's land rights have their foundation in the Kenya National Land Policy, 2009.

5.3.2 Women's land rights under the Land Act 2012

The Kenyan Constitution mandated the Parliament to revise, consolidate and rationalize the land laws in Kenya to conform to the provisions of the Constitution.[999] The Land Act, 2012 was enacted to provide a comprehensive legal framework on land use, management and governance in Kenya based on the principles established in the National Land Policy and the Constitution. The Land Act reiterates the guiding principles enumerated in the Constitution on land use and management being, equitable access to land by everyone, prohibition of discrimination in land use, and access to and security of land rights among others.[1000] In conformity with the Constitution, the Land Act categorizes land in Kenya as private, public or community land and establishes the framework for

[997] *Fatuma Adan Dullo & 4 others v Cabinet Secretary Ministry of Lands and Physical Planning & 2 others* (2020) 7.
[998] Kenya Constitution (2010) arts. 62, 63 & 64.
[999] Kenya Constitution (2010) art. 68.
[1000] Land Act (2012), s 4(1).

the use, managing and administering private and private land.[1001] Customary rights are recognized as long as they are consistent with the Constitution and there should be non-discrimination in the use and access of land under the recognized tenure systems.[1002]

5.3.3 Women's land rights in marriage and at divorce

Marriages in Kenya are governed by the Marriage Act.[1003] The Act recognizes Civil, Christian, Customary, Muslim and Hindu marriages.[1004] Marriage is defined as a voluntary union, whether monogamous or polygamous between a man and woman, and must be registered in accordance with the Act.[1005] The parties to the marriage must be 18 years or above.[1006] Both spouses must be present at the marriage ceremony.[1007] The legal status of unregistered marriages recognized and conducted in accordance with the Act is not clear. Unlike the Law of Marriage Act 1971 of Tanzania, which imputes a rebuttable presumption of marriage if spouses have cohabited for more than two years, the Marriage Act of Kenya has no provisions of a rebuttable presumption of marriage for cohabiting couples. Cohabitation is defined as 'an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage'.[1008] Prior to the 2014 Marriage Act, case law in Kenya pointed to a presumption of marriage in cases of long cohabitation.

In *Anna Munini & Anor v Margaret Nzambi,*[1009] John Kituu died intestate of liver cancer, leaving behind two wives, Anna Munini and Beatrice Misangi and another lady, the respondent, who was living at the deceased's homestead at the time of his death. Munini and Misangi alleged that the respondent was the deceased's maid or at most his lover, whereas the respondent alleged that she had been married to the deceased customarily. The court discovered that Munini and Musangi were the countryside wives, and the respondent was the town lady, and had cohabited with deceased for four-and-a-half years. The court observed that four-and-a-half years was a long period

[1001] Land Act (2012), s 3.
[1002] Land Act (2012), s 5(1) & (2).
[1003] The Marriage Act, No. 4 of 2014.
[1004] The Marriage Act (2014) s 6.
[1005] The Marriage Act (2014) s 3(1).
[1006] The Marriage Act (2014) s 3(4).
[1007] The Marriage Act (2014) s 11(I) (e) & (f).
[1008] The Marriage Act (2014) s 2.
[1009] *Anna Munini & anor v Margaret Nzambi (1984) eKLR.*

of cohabitation, coupled with the fact that some customary rituals for marriage had been done by deceased, although not fully concluded before his death.[1010] On the balance of probabilities, the court concluded that deceased and respondent were husband and wife in accordance with their customary law. The court in making the decision followed the precedence in *Hortensiah Wanjiku Yawe v The Public Trustee,*[1011] where the East African Court of Appeal held that long cohabitation by a man and woman gave rise to a presumption of marriage in favour of the party asserting it, and that even if certain or specific customary and ceremonial rituals had not been concluded, this would not invalidate the marriage unless there was strong and compelling evidence to rebut the presumption.

In *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another,*[1012] the Court of Appeal of Kenya stated that;

> [B]efore a presumption of marriage can arise, a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage and that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.[1013]

Recent case law in Kenya even after the enactment of the Marriage Act 2014 still points to a judicial recognition of the presumption of marriage arising from a long cohabitation. In *Hellen Omwoyo v David Ouma Gor,*[1014] the court cited with approval the decisions in *the Matter of the Estate of Isaac Gidraph Njuguna Mukururo (Deceased)*[1015] and the case of *Hottensiah Wanjiku Yaw v Public Trustee,*[1016] and the decision in *Njau & Another v Wahito,*[1017] and held that a long

[1010] *Anna Munini & anor v Margaret Nzambi (1984) 8.*
[1011] *Hortensiah Wanjiku Yawe v The Public Trustee;* Court of Appeal Civil Appeal 13 of 1976.
[1012] *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another Civil Appeal No. 313 of 2001[2009] eKLR.*
[1013] *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another (2001) 7.*
[1014] *Hellen Omwoyo v David Ouma Gor* [2017] eKLR.
[1015] *In the matter of the estate of Isaac Gidraph Njuguna Mukururo (deceased)* [2013] EKLR.
[1016] *Hottensiah Wanjiku Yawe v Public Trustee* C.A 13 of 76.
[1017] *Njau And Another v Wahito* [2008] EKLR.

cohabitation as man and wife gives rise to presumption of marriage, and only cogent evidence to the contrary could rebut such a presumption. The court held that there was enough evidence that proved that the respondent and the deceased had lived, cohabited together, had children together and conducted their affairs as husband and wife leading to a presumption of marriage.[1018] The High Court in Kenya made the a similar ruling in *M W M v W E L*[1019] by making a presumption that the parties were married under the Turkana custom by virtue of their long cohabitation, lasting 10 years,, coupled with the birth of their two children.[1020]

As noted already, the Marriage Act of Kenya recognizes customary marriages. Section 43 of the Marriage Act, 2014 allows the celebration of marriage in accordance with the customs of one or both of the intended parties to the marriage.[1021] In *Hellen Omwoyo v David Ouma Gor,*[1022] the appellant's daughter passed on having lived with the respondent for many years, with three children together. The appellant belonged to the Abaguusi tribe, whereas the respondent belonged to the Luo tribe. The appellant alleged that his daughter would be buried according to the Abaguusi culture, apparently because the respondent had never paid dowry. The respondent argued that the deceased was his wife and would be buried at his ancestral home in accordance with the Luo culture. The lower court had ruled that the couple had cohabited since 2012, with children and the deceased had openly acknowledged the respondent as her husband. The court imputed a presumption of marriage ordering the deceased to be buried in accordance with the husband's Luo customary culture. On appeal, the court re-stated the basis of application of customary law in Kenya; the court referred to article 2(4) of the Constitution of Kenya which recognises the application of customary law as long as it is consistent with the Constitution. The court cited the provisions of the Judicature Act,[1023] which acknowledge customary law as a system of marriage in Kenya and stated as follows:

> [T]he High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is

[1018] *Hellen Omwoyo V David Ouma Gor* [2017] 7.
[1019] *M W M v W E L* [2017] eKLR.
[1020] *M W M v W E L* [2017] eKLR 3.
[1021] Section 43 of the Marriage Act, No.4 of 2014.
[1022] *Hellen Omwoyo v David Ouma Gor* [2017] eKLR.
[1023] Chapter 8 of the Laws of Kenya.

> subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedures and without undue delay.[1024]

The court further referred to the provision in the Marriage Act that provides that where the custom of that community requires payment of dowry as proof of marriage, a token of payment towards the dowry is sufficient proof of customary law.[1025] In this case, the appellant had acknowledged receipt of a partial payment of the dowry.[1026] This was sufficient proof of the existence of a customary marriage, which gave the respondent's marriage to the deceased legal recognition and the deceased would therefore be buried in accordance with the husband's customs. The High Court in Kenya echoed the same principles on the application of customary law in Kenya in the case of *Wilfred Mongare Orina v Askah Mocheche Momanyi*[1027] by referring to section 2 of the Magistrates Court Act, Cap 10 on what a claim under customary law entails, and section 3(2) of the Judicature Act that states that where both parties to a claim are subject to customary law, the courts should be guided by the customary law of the parties to the extent that the same is not repugnant to justice and morality.[1028]

The land and property rights of married women are covered in the Matrimonial Property Act, 2013.[1029] Under the Act, parties intending to marry may enter into an agreement before the marriage determining each one's property rights.[1030] Matrimonial property which includes the matrimonial home(s) is considered joint property, and at divorce or at the dissolution of the marriage, it shall be divided according to their contribution to the acquisition.[1031] 'Matrimonial home' is defined as 'any property that is owned or leased by one or both spouses and occupied or utilised by the spouses as their family home, and includes any other attached property'.[1032] Under

[1024] Section 3(2) of the Judicature Act, chapter 8 of the Laws of Kenya.
[1025] Section 43(2) of the Marriage Act, No.4 of 2014.
[1026] *Hellen Omwoyo v David Ouma Gor* (2017) 6.
[1027] *Wilfred Mongare Orina v Askah Mocheche Momanyi* [2019] eKLR.
[1028] *Wilfred Mongare Orina v Askah Mocheche Momanyi* [2019] 3.
[1029] The Matrimonial Property Act, No. 49 of 2013.
[1030] The Matrimonial Property Act (2013) s 6(3).
[1031] The Matrimonial Property Act (2013) s 7.
[1032] The Matrimonial Property Act (2013) s 2.

the Act, contribution can be monetary contributions and non-monetary contributions, including management of the matrimonial home, domestic work and child care, management of family business, companionship, and farm work.[1033] Thus as long as a spouse proves contribution to the matrimonial home even when the contribution is non-monetary, he or she is entitled to a share of that property upon divorce or dissolution of the marriage. In *E M N v N M*,[1034] the parties had been married under the Kiembu customary law with 10 issues. Upon their separation, the plaintiff made a claim for half share of the matrimonial properties based on her non-monetary contribution. The defendant denied that the plaintiff made a contribution in the purchase of the properties in any way. The court in its ruling cited article 45(3) of the Constitution of Kenya that provides for equal rights at marriage, during marriage and at the dissolution of marriage. The court referred to sections 6 and 8 of the Matrimonial Property Act, 2013 that provides for the definition of matrimonial property and how matrimonial property in a polygamous marriage shall be divided respectively. The court noted the fact that the plaintiff had never been gainfully employed and neither did she make a financial contribution to the purchase of the properties in issue.[1035] The court took account of the plaintiff's contribution in her capacity as a mother and wife and the farming that she carried out which were all enormous contributions to the welfare of the family. The court assessed the plaintiff's contribution of all the properties acquired during the marriage at 45 per cent, and the husband's at 55 per cent and ordered the division accordingly.[1036] Thus a spouse acquires a beneficial interest in the property acquired before or during the marriage if he or she proves that he or she made a contribution towards the improvement of the property and his or her share will be according to the contribution made.[1037] A spouse retains exclusive ownership of property other than the matrimonial home acquired before or during the marriage in his or her name unless the other spouse proves contribution to that property. This does not apply to matrimonial property acquired during the marriage. There is a rebuttable presumption that where matrimonial property is acquired in the name of one spouse, that property is held in trust for the other spouse and where it is acquired jointly in the names of both spouses, their beneficial interests in the property are equal.[1038] These provisions are buttressed by the provisions in the Land Registration Act that create

[1033] The Matrimonial Property Act (2013) s 2.
[1034] *E M N v N M* [2018] eKLR.
[1035] *E M N v N M* [2018] 3.
[1036] *E M N v N M* [2018] 5.
[1037] The Matrimonial Property Act (2013) s 9.
[1038] The Matrimonial Property Act (2013) s 14.

a rebuttable presumption of a joint tenancy in cases of property acquired during the subsistence of the marriage and where a spouse has proved contribution.[1039]

In *M W M v W E L*,[1040] the couple had purchased a property for Ksh. 45,000/ with each raising Ksh. 10,000 towards the purchase price and the respondent's father advancing them the balance of Ksh. 25,000/. The property was registered in the sole names of the respondent. The couple established their matrimonial home on the property. The home was built using the applicant's savings and income from her shop, and the respondent's salary. The applicant proved also that she did domestic work, fetched water and cooked for workers during construction. At the dissolution of the marriage, the court referred to section 14 of the Matrimonial Property Act which makes a presumption that property acquired during marriage but registered in the name of one spouse is held in trust for the other spouse. The court took notice of the fact that the applicant not only made non-monetary contribution but also direct monetary contribution towards the purchase of the property. Taking cognizance of section 7 of the Matrimonial Property Act that provides for the division of matrimonial property at divorce or dissolution of marriage amongst the spouses in accordance with their contribution, the court ordered that the property be subdivided in equal shares.[1041]

In polygamous marriages, property acquired in the first marriage is exclusive property of the man and his first wife while that property acquired subsequent to the second marriage is property of the man and his wives, taking into account each one's contribution.[1042] Lastly, the Matrimonial Property Act has spousal consent provisions, similar to section 39 of the Land Act of Uganda. An interest or estate in matrimonial property cannot be alienated by one spouse by way of sale, mortgage, lease or gift without the consent of the other spouse, and a spouse cannot during the subsistence of the marriage be evicted from the matrimonial home except by court order.[1043]

[1039] The Land Registration Act No. 3 (2012) s 93.
[1040] *M W M v W E L* [2017] eKLR.
[1041] *M W M v W E L* [2017] eKLR.
[1042] The Matrimonial Property Act (2013) s 8.
[1043] The Matrimonial Property Act (2013) s 12.

In *M W K v S K & 5 others,*[1044] the plaintiff, a wife of the first defendant brought a claim for cancellation of the sale and transfer of land, which transfers were done by the first defendant without her consent. She alleged that the suit land was matrimonial property. The suit land had been registered in the names of the first defendant. The first defendant had inherited the land from his father but upon marriage, the plaintiff and the first defendant lived on the land for more than 10 years, but later relocated to Nairobi where they started several businesses and were able to raise enough money to build a four story property on the suit land, and acquired and developed other properties. The court held that, although the land had been there before marriage, there was uncontroverted evidence that the couple jointly invested their efforts, time and money to develop the property. The court first made reference to section 5 of the Matrimonial Property Act that provides that property acquired or inherited before marriage shall not form part of the matrimonial property. However, section 5 read together with section 9 of the Matrimonial Property Act, provided that, where a spouse makes a contribution to the improvement of such property, that spouse acquires a beneficial interest in the property equivalent to the contribution.[1045] The court concluded that the plaintiff had acquired spousal rights over the land, which are overriding interests under the Land Registration Act 2012 and the Matrimonial Property Act, for which spousal consent should have been obtained first.[1046]

5.3.4 Women's land rights through succession and inheritance

Succession and inheritance in Kenya are governed by the Law of Succession Act, 2010, except for people professing the Muslim faith who are governed by Islamic law. Succession and inheritance for non-Muslims therefore fall under the Act.[1047] Inheritance and distribution of agricultural land, crops and livestock in specified counties in section 32 of the Act shall be carried out in accordance with the customary rules of the deceased's community or tribe. The Act has provisions for both intestate and testamentary succession. The wife, wives, former wife, former wives and children, whether or not they were being maintained by the deceased immediately prior to his death, are entitled to a share of the deceased estate.[1048] Other dependents such as the deceased parents,

[1044] *M W K v S K & 5 others* [2018] eKLR.
[1045] *M W K v S K & 5 others* [2018] 9.
[1046] *M W K v S K & 5 others* [2018] 11.
[1047] The Law of Succession Act (2010) s 2(3).
[1048] The Law of Succession Act (2010) s 29.

grandparents, grandchildren, brothers, sisters, and sons must have been under the maintenance of the deceased immediately prior to his death to partake in the distribution and sharing.[1049] If the deceased is a woman, the husband is entitled to a share of the estate if he was being maintained by her immediately prior to her death.[1050] Where an intestate deceased has left behind a spouse and child/children, the spouse is entitled to household and personal effects and a life interest in the whole residue of the deceased's net intestate estate[1051] but if the surviving spouse is a widow, the life interest is determined on her re-marriage. *In re Estate of Zablon Komingoi Mateget,*[1052] the deceased, a polygamous man with three wives, died intestate. He was survived by children from the three houses, and one wife as the other two wives were also deceased. The issue before court was on the manner of distribution of the estate amongst the three houses. The court referred to section 40 of the Succession Act of Kenya that provides that, where the intestate was polygamous and married under any system of law that permits polygamy, the personal and household effects plus the net residue of the intestate shall be divided in the first instance among the houses in accordance with the number of children in the each house.[1053] Any surviving wife would be an additional unit to the number of children. Since the first and second wives were deceased, their children would take the share due to their respective houses in equal share. With respect to the surviving widow, she would be entitled to a life interest in her house's share of the estate and, upon her death, her children would take their share of the estate in equal share. The court determined the entire estate as 52.99 acres, and taking into account the units in each house, which were 23 in total, each beneficiary was entitled to 2.3 acres.[1054] Where the intestate leaves behind a spouse but had no children, the surviving spouse is entitled to: (i) the personal and household effects of the deceased absolutely; and (ii) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and (iii) a life interest in the whole of the remainder, but if the surviving spouse is a widow, the life interest expires when she remarries.[1055] A surviving spouse entitled to a life interest can only sell part of the immovable property subject to a life interest with the consent of court.[1056] Where the intestate has no spouse

[1049] The Law of Succession Act (2010) s 29.
[1050] The Law of Succession Act (2010) s 29(c).
[1051] The Law of Succession Act (2010) s 35(1).
[1052] *In re Estate of Zablon Komingoi Mateget [2018] eKLR.*
[1053] *In re Estate of Zablon Komingoi Mateget [2018] 3.*
[1054] *In re Estate of Zablon Komingoi Mateget [2018] 5.*
[1055] The Law of Succession Act (2010) s 36.
[1056] The Law of Succession Act (2010) s 37.

but a child, the net intestate estate shall devolve to the child or the children in equal shares.[1057] Note that the Act makes no distinction between girls and boys. Where the intestate had no spouse or child, the net estate shall devolve in order of priority, first to the father and if the father is dead, the mother, if dead, brothers and sisters.[1058] Lastly, if the intestate was polygamous, the net estate shall be divided among the wives households according to the number of children in each household; a widow is included in the household count meaning that a widow without a child will also get a share of the new estate.[1059]

In *Loise Selenkia v Grace Naneu Andrew & another*,[1060] the deceased was survived by two wives. The first wife had five children and the second had three children. The court held that as the deceased was polygamous, distribution of the estate would be under section 40 of the Law of Succession Act, not in equal shares but equitable distribution as per the units in each house.[1061] The first family was given ⅔ of the land, estimated at 20 acres and the second family given ⅓, estimated at 10 acres.

The formal courts have jurisdiction over customary marriages, divorces, succession and inheritance. The jurisdiction is bestowed on the Magistrate's Court if the value of the estate is less than one hundred thousand shillings, and where it is above, the High Court has the jurisdiction, with the Kadhi Courts having jurisdiction over the estates of deceased Muslims which determine disputes in accordance with Islamic law.[1062]

In resolving land disputes, the formal courts normally make reference or are guided by customary law. Customary rules and laws are recognized in Kenyan legislation, but the Constitution invalidates customary law to the extent that it is inconsistent with the Constitution.[1063] The Kenyan Constitution strongly encourages the use of local dispute-solving mechanisms consistent with the Constitution to resolve land-related disputes.[1064] Gender discrimination in law and customs related

[1057] The Law of Succession Act (2010) s 38.
[1058] The Law of Succession Act (2010) s 39.
[1059] The Law of Succession Act (2010) s 40.
[1060] *Loise Selenkia v Grace Naneu Andrew & another* [2017] eKLR.
[1061] *Loise Selenkia v Grace Naneu Andrew & another* [2017] 9.
[1062] The Law of Succession Act (2010) s 48(1) & (2).
[1063] Constitution of Kenya (2010) article 2(4).
[1064] Constitution of Kenya (2010) article 60(g).

to land is prohibited under the Constitution which means that the local dispute mechanisms and institutions must ensure that there is no gender discrimination when resolving land conflicts. The question has always been whether the formal courts in adjudicating matters involving customary law adhere to the gender equality principles as enshrined in the Constitution. One guiding principle in land use and management in the Kenyan Constitution is the elimination of gender discrimination in laws, customs and practices related to land.[1065] Prior to the 2010 Constitution, the court in Kenya referred to Kenya's ratification of the international conventions on women's land rights to overrule customary practices that denied women equal rights to land.

In *Mary Rono v. Jane Rono,*[1066] the lower court had awarded less acreage of land to the daughters of the deceased on ground that they were women who would in future marry, entitling them to property elsewhere. On appeal, the court referred to Kenya's ratification of CEDAW, the International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights and the African Charter on Human and People's Rights, and observed that although Kenya had not enacted an implementing legislation to incorporate treaty law into domestic law, the court was alive to the emerging international theory that international treaty law can be applied by domestic courts where there is no conflict with state law, even in the absence of an implementation legislation.[1067] On the basis of the non-discrimination provisions in CEDAW, the court ruled that the deceased's sons and daughters would share the estate equally, each receiving 14.4 acres of land. In the *Matter of the Estate of Lorionka Ole Ntutu (Deceased),*[1068] the deceased, Masai by tribe, had died intestate leaving behind several sons and daughters and, at the distribution of the estate, the daughters challenged the Masai customary cultures on succession that denied daughters the right to inherit the father's estate. The deceased lived in Narok District which, under section 32 of the Succession Act, was one of the counties where inheritance and distribution of agricultural land, crops and livestock would not be carried out in accordance with the provisions of the Succession Act that provided for equality, but in accordance with the customary rules of the deceased's community or tribe. The court held that even though the provisions of section 32 applied to Narok District where the deceased lived, and even if the

[1065] Constitution of Kenya (2010) article 60(1) (f).
[1066] *Mary Rono v Jane Rono*, Civil Appeal No. 66 of 2002 (Court of Appeal at Eldoret, Kenya).
[1067] *Mary Rono v Jane Rono* (2002) 7-8.
[1068] *In Re Estate of Lerionka Ole Ntutu* (Deceased) [2008] eKLR.

customary law of the Masai was to be applied to the estate, a customary law that denied daughters of the deceased a right to inherit his estate could not be applied, as it was repugnant to natural justice and morality.[1069]

Following the promulgation of the 2010 Constitution of the Republic of Kenya, the courts continue to make progressive rulings reinforcing the constitutional provisions on quality where customary law is a barrier to women's land rights. In *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir,*[1070] the High Court in Kenya overruled a customary practice that prohibited girls and daughters from inheriting their fathers land in contravention of the constitutional provisions of equality. In this case, a man died intestate leaving two sons and several daughters, among whom was the plaintiff. After separating from her husband, the plaintiff moved back to her father's land with her children. With no source of income, she tried to convince her brothers to give her at least one acre for farming to enable her to raise school fees for her children. The brothers refused and actually kept on evicting her from the land. At the distribution of the estate by elders, it was emphasised that girls under Kipsigis culture have no clans until they are married, and cannot inherit land from their parents once they are married; and so, it would amount to trespass for a daughter and her children to live on her father's land.[1071] On appeal, the court held that the Kipsigis custom that seems to suggest that daughters belong nowhere until they are married is in contravention of the constitution provisions of equality in article 27 that prohibits discrimination on the basis of race, colour, ethnic origin or sex. There was no basis either for discriminating against the children of a deceased person on the basis of their marital status. The court was also alive to section 38 of the Law of Succession Act, which provides that where an intestate has left a surviving child or children but no spouse, the net intestate estate shall devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children. The court held that the custom that bars daughters and women from inheriting their fathers land is *out of step with modern thinking and the law* and ordered that the estate be distributed equally among the children.[1072]

[1069] *In Re Estate of Lerionka Ole Ntutu* (2008) 9.
[1070] *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir [2017] eKLR.*
[1071] *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir [2017] 4.*
[1072] *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir* [2017] 4.

Available literature, however, still shows that Kenyan women rarely take disputes over their land rights to the formal courts, partly because of an expensive, complicated, costly, time consuming and lengthy legal process. The costly, lengthy and complicated legal processes involved in filing and concluding a suit in a formal court is a significant deterrent to women whose land rights have been violated. Women are also at times scared of the community response which can be negative and at times violent when they file cases in formal courts.[1073] Some communities in Kenya see it as disruptive and infuriating when a woman goes to court to enforce her land rights.[1074] Because of these perceptions and to preserve family peace and harmony, most women will instead channel disputes about their land rights through informal and local channels rather than the formal courts. These local dispute-resolving mechanisms do not have a standard process, but this normally starts with a woman filing a complaint with family elders who tend to call the disputants together for a meeting to resolve the conflict. In some societies, women cannot appear before elders, and this may result in their cases being decided in their absence. In some other communities, women will be subjected to harassment and violence simply because of filing a complaint against violations of their land rights.[1075] Because of some of these prejudices, most women are scared of filing grievances against violations of their land rights to the formal courts, neither do they file them in the local traditional dispute resolution mechanisms even when they have viable and justifiable claims.

Kenya is largely a patrilineal society,[1076] meaning that most of the succession and inheritance is passed through the male bloodline. Under these patrilineal systems, the man is traditionally the head of the household and is in charge of the use, management and allocation of family land. Women have limited say in the use of family land and a woman's ability to receive a share of the family land largely depends on her relationship with her father, husband or brothers.[1077] Women's land rights are therefore secondary, and largely derived and dependent on their relationship with the male members of the household who have the primary rights to land. At best, women may have usufruct rights on the land, but this again depends on their relationship with the men in the

[1073] Harrington (2008) 145.
[1074] Harrington (2010) 5.
[1075] Harrington (2010) 15.
[1076] Harrington (2010) 15.
[1077] Kameri-Mbote (2005) 151.

household, either as their fathers, brothers, or other powerful male members of the household.[1078] In many communities in Kenya, whenever a man dies and leaves behind only daughters, the man is treated as someone who has died without children, and his land reverts back to his father, brothers or other male members within the household.[1079] The only reliable way in which women and girls' land rights could be secured is if the parent or husband should will the land to a woman before his death, but there have also been situations where brothers or male members of the household have interfered, even where there was a will.[1080] Thus, even though the Succession Act gives a widow a life estate, her interest terminates upon her death or remarriage, and the land reverts to her sons. The Kenyan government seventh periodic report to CEDAW admits to customary law being the one area which has greatly disadvantaged women in respect of property rights and inheritance.[1081]

5.3.5 Women and land administration in Kenya

There have been progressive reforms aimed at promoting the representation of women in land institutions in Kenya. The Kenya National Land Policy 2009 recognized the fact that women were inadequately and insufficiently represented in institutions dealing with land use, policy and management in Kenya.[1082] The Land Policy directed the Kenyan government to ensure that there is proportionate representation of women in institutions dealing with land matters. The 2010 Constitution of Kenya took cognizance of this under-representation of women, and provides for the implementation of affirmative and other legislative actions and programs designed to redress any imbalances because of past discrimination.[1083] The state is also mandated to implement the principle that no more than two thirds of the members of elective or appointed bodies shall be of the same gender.[1084] This principle ensures that women are represented in institutions dealing with land.

[1078] Kameri-Mbote (2005) 151.
[1079] Harrington (2010) 146.
[1080] Harrington (2010) 8.
[1081] CEDAW/C/KEN/7, para 26.
[1082] Kenya National Land Policy (2009) at para. 223; para. 225(h)
[1083] Constitution of Kenya (2010) art 27(6).
[1084] Constitution of Kenya (2010) art 27(8).

The National Land Commission Act, 2012[1085] that established the National Land Commission in accordance with article 67 of the Constitution has gender equity emphasized and highlighted throughout the Act. The objectives of the National Land Commission, inter alia, are to manage public land of the national and country governments, investigate historical land injustices, and make recommendations on appropriate redress.[1086] The National Land Commission is composed of the chairperson and eight other members, and not more than two thirds of the members of the Commission shall be of the same gender.[1087]

Critical to this discussion is also representation of women on the Bench. Article 162(2) (b) of the Constitution mandates the establishment of the Environment and Land Court to hear and determine disputes relating to environment and land. The Land and Environment Court Act, 2011 was enacted in that regard with its jurisdiction covering, among other things, environmental planning and protection, land use and management, compulsory acquisition of land, solving disputes on private, public and community land among others.[1088] The Act provides for the reasonable and equitable access by all to its services in all counties.[1089] One of the guiding principles of the court while exercising its jurisdiction is to ensure that it upholds traditional cultural and societal principles used or applied by any community in Kenya in the management of land and environment consistent with the Constitution.[1090] But, as already observed, there are gaps between formal law and customary law and that is where women's land rights are undermined.

5.3.6 Women's land rights in the Compulsory Acquisition of Land

The Constitution and the Land Act have provisions on the compulsory acquisition of land in public interest or for a public purpose.[1091] Where land is to be compulsorily acquired, there must be full and prompt compensation, and any person with an interest or right over the land has a right to petition the court.[1092] The Constitution further makes provision for compensation of all occupants

[1085] National Land Commission Act, No. 5 of 2012.
[1086] National Land Commission Act (2009), s 5(1).
[1087] National Land Commission Act (2009), 1st Schedule, section 12.
[1088] The Land and Environment Court Act (2011) s 13.
[1089] The Land and Environment Court Act (2011) s 26(1).
[1090] The Land and Environment Court Act (2011) s 18(a) ii.
[1091] Constitution of Kenya (2010) art 40(3).
[1092] Constitution of Kenya (2010) art 40(3) b.

in good faith who may not hold title to the land.[1093] The incorporation of 'interested parties' and all 'occupants in good faith' for the purposes of compensation includes spouses. This is actually brought out clearly in the Land Act which provides that all interested parties must be given notice of the intended compulsory acquisition.[1094] The interested parties include any person whose interest appears in the land registry, the spouse of such person, as well as any person occupying that land including his or her spouse. These provisions in the Constitution and the Land Act were intended to promote spouses' interests in the land, especially the women's, so that they are catered for and considered during the compulsory acquisition of land.

5.4Conclusion

The chapter has given an overview of women's land rights in East Africa with particular focus on Kenya and Tanzania. There is noticeable judicial and legislative progress in the promotion of women's land rights. That notwithstanding, the majority of the communities in Kenya and Tanzania follow the patrilineal customary principles in marriage and inheritance. In these patrilineal communities, family and clan land is largely inheritable by men, with women acquiring land mostly through their husbands (with some difficulty). In many cases, unless the woman is appointed the administrator of the estate, access to her deceased husband's land is dependent on her relationship with the deceased's family or her sons. Although state law in both Kenya and Tanzania recognizes a woman's right to acquire, hold and dispose of land on equal terms with men, together with other spousal rights, statutory law, possibly by design, omitted the equal right to inherit land. Statutory law in both countries still recognizes customary law in inheritance. In Tanzania, the Indian succession Act, 1865, which has English Common Law gender-neutral succession, and its inheritance provisions are only applicable to Christians and persons of European origin. For the rest of the Tanzanians, there is a rebuttable presumption that customary law on inheritance applies. Thus, although there is some progressive judicial process in women's land rights, there is a remarkable lack of law reform in women's inheritance.

In Kenya, land reform followed constitutional reform, but Kenya has also remarkably failed to amend its 1972 Succession Act that contains discriminatory inheritance rights. Among other

[1093] Constitution of Kenya (2010) art 40(4).
[1094] The Land Act (2012) as amended, section 107(5).

reasons for the deliberate omission to incorporate the equal right to inherit is the political and social sensitivity attached to family land,[1095] mostly centred on the social construction that a woman will eventually be married off to her husband's family and his land, and therefore inheriting her father's land would amount to a double share. There is no doubt however that attitudes towards women's inheritance of family land are changing. The incorporation of gender equality in the 2010 Constitution of Kenya is notable, as is emerging judicial activism on women's equal inheritance rights. In Kenya, the cases of Mary *Rono v. Jane Rono,*[1096] *In the Matter of the Estate of Lorionka Ole Ntutu (Deceased),*[1097] and *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir*[1098] are a clear example of progressive judicial activism in the promotion of women's land rights. The courts have in these cases applied constitutional and international human rights provisions to overrule customary practices favouring men in land inheritance.

In Tanzania, the landmark case of *Ephrahim v Pastory*[1099] is a significant victory for women's land inheritance rights. At the same time, discrimination against women in inheritance of family land remains widespread. Legislative intervention is needed, which should involve sustained community engagement. Thus, in spite of the legal reforms across East Africa aimed at promoting and advancing women's land rights, as has been discussed, progressive legal reforms on advancement of women's rights continue to meet resistance from the deep-rooted African cultures and traditions. The requirement to comply with national laws on the advancement of women's land rights, at the same time respecting African traditions and cultures, continue to create huge implementation dilemmas. These dilemmas make the realization and enjoyment of women's land rights in East Africa challenging and difficult.

[1095] Dancer & Helen (2017) 297.
[1096] *Mary Rono v Jane Rono*, Civil Appeal No. 66 of 2002 (Court of Appeal at Eldoret, Kenya).
[1097] *In Re Estate of Lerionka Ole Ntutu* (Deceased) [2008] eKLR.
[1098] *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir* [2017] eKLR.
[1099] *Ephrahim v Pastory* (2001) AHRLR 236 (TzHC (1990).

Chapter 6:
Conclusions and Recommendations

6.1 Introduction

The thesis analysed the Ugandan policy and legal framework on women's land rights vis-à-vis the regional and international legal and policy framework, to identify the gaps, progress and the way forward. Uganda adopted Vision 2040 with a view of achieving middle income status by 2040. Vision 2040 has provisions on the promotion of gender equality and reducing inequalities. If we identify gender equality as a vital cog in the quest to achieve middle income, Uganda cannot develop and attain middle income status when there is gender inequality in access to productive resources like land. Goal 5(a) of the 2030 Agenda for Sustainable Development mandates countries to ensure that there is gender equality in ownership of land and other productive areas.[1100] Unless Uganda achieves gender equality in ownership of and access to land and other vital areas, it may be unable to meet its targets under the 2030 Sustainable Development Goals. The 2030 Agenda is meant to achieve sustainable development through the reduction of poverty and promotion of equality in all spheres of life. Uganda therefore needs policy reforms that allow inclusive and equal access and ownership of land. Equality in ownership and access of land is central to a country's growth, stability and poverty reduction. Lastly, the thesis analysed the link between women's land rights and financial inclusion.

Four objectives were framed in handling the research problem. First, there was an analysis of the regional and international legal framework on the rights of women to land. Secondly, the study examined and analysed the legal framework on the rights of women concerning access to, control over, and ownership of land in Uganda. Thirdly, the study reviewed the nexus between women's land rights and financial inclusion in Uganda. Lastly, it reviewed the proposed policy and strategic reforms for advancement of the rights of women to land in Uganda.

The thesis was structured into six chapters. Chapter 1 laid down the background and context of the study, the problem statement, aims and objectives of the study and the significance of the study.

[1100] The New Global Sustainable Development Goals were adopted in September 2015 at the UN sitting of the Heads of State and High Representatives.

The research methodology was also highlighted and so were the limitations of the study. Chapter 2 discusses the regional and international legal and policy framework on women's rights to land. Chapter 3 has an analysis of the legal framework on the rights of women regarding access, control over, and ownership of land in Uganda. Chapter 4 discusses the link between women's land rights and financial inclusion. Financial inclusion has in the last decade gained a lot of prominence with policy-makers, researchers and financial sector players. This is because of increasing literature highlighting the vital role that increased access to finance plays in society, and as a potential tool for initiating economic and social development, and political empowerment. At the 2009 Pittsburgh Summit of the G20, increasing financial access to the poor and the promotion of financial inclusion were indicated as the main pillars for restarting the global economy following the 2008 financial crisis.[1101] Under the 17 UN Sustainable Development Goals, financial inclusion is seen as an enabler in the achievement of at least seven of the Goals. The G20 has committed to advancing financial inclusion worldwide.[1102] Financial inclusion promotes inclusive growth and development by enabling the efficient and effective distribution of scarce resources for the well-being of the society.[1103] Uganda aspires to achieve middle income status by 2040, so there has to be inclusive growth, and this can be achieved by having inclusive and equitable access to all productive resources. As the thesis reviewed women's access to land in Uganda, a discussion was included on whether equal access to land would translate into increased financial inclusion. Chapter 5 narrowed the discussion to women's land rights in the East African region with particular focus on Kenya and Tanzania. In Chapter 6, there is a summary of each of the first five chapters. The findings in each chapter are highlighted. Finally, there are recommendations on how women's land rights can be strengthened in Uganda.

6.2 Summary of the main arguments and findings in the chapters

6.2.1 The study and methodology

Chapter 1 of the study is the background to the study and brings out the fact that women in Uganda face significant barriers to access, ownership and control of land.[1104] Uganda is significantly an

[1101] Cull, Ehrbeck (2014) note 92.
[1102] This commitment was made on 17 and 18 March 2017 at the sitting of the Finance Ministers and Central Bank Governors of the G20 in Baden, Germany.
[1103] Martinez (2011) 5.
[1104] Uganda Bureau of Statistics report (2020) 5.

agricultural country with the agricultural sector employing over 81.2 per cent of the total labour; women form almost 90 per cent of this labour force.[1105] Available literature shows significant disparities between men and women over tenure rights on agricultural land with men controlling 48.7 per cent of the agricultural land in Uganda, compared to women at 31.1 per cent.[1106] Other reports have shown that women control only 27 per cent of registered land in Uganda.[1107]

In this chapter, I illustrate that Uganda has made progressive constitutional, legislative and judicial processes in the advancement of women's land rights. The reforms are, however, time and again stifled by long-standing discriminatory cultures, customs, practices and pieces of legislation that continue to restrict women from owning or inheriting land. Cultural practices and norms continue to override formal law in Uganda. Succession and inheritance of family or marital land is heavily influenced by a patriarchal culture that favours male lineage. Moreover, pieces of legislation, particularly the Land Act, make no mention of the land rights of widows, divorcees and women in cohabitation. The spousal consent provisions in the Land Act that were meant to give married women some secure tenure rights on family land have been ineffective due to failure in implementation and enforcement.

Doctrinal research involving the analysis of both primary and secondary data were used in this research.

This is a summary of my findings in Chapter 1.

- Women form the largest labour force in the agricultural sector in Uganda, yet they still have less access, control and ownership rights over the land.
- There are pieces of legislation, customary laws and practices on land ownership and inheritance that discriminate against women.[1108] Most of this discrimination stems from historical traditional stereotypes.
- Women's access to and control of land is hindered by lack of proper implementation and streamlining of the laws and policies on women's land rights, coupled with the persistent

[1105] The Uganda Bureau of Statistics Annual Agriculture Survey (AAS) (2018) 3.
[1106] AAS (2018) 4.
[1107] Uganda Second National Development Plan (NDPII) (2015/16-2019/20) 74-75.
[1108] Uganda later submitted a combined omnibus report (CEDAW/C/UGA/7) in 2009. The report was considered by the pre-session working group in October 2010.

poverty levels among women, marginalisation and negative cultural perceptions.[1109] The laws on marriage, separation and divorce are outdated, lacking and unclear in some instances.

- There are no specific laws catering for Muslim marriages, and the rights of Muslim women during and at the dissolution of the marriage.[1110]
- My findings point to piecemeal progress in addressing inequalities faced by women when it comes to equal access, control and ownership of land with just a few positive developments in terms of policy and law reform.
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6.2.2 The international and regional legal or policy framework on women's land rights

In chapter 2, I discussed the international and regional legal instruments on women's land rights. I mentioned the fact there is no human right to land, as land has no explicit recognition in the international legal instruments. Land rights instead receive attention only in the general discussion of property rights as reflected in the Universal Declaration of Human Rights that guarantees the right to own property alone or in association with others.[1111] Uganda ratified the CEDAW,[1112] which contains provisions for the equal treatment of women regarding access and ownership of land and agrarian reform, as well as in land resettlement schemes.[1113] Uganda ratified the International Covenant on Economic, Social and Cultural Rights[1114] which provides for the equal treatment of women regarding economic, social and cultural rights.[1115] Uganda is also signatory to the Beijing Declaration and Platform for Action 1995,[1116] that made provisions for women

[1109] Uwonet (2017) 12.
[1110] The Committee made its concluding observations on Uganda's implementations of CEDAW in its report (CEDAW/C/SR.954 and 955) at its 47th session in October 2010.
[1111] Article 17 of the UDHR.
[1112] CEDAW was adopted by the General Assembly of the UN in its resolution 34/180 on 18 December 1979. The Convention entered into force on 3 September 1981. It became the first globally recognised and comprehensive legally binding international treaty aimed at the elimination of all forms of sex- and gender-based discrimination against women. It was ratified by Uganda on 22 July 1985.
[1113] Article 14(g) CEDAW.
[1114] The Convention was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, it entered into force on 3 January 1976, in accordance with article 27. Uganda ratified the Convention on the 21 January 1987.
[1115] Article 3 CESCR.
[1116] The Beijing Declaration and Platform for Action was a landmark fourth UN World Conference on women. The conference was held in Beijing, China in 1995. The Platform for Action is meant to guide governments in setting agendas for women's equality and women's advancement. It is also supposed to guide governments in coming up with policies and strategies that promote inclusive, equitable and sustainable development.

empowerment and the promotion of women's rights to land by governments, through the elimination of all obstacles to women's access to land.[1117]

Uganda is signatory to the Istanbul Declarations on Human Settlement and Habitat Agenda 1996 that contain state obligations regarding women's access to land and inheritance rights.[1118] At the regional level, Uganda ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)[1119] that makes provision for the promotion of women's access to and control over productive resources such as land, and guarantees their right to property.[1120] The CEDAW Committee and the CESCR Council have all raised concerns about Uganda's implementation of its obligations on women's land access rights under the respective conventions.

6.2.3 The legal framework on the rights of women to land in Uganda

In chapter 3, I discussed the evolution of land tenure in Uganda right from the pre-colonial period to today. This included a discussion on the evolution of women's property rights to land and the security of land tenure accorded to women. I noted that prior to colonisation, land was communally owned under the different customary tenure regimes,[1121] that different ethnic groups existed in Uganda with each group having its own distinct unwritten customary rules and norms on land ownership and use that was passed from generation to generation.[1122] Land was communally owned with women tasked with planting food, tilling and manning, harvesting and controlling the produce for their households.[1123] With the declaration of Uganda as a British protectorate[1124] in 1896, and the signing of the 1900 Buganda Agreement, land tenure in Uganda went through fundamental changes. The 1900 Buganda Agreement introduced the practice of individual allocations of land and because of this allocation of large pieces of *mailos* of land, people previously living on the land and using the land on a customary basis became tenants of the new

[1117] Paragraphs 58, 60 and 61 of the Beijing Platform for Action.
[1118] National Report on implementation of the Beijing Platform for Action (1995) 32.
[1119] The protocol is the main legal instrument for protection of women and girl rights in Africa. It entered into force in November 2005 on being ratified by 15 countries. Uganda ratified it on 22 July 2010.
[1120] Article 15 and 19(b) Maputo Protocol.
[1121] Batungi & Rüther (2008) 116-128.
[1122] Mabikke (2016) 157.
[1123] Olanya (2011) 3.
[1124] London Gazetteer, 19 June 1894.

landlords.[1125] I further discussed a series of legislative processes on land subsequent to the 1900 Uganda Agreement and their effect on women's rights in land in Uganda. There was the introduction of the *mailo*, freehold and leasehold land-tenure systems.[1126] The study shows that the 1900 Agreement did not define the relationship between the new *mailo* owners and the peasants who had been living on the land. The introduction of the Registration of Titles Ordinance (now Registration of Titles Act, 1924), based on the principles of the Torrens system, was also noted. Under the Registration of Titles Act (RTA) 1924, a certificate of title is conclusive evidence of ownership of land.[1127] It is worth noting that the Act does not recognise or regulate land held in customary tenure systems unless the land is converted into freehold. I also gave a brief discussion about the Land Reform Decree 1975[1128] that vested all land in Uganda in the state.[1129] The study noted how the Decree reduced the land-tenure systems in Uganda from four (leasehold, customary, *mailo* and freehold) to two (leasehold and customary). Overall, the study shows that the Decree had limited impact as the majority of Ugandans were unaware of it and it remained largely unimplemented.[1130] Lastly, there is an extensive discussion on the 1995 Constitution and the Land Act as the most significant legislative attempts to strengthen women's land rights in Uganda. The equality provisions in articles 31 – 33, affirmative action in articles 21, 32 and 33, and the provisions on prohibition of customary practices and cultures that discriminate against women[1131] were highlighted. The provisions of the Land Act on women's land rights and their participation in land administration were noted. The provisions of section 27 of the Land Act in relation to the protection of women's rights on customary land were highlighted. I also discussed the 2004 amendments to the Land Act[1132] on the security of occupancy on family land by a spouse,[1133] and the requirement of spousal consent on transactions involving family land in section 38A of the Land Act.[1134]

[1125] Bikaako & Ssenkumba (2003) 15.
[1126] Olanya (2011) 4.
[1127] Section 59 of the Registration of Titles Act, Ch. 230 (Laws of Uganda).
[1128] The Land Reform Decree' (Decree No. 3 of 1975).
[1129] Section 1 of the Land Reform Decree (Decree No. 3 of 1975).
[1130] Okuku (2006) 11.
[1131] Article 33 of the Constitution of Uganda
[1132] The Land (Amendment) Act, 2004.
[1133] Section 38A Land (Amendment) Act 2004.
[1134] Section 38A (2) and section 39 of the Land (Amendment) Act 2004.

Below is a summary of my findings in chapter 3.

The 1900 Agreement did not take into account the rights of peasants and women who were occupying and using the land. This has been a source of conflicts to date. Furthermore, the 1900 Buganda Agreement was a precursor to the emergency of a dominant male force controlling huge pieces of land with greater autonomy, and this rendered women's use and access rights less secure than in the pre-colonial times.[1135] I noted that few women were allocated land under the 1900 Buganda Agreement, as women's ability to own land was hampered by inheritance customs that favoured men, and the fact that women did not have money to buy land.[1136]I tried to find out the impact of the Registration of Titles Ordinance 1908 and its successor the Registration of Titles Act (RTA) in protecting the land rights of women in marriage and at the dissolution of the marriage. As the RTA deals only with registered land, and in the absence of any law in Uganda relating to the property of married people, it is not clear how the RTA would assist a spouse who does not appear on the certificate of title. Even in situations where both spouses are registered on the title, it is not clear how such property would be divided at the dissolution of marriage. The Registration of Titles Ordinance 1908 and its successor the Registration of Titles Act have not been helpful in protection of the land rights of women in marriage, or at the dissolution of the marriage.

Under section 3(4) of the Land Act, the *mailo* owner holds the land in perpetuity and in freehold but subject to the interests of the tenants by occupancy. Most occupiers of *mailo* land are tenants rather than landlords. The *mailo* owner holds the land in freehold, but the difference with the freehold tenure system is that the *mailo* tenure is held subject to the statutory and customary rights of the bona fide and lawful occupants.[1137] It can therefore be described as a hybrid system of traditional customary tenure and the modern freehold. Under section 33 of the Land Act, the bona fide and lawful occupants can apply for a certificate of occupancy from the *mailo* owner. This has created dual interests on the land and this is amplified in sections 34 and 35 of the Land Act where neither the *mailo* owner nor the tenant by occupancy can carry out any lawful transaction on the land without the consent of the other. The full rights of ownership granted to the *mailo* owner are therefore on paper and not on the ground. The bona fide occupants are statutory tenants of the

[1135] Tukahirwa (2002) 26. Retrieved June 17, 2021, from http://www.lucideastafrica.org/publications/tukahirwa_Lucid_WP17.pdf
[1136] Mukwaya (1953) 36.
[1137] Wabineno & Mono (2015) 11.

registered proprietor with their only obligation being to pay annual ground rent not exceeding Uganda shillings one thousand. This dual claim over the land has led to massive confrontations between the registered owner and the statutory tenant as the landlord cannot sell or use the land, neither can the tenant develop the land he is occupying because he has no title. This conflict has led to massive confrontations and evictions of the peasants by the *mailo* owners and in most cases, it is the women who are affected.

The re-introduction and recognition of the customary land-tenure system has not really had any major impact on women's land rights, other than the fact that the Land Act prohibits any decisions in respect to customary land that denies women access to ownership, occupation or use of the land.[1138] There is insecurity of tenure on customary land as the land is collectively owned and managed through clan heads that are usually male.[1139] The Land Act does not delineate individual rights from the communal rights. It is therefore not clear how women's land rights on communal land have been strengthened. Secondly, whereas acquiring a certificate of customary ownership could have helped in ascertaining some security of tenure, this provision has its ambiguities. The Land Act does not, for instance, ascertain the status and value of the certificate of customary ownership vis-à-vis other certificates of title/title deeds and the rights/benefits a holder of the certificate of customary ownership is entitled to. Thirdly, there are also issues with conversion of customary land to freehold. People occupying customary land are mostly women, illiterates and peasants who are bound to find the process complicated, confusing and costly coupled with the fact there has been little public education on the Act.[1140] It is also worth noting that, although the certificate of customary ownership is an important step in ascertaining customary tenure rights, it does not change the land-tenure system, which is still customary. As noted, the customary law in Uganda is still male based, and looks at men as the owners of land and other property.[1141] These concerns if addressed would have been important in strengthening women's land rights on customary land.

[1138] Section 27 of the Land Act, Ch.227 (as amended).
[1139] Okuku (2006) 13.
[1140] Okuku (2006) 14.
[1141] Kemigisha (2021) 15.

The requirement of spousal consent on transactions involving family land in section 38A of the Land Act[1142] was extensively discussed. To reinforce the requirement of prior written consent, a spouse can lodge a caveat on a certificate of title, certificate of customary ownership or on the certificate of occupancy of family land when he or she notices that there is a transaction about to happen without his or her consent and the said caveat under section 39(8) does not lapse if the spouse's security of occupancy subsists. Although the consent provisions were lauded from a human rights perspective as important in strengthening women's land rights,[1143] it is not clear whether this consent clause has actually and effectively promoted women's rights to land. These provisions only recognise a woman's right and participation to transactions on family land as long as the marriage persists but they are silent on the woman's land rights when the marriage has ended. They are equally silent on the land rights of widows, divorcees and women in cohabitation. The study notes the lack of a specific body or authority to verify or approve the prior spousal consent as a significant barrier in the enforcement of the above provisions.

It is also important to view spousal consent in the context of the gender-based violence prevalent in Uganda and consider whether the consent is obtained by agreement or through violence.[1144] It has been observed that the consent clause may have little impact in rural areas where most women have little formal education and husbands can easily pressure them to give their consent.[1145] Further, under sections 39(5) and (6) of the Land Act, consent should not be unreasonably withheld, and the spouse aggrieved by the withholding of the consent may appeal to the land tribunal and, as some scholars have pointed out, tribunals may be influenced by political and social factors to give the husband a go-ahead.[1146] These lacunas in the Land Act call for transformation of the consent clause to strengthen the land rights of women.

I also noted a persistent patriarchal culture that favours a male child on land matters and the lack of a functioning institutional framework for addressing women's land rights.[1147] When it comes to women's participation in land management institutions, the one-third allocation leaves women as

[1142] Section 38A (2) and section 39 of the Land (Amendment) Act 2004.
[1143] Nakirunda (2011) 21.
[1144] Nakirunda (2011) 30.
[1145] Diana.H (2004) 185.
[1146] Rugadya et all (2004)
[1147] Kabahinda (2017) 828–838.

minorities in these institutions, and quite often their views are suppressed by the majority.[1148] I demonstrated that the Area Land Committee, the basic land management structure, works with a cultural institution of elders, many of whom are still very influenced by a patrilineal ideology.[1149] The failure of government to establish the Parish Land Committees that were meant to advice the District Land Board on ascertainment of rights to land[1150] has been a huge barrier to the promotion of women's land rights as women may find it difficult or expensive to prove their rights mostly on unregistered customary land.

Of significant concern is the fact that the Land Act of Uganda makes no mention of the land rights of women in cohabitation, widows and divorcees.

I also noted the lack of a standard law or formula for distribution of matrimonial property at the dissolution of marriage. This has been left in the hands of courts, notably the case of *Julius Rwabinumi v Hope Bahimbisomwe*[1151] where the court concluded that a spouse's share in marital property depends on his or her contribution and that the contribution may be direct or indirect monetary contribution or non-monetary. Although this approach by courts has been applauded,[1152] there is no clear formula for assessing a woman's non-monetary contribution and putting a value on it. In one case, it was observed that this lacuna leaves an imbalance between men and women regarding property rights[1153] and this has an indirect negative impact on women's land rights. The study notes that this imbalance is outside the realm of judicial interpretation and can only be a matter of parliamentary backing. It is important to note that the formula for distribution of the deceased intestate does not take into account the woman's contribution to the family wealth.

6.2.4 Women's land rights and financial inclusion

In chapter 4, I discussed the relationship between women's land rights and financial inclusion. There is growing research showing how financial inclusion is an enabler for inclusive growth and development by enabling the efficient and effective distribution of scarce resources for the well-

[1148] Acidri (2014) 195.
[1149] Acidri (2014) 196.
[1150] Section 64 land Act, Ch.227.
[1151] *Rwabinumi v Bahimbisomwe* (Civil Appeal No. 10 of 2009) [2013] UGSC 5 (20 March 2013).
[1152] Mujuzi (2019) 212.
[1153] *Ayiko v Lekuru* (2015) 27.

being of the society.[1154] It is a global priority that governments ensure that women have equal access to finance. This chapter therefore reviewed whether easy access, control and ownership of land by women would turn into increased uptake of formal financial services, a positive trend for a Uganda's growth.

I reviewed the legal and policy framework on financial inclusion in Uganda. I pointed out that Uganda's financial industry started evolving in the 1990s following the liberalization policies. Prior to the policy reforms, the financial sector was highly unregulated, with the state having a dominant share in the few financial institutions. Financial reforms in Uganda were incorporated and implemented under the newly enacted Bank of Uganda Act 1993,[1155] and the Financial Institutions Act 2004. The extension of microfinance under the Microfinance Deposit Taking Institutions Act, 2003 is also an area of great study. The study highlighted the excitement all over the world on the impact of microfinance and how this excitement has been questioned by studies concluding that the international enthusiasm for microfinance as a global development prescription had no empirical basis and was rather built on a foundation of sand.[1156] The study further highlighted the amendment of the Financial Institutions Act to allow for Agent banking[1157] and Islamic banking,[1158] and the Agent banking[1159] and Islamic banking Regulations.[1160] The impact of agency banking on financial inclusion should be an area of research interest.

The study discussed the emergence of mobile money and its impact on the financial sector in Uganda. Although studies have linked mobile money to increased financial inclusion, there is therefore growing ambiguity on the actual impact of mobile money transfer service on financial inclusion, especially concerning the rural poor and women. Some authors question how the mobile money service, with its high transactional costs, can drive financial inclusion.[1161] The study also highlighted the regulatory challenges in identifying which mobile money services fall under the

[1154] Martinez (2011) 5.
[1155] Bank of Uganda Act (2004) Ch.51.
[1156] Duvendack, Maren et al. (2011).
[1157] The Financial Institutions (Amendment) Act (2016) s 131.
[1158] The Financial Institutions (Amendment) Act (2016) s 115A.
[1159] The Financial Institutions (Agent Banking) Regulations, 2017 (under sections 4(2b) and 131(lb) of the Financial Institutions Act, Act No. 2 of 2004).
[1160] The Financial Institutions (Islamic Banking) Regulations, 2018.
[1161] Milton (2009) 34.

financial or communication sector. This should also be an area of great interest. Finally, the study highlighted the National Payment Systems Act 2020,[1162] which is meant to regulate, among other things, the issuance of electronic money and to provide a framework for a safe, efficient and secure payment system in Uganda.[1163]

After discussing the regulatory framework, the study discussed the link between women's land rights and financial inclusion. Several studies were reviewed.
These were my findings in chapter 3.

- There is no evidence that having an account with a formal financial institution leads to increased financial usage. For instance, a 2014 study revealed that although 27.8 per cent of Ugandans had an account with a formal financial institution, only 15.7 were able to obtain credit or a loan from a formal financial institution. Thus, having an account does not translate into financial usage, and the notion that deeper financial outreach leads to financial inclusion lacks research.
- There is growing ambiguity on the actual impact of mobile money transfer services on financial inclusion, especially for the rural poor and women. Although financial access in Uganda is being driven by the mobile money industry, there is no empirical evidence to suggest that having a mobile money account or expanding financial outreach or having an account with a financial institution leads to financial inclusion. But it is what you actually do with the account that matters most.
- There is ambiguity on the impact of documented or titled collateral on financial inclusion. Although titled land is vital in securing finance, the viability of these instruments in transforming property rights, especially over smallholdings, into viable instruments that can be used to obtain commercial credit is unclear.
- It also noted that land reforms, for instance land registrations aimed at increasing women's security of tenure, may come with many advantages, for instance, the easy transferability of land through a sale and being able to transfer the proceeds from agricultural to non-agricultural activities, thereby increasing investment incentives. There are however a lot of imperfections in the credit markets in developing countries that have the potential to limit

[1162] National Payment Systems Act, No. 15, 2020.
[1163] National Payment Systems Act, No. 15 (2020) s 3.

the expansion of credit to the poor farmers in rural areas, many of whom are women. These imperfections include politically or socially motivated restrictions on the ability of lenders to foreclose readily and dispose of the collateral.[1164] It may thus be unrealistic to expect large-scale credit related benefits from the land related reforms aimed at promoting land rights. There is also the fact that farming in rural areas is prone to many risks, for instance weather outcomes and other natural phenomena. This hinders banks from lending to these rural farmers, many of whom are women, even when using registered land, because any bad weather outcome that destroys crops means that many farmers will not be able to pay back the loans.

The study's conclusion was that formal land rights and access to credit are intrinsically linked to a country's economic development prescription, but there is also literature showing that land reforms guaranteeing secure land tenure rights to women may not necessarily increase women's financial access. More studies are needed on this aspect.

6.2.5 A comparative analysis of women's land rights in East Africa

Chapter 5 gave a broad overview of legal frameworks on women's land rights in the East African region.[1165] Emphasis was placed on women's land rights in Kenya and Tanzania. This is because Uganda, Kenya and Tanzania have many things in common, not just by having been British colonies, but because of their close links as neighbours, and as original members of the East African Community. The discussion covered women's land rights under the respective national constitutions and national laws. Women's land rights in marriage, inheritance and succession in Kenya and Tanzania were also discussed. I observed that land tenure rights in Kenya and Tanzania, just as in Uganda, were forged through historical transitions with land initially communally held, each ethnic group having its own distinct tenure arrangements based on traditions and cultures.[1166] When the Germans colonised Tanzania (1884 – 1916), land in Tanzania was declared crown land vested in the empire[1167] and they started granting freeholds to mostly commercial foreign settlers

[1164] Deininger, Klaus, et al. (2009) 246.
[1165] Traditionally, the East African Region composed of Uganda, Kenya and Tanzania. The Horn of Africa is composed of Somalia, Djibouti, Eritrea and Ethiopia.
[1166] Tanzania National Land Use Planning Commission (NLUPC) (2005) 1.
[1167] Chidzero (1961) 114.

thereby alienating huge areas of most of Tanzania's fertile land.[1168] When the Germans were defeated in World War 1, Britain, which under the League of Nations mandate assumed trust power over Tanzania, declared all land in Tanzania public land, vested in the Governor in trust for the native people.[1169]

Following Tanzania's attainment of Independence in 1960, land has gone through a series of legislative reforms codified in Tanzania National Land Policy 1995, the Land Act 1999, the 1967 Land Acquisition Act 1967, the Law of Marriage Act of 1971, the Village Land Act 1999, and the Mortgage Financing (Special Provisions) Act of 2008, with several provisions on women's land rights.

In relation to women's land rights in Tanzania, this is a summary of my findings.
The provisions in the Law of Marriage Act 1971 on rebuttable presumption of marriage where a couple have lived together for two or more years in such circumstances as to have acquired a reputation of wife and husband are vital in women's land rights.

Notwithstanding the legislative progress in Tanzania, there is a strong reliance on customs and traditions in matters of marriage, succession and inheritance that tend to harm women's land rights.[1170] Women married customarily in Tanzania tend to have limited land rights, as most of these customary marriages are patrilineal and patrilocal,[1171] with women accessing land mostly through a male relation. The legal reforms on the promotion of women's land rights in Tanzania, just as in Uganda, quite often meet deep-rooted resistance from the cultures and traditions.
It is also worth noting that the Tanzania Constitution has no explicit direction on the conflict between customary laws and women's land rights.

Land tenure in pre-colonial, Kenya just like in Uganda and Tanzania, can also be described as communal, with each different community having its own distinct land management systems in

[1168] Tanzania National Land Use Planning Commission (NLUPC) (2005) 4.
[1169] Okoth-Ogendo (1969) 65.
[1170] Geo. J. Gender (2006) 604.
[1171] Marjolein Benschop (2002) 106.

accordance with their traditions and norms.[1172] The customary land tenure somehow protected and safeguarded women's user rights over land for agricultural production until colonialism with its so-called modern notions of individual ownership of land.

Once Kenya was declared a British Protectorate after 1885 Berlin Conference, what followed was a series of proclamations and ordinances alienating large tracts of land from the indigenous people,[1173] with the imperialists issuing out freeholds, turning Kenya into a territory of large individual private estate owners. There was systematic pressure from the settlers on the colonial government demanding the imposition of English Property Law with regard to leases, mortgages and transfers.[1174]

To the colonialists, communal ownership of land had to be done away in favour of individual land tenure.[1175] This individual private land-tenure system was to be relentlessly pursued by the colonial government throughout the colonial period. This individualism obviously had an effect on women's land rights as opposed to the rights previously enjoyed under the communal customary land tenure.

After attaining independence, Kenya's legal framework on land tenure and women's land rights went through a lot of legislative processes, but these processes have been comprehensive overhauled because of the changes introduced by the 2010 Constitution. I reviewed the new legal frameworks on women's land rights that have been enacted, notably the Land Act 2012,[1176] the Land Registration Act 2012,[1177] the National Land Commission Act 2012,[1178] the Matrimonial Property Act, 2013[1179] and the Marriage Act, 2014.[1180] As for Kenya, this is a summary of my findings on women's land rights.

[1172] Davison J. (1987) 5.
[1173] Wanjala & Musyimi (1989) 16.
[1174] Sorrenson (1968) 1503.
[1175] Swynnerton Plan (1954) 13.
[1176] The Land Act, 2012 (No.6 of 2012).
[1177] The Land Registration Act, 2012 (No. 3 of 2012).
[1178] The National Land Commission Act, 2012 (No. 5 of 2012).
[1179] The Matrimonial Property Act, 2013 (No. 49 of 2013).
[1180] The Marriage Act, 2014 (No.4 of 2014).

Of special mention is the provision in the Marriage Act 2014 that requires that marriages in Kenya be registered in accordance with the Act,[1181] which leaves a lacuna in the legal status of unregistered marriages recognized and conducted in accordance with the Act.

Worth noting also is that, unlike the Law of Marriage Act 1971 of Tanzania which imputes a rebuttable presumption of marriage if spouses have cohabited for more than two years, the Marriage Act of Kenya has no provisions for rebuttable presumption of marriage for cohabiting couples, although case law appears to recognize a rebuttable presumption of marriage arising from long cohabitation. The question should be how long the cohabitation should be to be recognized. Worth noting are the provisions in the Marriage Act, 2014 that allow parties intending to marry to enter into an agreement before the marriage, determining each one's property rights.[1182]

I discussed the provisions on matrimonial property which include the matrimonial home(s) which are considered joint property, and at divorce or at the dissolution of the marriage, shall be divided according to partners' contribution to the acquisition.[1183] A spouse acquires a beneficial interest in the property acquired before or during the marriage if he or she proves that he or she made a contribution towards the improvement of the property and /his or her share will be according to the contribution made.[1184] This is akin to case law in Uganda on division of matrimonial property and just like Uganda; the lacuna is that there is no clear formula in determining a couple's non-monetary contribution.

Lastly, in resolving land disputes, the formal courts in Kenya normally make reference or are guided by customary law. The Constitution recognizes culture as a foundation of the nation.[1185] The formal courts have jurisdiction over customary marriages, divorces, succession and inheritance. In the resolution of disputes, the courts and tribunals in Kenya can employ alternative methods of dispute resolution including traditional dispute resolving mechanisms, as long as they are not repugnant to justice and morality, do not contravene the Bill of Rights and are not

[1181] The Marriage Act (2014) s 3(1) & (4).
[1182] The Matrimonial Property Act (2013) s 6(3).
[1183] The Matrimonial Property Act (2013) s 7.
[1184] The Matrimonial Property Act (2013) s 9.
[1185] Kenya Constitution (2010) art. 11(1).

inconsistent with the Constitution or any other written law.[1186] The question is whether the formal courts in adjudicating matters involving customary law adhere to the gender equality principles as enshrined in the Constitution.

6.3 Recommendations

6.3.1 Domestication of the Maputo Protocol

The MAPUTO Protocol provides for women's right to inherit in equitable shares the parent's properties as men.[1187] The Protocol provides for the widow's equitable share in the inheritance of the husband's property together with the right to live in the matrimonial house.[1188] The Protocol mandates states to introduce legislative, institutional and other measures aimed at creating gender equality. It further provides for integrating of gender equality policies in development programs and plans.[1189] Since ratification, Uganda has not domesticated the Protocol. A study on Uganda's implementation of the Maputo Protocol found out that women's access to and control of land is hindered by lack of implementation and streamlining of the laws and policies on women's land rights, coupled with the persistent poverty levels among women, marginalisation and negative cultural perceptions.[1190] Uganda needs to domesticate the Maputo Protocol. This should be followed by programmes aimed at addressing high poverty levels among women. The government has indeed launched programs such as the Parish Development Model, Youth Livelihood Programs and others all aimed at addressing gender inequality and women empowerment, but their effects on the ground is not known yet as these programmes are quite new. That notwithstanding, the programmes should be reinforced with policies and strategies to address specific women needs in the different regions of Uganda. Women should be involved in the formulation, planning and implementation of programmes aimed at addressing gender inequality and their economic prosperity. As already noted, Uganda cannot achieve Vision 2040 and the UN Sustainable Development Goals when there is still a lot of gender inequality.

[1186] Kenya Constitution (2010) art. 159(2) & (3).
[1187] Article 21(2) Maputo Protocol.
[1188] Article 21(1) Maputo Protocol.
[1189] Article 2 Maputo Protocol.
[1190] Uwonet (2017) 12.

6.3.2 Overhaul of the legal framework on women's land rights

The CEDAW Committee has raised concerns on the status of women's land rights in Uganda and called for repealing of legislation, customary laws and practices on land ownership that discriminate against women.[1191] The Committee recommended the quick enactment of the Marriage and Divorce Bill that is meant to consolidate laws related to marriage, separation, cohabitation and divorce, and the Muslim Personal Law Bill that should cater for Muslim marriages and the rights of Muslim women during and at the dissolution of the marriage.[1192] The Marriage and Divorce Bill that has been shelved in Parliament should be re-tabled and passed into law.

The CESCR Council has raised similar concerns on Uganda's implementations of its obligations on women's rights under the Convention.[1193] The Council in its concluding observations proposed a multi-pronged approach to Uganda, including the harmonisation and consolidation of the legal and policy frameworks that protect women's land rights. It has recommended adopting a comprehensive non-discrimination law that eliminates all kinds of discrimination against women, including the historical traditional stereotypes. The Council noted that women's access and control of land is hindered by lack of implementation and streamlining of the laws and policies on women's land rights.[1194] A comprehensive non-discrimination law should be enacted prohibiting discrimination in all spheres of life in Uganda.

The laws of marriage, separation and divorce are outdated, lacking and unclear in some instances. A law should be enacted catering for Muslim marriages and the rights of Muslim women during and at the dissolution of the marriage.[1195]

[1191] Uganda later submitted a combined omnibus report ((CEDAW/C/UGA/7) in 2009. The report was considered by the pre-session working group in October 2010.
[1192] The Committee made its concluding observations on Uganda's implementations of CEDAW in its report (CEDAW/C/SR.954 and 955) at its forty seventh session in October 2010.
[1193] The Committee on Economic, Social and Cultural Rights considered the initial report of Uganda on the implementation of the International Covenant on Economic, Social and Cultural Rights (E/C.12/UGA/1) at its 36th to 38th meetings (E/C.12/2015/SR.36–38), held on 10 and 11 June 2015.
[1194] Uwonet (2017) 12.
[1195] The Committee made its concluding observations on Uganda's implementations of CEDAW in its report (CEDAW/C/SR.954 and 955) at its forty-seventh session in October 2010.

The Land Act of Uganda should be amended to include the land rights of women in cohabitation, widows and divorcees.

6.3.3 Building strong institutions to strengthen women's land rights

The government should create a functioning institutional framework for addressing women's land rights.[1196] There should be reform of the composition of membership in land management institutions. The one-third allocation leaves women as minorities in these institutions, and quite often their views are suppressed by the majority.[1197] The Area Land Committee, the basic land management structure at the village level works with a cultural institution of elders, many of whom are still very influenced by a patrilineal ideology.[1198] The Area Land Committee should be restructured to compose an equal number of men and women. The government must with immediate effect establish the Parish Land Committees. The failure of government to establish the Parish Land Committees that were meant to advise the District Land Board on ascertainment of rights to land[1199] is a huge barrier to the promotion of women's land rights, as women may find it difficult or expensive to prove their rights on mostly unregistered customary land. A committee composed of men and women should be established within the Area Land Committee or at the Local Council level, to verify or approve the prior spousal consent, with a right of appeal to the Parish Land Committee.

6.3.4 Enactment of a law on matrimonial property

There is no definition of matrimonial property in Uganda. The laws are all silent on what constitutes matrimonial property. Kenya has the Matrimonial Property Act, 2013[1200] that defines what constitutes matrimonial property.[1201] Matrimonial property, which includes the matrimonial home(s), is considered joint property and at divorce or at the dissolution of the marriage, it is divided according to the contribution by the spouses to the acquisition.[1202] 'Matrimonial home' is defined as 'any property that is owned or leased by one or both spouses and occupied or utilised

[1196] Kabahinda (2017) 828-838.
[1197] Acidri (2014) 195.
[1198] Acidri (2014) 196.
[1199] Section 64 land Act, Ch.227.
[1200] The Matrimonial Property Act, No. 49 of 2013.
[1201] The Matrimonial Property Act (2013) s 6(3).
[1202] The Matrimonial Property Act (2013) s 7.

by the spouses as their family home, and includes any other attached property'.[1203] Under the Act, contribution can be monetary contributions and non-monetary contributions, including management of the matrimonial home, domestic work and child care, management of family business, companionship, and farm work.[1204] A law is needed in Uganda that defines what constitutes marital/matrimonial property, as opposed to individually held property of married persons, and the principles or formulae that the courts should follow in resolving disputes on the distribution of matrimonial property at the dissolution of marriage. This was observed by Kisaakye JSC in *Julius Rwabinumi v Hope Bahimbisomwe.*[1205]

Further, the Registration of Titles Act of Uganda only deals with only registered land, and the RTA will not assist a spouse who does not appear on the certificate of title. But even where both spouses are registered on the title, it is not clear how such property would be divided at the dissolution of marriage in the absence of any law regulating division of property of married people in Uganda.
In Kenya, there is a rebuttable presumption under the Matrimonial Property Act that where matrimonial property is acquired in the names of one spouse, that property is held in trust for the other spouse, and where it is acquired jointly in the names of both spouses, their beneficial interests in the property are equal.[1206] A new Matrimonial Property law should define the situations where a spouse would be entitled to share in registered property where he or she does not appear on the certificate of title.

6.3.5 Amendment of the Marriage Act

The Marriage Act of Uganda should be amended to include provisions on the rebuttable presumption of marriage in cases of cohabitation for a specified number of years. In the Law of Marriage Act 1971 of Tanzania, a rebuttable presumption of marriage is assumed where a couple has lived together for two years or more in such circumstances as to have acquired a reputation of wife and husband. The Marriage Act of Kenya does not have provisions on rebuttable presumption of marriage, but case law in Kenya has precedents creating the presumption in cases of a reasonable period of cohabitation.

[1203] The Matrimonial Property Act (2013) s 2.
[1204] The Matrimonial Property Act (2013) s 2.
[1205] *Rwabinumi v Bahimbisomwe* (2009) 23.
[1206] The Matrimonial Property Act (2013) s 14.

The amendments in the Marriage Act could also include provisions akin to the provisions in the Marriage Act, 2014 of Kenya that allow parties intending to marry to enter into an agreement before the marriage determining each one's property rights.[1207] This is akin to prenuptial agreements common in many developed economies.

6.3.6 Strengthening the security of tenure on customary land

Under the Land Act of Uganda, one can apply for a certificate of customary ownership on customary land. As noted already in this thesis, most women in Uganda live on customary land. Obtaining a certificate of customary ownership could help in ascertaining some security of tenure. The people occupying customary land are mostly women, illiterates and peasants who are bound to find the process complicated, confusing and costly, coupled with the fact there has been little public education on the Act.[1208]

In Tanzania, women are involved in decisions to do with allocations of customary land and decisions related to the planning and use of village land.[1209] Further, an application for a customary right of occupancy on village land shall, if made by a family unit, be signed by at least two persons from that family unit.[1210] The assumption here is that when the application is from a family, both spouses must sign. In cases where a spouse occupies land under the certificate of customary right of occupancy and wishes to surrender his or her right or wishes to abandon the property, the Commissioner of Lands shall not accept that surrender if that surrender has been designed to defeat the other spouse's right to share or obtain part of the land. In cases of village land, any attempts to surrender customary rights of occupancy that would harm or deprive the spouse occupying the land is void[1211] and spouses must consent to any surrender,[1212] and where it has been surrendered, the village council must ensure that the other spouse has the first option before it is re-granted by the village council.[1213] The Land Act of Uganda should be amended to include clauses that ensure

[1207] The Matrimonial Property Act (2013) s 6(3).
[1208] Okuku (2006) 14.
[1209] Carpano (2010) 12-13.
[1210] Village Land Act (1999) s 22(3) (b) (ii).
[1211] Village Land Act (1999) s 35(2).
[1212] Village Land Act (1999) s 35(7).
[1213] Village Land Act (1999) s 36.

that in all applications of a certificate of customary ownership, women/spouses are involved and in all transactions regarding customary land, all spouses must consent.

The Land Act does not also ascertain the status and value of the certificate of customary ownership vis-à-vis other certificates of title/title deeds and the rights/benefits a holder of the certificate of customary ownership is entitled to. The law should be amended to indicate the value attached to a certificate of customary ownership, for instance whether it is transferrable, or whether it could be used to facilitate transactions like mortgages, leases, and so on.

There are also issues with conversion of customary land to freehold which is allowable under the Land Act. A special government fund should be put in place to help in converting customary land to freehold.

6.3.7 Awareness campaigns

There should be serious awareness campaigns against women discrimination in land matters and other areas. The capacity of institutions involved in the promotion of women's land rights should be developed.[1214] As discussed in Chapter 3, there are a lot of constitutional and legislative provisions on women's land rights which have not been implemented, nor are women are aware of them. Serious awareness campaigns must be launched, in conjunction with dialogues with community leaders and elders. The Constitution and other laws on marriage and land rights of women should be translated into local languages. This should be given serious consideration by government. Although state law in Uganda (as in both Kenya and Tanzania) recognizes a woman's right to acquire, hold and dispose of land on equal terms with men, and other spousal rights, statutory law (possibly by design) omitted the 'equal' right to inherit land. Statutory law in both countries still recognizes customary law in inheritance. Among other reasons for the deliberate omission to incorporate the equal right to inherit is the political and social sensitivity attached to family land,[1215] mostly centred on the social construction that a woman will eventually be married off to her husband's family and his land, and therefore inheriting her father's land would amount to a double share. That is why serious awareness campaigns to dispel these historical prejudices

[1214] CESCR Concluding Observations on Uganda, 2015, para. 18.
[1215] Dancer & Helen (2017) 297.

on women's equal right to land should be extensively carried out, involving community leaders, elders and politicians. This can also be buttressed by provision of legal aid to women having land disputes with family members or a spouse.

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