

NEGOTIATING LAW AND CUSTOM: JUDICIAL DOCTRINE AND WOMEN'S PROPERTY RIGHTS IN UGANDA

LYNN KHADIAGALA*

Since the promulgation of Uganda's new constitution in 1995, the Law Reform Commission (LRC) has had the task of revising statutory laws to conform to the new constitution. One focal point has been the drafting of a Domestic Relations Bill. The bill proposes significant changes in women's legal status within the institutions of marriage and succession. Under the new statute, for example, women would gain joint marital property rights over any assets acquired during the course of marriage.¹ Women could use the law to challenge husbands who seek to sell property or shift assets among their wives. The bill also proposes that when a married person dies intestate, the surviving spouse(s) should be appointed administrator of the estate, unless the courts have good reason not to do so. This should facilitate widows who seek to protect their assets from relatives who perceive in death opportunities to grab property. Not surprisingly, publication of the bill generated considerable outrage among men who perceive the extension of property rights to women as a direct threat to a natural social order privileging male authority.

The denial of property rights to women is, in fact, a relatively recent development in Ugandan legal and social history. One need not retreat too far into the past to find evidence that custom and law, in at least one region, once sanctioned the organization of property rights around relatively autonomous, female-headed households. In Kabale District, in southwestern Uganda, the colonial-era chiefs' courts routinely upheld women's right to control property to the exclusion of husbands and co-wives. Men who sought to sell a wife's land or to transfer parcels among co-wives received sharp rebukes from the courts. It was not until the late 1960s that the magistrates' courts favoured a more patriarchal vision of family. By the 1990s, entrenched in judicial doctrine was a legal presumption that property belongs to the male head of household.

Intrigued by the precipitous decline in women's legal status, I advance two hypotheses on the sources and evolution of judicial doctrine, which I treat as a set of beliefs and principles that guide legal decisions. First, the belief that the legal process should, first and foremost, maintain social order constitutes the philosophical foundation of judicial thought in Uganda. The imperative of social order alone, however, is indeterminate of doctrine toward women's property rights. The specific construction of women's property rights depends on whether the courts perceive female authority to be a guarantor of social order (as they did from the 1930s to the late 1960s) or as the source of social chaos (as was the case from the 1970s onward). Second, the fluidity of customary law in the absence of statutory guidance permits activist judges wide discretion to reshape

* Visiting Assistant Professor, College of William and Mary, Williamsburg.

¹ *Summary of Draft Recommendations for the Draft Report of the Uganda Law Reform Commission on the Reform of the Law of Domestic Relations* (c. 1998), Cap. 5 (unpublished).

doctrine to reflect their world-views or in response to the changing social, political or economic conditions. I suggest that as Uganda descended into political and economic chaos in the 1970s, the courts shifted toward a more authoritarian and patriarchal vision of family and society, stripping women of their authority and autonomy.

I proceed chronologically through three periods of judicial doctrine. I turn first to the colonial era in which the courts interpreted customary law in terms favourable to women. Concerns with food security as the primary threat to social order oriented officials toward protecting women's access to land and severely restricting male authority. The courts accorded women extensive autonomy over land through the principle of gifting: once a man had allocated property to a wife's "house", the courts made it difficult for him to take it back.

Judicial patterns in Kabale District run counter to Chanock's assertion that colonial officers and African male elders collaborated over the content of customary law to bolster the authority of men over persons and property.² Fearful that rapid social and economic changes unleashed by colonialism would threaten their fragile control, colonial officers perceived in customary law the best possibility of maintaining order and stability. Still, the ability of women in some jurisdictions to use the courts to their benefit calls into question this legal monopoly.³ Maragoli widows in western Kenya skilfully employed idealized stereotypes of gender roles to shame men into fulfilling their social responsibilities. Women in colonial Natal, South Africa, figured out that the "white-staffed customary law courts sometimes provided an opportunity to escape rigid control . . .".⁴

The second period endures from roughly the mid-1960s to the late 1970s. This is a time of doctrinal transition and instability as magistrates struggle to reconcile the contradictions among women's property rights, increased scarcity of land, and polygamy. The problem confronting the courts was the inability of men to marry multiple wives and to provide each wife adequate acreage without reallocating land from senior to junior wives. At the same time, the emergence of Milton Obote (1962–1971) and Idi Amin (1971–1979) as African "big men" and the growing political instability of the post-independence period contributed to the courts' shift toward a more authoritarian and patriarchal model. The association of women's property rights with social order gave way to the belief that female authority was a threat to social order. The new paradigm of family contained only one decision maker—the male head of household.

The third phase, which begins roughly in the 1980s, highlights the agency of activist judges in orienting and consolidating shifts in judicial doctrine. While the fluidity of customary law facilitated judicial activism, the shift from oral to written land transactions undermined the legality of women's authority by changing the rules of evidence. Earlier taboos against women holding money expanded to include restrictions against women signing (or thumb printing) land

² M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge, 1985, chap. 1. See also K. Firmin-Sellers, *The Transformation of Property Rights in the Gold Coast: An Empirical Analysis Applying Rational Choice Theory*, Cambridge, 1996.

³ B. Shadler, "Changing traditions to meet current altering conditions": Customary law, African courts and the rejection of codification in Kenya, 1930–60" (1999) 40 *Journal of African History* 412.

⁴ K. Mutongi, "'Worries of the heart': Widowed mothers, daughters and masculinities in Maragoli, Western Kenya, 1940–60", (1999) 40 *Journal of African History* 67–68; T. McClendon, "Tradition and domestic struggle in the courtroom: Customary law and the control of women in segregation-era Natal" (1995) 28 *International Journal of African Historical Studies* 527.

documents. Transplanted into a legal setting, these taboos culminated in two ideas: first, that women are not financially capable of purchasing property and, second, the legal presumption that, unless proven otherwise, property belongs to men. Whereas men had previously borne the burden of proof by having to justify their actions to the courts, reliance on written land transactions shifted the burden of proof of ownership to women. This era culminated in 1993 when an influential High Court judge cemented the subordination of women in legal precedent.

“MY LAND, HIS LAND, AND HER LAND”: NATIVE AFRICAN COURTS AND
THE PRINCIPLE OF GIFTING 1940S–1964

In 1964, an elderly woman stepped before a magistrate to challenge her husband's right to give land that she had been farming to a co-wife. She told the court,

My husband, the defendant, has four wives. Each wife has her own land and I have mine which he has given to another wife. It is my nine strips of land. Two strips are at Nyabihogo, three are on the hill and I have four strips in the valley. I am now left with only four strips, three in the valley and one on the hill.⁵

The court agreed with her, upholding a conception of property rights known as the house-property complex that had guided the colonial courts but that would soon give way to a patriarchal doctrine. Common throughout eastern and southern Africa, the house-property complex organized assets around autonomous female-headed houses.⁶ Men retained a few parcels of land but distributed the bulk of their assets to women for food production. Several aspects contributed to women's perceptions of ownership. First, a combination of female responsibility for ensuring a steady food supply for their families and the investment of their labour in the land fostered a legitimate right to challenge any person who threatened women's land security. Second, succession patterns reinforced women's proprietary rights. To minimize disputes among stepbrothers, sons inherited from the property of their mothers; in the absence of sons, daughters took the property, to the chagrin of their step-brothers.⁷

Third, the institutionalization of women's property in the tax system lent an air of legality to female ownership. Colonial authorities required men to maintain one tax book per wife in which they recorded women's animals and land. Women presented these books to the courts as evidence of ownership; persons who sought to grab land from women did their best to steal and destroy them.

In court, the key aspect of the house-property complex was the classification of land transfers as gifts and therefore irreversible. Usually referred to as marriage gifts of land, the courts were explicit that the principle of gifting applied equally to women. In 1959, a son accused his mother of wrongdoing when she ceded a plot of land to a son-in-law.⁸ The mother had done so because “while drinking, he performed a very good dance that pleased [her]”.⁹ The court denied his

⁵ Native Court [Nat. Ct.], Rwamucucu [Rwa] No. 175–64.

⁶ R. Smith Oboler, *Women, Power, and Economic Change: The Nandi of Kenya*, Palo Alto, 1985, 342–57.

⁷ Nat. Ct., Rwa., No. 42/60 and 96/61.

⁸ James Obol-Ochola, “The pilot scheme for the registration of titles in Kigezi”, *Uganda Law Focus* 1, 3 (1973): 136.

⁹ *Ibid.*, 136.

request for a reversal on the grounds that the woman had a right to give away her land and that gifts cannot be reversed.

Gifts protected women from the loss of land to new co-wives, an increasingly serious threat as land scarcity made it more difficult for men to marry multiple wives without subdividing existing assets. During the colonial period, the courts exhibited little sympathy for men. In 1952, a woman sued her husband for giving her land to a co-wife, Chief Bigombe sided with the woman noting that “when the defendant [husband] lacked land [for his new wife], he decided to take away the plaintiff’s land . . . the defendant agrees the land belonged to the plaintiff”.¹⁰ In a dispute between a senior wife and her young co-wife that reached the courts in 1963, the senior wife, backed up by her husband and brother-in-law, laid claim to the disputed land because it was a gift from her parents-in-law in 1937. Her brother-in-law testified that he was the one who had cleared the land for her after his parents had given it to her.

Behind the court’s willingness to treat land transfers as gifts was a preoccupation with food security in a region plagued by high population densities and occasional famines. The brevity of court records in the 1940s obscure judicial thought, but in two cases the courts make explicit reference linking women to food. In 1949–50, Chief Bigombe declared that food “belongs to the wife”, when women complained that their husbands had denied them access to granaries.¹¹ Presaging later doctrinal developments, Chief Bigombe, at least once, invoked the notion of sufficiency. He was of the opinion that men, upon marrying an additional wife, ought to make sure that they have sufficient land before doing so. In one case, he told an errant husband that 14 strips of land were insufficient for two wives and ordered him to settle the new wife in the forest where land was plentiful.¹²

Preoccupation with food and land security could also work against women. In 1948, the colonial government initiated migration schemes to alleviate the high population densities near the Rwandan border. Older women appear especially reluctant to move, but protests to the courts did them little good. The courts upheld the right of husbands to make unilateral decisions. If women wanted to remain in Kigezi, they had to purchase the land from their husbands.

The courts also protected women when adult sons and levir husbands sought to grab widows’ assets. In part, the courts protected women because of their structural position in inheritance patterns that tie the future security of children to the property rights of women. But the courts also recognized the vulnerability of widows along with their inherent rights. In a case involving breach of contract, the court decided:

“The plaintiff [widow] has won the case because . . . it is true the defendant borrowed that cow to pay as dowry . . . and promised to repay it on 31 December 1955. And as he saw that the plaintiff’s husband had died he never minded to work so that he can repay that cow to the plaintiff when she is already a widow.”¹³

They not only held levir husbands responsible for the welfare of the widow and her children, but they had to use their own assets to fulfil these obligations.¹⁴

¹⁰ Nat. Ct., Kyanamira [Kya.], No. 156/50; No. 2/51; and No. 157/52.

¹¹ Nat. Ct., Kya., No. 159/49; and No. 140/49.

¹² Nat. Ct., Kya., No. 147/49.

¹³ Nat. Ct., Kya., No. 28/56.

¹⁴ Nat. Ct., Kya., No. 215/50; No. 28/56; No. 15/59; Nat. Ct., Rwamucucu, No. 90/57; and No. 139/62.

But the courts also perceived women as having their own inherent right to property. In 1963, the chief magistrate iterated that women's rights to their husbands' property go beyond mere subsistence rights; on the death of a husband, a woman assumes ownership, even to the point of being able to change her husband's will.

The expectation that women retained their own property and also shared in the distribution of a deceased husband's personal assets (including land and animals) was a source of friction between women and adult sons. Where land was scarce, men viewed the death of a parent as an opportunity to marry an additional wife and often resented their mothers' grip on family assets. In a suit between a mother and son in 1950, the woman complained to the court that she had given her son, the defendant, six strips of land and a sheep so that he could look after her, but that he had neglected her. The court ordered the man to return her property "so that she gives them to anybody ready to care for her".¹⁵ The court handed down a hefty fine and a punishment of six lashings with a cane to a man who had not only stolen money from his step-mother but beat her when she protested. The man argued that the property was his because it had once belonged to his father.¹⁶

Some men must have anticipated problems for their surviving widows because women, in a few cases, produced agreements written by their husbands spelling out the land holdings of each wife. One man, after marrying his third and final wife, gave her land out of his personal holdings and pieces donated by his first two wives. He then proceeded to record the holdings of each wife, giving a copy to each woman. In 1962, after the death of the father and his own mother, a son challenged the right of the third wife to land that his mother had donated during the final redistribution. The woman, however, supported by her one surviving co-wife, produced the written agreement, which the court honoured.¹⁷

FROM ORDER TO CHAOS: 1964–1979

While political independence in 1962 signalled the end of colonialism, the merging of the native African and magistrates' courts in 1964 had little effect on the ideological legacies of colonial law. Maintaining social order remained the primary purpose of the courts. What changed was the place of women's property rights in that social order. As land scarcity forced the courts to confront the incompatibility of women's property rights and polygamy, judicial doctrine took a patriarchal turn. From the decentralized nature of authority under the house-property complex, the courts zigzagged their way toward the centralization of power in male heads of households.

The transition was fraught with uncertainty for women as shifts in doctrine made judicial outcomes unpredictable. A few magistrates protected female autonomy but many adopted the new principles of sufficiency and necessity to justify granting men absolute control over property. Whereas the responsibility of women to ensure an adequate food supply previously yielded them autonomy over land, the logical relationship between rights and responsibilities shifted to men. Under the principles of necessity and sufficiency, the courts emphasized

¹⁵ Nat. Ct., Kya., No. 218/50.

¹⁶ Nat. Ct., Kya., No. 175/49.

¹⁷ Nat. Ct., Rwa., No. 24/62.

the responsibility of husbands to ensure a sufficient supply of land to each wife and the corresponding right to redistribute a wife's surplus land.

This shift, not coincidentally, paralleled political events. The rise of "big men" Milton Obote (1963–71), and subsequently Idi Amin (1971–79), the concentration of power in the office of the president, and the downward spiral of polity, society and economy into chaos and violence influenced judicial doctrine.¹⁸ Over the course of the 1970s, a greater number of magistrates would subscribe to a patriarchal and authoritarian model of the family. And, just as the political strongmen manipulated the legal system for political purposes, the courts selectively disregarded or applied the law to construct a judicial doctrine that invested absolute power in male heads of households.

Hints of the demise of female authority surfaced in the mid-1960s when women who were married under the Marriage Act failed to move the courts to enforce the monogamy clause. While customary marriages were potentially polygamous, couples married under the Act, either in a Christian or civil ceremony, were legally bound to monogamy. Women used the Act to argue the illegality of their husbands' subsequent marriages, but the magistrates declared polygamy to be an integral part of African society and a natural right of African men.

Women viewed polygamy as a personal betrayal but they were more concerned with preserving their assets than sharing men with co-wives. In the typical case, the couple had been married for ten to fifteen years during which they laboured together to accumulate wealth in land and animals. Women considered themselves co-owners of property acquired during marriage because of the economic importance of their agricultural labour. Men viewed the property, however, as theirs to use to marry a second wife. This was the case in a dispute that festered in the courts for several years. The couple married in church in 1944; in 1963, he used the accumulated land and cattle to marry a second wife.¹⁹ His first wife successfully sued him in 1963 and the man moved his second wife to a new homestead. In 1967, he returned her to the original site and his first wife, in retaliation, slaughtered a cow, a bull, and two heifers.

The first wife brought witnesses to testify that the animals were gifts from her own family, given to her after she complained to them of conjugal neglect. The magistrate attributed the problem to the jealousies inherent in polygamous households. Sidestepping the illegality of the second marriage, the magistrate wrote:

"I am of the opinion, . . . that the Plaintiff's [wife] claim is based on her jealousy that the Defendant [husband] was married to another wife but this does not entitle her to deprive him of the right of owning his property. If the Plaintiff wished to share the property, I suggest she goes home and leaves the distribution to the entire decision of the Defendant."

Women persisted in their expectation to participate in decisions that directly affected their land. The words of one woman in court are reflective of the sentiments of others:

"The land in dispute was given to me as part of my share and he later sold this land without my knowledge. All my sorghum which I cultivated was destroyed. The land has not been returned to me . . . I would not have prevented defendant

¹⁸ Interviews, Kabale District, 18 April, 1996; and 8 December, 1996.

¹⁹ Mag. Ct., Nyakagyeme, Rukungiri District, Civ. Suit 37/67.

[her husband] from selling the land if he had informed me and gave me another land instead. I am still defendant's wife and I am an old lady and have nowhere to go except to remain on defendant's land and die there."²⁰

The chief magistrate agreed that the woman must have land "because she needs somewhere to cultivate food to feed her family". But he also strenuously defended the man's right to sell family land because "under customary law, the plaintiff [wife] and the land are the property of the defendant [husband]."²¹

The principles of necessity and sufficiency are first evident in 1972, when a 45-year-old woman complained of living in a leaking house with only one strip of land because her husband gave her land to a new co-wife. The man denied the charge, telling the court that she possesses six strips of land that she "uses exclusively", a strip of coffee trees, and a banana plantation. The magistrate, concurring with the husband that she has enough land, accused the wife of greed.

"She wants a lion's share of her husband's land. The point to be decided upon, in fact, is whether the plaintiff has been given enough land after the defendant has married another wife to cultivate and enough banana plantation on which she can feed."²²

In 1975, the presiding chief magistrate appeared to breathe new life into the principle of gifting by linking it to the common law principle that title follows possession. Any land a husband "conveyed" to his wife at marriage belonged to her.²³ The attempt to legalize marriage gifts under common law principles was short lived. Chief magistrates may influence the thinking of the lower courts through their rulings as appellate courts. Lower-level magistrates monitor the outcomes of appeals against their decisions. But absent the ability to set legal precedent, the frequent rotation of the chiefs limits their long-term influence on judicial thought.

The contradictory testimony by witnesses (most often male) called to provide authoritative statements on local custom sustained the confusion in the courts. When the question of marriage gifts again comes before a magistrate grade one in 1979, he erroneously classifies the practice as a new development in Kiga customary law:

It would appear to me a recent development in Kiga customs that when a man . . . decides to give his wife or wives land whether to use or live upon, such gift is taken as an outright gift to the wife or wives. He cannot later demand it back or try to retrieve it from her. The land becomes hers and can only be inherited by her direct offspring. This custom of which I have become acquainted with is opposed in some quarters by people who regard it as a new intrusion on the customary powers of the man and they still insist that land belongs to the man and not the woman. It remains to wait and see what the decision of the High Court will be . . . but suffice it to say that there is no decisive authority on his custom, even among the old Bakiga.²⁴

The High Court would eventually settle this question in favour of male ownership. In the meantime, a shift from oral testimony to written evidence of

²⁰ Ch. Mag. Ct., Kabale, Civ. App. MKA 21/71, arising from Mag. Ct., Ikumba, Civ. Suit 6/69.

²¹ Ibid.

²² Mag. Ct., Kashambya, Civ. Suit 85/72.

²³ Ch. Mag. Ct., Civ. Suit MKA 184/75.

²⁴ Mag. Ct., Kabale, Admin Cause MKA 8/79.

ownership escalated the legal burden of proof for women and marked a significant turning point in the redistribution of property rights in the household.

PAPER TRAILS AND LEGAL PRESUMPTIONS: "IT IS A KIGA CUSTOM THAT
LAND BELONGS TO MEN", 1980–1997

Social taboos about women and money and changes in how people conducted land transactions culminated in new rules of evidence that escalated the burden of proof for women in the 1980s. With the incorporation of Kabale into a market economy (in the 1930s), social taboos tainting women who engaged in income-generating activities as sinful evolved as men sought to control women's labour and the income it generated. By the 1950s, the shift from oral to written land transactions generated a corresponding taboo against women signing or thumb printing written documents. The legal consequences were significant. First, the cultural prohibitions that discouraged married women from achieving financial independence reinforced the assertions by husbands and lawyers in court that women are financially incapable of purchasing land. Second, the use of written records to document land ownership not only gave men the means to secure sole ownership. It altered the rules of evidence in court. Whereas oral testimony had biased the courts toward women as the daily users of land, written proof skewed it toward men.²⁵ The consequences are visible in the legal presumption that property, unless women produce written evidence to the contrary, belongs to the male head of household.

The practical consequences of changes in the rules of evidence were apparent in a suit in which the chief magistrate used women's presumed financial incapacity to find that they could not hold property to the exclusion of co-wives. In what began as a typical dispute, a woman told the trial court that she and her husband had built a commercial building for her on a plot of land that she retained at a trading centre.²⁶ Her two sons had assisted in the construction. When completed, though, her co-wife moved onto the premises. The husband contended that the plot was his personal land, purchased in 1932. The lower court framed the issue as the right of one wife to hold property to the exclusion of her co-wives, as was the case under the house-property complex. Noting that the wife in court had used the plot to grow food, the lower magistrate accepted this as

"prima facie evidence that the plot of land in dispute is the share of the plaintiff to the exclusion of her co-wives. Whatever is on that plot of land including the house in dispute is the property of the defendant [husband] and plaintiff [wife] jointly as husband and wife to the exclusion of any of defendant's wives. Defendant was therefore wrong to give that house to his other wife."²⁷

But, in the appeal before the chief magistrate, counsel for the appellant-husband argued that the wife had produced no evidence that she had participated in the purchase of the plot or the building of the house. Hence, although a wife married by custom has a right to equity and good conscience, a husband has an overriding right to determine how to dispose of his property. The chief magistrate agreed and suggested that the trial court should have found out how "a customary housewife could contribute toward the purchase of land . . . [and]

²⁵ Mag. Ct., Rwa., Civ. Suit 154/63; Civ. Suit 175/64; Civ. Suit 176/64; and Civ. Suit 132/64.

²⁶ Mag. Ct., Kamwezi, Kabale District, Civ. Suit 58/79.

²⁷ *Ibid.*

ought to have put questions to elicit information to show how she came to jointly buy the plot with her husband."²⁸

Nor did the legal logic of another magistrate endure in the appellate court. The centrepiece of his decision was the legal fiction that husband and wife are one in marriage:

“once a couple is married in church they become one and whatever each owns belongs to the other and therefore the question of differentiating the ownership of their property is out. . . . Theirs is a joint ownership of the land and therefore neither party can expel the other away from the land.”²⁹

The plaintiff-wife claimed to have lost 23 strips of land to her co-wife, some of which she had bought herself in the 1950s using money received from her brother and the sale of food crops. When the lawyer for the husband argued that an illiterate female could never have bought land on her own in the 1950s, her lawyer retorted that the “old customary law . . . has been modified by the modern rules that land is jointly owned by both husband and wife and accordingly cannot be disposed of without the consent of either.”³⁰

The courts' demands for legal evidence of ownership stood in stark contrast to their tolerance for men who violated the Marriage Act. The inconsistent enforcement of law underscores the wide discretionary powers available to magistrates. The fluidity of customary law facilitated this but so do conditions of legal pluralism whereby magistrates are left to decide whether to apply customary or statutory law. The flurry of illegal polygamy cases before the courts in the 1980s illustrate the courts' preoccupation with preserving male authority as the foundation of social order, even if it means sanctioning illegal actions.³¹ The chief magistrate in 1989 was circumspect about reconciling his obligation to uphold the laws of Uganda, he opted to emphasize that polygamy was a natural right of men. He wrote:

“It would be sheer hypocrisy to shut our eyes to realities of life in Africa in general and Uganda in particular. In this part of Uganda, polygamous marriages are not rare. Many customs and traditions do not frown upon second marriages during the pendency of the first marriage . . . many a man here have married second wives without any penal sanctions visiting them. I would therefore be reluctant to declare the second marriage . . . null and void for the simple reason that problems have since cropped up between husband and wife. . . . This is however not to declare that it is legal.”³²

Furthermore, the contraction of an illegal marriage should have no consequences for the authority of men in the family:

“a law which would render a man impotent in his own property has not yet been enacted . . . can it be said that a man who takes it upon himself and acquires a second wife has to lose his role in the home as head of household? I think not.”

²⁸ Ch. Mag. Ct., Kabale, Civ. App. MKA 26/80, arising from Mag. Ct., Kamwezi, Civ. Suit 58/79.

²⁹ Ch. Mag. Ct., Kabale, Civ. App. MKA 33/83, arising from Mag. Ct., Ikumba, Civ. Suit 88/79.

³⁰ *Ibid.*

³¹ Ch. Mag. Ct., Kabale, Civ. App. MKA 67/1989, arising from Mag. Ct., Nyakishenyi, Civ. Suit 11/88.

³² Ch. Mag. Ct., Civ. App. MKA 67/89.

The husband “is the undisputed bread winner for the home” and, as the head of the family, he had the sole right and authority to determine what constitutes a fair and equitable distribution of property.

Ironically, it was a land dispute between a father and son that entrenched the subordination of women in legal precedent. The general question before the courts was whether the property used by a woman during her marriage reverts, upon either her death or a divorce, to her husband or to her children. Under an idealized house-property complex, land passed from mother to son. Should a woman die or divorce before her children reach maturity, the husband holds the land in trust for them. Protecting the property rights of women was essential to the future economic security of children.

In 1983, before a magistrate grade two, the children of a divorced wife sued their father over his right to sell the house in which their mother had lived. The trial magistrate ruled in favour of the children holding:

“It is a fact that D1 has divorced his wife and that he has not divorced his children. D1 is still duty-bound to care for his children by providing food, shelter, and clothing—the necessities of life. It is also customarily accepted that the children of a divorced wife have to step in the shoes of their divorced mother by way of inheriting the property that was used by their mother. This court cannot lose sight of this fundamental Bakiga custom.”³³

The chief magistrate presiding over a different case in 1989 concurred, stating that “. . . it is an established custom in Kigezi and the courts have taken Judicial Notice that in a polygamous marriage, each son or daughter inherits the land his or her mother was cultivating. . . .”³⁴

The ability of daughters to inherit in the absence of sons illustrates the centrality of women's houses in the succession process. In 1979, a woman's uncle defended her right to inherit her mother's property against the protestations of several step-brothers. A man of about sixty years, he testified that “according to me the land belonged to Plaintiff [daughter]. I say this because the Plaintiff represents her mother. Her step-brothers have their own land. . . . Our custom recognized that women can own land. After the death of parents then the children inherit the land.”

“The children including the females are entitled to a share of her parents' properties. If a female child got special problems she would have a right to sell the land. A woman can have title to the land. Customs are now changing. It would be a wrong custom that the properties of one mother and father revert to the children of a step-mother. A child inherits the property of her mother.”³⁵

But, in 1993, Justice Karokora, resident judge of the High Court in Mbarara, anchored judicial doctrine firmly in the idea that men, as the head of the household, exercise superior authority over property and persons. He rejected the house-property complex as an unproven custom that undermines the authority and control of men over their households.³⁶ The pivotal case was *Bariguga v. Karegyesa and two others*, in which three sons sued their father over the right to

³³ Mag. Ct., Nyarushanje, Rukungiri District, Civ. Suit 75/83; Ch. Mag. Ct., Kabale, Civ. App. MKA 109/87.

³⁴ Ch. Mag. Ct., Kabale, Civ. App. MKA 68/89, arising from Subcounty Council, Bukinda, Kabale (no case number).

³⁵ Ch. Mag. Ct., Kabale, Civ. App. MKA 10/84, arising from Mag. Ct., Kaharo, Kabale, Civ. Suit 69/79. The disputants were previously in court in Civ. Suit 87/64 and Civ. App. 82/65.

³⁶ District Register, High Court of Uganda at Kabale, Civ. App. MKA 13/93, arising from Civ. App. MKA 48/90.

inherit land that their deceased mother had once farmed. Their mother died when the sons were young and the father remarried in the same homestead. According to the record of the High Court, problems arose when the sons sought to build within this homestead without the permission of their father. The suit began in the local council courts with the village and parish council courts voting in favour of the father while the subcounty court ordered the latter to divide and distribute the land to his sons and daughters. On appeal to the chief magistrate, the order to divide the land stood but the presiding chief magistrate excluded the daughters from the distribution.

The grounds of appeal before the High Court consisted of four points which, in the words of counsel for the appellant-father, hinged on “[W]hether or not a son can force his father to give him land which the mother of that son was using before she died.”³⁷ The counsel for the respondent-sons conceded that such customs were undecided but that the sons had been living on the land, had built permanent houses, and planted permanent crops without objection from the father.

Judge Karokora, a chief magistrate in Kabale in the late 1970s and now a judge of the Supreme Court of Uganda, defined the case as a question of whether a woman could claim exclusive control over matrimonial property given to her by her husband to the point that upon her death it would become the property of her children. He wrote:

“I must state here that I am not aware of any customary law which deprives a man of his land and divests it exclusively in his wife and on to his sons after his wife has died on the basis of the land having been cultivated by the mother of respondents that is, the wife of the appellant. In my considered view, if the deceased mother of the respondents was using the land on her marriage, she was using it as matrimonial property in trust for her benefit and husband's benefit. The husband never lost his customary proprietary rights in that land, merely because his wife was cultivating it. On her death, her interest in that land came to an end and the land remained exclusively husband's land.”³⁸

The judge continued,

“I must add that if there is any custom which says that land which was being used by their mother should pass on to her sons rather than reverting to the husband would be repugnant to natural justice, equity and good conscience because that would be depriving a man, as head of family, of property *vis-à-vis* his children and even his power to control his children.”³⁹

As a court of record, it is inevitable that the High Court's ruling will influence the lower courts. But widespread citation of the case by magistrates is indicative of the power of individual judges to give legal force to their own normative frameworks. In 1995, drawing on the decision of the High Court, the chief magistrate denied the right of children, whose mother had deserted their husband while they were still young, to take control of their mother's land upon reaching an age of majority. The chief magistrate observed:

“This is a typical case of what polygamy can be in an African family. The parties do not see themselves from the eyes of [the father] but see themselves from the eyes of their mothers. . . . There was no evidence to prove that there is a custom that once a person's mother stayed or used to cultivate a certain area then

³⁷ Ibid., 2.

³⁸ Ibid., 4.

³⁹ Ibid., 4.

Table 1: Applications for Letters of Administration, Chief Magistrate's Court of Kigezi, 1990–95

Year	<i>Application to administer estate of deceased male by:</i>		<i>Application to administer estate of deceased female by:</i>	
	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>
1990	0	1	1	0
1991	2	7	0	0
1992	3	9	0	1
1993	18	35	4	1
1994	10	44	7	0
1995	32	42	12	5

Source: Civil Registry, Chief Magistrate's Court, Kabale District.

automatically that area belongs to her sons. Such a custom would, as in this case, have the effect of breaking up the homes of people dying intestate and I must say it was wrong.”⁴⁰

The social and legal disconnect between women and property caused researchers at the Ministry of Women in Development, Culture, and Youth to ponder what happens to women's property when they die. In their survey of applications for probate or letters of administration filed at the Administrator General's Office in Kampala, they found that the majority of applications pertained to the estates of men rather than women. A similar pattern occurs in Kabale (Table 1). In 1995, for example, the court at Kabale registered 74 applications to administer the estates of deceased males and only 17 applications to administer the estates of deceased females. The authors of the Ministry's study ask whether “women as a whole do not own property so that on death, they leave no property to be administered? If they work during their lives, does their labor yield them nothing by way of property? If they get something, how come that their property is not administered and, in default of administration, who inherits?”⁴¹

One answer lies in the incorporation of social hierarchies into the legal presumptions that guide the courts in differentiating competing claims to land. Even magistrates who couch their decisions in the language of joint marital property rights do not escape the asymmetries in female and male legal standing. While jointure allows men to claim authority over assets that women inherited from their own families, the courts do not allocate reciprocal privileges to women. The variance in filings for female and male estates occurs because the law allows men, but not women, to hold property independent of their spouses.

In a dispute between a man and his widowed step-mother, the former claimed that his mother had inherited the land in question from her parents.⁴² Upon the death of his mother, prior to his reaching majority age, the land reverted to his father. But, he argued, his father's authority was limited to holding the land in trust for the children. The chief magistrate disagreed. The fact that the land had previously belonged to the mother's family was not in dispute. Nevertheless,

⁴⁰ Ch. Mag. Ct., Civ. App. MKA 1/95, arising from Subcounty Council, Myakabande (no case number).

⁴¹ Ministry of Women, “A Study on the Administrator General's Office”, 6.

⁴² Ch. Mag. Ct., Kabale, Civ. App. MKA 83/95, arising from Subcounty Court, Murora, Kisoro District (no case number).

the chief magistrate reasoned that her parents had most likely gifted the land to the husband *and* wife. Hence, upon the death of the wife, the surviving spouse retains ownership. And, “once the husband married another wife such gift is owned by both husband and new wife, unless such husband makes it clear that the gift has nothing to do with his new wife.”⁴³

CONCLUSION

In a relatively short space of fifty years, women in Kabale have experienced a precipitous decline in their legal property rights. Women who sought relief or protection from the courts in the 1950s were far more likely to succeed than those who do so today. In trying to understand the sources of judicial doctrine and the forces of change, I have argued two points. First, in the absence of legislative guidance on women's property rights, the preoccupation with maintaining social order rather than facilitating social justice underlies judicial doctrine. Women's property rights are a function of whether the courts view female authority over land as essential to social order or a sign of impending chaos. Second, the fluidity of customary law and the deterioration in political and economic conditions drove changes in judicial doctrine. As Uganda descended into authoritarianism, political violence, and eventually civil war, the courts increasingly viewed the bolstering of male authority in family and society as a bulwark against chaos and anarchy. In 1993, the High Court established as legal precedent the subordination of women's property rights to those of a male head of household.

The evolution in the legal construction of women's property rights has implications for the current political debates in Uganda surrounding the Domestic Relations bill and the revision of laws pertaining to land, marriage and succession. Those who argue that customary law reflects a natural and immutable social order fail to understand that custom is a social construct reflecting a shifting constellation of ideological, political, social and economic inputs. More significant, however, is the question of who gets to participate in the making of the laws that govern the daily lives of ordinary Ugandans. In the absence of legislative guidance, the courts exercise unfettered power to make law. Not only is this undemocratic in the sense that Ugandans are denied the right to participate in the process, but it perpetuates the belief that a “rule of persons” prevails over a “rule of law”.

⁴³ Ibid.