



# **UGANDA LAW REFORM COMMISSION**

## **STUDY REPORT ON THE REVIEW OF LAWS ON SUCCESSION IN UGANDA**

**JULY 2013**

## TABLE OF CONTENTS

CHAPTER ONE .....	3
INTRODUCTION AND BACKGROUND TO THE STUDY .....	3
1.1 Introduction .....	3
1.2 Background and context .....	4
1.3 Statement of the problem.....	8
1.4 Objectives of the Study.....	9
1.6 Scope of the study .....	12
CHAPTER TWO.....	13
LITERATURE REVIEW.....	13
2.1 Introduction .....	13
2.2 Gaps and Anomalies.....	14
2.3 Discriminatory provisions .....	24
2.4 Customary heir.....	43
2.5 Separation and its resultant effects.....	43
2.6 Right of the widow to letters of administration .....	45
2.7 Cohabitation.....	46
2.8 Entitlement of dependant relatives .....	49
2.9 Customary Practices of Succession.....	52
2.10 Legal pluralism.....	54
2.11 Religious Practices (The position of Islam) .....	56
CHAPTER THREE .....	86
METHODOLOGY OF THE STUDY .....	86
3.1 The Study Design.....	86
3.2 Population and Area of study .....	86
3.3 Data Collection Techniques.....	88
3.4 Data collection methods.....	90
3.5 Procedure .....	90
3.6 Fieldwork .....	91
3.7 Data Analysis and Report writing.....	91
FINDINGS OF THE STUDY.....	92
4.1 Introduction .....	92
4.2 Knowledge of the law.....	92
4.3 Areas of the Law Requiring Law Reform.....	94
4.4 Testate Succession.....	98
4.5 Intestate Succession .....	116
4.6 Cohabitation.....	130
4.7 Customary Heir.....	131
4.8 Challenges faced by implementers of the law when dealing with administrators of estates .....	132
4.9 Mechanisms in place to check the powers of an administrator .....	133
4.10 Challenges in enforcing the available mechanisms .....	134

4.11	How implementers address mismanagement by Administrators .....	134
4.12	Office of the Administrator General .....	136
4.13	Services offered by the Office of the Administrator General .....	137
4.14	Intermeddling with property of the deceased .....	143
4.15	Judiciary/ Formal Courts .....	146
CHAPTER FIVE .....		152
CUSTOMARY NORMS AND PRACTICES OF SUCCESSION IN UGANDA .....		152
5.1	Introduction .....	152
5.2	Nilotic Ethnic Group .....	152
5.3	Nilo-Hamites Ethnic Group .....	153
5.4	Bantu Ethnic Group .....	155
5.6	Influences of customary practices on succession .....	160
5.7	Distribution of property /Property inherited.....	163
5.8	Decision making by women in matters of inheritance of an intestate ....	167
5.9	Effectiveness of customary practices of succession .....	169
5.10	Perception on the growing influence and equality of women in property ownership and succession .....	170
5.11	Conclusion and Recommendations.....	171
BIBLIOGRAPHY .....		172
Annex 1: LEGAL AUDIT OF SUCCESSION LAWS.....		176

## CHAPTER ONE

### INTRODUCTION AND BACKGROUND TO THE STUDY

#### 1.1 Introduction

The Uganda Law Reform Commission with support from the Justice Law and Order Sector undertook a study to review the laws of succession in Uganda. The purpose of the study was to ensure among others that; the provisions of the laws of succession are in conformity with the 1995 Constitution of the Republic of Uganda, national laws and international and regional human rights standards and practices, are up to date with the changing socio-economic circumstances of Uganda, and that the law is accessible to the people and its implementation can be better realised.

Succession means the acquisition of rights and/or property of a deceased person by law. The terms “Succession” and “inheritance” are commonly used interchangeably. For purposes of this study, we shall restrict ourselves to the use of the term succession which is the legal term.

In Uganda, succession is provided for under various laws. These include; the Constitution of the Republic of Uganda, 1995, the Succession Act<sup>1</sup>, the Administrator Generals Act<sup>2</sup>, the Estates of Missing Persons (Management)Act<sup>3</sup>, the Administration of Estates (Small Estates) (Special Provisions)Act<sup>4</sup>, the Local Council Courts Act<sup>5</sup>, the Probate (Resealing) Act<sup>6</sup>, the Trustees Incorporation Act<sup>7</sup>, the Public Trustee Act,<sup>8</sup> the Administration of Estates by Consular officers Act<sup>9</sup>, the Administration of Estates of Persons of Unsound Mind Act<sup>10</sup>, the Church of England Trustees Act<sup>11</sup> and the Local Governments Act.<sup>12</sup>

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<sup>1</sup> Cap 162.

<sup>2</sup> Cap 157

<sup>3</sup> Cap 159

<sup>4</sup> Cap 156

<sup>5</sup> Local Council Act, 2006.

<sup>6</sup> Cap 160

<sup>7</sup> Cap 165

<sup>8</sup> Cap 161

<sup>9</sup> Cap 154

<sup>10</sup> Cap 155

<sup>11</sup> Cap 158

<sup>12</sup> Cap 243

These laws set out the substantive law and procedures for matters of succession such as: the succession rights of widows/widowers and children during both testate and intestate succession, protection accorded to the different sexes in succession matters, powers and duties of the office of the Administrator General; powers and duties of an administrator or executor of an estate; jurisdiction of the courts; procedure for obtaining letters of administration or grant of probate; and offences arising there from.

Owing to the large scope of the succession legal regime via avis the limited resources, this study mainly focused on the succession Act, Cap 162 and the Administrator General's Act, Cap 157 and occasionally made reference to the other laws on succession afore mentioned.

## **1.2 Background and context**

### **1.2.1 Historical background**

#### **1.2.1.1 Succession Ordinance, 1906**

The origin of Uganda's law of succession can be traced as far back as the Succession Ordinance of 1906<sup>13</sup>, which was adopted from English law. The Ordinance introduced the British models of succession and inheritance into Uganda as the law applicable to all cases of intestate or testamentary Succession. However, the Ordinance exempted the estates of all natives of the protectorate from the operation of the succession Ordinance and estates of Mohammadans were exempted from the provisions of Part V of the Ordinance. Part V of the Ordinance provided for the distribution of an intestate's property<sup>14</sup>. The Ordinance did not exhaustively provide for testate succession and generally fell short on intestate succession especially with respect to the different interests in an intestate's property of the Ugandans who were left to apply customary and cultural practices of succession with their shortfalls. The Ordinance further discriminated against illegitimate children and relatives in succession matters by its recognition and preference to legitimate children and relatives. Illegitimate children took a secondary position only if at the time of writing the will or intestate's death had acquired the reputation of being such a relative.<sup>15</sup>

The Ordinance saved the application of religious and customary law by natives in succession matters. Hence Africans' religious (Muhammadan) and customary practices continued to influence their decisions in handling

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<sup>13</sup> Subsequently the Succession Act.

<sup>14</sup> General Notice of 22<sup>nd</sup> January 1906.

<sup>15</sup> S. 87 Succession Ordinance 1906

succession matters. Those Africans who preferred the customary way of handling succession still continued to apply customary practices alongside the statutory law. This sowed the seeds for the legal pluralism that surrounds the law of succession in Uganda today.

In matters of testate succession, the Ordinance presupposed that it was only the husband who would make a will<sup>16</sup> as well as appoint a testamentary guardian for his children<sup>17</sup>. The widow of an intestate was entitled to 1/3 (one third) and 2/3 (two thirds) went to the lineal descendants, about 30% compared to the 15% which is given to the widow(s) under the current succession Act.

### **1.2.1.2 Succession (Amendment) Decree, 1972**

Due to the shortcomings in the Succession Ordinance of 1906, the law was subsequently amended in 1972 by the Succession (Amendment) Decree<sup>18</sup>, to provide for succession to estates of Ugandans dying intestate and restricted the disposal of property by will among other things. The new law recognised the rights of illegitimate and adopted children. The definition of a child in the Decree included legitimate, illegitimate and adopted children<sup>19</sup>.

The Decree introduced dependant relatives as a category of beneficiaries to a deceased's estate, recognised polygamy, the concept of customary and legal heir, and introduced the concept of a male preference to the female when choosing a legal heir.

The matrimonial home was protected during intestate while a widow's share was reduced to 15% down from the 30% in the Succession Ordinance of 1906<sup>20</sup>. It further provided that each category of lineal descendants, wives and dependant relatives shall be entitled to share their proportion of a deceased's estate in equal proportions and that any child of a deceased lineal descendant takes the deceased lineal descendant's share if he survives the intestate<sup>21</sup>.

In the 2<sup>nd</sup> schedule to the Decree, re-marriage by a widow terminated her occupancy of the matrimonial home which was not the case for the widower who was allowed to remarry and maintain occupancy of the matrimonial

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<sup>16</sup> Ibid, S. 25

<sup>17</sup> Ibid, S. 47

<sup>18</sup> 1972

<sup>19</sup> Ibid, S.3

<sup>20</sup> Succession Ordinance, Opcit, S.28

<sup>21</sup> Ibid, S. 29

home. At the same time preference was given to the father's side during the appointment of a statutory guardian of minor children.

It should be noted that many of the provisions above were largely discriminatory on the basis of sex. The application of such provisions left women in an inferior position to that of the men. Such provisions would later sow seeds of discontent among the women activists particularly after the coming into force of the 1995 Constitution of the Republic of Uganda which brought about the principle of equality between men and women in Uganda.

### **1.2.1.3 Succession Act, Cap 162**

The current Succession Act attempted to bring on board the aspirations of the people of Uganda over time. The current Succession Act is largely a replica of the provisions of the Succession Amendment Decree with its gaps and anomalies as highlighted above. As a result, the current succession Act necessitated a review to address the gaps and anomalies that had pertained for long time. Over time several studies have been conducted in Uganda and recommendations for amendment of the law of succession have been made based on the identified gaps. Some of these studies include; The Kalema Commission of Inquiry<sup>22</sup>, Ministry of Gender and Community Development study<sup>23</sup>, Ministry of Women in Development, Culture and Youth<sup>24</sup> and the Uganda Law Reform Commission secondary study on the law of Succession alongside the study on the Domestic Relations Bill.

The studies established several challenges within the law and practices of succession among these were that; the law on succession is largely unused as culture and tradition was predominantly relied upon to operate in matters of succession<sup>25</sup>, the provisions in the law were evidently discriminatory<sup>26</sup> and that the actors involved in implementation of the Act were faced with challenges of implementation as the communities were largely unaware of the law and only resorted to the formal institutions when customary procedures had failed<sup>27</sup>, Centralization of the Office of the Administrator General<sup>28</sup>,

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<sup>22</sup> Report of the Commission on marriage, divorce and Status of Women, 1965 (the Kalema Commission Report)

<sup>23</sup> A study of Women and Inheritance in Bushenyi District, Project paper No.4, July 1994

<sup>24</sup> A study on the Administrator General's Office, Research Project on Women and Inheritance, November 1993.

<sup>25</sup> The study established that customary clan structures that control the administration of property after death were still firmly entrenched in the communities studied. As a result, even where a valid will exists, the customary norms may supersede it. Domestic Relations Study Report page. 272.

<sup>26</sup> Definition of Legal heir- see Domestic Relations Study Report, page 301.

<sup>27</sup> According to the DRB report, formal institutions are only resorted to when the informal customary mechanisms fail to resolve a dispute over administration. Supra at page 278.

<sup>28</sup> Study of Women and Inheritance in Bushenyi District, Project paper No.4, July 1994

unrealistically light penalties in the law, complex and expensive procedures for acquiring probate and letters of Administration among others. It was on this premise that the Domestic Relations study recommended a comprehensive study on the reform of the law of succession in Uganda.

There have also been a number of concerns like the discriminatory nature of some of the provisions of the succession Act<sup>29</sup> and the obsolete fines and penalties raised by various stake holders such as the Administrator General's office, Civil Society Organisations<sup>30</sup>, women's movements<sup>31</sup> and individual actors calling for the inequality and the resulting unfairness in the above mentioned laws to be addressed through law reform<sup>32</sup>. To date these gaps and challenges have never been addressed in our laws of succession.

In addition, Uganda is a signatory to various international and regional legal instruments that champion the cause of equality and non discrimination of persons and is therefore under an obligation to fulfil its commitments to eliminate discriminatory provisions in its laws. The said instruments include the African Charter on Human and Peoples Rights (ACHPR), The Convention to eliminate all forms of Discrimination against Women (CEDAW) and the Universal Declaration on Human Rights among others (UDHR) among others. The (CEDAW) requires states parties not only to prohibit discrimination but also to take affirmative steps in order to achieve gender equality. This imposes an obligation on state parties to reform laws that are in violation of the convention. The African Charter on Human and Peoples Rights (African Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (The Women's Protocol to the African Charter) similarly prohibit discriminatory practice against women. It was noted that the current laws of succession are not in congruence with Uganda's obligations in the above mentioned international and regional instruments.

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<sup>29</sup> Law and Advocacy for Women in Uganda Vs A.G Constitutional Petition No. 13/2005 & 05/2006

<sup>30</sup> UN- HABITAT- Rights and Reality, Are Women's Equal Rights to Land, Housing and Property Implemented in East Africa? This report high lights the inequality and discrimination women as a vulnerable group face including discrimination in the legal regimes of East African Countries in relation to property rights among others. The African studies quarterly report, volume 7, Issue 4 on women's movements, customary law, and land rights in Africa: The case of Uganda lends credit to the issues of concern pointed out above.

<sup>31</sup> Jackie Asiimwe, "Universalism versus cultural relativism: family law reform in Uganda: The Ugandan Women's Movements' efforts to reform family law in Uganda".

<sup>32</sup> The Constitutional Court decision of Law Uganda and Attorney General, Constitutional Petition No. 13/06. Where it was held that Sections 2(n) (i) and (ii), 14, 15, 26, 27, 29, 43, 44 of the Succession Act and Rules 1, 7, 8, and 9 of the Second Schedule of the same Act are inconsistent with and contravene Articles 21(1) (2) (3) 31, 33(6) of the Constitution and they are null and void.



### 1.3 Statement of the problem

The Succession Legal Regime today is a reflection of the colonial influence which largely continued to uphold the principles of English Law and as such failed to reflect the different customary and cultural practices of the people of Uganda which are central to their existence. It is also important to note that the last official review of the law of Succession was the Kalema Commission Review of 1965 that culminated into the 1972 Succession (Amendment) Decree. As such, the provisions in the current laws are outdated and do not reflect the contemporary social and economic changes of the day and the changes in other laws specifically the equality and non discrimination guarantees enshrined in the 1995 Constitution of the Republic of Uganda. The above shortcomings have been specifically identified in the laws of succession as those which require urgent reform.

Although matters involving succession have been codified, many people rely upon customary and religious practices to determine succession matters. This has been attributed to ignorance of the formal institutions and lack of awareness as to their role<sup>33</sup>. The Constitution of Uganda allows for the operation of customary law in so far as it is not detrimental to the rights of marginalised groups<sup>34</sup>. Despite this Constitutional guarantee, some of these customary practices relating to succession are oppressive and discriminatory against women and children which contravene the 1995 Constitution.

The Laws on Succession establish various institutions to handle matters of succession in circumstances of a deceased dying testate or intestate. However, it has been established that access to these formal institutions is hampered by illiteracy, lack of awareness and the anticipated legal fees among others<sup>35</sup>. It has also been established that there is little awareness and use of the district agents of the Administrator General and the institutional structures at the local level which in effect hampers effective functioning of the legal system.

Recent Constitutional Court pronouncements have rendered some of the provisions of the Succession Act unconstitutional hence null and void<sup>36</sup> on the basis of gender discrimination. The Succession Act needs to be reformed in order to bring them into conformity with the 1995 Constitution and International human rights standards as was rightly found by the Justices of the Constitutional Court.

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<sup>33</sup> ULRC Domestic Relations Report at pages 277, 283 and 284.

<sup>34</sup> Article 2 (2) and Art. 32(2) of the Constitution of the Republic of Uganda, 1995

<sup>35</sup> ULRC Domestic Relations report at page 265.

<sup>36</sup> Law Uganda Case *ibid*.

Some of the provisions within the various enactments pertaining to succession are outdated. The fines in the laws are outdated in terms of the prevailing socio-economic circumstances and thereby require review to reflect the intended punitive aspects of the provisions at the time they were enacted.

There are also several case law decisions that offer interpretation of the law of succession taking into account the values trends developments and aspirations of the Ugandan society. However, such comprehensive and well thought out jurisprudence has not been reflected in the provisions of the law to reflect the developing trends and interests of the people. This would be necessary for purposes of ensuring clarity on the position in the law and thereby offering enhanced protection in succession matters.

## **1.4 Objectives of the Study**

### **1.4.1 Overall objective**

The overall objective of this study is to review and harmonise legislation relating to succession in Uganda with a view of; identifying the gaps and anomalies within the law for elimination, identifying challenges and proposing solutions for the better implementation of the law, identifying the various customary and religious practices in the area of succession that fall short of the human rights standards with a view to proposing their elimination and identifying best practices from other jurisdictions to improve on the nature and substance of the law.

### **1.4.2 Specific objectives**

The specific objectives of the study are to:-

- 1) Identify gaps and anomalies in the current laws on succession in Uganda in a bid to bring the law in conformity with the 1995 Constitution of the Republic of Uganda and Uganda's International and Regional commitments.
- 2) Establish the negative and positive customary and religious practices and attitudes on succession in the various ethnic and religious groups in Uganda.
- 3) Identify challenges involved in the implementation of the law of succession in Uganda.

- 4) Make proposals for reform of the law on succession in Uganda and a draft Bill.

## 1.5 Justification for the study

Although a number of studies have been carried out on the law of succession in Uganda, these studies have had some notable limitations. The only official study on the law on Succession is about 5 decades old having been carried out in 1965<sup>37</sup>. It is also important to note that this study did not focus specifically on matters of succession as its major focus was marriage, divorce and the status of women. Similarly, the Domestic Relations study by the Uganda Law Reform Commission was part of another study that focused on Domestic Relations thereby making issues of succession secondary.

Other studies by independent researchers<sup>38</sup> were limited in their scope; they largely focused on women's concerns and did not culminate into tangible legal reforms. Nonetheless, the findings of these studies were used to inform the present study. This study was more comprehensive in its scope including; gender, ethnic and religious concerns, as well as attitudes and practices which influence the operation of the law of succession.

Other issues which were taken into consideration under this study included the developing social trends, international and regional obligations and developments in jurisprudence.

There were a variety of social changes that had taken place since the enactment of the succession laws that necessitated a review. Some of these included changes within the family dynamics, the changing role of women in contribution to property within the home, developments in land tenure systems, and increasing recognition of individual property rights within marriage. Presently, legal reforms<sup>39</sup> recognise the equitable interests of spouses and family members and reform proposals are targeting the recognition of property rights of cohabiting couples<sup>40</sup>. It is also important to note that economic empowerment of women had enabled them to contribute to purchase of family property thereby changing their status from dependants to co-owners in some instances. These issues brought to the fore key issues for reform within the law of succession.

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<sup>37</sup> Report of the Kalema Commission on Marriage, Divorce and the status of Women, 1965.

<sup>38</sup> WLEA (ibid), Okumu Wengi (ibid).

<sup>39</sup> Land Act section 39 and Mortgage Act Section... No. 8 of 2009

<sup>40</sup> Marriage and Divorce Bill. No. 19 of 2009.

It was also the case that there had been no recent attempt to concretely analyse the complex issue of succession under the customary laws of the different communities in Uganda. As such there was limited empirical research available on succession according to the lived realities of women, children and men at the grassroots where customary practices of succession are applied. Therefore, there was a need for an empirical study to establish the body of customary laws on inheritance as practiced in the communities. This would serve the purpose of giving an enlightened perspective about the customary law *vis-a-vis* statutory law of succession and to identify those practices that are fair and just while eliminating those that are discriminatory hence unconstitutional.

Recent Constitutional court decisions had rendered some provisions of the Succession Act null and void for non conformity with the Constitution. In the case of *Law and Advocacy for Women in Uganda and Attorney General*<sup>41</sup> the Constitutional Court declared as null and void sections: 2(n)(i), (ii), 14, 15, 26, 27, 29, 43 and 44 and Rules 1, 7, 8, 9 of the 2<sup>nd</sup> Schedule of the Succession Act. Consequently, an implementation gap was created for the actors in the law of succession which needed to be bridged urgently by amending the current law to bring it in conformity with the 1995 Constitution of the Republic of Uganda.

In addition, Uganda is signatory to various regional and international law instruments that champion the cause of equality and non discrimination of persons<sup>42</sup>. The Charter of the United Nations attests to a faith in fundamental human rights, specifically to the dignity and ultimate worth of the person, and recites among its purposes the 'promotion and encouragement of respect' for those rights 'for all without distinction as to race, sex, language, or religion.'<sup>43</sup>

The (CEDAW) requires states not only to prohibit discrimination but also to take affirmative steps in order to achieve gender equality. The African Charter on Human and Peoples Rights (the African Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (The Women's Protocol to the African Charter) similarly prohibit discriminatory practice against women. The discriminatory provisions in the succession Act fall short of the required standard of equality and non-discrimination in these

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<sup>41</sup> Constitutional Petition No.13/05 and 05/06

<sup>42</sup> These include the African Charter on Human and Peoples Rights, The Convention to eliminate all forms of Discrimination against Women and the Universal Declaration on Human Rights among others.

<sup>43</sup> Winston Langley "The Rights of Women, The African Charter, and the Economic Development of Africa", 7 *Boston College Third World Law Journal* 215.

international instruments. Uganda is therefore under an obligation to review its Succession Laws to be congruent with the above mentioned instruments.

There are other emerging issues that were taken into account by the study which included; developments in modern technology, fusion of nationalities, dual citizenship, multinational partnerships and business ventures and cross cultural unions. It is therefore important that Uganda's Succession Law is designed to accommodate these trends.

## **1.6 Scope of the study**

This study reviewed the existing laws on Succession in Uganda and implementation mechanisms in place and identified the customary and religious practices of succession pertaining in the different ethnic groups. It identified the gaps and anomalies in existing law, and administrative and implementation challenges which were critically analysed to inform proposals for law reform.

The study was conducted in six regions of Uganda; Central, Eastern1, Eastern 2, West Nile, Western and Northern. The districts where the study was undertaken were; Masaka and Kampala in the Central region, Kamuli, Kapchorwa and Mbale in Eastern 1, Soroti and Moroto in Eastern 2, Nebbi, Arua and Moyo in the West Nile region, Gulu, Masindi and Lira in the Northern region, Kabale, Kabarole and Mbarara in the western region.

## CHAPTER TWO

### LITERATURE REVIEW

#### 2.1 Introduction

The law of succession is generally concerned with the transfer or devolution of property of a deceased person upon death.<sup>44</sup> Succession relates to that which descends to the heir on the death of the owner. Much as the terms succession and inheritance are often used interchangeably there is need to distinguish between them. Inheritance relates to the order in which persons succeed to property or some title and is the process of becoming entitled to property of the deceased by operation of law or under a will<sup>45</sup>. Succession can be defined as the acquisition of rights or property by inheritance under the laws of descent and distribution<sup>46</sup>. The two terms are sometimes collectively used to mean the devolution of title to property under the law of descent and distribution.<sup>47</sup> Succession is a legal term which is ordinarily called inheritance. It follows that the law of succession is what is ordinarily referred to as the law of inheritance.<sup>48</sup> The law of Succession comprises of two components; testate and intestacy.

The law of succession in Uganda has been largely static in spite of the fact that the socio-economic situation of Uganda continues to evolve over the years, rendering some of the provisions of the law inapplicable. It is also the case that local and international jurisprudence has advanced considerably bringing on board human rights standards and obligations.<sup>49</sup> These developments have rendered some provisions of the existing law of succession obsolete, archaic, unconstitutional and in other instances inadequate to uphold the rights of Ugandans. This apparent lacuna in the law needs to be filled through review and reform of the law.

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<sup>44</sup> Parry and Clark, *The Law of Succession*, Eleventh Edition (2002). Sweet and Maxwell, London.

<sup>45</sup> Tuhaise, et al. *The law of Succession in Uganda: Women, inheritance Laws and practices*: at page 18.

<sup>46</sup> Black's law dictionary 8<sup>th</sup> edition.

<sup>47</sup> Kameri Mbote, gender dimensions of law, colonialism and inheritance in east Africa; Kenyan women's experiences at page 3-4.

<sup>48</sup> Ministry of Justice handbook ; 'What it is what it does'.

<sup>49</sup> International Covenant on Economic Social and Cultural Rights(ICESCR), African Charter on Human and Peoples Rights(ICESCR) and The Maputo Protocol· Convention on the Elimination of all forms of discrimination against women., like the 1995 Constitution of the Republic of Uganda, the Land Act and the Mortgage Act , among others.

Some of these shortfalls in the law include; the definition of customary heir which gives preference to the male child; the widows right to the matrimonial home which is restricted to occupancy of the matrimonial home; obsolete fines and monetary jurisdiction of the Administrator General and an altogether inadequate penalty regime. These and others are some of the issues that the study seeks to address.

There have been some attempts to highlight the weakness of the Ugandan succession legal regime prior to this study<sup>50</sup>. There have also been proposals and discussions on best practices that would ensure the enjoyment of the rights of persons in the area of succession which, although not specific to Uganda, would address some of the challenges presently facing the Ugandan legal regime. It is thereby important for this study to consider these discussions in designing a comprehensive and relevant legal regime. This chapter will provide a detailed discussion of some of these issues.

## **2.2 Gaps and Anomalies**

### **2.2.1 Excesses of testamentary freedom**

Testamentary freedom refers to the freedom of a testator to do what he/she wills with his/her own property<sup>51</sup>. The Succession Act makes provision for testamentary freedom<sup>52</sup>, however, there is no guarantee that a testator will uphold his duty of family provision and consider it paramount over all interests when making a bequest.

The law however anticipates such scenarios and makes provision for a platform where such bequests can be challenged.<sup>53</sup> Similarly, the 1975 Inheritance Act of England entitles specified persons to apply for provision from a deceased's estate. It gives the court reviewing such an application the power to make

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<sup>50</sup> Uganda Law Reform Commission, Domestic Relations Study, WLEA study.

<sup>51</sup> Black's law Dictionary 8<sup>th</sup> Edition.

<sup>52</sup> Section 36(1) of the Succession Act provides that every person of sound mind and not a minor may by will dispose of his or her property.

<sup>53</sup> Notwithstanding section 36, where a person, by his or her will, disposes of all his or her property without making reasonable provision for the maintenance of his or her dependent relatives, section 38 shall apply. Section 38 provides that: (1) Where a person dies domiciled in Uganda leaving a dependent relative, then, if the court, on application by or on behalf of the dependent relative of the deceased, is of opinion that the disposition of the deceased's estate effected by his or her will is not such as to make reasonable provision for the maintenance of that dependent relative, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the deceased's estate for the maintenance of that dependent relative.

provision from the estate in disregard of the deceased's will and of the intestacy laws.

The challenge with this position is that very few dependants in Uganda have the awareness or the capacity to engage in the expense and rigour of court process to challenge a bequest that may have left them out. As such, this provision on its own may offer a solution for only a handful of persons.

In England, several developments have taken place in the area of contesting testamentary freedom. As a result, this area of common law has developed remarkably. In **Illot vs. Mitson**,<sup>54</sup> court held that although the Succession Act allows for a particular class of persons to challenge the distribution of an estate, the test when assessing the claim is whether when, looked at objectively, the distribution under the will produced an unreasonable result.

French law on the other hand does not have testamentary freedom for all, meaning a person may not leave assets to whomever and in whatever proportions they please, if they have children. The Droits de Succession covers death duties and lifetime transfers, and dictates who inherits the deceased's assets. In France, a person's children are considered reserved heirs (*héritiers réservataires*). Reserved heirs inherit a portion of their deceased parent's estate. This is the reserved portion (*réserve légale*). Exactly what the reserved portion is depends on the number of children. For example, for someone with three children, 75 percent of the estate must be left to those heirs in equal shares. The remaining 25 percent is considered the unreserved portion (*quotité disponible*) and may be left to whomsoever the owner pleases. A will cannot override the law of reserved heirs<sup>55</sup>.

In Scotland the deceased has an absolute right to test over only one third to one half of his or her moveable estate. This common law right was extended to civil partners by the Civil Partnership Act 2004.<sup>56</sup> Legal rights (exigible from the moveable estate only) are available to spouses or civil partners and to issue (including by way of representation) in both testate and intestate succession.

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<sup>54</sup> [2011] EWCA CIV 346

<sup>55</sup> <http://paris.angloinfo.com/countries/france/inheritance.asp> as at 7th July 2011

<sup>56</sup> Civil Partnership Act 2004 s.131. The Civil Partnership Act 2004 applies to the UK as a whole and came into force on 5 December 2005. It sets out the legal rules for the Constitution and dissolution of civil partnerships but the greater part of the Act functions as an almost comprehensive series of amendments and repeals to existing legislation, in order to confer legal recognition of civil partnerships through creating an identity with the position of spouses.



Where the deceased is survived by both a spouse or civil partner and issue, the moveable estate is divided into three parts, with the spouse or civil partner receiving one third, the issue one third and the remaining third falling to the free estate. Where he or she is survived only by a spouse or civil partner or only by issue, it is divided into two parts with the spouse or civil partner or the children receiving half. The remaining half falls to the free estate. The free estate is available to fulfil the purposes of the will; where the deceased has died intestate, the free moveable estate is available to pay the heirs in intestacy. Where the deceased died testate, legal rights may not be claimed in addition to a legacy and the claimant must elect whether to take his or her testamentary provision or to discharge the claim to legal rights.

Neither statute nor judicial discretion permits the courts to alter the terms of a will where either no provision or little provision has been made for a surviving spouse or civil partner or children and legal rights are all that may be claimed in these circumstances. This is a different position in the Succession Act, cap 162, as sections 37 and 38 allows courts to vary a will under certain conditions.

The only ground on which a will may be challenged under Scotland law is that it is invalid, either formally (there is a fatal defect in the execution of the deed) or essentially (the provisions of the will were not made freely by the deceased because of, for example, a weakness of mind). The consequence of any such invalidity will be that the will is reduced (wholly or partially) and the estate falls into intestacy (total or partial), it will then be distributed according to the rules of intestacy set out in the Succession (Scotland) Act 1964.

In contrast to Scots law, the English law of succession adheres, at least theoretically, to the principle of absolute freedom of testation. In consequence, fixed shares are not available as a matter of right to spouses, civil partners or issue where the deceased has made little or no provision for them by will. However, the court has a discretionary power under the Inheritance (Provision for Family and Dependents) Act 1975 whereby a range of persons may apply to the court for a share of the estate. The 1975 Act may also be used to alter the effects of the statutory intestacy rules under the Administration of Estates Act, 1925. The general rule of English law is that pre-nuptial agreements are not enforceable; rather, they may be a factor to take into account when making an

order for financial provision on divorce under the Matrimonial Causes Act, 1973.<sup>57</sup>

The courts have discretion under the Inheritance (Provisions for Family and Dependents) Act 1975<sup>58</sup> to alter the terms of a will where no provision or inadequate provision has been made for certain categories of person; these are not confined to spouses, civil partners or children. Those entitled to apply to the court for a share of the estate are: a surviving spouse or civil partner; a former spouse who has not remarried; a child of the deceased; any person who was treated by the deceased as a child of the family in relation to a marriage; any other person who was maintained wholly or partly by the deceased prior to his or her death; any person living in the same household as the deceased as husband or wife or as civil partner during the whole of the two year period preceding the date on which the deceased died.

According to Corbett and Others<sup>59</sup>, in South Africa, the law of testate succession is found in the Wills Act 7 of 1953<sup>60</sup> and common law Principles<sup>61</sup>. The common law of testate succession is based on the principle of freedom of testation.

In terms of section 25(1) of the Constitution:-

*“...no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.” The provision guarantees the right to private property and it includes the right to dispose of one’s property. The institution of succession is thus guaranteed. It allows individuals to dispose of their property to whomever they want to<sup>62</sup>. According to this principle; testators are free to dispose of their assets regardless of the interest of intestate heirs.*

The Kalema Commission recommended that there should be some sort of a brake on the liberty of the individual to dispose of his property as he likes in the interests of social justice.<sup>63</sup> This study proposes that the law should safeguard

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<sup>57</sup> See for example: F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45 (Fam Div); S v S (Matrimonial Proceedings: Appropriate Forum) [1997] 2 FLR 100 (Fam Div); N v N (Jurisdiction: Pre Nuptial Agreement [1999] 2 FLR 745 (Fam Div); M v M (Pre Nuptial Agreement) [2002] 1 FLR 654 (Fam Div).

<sup>58</sup> As amended by the Law Reform (Succession) Act 1995 and the Civil Partnership Act 2005.

<sup>59</sup> M. M. Corbett, G. Hofmeyr and E. Kahn, *The Law of Succession in South Africa* 2nd edn (2001) 2 fn 7. (henceforth Corbett et al Succession); Palmer *Mixed Jurisdictions* 119.

<sup>60</sup> As amended by the Law of Succession Amendment Act 43 of 1992

<sup>61</sup> Corbett et al (2001) and De Waal and Schoeman *Succession* (2003).

<sup>62</sup> A power that was derived from the principle of absolute ownership of property.

<sup>63</sup> Kalema Report *supra* at page 70.

against the excesses of testamentary freedom in light of upholding proper provision for family members and promotion of the element of continuity and survival of the testator's family.

The Succession Act of Kenya, 2008, makes detailed provisions relating to capacity to make wills construction and formalities among others. For any disposition of the deceased's estate under the Act, whether the disposition is effected by a will, gift in contemplation of death or by the law relating to intestacy or by the combination of will, gift and law, if it is deemed unreasonable by the court, such court could order reasonable provision for any dependant left out of the deceased's estate<sup>64</sup>.

The Domestic relations study particularly highlighted the need to protect the family/home.<sup>65</sup> The study recommended that a testator should not be given the liberty to dispose of the matrimonial home by will but that it should be devised to the beneficiaries entitled in the law.

At present, there are other legal protections in existence that guard against unfair disposal and transfer of family property. The Land Act <sup>66</sup> provides restrictions on sell, exchange, transfer, pledge, mortgage or lease of any land from which the family (dependants or spouse), derive sustenance or ordinarily depend. Similarly, the Mortgage Act<sup>67</sup> requires spousal consent in instances where a matrimonial home is subject to a Mortgage. In the same spirit, it is important that these protections should be respectively accorded in the protection of matrimonial home and family property in the area of inheritance and succession.

### **Recommendation**

**The provision in the law that guarantees the liberty to exercise testamentary freedom should have tied in with it, an obligation to ensure that a testator makes provision for his or her primary dependants from the onset.**

### **2.2.3 Capacity to make a will**

The Succession Law of Uganda requires that a will should be written, attested by the testator and witnessed by two persons with the capacity to make a will. It

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<sup>64</sup> Section 26

<sup>65</sup> supra pp.276.

<sup>66</sup>Section 39 of Cap 227

<sup>67</sup> Section 5, Act No.8.2009.

further spells out the capacity requirements for a testator<sup>68</sup>. Although the law can be said to suffice in that regard<sup>69</sup>the issue of will writing is uncommon in Uganda.

Some studies have advanced many reasons for this and they include; the traditional practice of verbal wills, the reliance on clan leaders for property distribution, widespread belief that “preparing for death” will *cause* death, fear that wills and will making may cause property grabbing and conflict, poor knowledge and enforcement of laws protecting women and children’s property rights, low literacy levels and capacity to write wills, and fears that wills could be plagiarized and falsified, the association of wills with European colonialists and the fact that some people have limited or no household property to will as well as the fact that some people do not have appropriate, secure places to keep their wills<sup>70</sup>.

The Domestic Relations study<sup>71</sup> noted that there was need for both immediate and long term interventions to overcome these barriers including law enforcement mechanisms to ensure observance of the law, as well as sensitisation to change attitudes towards will writing.

### **Recommendation**

**Administrator General’s department and Civil Society should consider sensitisation to change attitudes towards will writing.**

#### **2.2.4 Property jointly owned by spouses**

The Succession Act allows for the rights of persons in marriage to dispose of property by will and even specifically provides for the rights of a married woman to dispose of any property independently owned by her.

In Kenya, the capacity of women to make wills has been specifically provided for. The fact that women can now own property seems to be the guiding force behind this provision. Section 5 (2) of the Succession Act provides that;

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<sup>68</sup>Section 36; Majority age, sound mind, not suffering from a condition that impairs ability to understand that he or she is making a will and not acting out of undue influence.

<sup>69</sup>Domestic Relations Study *supra*

<sup>70</sup>Plan Uganda, Succession planning in Uganda, Early Outreach for AIDS affected children and their families. <http://www.popcouncil.org/pdfs/horizons/orphnsfnl.pdf>.

<sup>71</sup>*Supra*

*“A female person, whether married or unmarried has the same capacity to make a will as does a male person.” Such female person ought to be an adult of sound mind and the will may be oral or written. She can only make a will in respect of property that she owns.*

Whereas the law acknowledges this position, there is a lacuna on the procedure for disposal of property jointly owned by spouses. The Ugandan Succession Act does not stipulate the procedure for testate disposal of property jointly owned by spouses. This lacuna poses a challenge both in will writing and in execution.

There is as such, a need to investigate options to cure this lacuna. Property in marriage is usually considered as belonging to both spouses, however for purposes of real property it is important that for, the interest of each of the parties to the marriage to be clearly stipulated in order to ease the process of will-writing in relation to jointly owned property. Property law recognises several forms of joint ownership; each of these forms of property ownership has a bearing on the law of Succession as discussed below.

### **2.2.5 Types of Joint Ownership**

Common law provides for two forms of concurrent ownership of real or personal property. Tenancy in common and joint tenancy<sup>72</sup>. American Law recognizes another form of tenancy by the entirety<sup>73</sup>.

#### **2.2.5.1 Tenancy in Common - Subject to Probate**

Each owner has a separate interest and on his or her death, their share passes under a will or under the rules applicable to intestacy<sup>74</sup>. As such, a tenant in common can leave their interest in the co-owned property to an heir or beneficiary of a will.

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<sup>72</sup> Parry and Clarke, The Law of Succession, Eleventh Edition, at page 1.

<sup>73</sup> <http://wills-probate.lawyers.com/wills-probate/Does-Joint-Property-Need-to-Go-Through-Probate.html> as at 10th July 2011.

<sup>74</sup> Parry and Clarke at page 1

### **2.2.5.2 Joint Tenancy with Right of Survivorship - Not Subject to Probate**

Under a joint tenancy, there is a single interest and a right of survivorship. As each joint owner dies, his rights are extinguished and vest in the surviving joint owner. Beneficial joint ownership of real property may be severed with the result that the joint tenancy is converted into a tenancy in common<sup>75</sup> Under UK law, in order to sever a joint tenancy and create a tenancy in common, a notice of severance needs to be served by one owner on the other owner of the property.

Section 36(2) of the UK Law of Property Act 1925 provides that:-

*No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect the right of a joint tenant to release his interest to the other joint tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants:*

*“Provided that, where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon the land shall be held in trust on terms which would have been requisite for giving effect to the beneficial interests if there had been an actual severance. Nothing in this Act affects the right of a survivor of joint tenants, who is solely and beneficially interested; to deal with his legal estate as if it were not held in trust.”*

Under American Law, where, a joint tenant transfers an interest in the property to another person who isn't a joint tenant, the transfer of interest in the property to a non joint tenant changes the ownership to a tenancy in common making it subject to probate<sup>76</sup>.

### **2.2.5.3 Tenancy by the Entirety - Not Subject to Probate**

This tenancy is specific to American Law. It is a type of concurrent estate in real property held by a husband and wife whereby each owns the undivided whole of the property, coupled with the Right of Survivorship so that upon the death of

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<sup>75</sup> Chadwick L.J In Carr –Glynn v Frearsons(1999) Ch. 326,336. “On a proper analysis, the service of a notice of severance was a part of the will main processes”.

<sup>76</sup> <http://wills-probate.lawyers.com/wills-probate/Does-Joint-Property-Need-to-Go-Through-Probate.html> as at 10th July 2011.

one, the survivor is entitled to the decedent's share<sup>77</sup>. Both spouses, as a marital unit, own the entire interest in the property. Additionally, when one spouse dies it isn't treated as an event that passes title to the surviving spouse since the spouse already owns the title. For this reason, the property doesn't go through probate.

### **2.2.6 Rights of a Husband and Wife under English Law**

Section 37 of the UK Law of Property Act 1925 provides that:-

*A husband and wife shall, for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after the commencement of this Act, be treated as two persons.*

Under English Law, resulting trusts are created where property is not properly disposed of. Where property passes between individuals, English law presumes that the relationship between them makes it an outright gift, and thus not subject to a resulting trust in the event of failure; this is the "presumption of advancement". With some relationships, such as property transfers between father and son and husband and wife, this presumption of advancement is applied by default, and requires strong evidence for it to be rebutted<sup>78</sup>.

Presently, husband and wife are treated as two legal persons each with his or her own property rights. There is no automatic "community property" rule in English law, such as exists in the laws of many American states<sup>79</sup>. In broad terms, a resulting trust may arise where a person other than the legal owner contributes to the purchase price. This person might be a spouse or cohabitant of the legal owner, or it might be some other relative such as a parent or (in the case of an elderly owner) an adult child. The contribution might be made at the time of the initial purchase, or (very often nowadays) might be made by meeting the mortgage repayments as they fell due. Under s.37 of the Matrimonial Proceedings and Property Act 1970, provides that substantial contributions of money or money's worth, by either spouse, to the improvement of property belonging to either or both may entitle that party to such an equitable interest as the court may think just. s.14 of the Trusts of Land Act 1996 allows either party to apply to the court, which can make any order it thinks fit. In particular, the court can declare the nature and extent of any person's interest in the property.

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<sup>77</sup> <http://legal-dictionary.thefreedictionary.com/Tenancy+by+the+Entirety> AS AT 10<sup>th</sup> August 2011.

<sup>78</sup> Legal Encyclopedia

<sup>79</sup> "Financial Matters During Marriage", <http://www.lawteacher.net/family-law/cases/financial-matters-during-marriage.php>.

In the recently decided case of **Julius Rwabinumi Vs Hope Bahimbisomwe**<sup>80</sup> Justice Twinomujuni held that:

*“Matrimonial property is joint property between husband and wife and should be shared equally on divorce, irrespective of who paid for what and how much was paid... However, the application of the principle may vary depending on the nature of the marriage contract the spouses agreed to contract...Like in all other contracts, parties to a marriage have a right to exclude any property from those to be deemed as matrimonial property. This can be made expressly or by implication before marriage or at the time of acquisition of the property by any spouse. Otherwise the joint trust principle will be deemed to apply to all property belonging to the parties to the marriage at the time of the marriage and during its subsistence.”*

It should also be noted that under the Succession Act intestacy provisions apply to male intestates alone.<sup>81</sup> It is also the case that customary law and practice do not recognise a woman’s right to own individual property separate from her husband. In many instances, wife’s *intestate* is often without question taken over by the husband<sup>82</sup>. It has been established that<sup>83</sup>, “Even Magistrates who couch their decisions in the language of joint marital property rights do not escape the asymmetric in female and male legal standing. While jointure<sup>84</sup> allows men to claim authority over assets that women inherited from their own families, the courts do not allocate reciprocal privileges to women”. According to Tripp, “Under customary law, which prevails in Uganda, a woman may have jointly acquired land with her husband and may have spent her entire adult life cultivating the land, but she cannot claim ownership of the property.”<sup>85</sup> This tendency is rooted in the idea that men as heads of the household exercise superior authority over property and persons<sup>86</sup>.

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<sup>80</sup> Civil Appeal No. 30/2007

<sup>81</sup> Section 30

<sup>82</sup> According to the findings of the Domestic relation’s study “Even where wives own property separately or jointly with their husbands, such property is considered to belong to the husband therefore not subject to administration on the death of the wife”. *Supra* at page 297

<sup>83</sup> Lynn Khadiagala, ‘Negotiating Law and Custom: Judicial Doctrine and Women’s property rights in Uganda’. *Journal of African Law* 46, 1, (2002). P 1-13. © School of Oriental and African Studies.

<sup>84</sup> An arrangement by which a man sets aside property to be used for the support of his wife after his death. *The American Heritage® Dictionary of the English Language*, Fourth Edition copyright ©2000 by Houghton Mifflin Company. Updated in 2009. Published by Houghton Mifflin Company. All rights reserved.

<sup>85</sup> Tripp, Ailli. “Women’s Movements, Customary Law, and Land Rights in Africa: The Case of Uganda.” *African Studies Quarterly* 7, no.4: [online] URL: <http://web.africa.ufl.edu/asq/v7/v7i4a1.htm>

<sup>86</sup> Khadiagala *supra*



In the case of **Bariguga Vs Karegyesa and two others**<sup>87</sup>, in which three sons sued their father over the right to inherit land that their mother had once farmed, Justice Karokora held that:-

*“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, the husbands, land.*

In Uganda, there is no specific legislation on property rights in Marriage. Upon death, there is presently no clarity on property sharing in marriage and upon death where parties own property jointly. This leaves it to evidence and common law to determine. Although the Marriage and Divorce Bill seeks to clarify these positions it has not been passed as yet.

## **Recommendations**

**For avoidance of doubt, the law should stipulate the above mentioned categories of joint ownership as exempt from distribution under the Act.**

### **2.3 Discriminatory provisions**

Certain provisions within the Succession Act are discriminatory against women and fall short of the Constitutional standard of equality set out in the Constitution<sup>88</sup>. According to article 1 of the CEDAW Convention the term “discrimination against women” shall mean:-

*“Any 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 the marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.*

The Succession Act, does contain provisions that are discriminatory on the basis of sex and they include; the provisions on the legal heir, , distribution of a male intestate’s property, appointment of a testamentary guardian and domicile and the right of occupancy of the matrimonial home on remarriage. In detail, the provisions are as follows;

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<sup>87</sup> District Register, High Court of Uganda at Kabale, Civ.App. MKA, 13/93. Arising from Civ. App. MKA 48/90

<sup>88</sup> Article 21: Equality and freedom from discrimination.

### 2.3.1 Legal heir

Section 2 (n) (i) and (ii) that define a legal heir, a male heir is preferred to a female heir. This is on the basis of sex which is discriminatory. Under the law a Legal heir is defined as follows:-

*“legal heir” means the living relative nearest in degree to an intestate under the provisions set out in Part III to this Act together with and as varied by the following provisions—*

- (i) between kindred of the same degree a lineal descendant shall be preferred to a lineal ancestor and a lineal ancestor shall be preferred to a collateral relative and a paternal ancestor shall be preferred to a maternal ancestor;*
- (ii) where there is equality under subparagraph (i) of this paragraph, a male shall be preferred to a female;*
- (iii) where there is equality under subparagraph (ii) of this paragraph, the elder shall be preferred to the younger;*
- (iv) if no legal heir is existing and reasonably ascertainable under subparagraphs (i), (ii) and (iii) of this paragraph, the husband or the senior wife of the intestate, as the case maybe, shall be the legal heir;*

This definition has already been pronounced as unconstitutional by the Constitutional court on the basis that it is discriminatory on the basis of sex. It would therefore be necessary for this study to re-examine the position in the law.

The concept of legal heir stems from the English law of primogeniture that was used in the Colonial inheritance legislation.

*“The old English Law of Primogeniture concerns the inheritance of “real property” only, such as land, buildings, etc. Under this law, the eldest living son (the “heir at law”) inherited all the real property of the father if the father died intestate<sup>89</sup>.*

The operation of primo-geniture is common in most post-colonial legislation, but has been successfully challenged in some spheres. In the leading case of *Bhe and others vs Magistrate, Khaletysha and others*<sup>90</sup>It was held that:-

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<sup>89</sup> Phil Norfleet : Law of Primo geniture in the South:

[http://sc.tories.tripod.com/law\\_of\\_primogeniture\\_in\\_the\\_south.htm](http://sc.tories.tripod.com/law_of_primogeniture_in_the_south.htm) as at 10th October 2011. Copyright © 2001-2007 Robert W. Baird,

<sup>90</sup> 2005 (1) SA 580 (CC) CCT 49/03, 69/03 and 50/03 CCT 49/03, 69/03 and 50/03

*..the exclusion of women from inheritance on the grounds of gender was a clear violation of s 9(3) of the Constitution. It was a form of discrimination that entrenched past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order*

*It was further held that the principle of primogeniture also violated the right of women to human dignity guaranteed by s 10 of the Constitution because it implied that women were not fit or competent to own and administer property. Its effect was also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity was further affronted by the fact that, as women, they were also excluded from intestate succession and denied the right to be holders of and to control property.*

*It was held, further, that to the extent that the primogeniture rule prevented all female children, and significantly curtailed the rights of male extra-marital children, from inheriting, it discriminated against them too. These were particularly vulnerable groups in our society, which correctly placed much store in the well-being and protection of children who were ordinarily not in a position to protect themselves. In denying female and extra -marital children the ability and the opportunity to inherit from their deceased fathers, the application of the principle of primogeniture was also in violation of s 9(3) of the Constitution.*

*Court held, further, that the primogeniture rule as applied to the customary law of succession could not be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centerpiece of the customary-law system of succession, the rule violated the equality rights of women and was an affront to their dignity. Accordingly, it was held that the customary-law rule of primogeniture, in its application to intestate succession, was not consistent with the equality protection under the Constitution.....*

In 1925, the British Parliament abolished primogeniture as the governing rule in the absence of a valid will<sup>91</sup> Section 33(1) of the The Administration of Estates Act 1925 provides for the ending of primogeniture in respect of deaths after 1926. Whereby, on the death of a person intestate as to any real or personal estate, that

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<sup>91</sup> Rheinstein and Glendon 1994–2002.

estate shall be held in trust by his personal representatives with the power to sell it.

Contemporary developments in the law are in favour of equality, whereby the law does not highlight entitlement and categories of persons as beneficiaries but instead allows for a personal representative to equitably distribute the estate according to the beneficiaries available (usually according to statutory stipulations). This position guards against the discrimination that has its roots in primogeniture. In keeping with this position, the concept of a legal heir would in effect be done away with.

### **Recommendations**

- 1. Amend the law to remove the definition of a legal heir.**
- 2. The division of property on intestacy should be equitable and not favour particular categories of persons to the detriment of others.**

#### **2.3.2 Distribution of an intestate's property**

Section 27 governs distribution of property of an intestate. It however makes reference to a male intestate and makes no mention of distribution in the case of a female intestate.

Under the 1995 Constitution of Uganda every person has a right to own property either individually or in association with others. Women are thereby free to own individual property<sup>92</sup>. Whereas this may be the case, very few women actually own property in Uganda. A small percentage of women inherit property from their husbands, while some do inherit from their families.

Land is the most important resource in Uganda because people depend on it for cultivation and therefore their livelihoods. In Uganda, as elsewhere in the world, unequal access to land is one of the most important forms of economic inequality between men and women and has consequences for women as social and political actors<sup>93</sup>.

Whereas the majority of women do not inherit land. A recent study<sup>94</sup> records a total of 27 percent of the women who are landowners who state that they have

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<sup>92</sup> Article 26(1)

<sup>93</sup> Aili Mari Tripp. *Women's Movements, Customary Law, And Land Rights In Africa : The Case Of Uganda*

<sup>94</sup> Doss et al : *Women Marriage and Asset Inheritance in Uganda: Chronic Poverty Research Centre*

acquired the land through marriage. It is however highlighted that the rights that many of these women have depend on the stability of their marriage. They risk losing it in the event of divorce or on the death of their husband.

In spite of these realities, it is important that the law recognises that women do own property and require the legislative regime on inheritance to consider the passing of their property in instances of intestacy.

English law defined the role of the wife as a 'feme covert', emphasizing her subordination to her husband, and putting her under the 'protection and influence of her husband, her baron, or lord'. Under English Law, upon marriage, the husband and wife became one person under the law, as the property of the wife was surrendered to her husband, and her legal identity ceased to exist. Any personal property acquired by the wife during the marriage, unless specified that it was for her own separate use, went automatically to her husband. If a woman writer had copyright before marriage, the copyright would pass to the husband afterwards, for instance. Further, married women were unable to draft wills or dispose of any property without their husbands' consent<sup>95</sup>

The position was altered with the Married Women's Property Rights Act of 1882 altered the common law doctrine of coverture to include the wife's right to own, buy and sell her separate property. Wives' legal identities were also restored, as the courts were forced to recognize a husband and a wife as two separate legal entities.

Presently the law on intestacy provides that on the death of a person intestate, the estate shall be held in trust by his personal representatives with the power to sell it<sup>96</sup>. The provision applies to both male and female intestate.

In this regard, the law on intestacy is not restricted in anyway, as is the case for Uganda. In spite of the fact that a small percentage of women own property in Uganda, there is need for the law to provide for the distribution of their property in line with the Constitutional guarantees on equality of persons and the right to own property.

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<sup>95</sup> Bridget Hill, *Women, Work and Sexual Politics in Eighteenth-century England*, (London: Blackwell, 1989), 196. at page 5. copy right 2011.

<sup>96</sup> Section 33(1) Administration of Estates Act 1925.

## **Recommendation**

**Amendments should be made to ensure that the provisions on intestacy are gender neutral.**

### **2.3.3 Appointment of a testamentary guardian**

Section 43 empowers a father to appoint a testamentary guardian for his minor children. Section 44 provides a list of persons who may take on the role of a guardian where none has been appointed on the death of the father of an infant or where the one appointed by will is dead or refuses to Act. The persons in order of priority are:-

- (a) the father or mother of the deceased;
- (b) if the father and mother of the deceased are dead, the brothers and sisters of the deceased;
- (c) if the brothers and sisters of the deceased are dead, the brothers and sisters of the deceased's father;
- (d) if the brothers and sisters of the deceased's father are dead, the mother's brothers; or
- (e) if there are no mother's brothers, the mother's father. (2) If there is no person willing or entitled to be a guardian under subsection (1) (a) to (e), the court may, on the application of any person interested in the welfare of the infant, appoint a guardian.

The provision is discriminatory on many fronts. In the first instance, a mother is not equally empowered to appoint a testamentary guardian for her minor children. The statutory guardians listed in the subsequent section prioritise the fathers family, awarding them the power of guardianship over the children in subsections (a) –(c), while the mothers family is accorded the least priority in which case, only the male relatives are recognised as viable contenders.

It is quite anomalous that a mother is not considered to play the role of guardian over her own children, or to participate in the appointment of those that she may deem fit.

The Guardianship of Infants Act of Kenya<sup>97</sup> gave the right to appoint a testamentary guardian to either parent. Section 4 (1) stipulated:-

*Either parent of an infant may by deed or will appoint any person to be guardian of the infant after his death and that a guardian so appointed shall*

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<sup>97</sup> Cap 144 (Now repealed by the Children Act cap 144).

*act jointly with the surviving parent of the infant so long as that parent remains alive, unless that parent objects to his so acting.*

This position passes the test of equality guaranteed by the Constitution, and could be considered for adoption into Uganda's legislation.

### 2.3.4 Domicile

The succession Act provides for domicile for purposes of determining the law applicable in Succession matters. In determining the domicile of origin, the Ugandan Succession Act distinguishes between persons of legitimate birth and illegitimate birth whereby, the former acquire the domicile of their mothers while the latter acquire the domicile of their fathers.

Although the law does not clearly define an illegitimate child in the definition section:-

*"Illegitimate child" means an illegitimate child recognized or accepted by the deceased as a child of his or her own;*

The definition can be obtained from the Blacks Law Dictionary<sup>98</sup> which defines it as:-

*"The status of a person who is born outside a lawful marriage and who is not later legitimated by the parents.*

This in effect sets the standard of determining the domicile of a person at the marital status of their parents. This is impractical and redundant in light of the socio-economic realities on the ground where we have small numbers of persons engaged in formal unions and poor record keeping within our administrative structures.

It is also the case that the position in the law has since been altered to disregard references to illegitimate children. Following the case of **Kabali vs. Kajubi**<sup>99</sup>, where it was held that all illegitimate children in Buganda are regarded as children of the deceased unless somebody claims otherwise. It was on this premise that the definition of children in the Succession Act was amended to cover both illegitimate and legitimate children. It should therefore follow that the law on domicile is amended accordingly for purposes of uniformity.

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<sup>98</sup> Eighth Edition.

<sup>99</sup> [1944] 11 EACA

In Kenya, the Domicile Act<sup>100</sup> governs the passing of domicile to ones child or spouse. Like the case of Uganda, a woman, at marriage acquires the domicile of her husband and not vice-versa<sup>101</sup>. Succession to immovable property located in Uganda and Kenya is regulated by the national laws whatever the location or domicile of the owner at the time of death; In both countries, succession to moveable assets is regulated by the law of the country of the domicile of the owner at the time of death.

The provision that a wife takes up the domicile of her husband at marriage and not vice versa is discriminatory and falls short of the Constitutional standard of equality between spouses at marriage, during marriage and at its dissolution<sup>102</sup>. The possibility of the law making provision for the parties to a marriage to have an equal right to determine their domicile or to each retain their domicile of origin should be considered.

### **Recommendations**

**The law on domicile should be amended to remove distinctions on the basis of legitimacy.**

- 1. Parties to a marriage should have an equal right to determine their domicile or to each retain their domicile of origin.**

#### **2.3.5 Devolution of residential holdings**

#### **2.3.6 Principal residence in trust for legal heir**

Presently, the Succession Act entitles either spouse to a right of occupancy in relation to a principal residence owned by either of them. The principal residential holding is reserved from distribution as it is held in trust for the legal heir<sup>103</sup>. Actual occupation of either spouse or child does not affect any of their shares in the intestate<sup>104</sup>.

The concept of a legal heir as provided for in the act was declared null and void on the basis of being discriminatory and thereby unconstitutional<sup>105</sup>. It would also be unfair for the law to uphold the practice of bestowing the principal

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<sup>100</sup> Cap 37

<sup>101</sup> Sections 15 and 16 Succession Act.

<sup>102</sup> Article 21

<sup>103</sup> Section 26

<sup>104</sup> Section 29

<sup>105</sup> Law (U) vs. A.G.



residential holding upon one child at the expense of the other children. It would be fairer if all the children were awarded a reversionary interest in the same. Similarly, a spouse should not be awarded a mere right of occupancy alone; they too should be awarded a real interest in the principal residential holding.

### **Recommendation**

- a) **All children should be equally entitled to the reversionary interest in the principal residence of either parent.**
- b) **A spouse should also be entitled to a proportion of the reversionary interest of the principal residence.**

### **2.3.7 Occupation of the principal residence**

The second schedule spells out the persons entitled to occupation of the principal residence which the intestate occupied as his or her principal residence. Under rule 1 of the second schedule. These include a wife, husband, and children that were normally resident with the intestate. Further specifications pertaining to children are that the males should be under 18 while the females should be under 21 and unmarried<sup>106</sup>. Where the principal residential holding was not occupied by the intestate because he or she was living in premises owned by another person, then the earlier mentioned persons are similarly entitled to occupy it<sup>107</sup>. These persons should have been normally resident with the intestate.

Rule 1 sub-rule 3 provides that:-

*“In the case of any other residential holding owned by the intestate, any wife, or children, under eighteen years of age if male, or under twenty one years of age and unmarried if female, who were normally resident in the residential holding shall be entitled to occupy it.”*

This provision is made in reference to polygamous situations in which a male intestate may have a residence other than a principal residence in which one of his families resides. It may be necessary to highlight this provision and distinguish it from the rest of the section so as to make the protection clearer to those concerned.

The specifications that set the age limit at which the children are entitled to occupy the residence are unconstitutional because they set varying standards

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<sup>106</sup> Rule 1 sub-rule (1)

<sup>107</sup> Rule 1 sub-rule (2)

based on sex difference. A common standard should be set for children as a category. The occupancy should cease on marriage for both male and female. No limits should be created on the basis of age in light of the present socio-economic realities where children remain dependant on parental support for an extended period of time.

#### **Recommendations**

- a) **Create a specific provision for devolution in the case of polygamous families**
- b) **Occupancy should cease on marriage for all children.**
- c) **Remove time limits on period of occupancy.**

#### **2.3.8 Conditions for occupancy**

Rule 7 of the second schedule stipulates the conditions to be performed and observed by the occupants. Consent should be obtained from the person entitled to the legal estate, where an occupant wishes to perform any developments or to put the residential holding to another purpose other than that for which it was used prior to the death of the intestate. Occupants should also ensure among other things that the residential holding is in good and tenantable repair upon termination of the occupancy.

In light of the foregoing recommendations to ensure fairness among the would be beneficiaries, consent should be obtained from the administrator of the estate, in consultation with the occupants who hold a reversionary interest.

#### **Recommendation**

**Amend rule 7 to provide that where an occupant wishes to perform any developments or to put the residential holding to another purpose other than that for which it was used prior to the death of the intestate, consent should be obtained from the administrator of the estate, in consultation with the occupants who hold a reversionary interest.**

#### **2.3.9 Termination of occupancy**

Rule 8 provides for termination by events. Notable in the section is the provision that states that the occupancy of a residential holding shall be terminated automatically upon the remarriage of the occupant where the occupant is a wife.

The import of this rule is that a woman's occupation of the principal residence is subject to her re-marriage. This limitation does not apply to male spouses, in spite of the fact that the law acknowledges that a principal residence may belong to either spouse.

The Commissions study<sup>108</sup> established the justification for this provision as stemming out of the fact that traditionally, the matrimonial home was on clan land or the locality of the clan of the male spouse and as such a widow could not remarry someone outside the clan and reside with him/her on clan property. Whereas this state of affairs may continue in rural areas, social mobility and changes in the economy have resulted in individuals acquiring land and developing property on land separate from clan or communal land. It is also the case that there are women who have built their own residences and subsequently married. The law should reflect these developments in order to present a balanced picture and to be in keeping with the Constitutional standard.

### **Recommendation**

**The law should stipulate that the occupancy of a residential holding shall be terminated automatically upon the remarriage of either spouse.**

A close look at the provisions of the Succession Acts in some of Uganda's neighbouring states, largely reveals a similarity in discrimination on the statute books in many respects, while in the same vein, there are some practices that serve the purpose of curtailing the same. The study considered the law on Succession in Kenya and established some similarities and differences.

The Kenyan Act does not differentiate between male and female children. The spirit behind this provision is to allow for fair distribution by making an allowance for all the children, male, female, married or unmarried depending on their means and needs<sup>109</sup>.

Contrary to Uganda, in Kenya, the law provides for the absolute and distinct ownership of the personal and household effects of the deceased to the surviving spouse where an intestate has left one surviving spouse and children. It also makes clear provisions for a polygamous setting. In a monogamous situation' a surviving spouse is also entitled to a life interest in the residue of the net intestate estate.

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<sup>108</sup> ULRC study *supra*

<sup>109</sup> Kameri Mbote *ibid* at page 15.

As is the case in Uganda, for a widow, the life interest in the residue of the net intestate estate the right is subject to her remarriage.

The law of Kenya also stipulates that the law applicable to the distribution on intestacy for agricultural land and crops as well as livestock in certain districts shall be the law or custom applicable to the deceased's community or tribe<sup>110</sup>. However, it is the case that the two categories of property excluded may be the only property owned by the deceased person. This means that women in those areas cannot benefit from or seek protection under the provisions on intestacy which if properly implemented could elevate the status of women in property control and management in Kenya<sup>111</sup>.

Article 21 of the Constitution of the Republic of Uganda provides for equality and freedom from discrimination and states that a person shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

To discriminate is defined as giving different treatment to different persons attributable only or mainly to their respective descriptions. Article 31 (1) of the Constitution further provides for the rights of the family and specifies that men and women are entitled to equal rights in marriage, during marriage and at its dissolution. It is in this regard that the provisions identified are highlighted as being Unconstitutional.

The Constitutional court in the case of **Law and Advocacy for women in Uganda and the Attorney General**<sup>112</sup> Declared that the above sections were Unconstitutional on the basis that they contravene articles 21(1), (2) (3), 31, 33(6) of the Constitution and as such are null and void. This decision created a requirement for the law to be amended to reflect equal application of the law of succession without preference on the basis of sex.

### **2.3.10 Distribution schedule on intestacy**

Intestacy occurs where a deceased did not make a will or a valid will disposing of his property. Intestate succession can be either total or partial. Intestacy is

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<sup>110</sup> Section 32 and 33 Cap 160.

<sup>111</sup> Kameri Mbote at page 14.

<sup>112</sup> *Supra*

said to be total where the deceased does not effectively dispose of any beneficial interest in any of his property by will while a partial intestacy exists where the deceased effectively disposes of some, but not all of the beneficial interest in his property by will.<sup>113</sup> Where this happens, the intestacy rules take effect subject to the provisions contained in the will.

The law on intestacy in Uganda was contained under section 27 of the Act. Following the constitutional court pronouncement in the case of **Law and Advocacy for Women in Uganda vs. A.G**<sup>114</sup>, the provisions on intestacy were pronounced null and void, leaving a lacuna in the law. The section was challenged on the basis of the fact that it was discriminatory on the basis of sex as it made reference to distribution on the death of a male intestate and not to a female intestate. As such it fell short of the guaranteed Constitutional standard of equality between men and women.

Whereas this is the position in the law, the study took cognisance of what the law provided formerly in order to make proposals for future reform.

Section 27 provides a detailed distribution schedule listing the percentage entitlements of wives, children, dependant relatives and the customary heir as follows:-

**(a) Where the intestate is survived by a customary heir, wife, lineal descendant and a dependant relative**

<b>Class</b>	<b>Percentage entitlement</b>
Customary heir	1%
Wives	15%
Dependant relatives	9%
Lineal descendants	75%

Where the deceased was not survived by a wife or dependant relatives then the proportion would go to the lineal descendant. Lineal descendant is not defined in the definition section of the Succession Act. However, Lineal consanguinity is defined<sup>115</sup> to mean that which subsists between two persons one of whom is descended in a direct line from the other as between a man and his father.

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<sup>113</sup> Parry and Clark 'The law of succession'

<sup>114</sup> supra

<sup>115</sup> Under section 20 of the Act

- (a) Where the intestate is survived by a customary heir, a wife, and a dependant relative but no lineal descendant

<b>Class</b>	<b>Entitlement</b>
Customary heir	1%
Wife	50%
Dependant Relatives	49%

- (b) Where the intestate is survived by a customary heir, a wife or a dependant relative but no lineal descendant

<b>Class</b>	<b>Entitlement</b>
Customary heir	1%
Wife/dependant relative	99%

- (c) Where the intestate leaves no person surviving him, other than a customary heir, capable of taking a proportion of his property under paragraph (a) ( b) (c) the estate shall be divided equally between those relatives in the nearest degree of kinship to the intestate.
- (d) If no person takes any proportion of the property of the intestate under paragraph (a) – (d), the whole of the property shall belong to the customary heir
- (e) Where there is no customary heir of an intestate, the customary heir’s share shall belong to the legal heir.

Whereas the law was challenged on the premise of being discriminatory, there are other anomalies within the distribution schedule that require redress.

Under U.K. law, the rules relating to intestacy are contained in Part IV of the Administration of Estates Act 1925 as amended. Where a person dies intestate, any real or personal estate shall be held in trust by personal representatives with the power to sell it<sup>116</sup>. The personal representatives are required to pay the intestates funeral, testamentary and administration expenses , debts and other liabilities out of the deceased’s ready money and out of any net money arising from disposing of any other part of his estate. <sup>117</sup> They have power during the

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<sup>116</sup> Section 33(1) of the 1925 Act

<sup>117</sup> S. 33(2).

minority of any beneficiary, or the subsistence of any life interest, to invest any money held by them.<sup>118</sup> The residuary estate of the intestate which is distributable among persons beneficially entitled on intestacy under Part IV of the Act , means (i) the residue of the deceased's ready money and any net money arising from disposing of any other part of his estate , together with any investments for the time being representing such money , and (ii) any part of the intestates estate remaining unsold and not required for administration purposes.

Section 46 provides for the beneficial interest taken by the surviving spouse. This varies in extent according to the state of the intestate's family at or after his death.

Situation	Interests of surviving spouse
(a) Where the intestate leaves issue Children, grandchildren or remoter descendants	Personal chattels absolutely Fixed net sum with interest <sup>119</sup> (125,000 pounds A life interest in one half of the balance of the residuary estate <sup>120</sup>
(b) Where the intestate leaves no issue but leaves a specified relative <sup>121</sup>	Personal chattels absolutely Fixed net sum is 200,000 pounds One half of the balance absolutely
(c) Where the intestate leaves no issue and no specified relative	Surviving spouse is entitled to the capital of one half of the balance.

Often the statutory legacy under heads (a) or (b) exhausts the residuary estate of the intestate and in consequence the surviving spouse alone benefits on intestacy , even though head(c) is not applicable. This will be particularly common where the intestate and his spouse owned the matrimonial home as

<sup>118</sup> S 33(3).

<sup>119</sup> This is a statutory legacy close in resemblance to a general pecuniary legacy given to a surviving spouse by will, with a direction in the will that it is to be paid immediately after the testators death.

<sup>120</sup> A surviving spouse entitled to such a life interest in half of the residuary estate may elect to have it redeemed and to receive its capital value from the personal representatives.

<sup>121</sup> Applies to instances where the intestate leaves no issue who attain the age of 18 years or marry under that age but leaves in addition to the spouse one or more of the following specified relatives or parent, or a brother or sister of the whole blood or issue of a brother or sister of the whole blood who attain the age of 18 or marry under that age.

beneficial joint tenants, with the result that the home will pass to the survivor by operation of law and not intestacy.

Under Kenyan intestacy Law, the law applicable to the distribution on intestacy does not apply to agricultural land and crops and livestock in regard to various districts set out in the schedule<sup>122</sup>. The law applicable in this case shall be the law and custom applicable to the deceased's community or tribe as the case may be.<sup>123</sup>

A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.

<b>Situation</b>	<b>Interests of surviving spouse/child/other</b>
Surviving spouse, children	Personal and household effects of the deceased absolutely Life interest in the whole residue of the net intestate (subject to re-marriage of a widow).
Surviving spouse, no children	The personal and household effects of the deceased absolutely. The first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater and A life interest in the whole of the remainder. (Subject to the remarriage of a widow).
Surviving child/children and no spouse	Surviving child or equally among surviving children
No surviving spouse or children	Kindred of the estate in this order of priority; Father; if dead Mother; if dead Brothers and sisters and any child or children of deceased brothers and sisters in equal shares; if none Relatives in the nearest degree of consanguinity up to and including the sixth degree, in equal shares. If none, half brothers and half sisters in equal shares; if none The relatives who are in the nearest degree of

<sup>122</sup> Section 32

<sup>123</sup> Section 33



	consanguinity up to and including the sixth degree, in equal shares.
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As evidenced above, the Succession Law on intestacy in other jurisdictions prioritises the interests of the spouse in comparison to lineal descendants and other family relations. It is also worth noting that the law clearly stipulates that the household effects and personal effects pass onto the surviving spouse. The Ugandan law is also peculiar in the sense that it does not award a pecuniary legacy but instead stipulates percentage entitlements. This may be cumbersome in implementation. It is however worth noting that the Kenyan Law also upholds the unconstitutional practice of disentiing a female spouse on her remarriage. It may therefore be necessary for the law on intestacy to be amended to take into account the following changes:-

- (a) **consider amending from a percentages to pecuniary legacy which may be amended from time to time by the Minister;**
- (b) **prioritise the surviving spouse as the chief beneficiary of an intestate's estate. Children should follow in order of priority where there is no spouse or where there is a residue available after the surviving spouse has obtained his or her entitlement;**
- (c) **ensure that the provisions do not promote discrimination on the basis of sex especially in regard to subjecting a widow's entitlement to remarriage;**
- (d) **ensure that the personal effects and household chattels are left to the surviving spouse;**
- (e) **consider revisiting and doing away with the entitlement of the categories provided for in the former distribution schedule such as the dependant relatives and customary heir. May be entitled only if one of the categories among the spouse and children is not available.**

Presently, the entitlement of wives under the intestate distribution schedule is meager in light of the fact that in most instances, the wife/ wives may have substantially contributed to the deceased's estate. Whereas it is the case that "Customary law did not recognise any trust or equitable contribution of a wife to matrimonial property other than chattels. The family property is presumed to belong to the husband. It is the rare cases where the courts have applied the doctrines of equity to protect the contributory interests of a woman to family property"<sup>124</sup>. Some matrimonial causes although they do not deal directly with

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<sup>124</sup> WLEA

succession illustrate equitable doctrines that point towards women's position in regard to marital property. In the case of **Edith Nakiyingi V. Merekizedeki (1978)**, court held that the house and the kibanja (land) were beneficially owned by the husband and wife under a trust for sale. The trust having arisen out of the substantial contribution by the wife to the development of the land and the building of the house. Thus the respondent who was the husband could not exclude the appellant wife from the enjoyment of their joint endeavours. The same principle of equity was upheld in the case of **Lule Salongo (1982)**.

Other jurisdictions have developed their jurisprudence to take cognisance of the interests of the surviving spouse. In the United Kingdom, the beneficial interest of a surviving spouse in the residuary estates varies in extent according to the state of the intestate's family at or after his death<sup>125</sup>. Beyond this, no considerations of entitlement are advanced on the basis of sexual differences

Section 27 (a) of the **Succession Ordinance 1906** provided for a **1/3 (one third)** of the property being left to a widow. However the amendment decree reduced it to 15% in cases where there is an heir and other lineal dependants. It is only where there are no lineal dependants and no legal heir and dependant relatives that the wife can get 99% of the property. The provision of consanguinity which follows the patrilineal line is obviously unfair to women. Lineal consanguinity is a lineage limited to males only namely grandfather, grandson, father etc. Collateral relatives are also branches of the male line.

Furthermore the patriarchy in the table implies that a mother of an intestate is not a dependant, and the deceased leaves no person surviving him other than a customary heir, the property would belong to the relatives nearest in lineage. The mother of the deceased under the table of consanguinity is not a lineal ancestor or a collateral relative. She can only claim as a dependant relative.

The Succession Act entitles the wife or wives of a male intestate to 15% of the estate<sup>126</sup>. The provision ostensibly overlooks the fact that the spouse (s) may have made a considerable contribution to the estate in question<sup>127</sup> and is even more inequitable where the deceased male was in a polygamous marriage because all the wives share in 15 percent of his estate regardless of its size, the length of the marriage or contributions made towards its acquisition and preservation.

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<sup>125</sup> Parry and Clarke *ibid* at page 10

<sup>126</sup> Section 27

<sup>127</sup> Domestic Relations study *supra*

According to a report by The Uganda Women's Network (UWONET) "The law assumes that the deceased male acquired all the assets without the wife's or wives' contribution which is more or less impossible whether in rural or urban settings<sup>128</sup>. In the case of Zambia, each widow is entitled with her children absolutely to her homestead (to the exclusion of other beneficiaries) and the common property (used by all family members) is shared between the widows<sup>129</sup>. Although cumbersome in some ways, this provision purposes to preserve the status of each of the widows prior to the intestate's death by taking cognisance of each of the widow's entitlement and contribution to their respective matrimonial home.

Under Kenyan Law<sup>130</sup>, where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the spouses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children. The distribution of the personal and household effects within each house shall be in accordance with the rules set out in sections 35- 38 (rules of intestacy).

The Ugandan law makes reference to principal residence or other residences and provides that:-

*" In the case of any other residential holding owned by the intestate, any wife, or children, under eighteen years of age if male, or under twenty-one years of age and unmarried if female, who were normally resident in that residential holding shall be entitled to occupy it."*

This provision protects interests of residential occupation to wives and children under polygamous unions. The intestacy provisions under the former section 27 make provision for the wife or wives to equally share the 15% entitlement of the intestate while the children (legitimate or illegitimate) are all equally entitled to the 75% entitlement of the lineal descendants.

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<sup>128</sup> UWONET 2006 : Gender Audit of Key Laws Affecting Women in Uganda  
[http://www.uwonet.or.ug/index.php?mact=Uploads,cntnt01,getfile,0&cntnt01showtemplate=false&cntnt01upload\\_id=13&cntnt01returnid=59](http://www.uwonet.or.ug/index.php?mact=Uploads,cntnt01,getfile,0&cntnt01showtemplate=false&cntnt01upload_id=13&cntnt01returnid=59) as at 20th November 2009 .

<sup>129</sup> Section 10, Zambian Intestate Succession Act Cap 59.

<sup>130</sup> Section 40

Presently, there is no law on distribution of the state in instances of polygamous unions. There is need for the law to make provision for the division of the estate in such a situation.

### **Recommendation**

**The law should make provision for fair distribution of an intestate in the case of polygamous unions.**

## **2.4 Customary heir**

According to most Ugandan traditions, the customary heir (usually the eldest son of the deceased) received the bulk of the estate in trust for other beneficiaries and assumed some of the responsibilities of the deceased.<sup>131</sup> The position of a customary heir was fashioned to ensure cohesion and continuity within a clan<sup>132</sup>.

However, experience has shown that this role is often abused, with many of those appointed instead using the property for their own gain. This has been exacerbated by the absence of effective customary mechanisms for checking the exercise of this function. To check these unfair practices, the law restricts the entitlement of a customary heir of an intestate to 1% of the estate. However, it is often the case, that this provision is circumvented in favour of the customary position where the heir takes charge of the estate to the detriment of the beneficiaries of the estate.

### **Recommendation**

- a) **The role of customary heir should be maintained as it is a central tenet of Succession practice within most cultures within Uganda.**
- b) **For the avoidance of doubt the law should stipulate clearly that a customary heir is a ceremonial role that does not entitle one to administer the estate unless otherwise elected by law.**

## **2.5 Separation and its resultant effects**

According to the Succession Act<sup>133</sup> in order to benefit from the estate, a spouse should not have been separated as a member of the same household at the time

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<sup>131</sup> The Commissions study on Domestic Relations established that the customary heir's responsibilities include raising bride wealth for unmarried brothers and maintaining the widow and any unmarried sisters until marriage as well as arranging their marriages. Study Report supra at page 288.

<sup>132</sup> DRB report supra

<sup>133</sup> S. 30 *Supra*

of death with his or her deceased counterpart. To avoid losing the right to inherit, the surviving spouse must apply within six months of the death to obtain a waiver of this rule by the court hearing the application for letters of administration.

The provision is lacking because the considerations for waiver of this provision do not take into account<sup>134</sup> or consider as material the spouse at whose instance the termination occurred. This leaves it open to any form of separation including abandonment as actionable under the law. It would be unfair for the law to exclude those who have simply been abandoned by their spouses without undergoing any formal processes such as judicial separation or the actual termination of the marriage through divorce. It should also be noted that separation may be a temporary measure with a possibility of reconciliation. Where one dies intestate under these circumstances, the section should not stand.

**In Nyendwoha Lucy vs. Nyendwoha Robert**, the wife left the husband on account of insecurity on 21<sup>st</sup> May 1982, the husband was subsequently gunned down on 2<sup>nd</sup> June 1982. Court held that such separation did not mean any physical separation for a given reason.

The provision does not take into account any contributions made by the other spouse to the wealth of the deceased as a ground for waiver of this provision. In some cases, the contribution, although non monetary, creates an equitable interest in the intestates property. It is the case in Uganda that female spouses participate in informal employment which contributes substantially to the family establishment but is not monetarily rewarding while on the other hand their male counterparts mainly engage in formal employment for monetary gain. The operation of this provision may create scenarios where a spouse is left in poverty in the event of separation regardless of their non-monetary contribution to the family's wellbeing. The provision perpetuates unfairness and should be amended to fairly safeguard the interests of people involved in separation.

Under U.K Law, the provision on separation provides that where either spouse dies intestate while a decree of judicial separation is in force, and the separation is continuing, the surviving spouse is treated as already dead and takes no beneficial interest on intestacy<sup>135</sup>. Judicial separation confers a recognised status

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<sup>134</sup> 30(2) provides that the section does not apply where such wife or husband has been absent on a approved course of study in an educational institution.

<sup>135</sup> Family Law Act 1996, section 21. The surviving spouse may nevertheless apply to the court for reasonable financial provision under the inheritance (Provision for Family and Dependents) ACT 1975.

to the parties under the law, after a formal process. This clarity should be adopted in Ugandan legislation.

### **Recommendation**

- a) **Amend the legislation to specify, judicial separation and separation recognised under customary law.**
- b) **Create an avenue for an application for reasonable financial provision where possible.**

## **2.6 Right of the widow to letters of administration**

Prior to the enactment of the Succession (Amendment) Decree, a widow of an intestate other than a Ugandan African had a right to administer the estate of her spouse. The Succession Act stipulated<sup>136</sup> that where the deceased left a widow, letters of administration shall be granted to the widow unless the court deemed it fit to exclude her on the ground of some personal disqualification or that she had no interest in the estate. The court had the discretion to associate the widow with any other person next entitled to letters of administration.

This position was upheld in the Kenyan case of **Re Kibiego (1972)**. Where High court held that:-

*“A widow of whatever race is the proper person to obtain letters of administration to her husband’s estate particularly where the children are underage. This position has been cited as good law in many Ugandan cases”.*

The Succession Amendment decree,<sup>137</sup> amended section 201-203 by substituting them with new provisions. Section 201 which previously guaranteed the right of the widow to administer her husband’s estate now provided that letters of administration would be granted to the one entitled to the greatest share of the estate under the statutory distribution scheme under section 28 of the decree. Furthermore, section 201 was made subject to section 5 of the Administrator General’s Act which requires an administrator other than a widow/ widower or an executor appointed by a will to get a Certificate of No objection from the Administrator General before applying for letters of Administration. This places the surviving spouse at an advantage among those entitled to Letters of Administration.

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<sup>136</sup> Section 201

<sup>137</sup> section 87(p) of the decree

The Succession Act of Kenya under section 35 denominates the surviving spouse in a monogamous union as the most suitable person to take charge of a deceased's property. This is a departure from the African Customary and Hindu practice of favouring the eldest male issue. The surviving spouse gets only a life interest in the property and where that is the woman, the interest terminates upon her remarriage. This practice is upheld to date and needs to be revisited in light of Constitutional standards of equality and other international commitments made under existing Human rights instruments including the Universal Declaration of Human Rights among others.

In Canada, the Estate Administration Act<sup>138</sup> establishes the priority of relatives' rights to inherit and thus to administer the estate. Spouses have first priority, followed by children, grandchildren (or guardians on their behalves), and parents. Siblings and children of predeceased siblings are next, followed by nieces and nephews. Any one of the heirs to an estate can administer the estate with the consent of all the other heirs. The Public Guardian and Trustee may also be able to act, with the consent of heirs; if no one is willing or able to undertake this responsibility<sup>139</sup>.

Following the Constitutional Court pronouncement in the LAW (U) case, the section as it stands entitling the one with the test share of the estate under the statutory distribution scheme to the letters of administration is consequentially affected.

### **Recommendations**

**Proposals for amendment should spell out a priority list of relatives' to inherit and administer the estate. Spouses should have first priority.**

## **2.7 Cohabitation**

The Succession Act does not make provision for instances of unmarried cohabiting unions although studies have shown that a significant percentage of Ugandan Families live under cohabitation<sup>140</sup>.

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<sup>138</sup> Estate Administration Act [RSBC 1996] CHAPTER 122

<sup>139</sup> [http://www.trustee.bc.ca/faq/faq\\_estates.html](http://www.trustee.bc.ca/faq/faq_estates.html)

<sup>140</sup> According to a 2008 study by the International Food Policy Research Institute, cohabitants form 30% of Ugandan Families. Kabumbuli, Mubangizi, Kindi, and Ssebuliba: Landownership and Food Security in Uganda ; A Study of Land Use and Control Among Households of Women Living with HIV in Four Districts.

Though the word “wife” is used loosely in Ugandan society to include women who are living in cohabitation or merely having love affairs with men, the term “legal wife” refers only to the woman who is validly married to a man according to the laws of Uganda<sup>141</sup>.

If a cohabiting partner dies without leaving a will, there is no assumption that their cohabitant should inherit any of their estate, no matter their contribution to the estate or how long they may have lived together. It is open to cohabiting partners to make wills in each other’s favour but it should however be noted that very few cohabitants do this. This could be attributed to widespread ignorance of the legal position of cohabitants.

The Ugandan Succession Act currently does not expressly state the rights of cohabitees in each other’s estate. The study sought to propose measures to cure this lacuna to cater for the growing trends of cohabitation, under which a significant number of the Ugandan population live, acquire property and accrue other rights.

In Kenya, many man-woman unions are contracted without undergoing a formal marriage ceremony under any of the four recognised marriage systems. Cohabitees many times acquire property together or accumulate property acquired severally before the cohabitation. The management and control of their property closely relates to that under the system they would have transacted in their marriages. Should the man die in such a relationship, the woman is hard pressed to prove that she was married. Kenyan Law recognises the presumption of marriage arising from some form of ceremony or a long period of cohabitation<sup>142</sup>.

In many cases such a presumption is not upheld. As was seen in the case of **Ruguru**<sup>143</sup> The woman could lose all her property to the deceased’s relatives who would seek to show that no marriage existed between their son or brother and the woman now claiming to be his wife<sup>144</sup>.

It is common for a man to contract a Christian marriage and then proceed to marry another wife under custom. In such cases, the issue as to who is the

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<sup>141</sup> WLEA

<sup>142</sup> Mbote

<sup>143</sup> 1970 E.A. 55.

<sup>144</sup> Mary Njoki vs. John Kinyanjui Muthuru and others Civil appeal No. 21 of 1984



widow would arise upon the man's demise. Consequently, the subsequent marriages are null and void and the wives in this case cannot inherit.

Although under Ugandan Law, illegitimate children are recognised and can thereby inherit, the women and their contribution are lost during such instances. There is need to secure the property rights of cohabitants of an intestate in monogamous and polygamous unions.

In England, a Law Commission report<sup>145</sup> considered, *inter- alia*, whether cohabitants should be provided for under the intestacy rules<sup>146</sup>. The report recommended that cohabitants should not be provided for under intestacy rules but that they should, instead be provided for under the Family provision legislation. In accordance with this recommendation, section 2 of the Law Reform (Succession) Act 1995 amended the 1975 Act by adding cohabitants as a further class of applicants.

The 1975 Act as amended by the Law Reform (Succession) Act 1995, any of the following persons may apply for provision:-

- (a) the wife or husband of the deceased;
- (b) a former wife or former husband of the deceased who has not remarried;
- (c) any person who was living in the same household as the deceased, and as the husband or wife of the deceased, during the whole of the period of two years ending immediately before the date when the deceased died;
- (d) a child of the deceased;
- (e) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
- (f) any person, (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased.

The maintenance standard applies on application by the cohabitant. The particular guidelines to which the court must have regard are:-<sup>147</sup>

- (a) the age of the applicant and the length of the period during which the applicant lived as the deceased's husband or wife and in the same household as the deceased; and

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<sup>145</sup> Distribution on intestacy. Law.com.No.187.

<sup>146</sup> Parry and Clarke *ibid* at page 189.

<sup>147</sup> Section 3(2A), inserted by the Law Reform (Succession) Act 1995, s2 (4).

- (b) the contribution made by the applicant to the welfare of the deceased's family, including any contribution made by looking after the home or caring for the family.

The expression "living as the husband or wife of the deceased" follows the Law Commission's recommendation,<sup>148</sup> similar to the definition of cohabitant used in section 1(3) (b) of the Fatal Accidents Act 1976.<sup>149</sup>

**In Re: Watson**<sup>150</sup>. It was held by Neuberger J that a middle aged couple living together but slept in separate bedrooms did live together as husband and wife. It was stated that court should ask itself whether, in the opinion of a reasonable person with normal perceptions, it could be said that the two people were living together as husband and wife: when considering that question, one should not ignore the multifarious nature of marital relationships.

Pertaining to the issue of the two year period of living together. In the same case, of **Re: Watson**<sup>151</sup>. **Neuberger J.** held that the two year period of living together was not defeated by a short period of hospitalisation of the deceased shortly before his death.

The issue of cohabitation is not legislated for in Uganda. However, it is the case that many live under this arrangement. Whereas proposals have been made for property rights in cohabitation within the Marriage and Divorce Bill, they are limited to rights at separation and during the cohabitation. In light of the foregoing, it may be necessary to make specific provisions for devolution of property at death of one cohabitant.

### **Recommendations**

**The amendment should define cohabitees and their interests in each other's intestate estates. The proposed definition should contain a time span as to when a cohabiting partner qualifies to benefit from such an estate.**

## **2.8 Entitlement of dependant relatives**

Dependent relatives are defined in the Succession Act as persons related to the deceased by marriage or blood or who, during the lifetime of the deceased were

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<sup>148</sup> Law Com. No. 187 PP.15 AND 16.

<sup>149</sup> Parry and Clark *ibid* at page 178.

<sup>150</sup> [1999] 1 F.L.R 878

<sup>151</sup> [1999] 1 F.L.R 878

substantially dependant upon him/her for their upkeep<sup>152</sup>. These persons are entitled to 9% of the deceased intestate's estate. The Commissions study on Domestic relations <sup>153</sup> established views against this position one of which was that the surviving person has no duty to maintain dependant relatives as they are not part of the deceased's immediate family. It was also argued that since they are usually persons that the deceased assisted out of kindness, no obligation should remain on the immediate family to cater for them. It was further advanced in argument that the estate may in some cases not even be sufficient to cater for the immediate family's own needs.

Another study on Muslim Women in Marriage and Household Resource Management in Uganda<sup>154</sup> proposes that the estate of a deceased man should be exclusively for the benefit of the widow/widower and children of the deceased. That the relative should not get shares out of such an estate as they jeopardise the property rights of the widows/widowers and children.

The key issue to determine is whether dependent relatives should continue to be included as a class of beneficiaries in an intestate.

The Kenyan Law of Succession defines dependants<sup>155</sup> as:-

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grand -parents, grand-children, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half brothers and half sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Under the law, the above categories of dependants are entitled to reasonable provision by will, gift or law or under intestacy. The section allows for a dependant to make an application to court for redress where provision made to them by the deceased or the administrator is deemed unreasonable. <sup>156</sup> In making

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<sup>152</sup> Section 2 (g).

<sup>153</sup> *Supra*

<sup>154</sup> Tuhaise et el, Women and Law in east Africa

<sup>155</sup> Section 29

<sup>156</sup> Section 26 cap 160 Succession Ordinance 1906 cap 160 2008 Laws of Kenya.

the award under the circumstances court considers several factors including the nature and amount of the deceased's property, existing and future means of the dependant, the situation and circumstances of the deceased's other dependants and the beneficiaries under any will and the general circumstances of the case, including the testator's reasons for not making provision for the dependant in so far as they can be ascertained.

The U.K. law takes cognisance of "other relatives". These are entitled beneficiaries subject to a condition where no issue of the intestate attains a vested interest, subject to beneficial interests of the surviving spouse (if any). The residuary estate of an intestate is held in trust for the relatives of the intestate in a specific order<sup>157</sup>. Any person who takes a vested interest under one paragraph excludes any person falling within a subsequent paragraph:-

- 1) **Parents**; surviving parents take in equal shares absolutely: if only one survives the intestate, that parent takes absolutely.
- 2) **Brothers and sisters of the whole blood** of the intestate, on the statutory trusts.
- 3) **Brothers and sisters of the half blood** of the intestate, on the statutory trusts.
- 4) **Grandparents**: surviving grandparents take in equal shares absolutely; if only one survives the intestate, that grandparent takes absolutely.
- 5) **Uncles and aunts of the whole blood**, on the statutory trusts; such an uncle or aunt must be a brother or sister of the whole blood of a parent of the intestate : thus an uncle's, or aunt's, spouse is excluded, although usually called aunt or uncle.
- 6) **Uncles and aunts of the half blood, on the statutory trusts**; such an uncle or aunt must be a brother or sister of the half blood of a parent of the intestate.

The provision for dependant relatives is a pervasive and commendable practice however; in some instances the estate may not be adequate to sustain provision for some of the dependants. This may be the case where the deceased was a

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<sup>157</sup> S.46(1).

salaried earner, or where the estate is simply too small to cater for a large number of dependants. It would thereby be important for the law to specify conditions under which each of the categories of beneficiaries is entitled to a share of the estate. Priority should be stipulated clearly, with the immediate family i.e. spouse and issue being given precedence.

### **Recommendations**

- a) **The law should make provision for dependant relatives subject to certain conditions including the nature and amount of the deceased's property, existing and future means of the dependant, the situation and circumstances of the deceased's other dependants and the beneficiaries**
- b) **Dependant relatives should also be considered subject to the interests of the intestates issue and the surviving spouse (if any).**
- c) **The residuary estate of an intestate should be held in trust for the dependant relatives of the intestate in a specific order of priority.**

## **2.9 Customary Practices of Succession**

Right from the Succession Ordinance of 1906, and legal Notice cap 34 of 1906 which exempted the estates of all natives of the Protectorate from the operations of the Succession Ordinance, African customary law relating to marriage and succession has continued to play a central role<sup>158</sup> alongside statutory law.

To date, the Judicature Act recognises the application of existing custom which is not repugnant to natural justice; equity and good conscience and such customs should not be incompatible either directly or by necessary implication with any written law<sup>159</sup>.

The 1995 Constitution of the Republic of Uganda prohibits laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised groups<sup>160</sup>. The current law in Uganda sets standards to be applied when applying customary law however, available literature indicates that cultural and customary practices which are against the dignity, welfare and interests of women and other marginalised groups like children as well as discriminatory continue to be practised when it comes to

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<sup>158</sup> S. 50 Succession Ordinance 1906 cap 160 2008 Laws of Kenya.

<sup>159</sup> Section 15 Judicature Act, Cap 13

<sup>160</sup> Art. 32(2) 1995 Constitution of Uganda

handling succession matters in the different ethnic groups in Uganda which needs to be reconciled with the statutory provisions.

Customary practices vary from one ethnic group to another however on the whole, there is an apparent preference of the male to the female child and the patrilineal lineage to the matrilineal lineage. Uganda is a predominantly patrilineal society and at death of an intestate, property passes from the father to the eldest son or the customary heir who is a son among the Baganda<sup>161</sup>. The male children usually take the largest share with the customary heir getting the largest portion.

Customary marriages in Uganda are celebrated through the payment of bride wealth by the groom and his family to the family of the bridegroom such as agricultural implements, cattle, or goats. Most of the husbands entertain wrongly that after payment of bride price, the wives become their property. To date some men claim to own the wife and her labour. Consequently, in the event of divorce or death of the husband the wife is left without any share of the wealth she created jointly with the husband. Cases of property grabbing by the deceased man's relatives are common where the widow and in extreme cases her children are disinherited by the man's relatives. In many of these cases, the customary practices override the law.

Be that as it may, current legislation, given customary practices, provides limited possibilities for women to own land. In patrilineal societies, which are most prevalent in Uganda, women generally do not inherit land from either their fathers or their husbands. Their fathers often do not bequeath land to their daughters because they believe that daughters marry outside the clan, and will as a result pass the land on to another clan. Husbands often do not bequeath land to their wives for the same reason: They need to ensure that the land remains in the clan because they worry that the widow might sell the land to non-clan members or allow it to be taken over by another clan if she re-marries. In some societies in Uganda, if the husband dies, the wife and children are inherited by the husband's brother or another family member so that he may provide for them. This practice is dying out, raising fears that if a widow remarries outside the clan, the clan land she has acquired is lost<sup>162</sup>.

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<sup>161</sup> Tuhaise et al at page 32

<sup>162</sup> Aili Mari Trippwomen's Movements, Customary Law, And Land Rights in Africa: The Case Of Uganda.

Thus under customary law, which prevails in Uganda, a woman may have jointly acquired land with her husband and may have spent her entire adult life cultivating the land, but she cannot claim ownership of the property. If the husband dies, the land generally goes to the sons, but may also be left to daughters. Nevertheless, the husband may still leave the wife with no land and therefore no source of subsistence.

Land is the most important resource in Uganda because people depend on it for cultivation and therefore their livelihoods. In Uganda, as elsewhere in the world, unequal access to land is one of the most important forms of economic inequality between men and women and has dire consequences for women as social and political actors. Women provide 70-80 percent of all agricultural labour and 90 percent of all labour involving food production in Uganda, yet they own only a fraction of the land.

Whereas attitude change and cultural practice may not be addressed solely through legislation. It is important to note in this report that it would go along way in addressing landlessness among some facets of the community. Inheritance is the most common way in which land is passed on in Ugandan society. It is thereby important that attitudes are re-oriented to allow for both women and men as potential beneficiaries for inheritance to land.

### **Recommendation**

**The MoGLSD should design advocacy programs targeting attitude re-orientation in cultural practice that discriminates against women and girl beneficiaries in land –inheritance.**

### **2.10 Legal pluralism**

There is a wide range of normative orders other than formal law that come into play to shape both women and men's legal and social position regarding succession on death and these include culture, customs and religion among others. According to a study by Human Rights Watch<sup>163</sup>, "A complex mix of cultural, legal, and social factors underlies women's property rights violations. In many countries, customary laws—largely unwritten but influential local norms that coexist with formal laws—are based on patriarchal traditions in which men

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<sup>163</sup> Human Rights Watch: Policy Paralysis: A Call For Action On HIV/Aids-Related Human Rights Abuses Against Women And Girls In Africa, Discrimination in Property and Inheritance Rights and HIV/AIDS. [http://www.hrw.org/reports/2003/africa1203/5.htm#\\_Toc56508488](http://www.hrw.org/reports/2003/africa1203/5.htm#_Toc56508488)

inherit and largely control land and other property, and women are “protected” but have lesser property rights. Past practices permeate contemporary customs that deprive women of property rights and silence them when those rights are infringed.

According to the Domestic relations study, “The absence of rights to land was partly related to the patrilocal<sup>164</sup> and exogamous<sup>165</sup> nature of marriage coupled with the communal nature of ownership of resources. Under this system, a woman would marry a man from another clan and move physically to live with him in land owned by his clan. However, while a significant proportion of the population continues to live on clan land, the rules derived from this system are indiscriminately applied even to tenured land under title individually acquired by either of the spouses and separately held from communal clan land”<sup>166</sup>.

Another study by Women and Law in East Africa on the law of succession in Uganda<sup>167</sup> provides a comparative study of the customary practices of succession as practiced among the Baganda, Bakiga, Iteso, and Lugbara. The study established that legal pluralism whereby statutory and customary law co-exist and operate alongside each other as a prominent feature of succession in Uganda. On the whole, the study established that Ugandan societies are predominantly patriarchal and patrilocal. Property especially land has until recently been a preserve of the sons and male relatives at succession. This is still the position in cases of intestate. Girls are beginning to inherit land only where the deceased left a will specifically bequeathing a share of his land to his daughters or female relatives.

It is assumed that as daughters get married, they are likely to sell off or give the land they acquired to their husbands or off-springs who are members of a different clan. This practice is discriminatory on the basis of sex. Much as the Succession Act provides that children of an intestate are entitled to 75% of his estate shared in equal proportion, the girls are disinherited by the foregoing customary practice where the girls do not inherit from their fathers yet they are considered as outsiders by their husband’s families, hence losing out twice.

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<sup>164</sup> Of or relating to residence with a husband's kin group or clan.

<sup>165</sup> The custom of marrying outside the tribe, family, clan, or other social unit.

<sup>166</sup> Domestic Relations study *supra*

<sup>167</sup> Tuhaise et al Ibid



Appointment of a customary heir is another customary practice which was found to be common among the ethnic groups in the study. Among the Baganda, the customary guardian is known as '*omusika*' while the Iteso refer to him as '*emusika*'. It was found that this position is reserved for male children of the deceased and where he has none of his own, then his brother or brother's children can be his heir. Among the Baganda, a customary heir is the owner of the matrimonial home and has the power to evict the widower from that home and settle her somewhere else. Again such a customary practice contravenes the 2<sup>nd</sup> Schedule to the Succession Act which provides that a widow and deceased's children should be left to occupy the matrimonial home during intestacy.

Certain discriminatory customary practices exist and are existing within the communities that require legal and policy redress to modify them so that they can be accommodated to operate alongside formal legal structures without contravening the provisions of the Constitution<sup>168</sup> and other national laws.

### **Recommendation**

**Discriminatory practice such as widow inheritance and male preference should be outlawed.**

#### **2.11 Religious Practices (The position of Islam)**

Religious practices have been recognised as an influential factor in determining succession matters among certain sects of people. In Uganda, the Muslims in Uganda follow religious provisions of 'Sharia law' in determining succession matters. By a Legal Notice<sup>169</sup> Mohammedans were excluded from the operations of part V of the Succession Ordinance of 1906 which provided for distribution of an intestate's property. Therefore, the Mohammedans were entirely left to rely on the Sharia law in cases of intestate.

This position has not changed much over the past decades. The distribution of property of a deceased among the Muslims is believed to have been determined by God in such a way that a widow is entitled to a quarter of the man's wealth, in case the couple did not have children. Where there are children, the wife is entitled to one eighth of the husband's wealth. The girl children receive half of

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<sup>168</sup> Article 21 provides for Equality and freedom from discrimination while Article 32(2) provides that laws, cultures and customs that undermine the dignity, status and welfare of women are prohibited.

<sup>169</sup> Laws of Uganda 1951 Vol 7, Subsidiary Legislation caps 31-101 and Buganda native Laws

what the boys receive. This distribution takes place after settlement of a deceased's death<sup>170</sup>. Property distribution is done by an experienced Sheikh who is appointed by the Uganda Muslim Supreme Council. The recipients are expected to sign an agreement showing that they are contented with the distribution of property.

In cases where a Moslem believer makes a will and it is deemed to favour some children, the will is disregarded (destroyed) and the property is distributed according to Sharia law. In the case of **Abasi Magunda & Anor Vs Sulaiman Senoga & Ors**<sup>171</sup>, the petitioners in this case petitioned court for a declaration that a will left by a Muslim testator was invalid because the testator was a muslim who should not have made a will but relied on Sharia Islamic law for succession. Justice Okello held that the law of succession in Uganda had been codified largely under the Succession Act as amended. Therefore there was no such thing as customary or religious law of succession. She added that the deceased had opted out of Sharia law when he chose to make a will.

Such has been the courts position on the legal pluralism of succession in Uganda. Evidently the national laws take precedence. However, the situation is different in communities where customary and religious practices of succession are preferred to the statutory laws to the prejudice of women and children. There is need to understudy the effects of these customary and religious practices of the application of the law of succession and come up with a clear and settled position on the hierarchy, relevancy and applicability of each of these seemingly competing practices.

A study by Women and law in East Africa ' *Muslim women in marriage and household resource management in Uganda*<sup>172</sup> revealed a conflict between the application of statutory law and religion. Some religious practices which discriminate against women in the distribution of property where females are entitled to half of what their male counterparts receive contravene the Constitution which is the supreme law of the land hence rendering them null and void *ab initio*<sup>173</sup>. This further makes a case for law reform to bring these religious practices in conformity with the Constitution by addressing these imbalances as highlighted above.

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<sup>170</sup> Tuhaise, et el Ibid

<sup>171</sup> HCCS 663/93

<sup>172</sup> Tuhaise, et, el Muslim Women in marriage and household resource management in Uganda, Women and Law in East Africa

<sup>173</sup> Art. 33 (2) of the 1995 Constitution of the Republic of Uganda.

## **Recommendation**

- 1) The Amendment provisions should stipulate the special position of Islam as an exception within the overall legal and administrative framework on Succession.**
- 2) An option should be created for parties under Islam who may wish to opt out of Sharia practice.**

## **2.12 Administration of Estates of Deceased Persons**

Administration of an estate refers to the management of the affairs and property of the deceased person. This is done in order to make sure that estates are looked after properly and that those persons who are entitled to receive shares from them do not suffer hardships because of mismanagement or dishonesty. Accordingly, the Succession Act,<sup>174</sup> the Administrator-General's Act,<sup>175</sup> the Administration of Estates (Small Estates) Special Provisions Act<sup>176</sup>, the Public Trustee Act<sup>177</sup> and, the Trust Corporations (Probate and Administration) Act<sup>178</sup> provide for the way a person's property should be administered when he/she dies.

The way a person dies; whether testate<sup>179</sup> or intestate<sup>180</sup> determines the way of dealing with his or her estate. There are different ways of management of a deceased person's estate viz; management by probate, management by Letters of Administration, management by the Administrator General, management by Public Trustee and, management by a trust corporation among others. There are also cases where a person disappears and his or her whereabouts are not known or a person becomes of unsound mind, in such situations there is legislation<sup>181</sup> in place detailing what should be done. This section deals with these different ways of management of a deceased person's estate and issues arising there under that may necessitate reform of the law.

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<sup>174</sup> Cap. 162, Laws of Uganda 2000.

<sup>175</sup> Cap. 157, Laws of Uganda 2000.

<sup>176</sup> Cap. 156, Laws of Uganda 2000.

<sup>177</sup> Cap. 161, Laws of Uganda 2000.

<sup>178</sup> Cap. 163, Laws of Uganda 2000.

<sup>179</sup> A situation where a deceased person dies having written a statement expressing his/her wishes regarding the disposal of his/her property as well as his/her other rights and obligations.

<sup>180</sup> A person dies intestate if he/she dies without having written a valid will. In this situation the law provides for a way of distributing the deceased person's estate.

<sup>181</sup> Estates of Missing Persons (Management) Act, Cap. 159, Laws of Uganda 2000 and Administration of Estates of Persons of Unsound Mind Act, Cap. 155, Laws of Uganda 2000.

### 2.12.1 Management by Probate

If a person dies leaving a will, the person named in the will looks after the wishes of the dead person. However, such person cannot do this until he or she has lodged the will with the court and received a document called a 'probate'. This is his or her legal evidence of his or her right to look after the dead person's last wishes. This legal evidence is in form of a certificate signed and sealed by a competent court. This person is called an 'executor'. The executor can be a natural person or a legal person or can be a public office e.g. Administrator General. If the executor does not look after the estate properly, the probate can be revoked and the Administrator-General will take over administration. The executor derives his or her title from the will, the manner of dealing with the estate, depends on the provisions of the will. The manner of dealing with the estate by the executor can only be varied by statutory provisions or court order.

There are issues that arise in management by probate as follows:-

#### (a) Maximum and minimum number of executors

Section 185 of the Succession Act provides that when several executors are appointed, probate may be granted to all of them simultaneously or at different times. However the grant of powers to several persons in respect of the same part of the estate may be difficult and impractical and may hamper successful execution in some cases. It may therefore be necessary for the law to set a minimum and maximum threshold to the number of executors in respect of the same part of an estate.

Under the Supreme Court Act<sup>182</sup>;

*Probate shall not be granted to more than four persons in respect of the same part of the deceased's estate.*

If a testator appoints six executors for the same property, probate can be granted to not more than four of them, though power will be reserved to the others (if they have not renounced), to apply on the occurrence of any vacancy<sup>183</sup>. The section does not prohibit probate being granted to four executors in respect of a

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<sup>182</sup> Section 114 (1) UK, 1981.

<sup>183</sup> Parry and Clarke supra at page 391.

particular part of the deceased's estate and to four different executors in respect of the remainder of the estate<sup>184</sup>.

In England, as is the case in Uganda, probate may be granted to one executor, whether or not there is a minority or life interests which arises under the deceased's will or partial intestacy.

### **Recommendation**

- a) **The law should make specific provision for the maximum number of executors in relation to a particular part of the deceased's estate.**
- b) **The law should stipulate, that probate may be granted to a single executor.**
- c) **Passing over of executors**

There are certain circumstances and conditions that may render an executor unfit to administer an estate even if they have been appointed as such. Such circumstances include instances where the named executor has been pronounced guilty for a criminal act<sup>185</sup>, where the executors refuse to take out probate or any other circumstances that court may deem necessary.

Under English Law, this position is addressed by court which has the power to pass over an executor<sup>186</sup> and appoint as administrator such other person as it thinks expedient if by reason of any special circumstances, this appears to be necessary or expedient. The grant of administration may be limited in any way the court thinks fit. Probably, the special circumstances need not relate to the estate itself or to the administration of it but may extend to any other circumstances which the court thinks relevant<sup>187</sup>.

This option is not presently available in the Laws of Uganda; however, if it is made available, it would provide an expedient way for Ugandan courts to address similar instances.

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<sup>184</sup> Parry and Clarke, supra ta page 391.

<sup>185</sup> In the Estate of S[1968]P.302. Court passed over an executrix who was serving a sentence of life imprisonment for the manslaughter of the testator, her husband. In the Goods of Wright (1898) 79 LT. 473, The estate was passed over when the executor disappeared and the a warrant of arrest was issued on an embezzlement charge.

<sup>186</sup> Section 116 Of the Supreme Court Act 1981

<sup>187</sup> Parry and Clarke supra at page 393.

### **Recommendation**

**The amendment should contain a provision allowing for High Court to pass over an executor that is deemed unfit to handle the office and appoint an administrator in his/her place.**

#### **(b) Retracting a renunciation**

The Succession Law of Uganda makes no provision for instances where an executor who has renounced probate may retract his or her renunciation and take probate.

Under the common law of England this may be done with leave of court<sup>188</sup>. However, such a matter may only be entertained where the retraction of the renunciation will be for the benefit of the estate, or for the benefit of those interested under the testators will. In the Goods of Stiles<sup>189</sup>, leave was granted to an executor to retract his renunciation and take probate because his co-executor had absconded after taking probate.

Section 5 of the Administration of Estates Act 1925 allow for an executor to retract. A registrar may in exceptional circumstances give leave to an executor to retract after the grant has been made to some person in lower degree.

Section 6 of the same Act provides that if an executor is permitted to retract his/her renunciation, and prove the will, the probate shall take effect without prejudice to the previous acts and dealings of and notices to, any other personal representative who has previously proved the will or taken out letters of administration.

### **Recommendation**

**The amendment should consider bringing on board retraction of a renunciation of probate for special circumstances.**

#### **(c) Unchecked powers of the executor**

It has been noted<sup>190</sup> that the law gives without sufficient checks a lot of powers to the administrator or executor by vesting all property in their hands yet such powers can easily be abused to the detriment of the beneficiaries. No

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<sup>188</sup> *Ibid* at page 397.

<sup>189</sup> [1898] P.12.

<sup>190</sup> Aggrey Wagubi, *The Legal and Institutional Framework governing inheritance in Uganda: A critique of the Law and Institutions*. 2003 p. 27.

intervention can be made by the Administrator General to protect the estate unless the period of six months has elapsed and there is clear evidence of plunder. In the case of Dr. **Stephen Ouma (Deceased)**<sup>191</sup> The deceased died testate appointing his brother as executor bequeathing most of his estate to his wife and children. Misunderstandings developed between the widow and the executor regarding implementation of the will as the widow sought to be consulted in the process. The executor also took for personal use some of the deceased's personal belongings including a car. When the Administrator General made an application to protect the interests of the family, court held that the executor needed time to collect the whole estate of the deceased under section 281<sup>192</sup> before he/she could file an inventory. It was also held that the estate vested in the executor for distribution to the beneficiaries of the estate, and he was thereby absolved of any wrong doing. The widow sued the executor after eight months for *revocation* of probate and orders of preservation of the estate. By this time, the executor had squandered the estate. The Court revoked probate and granted the orders of preservation however, it can be said that the order was in vain because the executor had plundered the estate.

The Succession Act<sup>193</sup> provides for instances in which grant of probate may be revoked or annulled for just cause. An outstanding lacuna in this instance is the fact that the law does not make provision for revocation for breach of duty but for failure to exhibit an inventory or account or exhibition of an inventory or account that is untrue in a material respect. This creates a potential hurdle for beneficiaries who have to wait six months to challenge the inventory made by the executor. This would in most instances render their attempts futile.

The law of England stipulates circumstances under which a grant which was properly made may be revoked by the reason of the occurrence of subsequent events<sup>194</sup>. Pertinent to the foregoing, it is noteworthy that the law recognises instances where a grantee commits a breach of duty as a basis for revocation. This is done to secure the proper administration of the estate. **In the Goods of Love day**<sup>195</sup> The administratrix (widow) had disappeared. Sir Francis Jeune held that;

*The real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled*

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<sup>191</sup> *idem*. Administrator General's Cause No. 1570.

<sup>192</sup> Now Section. 278 of the Succession Act

<sup>193</sup> Section 234

<sup>194</sup> Parry and Clarke at page 460.

<sup>195</sup> [1900] P.154, 156.

*thereto.; and I can see no reason why the court should not take fresh action in regard to an estate where it is made clear that its previous grant has turned out abortive or inefficient.*

The apparent lacuna in legislation, leaves no room for would be beneficiaries to challenge unscrupulous executors until after the inventory has been filed. There is need for an immediate intervention to guard against the wastage of the estate that may be brought about by an inefficient or fraudulent executor.

### **Recommendation**

**The amendment should contain a provision allowing for instantaneous relief where a beneficiary or other interested party demonstrates that the grantee has breached duty or is fraudulent or inefficient in the management of the estate.**

### **2.12.2 Management by Letters of Administration**

Prior to the Law and Advocacy for women in Uganda case that had the effect of nullifying section 40 of the Succession Act, where a person made a will or left an invalid will, the property was to be distributed in accordance with the scheme of arrangement found in the Succession Act<sup>196</sup>.

Prior to this an application for Letters of Administration was made to court. Letters of Administration gave power to whoever held them to deal with the estate of the intestate as if he was a personal representative of the deceased<sup>197</sup>.

According to the Act, the person who is entitled to the biggest share in the property of the dead person would be appointed by the court to look after the administration and distribution of the property<sup>198</sup>.

If the person entitled to administer the will for any reason, was unable to take on the administration, another person entitled to share in the estate would be appointed. If the administrator did not look after the estate properly, his or her letters of administration would be taken away and the Administrator-General will take over administration<sup>199</sup>. The person to whom Letters of Administration with will are granted is known as the Administrator. However, the manner he

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<sup>196</sup> Peter Nanyenya and F.M. Ssekandi (eds). A Simple Guide to the Law of Succession in Uganda. 1977. p.8

<sup>197</sup> E.K. Sekandi. A Guide to the Administration of Small Estates 1974. p.2

<sup>198</sup> Nanyenya. *op.cit.*, p.8

<sup>199</sup> *ibid*, p.2



deals with the estate is similar to that of the executor in that he has to follow the will<sup>200</sup>. Issues that arise in management by Letters of Administration relate to the following;

### 2.12.3 Protection of the estate before grant

A person entitled to administration has no power to do anything as administrator before letters of administration are granted to him or her<sup>201</sup>. However, there is need to protect the assets of the estate before the grant of letters of administration is made. This option and remedy is presently not available within our legislation.

The practice in England is either for the court to appoint a receiver pending the grant on application by any party interested including a creditor or beneficiary<sup>202</sup> or to grant administration *ad colligenda bona* to any suitable person for the purpose of preserving the assets of the estate until a general grant is made. Such a grant is useful for instance where urgent action is needed and the person entitled to a general grant cannot readily apply for it. This grant is usually limited to the purpose of collecting, getting in and receiving the estate and doing acts necessary for its preservation, and is always limited until a further grant of representation is made. The grant is one of administration and no distribution to the beneficiaries is authorised. <sup>203</sup>.

Although the law stipulates that an intestate vests in the state and provides protections in criminalising the act of intermeddling, it is important to include a provision that protects the assets of the estate prior to the grant of letters of administration and probate. This is to augment protection especially in light of the context of legal pluralism where there are *de-facto* competing practices in custom and in law as to how an estate should be managed.

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<sup>200</sup> Sekandi. *op.cit*, p.3

<sup>201</sup> Section 191 of the Succession Act.

<sup>202</sup> In Re: Sutcliffe: [1942] Ch.453. Court appointed a receiver where an executor had carried on the deceased solicitor's practice for three years without taking probate. In Steer vs. Steer (1864) 2 Dr and Sm.311, A receiver and manager of the deceased's businesses was appointed.

<sup>203</sup> Parry and Clarke at page 437

## **Recommendation**

**The amendment should contain a provision protecting the estate from distribution before letters of administration and probate are granted.**

### **2.12.4 Management by the Administrator General**

The office of the Administrator General is established under the Administrator Generals Act<sup>204</sup> as a corporation sole, with perpetual succession. The Administrator General oversees administration of estates of declared persons and in some situations<sup>205</sup> administers estates of deceased persons. Under the Public Trustees Act, the Administrator-General is also the Public Trustee<sup>206</sup>. In performance of his duties, the Administrator General is assisted by agents who are appointed by the Minister or the Administrator General<sup>207</sup>.

The office of the Administrator General is presently faced with challenges of implementation such as absence of a comprehensive policy framework supporting legal aid provision, corruption, limited capacity to follow up cases in timely and efficient manner; limited human resources to meet the expectations of the clients; and lack of capacity to monitor performance and evaluate impact of the services on the status of the poor and disadvantaged. These challenges are examined in detail here below:-

#### **2.12.4.1 Limited monetary jurisdiction of the Administrator General**

The law confers on the Administrator General power to administer an estate of Shs. 20,000/= however, inflation over the years has rendered this provision ineffectual, because there is hardly any estate in Uganda of that value. This position unfairly disadvantages the poor. This is because the rationale behind this threshold was to assist the beneficiaries of small estates to access their benefits without incurring extra costs of court process<sup>208</sup>. At present, beneficiaries of small estates are equally tasked with the procedure of obtaining letters of

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<sup>204</sup> Section 2 Administrator Generals Act Cap 157

<sup>205</sup> The Administrator General may apply for letters of administration in the cases set out under sec 2 (9) i.e., where; the deceased left a will appointing the Administrator General as sole executor; there is a will with no named executor; the executors named in a will have died or renounced probate; two months have elapsed since the testator died and no letters of administration or probate have been obtained; or; the deceased died intestate.

<sup>206</sup> Cap. 161.

<sup>207</sup> Section 3 of the Administrator General's Act

<sup>208</sup> Wagubi *op.cit.* p. 58

administration. In many cases, the costs involved exhaust the value of the estate and render efforts by the beneficiaries futile.

In the Busoga **Administrator General's Cause No. 493**<sup>209</sup> the deceased maintained Shs. 200,000/= as her bank balance with Bank of Baroda. When the Administrator General requested the bank to send the funds to him for transmission to the beneficiaries, the bank replied that letters of administration had to be obtained before the funds could be sent. Since it was 200,000/=, the application had to be made to the High Court and the Administrator General charges Shs. 200,000/= to make the application. Given that all the funds were going to be consumed in the process, the beneficiaries abandoned the money in the bank.

This situation calls for urgent reform of the law in the spirit of the law to do away with the expensive process for small estates.

### **Recommendation**

**Amendment should revisit the threshold for small estates.**

#### **2.12.4.2 Lengthy procedure for obtaining letters of Administration and Probate**

As earlier stated, the Administrator General may administer a deceased person's estate by applying for letters of administration or probate where the same have not been obtained within 2 months from the death of the testator<sup>210</sup>. This position of the law was echoed in the High Court case of **Yokana Kakaire vs. Nakku Namusisi**<sup>211</sup>.

This power is however impracticable taking into account the administrative challenges within the institutional framework including Court bureaucracy and case backlog.<sup>212</sup> The section should be amended to reflect a more realistic timeframe and to make the law practicable.

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<sup>209</sup> 2003

<sup>210</sup> Section 4(3) Administrator General Act

<sup>211</sup> [1980] HCB 24.

<sup>212</sup> On average, a minimum of 6 months is taken after the death of the deceased to obtain probate or letters of administration.

## **Recommendation**

**The law should be amended to provide for a slightly longer period preceding intervention by the Administrator General.**

### **2.12.4.3 Revocation of grant**

The law empowers the Administrator General to recall and revoke letters of administration<sup>213</sup>. However, because the office of the Administrator General is not funded to initiate the suit, beneficiaries have to bear the litigation costs. This creates an obstacle in access to justice as very few if any can afford to shoulder the high costs involved.

In **Administrator General vs. Peter Mukasa**<sup>214</sup> Court rejected a preliminary objection raised by the defense counsel that the Administrator General had *no locus standi* to administer an estate where the deceased had left an immediate relative. Court held that the Administrator General may be granted letters of administration and may move court to call and revoke any grant previously made by Court.

The law of England recognises revocation of grants made. Jurisdiction is in the High Court for Non contentious matters and in the Chancery Division for contentious ones<sup>215</sup>. In the Family Division, a district judge or registrar may order a grant to be revoked or amended only on the application or with the consent of the person to whom the grant was made, unless there are exceptional circumstances (become incapable, wishes to be relieved of duties, disappears or commits a breach of duty). In all instances, suits are brought to court by an interested party including a beneficiary or a creditor. Court has power to revoke a grant on its own volition due to an error made but requires a revocation claim where the person to whom the grant was made opposes revocation<sup>216</sup>.

However in light of the foregoing, a stumbling block lies in the way in which suits of this nature are instituted because of the nature of the socio-economic circumstances in Uganda which limit those that can afford to institute suits of this nature. It has been suggested<sup>217</sup>that this problem could be resolved by

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<sup>213</sup> Section 5 Administrator General's Act

<sup>214</sup> High Court Civil Suit No. 542 of 1991.

<sup>215</sup> Parry and Clarke at page 459.

<sup>216</sup> Parry and Clarke at page 459.

<sup>217</sup> Wagubi. Op.cit., p. 62

allowing for the Administrator General to intervene summarily against errant administrators and executors.

### **Recommendation**

- a) **The law should be amended to broaden the channels through which revocation of grant may be obtained including:**
- b) **Application by an interested party**
- c) **Intervention by the Administrator General. (See section 4(5) (a) AG act).**

#### **2.12.4.4 Multiple actors**

The law grants power to the High Court and Magistrates Courts<sup>218</sup> to grant probate and letters of administration<sup>219</sup>. Additionally, the office of the Administrator General is mandated to oversee matters of administration of estates of deceased persons under the Administrator Generals Act<sup>220</sup>. It is in this spirit that the law requires notice of application for letters of administration to be given to the Administrator General<sup>221</sup>. It is also in this regard that the Succession Act provides that <sup>222</sup>

*“Except as hereafter provided but subject to section 4 of the Administrator Generals Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction.”*

Section 4 requires that death be reported to the Administrator General who may apply for grant of letters of Administration depending on the circumstances of the case.

In spite of these provisions, it has been established<sup>223</sup> that in many instances, the practice on the ground is that matters of administration are brought to the Administrator Generals office after being partially heard in the courts of law. This could be attributed either to the ignorance among the public of the relevant forum or to the absence of clear provisions stipulating that all matters of administration of estates should be channelled through the Administrator General.

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<sup>218</sup> In accordance with the Administration of Estates (Small Estates ) (Special Provisions) Act.

<sup>219</sup> Section 235 Succession Act.

<sup>220</sup> Section 2 of the Administrator General’s Act.

<sup>221</sup> Section 5 of the Administrator General’s Act.

<sup>222</sup> Section 191

<sup>223</sup> Law Reform Commission consultative workshop report ...

The foregoing lacuna promotes the erroneous idea that there exists a dual mechanism for addressing matters of succession and encourages forum shopping and duplicity which results in wastage of time and resources, especially on the part of Government.

It is therefore necessary for the law to clearly stipulate that all matters of administration of Estates are to be channelled through the Administrator Generals Office. In this regard, it would be prudent, in light of the prevailing challenging conditions the office is faced with<sup>224</sup>, to advocate for resources to support implementation.

### **Recommendation**

**The amendment should stipulate that all matters of estate administration should be channelled through the Administrator Generals Office.**

#### **2.12.4.5 Attachment of Administrator Generals Accounts**

Section 22<sup>225</sup> provides for action against the Administrator General by creditors and claimants. Where a suit is decreed in favour of the creditor or claimant, he or she is entitled to payment out of the assets of the deceased equally and rateably with other creditors<sup>226</sup>.

In practice, courts of law, in the pursuance of the foregoing section, are known to make orders for attachment of the Administrator General's accounts for purposes of recompensing creditors<sup>227</sup>. The practice is highly irregular especially in light of the fact that these accounts are trust accounts for beneficiaries<sup>228</sup>

Whereas section 35<sup>229</sup>, of the Administrator Generals Act provides that the revenues of Government shall be liable to make good the liability of the Administrator General, the Government Proceedings Act<sup>230</sup> provides a clear procedure for this determination through Civil Proceedings in the High Court

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<sup>224</sup> including financial and human resource constraints

<sup>225</sup> Administrator General's Act. *op.cit.*

<sup>226</sup> Section 22(2)

<sup>227</sup> Law Reform Commission Consultative workshop unpublished at page ..

<sup>228</sup> Paper presented by the Administrator General at the Family Justice working Group Workshop on May 10-11, 2010 at Colline Hotel, Mukono. P.7.

<sup>229</sup> Administrator General's Act. *op.cit.*

<sup>230</sup> Cap 77 Laws Of Uganda

and Magistrates Court<sup>231</sup>. In which case, proceedings are to be made against the Attorney General<sup>232</sup>.

In spite of the available legislation, the Administrator General's Accounts have on many occasions been subjected to attachment. This may be attributed to many causes including a lack of a specific prohibition in the law. It is thereby proposed that the law be amended to provide that the Administrator General' Accounts should not be subjected to attachment.

### **Recommendation**

**The law should expressly prohibit attachment of the Administrator Generals accounts.**

#### **2.12.4.6 Framework to address offences**

The law empowers the Administrator General to charge any person who without authority of Court or of the Administrator General intermeddles with property of deceased persons or refuses to deliver such property to the Administrator General<sup>233</sup>. The Administrator General can also charge the partner of a deceased person who fails to report particulars of the partnership to the Administrator General<sup>234</sup>. The Penal Code Act<sup>235</sup> also creates the felony of conversion of trust property by a trustee, whose penalty is 7 years imprisonment.

Although the law confers these powers on the Administrator General, the fines of Shs. 200 and 1500 are not punitive because they have been overtaken by inflation<sup>236</sup>. These weak penalty provisions and apparent lack of adequate safeguards is perhaps the biggest<sup>237</sup> hindrance to the efficiency of the current laws on succession.

It is also arguable that despite the existence of safeguards against intermeddling in the estate of a deceased person, the law enforcement agents are reluctant to enforce these laws against relatives of a deceased person. A case in point is the

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<sup>231</sup> Section 7 Cap 77.

<sup>232</sup> Section 10 *ibid*.

<sup>233</sup> Section 11 Administrator General's Act.

<sup>234</sup> Section 12 Administrator General's Act.

<sup>235</sup> Section 302 Cap 120 Laws of Uganda 2000.

<sup>236</sup> Wagubi *op.cit.*, p. 60.

<sup>237</sup> Reclaiming Rights – Reclaiming Livelihoods: A Brief on Secure Land and Property Rights for Women in Sub-Saharan Africa in the Era of AIDS, 25<sup>th</sup>, June, 2009 -90% of intra-familial conflicts are usually over women's land rights. In one of the district offices, 70% of the cases were cases on threats of eviction from of this vulnerable category from their homes which shows a very high percentage of intermeddling.

**Estate of Suleiman**<sup>238</sup> where the brother of the deceased had distributed property without Court authority and converted the vehicles and stock of the deceased's business in Kampala. When the Administrator requested the police to charge the said brother with intermeddling, the police were extremely reluctant to do so. The widow had no support from the relatives who believed that the brother had the customary right to dispose of the property.

Other challenges that create obstacles to redress include financial constraints and administrative barriers including accessibility to the Administrator General's Offices and delays in the process among others. According to WLEA study carried out in Uganda

*"A private prosecution by the widow is beyond the reach of most persons due to the onerous financial constraints as well as other administrative difficulties involved"*<sup>239</sup>.

It is thereby necessary for policy and administrative intervention to address these challenges. This may be achieved by Government and Civil society designing interventions to buttress the existing administrative framework tasked with the duty of administration of estates of deceased persons.

### **Recommendations**

- a) **Government and Civil society designing interventions to buttress the existing administrative framework tasked with the duty of administration of estates of deceased persons.**
- b) **The penalties available in the law should be updated to reflect a punitive stance in line with the current socio-economic conditions.**

#### **2.12.4.7 Challenges facing agents within the institutional framework**

In Uganda, the institutions responsible for recording deaths are the offices of the Registrar General and Administrator General's Office. Reporting of death is required to be made with the registrar of births and deaths at the district within one month of the death of a person<sup>240</sup>.

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<sup>238</sup> [1991] HCB.

<sup>239</sup> Tuhaise et al Ibid

<sup>240</sup> Section 16 of the Registration of Births and Deaths Act.



For inheritance purposes, the law requires death reports to be made to the office of the Administrator General through the sub-county chief<sup>241</sup>. According to the Administrator General's Act, the Minister may appoint any public servant or any chief of or above the rank of *gombolola* chief to be an agent of the Administrator General in any area of Uganda<sup>242</sup>. The introduction of agents at the district level was made in a bid to ease the procedural difficulties.<sup>243</sup> However, the agents are faced with challenges in the performance of their prescribed roles such as limited or lack of office space for keeping records, lack of awareness of law and procedure even amongst themselves, as well as lack of knowledge within the general public of the agent's functions<sup>244</sup>.

Other institutions with roles to play in succession are Local Councils and, the police. Currently the Chief Administrative Officers act as agents of the Administrator General in the districts. The law initially<sup>245</sup> required such agents to be remunerated by salary or such fees as the minister would prescribe. However by the amendment of 1967 this remuneration was made discretionary.

It is the case that most of the appointed agents for example the CAO are not equipped with the necessary legal training<sup>246</sup> and are often ignorant of the law they are supposed to enforce. Additionally, these agents usually have many competing interests in their offices which leave them with little or no time to attend to matters of succession, forcing those seeking the services to travel to Kampala which is very expensive and lengthens the process of handling their matters.

The local government council has the following powers or role in Succession Matters; to mediate in a situation where the rights of a child are infringed upon and, especially with regard to the protection of the child's right to succeed to the property of his or her parents and all the rights accorded to a child<sup>247</sup>. These

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<sup>241</sup> As provided for in Sec. 4, Cap. 157

<sup>242</sup> Under Section 2 (4) Cap. 157

<sup>243</sup> Women and Law in East Africa *op.cit.*, p. 53

<sup>244</sup> Report of the national consultation workshop on the assessment report of civic literacy in Uganda's local government, Kampala, December 7, 2005 Hotel Africana organized by the peace and conflict studies, Makerere university, Kampala, Uganda and the human security and peace building, school of peace and conflict management royal roads university, Victoria, Canada emphasized the issue of recording keeping amongst LCS, setting their minimum educational requirements, sensitization of these LCS and the people they lead as well as raising the issue of the remuneration.

<sup>245</sup> Cap. 140, Sec. 3(7), now section 2 (2) Cap 157

<sup>246</sup> Uganda Law Reform Commission secondary study on the law of Succession Act alongside the study on the Domestic Relations Bill- 1994.

<sup>247</sup> Section 10 of the Children's Act Cap 59.

powers do not include any powers of distribution of the property by the Local Councils<sup>248</sup>, registration of death for transmission to the Registrar General<sup>249</sup>.

Local councils are very influential in the communities in which they operate<sup>250</sup> as they have day-to-day interaction with the majority of the people that usually face the injustices perpetrated. However, most local council officials are not adequately trained<sup>251</sup> making them open to challenges such as reliance on negative cultural practices, involvement in property grabbing and procedural anomalies among others. Local council's also adequate lack resources to enable them function effectively.

The police have the important societal role of maintaining law and order which extends to matters of succession and inheritance. Under the Police Act, officers are under a duty to execute orders or directions issued by the Administrator General or court on succession and estate matters<sup>252</sup>.

Some of the challenges facing the agents are that most of them are not equipped with the necessary legal training<sup>253</sup> and are often ignorant of the law they are supposed to enforce. A 1994 study by the Ministry of Gender and Community Development in Bushenyi established that:-

*"The representatives of the Administrator General are ill equipped to carry out their role. Though they were aware of their status as representatives, the role they are supposed to play remains hazy to them. This is because there is neither a training program for them nor statute books from which to deduce their responsibilities<sup>254</sup>.*

Also coupled with the fact that their roles are additional to their official duties, many of them dedicate a limited amount of time to succession matters.

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<sup>248</sup> *ibid.* Section 10(4).

<sup>249</sup> As provided in the Second Schedule, part 2(14) of the Local Government Act 1, 1997.

<sup>250</sup> Advocates of alternative dispute resolution argue that informal, community-based institutions are better placed to provide inexpensive, expedient and culturally appropriate forms of justice: *The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights*: Lynn Khadiagala, School of International Service, American University, Washington DC, USA.-

<http://www3.interscience.wiley.com/journal/119016919/abstract?CRETRY=1&SRETRY=0> 05/2/2010.

<sup>251</sup> Report of the national consultation workshop on the assessment report of civic literacy in Uganda's local government, Kampala, December 7, 2005 Hotel Africana. *op.cit.*

<sup>252</sup> Section 21(e) Police Act cap 303.

<sup>253</sup> Uganda Law Reform Commission study on the Domestic Relations Bill- 1994, *supra* .

<sup>254</sup> Research Project on Women and Inheritance. Project Paper No. 4. A study of women and inheritance in Bushenyi District at page 27.

## **Recommendations**

- a) **Administrator Generals office should design initiatives to improve the capacity of the agents at the district level.**
- b) **Administrator Generals office should follow through on issues of remuneration for the additional roles performed by these agents.**

### **2.12.5 Office of the Assistant Estate Duty Commissioner**

The Succession Act<sup>255</sup> provides for the office of an Assistant Estate Duty Commissioner;

*Except in the case of an application by the Administrator General, no letters of administration or probate may be granted unless a certificate from the assistant estate duty commissioner is produced in the High Court.*

The role of this officer is to establish whether the requirements of any written law relating to estate duty in regard to the payment of duty have been or will be complied with.

In England, the Finance Act of 1894 introduced Estate Duty, payable subject to certain exceptions and modifications, on all property passing on death<sup>256</sup>. It was a graduated tax levied at increasing rates on successive slices of the deceased estate. In 1975, the Finance Act abolished estate duty and replaced it with capital transfer tax. This was a tax on transfers of value including lifetime gifts, death transfers and transfers into settlements. Inheritance tax was introduced in 1986. This tax taxes transfers of value. Section 4 is the principal charging section which covers transfers on death. It provides that:-

*(1) On the death of any person, tax shall be charged as if, immediately before his death, he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death".*

At present, there is no provision within the tax regime of Uganda that levies tax on inheritance. As such the office of the Estate Duty Commissioner is rendered extraneous. It should thereby be removed from the legislation.

## **Recommendation**

- a) **Section 252 of the Act should be repealed.**
- b) **Administrator Generals power to delegate summary administration**

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<sup>255</sup> Section 252 Succession Act, Cap. 162.

<sup>256</sup> Parry and Clarke supra. Taxes Payable Upon Death, at page 360

Section 2(5) of the Administrator General's Act empowers the Administrator General to delegate to an agent any or all powers to take over and summarily manage property not exceeding 2000/=.

The provision is welcome in light of the fact that the Administrator General is burdened by several duties. Whereas this is so, the figure quoted is very low and incongruous in the present socio-economic times. It is thereby proposed that figure be increased to reflect a realistic amount<sup>257</sup>.

### **Recommendation**

**The law should be updated to be brought in line with the current socio-economic conditions.**

#### **2.12.6 Management by Public Trustee**

The office of the Public Trustee is established by the Public Trustee Act<sup>258</sup>. It is a corporate sole with capacity to sue and be sued. The Public Trustee essentially manages property for the benefit of beneficiaries who are entitled to this property. A public Trustee is supposed to be appointed either by an instrument or Court order. The Administrator General was by Statutory Instrument<sup>259</sup> and in accordance with Section 2 of the Public Trustee Act appointed Public Trustee.

Under the Public Trustees Act<sup>260</sup> the Minister is empowered to make rules for the safe custody, deposit and investments of funds and for better functioning of the Public Trustee's office. According to Section 311 of the Succession Act and Section 9 of the Public Trustee Act, it is lawful for the administrator of the estate to transfer shares of an infant or lunatic to a Public Trustee for proper management.

However, it is notable that the office has been largely inoperative, with no existing machinery in place. It is also the case that in practice, the functions of the Public Trustee are largely executed by the Administrator General. It is therefore difficult to make out the difference between the two functions. Whereas the law

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<sup>257</sup> Paper presented by the Administrator General at the Family Justice working Group Workshop. *op.cit.* P.6.

<sup>258</sup> Cap. 161, Laws of Uganda 2000.

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<sup>260</sup> Section 16 Cap 161 *op cit.*,

stipulates that the office of the Public Trustee is autonomous there is no demarcation of these two offices<sup>261</sup>.

### **Recommendations**

- a) The amendment should stipulate the functions and duties of the office of the Public Trustee as additional responsibilities of the administrator General.**
- b) In light of the foregoing recommendation it is necessary for structural changes within the office of the Administrator General to allow for the fully fledged operations pertaining to this function.**
- c) The Ministry of Finance Planning and Economic Development and the Ministry of Justice and Constitutional Affairs should consider committing additional resources for the effective implementation of this function.**

### **2.12.7 Management of estates of missing persons**

Where one goes missing, the requirement to fulfil the needs of the absentee's family and creditors and also to manage and protect the property has led to the enactment of Law to administer the estate of missing persons, in many countries<sup>262</sup>. Reasons for going missing can include escape, being lost and forgetful, mental health reasons and foul play<sup>263</sup>.

In Uganda, the Administration of estates of missing persons is governed by the Estates of Missing Persons (Management) Act<sup>264</sup>. Under the Act, when a person disappears from Uganda and is not heard of for a period of six months despite all efforts to look for him, members of the family of the missing person may apply to court for what is known as an Order of Management. An order of management is a court authority given to an applicant to manage the estate of the missing person until such missing person is presumed dead. A missing person is presumed dead at the expiration of three years from the date of his disappearance. The person who obtains an order of management is called the manager. He is supposed to manage the estate according to the provisions of the law. At the end of the management, the manager must give the Administrator General a report accompanied with the accounts and documents relating to the

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<sup>261</sup> Wagubi. *op cit* p. 78.

<sup>262</sup> Australia, Canada, USA etc.

<sup>263</sup> Missing persons in Australia, Marianne James, Jessica Anderson, Judy Putt ,Research and Public Policy Series No.86 at page iii Australian Institute of Criminology 2008

<sup>264</sup> Cap. 159. *op. cit.*

estate of the missing person. After the estate has been reported to the Administrator General, then the administration of the estate of the missing persons takes the same course as the administration of an estate of a deceased person.

**In Re Benedicto Kagimu Kiwanuka (Missing Person)**<sup>265</sup>, Joseph Nnume Kakooza Ag.J (as he then was) observed that:-

*“Letters of management of the property and credits of a missing person allows the holder to manage the estate. The holder must furnish court with an inventory and annual accounts of the said estate and abide wholly by the Decree 20 of 1973 relating to management of estates of missing persons”*

A grant of letters of administration after the report has been made puts the estate under the realm of the Succession Act and other laws relating to the administration of the estate of the deceased persons.

It has been argued <sup>266</sup> that the Estate of Missing Persons (Management) Act is presently of no importance as it came into force during Idi Amin’s authoritarian regime where it was common place for people to disappear without trace.

However it can be argued that the legislation was not context specific in light of a particular regime, but was intended to cover the management of estates of persons in instances where they could not be traced.

The Estates of Missing Persons Act of Canada<sup>267</sup> defines a missing person<sup>268</sup> to include;

- (a) *a person whose relatives residing at the place where the person was last known to reside, and who would be likely to hear from the person, have not heard from or of the person for at least 3 months last past, and have been unable to ascertain the person’s whereabouts,*
- (b) *if the person does not have relatives of the kind described in paragraph (a), a person whose*
  - (i) *associates at the place where the person was last known to reside, and*
  - (ii) *relatives with whom until then the person had been in the habit of communicating to have not heard from or of the person for a period of*

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<sup>265</sup> Misc. application No. 4 of 1974 Unreported.

<sup>266</sup> Wagubi. *op.cit.*, p. 43.

<sup>267</sup> [RSBC 1996] CHAPTER 123

<sup>268</sup> Section 1

- at least 3 months last past and have been unable to ascertain the person's whereabouts, and*
- (c) *a person who has been missing for a shorter period than 3 months, but who is otherwise a missing person within the meaning of paragraph (a) or (b), and who is declared by the Supreme Court to be a missing person, on application, accompanied by evidence to the satisfaction of the court that there is urgent need of a curator being appointed under this Act for the preservation of the estate or the support of the dependants of that person.*

Where the Supreme Court determines that one is a missing person, a curator is appointed to manage the estate.

In England a "missing person is defined under the Public Trustee Act<sup>269</sup> as:-  
*"a person who cannot be found after all reasonable efforts have been made to locate him and includes a person who dies intestate or intestate as to some part of his estate without leaving any known heir-at-law living in the Province or any heir-at-law who can be readily communicated with living elsewhere or where the only heir-at-law is an infant or where Her Majesty in right of the Province has an interest in the estate or proceeds thereof"*

The law gives power to a Public Trustee to operate as a custodian of the property of a missing person<sup>270</sup>.

The problems inherent in the handling of property owned by one who has disappeared and remained absent without explanation are both numerous and difficult. The obvious need to satisfy the interests of the absentee's family and creditors and to keep the property in the stream of commerce while at the same time protecting the absentee from the dissolution of his or her estate has led to the enactment of remedial legislation in a number of states<sup>271</sup>.

In spite of the prevailing peace and stability in Uganda to date, there are instances where persons who own property disappear without trace. It can thereby be argued that the Missing Person's Act is applicable to date because the mischief that the law set out to cure is prevalent.

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<sup>269</sup> Cap 379

<sup>270</sup> Section 4(b) cap 379.

<sup>271</sup> Property Law, the Estates of Missing Persons, T.S.P and J.W.D. , Duke Law Journal, Vol.1996,No.3. (Summer, 1966), pp. 745-778. <http://www.jstor.org/stable/1371504>.

Whereas that may be so, the provisions pertaining to jurisdiction to make grant within the Act do not reflect the prevailing socio-economic conditions<sup>272</sup>. Section 3 stipulates that;

- 1) *Jurisdiction to make grant orders under the Act shall be exercised by;*
  - (a) *a magistrate grade II, where the total value of the estate does not exceed ten thousand shillings;*
  - (b) *A magistrate grade I, where the total value of the estate exceeds ten thousand shillings but does not exceed fifty thousand shillings;*
  - (c) *A chief magistrate, where the total value of the estate exceeds fifty thousand shillings but does not exceed one hundred thousand shillings; or*
  - (d) *The High Court, where the value of the estate exceeds one hundred thousand shillings.*

The Law should be amended to reflect the socio-economic trends.

### **Recommendations**

- a) **The Missing persons Act should be retained within the Succession Law Regime.**
- b) **The pecuniary jurisdiction within the Act should be updated accordingly.**

#### **2.12.8 Formal Courts**

The Administrator General's Act provides that no person may administer the estate of a deceased person without legal authority<sup>273</sup>. Section 235 of the Succession Act provides that jurisdiction to grant probate and letters of administration shall be exercised by the High Court and Magistrates Courts in accordance with the provisions of the Administration of Estates (Small Estates) (Special Provisions) Act.

The Act confers jurisdiction on Magistrate's courts to grant probate or letters of administration in respect of small estates of deceased persons.

Section 2 of the Act serves the purpose of conferring jurisdiction to grant probate or letters of administration in respect of small estates of deceased persons as follows:-

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<sup>272</sup> Section 3 Cap 159.

<sup>273</sup> Section 11 Cap 157



*“Notwithstanding any provision of the Succession Act or the Administrator Generals Act to the contrary, jurisdiction to grant probate or letters of administration in respect of small estates of deceased persons shall be exercised by;*

- (a) A magistrate grade II, where the total value of the estate does not exceed ten thousand shillings;*
- (b) A magistrate grade I, where the total value of the estate exceeds ten thousand shillings but does not exceed fifty thousand shillings;*
- (c) A chief magistrate, where the total value of the estate exceeds fifty thousand shillings but does not exceed one hundred thousand shillings.*

It should be noted that the Act was enacted in June 1972, when the values stipulated were substantial in nature. Approximately 40 years later, the prevailing socio-economic conditions, coupled with the current level of inflation<sup>274</sup>, render the jurisdiction of Magistrates prescribed under the Act ineffectual. Presently, Magistrates have no jurisdiction to grant letters of administration or probate to estates above Ug. Shs. 100,000/= (Shillings One Hundred Thousand). Literally no estate can be found to be worth one hundred thousand shillings or less. This position in effect leaves only the High Court as the sole arbiter in these matters and results in case overloads at that level.

In spite of this obstacle, it has been established on several occasions that Magistrates Courts continue to handle applications for letters of Administration and probate<sup>275</sup>, despite the apparent lack of jurisdiction under the law. In some instances court clerks have been known to conspire with applicants and under declare the value of the estates to reflect their value as below Shs. 100,000/= <sup>276</sup>.

In the case of **Sanyu Lwanga Musoke vs. Galiwango**<sup>277</sup> the value of the estate was declared to be above Shs. 100,000/=, however, the learned Magistrate entertained the application and made a grant of letters of Administration to the appellant. The Supreme Court declared that such a grant was null and void.

The process in High Court has been found to be tedious, expensive and inaccessible as compared to the process in the Magistrate courts. Magistrate’s

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<sup>274</sup> The Annual headline inflation rate for the year ending October 2011 rose to 30.5 % from 28.3% recorded for the year ended September 2011. UBOS 2011.  
<http://www.ubos.org/index.php?st=pagerelations&id=138&p=related%20pages:Consumer%20price%20Index>

<sup>275</sup> Women and Law in East Africa. *op cit.* p.

<sup>276</sup> Wagubi. *op cit.* p. 81.

<sup>277</sup> Supreme Court Civil Appeal No. 48 of 1995.

courts are also more strategically placed within reach of the communities <sup>278</sup> than the High Court.

It is on these premises that the need to address the apparent lacuna created in the law is emphasized. This can be addressed by stepping up the pecuniary jurisdiction of Magistrates Courts in Succession Matters.

### **Recommendation**

**The amendment should step up the pecuniary jurisdiction of Magistrates courts in handling Succession matters.**

#### **2.12.8.1 Caveats against applications for grant of probate or administration**

The Succession Act prescribes the procedure for lodging a caveat against an application for a grant of probate or letters of administration. The provision stipulates<sup>279</sup> that;

*“Caveats against the grant of probate or administration may be lodged with the High Court or a district delegate ; and immediately on any caveat being lodged with any district delegate, he or she shall send a copy of it to the High Court.”*

After a caveat is entered, the procedure for the removal of the caveat is by ordinary suit. Proceeding by ordinary suit is expensive and tedious process that the majority of Ugandans can ill-afford<sup>280</sup>. It has been observed <sup>281</sup> that the process of civil litigation in these instances is slow, expensive, bureaucratic and cumbersome<sup>282</sup> and that the lack of an alternative procedure unfairly disadvantages the caveator<sup>283</sup>, whose limitation period in this case is two years.

A respondent may opt to wait until the caveat ceases to be effective after the caveator fails to show cause against the grant.

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<sup>278</sup> Wagubi *op cit.* p. 82.

<sup>279</sup> Section 253

<sup>280</sup> Among the challenges to access to Justice in Uganda is the inability to afford filing fees especially in civil matters. A study by ILI in 2006 established in an interview with the Administrator General that many people cannot obtain letters of Administration due to lack of filing fees, which were slated at 300,000 (US\$ 150) at the time. The study also noted that the few existing lawyers charge about the same amount, which the average Ugandan cannot afford. ( Access to Justice and the Rule of Law, presented at the National Consultative Conference : Legal Empowerment of the Poor 24<sup>th</sup>-25<sup>th</sup> November 2006.)

<sup>281</sup> Wagubi p. 83.

<sup>282</sup> Namungo vs. Kilyankusa [1980] HCB 65.

<sup>283</sup> Wagubi *op cit.* p. 83.

In England, caveats are regulated under Probate rules<sup>284</sup> a caveat is obtained by a notice in writing to the Family Division of the High Court that no grant is to be sealed in the deceased's estate without notice to the caveator. The entry of a caveat stops the issue of any grant in the deceased's estate until the caveat ceases to be effective. This gives the caveator time to take legal advice, or collect evidence, so that he may decide whether to oppose an application by another person for grant.

When an applicant for a grant finds that a caveat has been entered, he may issue a warning in the prescribed form to the caveator. A warning states the interest of the applicant and sets out two alternative courses of action open to the caveator;

- 1) To enter appearance to the warning, stating the caveator's contrary interest. If the caveator enters an appearance no grant can be issued without an order of the court. Often the applicant or the caveator commences a probate action to obtain the decision of court as to who is entitled to a grant.
- 2) To issue a summons for directions if the caveator has no contrary interest but wishes to show cause against the sealing of a grant to the applicant. (The caveator and the applicant may for instance be entitled to a grant in the same degree).

If the caveator does not follow either of these courses of action, the caveat ceases to be effective and a grant of probate or administration may be issued to the applicant. A caveat also ceases to be effective at the expiration of six months beginning with the date on which it was entered<sup>285</sup>.

The question is whether court process is necessary to determine matters of caveats. This is possibly the case because of the high evidential requirement to prove entitlement, which cannot be resolved using any other means. In light of this it may be necessary to design a mechanism in which litigation on probate issues can be handled inexpensively.

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<sup>284</sup> 1987

<sup>285</sup> Parry and Clarke *ibid* at page 442.

## Recommendation

**The Administrator General's office should consider designing networks with civil society institutions to support the cause of offering pro-bono services in matters of granting probate or administration.**

### 2.12.9 Emerging Issues

#### a) Application of the law of succession to foreigners

The law provides that the property in Uganda of non Ugandans who have resided in Uganda for 2 years or more is subject to the Uganda law of Succession, if a wife or child of the person who dies is ordinarily resident in this country<sup>286</sup>.

In the first instance, the law is restrictive where it limits itself to a wife and child. The broader approach of referring to beneficiary including a spouse, a child or dependant relative would be more inclusive.

Nanyenya<sup>287</sup> observes that this provision protects illegitimate children of foreigners who die in Uganda without making a will, as well as their other dependants, thus preventing some hardship which was not prevented in the past. Whereas this interpretation may be true to a certain degree, one obvious lacuna lies in the fact that the provision restricts beneficiaries to persons who are resident in Uganda. The law is silent on what happens where a beneficiary is not resident in Uganda. This has been challenged as being restrictive and occasioning unfairness. In the case of **Olive Amelia Kawalya vs. Registrar of Titles**<sup>288</sup> the appellant after obtaining probate from the High Court applied to the Registrar of Titles to be registered as proprietor of the Mailo land of her late husband. The East African Court of Appeal upheld the Registrar's decision and held that an indigenous African tribe means indigenous to Uganda and as such she was not an African which was a requirement of the law enabling ownership of that tenure.

The law should be open to allow for foreigners to succeed the estates of their kinfolk in Uganda. In that regard, special proceedings should be designed within the law to accommodate these processes.

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<sup>286</sup> Section 3 Succession Act

<sup>287</sup> Nanyenya *op.cit.*, p.

<sup>288</sup> 1977 E.A. 481 1974 HCB 238.

In India, the main laws pertaining to issues related to succession and inheritance by foreigners in India are: The Foreigners' Act (provision for the government to make orders restricting or prohibiting rights of a foreign citizen) and The Foreign Exchange and Management Act (Acquisition and Transfer of Immovable Property in India). Different religious groups in India subscribe to different laws. Hindus have their own codified law (Hindu Succession Act) as well as a part uncodified, Muslims have their own textual law of inheritance (Islamic Law on Succession), Parsees come under the Indian Succession Act, as do Christians, as well as others (e.g. spouses with different religions married under The Indian Marriage Act).

The applicable law of inheritance depends on the personal law of the deceased at the time of death. If a foreign citizen inherits from a deceased Indian citizen, then the law prescribed for the appropriate Indian religious group applies. If the deceased was a foreign citizen, then the personal law of his religion or nationality applies. In the instance where the law of the nation to which the deceased foreigner belonged to at the time of death refers the inheritance issues back to India (i.e. place where his/her property is situated), then the applicable law which governs the inheritance of the deceased in India takes precedence. The personal law to which the deceased person subscribed applies to matters of inheritance in India. This law may be the textual law of the deceased's religion, or the codified law of the nation to which the deceased belonged to at the time

The civil court of the district deals with all matters relating to inheritance. Inheritance issues are dealt with by the principal civil court of original jurisdiction (district judge's court) where the property lies, or where the deceased used to live in India before death, or before departing the country. If the property lies in the jurisdiction of more than one civil court, the High Court (HC) may transfer the matter to one civil court. From there, up to two appeals may be referred to the HC. In special circumstance a Special Leave Petition (SLP) may be allowed for the matter to be considered in the Honourable Supreme Court of India, the Apex Court, but only after the second appeal is exhausted, and if special questions of law are involved. The local laws of the State in which the property is situated determines the stamp duty and court fees.

Disputes relating to succession and inheritance may take as much time as any other civil suit, which varies on a case to case basis, depending on the

complexities of the claims, the nature of interpretation of the law, and the number of appeals<sup>289</sup>.

The world is fast becoming a global village, and Uganda is one of the countries in which dual citizenship is entertained. In many instances, foreigners live work and acquire property in Uganda that may form part of their estate at their demise. It is thereby essential that the law is relevant to developing trends by catering for instances in which all or part of a foreigners estate remains within Uganda, whether or not his or her intended or de-facto beneficiaries are Ugandans.

### **Recommendation**

**The Succession Act should comprehensively stipulate processes to be undertaken for estates of foreigners including but not limited to instances where foreign citizen inherits from a Ugandan citizen.**

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<sup>289</sup> India Inheritance and Tax Law. <http://www.globalpropertyguide.com/Asia/India/Inheritance>.

## CHAPTER THREE

### METHODOLOGY OF THE STUDY

#### 3.1 The Study Design

The study largely used qualitative methods of research. Qualitative methods of research were chosen because they seek a deeper understanding while studying the subject from its natural setting, attempting to make sense of, or interpret phenomena in terms of the meanings people bring to them. It involved extensive documentary and literature review to provide theoretical and practical insights into succession practices.

This method was also intended to establish the social reality from the point of view of the actors in a more reflective manner and to provide a detailed description, and enable a deeper understanding of the obstacles to the implementation of the law of succession today and how it can be best addressed

#### 3.2 Population and Area of study

The study was intended to be conducted country wide, however due to the vast nature of the country; consultations were conducted at the national and regional levels to ensure effective representation of the country.

At the national level, interviews and documentary review were carried out in institutions dealing with matters of succession including the Judiciary<sup>290</sup>, Ministry of Justice and Constitutional Affairs<sup>291</sup>, Uganda Human Rights Commission<sup>292</sup>, the School of Law- Makerere University,<sup>293</sup> independent legal

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<sup>290</sup> The Judiciary in Uganda is the arm of government that is directly responsible for the handling, interpretation and passing of court judgments. It was important to consult this category on matters of implementation of the law on succession and the challenges they face when dealing with issues closely related to culture, whether at any point they refer such cases to informal courts of traditional leaders and what their attitude is towards this. How they deal with international law issues in the context of the state laws and the customary law in the context of the different communities in Uganda.

<sup>291</sup> This is the Ministry responsible for legal and administrative policy issues. It will be important to explore with them matters relating to policy and implementation among others.

<sup>292</sup> The Uganda Human Rights Commission is an independent Constitutional body established under article 51(1) of the Constitution of the Republic of Uganda (1995) and by the Uganda Human Rights Commission Act No.4 of 1997, to promote and protect human rights. It is responsible for investigating violations of human rights. One other function of the UHRC is to ensure compliance with international treaties. The central question was finding out issues of the definition, perception, translation of human rights and culture at the local, national and international levels.

practitioners and non governmental organisations to solicit their opinion, views and ideas on the subject of succession.

While at the regional level, respondents were chosen from among the key actors and implementers of the law on succession at regional level in selected districts and included district administrative leaders such as, the community development officers, the secretaries for social affairs at the District Local Council, Probation and Social Welfare Officers, Chief Administrative Officers and related Non Governmental Organizations representatives and police.<sup>294</sup>.

In addition to these, consultations were undertaken at ethnic levels to capture the current practices relating to succession as well as their implications on the implementation of the current law on succession in Uganda. At this level the targeted respondents were clan heads, village leaders, elders and community leaders, women and community members, widows and widowers, children and sub-county Community Development Assistants<sup>295</sup>, the Local Council III<sup>296</sup> Secretaries for Social Affairs. Great effort was made to ensure that the sites selected were representative of the broader picture of the traditional practices of succession in the different ethnic groups.

For the above purposes, a total of 1200 respondents were purposively identified and consulted.

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<sup>293</sup> This is one of the institutions responsible for the formation of legal practitioners in Uganda.

<sup>294</sup> Specific and related NGOs existing in the selected sites were identified during the pre-visits while some of them were identified while in the field. These will be consulted on some of the pertinent issues related to succession. The Teams also investigated whether there are some Community Based Organizations (CBOs) working on matters of succession.

<sup>295</sup> Community Development Assistants/ Officers are social workers, working with communities and district administrative stakeholders on issues related to cultural development.. They are found at all administrative levels in the district including village level. It was important to interview them on matters of succession within the communities in which they work. .

<sup>296</sup> Local Councils are political and administrative structures that are established under the Decentralization Policy provided for in Article 172(2)(a) of the 1995 Constitution of the Republic of Uganda. They are found at all district levels up to village level. They have a position of a councillor who is responsible for social affairs. It was important to interview these persons to establish their perceptions, views and experiences on the subject of succession within their communities.



### **3.3 Data collection techniques**

Data was collected through documentary review, key informant interviews, observation, focus group discussions, case studies, feedback and consensus building workshops with various stakeholders and taskforce meetings.

#### **3.3.1 Documentary review**

This was an ongoing process that involved reviewing a wide range of sources including textbooks, web materials, journals, newspapers, government and non-governmental regional and international publications and other policy documents. This review was undertaken to inform the proposals for the reform of the law on succession. It was also intended to act as a method to cross-validate information that was gathered from interviews, observations and through other sources listed above.

#### **3.3.2 Key informant interviews**

Key informant interviews were conducted with key stakeholders including representatives from the Administrator General's Office, Police officers, Local Council courts, Chief Administrative Officers, Community Development Officers, Courts (formal courts like magistrates' courts), legal practitioners, prosecutors, Sub-county Chiefs and representatives from civil society organizations especially those involved in the protection of the vulnerable groups whose rights are at the risk of being violated including children and women. Other categories of respondents included the widows, widowers, and orphans among others.

#### **3.3.3 Case studies**

These were conducted to enable the researchers investigate practices relating to succession in the identified ethnic groups in their real life context.

Case studies of pre-selected families which had experienced succession wrangles were also conducted. Two case studies were selected from each of the districts were under study. In Uganda, there are various ethnic groups namely the Bantu, the Nile- Hamites, the Luo and the Nilotics. Each ethnicity is composed of different tribes with almost similar practices when dealing with issues of succession. In addition, they more or less speak the same languages though with some slight difference in dialects. They can easily understand each other and are

usually in the same geographical location. It is for some of these reasons that the Commission purposively clustered them as representative tribes for this study and categorized them as follows:-

- 1) The Luo. This cluster included the Acholi, Lango and the Alur
- 2) The Bantu. This cluster included the Banyoro, Baganda, Basoga, the greater Ankole tribes and the Batooro
- 3) The Nilotics. This cluster included the Sudanic-Kakwa, the Madi and Lugubara
- 4) The Nilo-Hamities. This cluster included the Iteso, the Sebei and Karamojong tribes.

#### **3.3.4 Focus group discussions**

Focus group discussions (FGDs) were held with community members. Six focus group discussions comprising of 12 person were held in each of the six regions covered by the study. A total of 450 persons were consulted using the FGDs. This method was used to generate ideas and responses not originally anticipated. Focus group discussions were conducted with identified categories of respondents specifically with children , widows and members of the community who were familiar with succession issues in their communities/ frequently affected by decisions made relating to matters of succession.

#### **3.3.5 Observation**

The study also made use of observation to establish salient features of ethnicity that impact on the implementation of the law of succession in Uganda. observation involves the use of “all senses to notice what is seen, heard, smelled, tasted or touched” (Neuman 2000:361)<sup>297</sup> and enables an immense participation in the day-to-day life of the peoples to make meaning of norms, values and practices so as to generate more insight about the subject being researched on.

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<sup>297</sup> W. Lawrence Newman. Social Research Methods. Qualitative and Quantitative Approaches 4<sup>th</sup> edition 2000.

### **3.3.6 Taskforce Meetings**

In order to ensure that all the objectives of this study were achieved, the Commission constituted a taskforce comprising of key and technical persons from the institutions dealing with policy, planning and implementation of legislation relating to succession in Uganda. The taskforce held meetings and retreats to critically consider the proposals for consultation and the proposals for the reform of the law(s) on succession in Uganda.

The taskforce held a total of five meetings and two retreats during the course of this project. The first meeting was held to inaugurate the taskforce, to discuss the terms of reference and to plan a way forward. The second taskforce was held to review the study instruments, the third discussed the field study findings and planned for the national feedback and consensus building workshop, while the fourth taskforce meeting was held to finalize the study report and draft Bill.

The taskforce further held two retreats. The first retreat was held to discuss/refine the issues for consultations and the study instruments, while the second retreat was held to consider the draft report and draft Bill prepared by the Commission.

### **3.3.7 National Workshop**

A national workshop was held to disseminate the study findings and enable the stakeholders to discuss the study findings and the proposed amendment Bills as well as to build consensus and agree on the way forward. This workshop brought together all stakeholders including implementers, beneficiaries and actors to discuss the final report and the draft Bill. Comments from the workshop participants were used to enrich and strengthen the commission's final report, recommendations and the draft amendment bills.

## **3.4 Data collection methods**

A questionnaire and a question guide were designed. The questionnaire was semi-structured and administered to key informants while the question guide was used during focus group discussions.

## **3.5 Procedure**

As a matter of procedure to ensure collection of adequate and representative information, the study instruments were pre-tested and pre-visits done prior to the commencement of field work.

The instruments were pre-tested to ensure that they were consistent and addressed the objectives of the project, while the pre-visit was done to make arrangements for the field work. This involved identifying the communities to be consulted, identifying and making appointments prospective respondents, making arrangements for the individual and group meetings, identifying families for case studies, to set, and confirm appointments, arranging for interpreters, guides and community leaders/elders who would lead researchers into the clans and take care of their safety and security in the research sites as well as organizing clan feedback sessions among others.

Similar appointments were also made with **selected** legal practitioners and members of institutions responsible for the formulation of legal proposals, law reform, policy making and implementation and others that were identified during the study.

### **3.6 Fieldwork**

This involved actual data collection from different respondents within the selected districts and ethnic groups. Data was collected using the methods described under 3.3

### **3.7 Data analysis and report writing**

Data was analyzed using both the qualitative and quantitative methods. Quantitative data was analysed using the SSPA data analysis package while the qualitative data consisting of views, opinions, expressions and observations were analysed manually. The views and opinions expressed at the national workshops on the study findings, recommendations and draft amendment Bills were incorporated into the study report.

## CHAPTER FOUR

### FINDINGS OF THE STUDY

#### 4.1 Introduction

In this chapter, we discuss the findings of the study. The discussions are divided into testate and intestate succession and issues arising therein, challenges in the implementation of the law of succession in Uganda today, the negative and positive customary and religious practices which influence succession matters in the different ethnic groups in Uganda. The findings present interviewee responses and views obtained during FGDs, interviews with key informants, structured questionnaires with selected implementers of the law as well as researchers observations in the field. The responses have been analysed and recommendations for policy and legislative reforms have been advanced.

#### 4.2 Knowledge of the law

The study sought to establish the respondents' knowledge of the law on succession. Respondents were asked to mention the laws governing Succession that they knew. It was found that there was a general lack of awareness about the laws of succession among members of the public. Some of the responses from those who said they were aware of the law, demonstrated knowledge of the customary practices of succession applied within their communities and not of the law. This is illustrated by the following expressions from some respondents/ participants in the FGDs conducted.

In Singila village, Matheniko Sub-county, Moroto district, members observed that *'we do not know if there is any law on succession, we only use the traditional methods of succession'*. At another FGD in Acet Gwen village, Soroti district, members noted that, *'most members in this community are not aware about the law of succession. Only those that are literate know something about the law. They have been sensitised about it but still not everybody is aware'*. A member of this FGD on his part observed that, *'To me, I know that if my father dies and he leaves us (sons), one of us goes to the courts to become his heir, that is what I know.'*

In a FGD at Northern Division Headquarters, Soroti district, members observed that, *'We follow custom in succession matters. The clan sits to pick up the first male son. Even if there is an elder girl, our society is biased and will choose the son. It is this son to*

*decide to give away some of this property to the other children or not which of course is unfair to the women and the other children’.*

In an FGD in Kapchorwa (Kawowo sub-county), the participants unanimously opined that, *“we are not aware of the law of Succession and follow our customs where when a brother dies you take over even the wife.”* The participants went on to observe that, *“People are not bothered about statutory laws because they see them as an infringement on their customs which their fathers and grand parents used as they were growing up. Even our clan leaders currently use them.”*

Among the implementers, the study further established that many of the legal practitioners and implementers were not up to date with the law of succession. Some practitioners argued that the printed laws are not in wide circulation hence not easily available or accessible. A PSWO in Kamuli district was of the view that, *“The laws are okay but the problem is with us the implementers for example the RDCs usually implement the laws the other way round while culturally, people have all sorts of beliefs which affect the law for instance that barren women should not inherit any property.”*

The general lack of knowledge of the law of succession can be attributed to several factors. The study established that; the majority of the people in the communities are semi literate and illiterate yet the laws are in the English language; the ordinary person does not understand the various laws on succession which are too technical, let alone access the laws which they are very expensive; the laws are scattered in various legislations and yet they are complimentary and; most people are not aware of the different legislations that exist.

The Communities get to learn about the law through the community awareness sessions on the law conducted by NGOs such as FIDA Uganda and Platform for Labour Action. However, these have their short comings such as limited coverage of the country and limited funding. As a result, they are unable to reach all the people in the different communities.

Knowledge of the law of succession among the legal practitioners and implementers was equally scanty. Some admitted that the last time they had critically dealt with the law of succession was during law school training while other practitioners claimed that their knowledge was limited because they receive very few or no cases at all on succession matters. Other practitioners stated that the common instructions to practitioners are from clients seeking to

get letters of administration and probate and as a result their knowledge is limited to those aspects of the law that they refer to from time to time.

It can be garnered from the findings that there is a general lack of awareness on the laws of succession amongst the general public and to some extent the implementers and legal practitioners. This lack of knowledge is a particular disadvantage to the general public who need to be aware of the law in order to invoke it for their protection. Lack of awareness of the existing legal regime may be responsible for the public's recourse to cultural institutions in resolving matters of succession.

Knowledge of the law and access to information is one of the principles of good governance that perpetuate the rule of law. It is therefore of paramount importance to make the law accessible and known to the ordinary person.

### **Recommendations**

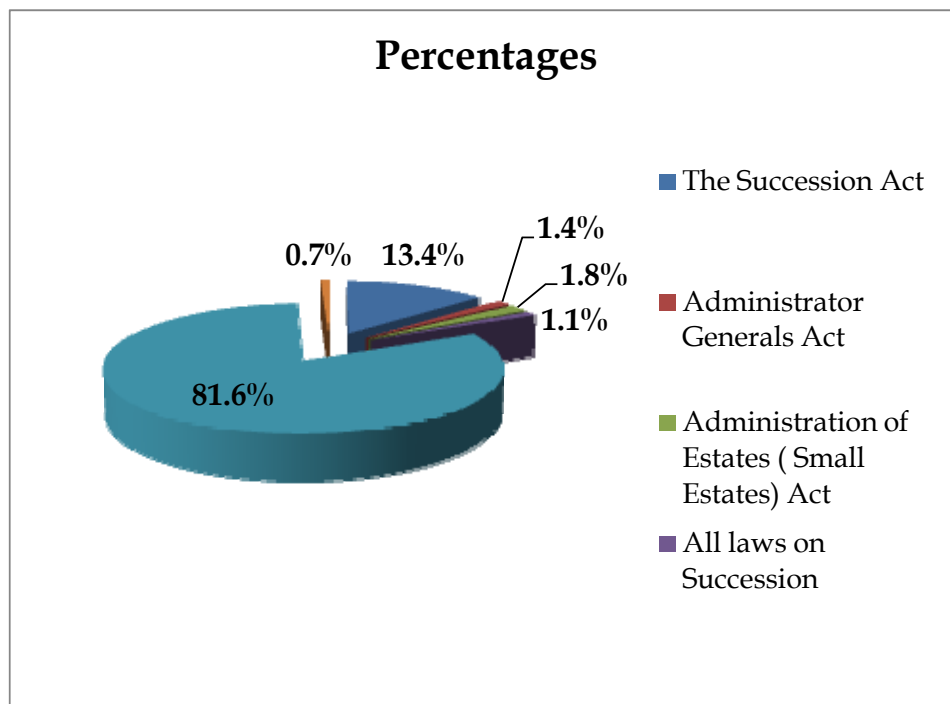
- 1) The ULRC in conjunction with the Administrator Generals department and civil society stakeholders should embark on public sensitisation to create awareness about the laws of succession.**
- 2) The ULRC should simplify the law on succession and translate it into the various local languages for dissemination at the community level.**
- 3) MoGLSD and the Ministry of Education should design training programs on the law of succession for officials involved in support services such as the Police, PSWOs and CDOs.**

### **4.3 Areas of the Law Requiring Law Reform**

The study sought to establish from members of the public and implementers of the law which of the current laws on succession require amendment, consolidation or repeal.

#### **4.3.1 Amendment**

The Pie-chart below summarises the responses from the general public about laws that require amendment.



A State Attorney in the Administrator Generals department had the following to say, *“the law should generally be reformed to update it to our current circumstances for example the 1995 constitution, application of customary rights and the current trends in company law”*.

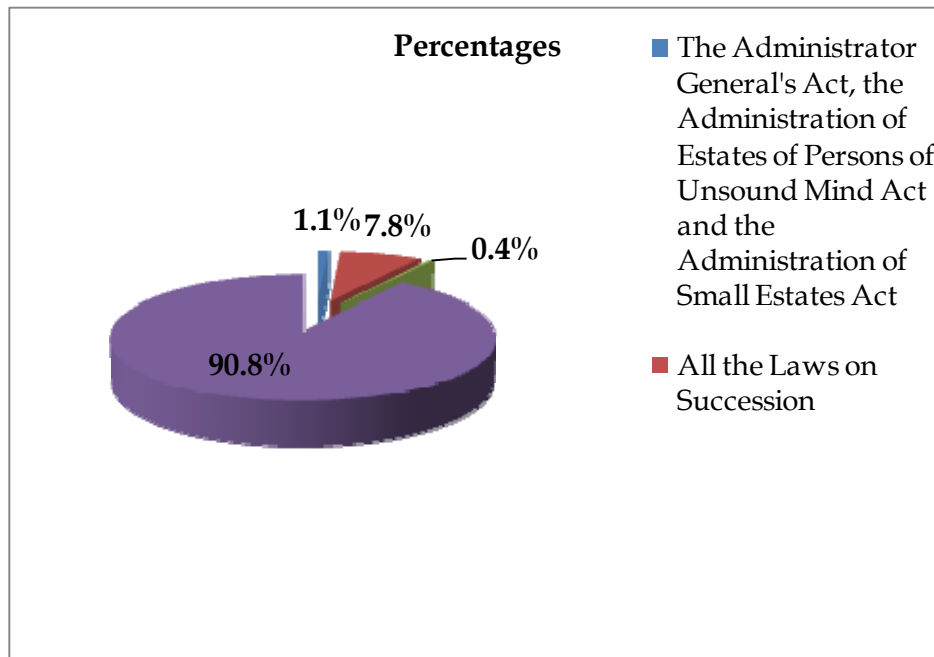
Another officer from the Administrator Generals office remarked as follows, *“all the current laws need to be amended because they were all passed before the 1995 Constitution which has therefore overtaken these laws, the laws are colonial oriented and should be brought in consonance with the modern times and emerging issues in the world are not covered”*.

Another respondent stated that, *“all the current laws on succession should be amended to reflect the cultural settings of Ugandans because they currently cause confusion between administrators, the customary heir and the executors. For us, a customary heir automatically becomes a legal heir which the English Law that we adopted does not accept.”*



### 4.3.2 Consolidation

The responses obtained on the issue of which laws to consolidate are illustrated in the pie -chart below.



Other responses expressed why some of the laws require consolidation as follows;

A legal practitioner in Mbale noted, *'This is a very big challenge because a person doing research in the area has to look at a range of different laws. Getting us a compendium on family laws will be very good. We now use one made by Rwakafuzi'*.

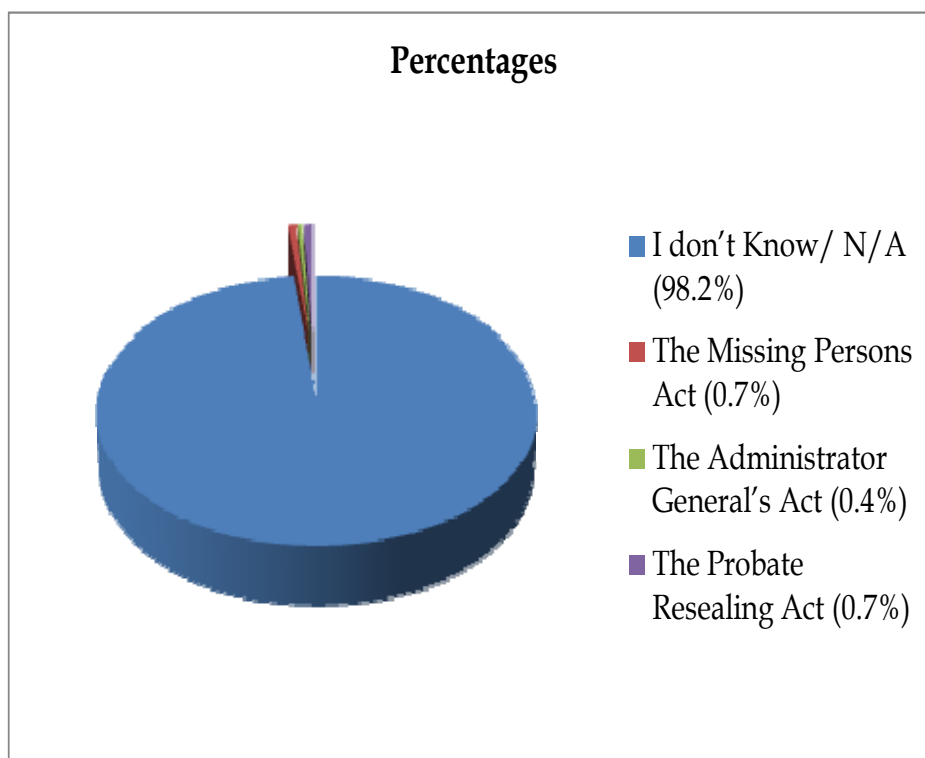
Another implementer of the law from the RDC's office, Mbale re-echoed the same concern by noting that, *"the current laws pose a very big challenge because as you try to solve a problem using one law, you are forced to look at others which delays us as leaders. People do not even know these different laws"*.

A principal officer in the Administrator Generals department summarised the situation of our laws by noting that, *'the laws would be better in one compendium. It is difficult to do any work if you don't have one of the laws'*. Another officer in the department highlighted another complication with the current laws by noting that, *'the laws duplicate many issues for example both the Succession Act and the Administrator Generals Act have provisions on Letters of Administration'*.

A private legal practitioner in Mbale district stated, *“These laws are scattered all over and it becomes difficult for lay people and those without services of a lawyer. They should be put into one compendium.”*

### 4.3.3 Repeal

The respondents were of the view that some of the laws were redundant and should be repealed. This is illustrated in the pie- chart below.



The majority of respondents did not make proposals for reform, consolidation and repeal because they were not conversant with the laws on succession. However, the responses from those conversant with the law reflected the need to bring on board constitutional, regional and international human rights standards.

### Recommendations

- 1) **The Succession laws should be reformed to reflect the prevailing socio-economic circumstances of Uganda.**
- 2) **The law of succession should be consolidated in as far as is possible.**

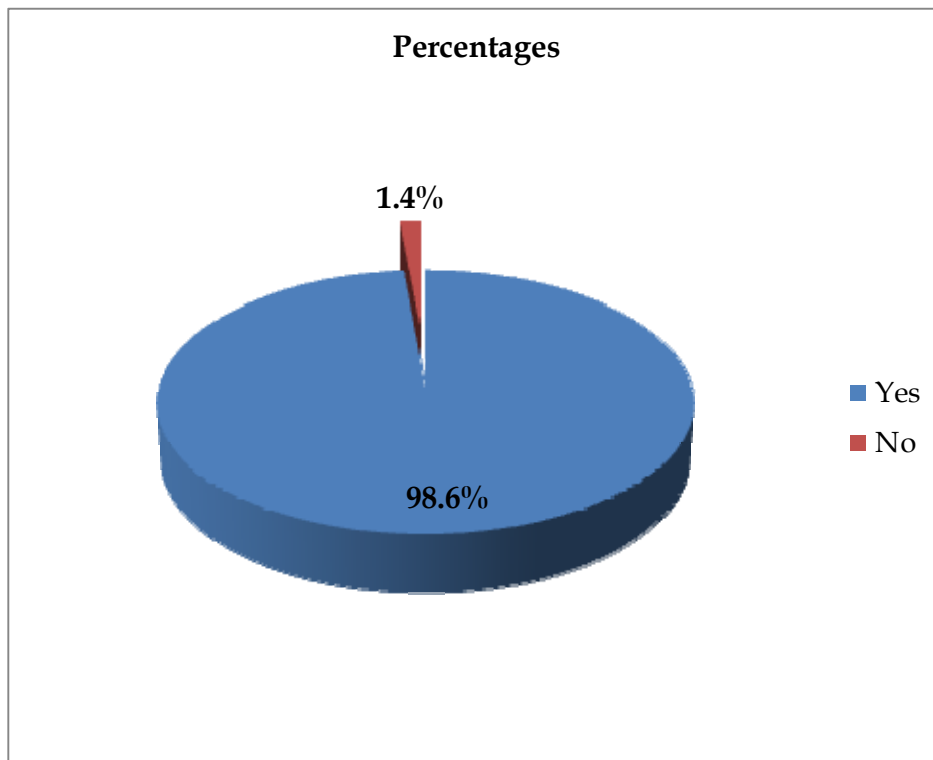
#### 4.4 Testate Succession

Testate succession refers to a situation a deceased person leaves a valid will. Below is a discussion of issues arising out of testate succession.

##### 4.4.1 Wills

The study sought to establish whether there was knowledge among the public about will writing. The responses are captured in the pie-charts below:-

**Do you know what a will is?**



##### **Reasons why people do not make wills**

It was also established at the same time among those interviewed that will writing was not commonly practiced. Among the reasons advanced for this trend were that; wills once written bring about conflicts in the family in instances where their contents are disclosed prior to the demise of the deceased; and where people dispute the contents of the wills; wills create an opportunity for forgery; promote the unfair distribution of property, and promote favouritism. It was also pointed out that people are not aware of what format a will should take and how

to write one much as they may be interested. Other reasons advanced for not writing wills were the belief that making a will is; a sign of eminent death and should be done by the elderly and the very sick. A participant in a FGD in Amen village, Soroti district observed that, *'there is common belief that you will die quickly if you write a will'*.

A participant in a FGD for widows in Rugando sub-county in Mbarara district noted that, *'in situations where a man has more than one wife and with many children and yet with little or no property to be equally distributed among the children, it is safe not to write a will. You leave the children and their mothers to tussle it out'*. In a FGD in Singila village, Moroto district, participants were of the view that, *'it is oral wills that are common and the husbands keep on issuing instructions to the elder son and wife on the property-women(mothers) also keep on telling their husbands and other relatives to take care of their children in the event of their death.'* Both husband and wife undertake these oral wills. *Writing wills has been difficult because a few of the people know how to read and write but it is expected that as many people continue to go to school, will writing may be started.'* In a FGD in Kawowo sub-county, Kapchorwa district members were of the view that some wills are not respected. Some wills are disregarded by clan members where one gives property like land to a non family member then people will not respect it. Such beneficiaries are threatened with death yet they fear court expenses and wasting time in the courts.

Other reasons advanced for not writing wills were that customary and religious practices of succession are satisfactory while others argued that it was not necessary to write wills if one had no property to bequeath. Among the Muslim respondents, it was advanced that the Quran adequately provides for the distribution of a deceased's property. In a FGD in Nakaloke, Mbale district, participants were of the view that, among the Muslims, children, spouses and parents of the deceased are entitled to the property. Even if you are to give some property to friends or brothers, you don't give them more than a certain percentage. Members also noted that among the Muslims, a child is denied his right to inherit if it is confirmed that he killed the father. A participant in a FGD in, Northern Division Headquarters, Soroti district noted that, *"Our fathers died without writing wills and we don't see the need to write these wills"*.

Poverty was another reason cited for the poor will writing culture among the respondents interviewed. A participant in a FGD in Mbarara district also observed thus, *"some of us stay in rented houses and the only properties we have are plates and clothes, so with this little property and yet with many children, it becomes difficult to divide them in a will"*. Male chauvinism was also cited as an obstacle to

will writing where all the property in the home is regarded to belong to the husband. This argument explains why few women were found to write wills in the visited communities.

It was established that although there was a good understanding of what a will is, very few people in the communities make wills and the reasons for this were diverse ranging from lack of awareness and illiteracy to poverty and cultural taboos. Will making would be the cheaper and easier mode of disposing of the property of a deceased person especially since the procedure undertaken in intestacy is lengthy and more expensive.

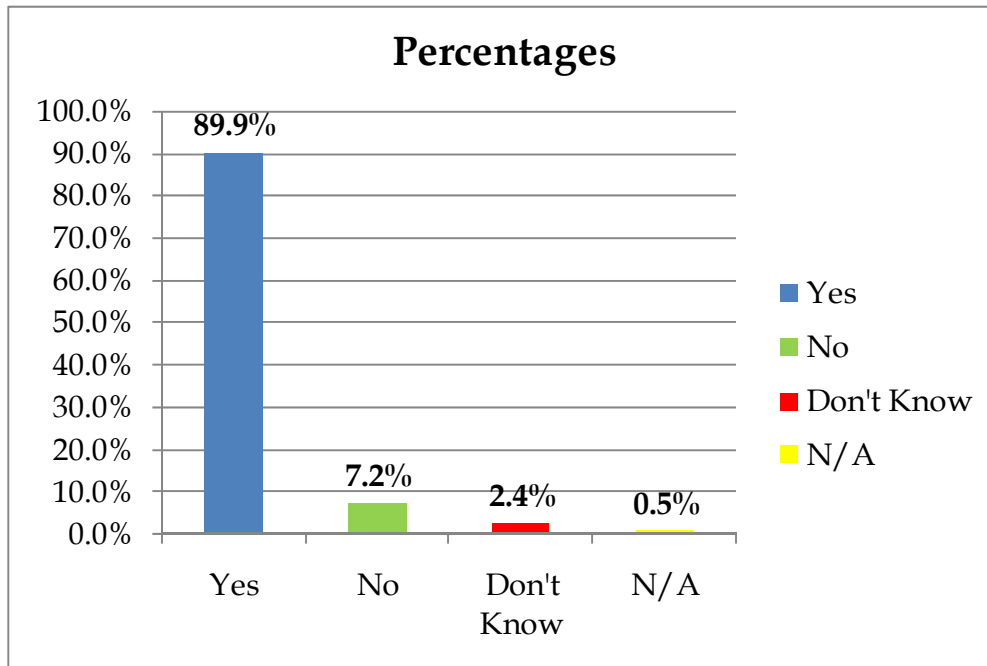
### **Recommendations**

**The general public should be sensitised about the benefits of will making and the requirements of a valid will.**

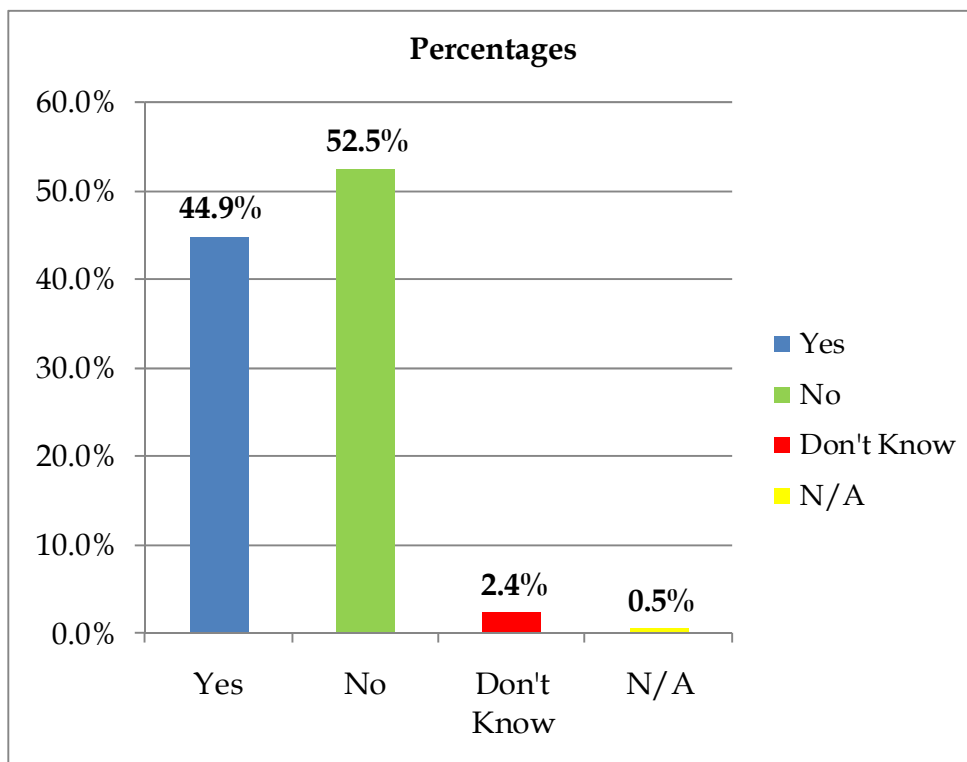
### **Purpose of a will**

Responses on the purpose of a will as obtained from the study are as follows;

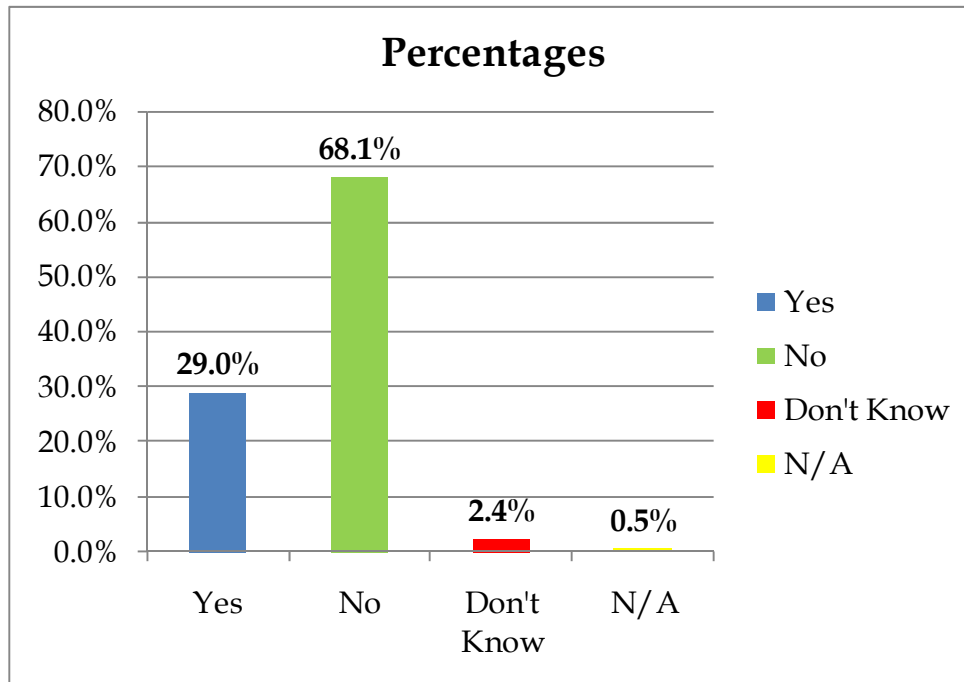
### To bequeath property



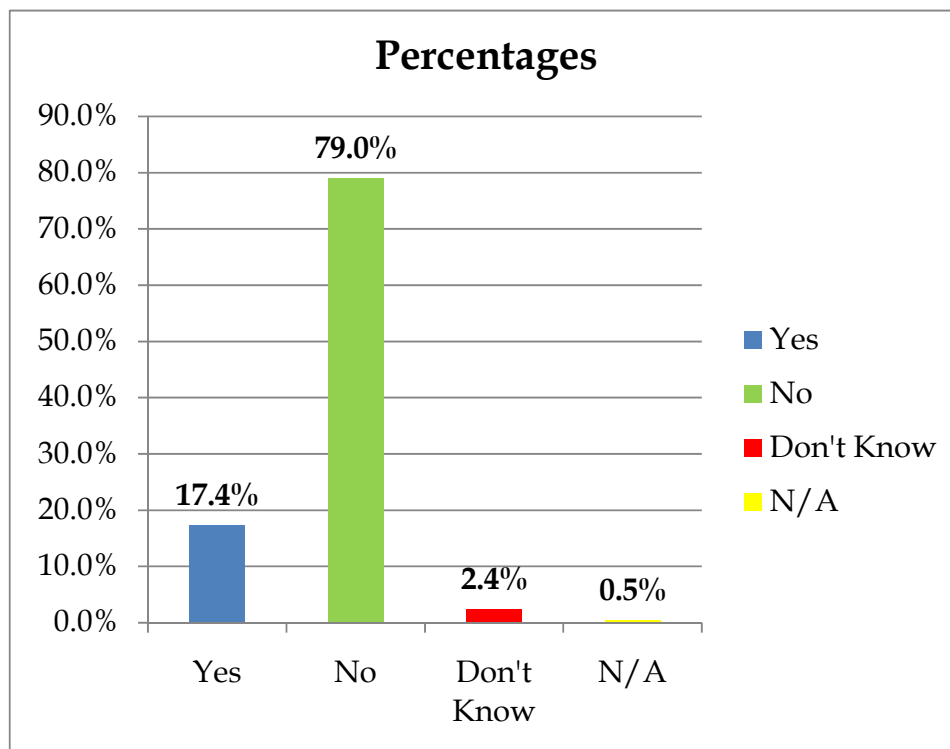
### To appoint an heir



### To appoint a guardian



### To determine burial arrangements



Among the views obtained from Focus Group discussions on the purpose of will making was; to guard against family conflict and to help chart a way forward for the families after the death of the testator.

A participant in a FGD at Northern Division Headquarters was of the view that, *'the law mandates a person to make a will when he/ she is not yet very sick and that person is supposed to choose a child he/ she trusts to take care of property. These wills are then kept in banks or the church'*.

A respondent from Teso Widows Development Initiative opined that, *'wills protect people not to conflict while handling inheritance matters'*. Another respondent from the same organisation noted that *'wills are important because they are used to bequeath property for the benefit of the family that has been left behind.'*

A CDO, Northern Division in Soroti district noted that, *"wills are important in bequeathing property and in appointing one's heir. Wills also direct how the home will be managed"*. In an FGD in , Kamuli district, members observed that *'wills are usually written by people who are sickly and have some property. Even women who have some property can make wills'*. In the same FGD, members observed that, *'the community generally regards those who write wills as intelligent because it minimises conflicts over property distribution among children upon one's death"*.

The findings indicate an overall understanding of the purpose of a will. There is however a general misconception that will writing is done by those on their death beds. There is therefore need to dispel such misconceptions and promote the will writing culture in the communities.

### **Recommendation**

- 1) Civil Society and Government Departments should partner to create awareness about will making within the communities.**
- 2) Administrator Generals department should avail will forms at the sub-county level**

#### **4.4.1.1 Categories of people that make wills**

The study further sought to establish the categories of persons who make wills.

The study findings indicated that wills are mostly made by elderly men and men in general. The reasons advanced for more men than women making wills were



that men are heads of the family and households and they are mostly the ones who own property in the home.

The study further established that most women do not write wills. This was attributed to the fact that they do not own much property, save for a few household items and in some cases a few livestock. In the Lango region the study established that there was a fear that allowing women to write wills would result in the loss of clan and family property. It was further argued that most women are not gainfully employed and therefore do not own property. It was also advanced that since it was uncommon for married women to own land (viewed as the major property to be bequeathed) in their husband's village, it was rare for married women to be engaged in will writing.

In an FGD in Lira, participants were of the view that, very few women write wills largely because women have no property. There is also fear that a woman may give away family property. Participants also noted that, although women nowadays just like the men have properties to bequeath to their beneficiaries; they often just give up their rights to their husbands.

A participant in a FGD at Acet Gwen in Soroti observed that, *'it is the men that write the wills because men seem to be dominant in our society. They own property and are the most dominant in all matters generally. As women we have not had the opportunity to write wills.'*

A respondent from the Teso Widows Development Initiative who noted that, most women fear to write wills because they think men as the heads of the family should do this.

At another FGD in Nebbi Town Council, the participants were of the view that, according to Alur culture, it is only the men who make wills. Women are not allowed to make wills. This was the same view as expressed at another FGD in Koro sub-county, Gulu district where a participant observed that, *"only men make wills. Our customary people make wills in such a way that only men own property and not women, however, as for me Angella, I don't have anything, so I cannot go to a lawyer to write my will. When I die, my girls automatically get my clothes, that I am sure clan members cannot deny them.'*

Will writing was found to be uncommon among the other categories namely the; youth, disabled, deaf and dumb largely because they do not own property. Participants in a FGD, Acet Gwen village, in Soroti observed that the youth have

little or no property. Another respondent regarding the question of the youth not writing wills was of the view that, people think that they must first become old before they can make these wills. The CDO, Northern Division , Soroti district on the other hand observed that the non participation of the above categories was due to inability, ignorance as to how to correctly make a will and laziness.

The findings illustrate that the involvement of women and men in will making is largely determined by cultural and social attitudes. Some members of the community are deterred by the belief that will making is for the elite only while others believe that it is for those with a considerable amount of property. Women do not feel empowered to make wills because they do not own property and feel that men are best positioned to handle property issues. Other categories of persons including the physically impaired and the youth do not make wills because they are largely dependent and thereby do not have property to bequeath.

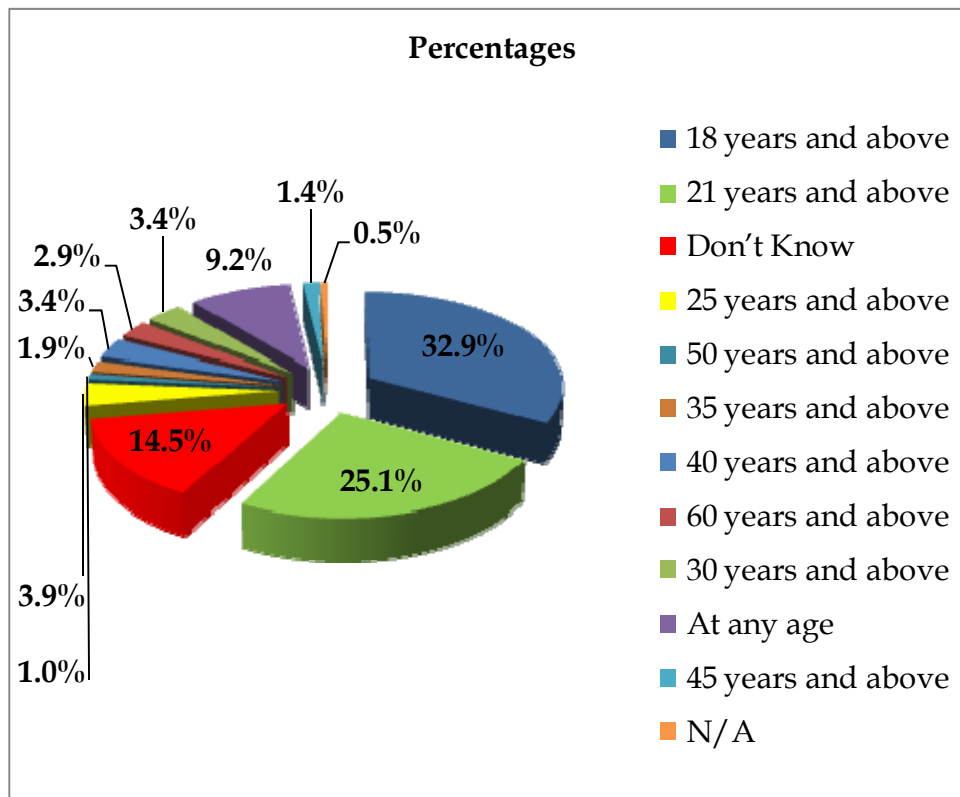
#### **Recommendation**

- 1) Sensitisation initiatives should target attitude change and promote will making by women and persons with disability.**
- 2) MoGLSD should consider specialised training of personnel to support and train persons with disabilities on will making.**
- 3) MoGLSD should consider budgeting for specialised braille literature and other resources such as video equipment to create awareness about will making among persons with disabilities.**

#### **4.4.1.2 Appropriate Age for Will Making**

When asked at what age a person should qualify to write a will, the majority (32.9%) of the respondents indicated that 18 years was the appropriate age. The reasons for their views were that by 18 years, one has matured and has started acquiring property and that one has become an adult. Other responses to the above question are illustrated in the pie-chart below;

## At what age should one qualify to make a will?



Findings indicate that the majority of responses were in favour of setting the age for will making at 18. This is in line with the other Constitutional provisions such as those that set the age for marriage, and voting at 18. The Succession Act sets the age for will making at 21 years. However, the majority of responses are in favour of reducing the age to 18 years.

### Recommendation

**The age at which one qualifies to make a will should be reduced to 18 years.**

#### 4.4.1.3 Implementation of Wills

The responses obtained from members of the general public revealed limited knowledge of the legal processes to be undertaken before a will is implemented. Respondents stated that; matters are taken to court before implementation of the will, the procedure in the law is followed, the families go to court and apply for probate and that the deceased's family engage a lawyer to handle implementation of the will.

A number of the responses indicated that the clan is involved in implementing the will. Common in all the regions was the response that clan members convene a family meeting to read the will at the demise of the testator and thereafter distribute the property accordingly.

In a FGD in Amen village, Soroti district participants stated that when a person dies having left behind a will, the same is read to the mourners before his/her burial to decide on certain matters like where the burial should take place and the clan members have to follow this. At another FGD held in Acet Gwen village, participants observed thus, *“wills are read before the burial and the clan collectively agrees on what is to be done. Sometimes this power of the clan is delegated to the customary heir”*.

The same was stated by members of a FGD in Mbarara comprising of orphaned boys and girls when they observed that the will is read after burial in the morning and all relatives including children of the deceased have to be present.

It was even the case that in some instances where the will was considered unfair in the view of the clan leaders, the clan made adjustments to suit the best interests of those concerned. The PSWO of Kamuli district pointed out that, *“culturally, people/elders are selfish and usually don’t want women to inherit and so they revise these wills”*.

Findings reveal limited knowledge about the legal processes of implementing wills. In many instances, the implementation is done by clan leaders or family members who wield a lot of influence in the communities. These clan leaders have been known to sometimes act outside the law by arbitrarily making decisions contrary to the provisions in the will. There is therefore need for immediate and long term interventions to overcome these barriers including creating awareness about the law and enhancing law enforcement mechanisms to ensure strict observance of the law.

### **Recommendations**

- 1) The prescribed forms required for applying for probate should be provided for in the succession Act.**
- 2) Sensitisation curriculum should focus on equipping the communities with basic knowledge on the legal processes on implementing a will.**
- 3) The penalty on intermeddling in the Administrator Generals Act should be strengthened.**

#### 4.4.2 Testamentary Freedom

The study sought to establish whether restrictions should apply to testamentary freedom.

##### 4.4.2.1 Restrictions should apply to Testamentary Freedom

The majority of the respondents (53.1%) from among the general public were of the view that testators should be restricted when disposing of their property by will while 37.7% of the respondents were against the idea. 9.2% did not give their views on this issue.

It was expressed in a FGD in Soroti district that, assets should be restricted to the benefit of family members. The property should be used to cater for orphans, widows and dependants because it becomes very difficult to support these families if this property is given away arbitrarily. Other responses included; to ensure that the deceased's family is taken care of, and to avoid family wrangles.

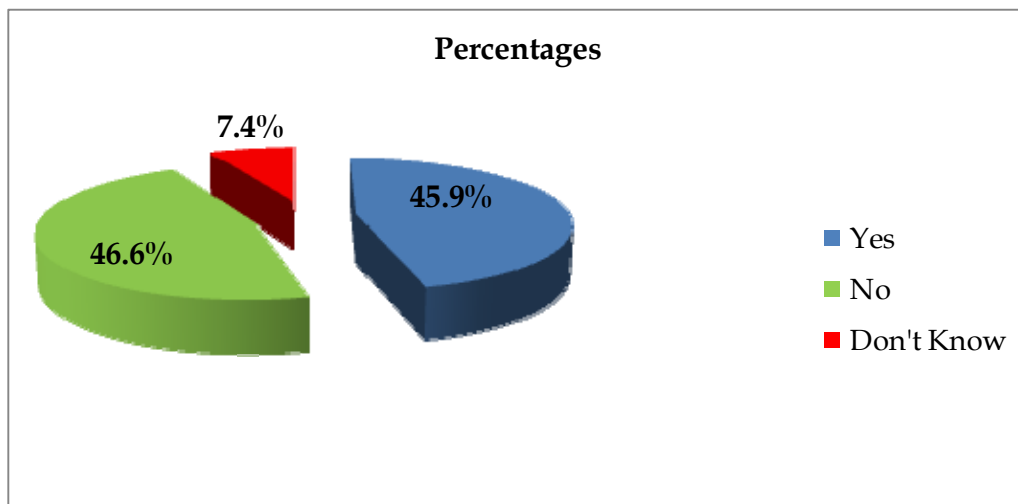
Another respondent from the RDC's office in Mbale district stated that, *"these wills should be studied by an independent authority before they are kept. People should be consulted like it is while spouses want to sell matrimonial property; the common interest of the couple must be protected"*. A legal practitioner in Mbale district on this question remarked that, *"people who have families and children must be protected and the law must reserve a certain percentage for their benefit."* The PSWO in Kamuli district expressed related concerns by noting that, certain things should remain in the control of the surviving spouse because they have to take care of the biological children of the deceased. The above expressions were also shared by the CDO from the Northern Division in Soroti district who observed thus that *"the people you have left behind need to continue. You were the bread winner and have to support them even at this level. Giving away property has often caused a lot of conflict and needs to be handled carefully."*

When consulted on this matter, an officer in the Administrator Generals Department in Kampala opined that, *"testamentary freedom should ideally not be curtailed but as long as other legislations are allowed to interfere in some of these matters, the Succession Act should also interfere with one's right to freely dispose of his/her property where one is married or has children for purposes of uniformity and consistency. The Land Act for example interferes in cases of selling matrimonial property and land that is the source of livelihood for the family."*

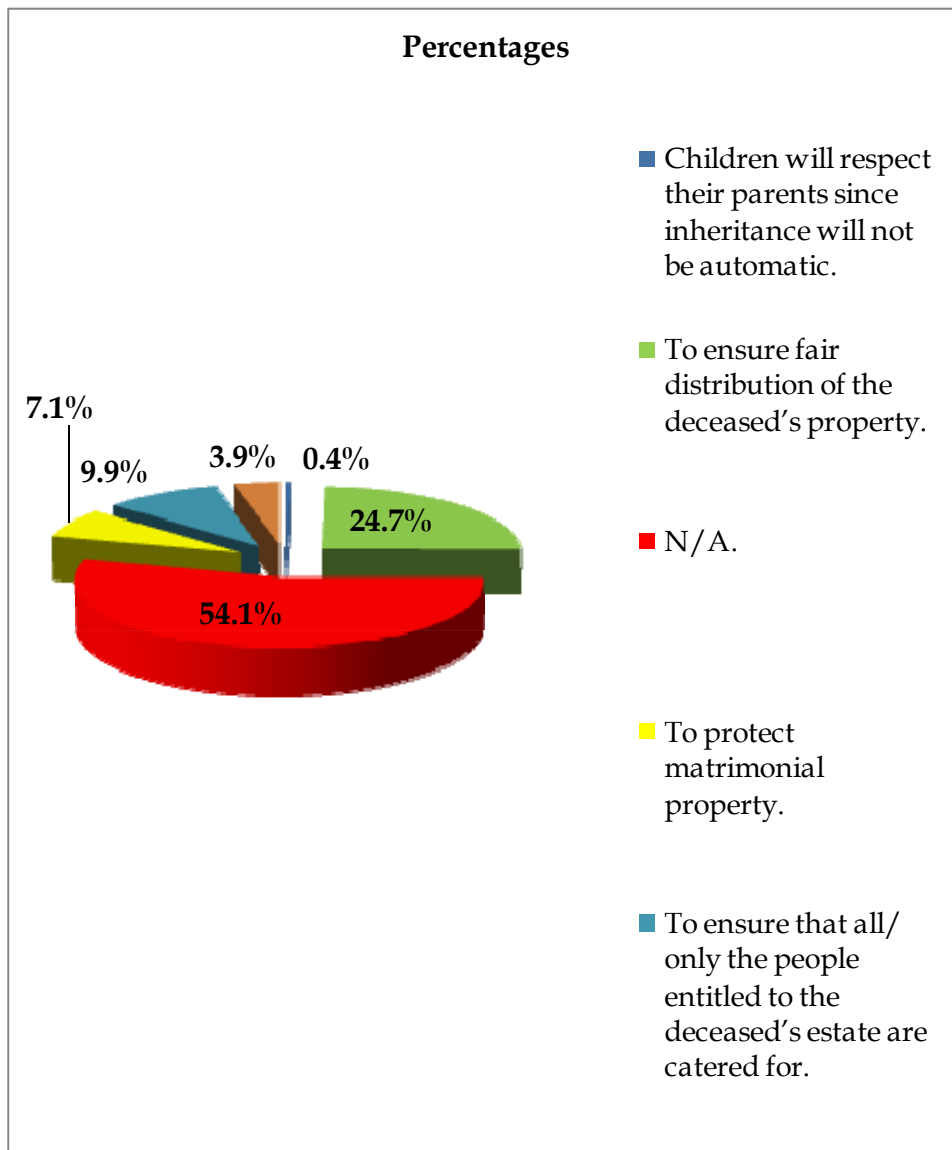
## Implementers' views on restrictions to testamentary freedom

Some of the implementers were in support of the view that testamentary freedom should be restricted and some of the reasons advanced are; for purposes of ensuring that beneficiaries are catered for and to protect family property as illustrated in the pie-chart below.

### Should the law restrict on what one can bequeath in a will?



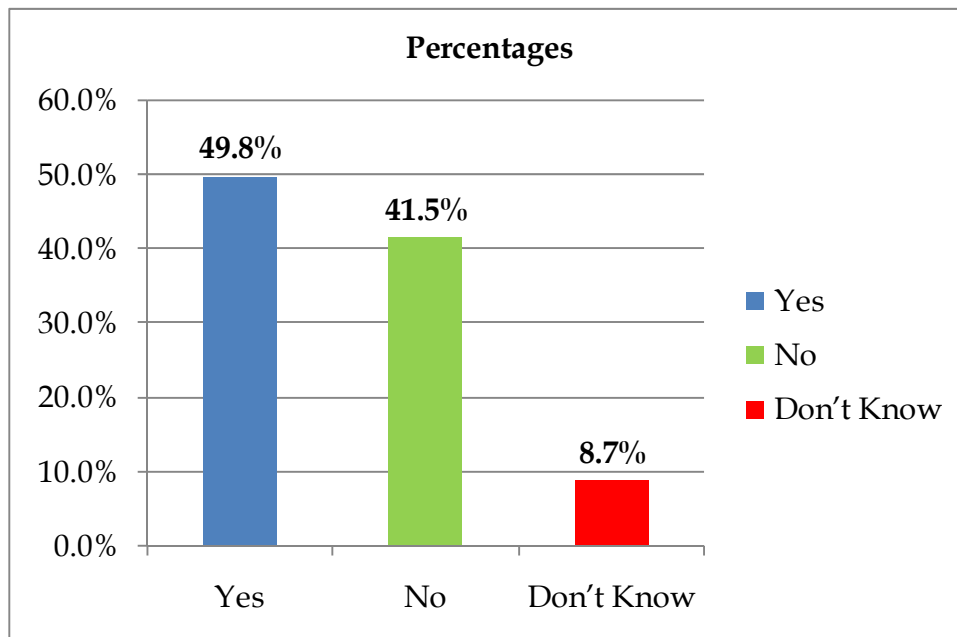
### Why should testamentary freedom be curtailed?



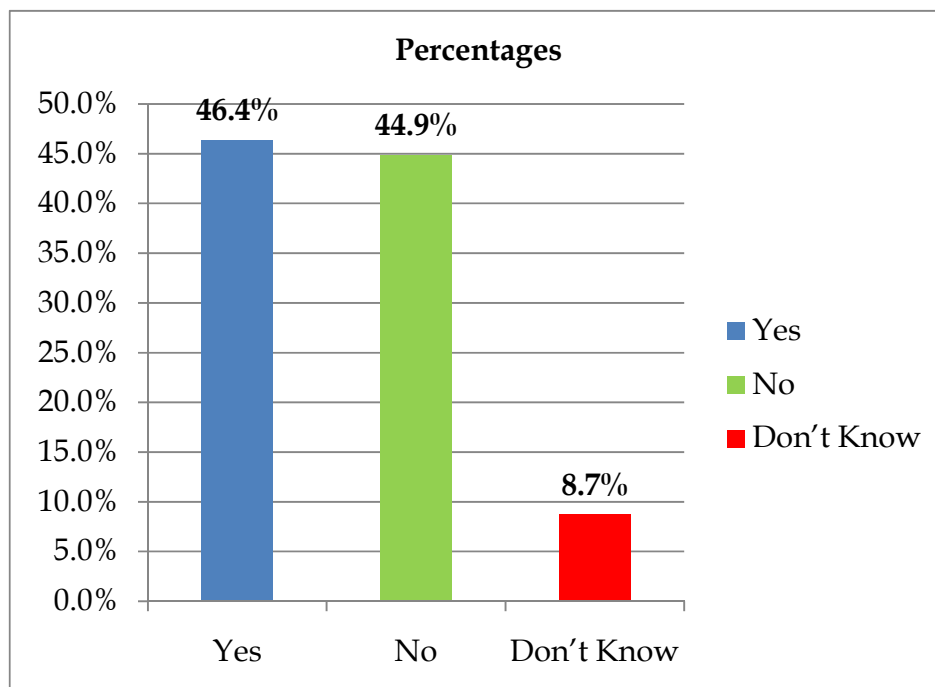
#### 4.4.2.2 To what property should restrictions apply?

The study sought to establish to what property the restrictions should apply to.

**Should restrictions apply to matrimonial property?**

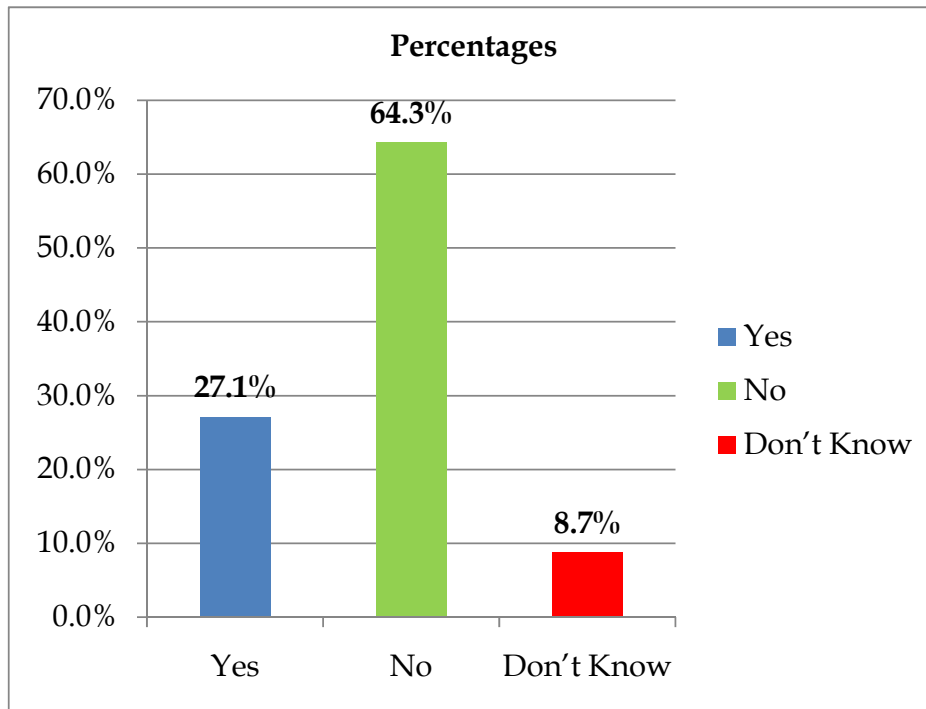


**Should this restriction apply to family land?**

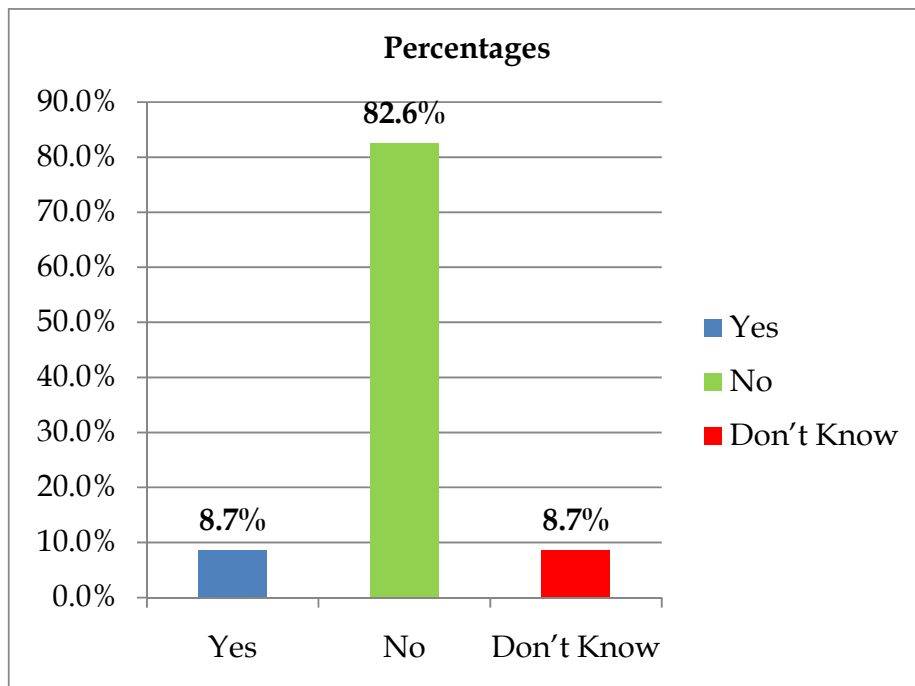




**Should this restriction apply to family business?**



**Should this restriction apply to family money/ wealth?**



Responses in favour of restrictions obtained during the FGDs conducted were as follows; that distribution of assets such as land by will should be restricted and the assets preserved for the benefit of immediate family members. In Kamuli district, participants observed that restrictions should apply to ensure that every child of a testator should be given a share of the property without preferences for particular children.

A respondent from the Teso Widows Development Initiative was of the view that, *“restriction should be made so that this property benefits the surviving spouse and her children without these strings of customary heirs”*. Another respondent, a legal practitioner in Mbale was of the view that, *“matrimonial property should be conditioned to benefit primarily the children of the deceased and the surviving spouse”*. Yet another advocate in Mbale also noted that, *“ownership must be restricted to the benefit of the deceased’s family. Where the surviving spouse also dies, the 15% should also be made to devolve to their children automatically”*.

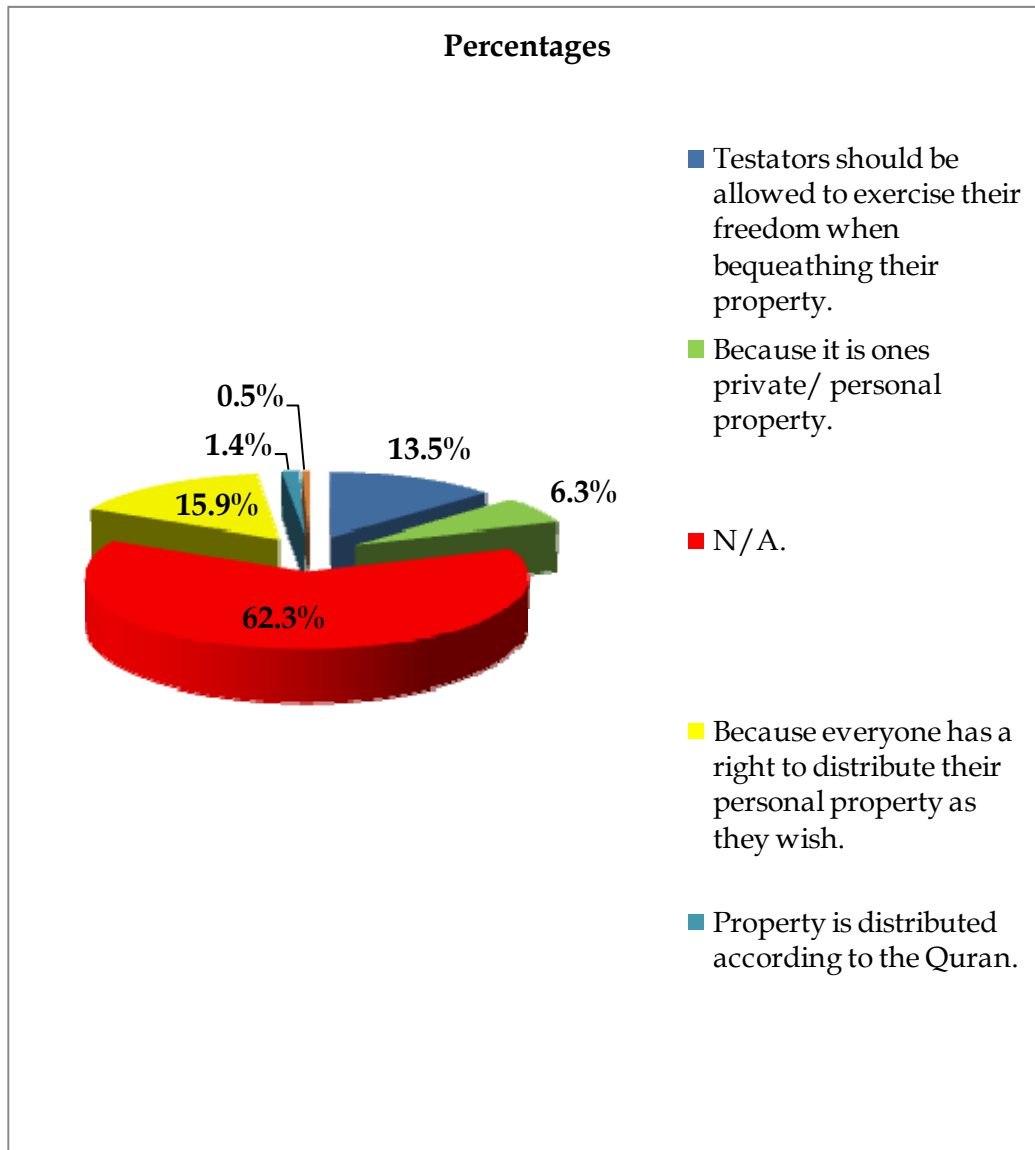
In Lira, one of the participants pointed out that, *“restriction may be good because some men give away all the property to only some men and women or children ignoring others who were dependent on them.”*

An officer in the Administrator General’s department in Kampala was of the view that, *“this property be strictly maintained for the surviving spouse because these survivors are dependant on it and it is also an identity of the family”*.

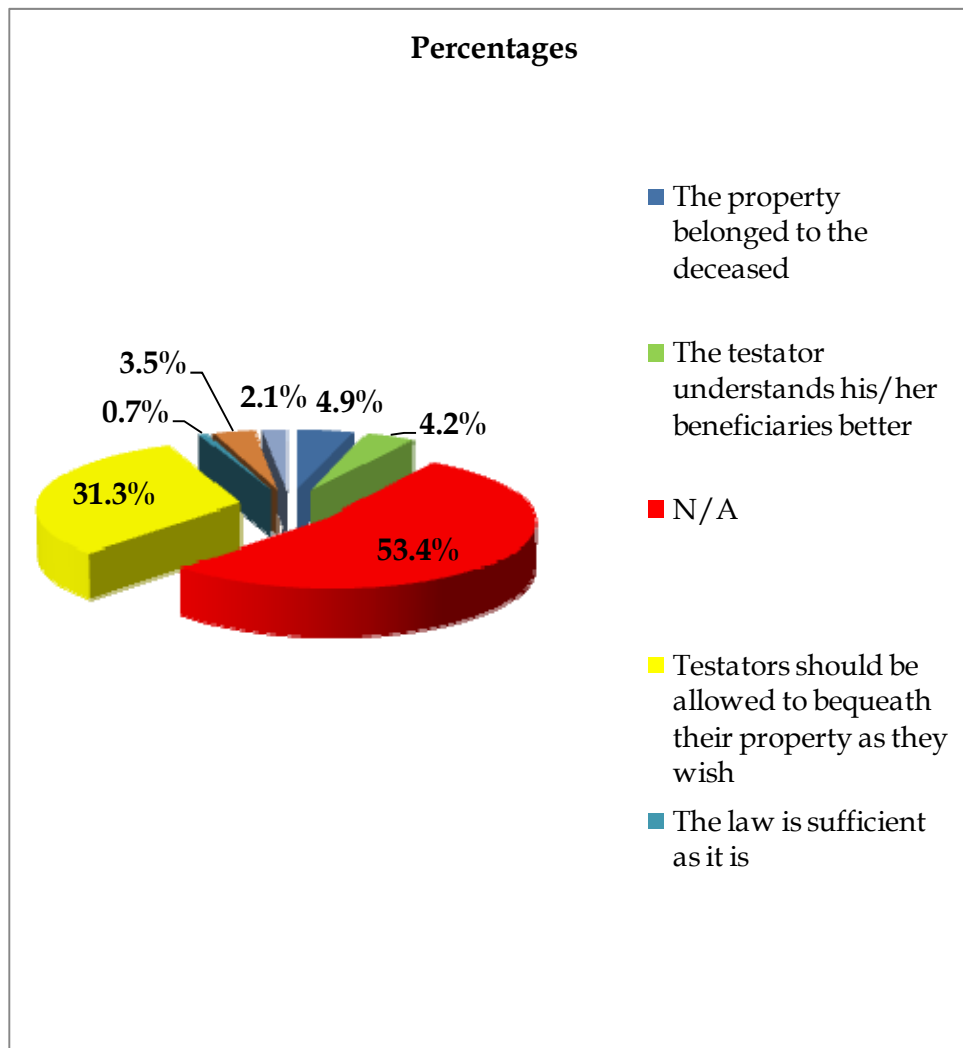
#### **4.4.2.3 Restrictions should not apply to Will Making**

Some respondents among the general public and the implementers advanced the view that a testator’s freedom should not be limited and advanced their reasons as illustrated below.

## Responses from general public



## Responses from implementers



Restriction of testamentary freedoms is a contentious issue as seen from the varied responses from among the general public and implementers. Arguments for and against highlight the need for a balance between the Constitutional guarantees' of the right to property and the need to protect the interests of the vulnerable in society. Developments in other legislations such as the Land Act and Mortgage Act restrict the sell, mortgage, transfer or any other exchange of matrimonial property without the consent of one's spouse. As such one should not be seen to acquire a right to give away by will what they were unable to give away during their life time.

It can be deduced from these legal positions that the right to property is subject to other interests. Similar protection of the principal residential holding is

provided in cases of intestate succession. In light of the foregoing it may be necessary for the law to restrict this testamentary freedom.

### **Recommendations**

**Testamentary freedom should be restricted to exclude the principal residential holding which should be reserved for the surviving spouse and children of the deceased.**

## **4.5 Intestate Succession**

Intestate succession refers to a situation where a person dies without leaving a valid will. The study sought to establish the application of the law on intestacy, challenges faced in the administration of an intestate and possible solutions to the problems faced.

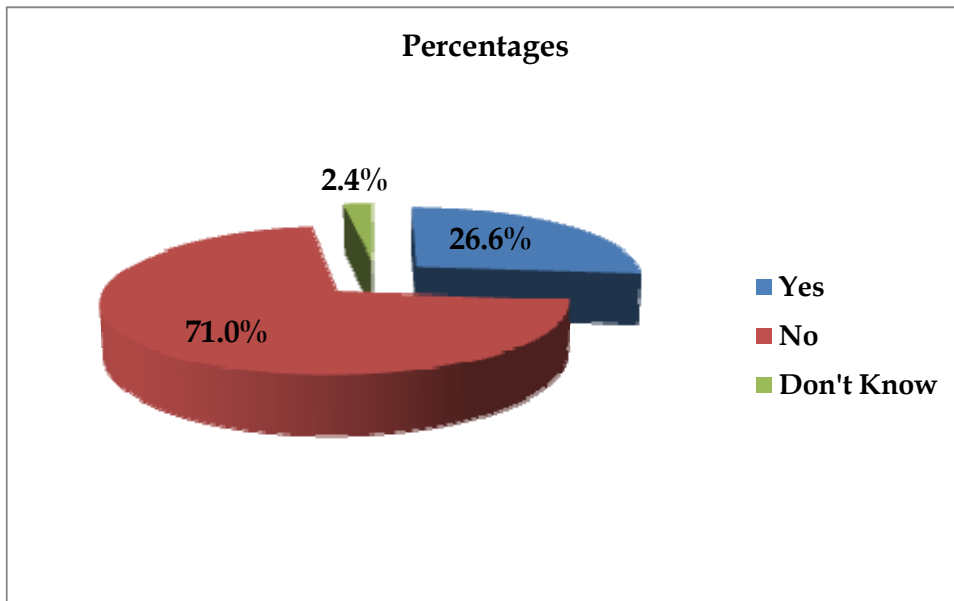
### **4.5.1 How property an intestate estate is distributed**

When the implementers were asked how property is distributed in intestacy, the majority of the respondents 58% mentioned that clan leaders/elders and family members convene a meeting to appoint a heir/heirress and distribute the deceased's property; 19.1% of the respondents said that the property is distributed according to the Succession Act, while 7.4% of the respondents did not know the procedure taken to distribute an intestate's estate.

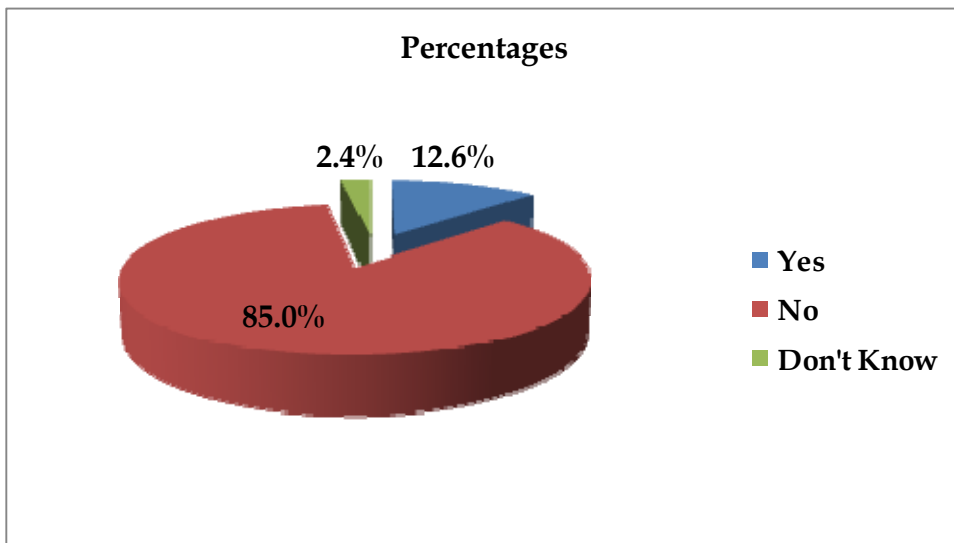
Others stated that; matters are referred to the Administrator General 0.7%, property is distributed according to the Sharia law 1.4%, all property is given to the appointed administrator of the estate, property is distributed according to the distribution scheme, beneficiaries apply for letters of administration 3.9%, male relations simply take over the deceased's property 4.9% and that the deceased's eldest son inherits all the property. 1.7%.

Members of the general public gave their views on how property is distributed during intestacy as represented below;

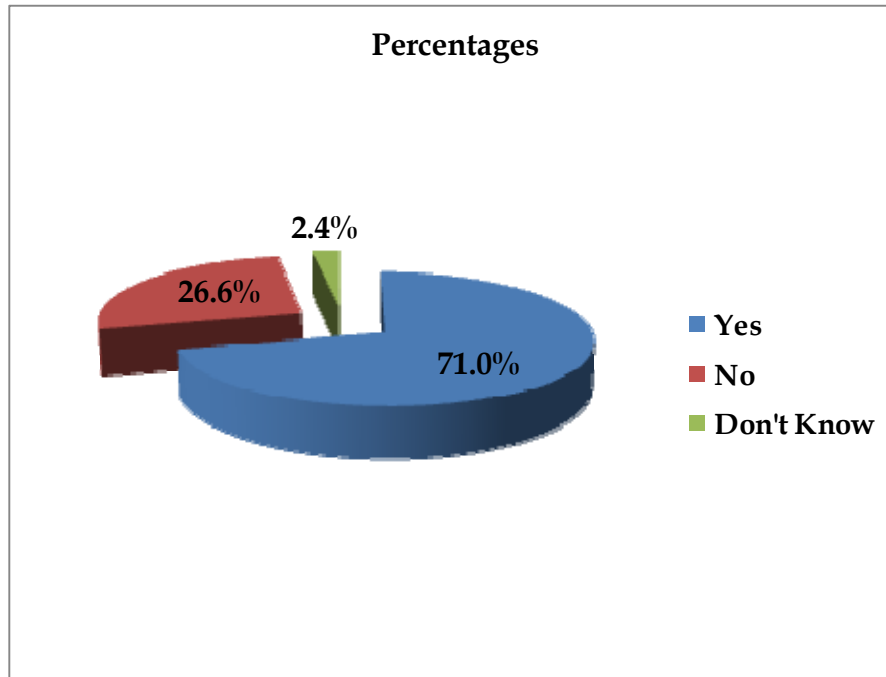
### Distribution according to the law



### Distribution is according to the religion



### Distribution is according to tradition



The study established a general lack of awareness among both the general public and the implementers about the legal procedure to be followed during the distribution of an intestate's estate. It was further established that customary practices of succession are commonly used to distribute intestate estates. Reasons advanced for the significant preference for customary practices over statutory law were that customary practices of succession are familiar, cheaper, and faster compared to the lengthy and expensive procedure in the law. Other respondents argued that the Administrator's office is inaccessible as it is only found in Kampala.

Knowledge of the law on distribution of the intestate's estate was limited to legal practitioners, and district officials involved in managing matters of inheritance including sub-county chiefs and chief administrative officers. Several among the agents of the Administrator General especially at the sub-county level were not familiar with the law.

## **Recommendations**

**Government and Civil society actors should spearhead initiatives to sensitize the general public about the law on intestate succession**

**The department of the Administrator General should be further decentralised**

### **4.5.2 Beneficiaries of an intestate's estate**

The implementer category of respondents was asked whether they are satisfied with the categories of beneficiaries of an intestate provided for under the Succession Act.

66.4% of the persons interviewed stated that they were satisfied with the existing categories while 19.4% were not satisfied. 14.1% had no idea about the current categories of the beneficiaries of an intestate as provided in the law.

Among the reasons advanced for not being satisfied were that; the law should provide for only immediate family members as beneficiaries, customary heirs should not benefit at all, dependant relatives should be excluded from the categories and that cohabiting partners are not provided for.

Findings reveal limited knowledge about the categories of beneficiaries existing under the law on intestacy. With the majority of the responses recorded for children and the surviving spouse.

### **4.5.3 Distribution Scheme on Intestacy**

The study sought to establish from the respondents whether they thought the distribution scheme as provided under S. 27(1) of the succession Act was fair. Among the implementers, 42.4% of the respondents were of the view that the scheme is fair on the basis that all the relevant categories of persons are provided for. On the other hand, 35% were of the view that the scheme is unfair and the reasons given were that; widows are given a small percentage, dependants should not be provided for, the surviving spouse and children should be awarded jointly, customary heir should not get anything, customary heir should be awarded more, a customary heir who is a child should only be awarded once, and that children are not adequately provided for. 22.6% of the implementers were not in position to state whether or not the scheme in the succession Act was fair. The following views for and against the scheme further illustrate the above findings;



A private legal practitioner in Mbale noted thus, *“the biggest percentage goes to the children who are the most vulnerable category. The widows get 15% and the dependants 9% which are also adequate since these are the other important category of beneficiaries.”* Another advocate was of the view that, *“the law is adequate. It gives a considerable portion of the estate to the wife and dependants and gives majority ownership to the children who are the most vulnerable and deserving category of the deceased’s estate.”*

A PSWO of Kamuli district on his part said that, *“it is fair because the biggest percentage goes to the children and even me and you (researcher) are basically working for the future of our children.”*

Those opposed to the scheme gave reasons such as, *“if there is only one wife, the percentage should be increased because at the end of the day, the surviving spouse has to look after these children even though they (children) get this high percentage.”* Advocate in Mbale.

The findings generally indicate that the categories of beneficiaries in the law are not in dispute. However, there are varied perceptions on the percentage entitlements due to the dependant relatives, the spouse and the children.

### **Recommendation**

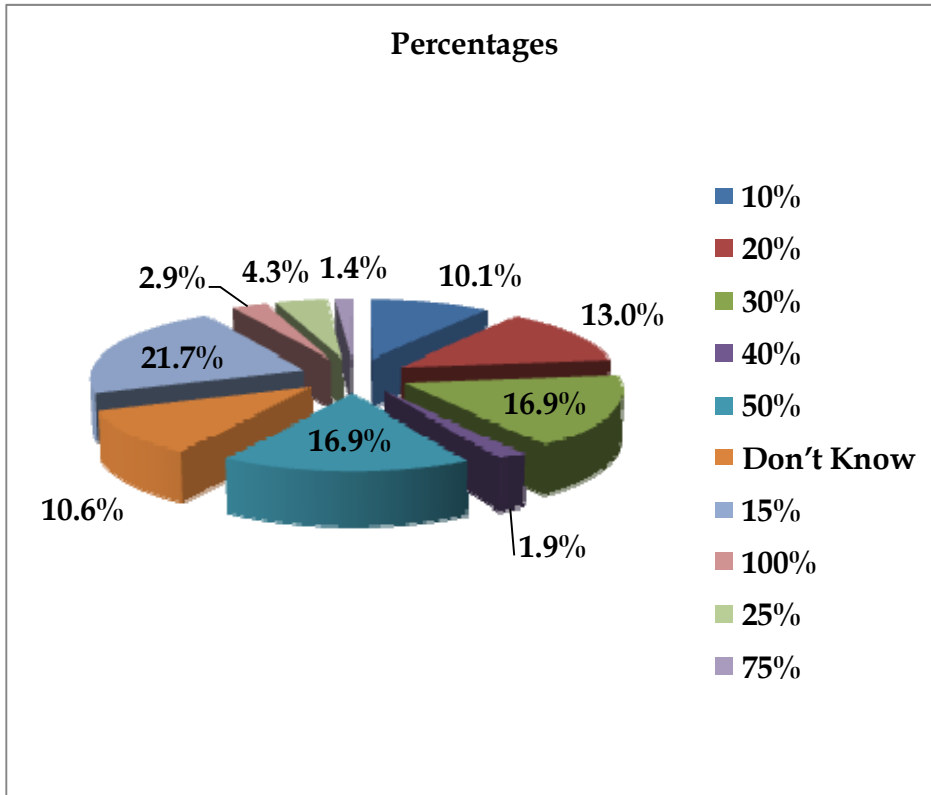
- 1) The categories of entitled persons under the distribution scheme should be maintained**
- 2) Consideration should be made to recognise the input of traditional institutions in the management of intestacy.**

#### **4.5.4 Spousal Share**

The study sought to establish what percentage of the deceased’s estate the surviving spouse should be entitled upon the death of an intestate.

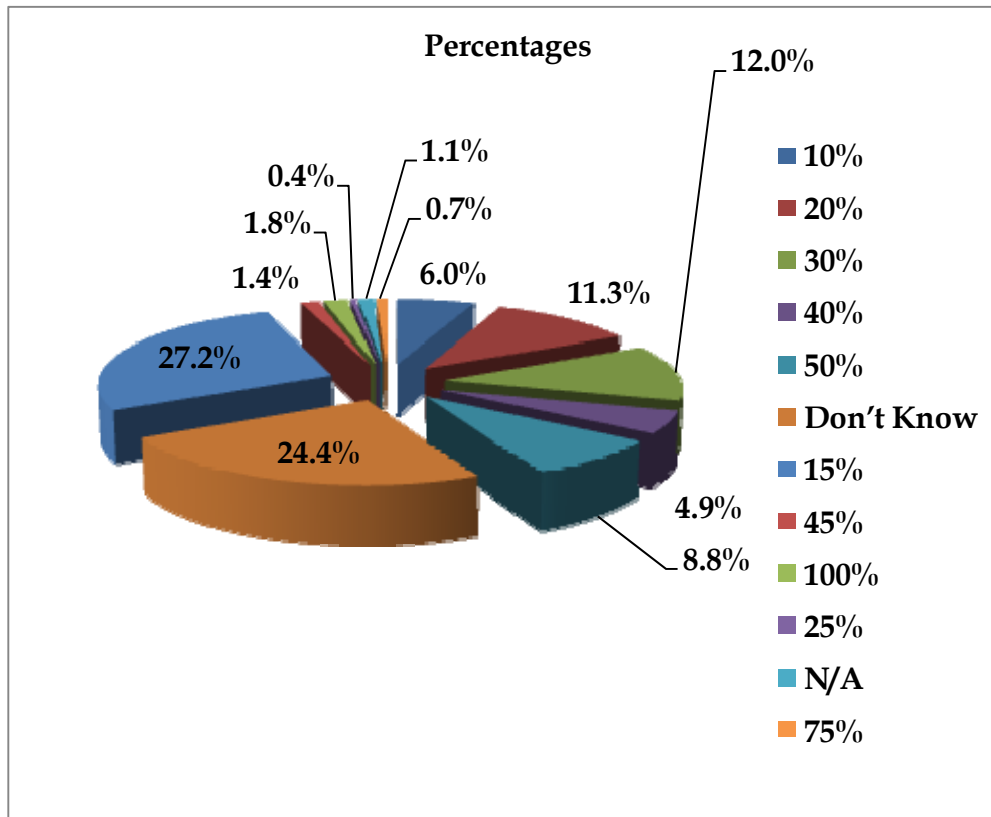
Currently a surviving spouse is entitled to 15% of the deceased’s estate. The majority of respondents (21.7%) from among the general public were of the view that the status quo of (15%) should be maintained and among the reasons given were that; most of the property should go to the children, the surviving spouse has to take care of the children, and the surviving spouse contributes to the acquisition of the estate as illustrated in the table below.

### Views by general public on spousal share



Similarly, among the implementers it was established that the majority of the respondents were of the view that 15% entitlement to the spouse was adequate. Reasons given for this view were that it is a fair and adequate portion for the spouse in light of the spouse's contributions and also the fact that there are children to be provided for. It was also pointed out that it was adequate because the spouse controls the children's share as well where the children are minors.

### Views by implementers on spousal share



The study established from among the implementers and the general public that the spouse's entitlement of 15% was adequate for monogamous unions. However it was generally agreed that the percentage entitlement of spouses was not fair in the case of polygamous unions.

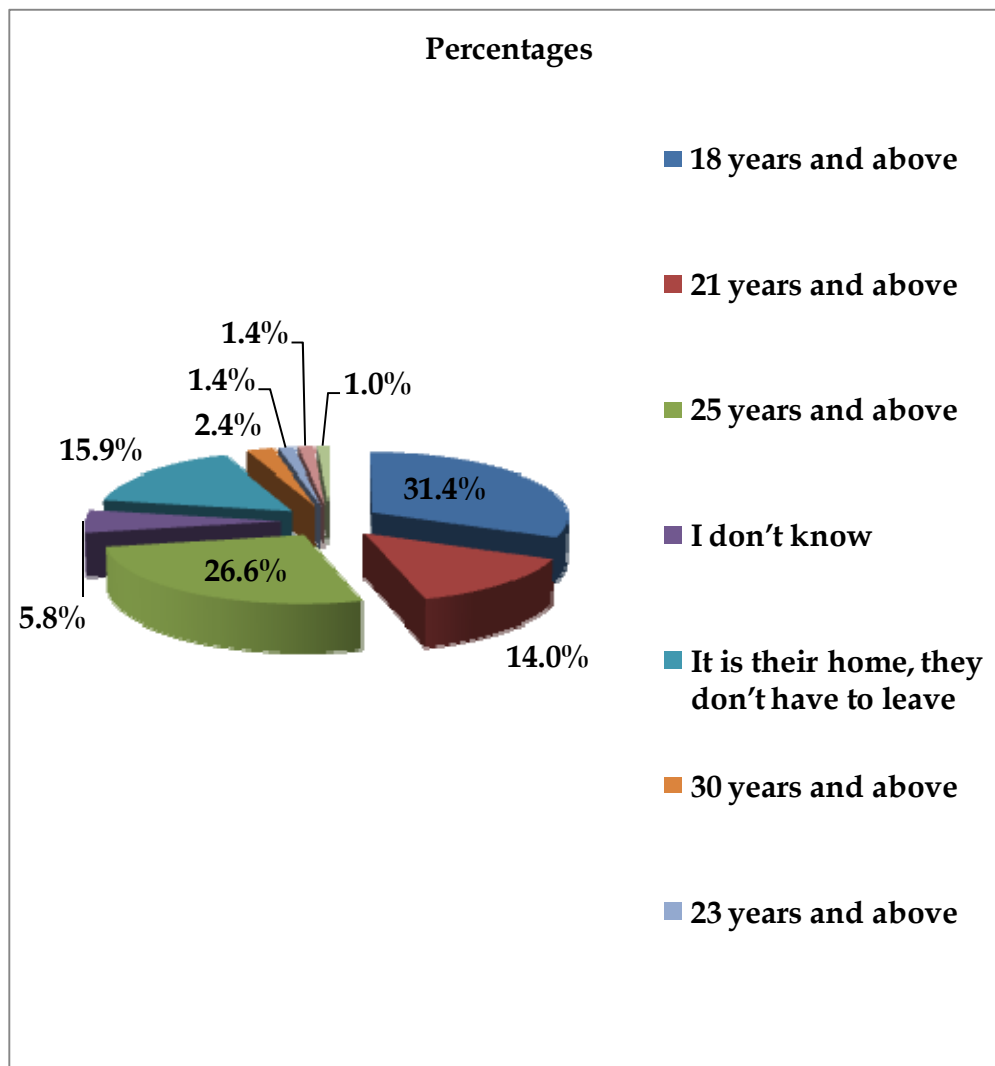
#### Recommendations

**Maintain the current 15% for spouses.**

#### 4.5.5 Entitlement to occupation of the principal residence.

The study sought to establish the age limit for the occupation of the principal residence by the "children" of the deceased.

Respondents from the general public gave varied responses ranging from 18 years to 25 years. See pie -chart below;



The reasons advanced by the respondents who mentioned 18 years and above as the appropriate age gave reasons including; the 'children' have finished school and can now get jobs, they are now adults who are mature enough to fend for themselves and that they are now married and have families of their own.

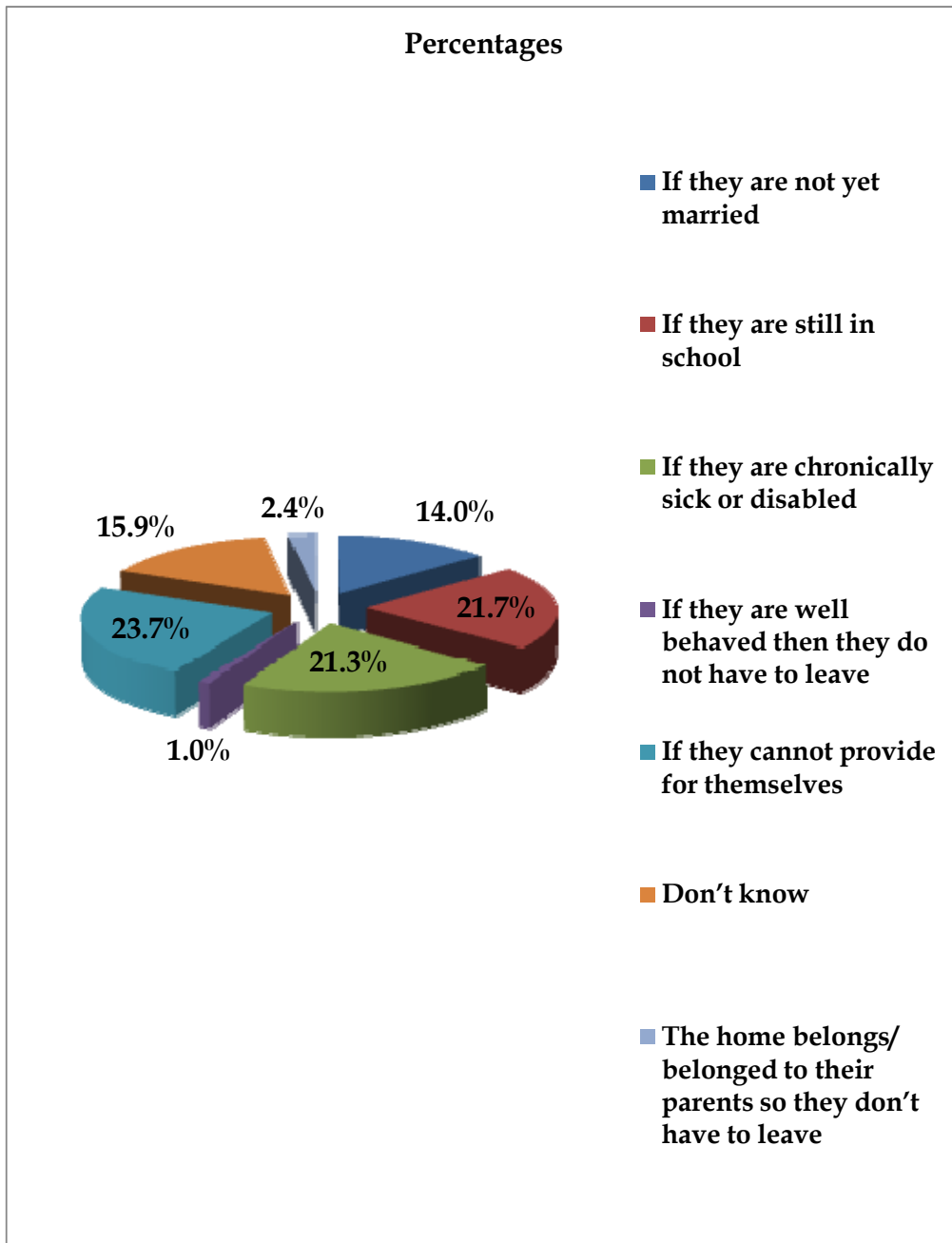
Those that recommended 21 years and above stated that at this age the 'children' have finished school and can get employment, they are mature enough to look after themselves and that they are now married and have their own families.

The respondents that mentioned 23 years and above also stated that these 'children' have finished school and can fend for themselves.

The respondents that mentioned 25 years and above noted that they said so because the 'children' have finished school and can now get employment, have matured and acquired their own property and are married with their own families. The respondents that recommended 30 years stated that at this age the 'children' are mature adults who can fend for themselves.

When the respondents were asked to give any peculiar circumstances in which these children may be considered to continue occupation of the principal residential holding, the reasons advanced were; those that are unmarried, well behaved, the disabled and those that cannot fend for themselves may remain in the home. The above responses and others are illustrated by the pie-chart below;

Under what circumstances may the offspring of the deceased remain in occupation of the principal residential holding?



The majority of the respondents recommended 18 years and above as the appropriate age for children to leave the principal residential holding. Whereas the findings reflect a general view in support of 18 years, it is necessary to consider the context of Uganda. Social economic reality is such that at this age, many are still dependant on parental support for basic necessities and education.

### **Recommendations**

- 1) The deceased's offspring should be entitled to occupy the principal residence till the age of 21/25.**
- 2) In determining the age limit, the circumstances of each particular child should be taken into account.**

#### **4.5.6 Certificates of no Objection**

The law currently does not require widows and widowers to get certificates of no objection from the Administrator General before applying for letters of administration.

The study sought to establish whether this status quo should be maintained given the ever rising cases of fraud, irregular marriages and the new challenge of cohabiting partners.

When asked whether the status quo referred to above should be maintained, 42.4% of the implementers were of the view that it should be maintained, 36.0% were against the current position being maintained while 21.6% of the respondents were not comfortable commenting on this matter.

Those in support of maintaining the current status quo of widows/ widowers not being required to get certificates of no objection before applying for letters of administration said they did so because; relatives may not like the widow/ widower and may frustrate efforts to get these certificates and eventually letters of administration and that widows and widowers are naturally entitled to their deceased spouse's property. Others stated that it makes the process of getting letters of administration faster and less complicated, both spouses are presumed to have the same status in marriage and so upon death of one of them, the other automatically becomes the administrator without restrictions and that the surviving spouse co- owns the deceased's estate.

On the other hand, the implementers against maintaining the current status quo stated so because in their view; some widows/ widowers are fraudulent and that

there are sometimes more than one widow which complicates matters when one is expressly allowed to apply for letters of administration. Others were of the view that the wrong person(s) may be issued with letters of administration and that the widow may not be the biological mother of the children and may end up mistreating them by not enabling them to benefit fully from the deceased's estate.

The above findings are further illustrated by a number of views from the respondents as below;

A private legal practitioner in Gulu district who was in support of maintaining the current status quo noted that, *"the widows/ widowers are better placed to manage this property in their interests as well as in the interests of their children and should not be burdened"*. A State Attorney (DPP's) in Masaka district also voiced related concerns when she stated that, *"it is bad enough that someone has lost a spouse hence he/ she should not be subjected to rigid processes."* Those against maintaining the status quo had the following views;

A PLAN (U) community volunteer in Kamuli district when asked about this issue stated that, *"all applicants should get certificates of no objection because false claimants can come around to grab property and need to be detected."* The Magistrate Grade 11 in Kamuli district on the same issue stated that, *"there are so many fake marriages which need to be verified before application for letters of administration."*

Whereas the majority of responses are in support of maintaining the status quo, it should be noted that the issue is a contentious one. In reality, automatic grant of letters of administration is prone to cause injustice in instances of informal unions and polygamous marriages. Under such circumstances, it would be necessary for judicial officers to unpack the circumstances of the claimants for purposes of identifying the rightful beneficiaries.

It is also important to note that the process for obtaining CONO has been streamlined and thereby shortened to 28 days. As such, it is worth considering the proposal to remove the exemption.

### **Recommendations**

- a) **All applicants for letters of administration should apply for certificates of no objection.**
- b) **Government and Civil society should embark on a drive to sensitize the general public to formalise their unions.**



#### **4.5.7 Entitlement of Dependant Relatives**

Respondents were asked whether dependant relatives should benefit from an intestate's estate. Among the members of the general public 71.5% were of the view that they should benefit. Reasons given were that in most cases they were depending on the deceased and have nowhere else to go, 16.4% were of the view that they should not benefit because their support should end with the death of their supporter and others were of the view that in most cases the deceased's estate can only cater for the surviving spouse and children.(12.1%).

According to the Implementers, 78.1% were of the view that they should benefit. Reasons given were that in most cases they were depending on the deceased and stated that they are part of the family. While 11.7% contended that they should not benefit because their support should end with the death of their supporter and because they are not part of the deceased's immediate family. 10.2% of the respondents did not have an opinion on this issue.

Some key responses from key informants included opinions such as; *“removing this kind of support will cause problems in society. Some of these people e.g. school goers will lose support and become a problem to society in future.”* OC/ Station, Kamuli district. In another interview, a State Attorney (DPP's) in Masaka district was of the view that, *“dependants who benefit should be limited to relatives below 18 yrs of age. Those above 18yrs can look after themselves.”* Another State Prosecutor in Kamuli district opined that, *‘these people are part of the family. We cannot do without dependency in Africa.’*

The majority of the respondents were of the view that dependant relatives should remain as a category of beneficiaries under the law in cases of intestacy. This was attributed to the culture and the socio economic realities in the wake of the HIV/aids scourge and insurgency. Whereas this may be so, it was prominently argued that the support of dependant relatives should terminate upon the death of their sponsor as it is often the case that the deceased's estate can only adequately cater for the surviving spouse and children.

#### **Recommendations**

- 1) Uphold the category of dependant relatives.**
- 2) The percentage due to dependant relatives should be reduced to 5%**

#### **4.5.8 Resultant effects of Separation**

Members of the general public were asked whether a separated spouse should benefit from an intestate's estate. The minority (30.4%) were of the view that they should benefit. Reasons given for this response were that the surviving spouse, though separated, also contributed to the acquisition of the deceased's estate, separation is not divorce, the surviving spouse may have to take care of the children, Others were of the view that the spouse in this instance should only benefit if she has children with the deceased.

While those of a contrary view 58.5% advanced the following reasons; that the relationship no longer exists, a separated spouse should not benefit where separation was due to the surviving spouse's adultery, where the surviving spouse left on their own volition, according to tradition and Shariah, property is divided upon separation, and that the spouse may have re-married. 11.1% of these respondents did not give an answer.

The majority of implementers (53.7%) were of the view that a surviving spouse should benefit. Reasons were that the surviving spouse, though separated, also contributed to the acquisition of the deceased's estate, separation is not divorce, the surviving spouse may have to take care of the children and some pointed out that in some cases separation was caused by the deceased spouse's mistreatment.

The implementers who held a contrary view constituted 35.7%, they advanced reasons similar to those given by the respondents from the general public and also noted that consideration should be given to instances where the spouse re-married or where the deceased could have acquired a new partner who could have contributed to the deceased's estate. 10.6% of the respondents did not respond to the question.

The responses generally point to the fact that the mere fact of separation by spouses at the time of one's death is not sufficient ground to deny the estranged spouse's right to inheritance of a deceased's estate. In light of this, it may be important for court to scrutinize the circumstances under which the spouses ceased to be members of the same household before a decision can be reached on whether or not to deny a separated spouse a share of the estate.

## Recommendations

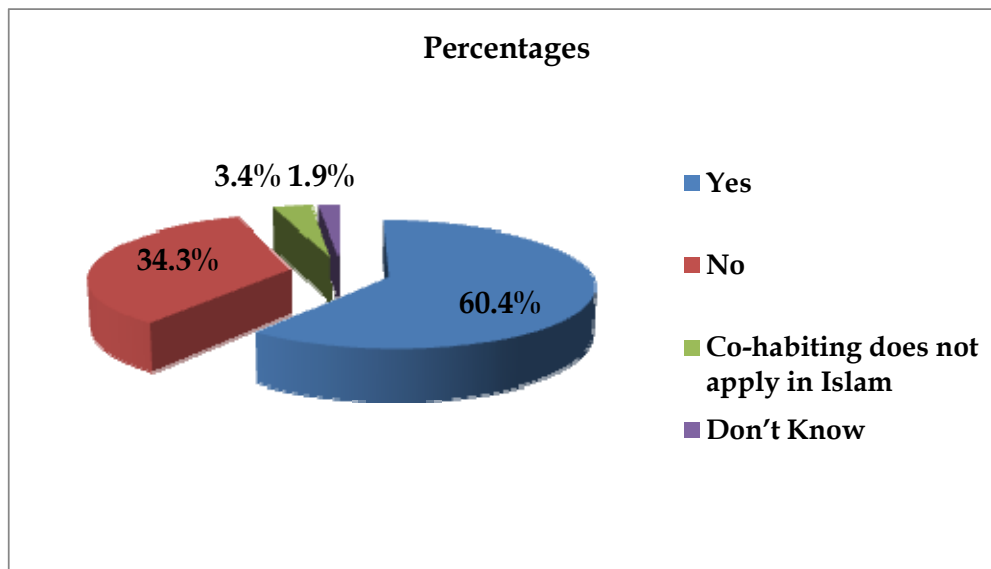
The Succession Act should set guidelines for determining applications brought by spouses who are excluded from benefiting from deceased's estates under section 30(3).

### 4.6 Cohabitation

Members of the general public were asked whether a surviving co-habitee should be entitled to a share of his / her partner's estate in intestacy.

The majority of the respondents were of the view that such a co-habiting partner should benefit. The responses are illustrated in the pie chart/ table below;

#### Should a cohabitee be entitled to a share in an intestate's estate?



When asked what percentage such a surviving co-habiting partner should be entitled to varying responses were given with some proposing 15% similar to that of a spouse and others proposing ranges from 10% to 30%. Others proposed that the percentage should be equivalent to what he / she contributed to the deceased's estate.

The majority of the implementers (59.7%) were of the view that such a co-habiting partner should benefit in consideration of the partner's contribution to the deceased's estate and because he / she has to look after the children.

The proposals from the implementers on what percentage entitlement cohabitantes should get ranged from 10% to 30% others were of the view that be entitled to a percentage equivalent to what he / she contributed to the deceased's estate.

Respondents were also asked what periods of co-habitation should be considered.

Among the general public the majority were of the view that it should be 5 years, while others proposed that it should be from the very start of co-habitation. Among the implementers, the majority similarly proposed a period of 5 years.

Cohabitation is common in many Ugandan societies, although not defined or recognised under any law. The Succession Act does not recognise such unions in cases of intestacy. It is the case that many unions in Uganda are informal, therefore restricting the definition of a spouse to persons within formal unions would have the effect of excluding the majority from the ambit of available legal protections.

### **Recommendations**

- a) **The Succession Act should define a cohabite**
- b) **A cohabite should be considered under the category of beneficiaries during intestacy.**

## **4.7 Customary Heir**

The study sought to establish matters relating to the institution of a customary heir including their role, entitlements and authority.

### **4.7.1 Roles of a customary heir**

According to the majority of the general public (81.6%), a customary heir is a person appointed by the clan to take over the deceased family and property, the roles and responsibilities of the deceased person in the family and to act as a guardian to the minor children.

Among the implementers the major roles played by a customary heir were listed as; taking care of a deceased's family and estate (76.3%). Others were; representing the deceased person, 3.9%, to settle family disputes 1.9%, taking over the deceased's roles and responsibilities 9.7%, continuing with the deceased's legacy 0.5% and 7.7% didn't know the roles of the customary heir.

The customary heir is a cultural role that is common in most of the communities visited. They are appointed by the family/clan members or sometimes by the deceased in their lifetime. The customary heir is a culturally recognised role signifying continuity of the deceased.

The study established that in some cases, persons who hold this position are involved in intermeddling under the erroneous belief that they automatically assume the power to manage and distribute the intestate. It may therefore be necessary to clarify the role of the customary heir in the law as ceremonial.

### **Recommendations**

**For avoidance of doubt, the Succession Act should stipulate the limitations of the role of a customary heir.**

#### **4.8 Challenges faced by implementers of the law when dealing with administrators of estates**

The study established that the implementers of the law face several challenges in dealing with administrators of estates and they include; fraudulent conduct of the administrators (converting the property of the deceased into personal property), (38.2%), mismanagement of the estate (13.1%), family wrangles over the deceased's property, (9.5%), and; Connivance between administrators and beneficiaries to disinherit other beneficiaries, (2.8%). It was also advanced that in some cases; the administrators ignore the wishes of the surviving spouse and beneficiaries and take arbitrary decisions, (3.5%). Other challenges include the fact that some administrators are ignorant of the law (3.5%), there is inequitable distribution of the estate among the beneficiaries (3.2%) and corruption (0.7%).(2.5%) observed that administrators do not give any feedback on the affairs of the estates they are managing.

Among those interviewed (23%) of the implementers stated they were not aware or had not experienced any challenges.

The challenges faced by implementers were discussed in detail in the FGD's and are highlighted here below:-

A PLAN Uganda (Para- legal) officer in Kamuli district stated that *"Administrators think the property is theirs to use as they please. They misappropriate the property."*

A CDO in Masaka noted that, *“There is usually inequitable distribution that is not in accordance with the percentages set in the law and feed back is not communicated.”*

A respondent from the Office of the CAO in Kamuli district on this issue was of the view that, *“The administrators don’t know their responsibilities. Since they don’t work to acquire this wealth, it is easy for them to mismanage it”.*

While an officer from the District Local Government in Fort Portal reported that, *“The administrators sell the property and chase away the family members”* which was the same view expressed by a State Prosecutor at the DPP’s office in Mbarara.

#### **4.9 Mechanisms in place to check the powers of an administrator**

Of the implementers interviewed, the majority (30%) were not aware of any mechanisms in place to check/regulate/control the powers of administrators. Those who were aware of the mechanisms mentioned court action (38.2%) including revocation of letters of administration for non compliance with the conditions for the grant and the requirement for filing of an inventory within 6 months of the grant of letters of administration (9.9%).

Other responses to note were that the Clan leaders/ elders intervene to resolve disputes which may arise (9.2%), the local councils intervene (1.8%), follow up is made by PWSOs (6.2%), Para- legals intervene (4.3%) and persons of integrity are appointed to become administrators of estates (0.4%).

The above findings are further corroborated by the views got from a number of respondents as illustrated below;

A legal practitioner in Mbarara district was of the view that, *“currently there are no other mechanisms in place unless you take them to courts of law.”*

The Chairman LC3 Court, Nakaloke in Mbale observed that, *People seek arbitration from relevant authorities for example the Courts and the PSWOs.”*

The CAO of Mbale district noted that, *“The people report to the Court to file an inventory.”* Similarly, the Resident State Attorney, Mbale like the foregoing respondent observed that, *“administrators have to account to the Court.”* This is in total contrast to the Chief Magistrate, Mbale who observed thus, *“ Most beneficiaries have no ability to come back to Court; hence children fall out of school as widows abandon children and remarry.”*The OC station, CPS in Kamuli district when asked about the available mechanisms was of the view that, *“there are very few other mechanisms except the reporting of cases to the police and the courts.”*

#### 4.10 Challenges in enforcing the available mechanisms

18.4% of the implementers interviewed stated that there were no challenges faced in enforcing the available mechanisms. 11.3% cited financial constraints as one of the challenges faced in enforcing the above mechanisms. While, 6.7% mentioned loopholes in the laws that are easily exploited by the administrators, 7.4% mentioned non compliance with the existing legal provisions and 5.3% cited ignorance of the law.

Others cited interference from the traditional practices (1.4%), lack of public support (3.9%), and lack of man power to follow up cases (3.9%) (e.g. PSWOs have many other responsibilities) , most people do not know where to seek redress (6.4%), difficulty in proving grounds for revocation of letters of Administration (0.4%), Letters of Administration are issued within six months which is a short time for investigations (0.4%), corruption (1.1%), lack of accurate information required to support the application, (0.7%), and fraud (0.7%).

Other challenges identified in the FGD's were that:-

*"Sometimes people don't know where to get the redress so they keep fighting amongst themselves."* The State Prosecutor (DPP's Kabale) another State Attorney from Masaka opined that, *"the administrators don't file the inventory."* The Chairman LC. 3 Namwendwa in Kamuli district was of the view that, *"Very few of our people report cases to the Police. They just give up."* The OC/CID Masaka (CPS) when asked about the challenges the station faces noted as follows, *" we don't have resources to follow up cases and administrators buy off and connive with some family members which complicates cases. Also, there are always threats from administrators which discourage witnesses."* The head of the FPU, CPS in Nebbi district gave related views by noting that, *"this work involves the need for handwriting experts who are not available here. Also, clan members take sides and evidence becomes scanty."*

#### 4.11 How implementers address mismanagement by Administrators

When asked how these challenges mentioned above were being dealt with by the beneficiaries the respondents stated that they; report to court (39.9%), report to police (9.5%), they apply for revocation of letters of administration (7.8%), they report to clan leaders (7.1%), they resort to mediation (5.3%), they report to the administrator General (1.1%), while 23.3% were not aware of the mechanisms available for redress, 2.8% said that they do nothing. Other responses where that; other administrators are chosen (1.8%), people take the law into their hands

(0.7%), and that they report to the LCs (0.7%). These views are further elaborated as follows:-

A State Prosecutor in Mbale was of the view that, *"matters have always been referred to Court."* A Para- Legal practitioner in Mbale with FONC noted that, *"people report to the clan leaders and some take such administrators to Courts of law."* The Resident State Attorney, Mbale was of the view that, *"they can report to the authorities and we prosecute."*

The Chief Magistrate, Mbale on the other hand noted thus, *"family members just look on and a few who can come to court do so but the process is so long and even by the time the case is decided, much of the estate is gone."* The LC. 3 Chairperson-Bungokho in Mbale was of the view that, *"we refer cases to LCs and CDOs who convene meetings to recover the property. In case of failure, we refer matters to the PSWO/ the Courts."* The CDO Mbale on his part noted that, *"we usually convene meetings to get a way forward. We also refer cases to the Police and the Courts for appropriate handling."*

Although the law provides some mechanisms to check administrators of estates, these are not sufficient to tackle the broad range of existing challenges. Some of the available mechanisms are expensive and do not offer immediate protection. Mechanisms for follow up of administrators who fail in their duties are also wanting. Therefore there is need to reconsider the existing legal mechanisms pertaining to supervision of administrators with a view to making them suitable and responsive to the needs of the beneficiaries.

### **Recommendations**

- 1) The Administrators of estates should file an inventory within 3 months of receiving the letters of administration and should file an account within a specified period prescribed in the law.**
- 2) The penalty for failure to file an inventory or account should be enhanced.**
- 3) Where a complaint is made about the administration of an estate, the administrator general should take over the estate to protect it from wastage.**
- 4) Administrators of estates should be sensitized about their roles and responsibilities.**
- 5) An estates' division of the High court should be established to supervise the administrators of estates more effectively**
- 6) Actions by administrators should be consented to by the concerned beneficiaries.**



- 7) **Letters of administration or probate should be granted for a limited time that is renewable subject to performance.**
- 8) **The administrators should periodically furnish the beneficiaries with statements of accounts.**

#### **4.12 Office of the Administrator General**

The review sought to establish the levels of public awareness about the functioning of the office of the Administrator General, the effectiveness of services offered, the challenges the general public faces in accessing their services as well as the challenges faced by the department in the performance of its functions.

##### **Knowledge of the existence of the office of the Administrator General**

When asked as to whether the respondents knew the office of the Administrator General; the general public 4.9% said they knew the office Administrator General while the majority 55.1% did not know about it.

The above findings are substantiated by the following views from respondents/ participants in FGDs.

In an FGD at Amen Ginnery, Soroti district the participants generally observed that they were not aware of the procedure for obtaining probate and letters of administration.

At another group discussion at Acet Gwen Church of Uganda, members had the following to say about the office of the Administrator General, *this is the first time we are hearing about this office and we do not know what they do, we have never heard about that ministry/department sensitizing people about what they do and where we the people can find them and we do not know sincerely, the formal processes of obtaining these letters of administration and probate*'. The same was echoed given by members at a group discussion at Katikekile sub-county, Lia Parish in Moroto district where members observed that they do not know about the office of the Administrator General and that they instead use traditional mechanisms to handle their affairs.

When asked about her knowledge of the office of the Administrator General, a respondent from the Teso Widows Development Initiative observed that, *"I do not know the offices of the Administrator General in Soroti and where I can get him/her"*.

On the other hand, the PSWO/ Kamuli district noted that the Administrator General is doing his/her work well because a number of the functions of the Administrator General are delegated to the CAOs and the Sub-county Chiefs. However, he acknowledged that sometimes they have to travel to Kampala to sort out some issues which become expensive and therefore recommended that the officers of the Administrator General should be decentralised to all district levels to improve upon service delivery.

#### **4.13 Services offered by the Office of the Administrator General**

Majority of the general public (22.7%) who knew about the services offered by the Administrator General's department said that the administrator general regulate wills and manages the estates of the deceased person. 12.6% said that the Administrator General issues letters of administration and probate. Others noted that; they handle matters of succession 5.8%, no services 3.9% and 55.1% were not in position to answer the question.

According to the implementers, 26.1% were of the view that the office of Administrator General was performing its roles satisfactorily because the Administrator General readily handles the matters brought before him and that most of the cases brought before the Administrator General have been handled prudently.

While 49.1% of the implementers were of the view that the Administrator General is not performing his roles satisfactorily because his office is not at the district level and he is very slow and understaffed. 24.7% of the implementers did not give their opinions.

The other reasons given for the poor performance of the department were that; some officers at the Administrator General's office are fraudulent and corrupt, there is lack of follow up of cases, sometimes they make mistakes because they do not consult properly, there is too much bureaucracy, they are very slow and the Administrator General is overwhelmed by the number of cases.

This was further evidenced by a PSWO in Nebbi district who noted that; *'illiteracy, failure/ reluctance by people to report cases and the problem of relatives forging letters of administrations are the biggest hinderances to access to the services of the Administrator General'*.

A private legal practitioner in Mbale on his part noted that *'the office of the Administrator General does not perform and therefore mismanages property because they do not have a personal stake in it. Additionally, he was of the view that the 5% that this office takes from estates in its care is very big and exploitative and should be reduced.'*

Another legal practitioner in Arua was of the view that most matters have to be sorted out in Kampala and the poor and old have to meet and suffer several costs to get to Kampala. This was the same view expressed by the RDC of Gulu when he stated thus; *'services are not accessible because at the end of the day, these poor people have to go to Kampala to clear some issues concerning letters of administration and the estates of the deceased'*.

Another legal practitioner Kabale expressed the view that the Administrator General's office *'lacks any flexibility regarding the handling of disputes as they have a lot of bureaucracy which makes things very expensive especially for the people upcountry because in addition to this bureaucracy, the services of lawyers must be sought at the same time'*.

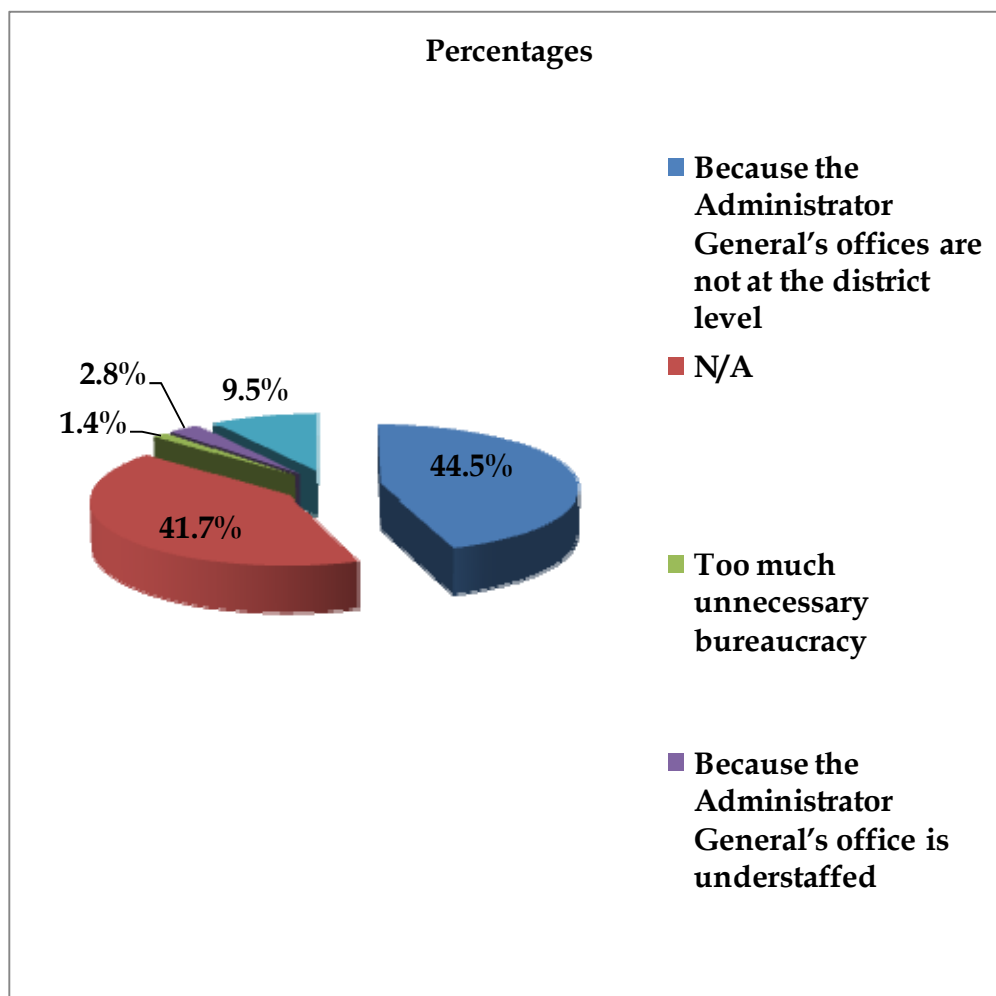
Below is a transcript from a case study that was done in Mbale with the aim of obtaining a personal perception and experience on the efficiency of The Administrator General's Office.

*"I am from Pallisa district, my father died without making a will and I was ill advised by some people to solve this issue right away from Kampala. Administrator General's asked me to "carry/ transport' all my 13 brothers and sisters to Kampala because the "learned friends" wanted to have a meeting with them. When we got there, we found human jam yet we had no where to sit or sleep. Feeding, transport and accommodation were very expensive. Despite all these expenses, they kept on asking us to go back. Additionally, this place has a lot of bureaucracy especially when you go to Kampala (Amamu House). This place is also full of lawyers (state attorneys) who are smartly dressed but have no skills in handling people. These people at Amamu House have double standards and connive with families which are willing to offer kickbacks to handle them first and if they learn of money in the estate you are processing, they want a percentage. They also put some of this money on the AG's account and it is a lot of money. These state attorneys at Amamu House are like the current phenomenon of "witch doctors" because when they learn that the deceased's estate has money, they will keep around that person and keep confusing them/ you until they get what they want (money). When they discovered that I am a policeman, they tried to frustrate me. I just came back home and used the local Court in Mbale which helped me to get the necessary*

*documents. Most people here in Mbale do not know about the presence of the AG's office. We do not do much with that office but we have the Family and Child Protection Unit here which handles related cases."*

When asked whether the Administrator General's services were accessible to the people; 18% of the implementers were of the view that they were accessible because people always use the Administrator General's service while 58.7% were of the view that his services were not accessible to the people because the Administrator General's offices were not at district level and that people were not aware of the services that the Administrator General offers. 23.3% didn't know whether the Administrator General's services are accessible to the people or not.

Below is pie- chart that illustrates the reasons given for the non accessibility of the Administrator Generals services:-



#### 4.13.1 Challenges Faced by the General Public in Accessing the Services of the Administrator General

The study especially sought to establish the challenges faced by the general public while accessing the Administrator General's office with a view to making appropriate recommendations to improve the efficiency of the department. Majority of the general public (27.5%) said that the office of the administrator general is not easily accessible as the office of the Administrator General is only in Kampala and not at district level. 45.9% were of the view that they didn't know the challenges, 4.3% no challenges, 7.2% said that their services are very expensive, 3.4% cited corruption and political interference, 3.4% said that they are understaffed they have a heavy backlog of cases to handle, 0.5% said that the process is too long. 0.5% said that there is too much bureaucracy. 4.3% people were not aware of the Administrator General's roles or office.

A legal practitioner in Mbale listed the key problems facing the Administrator General's Office as; shortage of man power at the regional office, ignorance about the availability of these services and the need for people to travel to Kampala to complete some processes. He also noted that the increasing cases of connivance by relatives to commit fraud against the deceased's estate is a very big problem because these relatives usually keep giving conflicting information to the Administrator General depending on their own interest.

Another respondent in the RDC's office in Mbale on the issue of challenges faced by people accessing the office of the Administrator General was of the view that, *'people in Mbale are not aware of the services of the Administrator General and worse still, the people because of cultural biases always disregard Court Orders or letters of administration from this office or even Court because of ignorance and greed. They really need sensitization'*.

An officer in the Family Protection Unit, Central Police Station, Mbale observed that, *'generally people are not aware of the roles and responsibilities of the Administrator General. They also do not trust the Administrator General because sometimes he / she appoints the same abusive persons to manage the estate of the deceased'*.

#### **4.13.2 Challenges Faced by the Administrator General in Management of Estates of Deceased Persons**

When the implementers were asked what challenges the Administrator General faces in the management of estates of deceased persons, the findings indicated the challenges as; understaffing, financial constraints, people do not know the services offered by the Administrator General's office, identifying the rightful beneficiaries, ignorance of the law, some cultural practices are repugnant to the law, fraud, beneficiaries do not trust the Administrator General, people resent interference from the Administrator General, and because the Administrator General's offices are not at district levels.

A legal practitioner in Masindi was of the view that; *"hostility in most of the families seeking services is a very big problem because it leads to continuous conflicts and little respect for the Administrator Generals decisions."*

When asked to suggest how best the problems identified above can be resolved, it was proposed that the Administrator General should involve clan leaders and elders when executing his duties, the general public should be sensitized on the law of succession, the Administrator General should open up offices at district

level, the Administrator General should recruit more staff, protection and supervision of the Administrator Generals Account, better facilitation of officials, civic education, sensitisation of the general public about the Administrator Generals role and adequate funding of the institution.

A PSWO in Kamuli noted that, *“the general public should be sensitized about the Administrator Generals services as well as the importance of respecting peoples’ wills.”*

A legal practitioner in Mbale noted that the Administrator General should empower all the regional offices to fully perform the roles of that department. Another legal practitioner recommended that officers at the regional office should be empowered and supervised to handle all matters instead of constantly referring cases to Kampala and that there should be adequate facilitation and recruitment for this office.

The Administrator Generals department is central to the enforcement of the laws related to succession yet the findings indicate that the department is faced with several challenges. It is therefore necessary to address these obstacles in order to ensure optimal performance.

### **Recommendations**

- 1) The department of the Administrator General should sensitize the public about its role.**
- 2) The MoFPED should ensure that the department is adequately facilitated to perform its functions.**
- 3) The department of the Administrator General should consider further decentralizing the department for wider coverage.**
- 4) The department of the Administrator General should further train its officers in public relations and people handling skills.**
- 5) The department of the Administrator General should improve upon its records system.**

#### **4.13.3 Agents of the Administrator General**

The implementers were asked whether they knew the agents of the Administrator general and their roles. The respondents mentioned the Chief Administrative officer, the probation and Social Welfare Officer, magistrates, state Attorneys, sub-county chiefs, Local council executives, police , lawyers, Community Development Officers and Resident District Commissioners.

Regarding their roles, the respondents mentioned that agents are responsible for; processing succession documents, sensitizing the public on the law, presiding over succession disputes, issuance of certificates of no objection, implementation of court orders, holding family meetings on behalf of the administrator general and providing legal advice among others.

For the challenges faced by the agents of the administrator General respondents mentioned financial constraints, lack of accurate information, mistrust and suspicion by beneficiaries, inadequate capacity to handle matters of succession, corruption and family wrangles.

The respondents made suggestions on how the services of these agents could be improved upon. Proposals included; improved facilitation, delegation of roles, and sensitization of the public about the roles of the Administrator General, decentralisation of the office of the administrator general and capacity building.

Findings indicate that the offices of the Administrator General relies on other government structures especially at the Local Government level to perform some of its functions. However, these offices are not adequately facilitated to perform this role. It is also the case that the Office of the CAO is also overburdened by this additional role. As such efforts should be directed at ensuring a smooth functioning of the operations of the Administrator Generals agents.

### **Recommendations**

- 1. The department of the Administrator General should facilitate their agents to perform their functions through training and logistical support.**
- 2. The department of the Administrator General should establish better networks, feedback channels and supervision mechanisms with his/her agents.**

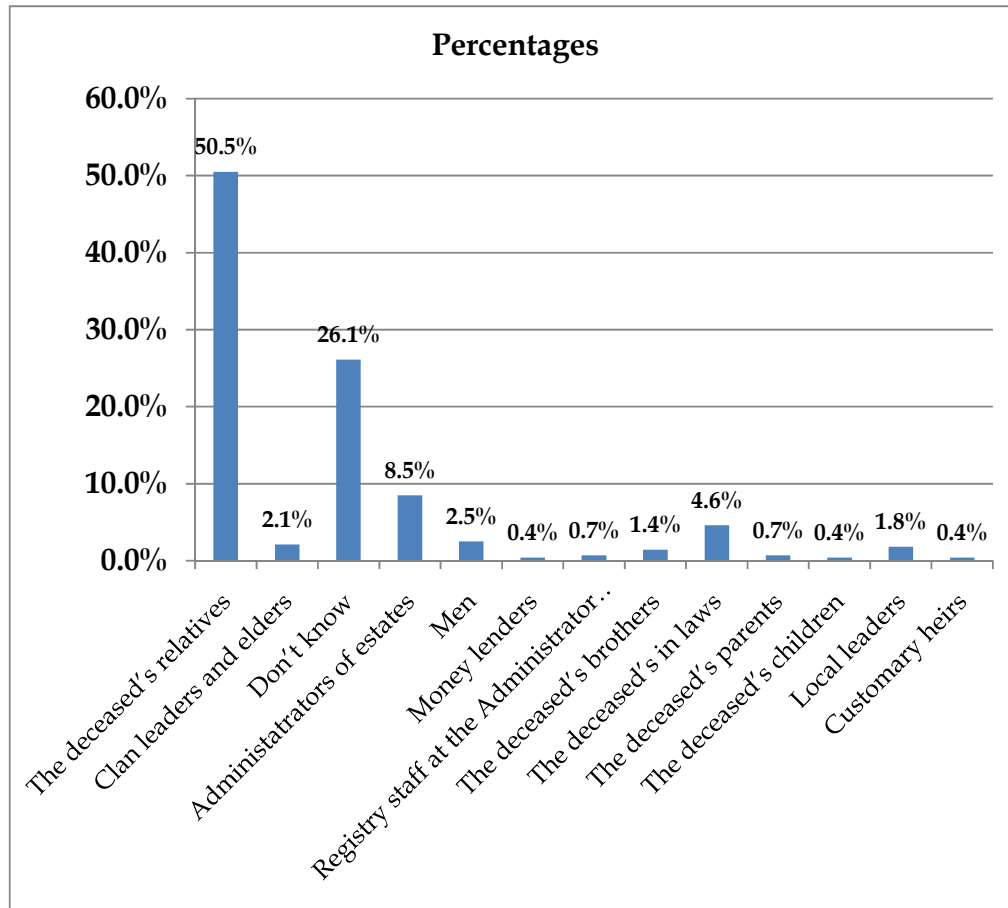
#### **4.14 Intermeddling with property of the deceased**

The study sought to investigate the causes of intermeddling. Implementers mentioned greed (39.9%), (14.5 %) cited ignorance of the law while (25.8%) said that they didn't know. Others causes mentioned were that some people want to get free property (6.0%), absence of a will (3.5%), poverty (6.0%), lack of awareness (0.4%), corruption (0.7%), and selfishness (2.8%).



When asked who the common perpetrators of intermeddling are, the implementers mentioned the deceased’s relatives, clan leaders and men.

### Who are the common perpetrators of intermeddling?



A private legal practitioner in Kabale district was of the view that intermeddling is caused by *“poverty amongst the general population and ignorance about the laws and our past socialisation of grabbing our brother’s assets.”* The in-charge CFPU/CPS in Moyo district stated that, *“this is caused by greed. The property is not yours and you have not been permitted to take it. This is just greed.”*

A respondent from the RDC’s office in Mbale district on this issue noted that, *“this mischief is caused by the poor mindset and attitude towards women. The people believe that women are not supposed to own and inherit anything. This is worse if they have no children.”* We are right now handling a matter in Nkoma – Senkulu cell where a blind man bought land with his sister who later passed away. A man not related to them

*in any way has come up to challenge ownership of this land and has actually gone to Court to claim this land just because the remaining person is blind. The court in Mbale is yet to conclusively handle this matter but this office is following it keenly to protect the interests of the blind man. Personally, I lost a brother in law and that very day, the man's relatives came and locked up the deceased's home with the aim of chasing away the widow. This was shocking and yet it is what is happening to our uneducated people.*

A private legal practitioner in Mbale district also attributed some of the causes of intermeddling to the unclear laws that Uganda inherited by giving his own experience as below:-

*Four people, I inclusive were appointed to administer an estate. One administrator kept on conniving with some of the beneficiaries to collect rent and recover moneys from debts due to the deceased without our knowledge and some of the beneficiaries. When we would officially go to demand for these monies, the tenants/debtors would show us letters/receipts of payments from our colleagues. This puzzled me because our law is very silent about it. The law (common law), which we inherited seems to bind all the administrators in the circumstances to the actions of others. This leads to a lot of confusion and needs to be addressed. Regarding the Courts, this is another issue that urgently needs attention. Our Courts for whatever reasons take so long to decide on matters before them and by the time their orders come up a lot of damage to the estate has already been done. I have handled a matter in which my client was fighting for an estate for a very long time but she even died a week before the Courts ruled in her favour.*

#### **4.13.1 Legal mechanisms available to address complaints of intermeddling**

Responses recorded were as follows; (25.1%) noted that they report to court, (15.9%) noted that they report to the police while (12.7%) stated that they report to the clan leaders/elders to intervene, (29.7%) did not know the mechanisms available Others stated that, they report to the local council (6.4%), (1.1%) they report to Para- Legals, (1.1%) report to the PWSO, (3.2%) people are sensitised on their rights under the law of succession, (1.4%) no mechanism, (2.5%) mediation and (1.1%) said that they report to the Administrator General.

In response to whether the respondents found the available mechanisms efficient in addressing the challenge of intermeddling, the majority of the respondents were satisfied with the efficiency of the mechanisms available (34.3%). While 28.3 stated that the mechanisms are not effective 1.7% of the respondents had no idea while 25.8% did not comment.

The practice of intermeddling is highly prevalent in both the urban and rural society. The available legal mechanism against intermeddling is a penalty that is too lenient to address the problem. There is need to review this punishment to match the prevailing social and economic circumstances. This coupled with sensitisation of the law on intestacy will go a long way in curbing the problem.

### **Recommendations**

- 1. Sensitisation efforts should address the practice of property grabbing.**
- 2. The current penalty for intermeddling should be updated.**

## **4.15 Judiciary/ Formal Courts**

### **4.15.1 Costs of Obtaining Letters of Administration or Probate**

The review sought to establish the cost of obtaining letters of administration/probate from the general public and the implementers of the law.

The majority of the implementers (67.1%) did not know the actual cost involved in obtaining letters of administration or probate. While (8.1%) of the respondents were not sure of the costs, but simply said that it is very expensive, (3.9%) said that it is affordable while (18.1%) of the respondents mentioned the various amounts that are likely to be spent when obtaining letters of administration or probate. While (2.8%) of the respondents indicated that the costs are never standardised, that they vary.

A legal practitioner in Mbale was of the view that *'the costs have not been much except that the commercialization of things is making things very expensive for example the requirements to make certain advertisements and then transport costs of about three journeys to and from Kampala'*.

Another private legal practitioner gave a related view when he opined that, *'the courts are very okay and affordable. The problem is the Administrator Generals office where one spends millions of shillings moving up and down transporting relatives to Kampala and other related costs'*. A respondent from the RDC's office in Mbale district on the issue of costs for obtaining letters of administration noted thus, *'about 20,000/= I helped an old man recently and it cost about that much. This is however not the case for all applicants for these letters because the court clerks and other officers in the Courts charge all sorts of illicit fees which scare away the ordinary people'*.

#### **4.15.2 Challenges Faced by the Beneficiaries in Accessing the Court for the Grant of Letters of Administration or Probate**

Majority of the implementers (76.9%) concurred that there are various challenges relating to access to courts for the grant of letters of administration or probate. The challenges mentioned included:-corruption, Illiteracy, Ignorance of the law and procedures, the courts are too busy with heavy backlog of cases to handle, they also mentioned the fact that the legal procedure is too long, while others indicated that the process to access court is very expensive.

A respondent from the Teso Widows Development Initiative noted that: “*The court system in Uganda is very expensive and is letting down many poor people including the widows. They keep asking for evidence and documents and yet they take so long to decide on matters. At least the Human Rights Commission follows up matters including processing of letters from the LCs and other investigations. Now when you are poor and a widow and these formal institutions keep tossing you around, you just give up.*”

The PSWO of Kamuli district noted that, *‘people here naturally fear the Courts. They perceive Courts as very expensive and that at the end of the process, they may be arrested’*. While a legal practitioner in Mbale noted *‘lack of knowledge on what should be done in case of need, the over commercialisation of the process characterized by illegal and the little legal fees; and the very long and tedious process as key challenges to access to the Courts’*.

Another legal practitioner in Mbale noted that, *‘the Courts take really long to determine the disputes before them which create problems’*. A respondent from the RDC’s office in Mbale on this matter was of the opinion that the court clerks and other court officials are the biggest problem. *‘they are not straight people because they keep charging the poor people all sorts of illegal fees which makes this process long and very expensive’*.

#### **4.15.3 Improving the Process for Obtaining Probate and LOA**

The study sought to establish from the implementers and the general public how best the process for obtaining probate and LOA can be made easier and faster.

A respondent from the Teso Widows Development Initiative noted that, *'people in our place do not know the law and they are easily taken advantage of. People are suffering because the court system is also very expensive. They keep postponing matters which has made people to give up and resign to their fate of just 'suffering''*. The PSWO of Kamuli recommended that the Courts should try to resolve issues in a timely manner and that the offices of the Administrator General should be decentralized.

A legal practitioner in Mbale was of the view that the lengthy processes involved should be shortened and that the Courts should handle these matters expeditiously. Another legal practitioner noted that reducing the lengthy processes at the Courts and the Administrator General's office and sensitizing the people to seek legal services from the right offices will go a long way in improving the whole process of grant of letters of administration.

The cost of procedures pertaining to administering a deceased's estate is one of the challenges in the way of many beneficiaries. Whereas it is the case that the Administrator Generals department has made tremendous strides to standardise the cost, the study established that there are some practitioners that charge very high costs, thereby greatly discouraging those intending to make applications. It may be necessary for these fees to be standardised and stream lined for better accessibility. It may also be necessary for Government to consider cheaper alternative procedures or the option of legal aid services for persons of little means.

Whereas courts play an important role in handling matters of succession, compounding this problem is the fact that even where court intervention is sought, there are limited interventions, inadequate manpower and initiative by existing institutions to follow up court orders. There is therefore need for the existing institutions to design an appropriate follow up mechanism to ensure that orders granted are not made in vain.

#### **Recommendations**

- 1) The Department of the Administrator General should regularly circulate information to the public about the standardised rates of obtaining probate and letters of administration.**

- 2) **The Uganda Law Society and other civil society actors should consider augmenting pro-bono services in the area of intestate succession.**
- 3) **The Administrator general's department should network with other actors at the district level for support in matters of implementation.**

#### **4.15.4 Proposals for Additional Roles that courts could play in improving the process of obtaining letters of Administration or Probate**

When the implementers were asked about what additional roles the Courts could play in improving the process of issuing letters of administration or probate, there were various responses; Some respondents were of the view that court should preside over family meetings, others proposed that court should be involved in sensitizing the public about the processes of obtaining letters of administration or probate, reducing the 14 days' notice to 7 days, court should shorten the period for filing inventories to every after three months instead of the current 6 months.

Others proposed that, some days of the week should be designated by judicial officers to handle issuance of letters of administration and probate, the magistrates courts at district level should be able to issue letters of administration and probate without the Administrator General getting involved, court should verify the applicants and their applications, mediation, courts should handle formal consultations about applicants of letters of administration.

A private legal practitioner in Mbale was of the view that, *'all the Courts need to do is to expeditiously handle all matters before them and that as an important stakeholder, they should participate in the sensitization of the general public'*. He additionally observed that the Courts should enforce the law by summoning administrators and beneficiaries to appear before it and explain what is happening and that the strict reporting on the inventory of the estate should be enforced.

A respondent from the RDC's office in Mbale stated that, *'the courts should adopt a follow up mechanism to make sure that its orders are implemented and also need to sensitize our people because they know very little about court processes. They do not even know about the right of appeal'*. He went on to observe that the courts should not only wait for complaints from other actors like the PSWOs and the RDCs, they should also get a mechanism of independently doing some of this work.

One of the major challenges highlighted is lack of follow up by the courts to enforce compliance by the administrators. In this regard the following recommendations were made;

#### **Recommendations**

- 1) The period of filing an inventory should be reduced to 3 months from the current 6 months. A copy should be filed with court and another copy given to the beneficiaries.**
- 2) Failure to file an inventory should attract a penalty or be a ground for court to revoke an appointment.**
- 3) An applicant for letters of administration should be required to attach his/her photograph to the application**
- 4) The courts should have a mechanism for regulating administrators of estates through issuance of provisional letters of administration which are confirmed after the filing of an inventory. It is after confirmation that an administrator should have the powers to sell, alienate, mortgage the estate's property**

#### **4.15.5 Legal Aid Services**

The study sought to establish the availability of legal services by the general public on matters of succession.

When the implementers were asked whether there are existing legal aid services offered to individuals seeking to obtain letters of administration or probate, (40.6%) they are not available, (36.7%) affirmed their existence while 22.6% were not aware of any legal aid service providers.

The respondents mentioned some of the existing legal aid service providers in the areas under study which included; FIDA(U), Plan International, Para- Legal, Legal Aid Project, UHRC, Advocates Sans Frontiers, Life Concern, Action Aid, and Uganet.

The PSWO of Kamuli district observed that FIDA Uganda had just left Kamuli after some years of very good work. He additionally noted that they now only have the Legal Rights Project by PLAN Uganda whose services are unfortunately limited to the 'PLAN area' which comprises of four sub-counties only. A legal practitioner in Mbale was of the view that there are very few organizations offering these services and could not readily identify them while another legal practitioner in Mbale noted that much as he often offered pro bono services

especially to widows, there are no known institutions offering legal aid services in Mbale.

The need for legal aid support in matters of succession cannot be overstated. A number of beneficiaries' estates were found to be plundered because the beneficiaries did not have access to legal support.

**Recommendation**

**The Administrator General's department should network with civil society to map out a strategy to offer legal aid support for the poor and vulnerable in matters of succession.**



## CHAPTER FIVE

### CUSTOMARY NORMS AND PRACTICES OF SUCCESSION IN UGANDA

#### 5.1 Introduction

In this chapter we discuss the findings of the study in respect to customary norms and practices of succession in Uganda. The study mainly covered four ethnic groups of Uganda that is Nilotic, Bantu, Nilo-Hamites and, Luo ethnic groups. The focus was on the practices of succession in the different ethnic groups especially where one has died intestate. The study in this respect employed qualitative methods and as such the findings discussed here are from in-depth interviews, focus group discussions and case studies. Qualitative methods were employed because this aspect of research is subjective and aimed at establishing the negative and positive customary practices on succession in the various ethnic groups in Uganda with a view to recommending for the elimination of customary practices which are contrary to the Constitution and other laws of Uganda.

#### 5.2 Nilotic Ethnic Group

The Nilotic ethnic group is mainly composed of the Lugbara, the Madi and the Sudanic Kakwa tribes. They all trace their origin from southern Sudan but their cultures and customs differ significantly. The Nilotics are predominately found in the districts of Arua, Moyo, Koboko, Yumbe, and, Adjumani in the West Nile region of Uganda and they are mainly agriculturalists.

##### 5.2.1 Customary practices of succession in the Nilotic ethnic group

Among the Nilotic ethnic group, the study established that when a person dies intestate, after 4 or 7 days from burial a meeting of the elders, widow, children and relatives of the deceased is convened. The purpose of the meeting is to appoint the heir of the deceased. The appointed heir is a son of the deceased usually the first born. It was indicated that preference for the heir is given to the male gender and thus the female gender is not appointed heiress. In case where the deceased has only girls as children, the heir is got from one of the boys of the deceased's relatives. The meeting ensures that the chosen person is a responsible person in a sense that he will not mismanage the estate of the deceased and can take care of the deceased's children. It is evident that the practice of appointing

only the boy child as a customary heir is discriminatory of the girl child and thus unconstitutional.

Distribution of the deceased's property is done in the same meeting by the elders amongst the male children first then the widow later. Children are given all other property of the deceased except the home and land that was cultivated by the deceased.

In case the children are young, clan heads and elders give the widow responsibility to take care of the estate until the children have grown up. When grown up the clan heads distribute the property to them. One widow from a case study carried out in Nebbi district said; *"After burial there was a meeting, the property was not distributed. Everything was left to me and my children."*

It was pointed out in the study that female orphans do not benefit in the estate of the deceased father. It is considered that female children benefit from their husband's estate. A female respondent from a FGD in Nebbi district said; *"Before my father died, I was given a piece of land for cultivation but when both my father and mother died, the piece of land was taken away."* In case such a female child separates from her husband she is free to come back home and stay with her mother.

In case the deceased died a married man, the community also considers who should inherit the widow. It was pointed out by the participants in Arua District that *"In Lugbara a brother to the husband is a smaller husband and upon death he is the one to take over the wife of the deceased."* However it was noted that wife inheritance is on the decrease because of the prevalence of HIV/AIDS. The widow is therefore not forced to be inherited; if she does not want to be inherited she will be left alone.

### **5.3 Nilo-Hamites Ethnic Group**

The Nilo-Hamites ethnic group is mainly composed of the Itesot, the Karimojong and Sebei tribes. They among others occupy the districts of Soroti, Moroto, Katakwi, Kaberamaido and, Serere in the North-Eastern region of Uganda. This group were traditionally pastoralists by nature however over the years, they have engaged in agriculture. Their food consists of milk, meat, millet, sorghum and beans.

### 5.3.1 Customary practices of succession among the Nilo-Hamites ethnic group

The study revealed that most of the people do not make wills and therefore custom and traditional practices determine the way matters of succession are handled.

Upon the burial of a person, the clan members are called upon to decide on how to distribute the property among the widow and, children of the deceased.

Among the Itesot the study established that the clan chooses the heir who is a male son of the deceased. Even where the eldest child is a girl, still a male child is preferred and installed as the heir of the deceased. It is the heir who decides on how property is to be distributed. One elder in a FGD conducted in Northern Division, Soroti District stated that *“The clan actually only installs the customary heir but does not distribute the property. It is the heir that makes the property to disappear and they leave the widow with what she had when the man died.”*

In Karamoja , all participants in the FGDs held agreed that after mourning the deceased, a meeting is held with the widow to establish the whereabouts of all the property left behind by the deceased. Three ceremonies are subsequently held culminating in the distribution of the property of the deceased. The ceremonies involve killing of bulls in the following order; the first for removing ash of the mourning bon fire; the second for shaving hair and; the third for cleansing and distribution of the deceased’s property. An elderly person in the clan locally known as “Kanithan” presides over the ceremony for distributing the deceased’s property. Animals are not distributed but remain with the sons of the deceased. In case the deceased left debts, some of the animals are used to clear the debts while land is left for the widow. It was stated that most of the man’s property is given to men only and nothing is given to the widow. If the deceased left brothers or any male relative then widow inheritance follows.

Much as the clan handles succession matters, there are cases where this does not happen. In these cases the in-laws just grab the deceased’s property regardless of what the customs hold. A widow aged 48 years from Nadunget Sub-county in Moroto District had this to say:-

*The heir to the late was a friend’s son who had been in the deceased’s care. After the last funeral rites, the nephew of the deceased, son to the deceased’s sister went and took all the deceased’s animals that had remained for the survival of the four wives- about 30 heads of cattle and goats, claiming that the heir was merely a dependant at*

*the deceased's home who did not deserve the recognition and therefore control of the deceased's property. When the property was taken by the deceased's nephew, the concerned neighbours called for a village meeting to resolve the matter of grabbing property from the widows. After the meeting the nephew returned the animals, which unfortunately were raided by the cattle rustlers. The animals before they were rustled were not distributed according to the family but were centrally controlled for the benefit of the four wives by the heir.*

Another female participant from Acet Gwen Village in Soroti District stated that *"When the husband dies, the clan put pressure on the widow until she goes away and they distribute the property to benefit themselves, this is usually characterized by violence amongst the intermeddlers"*.

The study revealed that according to the Sebei the appointed heir is usually a brother of the deceased who is given priority. Where there is no brother, then the son is appointed. Where the deceased left no brother and son, then the clan decides. Selection here usually depends on one's conduct, honesty, sense of responsibility, selflessness, calmness, and affection for others among other qualities. In cases where the eldest children are irresponsible, a young child can be appointed as the customary heir.

A guardian locally known as *"kondiyindet"* among the Sebei is also appointed. The guardian is chosen by clan leaders to look after the property and children of the deceased.

#### **5.4 Bantu Ethnic Group**

The Bantu are a group of people who speak related languages and have similar social characteristics. The Bantu are said to have originated from somewhere in the Congo region of Central Africa and spread rapidly to the southern and eastern Africa. In Uganda, there are several groups speaking different Bantu languages. It is because of this that it is notable that more than half of the population of Uganda are Bantu. The Bantu ethnic group includes the Baganda, the Banyoro, the Batooro, the Banyankole, the Bakiga, the Bafumbira, the Basoga, the Bagwere, the Banyole, the Bagishu and, the Basamia-Bagwe. They are found in the districts of Masaka, Mukono, Mpigi, Kalangala, Kiboga, Mbarara, Ntugamo, Bushenyi, Kabale, Kamuli and, Mbale among others in the central, Eastern, Western and South-Western regions of Uganda. They are mainly concentrated around the coast of Lake Victoria with very good soils and thus agriculture is their main source of livelihood. Though there are striking

similarities in language and customs among the different Bantu groups, each group has its own peculiarities in custom and other social arrangements.

#### **5.4.1 Customary practices of succession among the Bantu ethnic group**

Where a person dies intestate, a meeting of the clan leaders and deceased's relatives is called to appoint a customary heir and distribute the deceased's property. The clan elders therefore take the lead in conducting this meeting while the LC Chairperson is invited as a witness<sup>298</sup>. The surviving spouse identifies to the family the property of the deceased.

In the western region, the customary heir usually a male child of the deceased is given a spear while a girl is given saucepans and a hoe. The reason is that the boy is to protect the family from enemies using the spear while the girl should always prepare food for all the visitors who come to the home<sup>299</sup>.

Traditional practices when installing an heir include activities like covering the heir with a bark cloth, giving him a spear as a sign of empowering the heir with additional responsibility. It was pointed out that religiously especially to the Christians the practice of installing an heir involves giving that person a bible as well as conducting a service to pray for the heir<sup>300</sup>.

The deceased's brother is given responsibility to look after the surviving widow as the new husband. In case of death of one's wife, the widower has leeway to marry another wife. An elderly widow from a FGD in Rugando S/C, Mbarara district put it like this:-

*After the death of the man, the clan members and close relatives of your deceased husband sit down and select one of your brother- in- Law and who is given responsibility to look after you as your 'new husband'. In case he was already married, he can leave you and go back to his family. In most cases parting is not on a good note because sometimes he leaves after selling children's property. In case of the death of the wife, the widower is allowed to remarry.*

It was also noted that in case a will was left and the children do not respect it then elders are compelled to intervene and determine the affairs of the deceased. It was accordingly pointed out by an elder from Mbarara district in the following

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<sup>298</sup> Female orphan from a mixed FGD of orphaned boys and girls in Mbarara district.

<sup>299</sup> Female orphan from a mixed FGD of orphaned boys and girls in Kabarole district.

<sup>300</sup> Widower from a mixed FGD of widowers and widows in Kabarole district.

words “*Succession matters in this community are detailed in the will. Unless the children respect what was left behind in the will, the elders/clan members are made to handle*”<sup>301</sup>.

However some respondents had a contrary view. They noted that when a person dies everything stays put and the widow and children continue with their lives. In this respect, a participant in a FGD of widows in Ruganda S/C, Mbarara district said that “*Currently when a man dies that is the end, the widow takes full responsibility of her children and property left behind*”. On this note, another widow in Mbarara District on whom a case study was conducted exemplified it by remarking:-

*Weeks after burial, a clan meeting was held and all the property of the deceased was recorded and I was given the responsibility of looking after it. These included a car, a business building in Ntungamo town, cattle (5) and a home where I am currently residing including all the other children.*

Among the Basoga and Bagisu, it was established that the heir can be appointed by the deceased in his life time or the children can appoint the heir amongst themselves or the clan members can choose an heir. In Busoga, an heir is locally known as “*omusika*”. Where a person dies testate, the Clan leaders come with the will and identify the customary heir. The customary heir can be a boy or a girl who is a child of the home. If a girl child is responsible and capable of looking after her siblings, then she can be appointed an heir.

In Busoga it was intimated that in case a person dies intestate, shortly after burial usually 3 or 5 days, clan members call a meeting to install an heir of the deceased, distribute property and also see what to do for the widow. In some instances it was opined that clan members tell the children of the deceased to choose amongst themselves a capable child who can be the deceased’s heir and in case two different people are chosen a vote is cast and the heir is appointed.

In Buganda it was established that largely the female relatives such as the daughters, deceased’s sisters and widow who are responsible for selecting the customary heir. The selected person is then confirmed by the clan leaders. Selection here usually depends on one’s conduct, honesty, sense of responsibility, selflessness, calmness, and affection for others among other qualities. In cases where the eldest children are irresponsible, a young child can be appointed as the customary heir.

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<sup>301</sup> Elder from a mixed FGD of widows, widowers and elders in Mbarara district.

Regarding property distribution, the clan members and Bataka sit and distribute the property. The widows are asked to declare the property of the deceased. They are asked how the property should be distributed and usually decide to retain what they have been using. All this is recorded and kept by the omusika. It was noted that in distributing property, widows are given a small portion of the estate. The sons are given more than the daughters because the sons do not leave the home as the daughters do to get married. Where the children are young the property is not distributed but is left with the mother who controls it. It was revealed that the fathers in Mbale district give land to the wives when they are still alive to keep for their children's use hence land is not among the property that is distributed at the demise of the deceased.

The children of the girls don't take over their grandfather's land. They are forced to sell to buy elsewhere for their children. Before a girl child who has inherited land sells it elsewhere she must first consult the family members. There is a fear that once the children of daughters are allowed to stay on maternal land, they become a problem to the clan members. This is because they are viewed as outsiders who can kill clan members.

A guardian locally known as "*mukuza*" in Busoga is also appointed in the same meeting in which the omusika is appointed. The guardian is chosen by clan leaders to look after the property and children of the deceased.

In case a customary heir sells the family property he/she is considered 'bad' or a failure in his role as customary heir.

Among the Moslems, a mwalimu participates in burying the deceased and after 40 days calls clan members and distribute the property according to Sharia. This mode of distribution is peculiar to the moslems because no finding was made from any other religious group(s).

## **5.5 Luo Ethnic Group**

The Luo are said to have originated from southern Sudan. The Luo ethnic group is composed of the Acholi, the Langi, and the Alur tribes of the northern region of Uganda. They inhabit the districts of Gulu, Kitgum and Nebbi and largely practice mixed farming. They keep cattle, goats, sheep and fowl in addition to practicing agriculture. Their main food crops include sorghum, millet, simsim, cassava, potatoes and a wide assortment of beans.

### 5.5.1 Customary practices of inheritance among the Luo ethnic group

Where a person dies intestate, after burial and last funeral rites the family members notify clan leaders that the deceased had certain property, certain number of children and wife and for that matter a meeting should be called so that the property of the deceased is distributed. The clan members sit and distribute the estate.

The eldest male child of the deceased inherits the property. It is always assumed that the deceased prepared the eldest son as the heir to his estate and leader for the purposes of property distribution. Where the deceased has no son, a grandchild may be appointed as the customary heir.

The deceased's property is used to marry women for children when they finally grow up. For the young children, usually their mother is given such property to administer on their behalf until they have grown up. So a mother of the young children gets a bigger share compared to the rest of the beneficiaries.

The brothers of the deceased are accordingly given authority over the children and property as guardians. In other areas like Lango, any responsible and respectable person is chosen to be a guardian. This guardian could be the eldest son, deceased's brother, widow, or one of the clan leaders. It was categorically pointed out in this regard that girls are not appointed as guardians. It was however observed that in most cases brothers of the deceased always grab the deceased's property and exclude the widow and children from benefiting. In fact this is not only exclusive to the in-laws but also the children and other women of the deceased.

A widow from a FGD in Masindi district narrated to the researcher her ordeal in this way:-

*That upon the demise of her husband in 2008, her co-wife and children have been embroiled in a dispute about property. The deceased owned 180 acres of land that is being used by her co-wife and children to her detriment. The clan has not yet been useful in settling the dispute. That her intention is to have the property distributed but the deceased's family and her co-wife who has many adult children have resisted.*

The study further established that girl children hardly participate or benefit from the property distribution. The custom is in such a way that the females in that



home will get married and be provided for by their future husband and his family therefore there is no need for them to be given property. Except that, where such marriages fail, they can come back and be accommodated by the brother who benefited from the bride price received at the time of marriage.

It was also established that in cases of widow inheritance, the widow chooses a brother of the deceased to inherit her. However it was pointed out that the practice of widow inheritance is gradually being phased out due to fear of HIV/AIDS.

It also emerged among the Luo that if a woman dies, her heir is to be chosen from her parents' house or from her children. If the heir is from amongst the children then the guardian will be from their home.

## **5.6 Influences of customary practices on succession**

It was established across all the study areas that the existing customary practices of succession are a continuation of the practices that have been practiced from generations past. This is a fulfilment of the old saying that "*Old habits die hard*". Participants in Arua District had this to say;

*What is done today was done by our forefathers way back; we are also trying to follow what was done by them. People are also ignorant of the law; they would prefer to do things according to what they know.*

Even where there are wills, customs in some instances seem to override the wishes of the testator because custom and culture are very influential and respected. Custom and culture are also enforced largely by the male elders of the community who comprise of clan leaders. It was established that there were no female clan leaders in the different ethnic groups under study. Such lack of representation of the women on influential decision making organs is synonymous with the patriarchal nature of the Ugandan society. As a result, the women's voices and concerns are hardly heard and addressed resulting in discriminatory verdicts which are in most cases discriminatory and oppressive for the women and their young children. As such there is need for the relevant stakeholders to evoke the law of succession and sensitize members of the community about the legal provisions on succession for the protection of women and children's rights in matters of succession.

It was indicated that among the Basoga if the widow is not on good terms with the relatives of the deceased especially the 'mukuza', the clan can sit and decide

to chase the woman out of the matrimonial home. Yet the women are in most cases vulnerable, poor and illiterate and therefore unable to stand for their rights. Clan decisions are considered final and the victims are left with no option for appeal. Among the Baganda, it is common practice for the customary heir who is usually a son of the deceased to evict the widow from the matrimonial home which he claims he is entitled to as the customary heir. Such customary practices are against the law as it relates to instate succession which provides that a widows occupancy of the principal residential holding can only be terminated by remarriage, death, non occupancy for continuous period of six months, surrender in writing or by court order.<sup>302</sup>

Regarding property distribution, it was established that women and girl children are disinherited when the clan leaders sit to distribute the deceased's property. It was found to be a common belief among the ethnic groups studied that girls do not inherit land from their fathers because it is expected that they will get married and will benefit from their husbands' estates. In addition, the men interviewed were passionately against the idea of girls inheriting land and passing it on to their children. They argued that such children born to the girl child are non-clan members hence looked at with suspicion as people who are likely to cause conflict in the clan. At the same time, the widows are denied their rights to inherit a share of their husband's land for fear that they will sell it hence they are only given user rights. The land in most cases is inherited by the male children of the deceased and deceased's brothers. It is seen from the foregoing that women and girls are left in a dilemma as they are disinherited from both their fathers' and husbands' estates.

Such customary practices are blatantly discriminatory and against Articles 2 (2) and 32 (2) of the Constitution of the Republic of Uganda which prohibit discriminatory customary, traditional and cultural practices against marginalized groups especially women and children.

Asked why members of the different ethnic groups in the study continued to apply customary practices of succession despite its discriminatory and oppressive tendencies as opposed to the application of the law on succession, members cited several reasons for this choice.

Ignorance of the law where people resort to customary practices that they are familiar with stood out. This is fuelled by the inaccessibility to the laws and

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<sup>302</sup> Second schedule, rules 8 and 9 of the Succession Act

structures concerned with succession matters in their communities. According to members interviewed, the succession law is not known by many people in their communities and thus resort to following customary practices which they are familiar with. This was pointed out in a FGD in Moyo District in the following observation;

*The national law is not different from the traditional way of handling succession matters. The law makers documented and modified the practice of handling succession but did not come back to the people to tell them about the modified way of doing things so this being the case, the people have continued to do things their traditional way.*

It was also pointed out that the choice for customary practices of succession is influenced by the long and expensive legal processes unlike the quick and cheap customary processes. It was indicated that the customary practices of inheritance are to a significant extent simple to understand and foster family continuance<sup>303</sup>.

It was further indicated that customary practices are correctional in nature and not much punitive like the government laws. Other participants however indicated that customary practices of succession are characterised by greed which is mainly exhibited through property grabbing and connivance to disinherit rightful beneficiaries.

### **Recommendations**

- a) Communities should be sensitized by relevant stakeholders about the law and the procedures involved so as to enable people use the formal means and not the informal means.**
- b) Communities should be sensitized about their rights as enshrined in the 1995 Constitution of the Republic of Uganda.**
- c) The procedure for acquiring letters of Administration should be made easier.**
- d) There should be translation and simplification of the laws on succession.**
- e) There is need to discourage these discriminatory customary practices through massive sensitization of the communities about the law on succession.**

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<sup>303</sup> Common position from a FGD in Koro Sub-County Gulu district.

## 5.7 Nature of Property inherited

It was established by the study that the commonly distributable property of the deceased is land, animals (Cows, goats etc), houses apart from the home of the deceased's principal residence, vehicles, money left in the bank, businesses and banana or tree plantations<sup>304</sup>. respondents from Nebbi District said that personal effects of the deceased are also inheritable. They were however not consistent on who inherits the personal effects. While some said they are given to the mother's side others said that they are given to the brothers. Other respondents said that children are also inheritable property especially girls because they get married and bring wealth in the form of bride price. It was pointed out that the deceased's house and surrounding land are left to the widow and children if any although there are instances where this custom is not respected by greedy relatives. Where the family was polygamous in nature, every family retains the property they were using before the death occurred.

All participants generally agreed that there is a lot of gender discrimination surrounding who inherits what property to the disadvantage of women and girls. Only boys are given property while female orphans do not get any property. The customary heir takes the house and land. Widows are only given user rights over their deceased husbands' land and in most cases such widows are chased away from the land by their children especially the sons. Widows are given user rights because of the fear that they might marry someone else and give away the family land. Where a surviving spouse usually a widow has been separated from the deceased at the time of death, the estranged spouse does not benefit from the estate. However in other areas, it was stated that the female gender normally inherits personal property like clothes and, saucepans while the land, animals, ox-ploughs and bicycles are given to the male gender. The main reason advanced is that the females will grow and get married and their future lies with their husbands where as the boys have to remain and maintain the home. The married girls will thus leave the inherited property behind<sup>305</sup>. It was pointed out in Busoga that where girls are given land, they are forbidden from giving as gifts to their children or husbands neither can they sell it to non-clan members. If a daughter desires to sell a piece of land she inherited from her father, she is supposed to sell it to a clan member who in most cases buys the land at a giveaway price.

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<sup>304</sup> FGDs in the Western region mostly stated that banana and tree plantations are distributable property.

<sup>305</sup> Stated in all FGDs and in-depth interviews conducted.

In Busoga, members in a FGD were extremely passionate about this position and even threatened violence in case the law imposed it on them to allow girl children to inherit family land. They argued that among the Basoga, customary land tenure indicates that land was and is commonly owned by clans and thus it is only inherited by clan members. It is considered a great security risk for non clan members to 'invade' another clan's land be it by way of inheritance or purchase. Everything possible is done to ensure that clan land is passed on to a clan member hence promoting clan coherence. It was also reported that sometimes guardians connive with sons to steal land from the girls.

Among the Bagisu, girls are given cows and where there are no cows then land is demarcated and sold to give them money. Notwithstanding the moral behind these harsh restrictions it is unconstitutional for one to be restricted in the way he or she wants to deal in his or her property<sup>306</sup>. Participants from an FGD in Moyo District had this to say;

*There is discrimination between the male and the female in the distribution of the property of the deceased. Essentially preference is given to the male gender. It is the male gender who benefit out of the estate of the deceased that is the allocation of land, cows and goats. Widows usually benefit as they are left with the home so as to be able to bring up the children. In families where there are no boys, it becomes an issue. The women are blamed. But now people are looking at the benefits of girls and look at boys and girls equally.*

Much as there is outright discrimination in property distribution between the male and female gender, there is relief as this attitude is viewed by many as wrong and therefore the female gender should also be considered in the distribution of property.

It was noted from the study findings that regarding the property women or wives inherit, the customs vary. While in some places the home of the deceased together with the animals and the land that is cultivated are left for the widow and her children, in other places, it was reported that females do not get any property. Where the widow may seem to have got the property, it is just overseen together with the eldest son. An interview with a widow in Arua town revealed the following;

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<sup>306</sup> Article 26 of the Constitution of the Republic of Uganda 1995; cf. Section 39 of the Land Act, Cap. 227 as Amended.

*The man left a small sewing machine and some money in the bank but I have never received anything. Even the land was taken away. I reported to elders telling them my problems but I have been defeated and will be leaving my husband's place to go to my own place with the children because the relationship with my brother in laws was not been good, I decided to leave. Looking after the children has become a problem, because I cannot afford to pay school fees. The in-laws have refused to help in any way.*

The Constitution of the Republic of Uganda guarantees the right of widows and widowers to inherit the property of their deceased spouses<sup>307</sup>. The practice of widows not being left with the home of their deceased husbands is unconstitutional and therefore a negative practice.

It was reported that it is a common practice for customary heirs to abuse their authority. The customary heir in some cases sells off the property while some chase widows out of the matrimonial home and take occupation of the same. When this happens, the clan members intervene either on their own initiative or after being approached by the widow.

It was however pointed out that many people do not go to courts because they fear courts and its related challenges such as time wasting as they take long to determine matters before them, spending money on transport and other related costs. The would be court users keep away from courts due to these bottlenecks. They opt for customary ways of resolving succession disputes which arise out of property distribution. While some just suffer in silence, or resort to mob justice and in desperate cases witchcraft<sup>308</sup>.

To those who resort to customary ways of resolving succession matters, where it is established that there is mismanagement of the estate of the deceased by the person appointed to manage it, action is taken by the elders and clan leaders. The person can be cautioned or disowned and a new caretaker is appointed. An interview with a widow in a case study in Nebbi District revealed this;

*The In-laws especially the deceased's brother wanted to grab the land, and other things of the deceased but the clan leaders and elders intervoened in the matter and stopped him from interfering in the deceased's estate. Much as the bicycle was not returned, he was stopped from further interference.*

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<sup>307</sup> Article 31 of the Constitution of the Republic of Uganda 1995 as amended.

<sup>308</sup> Male participant from a FGD held in Namwendwa Sub-County in Kamuli district.

However, there are cases where even the clan people are involved in the grabbing of property as was revealed in an interview with a widow<sup>309</sup> in a case study in Soroti District;

*My husband died on the 13<sup>th</sup>/11/1999 in Soroti Main Hospital. He was working in BUSIA as a Police Officer. His body was taken to the village that day but we could not bury until his colleagues from Busia came for his burial which took place the following day. After the burial and immediately after the Police had left, the clan members especially the man's immediate relatives started demanding for the deceased's bank passbook. My late husband had written a will in favour of me and my children and they all knew this but they just ignored it and continued to grab the passbook and other properties. They also started harassing me with the aim of making me leave "their place/ land" my husband had anticipated this and warned me that these people could kill me because of our property in case he died and advised that in case of any problem, I report the same to the police (his friends) or the PSWO in Soroti.*

*After several disagreements and quarrels, I took these matters to the PSWO Soroti together with them and the PSWO asked them to come with evidence to support their claim to ownership but when the day came for presenting this evidence, they did not show up but we none the less went home( their homes) (me, the PSWO and the Police) and the PSWO told them that the house I was staying and all that I was using was my personal property and the same for my co-wife and that no item/ property should leave those compounds to go elsewhere. As soon as the police and the PSWO left, these people became so upset that they grabbed everything in the house and left it empty and even asked me to leave. I went back to the PSWO's office and told him everything and these people were eventually put in prison for two years and my things were returned.*

*Due to the love for peace, I went back and helped to secure their release but I seem to have worsened matters because they now just wanted to 'finish me off completely.' My friends told me that before the worst happens and in order to live, it is better to leave everything and just go away. I just left with the eight children and came to live in this camp. At first we were sleeping in those roofless classrooms (at the time) until we struggled and built that small house (mud & wattle) you are seeing.*

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<sup>309</sup> Janet Esiku from Moru Apesur IDP Camp, Soroti District.

*I come from Amuria and I am a total orphan that side because of the effects of these insurgences. Though those people did not/do not give anything to these to these children. We again tried to work together to procure my husband's gratuity but we were frustrated by the long and expensive procedures in the Ministry of Public Service. I now trade in fish in the market for survival and I am the Vice Chairperson of Teso Widows Development Initiative in this area and I move around teaching and counseling widows suffering the same (while crying). At least the situation has now changed because it is far better than the time my husband died. "If your organization can help me, I have the entire necessary document regarding my husband's working record. He was Mr. William Esiku, Police Officer – Busia Police Post.*

*As a consequence of these problems, my 8 children dropped out of school and most of them got married or have children. You can see those are some of my grand children (referring to 3 toddlers playing in the compound).*

In a FGD in Singila Village Moroto District, it was said that *"any perceived mismanagement of the estate by the administrator is resolved in a meeting called by a family and clan. The meeting makes a decision that is respected without any recourse to other means or appeal."* Through clan meetings the person especially the heir who is mismanaging the estate of the deceased is first cautioned so that he changes his behaviour. Where he does not change, the meeting of the clan can replace him with another person. It was indicated in a FGD in Acet Gwen Village in Soroti District that *"in case of any management problems the clan sits him/the heir down for advice and if that person cannot change, they remove such person from management of property"*.

In other cases, paralegals come in to help. However in some areas there is no action taken considering the fact that the person mismanaging the estate of the deceased is a child of the deceased and the fact that there may be no property left to salvage.

### **Recommendation**

- a) **Mass sensitization on the law of succession is needed.**
- b) **Prohibited discriminatory customary practices should be discouraged.**

### **5.8 Decision making by women in matters of inheritance of an intestate**



There were mixed reactions on whether or not women play any role in decision making in matters of succession in their communities. It was revealed that women's involvement is mainly limited to their attendance of family meetings which are headed by male clan heads. These women are not expected to be heard except when called upon to clarify on issues relating to the whereabouts of the husband's property, wife inheritance and issues regarding the number or identity of the children of the deceased. In an FGD in Oluko Sub-County Arua District it was said that;

*Women do not play any role in decision making in matters of inheritance because the woman has no say simply because the family of her deceased husband is not her family. If she wants to say anything she should do so in the family of her father and mother.*

On the other hand, other members observed that women are consulted on issues to do with children, the deceased's property and whom she would choose for remarriage. It was categorically stated by widows and widowers in Kabarole district as follows;

*Traditionally women never used to do so but today yes women (widows) are involved in deciding their own fate after losing their husbands. For instance, during the last funeral rites, widows are given an opportunity to make an informed decision regarding their status and how they wish to manage their affairs including looking after their children and the property left behind<sup>310</sup>.*

Similarly orphaned boys and girls in Kabarole district had a common position and thus said "Our mothers (widows) are entirely responsible for their property and how it will be shared among them"<sup>311</sup>. Other participants said that women only advise and others said that women make decisions only on those areas that are not contentious.

On the whole it was noted that women are not involved in decision making in inheritance matters. Men dominate decision making in matters of customary succession. Although women are allowed to be present in family meetings to decide what to do to the widow, children and property of the deceased is concerned, they are only attendants who are allowed to voice their concerns and to do other things regarding the meeting but not decision makers. A widow from a FGD conducted in Acet Gwen Village in Soroti District said that "*women are*

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<sup>310</sup> Mixed FGD of widows and widowers from Kabarole District.

<sup>311</sup> Mixed FGD of orphaned boys and girls Kabarole district.

*given opportunity to voice their opinion but are not the final decision makers. It is the men/clan that give the final decision". An elderly participant from Northern Division Headquarters Soroti District said that "even when present in the meeting, the woman does not influence anything apart from organising the meeting".*

### **Recommendations**

- a) Widows should be given a say in decision making in matters relating to succession.**
- b) Sensitization of the people on the principle of equality between men and women as enshrined in the 1995 Constitution of the republic of Uganda**

### **5.9 Effectiveness of customary practices of succession**

A significant number of the respondents were satisfied with the way succession matters are customarily handled save for a few shortcomings that were identified as discriminatory to the female gender. They therefore recommended that these practices should continue operating alongside the law. Participants from a FGD in Arua said that;

*"We are satisfied in the biggest portion. However there are some small things we would like to change like the women and girls who are being disinherited should have a say in decision making in the meeting of the family concerning succession matters. Widows should be given access to their deceased's money".*

*It was pointed out in an FGD in Soroti that; 'We are happy with our customary practice of the clan handling some of these affairs because they understand our cultural practices and are readily available to handle our matters at little or no cost. The clans should however be taught on how to implement women's rights.'*

According to an FGD in Moroto District, it was pointed out that;

*"We are satisfied with the way succession is handled in our community and should continue the way it is because nothing dissatisfying is happening."*

It was found that implementation of the law of succession is hampered in most cases by cultural and religious interference. The attitude as has been seen above points to the fact that customary and religious practices of inheritance are quick and cheap to use than the national law of succession therefore so many people prefer to apply customary and religious practices as opposed to following the lengthy and costly legal procedures.

The participants went ahead to make these suggestions; government should intervene to protect especially the widows and girls who should be considered in property distribution, clan members and relatives should be controlled especially when they are seen to be interested in grabbing the property of the deceased from widows and orphans, the surviving spouse more so the widow should be left to bequeath her property in the best way she sees fit and bring peace to her family, children of the deceased whether born in wedlock or outside wedlock should benefit equally because they are all children of the deceased, widow inheritance should be outlawed where it is still being practiced and, complicated cases that involve business assets should be handled by the law and finally customary practices should be harmonized with the law.

### **Recommendations**

- a) **The customary practices of succession should continue save for those practices that are unconstitutional.**
- b) **The positive customary practices of succession should be harmonized with the law.**

### **5.10 Perception on the growing influence and equality of women in property ownership and succession**

Study findings indicate that most people have embraced the growing influence and equality of women in property ownership and succession. Participants from a FGD in Arua district agreed that “women should own property “while those in Moyo district said that “women can now own property and inherit property”. It was pointed out that in case a woman dies, her property devolves either to the surviving spouse, children irrespective of gender or mother of the deceased. According to participants from Soroti district, women cannot own land but are allowed to own other property such as cows and crops. It was said so because land is customarily held by the clan hence women who are considered outsiders cannot own it.

However much as the equality between men and women in property ownership and succession has been embraced, there are still some pockets of resistance from members of the community who pointed out that women should not misunderstand this equality to mean that they can be men<sup>312</sup>. Women need to be sensitized so that they still play their motherly roles in the society but still also remain women and mothers. It was pointed out that women rights have caused

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<sup>312</sup> Female from a FGD in Koro Sub-County in Gulu district.

divorce and quarrels in families, and girls do not respect elders any more. They contended that when women acquire property through succession and work, they tend to become unruly hence fail in their marital duties. Therefore some men deliberately deny women their share to keep them in their 'subordinate position'.

### **5.11 Conclusion and Recommendations**

Customary practices of succession continue to influence the way succession matters are addressed in most of the communities in Uganda. Reference to the statutory law is made usually in cases where there is a conflict arising out of the management of one's estate. However, many of these customary practices negatively affect women and girls who are discriminated against. Much as the Constitution of Uganda provides for equality of all persons before the law<sup>313</sup> and goes ahead to prohibit customs and cultures which are against the interests of women or any other marginalised group<sup>314</sup>, such protective provisions are either unknown to the perpetrators or are just disregarded all together. The study findings revealed that customary practices of succession are very influential in succession matters in the different ethnic groups. There is therefore need to pay close attention to these customary practices by highlighting the negative customary practices that need to be eliminated. In addition sensitization should be conducted on the law of succession and other laws as well as putting in place systematic institutional interventions in succession matters at community and Gombolola levels to enhance record keeping and guide proceedings at that level. This will enhance the protection of the rights of the vulnerable and marginalized groups in succession matters.

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<sup>313</sup> Art. 21(1) (2) and (3) of the 1995 Constitution of the Republic of Uganda

<sup>314</sup> Art. 32(2) of the 1995 Constitution of the Republic of Uganda

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## LEGAL AUDIT OF SUCCESSION LAWS

Succession Act, Cap. 162; Commencement date-15<sup>th</sup> February 1906

IDENTIFIED GAPS	RECOMMENDATIONS
Definition of husband under <b>Section 2 (k)</b> of the Act; this section is only restricted to when one is intestate; thereby not taking into account of when one may die testate.	There is need to consider a situation where one dies testate.
<b>Section 2 (n) (i)</b> of the Act on legal heir; preference is to a paternal ancestor as opposed to a maternal ancestor.	There is need to consider a maternal ancestor as well.
<b>Section 2 (n) ii)</b> of the Act where there is equality arising from <b>subparagraph (1)</b> , a male is preferred to female.	There is need to put into consideration a female as well.
<b>Section 2 (w)</b> of the Act; the definition of wife is in cases of intestate, not in cases of testacy.	There is need to include cases of testacy.
<b>Section 3</b> of the Act provides for Interests and powers not acquired nor lost by marriage. This section does not cover exceptions where one acquires interest in the property of another by virtue of a marriage. A case in point being the provisions on family land and the proprietary interest created by marriage in the <b>Land (Amendment) Act of 2007</b> .	There is need to cover exceptions where one acquires interest in the property of another by virtue of a marriage.
<b>Section 18</b> of the Act provides for succession to movable property stating that, <i>“If a man dies leaving movable property in Uganda, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of Uganda”</i> . The language of the section presumes that it’s only men who have the capacity to hold/own movable property.	There is need to consider women as well because they too have the capacity to hold/own property.

IDENTIFIED GAPS	RECOMMENDATIONS
<i>Section 27</i> of the Act provides for the distribution of a male's intestate's property. This is a supposition that either females do not own property or cannot die intestate.	There is need to consider women as well because they too have the capacity to hold/own property, and/or can die intestate.
<i>Second schedule paragraph (1)</i> ; male to benefit from the residential holding until 18 years and yet girls are enjoying the holding up to 21 years. This disparity in age is against the constitutional provisions on equality and non - discrimination on grounds of sex for example. The same is repeated in <b>paragraph (2) and (3)</b> .	There is need to be consistent with and uphold the constitutional provisions on equality and non-discrimination.
<i>Paragraph 8 (c)</i> ; the 18 years for males and 21 years for females is repeated.	There is need to do away with the repetition.
<i>Paragraph 10</i> on offences; the six months imprisonment term and the fine of one thousand shillings imposed do not reflect the current law which provides that one month is equivalent to one currency point (twenty thousand shillings). The paragraph could be looked at with an intention of revising the sufficiency of the punishment imposed.	There is need to reconcile this and reflect the current law provisions which provide that one month is equivalent to one currency point (twenty thousand shillings). The sufficiency of the punishment should be revised.
<b>Section 35</b> of the Act provides for the approbation of settlement of the minor's property stating that it can only be done by the father and in his absence, by the High Court. No provision is made for the mothers and yet both parents are of equal standing.	There is need to make provision for the mother because both parents (mother and father) are equal in standing.
<b>Section 43</b> of the Act allows only a father to appoint a testamentary guardian for his child during minority. However no provision is made for the mother to do the same.	There is need to make provision for a mother to appoint a testamentary guardian for her child during minority.

IDENTIFIED GAPS	RECOMMENDATIONS
<p><b>Section 44</b> of the Act provides for statutory guardians. This section gives a list of who is to have guardianship upon the demise of the father of the infant, but there is no consideration for the demise of the mother.</p>	<p>There is need to consider demise of a mother.</p>
<p><b>Section 45</b> of the Act provides for the power of the court to remove a guardian stating that; <i>“Any court, other than a court presided over by a magistrate grade III, may, if it is satisfied that it is for the welfare of the infant—Remove from his or her office any testamentary guardian or any guardian appointed or acting by virtue of section 44; Appoint another guardian in place of the guardian so removed; Vary the order of priority specified under section 44.”</i>The mention of grade three magistrates is redundant since they were phased out.</p>	<p>This provision needs to be removed (repealed) since Grade III Magistrates are redundant.</p>
<p><b>Section 252</b> of the Act provides that no letters of administration or probate may be granted unless a certificate from the assistant estate duty commissioner is produced in the High court. The question to note: Who is this commissioner and is it still relevant today?</p>	<p>There is need to establish who is meant or referred to as the commissioner in the provision, and the provision as it is still relevant today.</p>
<p><b>Section 263</b> of the Act provides that court is to preserve all original will records until a public registry for wills is established and the minister should make regulations for the preservation and inspection of the wills so filed. Question to note: What is the practice and have that office and regulations been put in place?</p>	<p>There is need to determine as to whether the office and regulations are in place, and the relevance of this provision today.</p>
<p><b>Section 269</b> of the Act provides for the liability of an executor of his or her own wrong to account for such property that came into his or hands.</p>	<p>Question to note: Should there not be an offence created in addition but not in derogation of accounting?</p>

**Estates of Missing Persons (Management) Act 1973 (CH 159);  
Commencement date-1<sup>st</sup> October, 1973**

<b>IDENTIFIED GAPS</b>	<b>RECOMMENDATIONS</b>
<p><b>Section 3</b> of the Act provides for the general jurisdiction of the courts vis-à-vis estate values; this section needs to be reviewed so as to conform to the current estate values.</p>	<p>There is need for review of this section in order for it to conform to the current estate values. For example under <b>Section 3 (1) (a)</b> a magistrate grade II has jurisdiction if the value of the estate does not exceed ten thousand shillings</p>
<p><b>Sections 9 (ii), 10 (4) and 11(2)</b> of the Act.</p>	<p>There is need for correlation between the fine and imprisonment term imposed.</p>
<p><b>Section 12</b> of the Act on insurance.</p>	<p>There is need to cross- check with the current law on insurance to establish and ensure conformity.</p>

**The Local Council Courts Act, 2006; Commencement date-8<sup>th</sup> June, 2006**

<b>IDENTIFIED GAPS</b>	<b>RECOMMENDATIONS</b>
<p>The local councils have powers or role in Succession Matters which include; mediating in a situation where the rights of a child are infringed upon and, especially with regard to the protection of the child's right to succeed to the property of his or her parents and all the rights accorded to a child. These powers do not include any powers of distribution of the property by the Local Councils. Local councils are very influential in the communities in which they operate as they have day-to-day interaction with the majority of the people that usually face the injustices perpetrated. However, most local council officials are not adequately trained making them open to challenges such as reliance on negative cultural practices, involvement in property grabbing and procedural anomalies</p>	<p>There is need to establish the effectiveness of the role of Local Councils in the area of succession, and to also ascertain their operational challenges as they engage in their role as an institution that is involved in succession matters.</p>

among others. Local council's also adequate lack resources to enable them function effectively.	
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**Trustees Incorporation Act CAP 165; Commencement date-31<sup>st</sup> May, 1939**

<b>IDENTIFIED GAPS</b>	<b>RECOMMENDATIONS</b>
The Minister responsible is not defined.	There is need to define the Minister responsible
<b>Section 17</b> of the Act makes reference to the Land (Perpetual Succession) Ordinance; this is an obsolete law.	There is need to remove this provision of the law (repeal)

**The Administration of Estates by Consular Officers Act CAP 154; Commencement date-8<sup>th</sup> April, 1940**

<b>IDENTIFIED GAPS</b>	<b>RECOMMENDATIONS</b>
The Act is supposed to give consuls in Uganda a right to administer estates of foreigners who die in Uganda or who die outside Uganda but leave property in Uganda. The countries it is to apply to are to be listed in the schedule, yet all the schedule says is that the list of those countries ceased to have effect in relation to Uganda as of 31 <sup>st</sup> December 1964.	The law is redundant since it applies to no particular country.
<b>Section 2</b> of the Act provides for powers of trustees one of which is to hold land, but they are not to hold more than 2 acres of land without first writing to the President.	This restrictive part of the provision is not necessary as long the holding of the land arose from a legal transaction.

**The Administrator General Act CAP 157; Commencement date-15<sup>th</sup> August, 1933**

<b>IDENTIFIED GAPS</b>	<b>RECOMMENDATIONS</b>
Section 2 (5) of the Act.	The value of the estate needs to be made realistic since it is put at an amount of two thousand shillings only.
Section 9 of the Act.	The value of the estate needs to be made realistic since it is put at an amount of two thousand shillings only.
Sections 11(2), 12(4) and 13(2) of the Act provides for the fine and imprisonment term.	This needs to be revised as well ensuring compliance to the present law on fines and the corresponding imprisonment term.
Section 17(e) of the Act provides for powers of the Administrator General to destroy any information if not claimed by the parties concerned.	There is need to provide for notice to be given by the Administrators General before he or she can destroy any document or information.
Section 20 of the Act provides for fees and expenses of the Administrator General to be a first charge on the estate after funeral services. This is not cross-referenced in sections 280, 281, 282 and 283 of the Succession Act which lay down the priority in which debts are to be paid.	There is need to cross-reference the provision of Section 20 on fees and expenses of the Administrator General to be a first charge on the estate after funeral services in sections 280, 281, 282 and 283 of the Succession Act which lay down the priority in which debts are to be paid.
Section 30(3) of the Act provides for the gross value of assets to be at ten thousand shillings. This is very unrealistic.	This is very unrealistic and needs to be looked into.
Section 37 of the Act provides for the value of the estate.	This is not commensurate with the times and needs to be reviewed.

**The Administration of (Small Estates) (Special provisions) Act CAP 156;  
Commencement date-6<sup>th</sup> June, 1972**

<b>IDENTIFIED GAPS</b>	<b>RECOMMENDATIONS</b>
<p><b>Sections 2(1), (a), (b), (c) and 7(2)</b> provide for the value of small estates.</p>	<p>These sections need to be reviewed and amended so as to reflect and conform to the current estate values.</p>
<p><b>S. 2</b> on Jurisdiction to grant probate, etc. of small estates.</p>	<p>This needs to be reviewed. The civil jurisdiction of Magistrates was increased in the MCA (Amendment) Act no. 7 of 2007 and The Administration of Small Estates (Small Estates) (Special Provisions) (Amendment of Jurisdiction Magistrates Courts) Order, S.I 20 and 21 of 2009. A chief Magistrate's jurisdiction was increased from 5 million Shillings to 50 million shillings while that of a Magistrate Grade 1 was increased from 2 million to 20 million shillings.</p>
<p><b>S.8</b> on probate rules; the Minister may in consultation with the Chief Justice make probate rules.</p>	<p>The question is; Are these rules in place and up to date?</p>
<p><b>Section 10</b> on Applications under the Act; <b>Section 10 (4)</b> excludes the application of <b>part XXXI</b> of the succession Act from application made under this Act. This creates a lacuna in the application process which is far shorter and with few or no back stopping mechanisms to check fraudulent applicants.</p>	<p>There is need to strengthen the application process even in cases of small estates especially now that the jurisdiction of Magistrates has been enhanced.</p>
<p>Under <b>Section 10(5), Section 5</b> of the Administrator General's Act which requires an applicant for letters of Administration to give notice or seek consent from the Administrator General by the issuance of a certificate of No objection does not apply in matters of Small estates.</p>	<p>This provision needs to be reconsidered in light of the fact that applicants for probate and Letters of administration are abusing it by applying to Magistrates' courts even in matters where the gross value of the estate exceeds the civil jurisdiction of such magistrates' courts.</p>

