

Volume 52 Issue 3

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**Recommended Citation:** Lawrence Alado & Reagan Siima Musinguzi (2023); “Defending the Right to Love: A Case for Registration of Customary Marriages” Volume 52 Issue 3 Makerere Law Journal pp.186-218

**DEFENDING THE RIGHT TO LOVE: A CASE FOR REGISTRATION OF  
CUSTOMARY MARRIAGES.**

Lawrence Alado and Reagan Siima Musinguzi\*

**ABSTRACT**

*Customary marriages occur frequently in Uganda, but the inability to prove these marriages has resulted in many parties being unfairly deprived of the benefits and rights that come with being legally married. This paper argues for the mandatory registration of customary marriages to safeguard these rights. The authors conduct a comprehensive analysis of the existing frameworks governing customary marriages by identifying the gaps within the framework, examining the advantages that would arise from mandatory registration, addressing potential challenges, and outlining how the registration process should be carried out. The authors contend that the failure to mandate registration denies spouses and their offspring the rights that they are entitled to as a result of their marriage.*

**1.0 INTRODUCTION**

On June 3, 2016, Ms. Damalie Kantinti attempted to object to a marriage that was taking place at All Saints Cathedral in Kampala. She claimed that Mr. Sonko, the groom, was her husband. They had a traditional marriage in 2006 and had been together for five years, with four children as their marital issues. The couple had marital problems, which led to Mr. Sonko leaving their marital home and attempting to marry another woman.

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\* Third-year law students at Makerere University. We are grateful to the virtuoso team at the Makerere Law Journal for making necessary editing that we could not make. All mistakes and errors are ours.

Ms. Kantinti's requests to enter the church were denied because her marriage certificate was not registered when she was asked to present it. To her chagrin, the wedding went off without a hitch. The Reverend Diana Nkesiga, who officiated the wedding, was widely chastised for marrying the couple before the groom dissolved his traditional marriage. The Reverend's defence was that a marriage that was not registered with the government was not legally recognized.<sup>1</sup>

This is the quandary that the current position on the registration of customary marriages poses, and it is all too common. In this paper, we emphasize mandatory registration of customary marriages as the best option the state has for securing the constitutional rights of customary couples, particularly the right to love and receive the benefits that come with it. The goal of this paper is to advocate for the registration of all marriages and the use of a single registration system for all people, regardless of race, religion, or community.<sup>2</sup>

In this three-part analysis, we will first trace the history of customary marriages, then demystify the form of marriage and its legal positioning in Ugandan jurisprudence, then discuss the importance of customary marriage registration, and finally make recommendations that should be implemented.<sup>3</sup>

### **1.1. What is a Customary Marriage?**

Customary marriage is the most popular form of marriage in Uganda<sup>4</sup> and is the most convenient way of creating a matrimonial relationship for the majority of

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<sup>1</sup> Ainebyoona E., All Marriages Must Be Registered – Government. Daily Monitor Newspaper Article published on the 6<sup>th</sup> of June 2016. < <https://www.monitor.co.ug/uganda/news/>.> [Accessed 5 November 2022]

<sup>2</sup> The paper is intended to have the same effect as the 1968 Report of the Commission on the Law of Marriage and Divorce in Kenya, in which it was noted by the Commission, that because of the difficulty of proving customary marriages and the several conundrums that come from it, there should be mandatory registration of customary marriages and other forms of marriages in Kenya.

<sup>3</sup> See, the Report on Laws on Registration and Divorce of Marriage by the 18th Law Commission. Available at <<https://indiankanoon.org/doc/185208939/>> [Accessed 14/10/2022].

<sup>4</sup> Mujuzi, J. D. (2013). The Ugandan Customary Marriage (Registration) Act: a comment. *Journal of Third World Studies*, 30(1), 171-191.

Ugandans.<sup>5</sup> A customary marriage is one celebrated according to the rites of an African community and one of the parties.<sup>6</sup> Section 1(b) of the Customary Marriages (Registration) Act, defines a customary marriage as “a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community, or any marriage celebrated under Part III of this Act.”<sup>7</sup>

The definition in the Act, however, excludes the aspect of the customary community's collective responsibility. For the purposes of this discussion, we will use J. C. Bekker's definition, which states that it is "a union that creates reciprocal rights and obligations between the spouses for which their respective family groups are collectively responsible."<sup>8</sup>

Marriage in Uganda is a social institution that involves many interests exceeding those of the two individuals getting married, at times involving the entire community.<sup>9</sup> A vivid illustration of the benefit accrued to society with marriage is that it has an interest in the lineage group,<sup>10</sup> the establishment of alliances as well as providing domestic services for the society as a whole. Individual interests are viewed within the wider interests of the community.<sup>11</sup>

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<sup>5</sup> The other forms of marriage are Civil Marriages and Christian Marriages governed by the Marriage Act (Chapter 251); Hindu Marriages governed by the Hindu Marriages and Divorce Act (Chapter 250); Muslim Marriages governed by the Marriage and Divorce of Mohammedans Act (Chapter 252).

<sup>6</sup> Section 1(b), Customary Marriages (Registration) Act, Cap 248 Laws of Uganda

<sup>7</sup> Section 1(b), Customary Marriages (Registration) Act, Cap 248 Laws of Uganda.

<sup>8</sup> J. C Bekker & M Buchner -Eveleigh, The legal character of ancillary customary marriages, available at <<http://www.dejure.up.ac.za/images/files/2017.pdf>> [Accessed 11 November 2022]

<sup>9</sup> See generally, Irene Among, “Gender and Social Inclusion Analysis: Uganda”. Publication produced for review by the United States Agency for International Development, August 2017. Available at: <<https://www.usaid.gov/sites/1860/08.23.17.pdf>> [Accessed 6 December 2022]

<sup>10</sup> Customary marriage is typically guided by the traditional norms and practices of a community and is unregulated by national legal statutes on marriage, including those governing inheritance and the division of property

<sup>11</sup> Roscoe Pound, Interests of Personality. Harvard Law Review, Feb. 1915, Vol. 28, No. 4 (Feb. 1915), pp. 343-365 Published by: The Harvard Law Review Association Stable. Available at <https://www.jstor.org/stable/1326270>. [Accessed 6 December 2022]

Consequently, customary marriage is considered more of a social rather than a legal institution.<sup>12</sup> In the African setting, a man needed many sons to ensure the survival of the lineage and to increase his power within the clan, and daughters, who by their marriages would swell his herds and create beneficial alliances with other clans.<sup>13</sup> As members of the family, children were also important participants in the household economy. The whole clan thus had an interest in the children of its members, their upbringing, socialization, and eventually, marriage.

Moreover, the role of the wider family and community in marriage in Africa is not only limited to the couple but also extends to the upbringing and socialization of children, as they are seen as important participants in the household economy, and the clan has a vested interest in their future marriage. It would be perverse to argue for the abolition of the role of the wider family and the community in marriage in Africa.<sup>14</sup> Customary marriage is typically guided by the traditional norms and practices of a community and is celebrated according to the rites of an African Community in which one of the parties to the marriage must be a member.<sup>15</sup>

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<sup>12</sup> Bonthuys, A Patchwork of Marriages: The Legal Relevance of Marriage in a Plural Legal System. *Oñati Socio-legal Series*, 2016, 6 (6), 1303-1323. Available at: <<https://ssrn.com/abstract=2891014>> [Accessed 6 December 2022]

<sup>13</sup> Children are at the centre of the African concept of marriage as an arrangement serving interests wider than the immediate needs of the spouses

<sup>14</sup> This was expressed by Nhlapo in the book 'The African Family and Women's Rights: Friends or Foe's?' 1991 *Acta Juridical* 135 143.

<sup>15</sup> Bemanya Twebaze (Register General), Press Statement on Registration of Marriages in Uganda, URSB. 2016. <<https://www.jlos.go.ug/index.php/com-rsform-manage-directory-submissions/>> [Accessed 11 November 2022]

They are thus governed by customary law; the unwritten rules which have been developed from the tradition and practices of communities in Uganda.<sup>16</sup> Since it is unwritten, customary law is characterized by dynamism and flexibility as it develops and takes on different permutations in response to changing circumstances.<sup>17</sup>

Unlike civil marriages, customary unions occur gradually and are not defined by the occurrence of a single event like the signing of an official document.<sup>18</sup> The fluid nature of customary law, and the fact that it is unwritten, poses a challenge in determining its applicability, and to what extent it is relevant.<sup>19</sup> Particular customary laws are recognized as part of the laws in Uganda under Sections 14 and 15 of the Judicature Act.<sup>20</sup>

The way customary marriages are conducted varies from community to community. This was recognized in *Mifumi (U) ltd & 12 Others V Attorney General & Another*,<sup>21</sup> where Justice Tumwesigye took judicial notice of the custom of bride price. He observed that customs vary from tribe to tribe, and there is no

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<sup>16</sup> According to Ssekandi, "Customary law is indigenous to our soil and flourishes and will continue to flourish whether or not attempts are made to kill it, as was notoriously the view of some jurists at the time of independence. Attempts have been made to incorporate it in statutes, e.g., adultery and elopement, which were codified in the Penal Code, and rules of succession in the Succession Act. The cases that go to court under the statutes, however, are but a drop in the ocean compared to the many others that are decided in the courts based on the evidence of existing custom or solved under the mango tree, outside the judicial system, by elders administering customary law." Ssekandi, Francis M, "Autochthony: The Development of Law in Uganda". NYLS Journal of International and Comparative Law: 1983, Vol. 5: No. 1, Article 2. Available at: <<https://digitalcommons.nyls.edu/>> [Accessed 06th December 2022]

<sup>17</sup> Dr. Winifred Kamau, CUSTOMARY LAW AND WOMEN'S RIGHTS IN KENYA. Equality Effect, p. 2. Available at <<http://theequalityeffect.org/wpcontent/.pdf>>[Accessed 06th December 2022]

<sup>18</sup> A broader discussion can be found in Ward, W. P. (1990). *Courtship, love, and marriage in nineteenth-century English Canada*. McGill-Queen's Press-MQUP.

<sup>19</sup> Wafula Fred, "A Critical Analysis of the Evolution on The Law Governing Divorce in Customary Marriages in Uganda". Available at <<https://ir.kiu.ac.ug/.pdf>> [accessed 10<sup>th</sup> November 2022]

<sup>20</sup> This provision sets a prerequisite for customary law to be applied as the law should not be repugnant to natural justice, equity, and good conscience and should be compatible with written law. Therefore, customary law that is inconsistent with written law such as marrying off of children or killing of twins is not applicable in Uganda.

<sup>21</sup> Constitutional Appeal No. 02 OF 2010

universal form of customary marriage. One of the major reasons why customary marriage registration has not been emphasized is that this type of marriage was not legally recognized in Ugandan history.

## **2.0. RECOGNITION OF CUSTOMARY MARRIAGES IN UGANDA'S HISTORY**

To fully appreciate the position in *Mifumi* above, we must begin with a brief study of how customary marriages were treated under British colonial rule. The history of customary marriages in Uganda is complex and rich because originally, they were not considered by the colonialists as legal relationships. As far back as 1917, only 23 years after the British took over Uganda, a British Judge Justice Hamilton dismissed the concept of customary marriages and equated them to mere 'wife purchases'.<sup>22</sup> This was the position for many years during colonial rule.

This position was not any different from other British colonies in Africa that also did not recognize the concept of a customary marriage. Notably, in the South African case of *Nquobela V Shikele*,<sup>23</sup> the existence of customary marriage was rejected by Chief Justice De Villiers:

*A union...founded only upon native usages and customs within the colony proper is not a marriage... In the absence of special legislation recognizing such a union as a valid marriage, courts of law are bound (however much they may regret it) to treat the intercourse, I will not say as immoral, but illicit...<sup>24</sup>*

In pre-independent Uganda, customary marriages were not recognized by statute law and as a result, there was no need for registration. The laws not only did not protect customary marriages, but they also did not recognize them as marriages<sup>25</sup> on the same level as all other types of marriages with the same

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<sup>22</sup> *R V Amkeyo*, 7 E.A.L.R. (1917)

<sup>23</sup> (1983) 10 JUTA 346

<sup>24</sup> *ibid*

<sup>25</sup> Bojosi Othlogile, "Is Customary Marriage a "Union"?" Botswana Notes and Records, 1989, Vol. 21 (1989), pp. 61-66, available at <<https://www.jstor.org/stable/>> [Accessed 11 November 2022]

benefits accrued to them. The non-recognition of customary marriages, which were mostly polygamous, had a huge impact on people involved in these marriages, as they were denied legalization and recognition of their rights.<sup>26</sup>

This position was however changed after independence when Sir Udo Odoma, CJ in a landmark ruling,<sup>27</sup> declared that the non-recognition of customary marriages was an error in law and fact. He stated:

*“In my opinion, the views expressed by the learned chief magistrate are both extraordinary and dangerous having regard to the situation and the social structure of Uganda and the different and complex forms of marriage recognized by laws of Uganda.”<sup>28</sup>*

The recognition of customary marriages was a major leap because they are the basic standard for matrimonial institutionalization in Uganda.<sup>29</sup> Customary marriage is the norm in rural Uganda, with very few couples opting to have statutory marriages.<sup>30</sup> The reasoning behind this is that many Africans believe that once they marry under statutory law, radical changes take place in the applicability of their personal lives, as they can no longer practice polygamy and their ability to get divorces as well as the succession of their property is dependent on English law.<sup>31</sup>

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<sup>26</sup> JG Horn & AM Janse van Rensburg Practical implications of the recognition of customary marriages, (2002) Journal for Juridical Science 27(1): 54-69, available at <<https://journals.ufs.ac.za/index.php/jjs/article/download/2829/2745>> [Accessed 11 November 2022]

<sup>27</sup> *Alai v Uganda*, [1967] EA 596

<sup>28</sup> Id.

<sup>29</sup> Ojok D. 2017. The Socio-legal Dynamics of Customary Marriage in Uganda; CEPA Policy Series Paper Number 7 of 2017. Kampala. Available at <<https://cepa.or.ug/wp-content>> [Accessed 12 October 2022]

<sup>30</sup> Cheryl Doss, Mai Truong, Gorrettie Nabanoga, and Justine Namaalwa, Women, marriage and asset inheritance in Uganda. Working Paper April 2011 No. 184, Chronic Poverty Research Centre www.chronicpoverty ISBN: 978-1-906433-90-1, p. 5. Available at <<https://www.files.ethz.ch/isn/128555/>> [Accessed 6 December 2022]

<sup>31</sup> H.F Morris, The Development of Statutory Marriage Law in Twentieth-Century British Colonial Africa, Journal of African Law, Spring, 1979, Vol. 23, No. 1 (Spring, 1979), pp. 37-64 at p 37



The Customary Marriages (Registration) Act is the most recent legislation enacted to govern this form of marriage in Uganda,<sup>32</sup> arising partially, from the works of the 1965 Commission of Inquiry into Marriage, Divorce and Status of Women. The Commission, also known as the Kalema Commission, was formed to investigate the structural inequalities embedded within Uganda's family law.<sup>33</sup> Many of the provisions recommended by this commission were ignored, save for a few provisions that were incorporated in the Succession (Amendment) Decree of 1972 and the Administration of Estates Decree of the same year.<sup>34</sup>

### **3.0 THE LEGAL POSITION ON CUSTOMARY MARRIAGES POST-1995.**

Preserving culture was one of the long-term targets envisaged by the drafters of the 1995 constitution of Uganda.<sup>35</sup> Objective XXIV of the National Objectives and Directive Principles of State Policy in the Constitution provides that the cultural values of the Ugandan nations will always be protected and promoted.<sup>36</sup> The institution of customary marriages is protected in the Constitution.

Article 37 not only protects the right to engage in lawful cultural practices, but Articles 21 and 33 of the Constitution prohibit laws, cultures, customs, or traditions that are contrary to the dignity, welfare, or interest of women or undermine their status.<sup>37</sup> Further still, the Uganda National Culture Policy provides that “[e]verything shall be done to promote a culture of cooperation, understanding, appreciation, tolerance, and respect for each other's customs, traditions and beliefs.”<sup>38</sup>

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<sup>32</sup> This can be attributed to the fact that customary marriages were only recognized as legally binding marriages in 1967 after the ruling in *Alai V Uganda*

<sup>33</sup> Bakibisemu Edrine, “An Examination On The Right Of Women On Inheritance And Ownership Of Property In Marriage”. A Research Dissertation Submitted to the School of Law in Fulfilment of the Requirements for the Award of a Diploma in Law of Kampala International University in Uganda, APRIL, 2019, p. 10.

<sup>34</sup> Maria Nassali (ed), *The Politics of Putting Asunder; Divorce, Law and the Family* 2017, p 37.

<sup>35</sup> The 1995 Constitution of Uganda.

<sup>36</sup> Objective XXIV of the National Objectives in the Constitution.

<sup>37</sup> See Justice Tumwesigye in *Mifumi v Attorney General* (Supra)

<sup>38</sup> Objective 7.7 of the Uganda National Culture Policy.

Through these provisions in the *grund norm*, it is clear that the framers of the Constitution intended to protect the institution of the family with respect to culture. Customary marriages are not formally governed by the government, but they are legally recognized by the Customary Marriage (Registration) Act, which requires those marriages to be formally registered with the government, as will be seen later. This legislation, in its entirety, is a comprehensive blueprint for traditional marriages in Uganda.<sup>39</sup>

Even though non-registration does not affect the validity of a customary law marriage, in practice the absence of a registration certificate severely affects the spouses.<sup>40</sup> A registration certificate is, therefore, a necessity to access marital benefits such as pension, inheritance, and several others.<sup>41</sup> Proponents of registration of all marriages raise several justifications for its necessity.<sup>42</sup> It is generally true that marital legalization strengthens the position of women in their homes and lessens their likelihood of being unfairly divorced, and mistreated when it comes to property inheritance. In fact, the Kalema Report of 1965 recommended customary marriage registration as an antidote to this conundrum.<sup>43</sup>

Since its passage, the Customary Marriage (Registration) Act has been criticized for various constitutional flaws as well as violations of international human rights obligations that Uganda has ratified.<sup>44</sup> The Act acknowledges and

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<sup>39</sup> Ojok D., *The Socio-legal Dynamics of Customary Marriage in Uganda*; CEPA Policy Series Paper Number 7 (2017) Kampala, Available at <<https://cepa.or.ug/wp-content/#>> [Accessed 12 October 2022]

<sup>40</sup> *The registration of customary marriages: Banda v General Public Service Sectoral Bargaining Council* (JR3273/2009) (26 February 2014)

<sup>41</sup> See De Souza 'When non-registration becomes non-recognition: Examining the law and practice of customary marriage registration in South Africa' 2013 *Acta Juridica* 239-272 at 244 for the effect non-registration of a marriage has on children.

<sup>42</sup> One of the most compelling arguments is that with all marriages registered, there would be a compiled marriage database that would be a safeguard against bigamy, polygamy, and polyandry all of which are illegal in Uganda.

<sup>43</sup> *Ibid* n (15)

<sup>44</sup> See Gaffney-Rhys, R. (2011). International law as an instrument to combat child marriage. *The international journal of human rights*, 15(3), 359-373.

recognizes that a girl above the age of sixteen can get married customarily,<sup>45</sup> yet condones the marriage of men below the age of 18 years. This is even though the constitution of Uganda states that marriages should be between a man and a woman above 18.<sup>46</sup> The Constitution provides that the laws should be non-discriminatory and apply to everyone irrespective of their gender.<sup>47</sup> These provisions are also contrary to Article 28(2) of the African Charter on Rights and Welfare of the African Child, which was ratified in 1994.<sup>48</sup>

The Act recognizes the registration of marriages, but it does not specifically address the rights and obligations of each party during the marriage, it is particularly silent on the procedure necessary (if any) to dissolve a customary marriage.<sup>49</sup> The Uganda Registration Services Bureau (URSB) estimated in 2016 that up to 70% of couples under the age of 40 had not registered their customary marriages in their database. The actual figure could be higher given that the majority of Ugandans, including the elite, are unaware of customary marriage registration.<sup>50</sup>

#### **4.0 CUSTOMARY MARRIAGE REGISTRATION**

Registration of customary marriages, like registration of any other marriage in Uganda is not considered significant.<sup>51</sup> The Constitution provides for the

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<sup>45</sup> Customary Marriage Registration Act Section 11

<sup>46</sup> Constitution Article 31

<sup>47</sup> Constitution Article 21

<sup>48</sup> It provides that "[c]hild marriage ... shall be prohibited and effective action shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

<sup>49</sup> *ibid* n 7

<sup>50</sup> *ibid* n 10

<sup>51</sup> Several countries also do not recognize the registration of customary marriages, for example, in Ghana, The Customary Marriage and Divorce (Registration) Law 1985 provided for the proper registration of customary marriages and divorces, and was retroactive (i.e., applied to customary marriages and divorces contracted before, as well as after, its enactment). According to the Law, non-compliance was punishable by fine or imprisonment, but the marriage would still be regarded as valid. However, the Customary Marriage and Divorce (Registration)(Amendment) Law 1991 was later enacted and it provided that the registration of customary marriages and divorces would no longer be mandatory.

conditions precedent for any marriage, but does not make mention of registration as one.<sup>52</sup> The Customary Marriage (Registration) Act is a comprehensive blueprint for traditional marriages in Uganda.<sup>53</sup> It also provides that marriage districts are sub-counties, town councils, and municipalities where the customary function took place.<sup>54</sup> Furthermore, under the Act, sub-county chiefs and town clerks are given authority as marriage registrars and are required to have a customary marriage registration book in their possession, where they also record the necessary settlements agreed upon and completed by the parties.<sup>55</sup>

According to Section 6 of the Customary Marriage (Registration) Act, the married couple is required to go to the office of the sub-county chief or town clerk within six months to register the details of their traditional matrimonial union. When the couple, their witnesses, and the marriage registrar sign the prescribed certificate form, the registrar issues the parties a customary marriage certificate, which must be registered with the Uganda Registration Service Bureau (URSB).<sup>56</sup>

Section 20 of the Customary Marriage (Registration) Act makes non-registration illegal by penalizing any marriage that is not registered within six months. The section states that "[t]he parties to a customary marriage who fail to register their marriage within the time specified in section 6 commit an offence and are liable to a fine not exceeding five hundred shillings."<sup>57</sup>

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<sup>52</sup> Article 31 (1) of the Constitution provides that "[a] man and a woman are entitled to marry only if they are each of the age of eighteen years and above" and clause 31 (2a) only puts a bar on same-sex marriage.

<sup>53</sup> Ojok D. 2017., *ibid* at 5.

<sup>54</sup> Section 2 (1) of the Act provides that "[E]very sub-county, the city of Kampala, the municipalities of Jinja, Masaka, and Mbale and every township specified in the First Schedule to this Act shall be a marriage district for the purpose of the registration of customary marriages under this Act." Subsection 2 gives the Minister of Justice and Constitutional Affairs the authority to divide or create new marriage districts."

<sup>55</sup> Section 3 of the Act provides that "[A]ll sub county chiefs and the town clerks of the city of Kampala, the municipalities of Jinja, Masaka, and Mbale and the townships specified in the First Schedule to this Act shall be registrars for their respective marriage districts."

<sup>56</sup> *Ibid.* n (7)

<sup>57</sup> Section 20 of the Customary Marriage (Registration) Act

These legal provisions state that failure to register a customary marriage does not invalidate that marriage, but it is an offence that attracts a fine not exceeding five hundred Ugandan shillings.<sup>58</sup> According to Mujuzi, section 20 should be read together with section 8, which provides that a Registrar of a marriage district may register a customary marriage after the expiration of the six-month period specified in section 6 on payment of such fee as may be prescribed.<sup>59</sup>

Other sections of the Customary Marriage (Registration) Act operationalize sections 6 and 20. This includes sections like 4 (1) which stipulates that customary marriages may be celebrated in any part of Uganda,<sup>60</sup> and section 5 which provides that a registrar of marriages shall register customary marriages in a book called customary marriages register book.<sup>61</sup> Section 7 requires the registrar to issue a certificate to both parties at the registration of a customary marriage,<sup>62</sup> and section 8 requires the Registrar to register a marriage settlement.<sup>63</sup>

These provisions were discussed in *Steven Bujara v Polly Twengye Bujara*,<sup>64</sup> where the respondent filed a divorce petition under section 3 of the Divorces Act,<sup>65</sup> seeking the dissolution of her civil marriage to the appellant. The marriage in question had been celebrated on the 12th of April 1985 at the office of the District Commissioner in Kabale.<sup>66</sup> The court gave a decree nisi but the Appellant made an appeal to the High Court at Mbarara, where he abandoned all grounds of the

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<sup>58</sup> Ibid at n (2)

<sup>59</sup> Id.

<sup>60</sup> Section 4 (1) of the Customary Marriage (Registration) Act

<sup>61</sup> Section 5 provides that, “Every registrar of a marriage district shall cause to be kept in his or her office a “customary marriage register book” in the prescribed form”

<sup>62</sup> Section 7 provides that, “At the time of registration of a customary marriage, the registrar shall, upon payment of the prescribed fee, issue the parties with a certificate in the prescribed form”

<sup>63</sup> Section 8 provides that, “A registrar of a marriage district may register a customary marriage after the expiration of six months period specified in section 6 on payment of such fee as may be prescribed.”

<sup>64</sup> *Steven Bujara v Polly Twengye Bujara*, Civil Appeal No.81 of 2002 (Court of Appeal Judgement of 20 April 2004) (unreported)

<sup>65</sup> Cap 249 Laws of Uganda

<sup>66</sup> The petition was based on cruelty and adultery as the grounds for the divorce.

initial appeal and focused on only one ground; that there was no marriage in the first place, because he was married to other women prior to the civil marriage to the respondent.

He claimed that the evidence presented before the Magistrates Court showed that he had been customarily married to three wives, and that the trial Magistrate should have checked whether there was a valid marriage between the two parties to the suit, which would effectively call the customary marriages into question. According to the Learned Judge, the High Court ruled that there was no valid customary marriage between the Appellant and his other wives:

*“[The]mere mention of women or wives, was no evidence of marriage since the marriages in question had not been registered in accordance with the Customary Marriage (Registration) Act”<sup>67</sup>*

On appeal to the Court of Appeal, counsel for the Appellant argued *inter alia* that non-registration does not invalidate a customary marriage, an argument which the trial court had agreed with and held that the earlier unregistered marriages were valid. The Court stated that the validity of customary marriages is governed by Section 11 of the Customary Marriage (Registration) Act.<sup>68</sup> The court went ahead to hold that there was no evidence adduced in the Magistrate Court to prove that the appellant was customarily married as submitted by his counsel, the Justices held that:

*“[m]ere mention of wives or women did not mean that the appellant was not legally married customarily to other women. A customary marriage like any other marriage must be proved by evidence. One such evidence is a certificate of registration. The law requiring customary marriage to be registered was not made in vain. If the appellant was customarily married to other wives before he married the respondent, he should have*

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<sup>67</sup> Steven Bujara v Polly Twengye Bujara, p.3.

<sup>68</sup> Section 11 of the Act states as follows: “A customary marriage shall be void if-  
(a) the female party to it has not attained the age of sixteen years;  
(b) the male party to it has not attained the age of eighteen years;  
(c) one of the parties to it is of unsound mind;  
(d) the parties to it are within the prohibited degrees of kinship specified in the Second Schedule to this Act or the marriage is prohibited by the customs of one of the parties to the marriage; or  
(e) one of the parties has previously contracted a monogamous marriage which is still subsisting”.

*registered his marriage like he registered the one he contracted with the respondent...[T]here has to be evidence of customary ceremonies of the community or tribe having been performed before one can legally consider himself/herself customarily married and also to have the marriage registered. The registration must be witnessed by two people who were present when the ceremonies were performed.*<sup>69</sup>

The case depicts the lacuna that is brought by the Customary Marriage (Registration) Act when it comes to proving customary marriages. However, one may ask, what is the difficulty? And how can it be remedied? In Uganda's jurisdiction, unfortunately, less attention has been given to the registration of customary marriages compared to other aspects like payment of marriage gifts.<sup>70</sup> Indeed, judicial officers have held that there has to be evidence of customary ceremonies of the community or tribe before one can legally consider himself/herself customarily married.<sup>71</sup>

Judicial officers have failed to recognize that the money required for registration of the marriages is lower than that which can be given as a marriage gift.<sup>72</sup> The Customary Marriage Registration (Prescription of Forms and Fees) (Amendment) Regulations<sup>73</sup> provides just Sh. 20,000 as the Fees to be paid for entering details of customary marriage in the customary marriages register book within six months.<sup>74</sup>

#### **4.1 Difficulty in Proving Customary Marriage without Registration.**

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<sup>69</sup> *Steven Bujara v Polly Twengye Bujara.*, pp. 6-7.

<sup>70</sup> The Supreme Court, for example, in *Mifumi (U) Ltd & Anor v Attorney General & Anor* (Constitutional Appeal 2 of 2014) [2015] UGSC 13 took judicial notice of the fact that marriage gifts are paid in every traditional society in Uganda, this means that proof of the payment of the gifts is a valid proof of the customary marriage.

<sup>71</sup> *Steven Bujara v Polly Twengye Bujara.*, *ibid* n (6)

<sup>72</sup> Unfortunately, even the Marriage Bill of 2017 only makes provision for the sharing of marriage gifts as a voluntary act that takes place during the marriage, leaving out the requirement of registration of customary marriages. Clause 15 (1) of the Bill, provides that where a marriage gift has been given by a party to a marriage, it is an offence to demand the return of the Marriage gift.

<sup>73</sup> Statutory Instrument No. 2 of 2005.

<sup>74</sup> Rule 2 of the Customary Marriage Registration (Prescription of Forms and Fees) (Amendment) Regulations

As seen above, Steven Bujara was aware that he was married to three other women. Despite this knowledge, he proceeded to enter into a civil marriage and declared prior to the marriage that he was a bachelor, so when he later claimed before the court that he had prior customary marriages for which he could not produce certificates, the Court determined that there was no such customary marriage.<sup>75</sup>

In *Patrick Namenkere v Florence Mwanja*,<sup>76</sup> the late George William Mwanja wedded Nakalankya Mary Mwanja in the Anglican Church in December 1974. However, Florence Mwanja was later married to him in 1977 according to customary law. They lived together with their children on a plot that appeared to belong to the Ministry of Works and was offered to the late George for purchase, but after his death, the appellant sought to evict the respondent and filed a civil suit in the High Court. She claimed that because she was the widow of the late George William Mwanja, she was entitled to quiet possession, ownership, and use of her matrimonial home.

As a result, she asked the court for a permanent injunction to prevent the appellant from evicting or disturbing her and her dependents from the residential premises. The appellant claimed in his written statement of defence that the respondent was not the deceased's wife. The case raised two important issues; one was the tension between people's cultural practices and the Customary Marriage (Registration) Act and the other, was the indirect effect of the Court's finding on the property of people in unregistered customary marriages when such marriages involve children.<sup>77</sup>

The Court of Appeal held that the learned trial judge erred in law and fact when she held that the respondent was the widow of the late Mwanja. Justice Kitumba (as he was then) stated that “the learned Judge appears to have considered only

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<sup>75</sup> *Steven Bujara v Polly Twengye Bujara.*, pp. 6-7.

<sup>76</sup> Civil Appeal NO. 37 OF 2004

<sup>77</sup> *Jamil Ddamulira Mujuzi*. 2013., *ibid* at 181.



the formalities of a customary marriage and did not consider the law.”<sup>78</sup> The court determined that the December 1974 marriage was a monogamous marriage under the Marriage Act, and thus the customary marriage was null and void under Sections 11(a) and 12 of the Customary Marriage (Registration) Act, as well as Section 36 of the Marriage Act.<sup>79</sup>

Although the respondent and the late Mwanja were close companions, their relationship was not that of husband and wife. The case vividly depicts the plight of women who believe they have completed a customary marriage; they fulfill all of the requirements and are even recognized in society as customarily married, only to lose all of the protection they are entitled to by virtue of marriage.<sup>80</sup>

Women in unregistered customary marriages struggle to establish their right to matrimonial property. Mujuzi vehemently contends that women like Florence have property rights guaranteed by Section 26 of the Constitution regardless of their marital status, stating:

*“This was a woman, like many women in Uganda, who honestly believed that she was married. Everyone, including her relatives and neighbors even the deceased's church wife, believed that she was married to the deceased. But in the eyes of the law, she was not only denied the status of the deceased's widow but she was not even recognized as the deceased's dependent...Even if the Court had found that there had been no valid marriage between the deceased and Florence, it could have held that in terms of Article 26 of the Constitution Florence had the right to property, the house, which had been given to her by her late companion. Her right to property was independent of her legal status. The law does not prohibit a married man from giving some of his property to his mistresses.”<sup>81</sup>*

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<sup>78</sup> Civil Appeal NO. 37 OF 2004, at page 7.

<sup>79</sup> Cap. 251 of the Laws of Uganda.

<sup>80</sup> In her evidence, Florence testified that she had gotten married to the deceased in 1977 and that the deceased had paid dowry to her relatives. Also, Anania Suleiman Kasale Wanyosi, testified that he was the LC1 of Uhuru cell and had all the time known the respondent as the wife of the deceased as he used to attend all official functions with her. The witness only came to know of Mary much later. Additionally, Mary recognized Florence as her co-wife which meant that the respondent was a customary wife in the African context.

<sup>81</sup> Jamil Ddamulira Mujuzi. 2013., supra at 182-183.

Although the Customary Marriage (Registration) Act makes non-registration illegal, the courts do not declare likewise. In *Engineer Ephraim Turinawe and another v Molly Kyalikunda Turinawe and 4 others*,<sup>82</sup> Eng. Turinawe was assigned a residential house by the defunct Kampala City Council (KCC) in 1989. Mr. Turinawe was offered the opportunity to purchase the house by KCC in 1999, but he was unable to raise the necessary funds.

As a result, he sought out Elizabeth Kabutiti, who agreed to buy the house for Shs70 million, allowing Turinawe to profit by Shs. 5 million. The house was transferred to Turinawe by KCC, and the land was transferred to Kabutiti by Turinawe. Turinawe's wife, Molly Turinawe, and their four children filed a High Court petition in 2004. They argued that when the property in which they were residing was offered to the head of their family for purchase, it became their family property and residence, therefore, his decision to transfer the ownership of the property to Kabutiti without their consent was illegal, null, and void.

The Court of Appeal heard the appeal and had to decide inter alia whether there was a valid marriage between the Appellant and his wife under which she can claim the right of occupancy. The Court called upon the wife to adduce evidence to prove that she was customarily married to the Appellant and also asked her to present photos taken of the marriage ceremony. She brought her brother as one of the witnesses who testified that Ephraim 'married his sister by paying the dowry to their father.'<sup>83</sup>

There were no photographs brought and the court still decided that there was a subsisting customary marriage between the couple. They unanimously agreed to the decision of Kitumba JA, who declared in his judgment that:

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<sup>82</sup> *Engineer Ephraim Turinawe and others v Molly Kyalikunda Turinawe and 4 others* (Civil Appeal No. 18 of 2009) [2009] UGCA 49. The respondents later appealed to the Supreme Court but the issue of the Customary marriage was not in contention. The Supreme Court decided in favor of Engineer Ephraim Turinawe and held that the transfer was legally made.

<sup>83</sup> *Ibid*, p. 2.

*"The first respondent testified that the first appellant went to her father and paid the dowry, necessary for Kikiga customary marriage... [The respondent's] brother corroborated her evidence. Both witnesses testified that the first appellant paid shillings 700,000/= and 5 cows at her father's home ...That after paying the dowry the marriage was complete. I am of the considered opinion that the first appellant was married to the first respondent according to Kikiga custom and was, therefore, his spouse.<sup>84</sup>*

Similarly, in *Joseph Baguma v Sefuroza Matende*,<sup>85</sup> the late Eridadi Matende died intestate at Mulago Hospital. He was legally married in church to Molly Matende, the plaintiff's mother at Rukungiri. The late Matende owned land and a house in Rukungiri, where Molly lived at the time, but the letter for the administration of the deceased's estate was given to the respondent. The applicant thus petitioned the court, requesting that the defendant's letters of administration be revoked and that the same be granted to the plaintiff, his brothers or brothers in the order of the ages, or Mrs. Molly Matende.

He also prayed for an order to restrain the defendant from dealing or meddling in the estate of the intestate and finally sought an order that the defendant makes an account of or returns any property forming the estate of the late Matende to the Plaintiff. The defendant, on the other hand, stated that the deceased took her on as a wife and cohabited with her from 1966 to 1984 till his death. They were also blessed with three children.

The first issue before the court was whether the defendant was the wife of the deceased as solemnly declared. In answering this issue, the court based on two authorities; Section 11 of the Customary Marriage Registration Decree 16/73<sup>86</sup>

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<sup>84</sup> *Engineer Ephraim Turinamwe and others v Molly Kyalikunda Turinawe and 4 others*, p. 5.

<sup>85</sup> Civil Suit No. MFP 12 of 1985[1991] UGHC 23 (4 November 1991)

<sup>86</sup> section 11 of the Customary Marriage Registration decree (Decree 16/73) states: —

*"Notwithstanding the provisions of section 37 of the Marriage Act where a person was married under the Marriage Act or under any other law relating to marriage and subsequently contracted a customary marriage during the subsistence of the previous monogamous marriage but before the coming into force of this decree such subsequent customary marriage shall be deemed to be a valid marriage".*

Decree 16/73 came into force on 1/10/1973. See statutory instrument 1973 No. 110 (The customary marriage Registration order 1973).

and *Farzia Rwobuganda.V. Donato Banemuka*.<sup>87</sup> It held that the marriage would have been invalid if it had been celebrated after customary marriage registration Decree 16/73. However, since the decree did not make it invalid,<sup>88</sup> there was a valid customary marriage since there was the payment of the bride price. Justice Ignatius Mukanza stated:

*“I believe the defendant when she testified that Matende gave the bride price to her parents in the form of 2 goats and 5,000/=...on payment of the dowries to the parents of the defendant...there existed a subsisting customary marriage between the late Matende and the defendant at the time of the formers death even though a monogamous marriage did exist between the said intestate and Molly Matende it being immaterial that the marriage had never been registered under decree 16/73...I do disagree with him (Counsel for the plaintiff) that such marriage should have been registered by then.”<sup>89</sup>*

A certificate of a customary marriage is conclusive evidence of the marriage. Section 10 of the Customary Marriage (Registration) Act provides that a certificate of a customary marriage or a certified copy of the certificate shall be conclusive evidence of the marriage for all purposes in any written law.<sup>90</sup> This

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<sup>87</sup> (1978) HCB P.244 The plaintiff in the case was a widow of the deceased who applied for letters of administration of the deceased’s Estate but the defendant opposed it. The facts were that the deceased in 1964 married in church one Frediana but they separated in 1965 but never legally divorced. Fredina never returned to the home of the deceased until his death, however, after the separation the deceased took on the plaintiff in 1967 and the dowry was paid in 1970 so she contended that she was lawfully married under the customary law.

The defendant also presented a will dated 10th August 1966 in which the deceased appointed her as his executor which was not challenged. It was held that the plaintiff was married under customary law marriage. The marriage would have been invalid if it was conducted after the Customary Marriages Registration Decree (Decree 16/73).

The court held that in terms of section 56 (1) of the Succession Act, every will is revoked by the marriage of the maker. The will, therefore, stood revoked when the deceased married plaintiff in 1970. Deceased would be regarded as having died intestate. However, in terms of section 31 (1) of the Succession Act as amended by decree 22 of 1972 no spouse of an intestate shall take an interest in the estate of an intestate if at the death of the spouse was separated from the intestate as a member of the same household. The deceased's first wife had separated since 1965 up to the time of the deceased death, she would, therefore, take no interest in the estate of the deceased

<sup>88</sup> Section 11 of the Customary Marriage Registration decree, Decree 16/73., supra.

<sup>89</sup> Civil Suit No. MFP 12 of 1985[1991] UGHC 23., supra.

<sup>90</sup> Section 10 provides, “ A certificate of a customary marriage issued under this Act or a certified copy of the certificate shall be conclusive evidence of the marriage for all purposes in any written law.”

was reflected in the decision of the High Court in *Evelyn Aciro and Alfred Bongomin v Y.E.Obina*.<sup>91</sup> In Aciro's case, the plaintiffs, a widow and son of the deceased sued the father of the deceased who applied for and obtained letters of administration without the knowledge or consent of the plaintiffs.

He was not the best person to be granted letters of administration, and he mismanaged the deceased's estate. The court determined that the marriage followed Acholi customary marriage practices because the deceased paid shs. 100,000/= as dowry, leaving a balance of shs. 200,000/=. He also compensated them with shs. 50,000/= for the children they had before marriage. The marriage was witnessed by a document written by the deceased's uncle, who testified that "notwithstanding the non-payment of the balance of the dowry, the marriage was valid under the customary law of Acholi."<sup>92</sup>

Having looked at the above cases, the ultimate question is, "whether these conundrums could have been remedied in case there was the registration of the customary marriage or at least an attempt to do so?" We answer in the positive. Mujuzi wrote on the same and argued that although it may not be the duty of the court to inquire about the existence of a customary marriage, they should be able to do so whenever the parties before the court do not know that the onus is upon them to prove the existence of the customary marriage.<sup>93</sup> He stated that:

*"[I]n cases where the parties to the marriage are not represented by counsel...and where they are not familiar with the law relating to marriage, the court should require for more evidence or details to be adduced by one of the parties alleging that they were or are married customarily. This will give the applicants an opportunity to explain to the court what they meant when they said that they were or are married and for the court to decide whether indeed such a marriage existed or was thought to have existed by those involved in it."*<sup>94</sup>

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<sup>91</sup> (Civil Suit 20 of 1997) [1999] UGHC 18

<sup>92</sup> Ibid.

<sup>93</sup> Jamil Ddamulira Mujuzi. 2013., *ibid* at 178.

<sup>94</sup> Ibid.

Several Ugandans have the same mind-set about their customary marriages like Bujara; they think they are customarily married but have no proof of their marriages. Some women could be married in a customary marriage but end up being regarded as unmarried when the man enters into and registers a monogamous marriage.<sup>95</sup>

As we have seen, Ugandan judicial officers are bent towards payment of marriage gifts and take it as the requirement for customary marriage irrespective of the registration status of the marriage. In addition, the cases discussed above show that registration is more than significant in preserving the rights of married couples both during and after marriage. The significance of registration is also reflected in several jurisprudences around the world.

#### **4.2 Significance of Registration of Customary Marriages.**

The state's interests in marriage are varied, substantial and include "keeping records, promoting health, and preventing child or incestuous marriages,"<sup>96</sup> as well as providing a safe, healthy, and nurturing environment for children and families; facilitating private networks of mutual support and obligation; and supporting public morality.<sup>97</sup> Registration of marriages gives the state the necessary data to enable it achieve all these interests. The Indian Supreme Court, in *Smt. Seema vs Ashwani Kumar*,<sup>98</sup> cited with authority the report of the National Commission for Women wherein the reasons for compulsory registration of marriages were listed. The affidavit stated:

*"That the Commission is of the opinion that non-registration of marriages affects the most and hence has since its inception supported the*

<sup>95</sup> H.F. Morris, 'Uganda: Report of the Commission on Marriage, Divorce and the Status of Women (1966) 10:1 Journal of African Law.

<sup>96</sup> David S. Caudill, Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-law Marriage, 49 TENN. L. REV. 537, 558 (1982).

<sup>97</sup> Andrew W. Scott, Estop in the Name of Love: A Case for Constructive Marriage in Virginia, 49 Wm. & Mary L. Rev. 973 (2007), <<https://scholarship.law.wm.edu/wmlr/vol49/iss3/8>> [Accessed 04/10/2022].

<sup>98</sup> Transfer Petition (Civil) 291 of 2005.

*proposal for legislation on compulsory registration of marriages. Such a law would be of critical importance to various women-related issues such as:*

*(a) prevention of child marriages and to ensure minimum age of marriage.<sup>99</sup>*

*(b) prevention of marriages without the consent of the parties.*

*(c) Check illegal bigamy/polygamy*

*(d) Enabling married women to claim their right to live in the matrimonial house, maintenance, etc.*

*(e) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband.*

*(f) Deterring men from deserting women after marriage.*

*(g) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage.<sup>100</sup>*

Registration of customary marriage is significant, not only because a certificate of a customary marriage is conclusive evidence of the marriage,<sup>101</sup> but also because every other monogamous marriage contracted after the customary marriage with a different partner is void. Section 11 of the Customary Marriages (Registration) Act provides that a customary marriage shall be void if, amongst other things, 'one of the parties has previously contracted a monogamous which is still subsisting'<sup>102</sup> and section 13 which states that:

*“Where a person contracts a customary marriage under this Act and subsequently contracts a monogamous or Muslim marriage with another person, the validity of the customary marriage shall not be affected by*

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<sup>99</sup> In India, Registering Authorities do not register the marriages of any person, who has not completed the mandatory minimum age, as provided under Section 2(a) of the Marriage Prohibition Act, 2006. However, the Kerala High Court in *Punarjani Charitable Trust V State of Kerala* WP(C). No. 16181 of 2013 held that the registration of even child marriages would ensure that there is better transparency and adequate proof to penalize the offenders under the Prohibition of Child Marriage Act.

<sup>100</sup> Transfer Petition (Civil) 291 of 2005.

<sup>101</sup> Section 10 of the Customary Marriage (Registration) Act

<sup>102</sup> Section 11 of the Customary Marriages (Registration) Act

*the monogamous or Muslim marriage, but the monogamous or Muslim marriage shall be void.”<sup>103</sup>*

Non-registration creates confusion and exasperates the situation where one has to prove their customary marriage but cannot do so. No wonder, some of the kingdoms in Uganda have taken up the initiative to issue customary marriage certificates.<sup>104</sup> Besides, according to a statement by URSB, every certificate of marriage that has been filed with the bureau is admissible as evidence of the marriage to which it relates; in any court of law or before any person having by law or consent of the parties, authority to receive evidence on it.<sup>105</sup>

The challenge that arises where there is no registration was explored by the High Court in *Negulu Milly Eva v Dr. Solomon Serugga*.<sup>106</sup> Here, two parties cohabited for thirteen years (from 1996 to 2009) but their relationship went sour and the appellant filed for divorce. The respondent, however, made a preliminary objection claiming that the petition was “misconceived and unsustainable in its current form,” on grounds that the petitioner was relying on a customary marriage that never existed and had never been registered as required by law.

In reply, the appellant averred that the customary marriage had been formalized when she introduced the respondent to her parents in 2002. The Magistrate, at trial, upheld the preliminary objection and stated that the petitioner, having failed to comply with one of the requirements of the Customary Marriages (Registration) Act, could not use the same Act to enforce rights arising out of an alleged marriage that had not been completed.<sup>107</sup>

Justice Godfrey Namundi, on appeal, held that the omission to register the customary marriage does not necessarily invalidate it. He reasoned:

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<sup>103</sup> Section 13 of the Customary Marriages (Registration) Act

<sup>104</sup> Ojok D. 2017., supra at 6. Ojok in his survey found that only 1 person from his survey, on WhatsApp – a social media platform among 10 people, had been issued a customary marriage certificate from a traditional kingdom.

<sup>105</sup> Bemanya Twebaze. 2016. Loc Cit.

<sup>106</sup> *Negulu v Serugga*, (Civil Appeal 103 of 2013) [2014] UGHCCD 64.

<sup>107</sup> *Negulu v Serugga*, p. 4.



*“If section 20 is not redundant, then it was an administrative requirement, for purposes of keeping records, rather than a validation of the customary marriage. If it was the latter, then other laws on marriage in Uganda e.g. The Marriage Act Cap. 251 would have an equivalent to section 20 of Cap. 248.”*<sup>108</sup>

The learned Judge held that Section 20 is only redundant because the “Registrar General’s Department has never provided Registers for Customary Marriages and they are non-existent in any part of this country.”<sup>109</sup> He also went ahead and found “fortitude” in Article 126 of the Constitution which provides that Judicial Officers should not be barred by undue regard to technicalities when administering Substantial justice.

The judgment, however, is problematic because, aside from the fact that both parties appear to agree that they cohabited, neither of them clearly stated where the customary marriage occurred; the appellant claimed that the customary marriage occurred in Bukole village, Lumino Sub-county, Busia District in Kenya, while the respondent contested that there was no marriage at all. To add to the confusion, the trial magistrate appeared to have been guided by the confusion as to where the marriage occurred to conclude that there was no marriage at all, and that the alleged marriage was illegal regardless of the country of marriage.

In his ruling, he specifically pointed out that the country where the ceremony took place was not mentioned, leaving doubt as to whether the said village and District happened to fall in Uganda or Kenya.<sup>110</sup> Furthermore, the lady claimed that the ceremony only consisted of introducing the Respondent to her parents, which is one of the ceremonies that makes the marriage legal in many tribes. It was insufficient to make the marriage valid.

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<sup>108</sup> *Negulu v Serugga*, p. 8.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Negulu v Serugga*, p. 5.

While it may be argued that the learned justice was correct in exercising "undue regard to technicalities", there were several unanswered questions pertaining to the marriage that could have helped inform a more just decision. Specifically, the justice should have established the validity of the customary marriage in question before proceeding. Additionally, Article 126 stipulates that courts must adhere to the law before resorting to dispensing substantive justice. It should be noted that the Divorce Act<sup>111</sup> does not apply to presumed marriages and requires that the marriage must be recognized under the Constitution and the relevant legal instruments.

A registered customary marriage is a safeguard for spousal benefits like insurance, pension, citizenship, immigration, emigration, family resettlements as well as inheritance of estates upon the demise of a spouse.<sup>112</sup> A marriage certificate helps parents protect their children's right to inherit their property if they divorce or if either of the parents dies. A customary marriage certificate makes it easier to protect widows' and widowers' rights to inherit the property of their spouse.

Having a marriage certificate makes it easier to obtain other documents like Letters of Administration or Certificates of No Objection.<sup>113</sup> Registering a marriage provides legal clarity regarding the requirement of spousal consent for the sale of family land. In the event that one spouse seeks to dissolve the marriage and abscond with all assets, the marriage certificate can serve as evidence of the other spouse's rightful claim to the property.<sup>114</sup> Registration can also assist the Government of Uganda in building a credible marriage database.

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<sup>111</sup> The first paragraph of Article 126 (2) reads, "[I]n adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles..."

<sup>112</sup> Bemanya Twebaze. 2016. Loc Cit.

<sup>113</sup> Amato Nancy Immaculate, *Sharing of Properties under Customary Marriages in Uganda: An Examination of the Law*. A Dissertation Submitted to The School of Law in Partial Fulfilment of the Requirement of a Ward of a Diploma in Law at Lump Ala International University, pp. 14 – 15, 2018. Available at <<https://ir.kiu.ac.ug/bitstream/20.500.12306/>> [Accessed 14 October 2022]

<sup>114</sup> Ibid.

Registration is sufficient to operate as a constructive notice on the mortgagee that the second respondent was a married person notwithstanding her assertion to the contrary. In *Wamono Shem V Equity Bank*,<sup>115</sup> Hon. Justice Madrama emphasized that the court should not encourage unregistered marriages to operate as constructive notice or rely on presumptions of marriage where there are third-party rights that will be adversely and unfairly affected.

It goes without saying that a customary marriage is uncertain, and the customs are difficult to prove, which is why all customary marriages should be required to be registered.<sup>116</sup> Moreover, it has been suggested that the issue of uncertainty could be further resolved and simplified if traditional authorities were entrusted with the responsibility of acting as registrars for such marriages.<sup>117</sup>

## 5.0 RECOMMENDATIONS

Ultimately, it has become clear that simply advocating for a law mandating the registration of customary marriages is insufficient. Although the current legal framework requires registration and provides institutions for this purpose, the efficacy of this provision has been undermined by judicial officers.<sup>118</sup> Not only should the Customary Marriages (Registration) Act be amended to provide for mandatory registration of customary marriages, but the provision must also be strictly applied by the judicial officers.<sup>119</sup>

The Amendment should provide that the customary marriages be registered at any time within two years after the law comes into force and that registration

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<sup>115</sup> [2013] UGCommC 98

<sup>116</sup> Prisca N Anyolo, “Children in polygamous marriages from a customary perspective” in Oliver Christian Ruppel, “Children’s Rights in Namibia”, Macmillan Publishers), Windhoek, (2009) at p. 265. Available at <[https://www.kas.de/c/document\\_library/](https://www.kas.de/c/document_library/)> [Accessed 24 October, 2022]

<sup>117</sup> Ibid.

<sup>118</sup> Jane Godia, op cit., p. 3.

<sup>119</sup> UNICEF, “Early Marriage Child Spouses”, Innocenti Digest no. 7, p. 4. Available at <<https://www.unicef-irc.org/publications/pdf/digest7e.pdf>> [Accessed 24 October 2022]

will be free during that period.<sup>120</sup> After that, there will be a fee for registering customary marriages that took place before the law came into force.

In Uganda, customary marriages are often celebrated within the context of traditional practices and cultural norms. As such, they are not always registered with the relevant authorities. This poses a challenge, particularly when it comes to the recognition of these marriages by law and the protection of the rights of those involved. To address this issue, it is proposed that the authority to register customary marriages should be vested in clan leaders,<sup>121</sup> who are often the custodians of customary laws and practices.

By doing so, clan leaders would be entrusted with the responsibility of ensuring that marriages within their respective clans are registered with the Uganda Registration Services Bureau (URSB) on a monthly basis. To facilitate this process, a clear guideline on the registration of customary marriages should be established.<sup>122</sup> The guideline should specify the processes for registration, the responsible government ministries and agencies, and the penalties for non-compliance. The government should also provide adequate resources to sensitize the public on the importance of registering customary marriages and enforce compliance with registration requirements.

By involving clan leaders in the registration process, there is a higher likelihood of compliance as they are often respected and trusted members of the community. Additionally, having monthly registers of registered marriages submitted to the URSB would enable the bureau to have an accurate record of the number of customary marriages taking place and provide data to inform

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<sup>120</sup> Law Reform and Development Commission, *Recognition of Customary Marriages: A Summary of the Law Reform and Development Commission Proposal (2005)* at p. 5 Available at <<https://www.lac.org.na/projects/grap/Pdf/custommar2.pdf>.> [Accessed 4 October 2022]

<sup>121</sup> This borrows the leaf from Buganda Kingdom's method of ensuring that all marriages celebrated in the kingdom are concluded and a certificate issued signed by the clan leader given to the couple.

<sup>122</sup> Bemanya Twebaze., *Supra*.

policy-making. Ultimately, this would help to protect the rights of those involved in customary marriages and ensure that they are recognized by law.

We have seen that not only should the laws and the judicial officers have the same voice, but the masses must also know that the law protects their interests.<sup>123</sup> There are several customs and cultures in Uganda and each of these cultural groups should be made to realize that if they enter into marriages that cannot be recognized by the state, such will not confer the benefits that come with having the marriage registered.<sup>124</sup>

It is essential to sensitize the public about the benefits of registering marriages, particularly customary marriages. Registering a marriage serves as a safeguard tool for spousal benefits, which include insurance, pension, citizenship, immigration, emigration, family resettlements, and inheritance of estates upon the demise of a spouse. When a marriage is registered, it becomes recognized by law, and the spouses become eligible for various benefits that they might not have access to otherwise.

For instance, spouses in registered marriages are entitled to social security benefits, which include access to medical insurance, retirement benefits, and disability benefits. In the event of the death of a spouse, the surviving spouse is entitled to inherit the estate of the deceased spouse. This is crucial, especially in the case of customary marriages, where property rights are often not clear. Moreover, registered marriages provide a legal framework for settling disputes that may arise between spouses. If a marriage is registered, disputes regarding property rights, child custody, and other related issues can be resolved in a court of law.

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<sup>123</sup> See Article 8 of the Universal Declaration of Human Rights which provides that if the rights of an individual are violated, they are entitled to fair and skilful judgment. The provision entitles the judicial officers to only act according to the law and in the spirit of justice.

<sup>124</sup> Bell, Duran, "Defining Marriage and Legitimacy", *Current Anthropology*, vol. 38, no. 2, 1997, pp. 237–53. JSTOR. Available at: <<https://doi.org/10.1086/204606>>[Accessed 12 December, 2022]

It is crucial to recognize the role that the registration of customary marriages can play in promoting gender equality and inclusive economic development in Uganda. By registering customary marriages, disputes over the solemnization of marriages between two persons can be avoided to a significant extent. The record of marriage can serve as a crucial piece of evidence in cases where disputes arise over the existence and validity of a marriage.

Moreover, non-registration of marriages often affects women disproportionately. Without proper registration, women in customary marriages may lack legal recognition and protection, leading to the denial of their rights and entitlements, including inheritance and property ownership. Registration of customary marriages can provide women with the necessary legal recognition and protection to ensure that their rights are protected and that they can participate fully in economic development.

## **6.0 CONCLUSION**

In conclusion, customary marriages constitute the largest form of marriage in Uganda, rooted in the customs and cultural practices of the people. While the Customary Marriages (Registration) Act attempts to regulate these marriages, it falls short in several areas, including the lack of compulsory registration. As we have discussed, the registration of customary marriages is of utmost importance for ensuring gender equality, protecting women's rights, and promoting inclusive economic development in Uganda.

By involving clan leaders in the registration process and providing clear guidelines, the government can ensure that customary marriages are registered on a monthly basis with the Uganda Registration Services Bureau (URSB). This would not only help to avoid disputes over the solemnization of marriages but also provide women with the necessary legal recognition and protection to ensure their rights and entitlements are respected and upheld.

Therefore, we advocate for the registration of customary marriages as the best option for ensuring that the citizens of Uganda and the state can achieve their interests when it comes to customary marriages. By taking this step, Uganda can demonstrate its commitment to promoting gender equality and inclusive economic development, while also protecting the rights of all its citizens.

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