

ACCESS TO JUSTICE FOR THE WOMEN:

THE AFFORDABILITY OF ACCESS TO JUSTICE FOR WOMEN IN UGANDA & THE PLIGHT OF LASPS AND LEGAL FEES IN CASE OF HAVING TO PAY FEES AFTER LOSING A CASE.

A Presentation to FIDA – Uganda Advisory Committee
26th November 2015, Metroplole Hotel

UNDERSTANDING ACCESS TO JUSTICE:

The concept of Access to justice relates to ‘the mere contact or right to entry to use the justice system by citizens’¹. This process entails an examination of how individuals, groups and communities realise justice from the enforcement of substantive law as well as the quality of justice meted out on them by the justice delivery system i.e. procedural justice. Access to justice therefore encompasses *physical access to justice institutions and services: financial access to justice and: procedural or technical access to justice law and order institutions and services*. Sometimes, these factors may all come into play in the same circumstance, forming extreme barriers to justice. This is the common situation of the poor, vulnerable and marginalized, especially the women

Women as analysed through the Poverty, Marginalization and Vulnerability dimensions .

From a human rights perspective, poverty is understood as a multidimensional phenomenon that includes as one of its components chronic social, political and economic inequality or ‘a human condition characterized by the sustained or chronic deprivation of resources, capabilities, choices and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights’.² Further, the UN Special Rapporteur on Extreme poverty and Human rights links extreme poverty to extreme inequality, positioning the issue of poverty within a human rights narrative and arguing that ‘a human rights framework that does not address extreme inequality as one of the drivers of extreme poverty... is doomed to fail.’³

Pervasive gender inequalities in all sectors of life based on unequal power relations predispose women to vulnerability at any given point in time. There are several categories of women that display characteristics of vulnerability and often face victimization and marginalization, based on socio-economic and cultural constraints that they face. Particularly vulnerable women are PWDs,

¹ Donald Rukare, Access to Justice and the Rule of Law, National Consultation Conference: Legal Empowerment of the poor, 24-25 November 2015, page 10.

² E/C.12/2001/10, para.8.

³ UN Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights*, A/HRC/29/312015.

widows, older women, especially those in “generation gap” families who have to look after grandchildren, and women prisoners including those who are jailed for civil debt, suspects and convicts. Among this category, pregnant women prisoners face unique hardships⁴

High levels of poverty are evidenced more among women than men. The Poverty Status Report, 2014 states that women are vulnerable to poverty.⁵ The patterns of inheritance that favour male ownership of property and title means that women rarely own property in their own right and this increases their dependency on male relatives, spouses and partners. **Widows and girls in Uganda are systematically denied inheritance rights, which have been linked to their impoverishment.**⁶ In various social indicators, statistics indicate inequalities between men and women in the same category, e.g. 38% of female headed households have no formal education compared to 10.2% male households, 35% of the males in Uganda were involved in wage employment compared to only 27% of the female counterparts, ownership of owner occupied house in urban areas is 31.0% for men and 26.8% for women and 36% of male headed households owned land in urban areas compared to 23% of female headed households in both urban and rural areas.⁷ The feminization of poverty is a stark reality in Uganda, where women form the majority of the poor and vulnerable. Over 56% of the female-headed households had either widowed or divorced heads. 12% of the households in Uganda were headed by widows mostly in the North East (19%).

These findings show a group that is burdened by multiple roles, responsibilities and identities that require significant resources and status to make meaningful decisions and actions, yet gender relations have relegated a lower status to women in Uganda. This raises the risk of such women being exposed to multiple forms of vulnerability and disadvantage that puts them at risk

Poverty, vulnerability, marginalisation are interlinked and intertwined. The state of being poor makes one vulnerable and marginalised and in a same way being marginalised can make one vulnerable. However the common factor among these three dimensions of deprivation (poverty, vulnerability or marginalization) whether they are affecting an individual in unison or not, they deny one the capacity to claim and enforce his or her rights, from a personal standpoint or as a group. Therefore, the issue of determining who is poor, to be entitled legal aid should look way beyond financial deprivation, their also social and cultural barriers . This is the discourse narrative in which majority of women are situate in Uganda today and which enhances their limitations and lack affordable justice

⁴ Research Report on Poverty, marginalization and Vulnerability LASPNET 2015

⁵ Page 81.

⁶ Bennett V, Faulk G, Kovina A & Eres T ‘Inheritance Law in Uganda: The Plight of Widows and Children’ The Georgetown Journal of Gender and the Law Vol. VII: 451.

⁷ UNHS page 140, 144, 147-149.

Limitations of women's affordable access justice

Women face **de jure** barriers to accessing justice, due to many existing laws that are either gender neutral or discriminatory. In the area of property ownership including land and in the personal status laws relating to marriage, divorce and adultery, domestic violence and sexual offences, women continue to face gender related barriers. Several hindrances affect women ability to access and all afford justice. A number of questions that we have to ask ourselves

- What is the property regime of women in Uganda?
- What is the inheritance regime?
- To what extent do women own and control land and resources on the land?

Adversarial and unfriendly justice system: Women form the majority of the illiterate population and find it hard to access justice institutions and mechanisms for fear of the technicalities, complexities and costs involved. Within the traditional justice and informal justice mechanisms, women are subjected to the same patriarchal norms that reinforce inequalities and violence.⁸

Hallward and Tazeen notes that Discriminatory laws are not the only source of gaps in women's economic rights—de facto constraints in accessing justice can also be an important source of discrimination. **Practical constraints—including lack of awareness, distance, cost, language, and bias—can shape the ability to exercise statutory economic rights, especially for women.** When courts are located only in urban centers, conduct business only in European languages, and charge high fees, many women do not see them as a viable option. Few people in Uganda and in the region engage with the formal judicial system or even have much knowledge of the legal protections it affords. Particularly rural areas, have low income and education levels, and retain strong customary traditions, people rarely perceive the formal judicial system as relevant for securing their economic rights. Local elders or chiefs and customary practices are more likely to determine how disputes are resolved and property divided, **access to property by millions of women is resolved outside the protections afforded in constitutions and statutes.**⁹

The enforcement of laws is to some extent still challenged by the imbedded undeniable power of patriarchal norms especially when handling family, marriage, property and more so land matters, thus supressing heavily the rights of the poor more so the women and the children. Example: **The Case of a lady supported by LAP to regain her matrimonial home in Nsangi**

⁸ LASPNET Research 2015 poverty marginalization and vulnerability

⁹ Empowering Women Legal rights and economic opportunities in Africa : Mary Hallward – Driemeier , Tazeen Hasan - 2013

The formal justice system is monetised : It should be noted that the status of poor persons in a highly monetised justice system and environment raises fears of further marginalisation and re-victimisation. For example

- a). Various user fees for legal processes strongly serve as a deterrent to filing cases before justice institutions.
- b). Lawyers' fees tend to be prohibitive even where lawyers may be accessed. See the advocates Remuneration and taxation rules , professional fees, filing fees, perusal costs, disbursements, professional court attendance fees, this is deterrent especially when a woman loses the cases
- c) The corruption terrain of the justice system is itself a barrier The level of the entrenchment of corruption in JLOS institutions does not provide confidence that the poor have room and ease to access justice. Accordingly The 2008 National Service Delivery Survey indicates that for the people who interface with the JLOS institutions; 41% gave '*facilitation*' to the police, prisons 29%, and magistrates 15% while customary courts had the least at 2%.

Discrimination and stigmatisation: The general stigmatization of the poor through characterization such as but not limited to the following: unproductive, dirty, inherently lazy, dependent, irresponsible, undeserving and even criminally inclined etc. This common perception or even sometimes utterance, heard from within the justice system corridors creates a low self-esteem which subsequently prevents them from seeking justice even when they most need it.

Case backlog: Delayed disposals affect women affordability of justice. FAPAD. Have challenge of many court cases that have lasted over 5 years whose initial supporting projects closed .new donors are unwilling to take them to conclusion

The factors desirable to enhance access to Justice for women

An operational comprehensive legal aid framework [National legal aid policy & Law] which must a holistic approach to legal aid. Advisory and legal support but also the psych socio support and medical support as need arises. Legal aid is the provision of free or subsidized legal services to mainly poor and vulnerable people who cannot afford the services of paid lawyers. The right to legal aid is well entrenched in the International and Regional human rights treaty framework to most of which Uganda is a state party. The provision of legal aid addresses the concerns of the poor and vulnerable by focusing on challenges arising from: affordability of user costs, lack of

legal representation, and alienation due to technicalities, language and ignorance of legal rights¹⁰ for those like the women who cannot afford or are vulnerable

Eased physical access to justice institutions and services. Most of the JLOS services remain in the urban areas and central region. This creates a physical barrier that may result in victims or users choosing to relinquish their rights to pursue other options. The maternal functions of the women n limits them to access justice, they have the mother role, gardening and cooking, keeping the home , but even when they are heavy they lack the physical means to walk long distance.

The services for vulnerable women need to be holistic The Justice centers South Africa include social workers and labour officers to meet the psycho- social needs of the people. However, beyond the legal and social workers, they also attach labour officers to their justice centres.¹¹

Making the System more hospitable to women: Several sets of actions could make the legal system more hospitable to women. One would be to increase women’s participation in judicial decision-making use statutory quotas to boost women’s participation in land tribunals and other judicial or quasi-judicial bodies still, meaningful participation can start only once the presence of women is seen as the norm. It is this initial bar to entry that quota systems overturns. Enforcing the rules requires oversight. A second way to improve women’s experience with the legal system would be to expand sensitivity training in statutory and traditional sectors. Legal rights can be undermined by unsupportive implementers of the law, including judges, traditional leaders, land registry officers, land board tribunal members, and schools, which prepare the next generation of practitioners.¹²

Sensitizing Legal Professionals to Gender Issues: Previously the International Association of Women Judges Jurisprudence of Equality Program (JEP) trained judges and legal practitioners in applying international and regional human rights conventions to cases in domestic courts that involve discrimination or gender violence. Its workshops and seminars for judges focus on the concrete meanings of theoretical concepts of equal protection and nondiscrimination. Many JEP-trained judges credit the program with alerting them to their own and other’s hidden biases (and to stereotypes that sustain those biases) and to helping they find more effective and sensitive ways to question witnesses.

¹⁰ Legal Aid conference 2015: Source www.justicecentres.go.ug/index.php/free-extensions/latest-news/item/77-justice-centres-uganda-to-hold-3rd-annual-legal-aid-conference

¹¹ Legal Aid South Africa -Legal Aid Guide, 2014, 13th Edition

¹² Empowering women legal rights op.cit

Tackling Practical Constraints to Accessing Justice: The obstacles facing women and their needs should be addressed on their own, rather than as part of measures to increase access by the poor. To encourage compliance and increase access to the formal system, all procedural steps should be simple, inexpensive, and easy to carry out. Increasing accessibility. Several measures can help make the legal system more accessible. One measure is reducing court costs, such as fees. Exempting the very poor from paying fees would remove a significant constraint they face in accessing justice¹³ Extrajudicial costs, including bribes, should be addressed through anticorruption strategies, such as monitoring. Delays in the justice system should also be addressed. Delays and adjournments should be tracked and strategies developed to reduce blockages in the system. Another measure is printing all court forms and laws in local languages, using simplified language. Help desks and information kiosks in courts can help users understand proceedings and their claim's progress. There is need to have simple streamlined procedural or technical requirements that ease access at the justice law and order sector institutions. The ease of transactions of legal matters to the ordinary laypersons that may be literate and already disadvantaged in several ways requires to be friendly and accessible

Facilitating marriage registration and the recognition of customary marriages. Registry offices are oft en far from where the parties live, and the decision to register may well rest with the husband. Verifying that a customary marriage took place if it was not registered is oft en difficult, and husbands or family members oft en deny that a customary marriage took place when property disputes arise

Using Paralegals to Provide Low-Cost Legal Assistance to the Poor Many of the region's countries have paralegal services. Paralegals are long-established legal service providers in South Africa, where community organizations such as Black Sash set up "advice centers" in the 1960s to help the black community navigate apartheid regulations. Since the end of apartheid, these services have focused on violence against women, employment, and land restitution. Uganda is already applying this model however their standardized training, accreditation and equipping is key.

Equipping Women in Uganda with Knowledge of the Law. Hallward says "In Uganda, women never leave the offices of the Federation of Women Lawyers (FIDA) empty-handed. They leave with either a letter inviting the other party to the dispute to come to mediation or a piece of paper stating the (formal) law. Knowledge of the law may be sufficient to redress the inequality in negotiating strength and allow the parties to settle the dispute without third-party mediation"¹⁴ Over the long time, FIDA continue to transform social attitudes that adversely affect decisions made by traditional legal systems. Knowledge of equal rights by both men and

¹³ Invoking the Poor person's defense Act .

¹⁴ Hallward and Hazen , Empowering women Legal rights opict page 145

women will give women greater negotiating power before traditional justice forums and religious system that many times are biased in favor of the patriarchal.

Additionally Increasing Women's Awareness: Improving substantive protections and access to the legal system will have little impact if women are unaware of the laws protecting them. Disseminating information on existing protections and provisions, particularly in rural areas and among those who are less educated, is thus crucial. The greatest impact is normally on key life decisions: marriage, acquisition of property, and inheritance. Registering a marriage can extend statutory protections to women. Titling marital property jointly ensures greater control over key assets. Writing a will—and having one's husband and parents write wills—to specify that the wife (or daughter) inherits a share of the estate can ensure against other family members, particularly in-laws, disinheriting the woman.

Considering alternative dispute resolution mechanisms: Mechanisms such as mediation can be an alternative to the formal adversarial system in such areas as family law and property disputes. They may also be more familiar to communities already accustomed to traditional justice forums, such as village courts or councils of chiefs. Mechanisms can be backed by the formal system and employ statutory, customary, or religious law. When following this approach, both formal courts and traditional justice forums should adhere to the principles of human rights for all ethnic groups and nondiscrimination against women. **Small claims courts** are a useful fast-track mechanism. They do not require lawyers, and the process is generally less structured than a regular court hearing. This initiative should be popularized and more of such courts would help women assert claims to marital assets and help small business owners settle commercial disputes

Choosing a Beneficial Marital Property Regime: Women should be encouraged to choose beneficial marital property regimes. The best regime will often be community of property, particularly if not all assets are jointly titled or the woman's contribution to the family business is unpaid. Where women have their own assets or a separate business in their own name, a separate property regime may better serve their interests. This should follow Titling **Marital Property Jointly** to prevent ambiguity regarding the equitable division of marital property, women should take steps to ensure that the marital home is titled jointly. Doing so can protect their share of the marital home even in separate property regimes that do not recognize nonmonetary contributions. As women are rarely in a position to demand joint titling, statutory provisions requiring it would help them retain a share of the marital home following the end of a marriage, because of divorce or death. Where community of property regimes are available and not subject to the husband's administrative control, women should be made aware of the benefits of selecting this regime. This approach may not apply to poorer communities, where the value of the traditional dwellings may not make it worthwhile legally delineating ownership. In these cases, rights of occupation or use of land may better serve women's interests.

Using Prenuptial Agreements: Awareness of prenuptial agreements should be increased. For example, in Kenya, which has a separate property regime, the law recognizes prenuptial agreements, although they are rarely used. Beyond building awareness of their existence, a focus should be on the issues prenuptial agreements should cover. Clauses in Muslim marriage contracts should spell out property as being jointly owned and address issues other than property rights, such as polygamy, the right to work outside the home, the right to divorce, and custody of children on divorce. Many women lack the negotiating power to ask for a prenuptial agreement. Templates produced by nongovernmental organizations could increase access to such agreements.

Writing Wills That Ensure Women’s Access to a Share of the Estate:

Lack of awareness and prevailing social norms in many countries in Sub-Saharan Africa ensure that even in literate, urban communities, few people draw up wills.

Skilling of women for economic empowerment: Finally include economic empowerment in programming for legal aid interventions in order to enhance women capabilities to make informed decisions. Efforts and interventions should be geared towards making women enterprising and expanding their economic opportunities. Women should be empowered with legal abilities to make informed choices on their property rights, for example advocating for strong rights can promote investment, hence efforts should be geared toward changing inheritance laws to favor the girl child and provide equitable distribution of resources, having land rights that enables women to own land and the resources on land, capping domestic violence economic key

THE PLIGHT OF LASPS AND LEGAL FEES IN-CASE OF HAVING TO PAY FEES AFTER LOSING A CASE.

Defining Costs

Costs can loosely be defined as party’s expenses in litigation. They are regulated by the Law governing the remuneration of advocates depending on the state to which it apply, in Uganda it is the Advocates Act statutory Instrument 267-4 (Remuneration and Taxation of Costs) Rules. For our purposes, the sixth schedule governs costs in contentious cases.¹⁵

After instructions are given, an advocate drafts a notice of intention to sue. Hence forth, an

¹⁵ Source <http://www.lalawschoolguide.com/2014/09/costs-and-security-for-costs-expenses.html>

advocate is supposed to set all the bills incurred in litigation. This is called the bill of costs.

Section 27(2) of the Civil Procedure Act is to the effect that costs follow the event unless the court orders otherwise for good reason.

In UDB v Muganga Construction,¹⁶ Manyindo, J, as he then was, said that a successful party can only be denied costs if it is proved that but for his conduct, the action would not have been brought. The costs should follow the event only where a party succeeds in the main purpose of the suit.

Section 27(1) of the CPA gives the judge a discretion in matters relating to costs. It provides that: “*Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid.*”

That discretion however has to be exercised judiciously. *In Kiska v De Angelis*¹⁷, it was said that where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised UN-judicially or on wrong principles. Where it gives no reasons for its decision, the appellate court will interfere if it feels that the order was wrong. If a trial court gives reasons, the appellate court will interfere if it is satisfied that the reasons given are not good.

Security For Costs

The general rule in costs jurisdiction is that "*costs follow the event*". In other words, the loser in legal proceedings must pay the legal costs of the successful party. Where a defendant has a reasonable apprehension that its legal costs will not be paid for by the plaintiff if the defendant is successful, the defendant can apply to the court for an order that the plaintiff provide security for costs.

Order 26 rule 1 of the civil procedure rules provides that: “*The court may if it deems fit order a plaintiff in any suit to give security for the payment of all costs incurred by any defendant.*”

The words “*may if it deems fit*” connote a discretion. The words “*order a plaintiff*” mean that the made against a plaintiff. The underlying principle for security for costs is the fact that the defendant may in its opinion have a good defense. Court orders a plaintiff to deposit money so that if the defendant is successful his costs are secured.

¹⁶ (1981) HCB 35

¹⁷ **Civil Appeal No. 9 of 1968) [1968] EACA 7 (17 July 1968)**

In *Namboro & Another v Kala [1975] HCB 315*, **Sekandi J**, said that the main consideration in an application order is only for security for costs are:

- (a) whether the applicant is being put to undue expense by defending a frivolous and vexatious suit.
- (b) That the applicant has a good defense to the suit.
- (c) That the applicant/defendant is likely to win.

After these factors have been considered, the court may then consider the plaintiff's ability to pay. Mere poverty of the plaintiff is not by itself a ground for ordering security for costs. If this were so, poor litigants would be deterred from enforcing their legitimate rights through the legal process.

JUST like the litigants the law doesn't not give any exceptions to costs exemptions of LASPs or the clients on ground of poverty, in fact they are more vulnerable even if they brought a suit under the pauper's act and it is discovered that it was fictitious or where the defendant applies to court to have the LASP who would be defendant to furnish court with security of costs as per the provision of the CPR

The fees legal structure

Court fees administrative, family, civil related cases, (court fees structure – Judicature Act), **1.Filing fees for any subject matter of up to -6000 it is 900 and for subject matter of as much as 27 -30 million 127,000 and for any extra 3,000,000 you add 3000 + bank charges 2200; 2.Advertising in the paper-120,000, Bail Application -5000, Notice of Motion-3000, Or even-1500, Plus bank charges for each -2200¹⁸**

The legal practitioner's professional rules (Advocates remuneration and taxation of costs) rules

- Instruction fees—10% of the subject matter
- Research fees, including perusal of documents, 5000 per folio (100 words)
- Disbursements, both for client and advocates, stationary, airtime, transport, accommodation etc. Expert witnesses costs
- Attendance of court, filing of pleadings, 10,000 for law clerk , minus the transport , for advocate attending court for one hour 50,000
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To note, in cases of a LASP losing a case it means the likely costs will not be below 5,000, 0000

And for cases that drag on in court like land matters for a minimum of 5 years, the costs become exorbitant. The Civil proceedings by their nature are not as friendly with ping pong of

¹⁸ Source Judiciary handbook first edition 2006

miscellaneous applications all of which are meant to generating reward of costs for the winning party

What the LASPS say about losing cases

- Normally courts are slow in awarding against LASPs .As courts practice is that orders shouldn't be issued in vain where it's clear that will not be enforced. It's within the right of counsel to submit and report to consider the issues of their client's indigence
- Court only awards costs against an indigent person when it finds that the cases itself is frivolous vexatious and has long history of litigation. Costs awarded against them to deter them
- Justice Batema has a decision pending before him which will decide /touch issues and sense of direction on the costs of indigence

According to UCLF: No costs have been awarded against the organization as a LASP but to the indigent clients. UCLF has petitioned court to reconsider after seeing the client could not afford anyway. In case their clients win they always use the advantage s of court bailiffs who usually quicken the execution process especially land matters, administration causes but this comes with cost implications

According to Justice Centers Uganda, they don't have the capacity to handle all the complaints that are filed. This means that JCU is compelled to use the a means and merit test to ensure cases taken or all deserving in order to minimize the events that falls after a cases is lost to the defendant **Likelihood for success:** Test enables them to take only those cases with the highest likelihood for success.-80% probability that they will win a case. Therefore they have never experienced a time where costs are awarded against our clients. Even if they did many are poor and unable to pay and would be futile to do so.

According to ULS -LAP Fort-Portal: Yes costs have been awarded against clients but never against ULS/ LAP as an institutions and this ends up in the attachment/disposal of the indigent property. If a client doesn't want to risk costs awarded against them should proceed under for pauper suitsmost clients would risk to take the normal course

ULS pays for court fees and the standard costs apply even for other LASPs

Conclusion

The areas of law that bring a gender dimension to property rights and legal capacity are largely in family, inheritance, and land laws, areas that few policy makers look at when considering how to improve the investment climate for women. Their effect on who can access and control assets or enter into contracts is central in determining the ability and incentives of individuals to run a



business. Labor laws can also shape entrepreneurial activities, indirectly, through the relative attractiveness of employment, and potentially directly, by restricting the types of activities that women entrepreneurs can perform. Therefore legal reforms over time illustrate how reforms in family, inheritance, and land laws can strengthen the ability of women to pursue economic opportunities.

The MEANS AND MERITS TEST no doubt has to be applied cautiously to minimize on the risk of losing cases to the detriment of the already impoverished clients

THANK YOU FO LISTENING

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