

# The Prosecutor's Handbook on Property Grabbing Crimes





## Foreword

In Uganda, many widows and orphans live in fear of having their homes and land taken from them. They have seen it happen many times – crops and livestock cut to the ground; marital homes set on fire; brick walls pushed down on families; women brutalized with machetes, axes and fists; and children left without a source of livelihood – all because stronger and ruthless people want to grab their land for themselves, and because their husbands and fathers are no longer there to protect them.

Prosecutors are vital actors in the fight to protect these women and children, among others, from the brutality of property grabbing. Just as a syringe is required to administer life-saving medicine to a sick person, laws intended to protect the poor and vulnerable require the criminal justice system to administer justice to those for whom the law seeks to provide legal protection. The “syringe” that administers justice in Uganda is the Directorate of Public Prosecutions. It provides the life-saving power of the law to men, women and children who would surely suffer without it.

The purpose of these materials is to assist the administration of justice in Uganda as it flows through this “syringe.” Inside the Handbook you will find an explanation of the significance of property grabbing crimes in Uganda, the impact they have on the communities where they occur and why prosecution of these crimes is so important to end impunity for these offences.

The Vision of the Directorate of Public Prosecutions is for a crime free society, and its mission is to handle and prosecute criminal cases in a just, effective and efficient manner. The Directorate of Public Prosecutions is partnering with International Justice Mission in its efforts to make this vision a reality specifically in the area of property grabbing crimes. It is my hope that this Handbook will assist you as you continue working towards a day when all vulnerable people in our society, including widows and orphans, no longer have reason to fear that their homes and land will be taken from them with impunity.




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**Director of Public Prosecutions**







# Table of Contents

<b>FOREWORD</b>	<b>2</b>
<b>TABLE OF CONTENTS</b>	<b>3</b>
<b>1 INTRODUCTION</b>	<b>7</b>
1.1 About International Justice Mission	7
1.2 About this Handbook	8
<b>2 PROPERTY GRABBING</b>	<b>9</b>
2.1 What is Property Grabbing?	9
2.2 Why property grabbing should be prosecuted	10
<b>3 CRIMINAL OFFENCES – Eviction, Trespass &amp; Occupation Offences</b>	<b>12</b>
3.1 <b>Eviction or Attempted Eviction of a Lawful or Bona Fide Occupant</b>	<b>12</b>
3.1.1 Statutory Language	12
3.1.2 Elements of the Offence	12
3.1.3 Definitions and Notes	12
3.1.4 Defences	14
3.2 <b>Eviction or Attempted Eviction of a Widow/Child</b>	<b>14</b>
3.2.1 Statutory Language	14
3.2.2 Elements of the Offence	15
3.2.3 Definitions and Notes	15
3.2.4 Key Cases	16
3.3 <b>Malicious Damage of Property</b>	<b>16</b>
3.3.1 Statutory Language	16
3.3.2 Elements of the Offence	16
3.3.3 Definitions and Notes	17
3.3.4 Key Cases	17
3.3.5 Example Arguments for Potential Defences	18
3.4 <b>Demanding Property with Menaces</b>	<b>18</b>
3.4.1 Statutory Language	18
3.4.2 Elements of the Offence	19
3.4.3 Key Cases	19
3.5 <b>Criminal Trespass</b>	<b>20</b>
3.5.1 Statutory Language	20
3.5.2 Elements of the Offence	20
3.5.3 Definitions and Notes	20
3.5.4 Key Cases	21
3.5.5 Defences	22
3.6 <b>Occupying Land without Consent</b>	<b>22</b>
3.6.1 Statutory Language	22
3.6.2 Elements of the Offence	22

	3.6.3	Definitions and Notes	22
	<b>4</b>	<b>CRIMINAL OFFENCES – Boundary Mark Offences</b>	<b>24</b>
	4.1	<b>Damaging or Removing Survey and Boundary Marks</b>	24
	4.1.1	Statutory Language	24
	4.1.2	Elements of the Offence	24
	4.1.3	Definitions and Notes	25
	4.1.4	Key Cases	25
	<b>5</b>	<b>CRIMINAL OFFENCES – Estate Administration Offences</b>	<b>26</b>
	5.1	<b>Intermeddling</b>	26
	5.1.1	Statutory Language	26
	5.1.2	Elements of the Offence	27
	5.1.3	Definitions and Notes	27
	5.1.4	Key Cases	28
	5.1.5	Example Arguments for Potential Defences	28
	5.2	<b>Fraudulent Disposal of Trust Property</b>	29
	5.2.1	Statutory Language	29
	5.2.2	Elements of the Offence	29
	5.2.3	Definitions and Notes	29
	5.2.4	Key Cases	29
	5.2.5	Example Arguments for Potential Defences	30
	5.3	<b>Failure to File Inventory and Account</b>	31
	5.3.1	Statutory Language	31
	5.3.2	Elements of the Offence	32
	5.3.3	Definitions and Notes	32
	5.4	<b>Exhibiting a False Inventory or Account</b>	33
	5.4.1	Statutory Language	33
	5.4.2	Elements of the Offence	35
	5.4.3	Definitions and Notes	35
	<b>6</b>	<b>CRIMINAL OFFENCES – Wills, Deeds, &amp; Legal Instrument Offences</b>	<b>37</b>
	6.1	<b>Forgery of a Will, Title, or judicial, official or other defined Legal Document</b>	37
	6.1.1	Statutory Language	37
	6.1.2	Elements of the Offence	37
	6.1.3	Definitions and Notes	38
	6.1.4	Key Cases	39
	6.2	<b>Theft of a Will</b>	40
	6.2.1	Statutory Language	40
	6.2.2	Elements of the Offence	41
	6.2.3	Definitions and Notes	42
	6.3	<b>Concealing a Will</b>	42
	6.3.1	Statutory Language	42
	6.3.2	Elements of the Offence	42
	6.3.3	Definitions and Notes	42



Property Grabbing Crimes		
6.4	<b>Concealing a Deed</b>	43
6.4.1	Statutory Language	43
6.4.2	Elements of the Offence	43
6.4.3	Definitions and Notes	44
6.5	<b>Destroying or Damaging a Will or Deed</b>	44
6.5.1	Statutory Language	44
6.5.2	Elements for Destroying or Damaging a Will	45
6.5.3	Elements for Destroying or Damaging a Deed	45
6.5.4	Definitions and Notes	45
	<b>7 CRIMINAL OFFENCES – False Statement Offences</b>	46
7.1	<b>Uttering a False Document</b>	46
7.1.1	Statutory Language	46
7.1.2	Elements of the Offence	46
7.1.3	Definitions and Notes	46
7.1.4	Key Cases	47
7.1.5	Example Arguments for Potential Defences	48
7.2	<b>Obtaining Registration by False Pretence</b>	49
7.2.1	Statutory Language	49
7.2.2	Elements of the Offence	50
7.2.3	Definitions and Notes	50
7.2.4	Key Cases	50
7.2.5	Example Arguments for Potential Defences	50
7.3	<b>Making a False Declaration Relating to Land</b>	52
7.3.1	Statutory Language	52
7.3.2	Elements of the Offence	52
7.3.3	Key Cases	52
	<b>8 CRIMINAL OFFENCES – Domestic Violence</b>	53
8.1	<b>Domestic Violence</b>	53
8.1.1	Statutory Language	53
8.1.2	Elements of the Offence	53
8.1.3	Definitions and Notes	53
	<b>9 LEGAL DEFINITIONS</b>	55
9.1	<b>Wilful and Unlawful</b>	55
9.2	<b>Intent to Defraud</b>	55
	<b>10 TRIAL ISSUES AND OBSTACLES</b>	58
10.1	<b>Distinction and overlap of civil and criminal wrongs</b>	58
10.2	<b>Dismissal of a Case</b>	60
10.3	<b>Land Disputes and Claim of Right</b>	61
10.4	<b>Relevant Evidence</b>	65
10.5	<b>Reconciliation provision</b>	66

	10.5.1 Discretionary Nature of Section 160 of the MCA	67
	10.5.2 Qualifications on the Section 160 of the MCA	68
	10.5.3 Section 160 and Property Grabbing	68
	<b>11 SENTENCING</b>	<b>70</b>
	11.1 <b>Purposes of Punishment in Criminal Law</b>	70
	11.2 <b>Appropriate Sentencing</b>	70
	<b>12 SUCCESSION LAW OVERVIEW</b>	<b>73</b>
	12.1 <b>Introduction</b>	73
	12.2 <b>Obtaining Authorisation to Administer an Estate</b>	73
	12.2.1 Intestate Estates: Obtaining Letters of Administration	73
	12.2.2 Testate Estates: Obtaining Probate	76
	12.3 <b>Legal Rights of Executors, Administrators and Beneficiaries</b>	77
	12.3.1 Rights prior to a grant of Letters of Administration or Probate	77
	12.3.2 Rights of executor and administrators	77
	12.3.3 Standing to bring a Criminal Complaint	78
	12.4 <b>Distribution Rights of Beneficiaries</b>	79
	<b>13 PROPERTY GRABBING OFFENCES CHART</b>	<b>83</b>
	<b>14 TABLE OF AUTHORITIES</b>	<b>89</b>



# 1 INTRODUCTION

## 1.1 About International Justice Mission

International Justice Mission (IJM) is a global organisation that protects the poor from violence by partnering with local authorities to rescue victims, bring criminals to justice, restore survivors and strengthen justice systems. IJM's global team of attorneys, investigators, social workers and other professionals combat property grabbing, slavery, sex trafficking, sexual violence, police abuse of power and other forms of injustice.

In Uganda, IJM focuses on combatting the abuse of property grabbing from widows and orphans.<sup>1</sup> IJM engages the Ugandan justice system in Collaborative Casework, taking cases of individual victims of property grabbing through the justice system and providing hands-on support, training and mentoring to public justice system actors in the course of resolving each case. In partnership with local authorities, IJM secures property ownership for individual victims, restrains and prosecutes property grabbing offenders through the formal criminal justice system and supports victims of property grabbing through the provision of after-care services.

In addition to Collaborative Casework, IJM also engages in System Reform, a systemic approach to strengthening the justice system response in order to more sustainably protect vulnerable people from violence. In 2012, IJM launched Project Empaanyi<sup>2</sup> in Mukono County to strengthen the Ugandan justice system to prevent, deter, and respond to property grabbing. Project Empaanyi is designed to:

- **Deter perpetrators** from property grabbing by ensuring that the criminal justice system effectively investigates and holds perpetrators accountable for property grabbing.
- **Reduce vulnerability** to property grabbing by ensuring that widows and orphans have secure land ownership rights and documentation (including formalised marriages;

<sup>1</sup> IJM has been investigating and documenting cases of property grabbing since the early 2000s and currently works in Mukono County, and in Gulu and Amuru Districts

<sup>2</sup> Project Empaanyi is a strategic partnership between IJM and the Ugandan Public Justice System to end property grabbing in Mukono through collaborative casework and capacity building.



legally-valid wills; land demarcation, land titles and busuulu tickets; and proper estate administration) provided through responsive local government, education, and effective estate administration system.

IJM is registered as a non-governmental organisation and legal aid service provider.



## 1.1 About this Handbook

This Handbook is designed to assist in the prosecution of property grabbing-related offences. We have compiled this as an easy reference guide for when you are faced with particular property grabbing offences. The legislative text, elements, definitions, key cases and other relevant information have been set out for each offence. Common definitions that arise in numerous offences are explored in Section 9. In some places we have included civil cases not for precedential value, but to assist with definitions of terms where criminal cases are not available. We have included some samples of submissions and arguments the DPP and IJM have used to counter arguments made by defendants in cases before Magistrates Court within Mukono Magisterial area. These are designed to provide some ideas and examples that you can adapt for your own cases where relevant.

**Bold prosecutors are necessary to step in the gap and craft new precedents where criminal conduct has been largely ignored or recently outlawed in order to ensure that justice is done.**

As property grabbing often takes place in relation to a deceased's estate, some provisions of succession-related law have been included to provide a handy reminder of what you need to know in these situations.

IJM and the DPP have seen a number of issues frequently arise in the trials and sentencing of property grabbing-related offences. Some of these issues are specific to property grabbing cases, but others are more general. We have included some principles, legal theories and arguments that you can draw on when facing such obstacles.

A number of these offences have not been frequently prosecuted or have no decisions from a court of record. As with any criminal conduct that has been largely ignored or recently outlawed, bold prosecutors are necessary to step in the gap and craft new precedents in order to ensure that justice is done. We hope that the information gathered here will encourage and equip you in forging new paths.



### 2.1 What is Property Grabbing?

In this Handbook, ‘property grabbing’ is used to describe a range of criminal acts in which perpetrators use physical force, forgery, fraud, threats, intimidation, property destruction or collective pressure to drive vulnerable people from their rightful property. In Uganda, widows and orphans are among those who are most vulnerable to property grabbing.<sup>3</sup> Following the death of a male head of household, it is common for relatives, community members, authority figures and other opportunists to plunder the property that belonged to the deceased and his spouse, including their home and its surrounding gardens.

Property grabbing is often a violent crime and tends to escalate without prompt law enforcement intervention. Victims of property grabbing frequently face protracted periods of violence, threats and intimidation that leave them in constant fear for their life.<sup>4</sup> Perpetrators commonly seize property using physical force or threats to overpower a victim, maliciously damage crops or threaten witchcraft in order to intimidate a victim. Often these perpetrators are physically powerful and widows do not have the physical strength to resist the property grabbing. Without recourse to a fully functioning public justice system, perpetrators commit property grabbing with impunity.

Unfortunately, this is a common—even expected—experience for widows in Uganda. Studies consistently show that around 30% of widows are victims of property grabbing.<sup>5</sup> This is a threat that hangs

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3 Deininger, K. (2003). *Land Policies for Growth and Poverty Reduction*. World Bank Policy Research Report. Washington, DC: World Bank; New York: Oxford University Press.

4 Land and Equity Movement in Uganda (“LEMU”). 2009. *How does Land Grabbing Happen?* Policy Document. International Justice Mission (2014) *Property Grabbing from Ugandan Widows and the Justice System Response*, p 55.

5 Nearly 40% of widows in Mukono County come under attack in either successful or unsuccessful property grabbing attempts and over 30% of widows actually lose their home or land (International Justice Mission (2014) *Property Grabbing from Ugandan Widows and the Justice System Response*, p 50-51). Thirty percent of widows in Northern Uganda were victims of land grabbing (Burke, C. and Kobusingye, D. (2013) *Securing Women’s Land and Property Rights in Northern Uganda*, Oxfam. Unpublished Working Paper). A 2013 Oxfam study estimated that the prevalence rate of property grabbing among female widows in Northern Uganda (West Nile, Acholi, Lango, Teso and Karamoja) was 30% (Burke, C., and Kobusingye, D. (2013). *Securing Women’s Land and Property Rights in Northern Uganda*, Oxfam. Unpublished Working Paper).

over every woman in Uganda, with devastating effects that are grave and far reaching.

Human Rights Watch describes the impact of property grabbing on women and their dependents as “catastrophic: many end up homeless or living in slums, begging for food and water, unable to afford health care or school fees for their children, and at grave risk of sexual abuse or exploitation.”<sup>6</sup> IJM found that nearly a quarter of property grabbing victims have a dependent pass away in the year after the property grabbing.<sup>7</sup> Combatting such a pervasive abuse—that is violent and has such grave consequences—must be a priority.



## 2.2 Why property grabbing should be prosecuted

Property grabbing should be prosecuted because it is pervasive, devastating and often occurs in an environment of impunity. Without the deterrent of effective prosecution and punishment, widows and orphans will continue to face the devastating consequences of having their homes and livelihood taken from them.

While the Penal Code Act and other statutes do not include a specific offence called ‘property grabbing’, the act of taking land that belongs to another violates numerous criminal statutes and Article 26 of the Constitution, which guarantees protection of property.

Attempting to evict widows or unmarried orphans from the home of their deceased husband or father is made criminal by the Succession Act,<sup>8</sup> and inter-meddling in the process of estate administration and distribution after a death is made criminal by the Administrator General’s Act.<sup>9</sup> The Penal Code Act also contains provisions outlawing the full host of crimes commonly committed in the process of property grabbing.

Although property grabbing often includes elements of a civil dispute, Ugandan law has made the property grabbing itself, and the means used to grab the property, criminal. Eviction of a bona fide occupant and wrongful occupation of property were specifically criminalised by the Land (Amendment) Act 2010 due to the Parliament of Uganda’s

IJM found that nearly a quarter of property grabbing victims have a dependent pass away in the year after losing their land. Property grabbing can be a death sentence for many victims.

6 Human Rights Watch ‘HIV/AIDS and Women’s Property Rights in Africa Fact Sheet (available at <https://www.hrw.org/legacy/campaigns/women/property/aidsfactsheet.htm>).

7 International Justice Mission (2014) *Property Grabbing from Ugandan Widows and the Justice System Response* p 90.

8 Succession Act, Second Schedule, Rule 10.

9 Section 11 of the Administrator General’s Act.



## Property Grabbing Crimes

concern about rampant evictions and the violent nature of property grabbing.<sup>10</sup> The Parliament of Uganda has decided that property grabbing acts are so devastating to the broader community that it is not just a wrong done to the victim herself but to the community as a whole.

Despite the Parliament of Uganda's specific concern about the widespread nature of property grabbing and its ensuing violence, property grabbing takes place in an environment of near total impunity for those perpetrating property grabbing crimes.<sup>11</sup> Without meaningful criminal sentences to condemn these crimes, there is no justice for the victims of property grabbing and nothing to deter perpetrators from continuing to take criminal actions in order to grab property.

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<sup>10</sup> See Parliament of Uganda, Hansards, 2009 at 3374, per Mr Omara Atubo.

<sup>11</sup> International Justice Mission (2014) *Property Grabbing from Ugandan Widows and the Justice System Response*, p 83 -87.

## 3 CRIMINAL OFFENCES – Eviction, Trespass & Occupation Offences



### 3.1 Eviction or Attempted Eviction of a Lawful or Bona Fide Occupant

#### 3.1.1 Statutory Language

*Land Act, Section 92 Offences and penalties as amended by the Land (Amendment) Act 2010, Section 5(a) and (c).*

(1) A person who—

(e) attempts to evict, evicts, or participates in the eviction of a lawful or bona fide occupant from registered land without an order of eviction;

... commits an offence

(5a) A person convicted of an offence specified in subsection (1)(e) is liable on conviction to imprisonment not exceeding seven years.

(5b) Where a person is convicted under subsection (5a), the court may—

- (i) Order that person to pay compensation or damages to the person who was evicted; or
- (ii) Make an order for restitution in favour of the person who was evicted.

#### 3.1.2 Elements of the Offence

1. Evicts or attempts to evict (includes participation in the eviction)
2. From registered land
3. Of a lawful or bona fide occupant
4. Without an order of eviction

#### 3.1.3 Definitions and Notes

This offence was added into the Land Act by the Land (Amendment) Act 2010. The Land (Amendment) Act 2010 was enacted specifically to address the rampant evictions of customary land owners. Its purpose was to enhance the security of occupancy for tenants and protect customary land owners from unlawful evictions.<sup>12</sup>

<sup>12</sup> Hansard, at 3353 per Mr Omara Atubo (Minister of Lands, Housing and Urban Development).

This is a recent addition to Uganda's criminal offences. As of this writing there have been no reported prosecutions of this crime, despite its egregious nature. State Attorneys and Prosecutors charging this crime might have to clarify to magistrates the distinction between civil and criminal aspects of evictions. See Section 10.1



## Property Grabbing Crimes

### 'Lawful or bona fide occupant'

*Land Act, Section 29. Meaning of "lawful occupant" and "bona fide occupant".*

(1) "Lawful occupant" means—

- (a) a person occupying land by virtue of the repealed—
  - i. Busuulu and Envujjo Law of 1928;
  - ii. Toro Landlord and Tenant Law of 1937;
  - iii. Ankole Landlord and Tenant Law of 1937;
- (b) a person who entered the land with the consent of the registered owner, and includes a purchaser; or
- (c) a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.

(2) "Bona fide occupant" means a person who before the coming into force of the Constitution—

- (a) had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or
- (b) had been settled on land by the Government or an agent of the Government, which may include a local authority.

(5) Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this section shall be taken to be a bona fide occupant for the purposes of this Act.

For further elaboration on who falls within the definition of lawful and bona fide occupant, see the following civil cases:

- Registered land in section 92(2)(a) of the Land Act includes land under a statutory lease, where the land has been surveyed, has a plot number and a registered proprietor. (*Kampala District Land Board and another v National Housing and Construction Corporation*, [2005] 2 EA 69)
- Occupying and utilising land unchallenged for 25 years prior to the 1995 Constitution clearly fell within section 92(2)(a) of the *Land Act*. (*Kampala District Land Board and another v*

*National Housing and Construction Corporation*, [2005] 2 EA 69)

- People occupying land belonging to the Kabaka of Buganda and subject to a lease may be bona fide and/or lawful occupants. (*Kampala District Land Board and another v National Housing and Construction Corporation*, [2005] 2 EA 69)

### Order of eviction

The order of eviction must have been made by a Magistrate Grade I or a Chief Magistrate.<sup>13</sup> If it was made by a Magistrate Grade II or a local council court, it is not a valid order of eviction within the meaning of the section.

The order of eviction can only be made on the grounds of non-payment of ground rent.<sup>14</sup> No other reason for eviction is valid.

#### 3.1.4 Defences

The registered owner can raise the fact that they do have an order for eviction and thus defeat the charge. However, and as noted above, that order of eviction must have been properly obtained from a Grade 1 Magistrate or Chief Magistrate and must be in relation to non-payment of ground rent.

## 3.2 Eviction or Attempted Eviction of a Widow/Child

### 3.2.1 Statutory Language

*Succession Act, Second Schedule, Rule 10: Offences*

It shall be an offence punishable with imprisonment not exceeding six months or a fine not exceeding one thousand shillings or both for any person to evict or attempt to evict from a residential holding prior to the issue of a certificate under paragraph 4 of this Schedule any wife or child of an intestate who normally resided there at the date of death of the intestate or to do any act calculated to persuade or force any the wife or child to quit such holding prior to the issue of the certificate.

<sup>13</sup> Land Act Cap 227, as amended by the Land (Amendment) Act 2010, section 32A (4).

<sup>14</sup> Land Act Cap 227, as amended by the Land (Amendment) Act 2010, section 32A(1).

Like Eviction or Attempted Eviction of a Lawful Bona Fide Occupant, this is a recent addition to Uganda's criminal offences. While the DPP has successfully prosecuted this offence, there are no judgments from a court of record for this offence. State Attorneys and Prosecutors charging this crime might have to clarify to magistrates the distinction between civil and criminal aspects of evictions. See Section 10.1



## Property Grabbing Crimes

### 3.2.2 Elements of the Offence

1. Evict or attempt to evict (includes acts calculated to persuade or force to quit)
2. From a residential holding
3. Any wife or child of an intestate who normally resided there at date of the intestate's death
4. Prior to the issue of a certificate of occupancy

### 3.2.3 Definitions and Notes

Parts of the Succession Act were declared void by the Constitutional Court of Uganda in *Law Advocacy for Women in Uganda v Attorney General Constitutional Petitions Nos. 13/05 & 05/06* [2007] UGCC 1 (5 April 2007). Rule 10 of the Second Schedule was not affected by this decision.

For information about residential holdings, see Matrimonial Homes in Section 12.4 of this Handbook.

#### Certificate of occupancy

The offence mentions eviction 'prior to the issue of a certificate under paragraph 4 of this Schedule'. Paragraph 4 of Schedule 2 provides that the court shall issue a certificate of occupancy to a person when satisfied that the person is properly entitled to occupation, has taken occupation of the residential holding and that there is no other person entitled to occupation. In reality, these certificates are rarely, if ever, issued. Consequently, any eviction will always be prior to the issue of a certificate.

#### Acts calculated to persuade or force to quit

This offence does not just cover overt acts that successfully drive a widow or child off their land, but also includes attempts to evict, and eviction or attempted eviction driven by "acts calculated to persuade or force to quit". An offender does not have to actually throw the widow or child on the street to commit the offence; he or she can commit acts or create conditions that are designed to persuade or force the widow or child to quit the land.

Ugandan law has a helpful parallel in the concept of constructive desertion in divorce law. Black's Law Dictionary (8th Edition) defines constructive desertion as:

One spouse's misconduct that forces the other spouse to leave the marital abode. The actions of the offending spouse must be serious enough that the spouse



who is forced from the home finds the continuation of the marriage to be unendurable or dangerous to his or her safety and well-being, and finds it necessary to seek safety outside the marital domicile.

The court in *Sutton v Sutton* [2015] HC 63-2013 held that there was constructive desertion where there was uncontroverted evidence that the cross respondent's conduct forced the cross petitioner to leave the matrimonial home.

In a similar manner, the conduct of an offender can be calculated to persuade or force a widow or child to quit their residential holding. The DPP, with assistance from International Justice Mission, successfully prosecuted this offence in 2013 in the case of *Uganda v Kiraala Sam and Tabitha Nakibuule* at the Chief Magistrate's Court Mukono. The defendant committed acts calculated to persuade or force the victim to leave her residential holding, including destroying crops, stealing crops, repeatedly insulting and verbally abusing the victim, coming onto their land late at night yelling, hitting and damaging the home and threatening to kill the victim. The defendant pleaded guilty to, and was convicted of, the offence of Attempted Eviction of a Child.

### 3.2.4 Key Cases

We have been unable to find any case of precedent in which this offence has been prosecuted. However, the DPP, with support from International Justice Mission, has had successful prosecutions of this offence at the Magistrates Court, including the case mentioned above, *Uganda v Kiraala Sam and Tabitha Nakibuule*.



## 3.3 Malicious Damage of Property

### 3.3.1 Statutory Language

*Penal Code Act, Section 335 – Punishment for malicious injuries in general*

- (1) Any person who wilfully and unlawfully destroys or damages any property commits an offence and is liable, if no other punishment is provided, to imprisonment for five years.

### 3.3.2 Elements of the Offence

1. Wilful and unlawful act
2. Causing the destruction or damage
3. Of Property



In many cases of Malicious Damage of Property, the defence will attempt to raise a claim of right argument. For an in-depth discussion on claim of right, see Section 10.3.

## Property Grabbing Crimes

### 3.3.3 Definitions and Notes

See the definition of 'wilfully' in Section 9.1 of this book.

### 3.3.4 Key Cases

*Kamori Johnson v Uganda* [1995] KALR 205

*Key Principle: You cannot make a claim of right over property that is not yours.*

The appellant was accused of uprooting the complainant's young Irish potatoes. The appellant raised a claim of right over the land (allegedly belonging to his father), as his mother had Letters of Administration over the estate of his father. The court held that you cannot make a claim of right over property that is not yours; the claim that the property belonged to his mother does not give the appellant a claim of right. The uprooting of the Irish potatoes was held to be damaging and malicious because the evidence clearly indicated they were not yet ready to be harvested.

*Byekwaso Mayanja Sebalijja v Uganda* [1991] HCB 15

*Key Principle: An honest belief, whether justifiable or not, that the property is the appellant's would negate the element of mens rea.\**

*\*But see Wejuli below.*

The appellant (Byekwaso) was a customary tenant of the complainant, and the complainant planted trees on the appellant's land without consent. The appellant uprooted them and he was charged with malicious damage to property. The court held that an honest belief, whether justifiable or not, that the property is the appellant's would negate the element of mens rea.

*Wejuli v Uganda* HCT-04-CR-CN-0040-2009

*Key Principle: In finding a claim of right, there must be a possibility (a reasonable and not fanciful possibility) that there are grounds on which the defendant could believe the property belonged to him, even if the claim is mistaken.*

The appellant cut down trees that belonged to his grandmother. He raised the defence of claim of right in the trees, which he claimed to have planted. His grandmother claimed that the trees were hers. They were on her compound, which is the opposite side of the road to his. The court found there was no possibility that there were

grounds on which the appellant could claim to own the trees, and it upheld the appellant's conviction.

*Uganda v Gastafasi Musoke* [1995] UGHC 27

*Key Principle: If lower courts or tribunals issue a decision on ownership of land, that decision is relevant to considering the reasonableness of a claim of right.*

The defendant demolished a house on the land he occupied. The complainants alleged it was their land and he had maliciously damaged the house. There were two decisions, by the RCI and RCII Courts, which found in favour of the defendant regarding the ownership of the land. The court held that these decisions provided reasonable grounds for the defendant to believe the land was his, and upheld his claim of right defence.

### 3.3.5 Example Arguments for Potential Defences

These are examples of ways in which DPP staff have presented legal submissions on issues that have arisen in cases of malicious damage to property.

#### Defendant asserts a claim of right

The cases where a defence of claim of right is successfully raised tend to differ from the current circumstances. In many of these cases the accused, in the process of tending to property they believe to be theirs, removes or uproots crops or trees (see *Nkwine Jackson v Uganda* [1995] KALR 117; *Byekwaso Mayanja Sebalija v. Uganda* [1991] HCB 15 and *Wejuli v Uganda* HCT-04-CR-CN-0040-2009). However, the accused did not demolish the house in the process of maintaining or looking after a property which she was living or farming on. She damaged the property in the middle of the night and drove away quickly when she realised there was someone nearby. These are not the actions of someone who believes they have a right to demolish the house. It is worth noting that in *Uganda v Gastafasi Musoke* [1995] UGHC 27, the defendant was accused of demolishing a house on a disputed property and successfully raised claim of right as a defence. However, in that case there were several civil decisions that held that the land did actually belong to the defendant.



## 3.4 Demanding Property with Menaces

### 3.4.1 Statutory Language

*Penal Code Act, Section 293 – Demanding property with menaces*



Note that land cannot be stolen, but this section would apply to items like the title, will, crops or other removable property.

## Property Grabbing Crimes

Any person who, with intent to steal any valuable thing, demands it from any person with menaces or force, commits a felony and is liable to imprisonment for five years.

### 3.4.2 Elements of the Offence

1. Demands from a person
2. Any valuable thing
3. With menaces or force
4. With intent to steal it

### 3.4.3 Key Cases

*Vaz v R.* [1961] EA 320

*Key Principle: The menaces do not need to be explicit, and they do not need to induce actual fear or alarm.*

The appellant threatened to expose the dishonest practices of his employers unless they paid him money. The court set out three legal propositions:

- The menaces or threats do not need to be explicit; it is sufficient if the menace, though veiled, is implicit in the circumstance in which the money was demanded.
- While the menace must be calculated to cause the person menaced some degree of fear or alarm, it is not necessary to show that it did in fact induce such fear or alarm; it is the intention of the accused and the nature of the menace that is important.
- If the menace is unsuccessful, the test is whether, if it had been successful, and the money had been obtained, it could properly be said to have been stolen, with particular emphasis on whether it had been taken fraudulently and without claim of right.

*Josephati Kairu v Uganda* Court of Appeal (Cr.Appeal No.10 Of 1977)

*Key Principle: Impersonating a public official and using that perceived authority to demand money fulfils this crime.*

The appellant impersonated a police officer and, in doing so, demanded money from the complainant. The court held that he demanded money from the complainant, who parted with it against his will due to the fact that the appellant personated a police officer.



## 3.5 Criminal Trespass

### 3.5.1 Statutory Language

*Penal Code Act, Section 302 – Criminal trespass*

Any person who—

- (a) enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person; or
- (b) having lawfully entered into or upon such property remains there with intent thereby to intimidate, insult or annoy any person or with intent to commit any offence,

commits the misdemeanour termed criminal trespass and is liable to imprisonment for one year.

### 3.5.2 Elements of the Offence

1. Entrance onto or remaining upon property
2. In the possession of another
3. With intent to commit an offence or to intimidate, insult, or annoy a person

### 3.5.3 Definitions and Notes

Intent to commit an offence may include other property grabbing-related offences, including eviction of a widow or orphan or intermeddling.

**Intent to commit an offence may include other property grabbing-related offences, including eviction of a widow or orphan or intermeddling. For example, after the death of John, John's sister Esther enters onto John's property to show the property to potential buyers. She does not have permission to enter the land from Mary, John's widow who is living on the land, nor does she have authorisation to sell the land. This is criminal trespass because Esther entered onto property in possession of another – Mary – with the intent to commit the offence of intermeddling – selling the land of the deceased without authority.**



## Property Grabbing Crimes

### 3.5.4 Key Cases

#### *Kigorogolo v Rueshereka [1969] E.A. 426*

*Key Principle: 'Possession' refers to actual possession, not just right to possession. The intent is to 'commit an offence or to 'intimidate' (meaning to overawe, to put in fear by show of force or threats or violence) or to 'insult' (meaning to assail with scornful abuse or offensive disrespect), or to annoy (meaning to molest).*

The appellant gave permission to the respondent to cultivate a portion of his land, but when the respondent built a hut on the land, the appellant sued for vacant possession. The respondent refused to vacate and eventually the appellant brought a charge of criminal trespass against the respondent. As the respondent was in possession of the property, and did not manifest an intent to commit an offence or intimidate, insult or annoy, the elements of the offence were not present.

#### *Elineo Mutyaba v Uganda High Court at Kampala, Criminal Appeal No 45 of 2011*

*Key Principle: Despite raising claim of right, the defendants remaining on the property after the revocation of his permission constituted trespass.*

The complainant owned two plots of land with 20 units. She lived there and rented out the remaining units. The accused was a live-in partner of the complainant for one year. The relationship ended when the accused attempted to evict the complainant and her tenants from the property and install his own tenants, using an order he obtained from the RDC. The accused alleged that he had bought the land from the complainant's mother and had built the units himself.

The court found that the complainant did own and live on the property, and so was in possession for the purpose of the offence. Despite the fact that the accused also claimed to own the land, the court did not dismiss the case as a civil matter. Instead, the court examined the evidence and found that the complainant's evidence was to be favoured, and that the accused was lying.

The Court noted that the accused was charged under section 302(b), so the issue was whether he had remained on the property with intent to annoy, intimidate or insult. The Court held that the accused's permission to remain on the property ended when the complainant told him to leave and he refused. His intent to intimidate and annoy

the complainant was manifest in his actions in evicting her, her children and tenants, remaining on the property after she asked him to leave, employing people to carry out the evictions and intimidate the tenants.

### 3.5.5 Defences

See the discussion on claim of right Section 10.3 of this book.



## 3.6 Occupying Land without Consent

### 3.6.1 Statutory Language

*Land Act, Section 92 Offences and penalties as amended by the Land (Amendment) Act 2010, Section 5(b)*

(1) A person who—

(c) wilfully and without the consent of the owner occupies land belonging to another person; or

...commits an offence.

(4) A person convicted of an offence specified in subsection 1(c) is liable to a fine not exceeding ninety-six currency points or imprisonment not exceeding four years or both.

### 3.6.2 Elements of the Offence

1. Wilfully
2. Occupying land
3. Belonging to another
4. Without the consent of the owner

### 3.6.3 Definitions and Notes

See the definition of 'wilfully' in Section 9.1 of this book.

The Land Act (Amendment) Bill of 2007, which was passed in 2010,<sup>15</sup> was designed to tackle the issue of rampant evictions in order to protect vulnerable Ugandans.<sup>16</sup> Section 92 (1)(c) was impacted by this amendment because the punishment for this offence was increased from a maximum of six months in prison, to up to four years in prison.<sup>17</sup> The increase in the maximum sentence demonstrates Parliament's concern about such behaviour and the seriousness of such offences.

As there is no case law from a criminal court of record on this offence, parliamentary intent provides helpful guidance for this crime.

<sup>15</sup> The Land (Amendment) Act, 2010.

<sup>16</sup> Hansard, at 3405, 3544 per Mr Omara Atubo.

<sup>17</sup> The Land (Amendment) Act, 2010.



### Property Grabbing Crimes

Parliament explored section 92 (1)(c) in 2009. This section was intended to penalise illegal squatters, as opposed to lawful kibanja holders.<sup>18</sup> At one point during the discussion the Speaker of Parliament stopped discussions in order to explain that a squatter “is different than a lawful kibanja holder.”<sup>19</sup> “A kibanja holder is not a squatter.”<sup>20</sup> The distinction between squatters and kibanja holders is an important one, because kibanja holders are intended to be protected through this statute. As there is no case law on this offence, this section has the potential to be used for any land (whether subject to a kibanja holder’s interest or not) that is occupied without the consent of the owner.

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18 Hansard, at 3544 per Mr Omara Atubo.

19 Hansard, at 3544 per Mr Omara Atubo.

20 Hansard, at 3544 per Mr Omara Atubo at 3397.



## 4 CRIMINAL OFFENCES – Boundary Mark Offences

### 4.1 Damaging or Removing Survey and Boundary Marks

#### 4.1.1 Statutory Language

*Penal Code Act, Section 338 – Removing boundary marks*

Any person who wilfully and unlawfully and with intent to defraud removes or defaces any object or mark which has been lawfully erected or made as an indication of the boundary of any land commits a felony and is liable to imprisonment for three years.

*Penal Code Act, Section 339 – Wilful damage, etc. to survey and boundary marks*

Any person who—

- (a) wilfully removes, defaces or injures any survey mark or boundary mark which shall have been made or erected by or under the direction of any Government department or in the course of or for the purposes of a Government survey;
- (b) ...
- (c) wilfully removes, defaces or injures any survey mark erected by any person authorised or licensed by the Government to conduct survey operations or any mark erected by the holder of, or by an intending applicant for, any lease, licence or right under a written law relating to mines or minerals,

commits a misdemeanour and is liable to imprisonment for three months or to a fine of four hundred shillings, and may further be ordered by the court to pay the cost of repairing or replacing the survey mark or boundary mark and of making any survey rendered necessary by the offender's act or neglect.

#### 4.1.2 Elements of the Offence

1. A wilful and unlawful act
2. Removing or Defacing
3. A lawfully erected object or mark indicating a land boundary



## Property Grabbing Crimes

### 4. With intent to defraud

OR

1. A wilful act
2. Removing, defacing, or injuring
3. A survey or boundary mark authorised by the Government

#### 4.1.3 Definitions and Notes

See the definition of ‘wilfully’ in Section 9.1, and of intent to defraud’ in Section 9.2 of this Handbook.

There is significant overlap between the offences set out in sections 338 and 339 of the Penal Code Act. For example, a ‘lawfully erected’ boundary mark under section 338 encompasses a boundary mark ‘erected by or under the direction of a Government department’ under section 339(a). Further, both sections include removal and defacement of marks. Section 339 encompasses both survey marks and boundary marks whereas section 338 only covers boundary marks.

However, the crucial difference is that section 338 requires an intention to defraud, which is absent from section 339. This is a key point in determining whether to pursue an offence under section 338 or section 339. Where the accused is removing boundary marks with the intention of claiming, selling, cultivating or otherwise occupying land belonging to others, this would indicate an intention to defraud.

#### 4.1.4 Key Cases

*Karorero David v Uganda* [2000] Criminal Appeal No. KAB-00-CR-CN-0004-2000 (From Cr. C. No 321/99 of Kisoro Court)

*Key Principle: What needs to be proved is that the items that were damaged were actual boundary marks and that they were damaged unlawfully and with intent to defraud.*

The appellant in this High Court case was convicted of criminal trespass and removing boundary marks for cutting down plants used as boundary marks. In this case, the judge quashed the convictions for insufficient evidence that the boundary marks were actual boundary marks, and that they were cut unlawfully and with intent to defraud.

See Section 10.3 for a case where a defendant was successfully convicted of removing boundary marks, see *Uganda v Nakibi*.

## 5 CRIMINAL OFFENCES – Estate Administration Offences



### 5.1 Intermeddling

#### 5.1.1 Statutory Language

*Administrator General's Act, Section 11 Intermeddling with property of deceased.*

- (1) When a person dies, whether within or without Uganda, leaving property within Uganda, any person who, without being duly authorised by law or without the authority of the Administrator General or an agent, takes possession of, causes to be moved or otherwise intermeddles with any such property, except insofar as may be urgently necessary for the preservation of the property, or unlawfully refuses or neglects to deliver any such property to the Administrator General or his or her agent when called upon so to do, commits an offence; and any person taking any action in regard to any such property for the preservation of the property shall forthwith report particulars of the property and of the steps taken to the agent, and if that person fails so to report he or she commits an offence.
- (2) Any person who commits an offence under this section is liable on conviction to imprisonment for a period not exceeding three months or to a fine not exceeding two hundred shillings or to both, but without prejudice to any civil liabilities which he or she may have incurred.

*Succession Act, Section 268 Intermeddling, etc.*

A person who intermeddles with the estate of the deceased or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself or herself an executor of his or her own wrong; except that—

- (a) intermeddling with the goods of the deceased for the purpose of preserving them, or providing for his or her funeral, or for the immediate necessities of his or her own family or property; or
- (b) dealing in the ordinary course of business with goods of the deceased received from another, does not make an executor of his or her own wrong.



## Property Grabbing Crimes

### *Succession Act, Section 269 Liability of executor of his or her own wrong.*

When a person has so acted as to become an executor of his or her own wrong, he or she is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his or her hands, after deducting payments made to the rightful executor or administrator, and payments made in due course of administration.

#### 5.1.2 Elements of the Offence

1. Takes possession of, causes to be moved, or otherwise intermeddles with
2. Property left after the death of a person
3. Without the authorisation of the law, the Administrator General (“AG”) or an agent

OR

1. A person unlawfully
2. Refuses or neglects to deliver property (as above) to the AG or his agent when called upon to do so

#### 5.1.3 Definitions and Notes

‘Intermeddle’ is defined in the Oxford Dictionary as to “interfere in something that is not one’s concern”.

There is nothing in this offence that requires the complainant to have Letters of Administration. The requirement is that the accused *does not* have them, but there is no parallel requirement for the complainant to have them. There is no standing required of a complainant in a criminal case (see Section 12.3.3 of this book).

One of the elements of intermeddling is that the actions are “without being duly authorised by law or without the authority of the Administrator General or an agent.” A person is authorised by law to deal with the deceased’s estate when he or she has either Letters of Administration or a Grant of Probate (see Sections 12.2.1 and 12.2.2 below). Alternatively, a person can be authorised by the Administrator General if the Administrator General has Letters of Administration and delegates his or her powers and responsibilities to that person.<sup>21</sup> A person is not authorised to deal with a deceased’s estate if he or she is not a delegated agent of the Administrator

This offence only applies where the accused does not have Letters of Administration or a Grant of Probate. For more information on the process of obtaining such authority, see Section 12.

<sup>21</sup> Administrator General’s Act Cap 157, sections 2(4), 2(5), and 4.

General and he or she does not have Letters of Administration or a Grant of Probate.

#### 5.1.4 Key Cases

*Zachary Kataryeba & 3 Ors v Uganda* [1997] KALR 31

*Key Principle: Intermeddling does not apply where the accused's actions were taken to preserve the deceased's estate.*

This case concerns a firm of accountants which continued with the business after the death of the managing director. Those who continued the business were accused of intermeddling, but on appeal it was held that their actions were simply for the preservation of the estate: they kept the property as firm property and their dealing with the property was to raise revenue for the deceased's estate.

To prove the offence of intermeddling you need to prove that the actions of the accused are more than what was necessary to preserve the deceased's estate.

There have been a number of successful prosecutions of intermeddling by Magistrates' Courts and Chief Magistrate's Court. One example is *Uganda v Kakembo Fred* Criminal Case No 935/2010 Chief Magistrate's Court in Mukono. In that case, Sam Sekalega Semakula died in 1992. He owned 100 ft x 50 ft kibanja in Kabembe. The accused, the deceased's brother, sold this kibanja. He alleged he had been authorised by the clan to sell the land and buy an alternative kibanja for the deceased's children. However, he did not have Letters of Administration, and there was no urgent need to preserve the property at the time. The court convicted the accused of intermeddling.

\*Note that Magistrate's Court decisions do not have precedential value.

#### 5.1.5 Example Arguments for Potential Defences

A defence available to accused persons is that their actions are lawful where 'urgently necessary for the preservation of the property'. Often this defence does not apply in cases of property grabbing from widows and orphans because the person committing the crime of intermeddling is doing so for his own benefit and to the exclusion of the property beneficiaries. Here is a sample argument as to why this exception may not apply:

The exception to the offence was explored in *Zachary Kataryeba & 3 Ors v Uganda* [1997] KALR 31 where the partners moved office locations to raise revenue for the firm of which the estate of the deceased benefitted. The facts of *Zachary* could be distinguished from this case where A1 and A2 dealt with the land to their own benefit to the exclusion of the beneficiaries.



### 5.2.1 Statutory Language

*Anti-Corruption Act 2009, Section 21 Fraudulent disposal of trust property*

(1) A person who, being a trustee of any property, destroys the property with intent to defraud, or, with intent to defraud, converts the property to any use not authorised by the trust, commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty currency points or both.

(2) For the purposes of this section, the term “trustee” means the following persons and no others—

1. a trustee upon an express trust created by a deed, will or instrument in writing, whether for a public or private or charitable purpose;
2. a trustee appointed by or under the authority of a written law for any such purpose described in paragraph (a);
3. a person upon whom the duties referred to in paragraph (a) and (b) devolve;
4. an executor and an administrator.

### 5.2.2 Elements of the Offence

1. An executor, administrator, or other person who is a trustee of any property
2. Destroyed the property OR converted the property to an unauthorized use
3. With intent to defraud

### 5.2.3 Definitions and Notes

There is nothing in this offence that requires the complainant to have Letters of Administration. There is no standing required of a complainant in a criminal case (see Section 12.3.3 of this book).

See the definition of ‘intent to defraud’ in Section 9.2 of this book.

### 5.2.4 Key Cases

*Uganda v Bamwise Patrick Kakaire* H.C.Cr.S. 0002/2015, decided on 18<sup>th</sup> June 2015

*Key Principle: The elements of Fraudulent Disposal of Property are (1) that the accused was a trustee, (2) that the accused converted trust property, and (3) that the accused had intentions to defraud.*

The court held that the accused became a trustee for the estate when he secured Letters of Administration; that the land changed form, or was converted, when it went from being part of the estate of the deceased to bearing the names of the accused, particularly where most of the beneficiaries were unaware of the conversion; and lastly, that there was fraud in that the accused did not disclose his intention to register the land into a leasehold in his name to most of the beneficiaries, the accused never submitted an inventory in ten years and the accused presented a form that contained a signature that was later denied by the signatory.

*R v Burns* [1958] EA 142

*Key Principle: Conversion is dealing with goods in a manner inconsistent with the rights of the true owner with the intent to deny the owner's right.*

The court held 'conversion' to have the same meaning as it has in the law of tort and referred to *Caxton Publishing Co. v Sutherland Publishing Co.* (2), [1939] AC 178 at p 201 where Lord Porter said that conversion was "[d]ealing ... with goods in a manner inconsistent with the right of the true owner ... provided that ... there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right."

### 5.2.5 Example Arguments for Potential Defences

These are examples of ways in which DPP staff have presented legal submissions on issues that have arisen in cases of fraudulent disposal of trust property.

#### Whether the accused had an intent to defraud

In the present instance, it is clear that the accused acted with an intent to defraud the beneficiaries of the late's estate from receiving the land. The accused knew that the late had left a will leaving the land to certain beneficiaries. Thus, the accused's actions of transferring the plots to himself prejudiced and cheated the beneficiaries of the late's estate by causing them financial loss (they did not receive such land) and, at the same time, by bringing financial gain to himself (by receiving the land himself). In making such transfers, the accused fraudulently claimed that he was the beneficiary of the land. The facts and circumstances of the present case leave no doubt regarding the accused's intention to defraud. Because the law of Uganda is that



## Property Grabbing Crimes

“the intent of an offender is to be gathered from the circumstances of the case,” there should be no doubt that this element of the criminal offence of fraudulent disposal of trust property has been met in this case. See Katusiime v Uganda, High Court of Uganda Holden at Masindi (Crim. App. No. 10 of 2013).

### Whether or not trust property was converted

In the present case, it is clear that the accused’s act of transferring the land to himself was done as if such land was the accused’s own property, rather than land which was held in trust for others. Further, the accused knew that his actions were not authorised by the late’s will, since the property had been given to other beneficiaries. Thus, the accused’s actions were without lawful justification, were inconsistent with the rights of the late’s estate to such land and have deprived the rightful owners of the use and possession of such plots.

## 5.3 Failure to File Inventory and Account

### 5.3.1 Statutory Language

*Succession Act, Section 278 Inventory and account*

- (1) An executor or administrator shall, within six months from the Grant of Probate or Letters of Administration, or within such further time as the court which granted the probate or letters may from time to time appoint, exhibit in that court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner within one year from the grant, or within such further time as the court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his or her hands, and the manner in which they have been applied or disposed of.
- (2) On the completion of the administration of an estate, other than an estate administered under the Administration of Estates (Small Estates) (Special Provisions) Act, an executor or an administrator shall file in court the final accounts relating to the estate verified by an affidavit two copies of which shall be transmitted by the court to the Administrator General

...



- (4) If an executor or administrator, on being required by the court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he or she shall be deemed to have committed an offence under section 116 of the Penal Code Act.

*Penal Code Act, Section 116 Disobedience of statutory duty.*

Any person who wilfully disobeys any written law by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, commits a misdemeanour and is liable, unless it appears from such written law that it was the intention of the legislature to provide some other penalty for such disobedience, to imprisonment for two years.

### 5.3.2 Elements of the Offence

1. An Executor or Administrator
2. Intentionally
3. Omits to exhibit an inventory or account
4. Within the time required by law or the Court
  - a. The law sets the times as 6 months for an inventory and 12 months for an account, which can be extended by the Court

### 5.3.3 Definitions and Notes

The omission to file an inventory or account must be done intentionally. Intention was explored in *Kigorogolo v Rueshereka* [1969] E.A. 426 as follows:

There is also the question of the intent of the offender. This is to be gathered from the circumstances of the case. There is a distinction between the phrase “with intent” and “with knowledge” and the word “intent” cannot be read as if it were identical with “wish” or “desire”.

Because this offence deals with court administrative matters, certain evidence will be helpful in proving a criminal case. Certified copies of the Letters of Administration or Grant of Probate can be obtained from the issuing court and used to prove that a person is an executor or administrator. The Administration Bond can usually show that a person has been required by a court to exhibit an inventory or account. The Court Registrar can testify that an inventory or account has not been filed.

## Potential Property Grabbing Scenario

In 2001, John married Mary in church. John died in 2008. Mary applied for Letters of Administration and became the Administrator of John's estate in 2009. To date, she has not filed an inventory of the estate property and has not distributed the estate. Tom is John's son from another wife. He is 22 years old, and whenever he approaches Mary for his share of the estate Mary says she will not give him anything because he is a grown up man and his mother was not a lawful wife to the late John. Mary could be prosecuted with the offence of failing to file an inventory and an account since the failure is intentional, as can be ascertained from her refusal to include Tom among the beneficiaries.

### "Required by the Court"

This offence occurs when the accused, on being required by the court, intentionally omits to exhibit an inventory or account. Often, this requirement by the court comes at the time that a person is granted Letters of Administrations or a Grant of Probate and is mostly contained in the Administration Bond (signed by the administrator or executor).

In *Silver Wakayinja and 2 Others v Petwa Babirye*, High Court Uganda, Civil Suit No. 89 of 2014, the court noted that the provisions of section 278 are mandatory. The court found that the defendant had failed to file an inventory, or an account, within the time set by the Succession Act and the Administration Bond signed by the defendant before a Commissioner for Oaths, as the defendant in fact filed an inventory 10 years after the initial Grant of Probate. There was no reasonable cause for the defendant to have failed to file the inventory or account, nor had a court extended the time frame, and so the court found the failure to be wilful and intentional.



## 5.4 Exhibiting a False Inventory or Account

### 5.4.1 Statutory Language

*Succession Act, Section 278 Inventory and account.*

(1) An executor or administrator shall, within six months from the Grant of Probate or Letters of Administration, or within such further time as the court which granted the probate or letters may from time to time appoint, exhibit in that court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner within one year from the grant, or within such further time

as the court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his or her hands, and the manner in which they have been applied or disposed of.

(2) On the completion of the administration of an estate, other than an estate administered under the Administration of Estates (Small Estates) (Special Provisions) Act, an executor or an administrator shall file in court the final accounts relating to the estate verified by an affidavit two copies of which shall be transmitted by the court to the Administrator General.

...

(5) The exhibition by an executor or administrator of an intentionally false inventory or account under this section shall be deemed to be an offence under section 94 of the Penal Code Act.

*Penal Code Act, Section 94 Perjury and subornation of perjury.*

(1) Any person who in any judicial proceeding or for the purpose of instituting any judicial proceeding knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding commits the misdemeanour termed perjury.

(2) For the purposes of this section—

(a) it is immaterial whether—

- (i) the testimony is given on oath or under any other sanction authorised by law;
- (ii) the false testimony is given orally or in writing;
- (iii) the court or tribunal is properly constituted, or is held in the proper place, or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given;
- (iv) the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not;

(b) the forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if he or she assents to the forms and ceremonies actually used.

(3) Any person who aids, abets, counsels, procures or suborns another person to commit perjury is guilty of the misdemeanour termed subornation of perjury.

*Penal Code Act, Section 98 Evidence on charge of perjury.*



## Property Grabbing Crimes

A person shall not be convicted of committing perjury or of subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false.

*Penal Code Act, Section 22 Punishment for misdemeanours*

When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a period not exceeding two years.

### 5.4.2 Elements of the Offence

1. Executor or Administrator
2. Intentionally
3. Files a false inventory or account

### 5.4.3 Definitions and Notes

#### Potential property grabbing scenario

In 2001, John married Mary in church. John died in 2008. Mary applied for Letters of Administration and became the Administrator of John's estate in 2009. Tom is John's son from another wife. He is 22 years old, and has approached Mary for his share of the estate. Mary refuses to give him any share of the estate, but she files an inventory and account that says Tom has received a share. Mary could be prosecuted with the offence of exhibiting a false inventory and account.

#### Judicial Proceedings

Black's Law Dictionary (8th Edition) defines judicial proceeding as "any court proceeding initiated to procure an order or decree, whether in law or in equity." Proceeding is further defined as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment."

#### Perjury and the process of filling an inventory and account

A defendant who files a false inventory or account can also be charged with perjury under section 94 of the Penal Code Act. In a Joint Inventory & Account, the administrator makes the following statements:

I [Name of Administrator] of [address] do hereby solemnly make oath and state the following to constitute a true inventory of the estate of the late

[name of deceased] showing all items of which he was possessed or was entitled to at the time of his death, and which have at diverse times since his death, come to my hands or knowledge as Administrator of the estate

After then listing the assets of the estate, the beneficiaries and the distribution schedule, the administrator states:

AND I further state that no other estate or belonging to the deceased has at any time since his death come to my hands or knowledge.

The administrator swears to this statement before a commissioner of oaths. If an accused files an inventory or account under oath as part of that judicial proceeding, he or she has committed the offence of perjury.

The offence of perjury can be proved through documentary evidence alone. In *Hamraj Lalji Shah v R* [1958] 1 EA 332 (SCK), the defendant was convicted of three counts of perjury. One of the defendant's arguments on appeal was that he was convicted on the evidence of one witness, without corroboration, where the only other evidence of the false statement was documentary evidence. The court found that documentary evidence alone is sufficient to convict someone of perjury. In this case, an authenticated entry into a ledger was sufficient to convict the defendant of perjury.

Because this offence deals with court administrative matters, certain evidence will be helpful in proving a criminal case. Certified copies of the Letters of Administration or Grant of Probate can be obtained from the issuing court and used to prove that a person is an executor or administrator. The Court Registrar can testify that an inventory or account has been filed and tender the document.



## 6 CRIMINAL OFFENCES – Wills, Deeds, & Legal Instrument Offences

### 6.1 Forgery of a Will, Title, or judicial, official or other defined Legal Document

#### 6.1.1 Statutory Language

*Penal Code Act, Section 348 (1) – Forgery of wills, etc.*

Any person who forges any will, document of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker is liable to imprisonment for life.

*Penal Code Act, Section 349 – Forgery of judicial or official document*

Any person who forges any judicial or official document is liable to imprisonment for ten years.

*Penal Code Act, Section 342 – Forgery*

Forgery is the making of a false document with intent to defraud or to deceive.

*Penal Code Act, Section 347 – General punishment for forgery*

Any person who forges any document commits an offence which, unless otherwise stated, is a felony and is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.

#### 6.1.2 Elements of the Offence

1. Making a false document, which includes:
  - a. Makes a document purporting to be what it is not,
  - b. Alters a document without authority,
  - c. Introduces something into a document whilst being drawn up without authority, or
  - d. Signs a document in a different name without authorisation
2. Being a will, document of title to land, judicial record, power of attorney, Certificate of No Objection, Letters of Administration etc.

Accused must be proved to have participated in the making/material alteration.

3. With the intent to deceive or defraud (presumed if ability to defraud)

### 6.1.3 Definitions and Notes

#### *Penal Code Act, Section 345 – Making a false document*

Any person makes a false document who—

- (a) makes a document purporting to be what in fact it is not;
- (b) alters a document without authority in such a manner that if the alteration had been authorised it would have altered the effect of the document;
- (c) introduces into a document without authority while it is being drawn up matter which if it had been authorised would have altered the effect of the document;
- (d) signs a document—
  - (i) in the name of any person without his or her authority whether such name is or is not the same as that of the person signing;
  - (ii) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing;
  - (iii) in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person;
  - (iv) in the name of a person personated by the person signing the document,

if the effect of the instrument depends upon the identity between the person signing the document and the person whom he or she professes to be.

#### *Penal Code Act, Section 346 – Intent to defraud*

An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained, capable of being defrauded by it, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he or she had, or thought he or she had, a right to the thing to be obtained by the false document.

See the definition of 'intent to defraud' in Section 9.2 of this Handbook.



## Property Grabbing Crimes

### Judicial or official document

‘Judicial or official document’ is not defined in the Penal Code Act.

‘Judicial’ is defined by Black’s Law Dictionary (8th Edition) as ‘of, relating to, or by the court or a judge’. Presumably a judicial document would include any document issued by a judge or court such as a judgment, declaration, order or summons.

‘Official’ is defined by Black’s Law to be ‘of or relating to an office or position of trust or authority. 2. Authorised or approved by a proper authority’. Thus, an ‘official document’ would include documents issued by, or approved by, a government office. This may include a private document that has been registered, a certificate or registration issued by a government office, such as a Certificate of No Objection issued by the Administrator General’s office.

### Potential property grabbing scenario

In 2005, John died and he left behind four children and a widow Mary, who he had married under customary law. He wrote a will in which he distributed all his property to his wife and children. He kept the will with his brother Peter. When Peter read the will, the clan leader became very unhappy, and he immediately called for a family meeting the following day. At the meeting, the clan leader, disregarding the earlier will, read another will in which all John’s property was given to the clan to distribute as they deemed fit. Mary suspects that the second will was just made up by the clan leader to deprive her and her children of their inheritance. She takes the matter to the police, who obtain a handwriting expert’s report, which finds that the second will was not written by John but by the clan leader. The clan leader could be prosecuted with forging a will.

### 6.1.4 Key Cases

#### False Document

*Uganda v Kavuma Freddie Schoof HCT-00-CR-SC-0168-2008*

*Key Principle: Forgery involves a document that tells a lie about itself.*

- The defendant made a document purporting to be a receipt for VHS tapes from the complainant, but the complainant gave evidence that the defendant had never purchased VHS tapes, that the complainant does not sell VHS tapes and that the receipt and signature were not genuine. This was held to be a forgery because the document purported to be a receipt from the complainant but was not. The



court quoted the following passage from *Re-Windsor* [1965] 10 Cox 118:

Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery, because it is reduced to writing.

*Baigumamu v Uganda* [1973] EALR 26

*Key Principle: The falsity must be the purport of the document, not its contents.*

The appellant, a court registry clerk, received 30 UGX for providing a copy of judgment and gave a receipt. However, the fee should have been 15 UGX, and the appellant kept the additional 15 UGX for himself. This was held not to be forgery, because falsity must be of the purport of the document, not its contents. The document purported to be a receipt for the payment of 30 UGX and this was not false. To be forgery, the document must tell a lie about itself, and this did not.

### Meaning of Document

*Uganda v Geoffrey Kazinda* [2012] HCT 00 SC 138:

*Key Principle: The word document includes anything on which there is writing and anything on which there are marks, figures, symbols, codes, perforations or anything else having a meaning for a person qualified to interpret them. Such a document need not be complete or have legal force.*

### Altering a document without authority

*Mbande v Republic* [1971] EA 553

*Key Principle: It was a forgery for the defendant to insert details into money orders without, or in excess of, their authority.*



## 6.2 Theft of a Will

### 6.2.1 Statutory Language

*Penal Code Act, Section 254 – Definition of theft*

(1) A person who fraudulently and without claim of right takes



This crime occurs whether the testator is living or dead, so long as the theft took place.

## Property Grabbing Crimes

anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.

- (2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he or she does so with any of the following intents—
- an intent permanently to deprive the general or special owner of the thing of it;
  - an intent to use the thing as a pledge or security;
  - an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
  - an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
  - in the case of money, an intent to use it at the will of the person who takes or converts it, although he or she may intend afterwards to repay the amount to the owner,

and “special owner” includes any person who has any charge or lien upon the thing in question or any right arising from or dependent upon holding possession of the thing in question.

- (4) When a thing stolen is converted, it is immaterial—
- whether it is taken for the purpose of conversion or whether it is at the time of the conversion in the possession of the person who converts it;
  - that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorised to dispose of it.
- (6) A person shall not be deemed to take a thing unless he or she moves the thing or causes it to move.

### *Penal Code Act, Section 262 – Stealing wills*

If the thing stolen is a testamentary instrument, whether the testator is living or dead, the offender is liable to imprisonment for ten years.

## 6.2.2 Elements of the Offence

- Taking or conversion of

2. A will or other testamentary instrument
3. Fraudulently and without claim of right

### 6.2.3 Definitions and Notes

#### Potential property grabbing scenario

John died in 2011 and left a will, which was read at his burial and in which he left his property to his 4 children, two of whom he had outside of marriage. Moses, John's brother, went into John's house a week after the burial and took a number of John's documents, including the will. Moses is now claiming that the children from outside John's marriage are not really John's children and are not entitled to inherit any of John's property. Moses could be prosecuted for theft of a will as he took the will without claim of right and with the intent to deprive John's children of their property.

See the discussion on 'claim of right' in Section 10.3 of this book.

Testamentary instrument is defined in the decision of *Cock v Cooke* [1866] LR. 1 Pp & D 241 at 243, which held that: "It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary."



## 6.3 Concealing a Will

### 6.3.1 Statutory Language

*Penal Code Act, Section 277 – Concealing wills*

Any person, who with intent to defraud, conceals any testamentary instrument, whether the testator is living or dead, commits a felony and is liable to imprisonment for ten years.

Note that this crime occurs whether the testator is living or dead. See the definition of 'intent to defraud' in Section 9.2.

### 6.3.2 Elements of the Offence

1. Concealment
2. Of a will or other testamentary instrument
3. With intent to defraud

### 6.3.3 Definitions and Notes

Concealment is defined in Black's Law Dictionary (8th Edition) as: "1. The act of refraining from disclosure; especially an act by which one prevents or hinders the discovery of something; a cover-up. 2. The act of removing from sight or notice; hiding." IJM assisted in the successful prosecution of concealment of a deed (see Section 6.4.3



See the definitions of 'testamentary instrument' in Section 6.2.3, 'intent to defraud' in Section 9.2, and 'claim of right' in Section 10.3 of this book.

## Property Grabbing Crimes

of this book), where the Chief Magistrate relied on this definition in her judgment.

In *Maalim (Omar Abdulla Awadh) v R* [1964] EA 672, the court considered concealment in the context of concealment of stolen goods. A number of radios were stolen and two suspects went to the appellant's house. Police officers knocked on the door twice, but they received no response; however, when one officer climbed the door, he saw the appellant and two others on the floor together. Appellant was found to have assisted in the concealment of goods when he permitted the door to his house to remain closed and locked, and he remained silent inside the house with two other men who had the stolen goods. The court held that concealment occurred where defendant "behaved in a manner calculated to assist in maintaining the privacy and secrecy previously created" over the goods.

### Potential property grabbing scenario

A will is read at John's burial and distributed John's estate to all of his children. John's oldest daughter, Sylvia, keeps possession of the will and claims that she is the sole beneficiary of John's estate. She refuses to allow anyone to see the will, only provides partial copies to other members of the family and refuses to produce the will for probate or when a family meeting is held to distribute John's estate. Several family members can testify to the fact that the will existed and distributed the property to all of John's children. Sylvia could be prosecuted for concealing the will.



## 6.4 Concealing a Deed

### 6.4.1 Statutory Language

*Penal Code Act, Section 278 – Concealing deeds*

Any person who, with intent to defraud, conceals the whole or part of any document which is evidence of title to any land or estate in land commits a felony and is liable to imprisonment for three years.

### 6.4.2 Elements of the Offence

1. Concealment of the whole or part
2. Of a document which is evidence of title to land or estate in land
3. With intent to defraud

See the definition of 'concealment' in the Definitions and Notes on Concealing a Will in Section 6.3.3 of this Handbook.

See the definition of 'intent to defraud' in Section 9.2 of this Handbook.

### 6.4.3 Definitions and Notes

#### Evidence of title to land or estate in land

“Evidence of title to land” would include a certificate of title which, according to section 59 of the Registration of Titles Act, is conclusive evidence of title. “Evidence of estate in land” would likely include a Certificate of Customary Ownership or a Certificate of Occupancy which are granted under sections 4 and 33 respectively of the Land Act.

The DPP successfully prosecuted a concealment of title case in *Uganda v Kawooya Fred and Anor*, Chief Magistrate’s Court Mukono 0936/2011, decided on 17th March 2013. In this case the accused was charged with and convicted of concealing a title deed. In her judgment, the magistrate listed three elements for this offence:

- 1) A title deed must have been concealed
- 2) There must have been an intent to defraud
- 3) The accused must have participated in the act.

The magistrate defined “concealment” as an act of refraining from disclosure, or the act of removing from sight or notice, hiding. She found that the evidence proved concealment where the accused told witnesses that they did not have the title, when in fact the accused did have the title in his possession and refused to produce it. Additionally, the accused sold part of the land against the provisions of the will and without consultation of the rest of the beneficiaries, which the magistrate found amounted to an intention to defraud. Finally, the court found that the evidence proved the accused participated in these acts beyond a reasonable doubt.

\*Note that Magistrate’s Court decisions do not have precedential value.



## 6.5 Destroying or Damaging a Will or Deed

### 6.5.1 Statutory Language

*Penal Code Act, Section 335 – Punishment for malicious injuries in general*

- (1) Any person who wilfully and unlawfully destroys or damages any property commits an offence and is liable, if no other punishment is provided, to imprisonment for five years.
- (4) If the property in question is a testamentary instrument, whether the testator is living or dead, or a register which is authorised or required by law to be kept for authenticating or recording the title to any property or for recording births, baptisms, marriages, deaths or burials, or a copy of any part



## Property Grabbing Crimes

of any such register which is required by law to be sent to any public officer, the offender commits a felony and is liable to imprisonment for fourteen years.

- (8) If the property in question is a document which is deposited or kept in a public office or which is evidence of title to any land or estate in land, the offender commits a felony and is liable to imprisonment for seven years.

### 6.5.2 Elements for Destroying or Damaging a Will

1. A wilful and unlawful act
2. Causing the damage or destruction of (in whole or in part):
  - a. A testamentary instrument, (whether or not the testator is deceased) OR
  - b. Register authorised or required by law for authenticating or recording:
    - i. Title to any property or
    - ii. Births, baptisms, marriages, deaths or burials or
  - c. A copy of any part of any such register
    - i. Which is required by law to be sent to any public officer

### 6.5.3 Elements for Destroying or Damaging a Deed

1. A wilful and unlawful act
2. Causing the damage or destruction of (in whole or in part)
3. A document evidencing title to or estate in land

### 6.5.4 Definitions and Notes

See the definitions of ‘evidence of title to land’ in Section 6.4.3, ‘testamentary instrument’ in Section 6.2.3 , and ‘wilful and unlawful’ in Section 9.1 of this book.

## 7 CRIMINAL OFFENCES – False Statement Offences



### 7.1 Uttering a False Document

#### 7.1.1 Statutory Language

*Penal Code Act, Section 351 – Uttering False Documents*

Any person who knowingly and fraudulently utters a false document commits an offence of the same kind and is liable to the same punishment as if he or she had forged the thing in question.

*Penal Code Act, Section 346 – Intent to Defraud*

An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained, capable of being defrauded by it, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he or she had, or thought he or she had, a right to the thing to be obtained by the false document.

#### 7.1.2 Elements of the Offence

1. Knowingly
2. Utters
3. A false document
4. With intent to defraud (presumed if ability to defraud)

#### 7.1.3 Definitions and Notes

‘Utter’ is defined in Black’s Law Dictionary (8th Edition) as “[t]o put or send (a document) into circulation; especially to circulate (a forged note) as if genuine.”

See the punishment ranges for Forgery in Section 6.1.1 of this Handbook.

See the definition of ‘intent to defraud’ in Section 9.2 of this book.

The DPP successfully prosecuted a case involving Uttering False Document in *Uganda v Dungu Mutebi Erizmas* Criminal Case 59 of 2013, Magistrate’s Court at Nakifuma. The accused forged a land transfer from his late father to himself, that was dated 3 years after his late father’s death. The accused, through an agent, uttered the transfer form to the Lands Registry to obtain registration as the titled owner of the land. The accused then sold the land. The accused defended himself on the basis that he was acting as the customary heir and was authorised in his actions by a clan meeting.



The court held that any authority the accused had as customary heir did not justify forgery of a transfer form. Even if the accused had had Letters of Administration, which he did not, he would not be justified in his actions. Secondly, although the accused did not utter the transfer form to the Lands Registry himself, he procured the actions of his agent and so was criminally liable as if he had uttered the form himself. The accused was convicted of making a document without authority, uttering a false document, obtaining registration by false pretence and intermeddling.

\*Note that Magistrate's Court decisions do not have precedential value.

Uttering a False Document can be easier to prove than Forgery, particularly when it is not clear who actually forged the document.

### 7.1.4 Key Cases

*Kilee v Republic [1967] EA 713 (K)*

*Key Principle: A document must lie about itself, not its maker.*

The appellant was a veterinarian who was interdicted from duty in December 1965. Despite this interdiction, the appellant continued submitting documents in which he implied he was a registered or licensed veterinarian and listed a false address. He was initially convicted of uttering false documents, but this was overturned as, although there were lies about the appellant in the document, there was no lie about the document itself.

*Opiyo v Republic [1970] EA 319 (K)*

*Key Principle: Uttering can include placing documents in a safe.*

Defendant was accused of uttering and forging three cheques, which he put into the safe of a municipal council. The court inferred that these cheques were substitutes for a deficit of money and stamps that was missing from the safe. The act of "uttering" occurred where defendant placed forged cheques in a municipal safe.

*Zahida Mumtaz Ahamed and Mohammed Waqas v Uganda [2014] HCT-04-CR-CN-0057-2014*

*Key Principle: There is no requirement to prove who forged a document as part of proving the crime of uttering a false document.*

The appellants were alleged to have forged the age on an identity



Mere exhibition of a forged document to a party is an uttering to that party.

card and uttered it to the CAO's office in Mbale. The facts at trial could not prove which of the two appellants actually changed the age on the identity card, but the evidence was clear that the appellants uttered the forged card. Therefore, the convictions for uttering a false document were upheld, even though the convictions for forger were overturned.

Additional relevant case law:

- The accused need not have forged the document himself. An accused can commit this offence through his advocates if he instructs them to utter the document. *Tom Bwete v Uganda* [1995] HCCA 22/94, *Uganda v Richard Mutumba* HCCA 12/95 (Kampala).
- There is no requirement to show an intention to cause economic loss. Knowledge of the falsity is an ingredient of the offence. *The Attorney-General of Uganda v Gaburiel Ottii* [1957] EALR 341.
- The document must be false in some material particular. Where there is an intent to defraud or deceive, any false particular inserted for the purpose of achieving the purpose cannot be immaterial. *Jani v Republic* [1966] EALR 319.
- Intent to defraud exists when false document created with purpose of deceiving a person responsible for public duty into doing (or not doing) something that they wouldn't (or would) have done but for the deceit. To put such a document forward, with knowledge of falsity, is to commit the crime. *Uganda v Schoof* HCT-00-CR-0168-2008.
- The mere exhibition of a forged receipt to the party is an uttering to that party. *Kityo v Uganda* [1967] EA 23.

### 7.1.5 Example Arguments for Potential Defences

These are examples of ways in which DPP staff have presented legal submissions on issues that have arisen in cases of uttering a false document.

Defence argues that elements are not met

In *Uganda vs. Kavuma Freddie Schoof* (HCT-00-CR-SC-0168-2008), the Court quoted the following passage from *Welham Vs Director of Public Prosecutions* [1961] AC 103, 125 on addressed what it means for a person to "fraudulently" utter a false document by stating that:



## Property Grabbing Crimes

“In my opinion it is clear that in connection with this offence the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public duty into doing something that he would not have done but for deceit, or not doing something that but for it he would have done.

Correspondingly, to put such a document forward with knowledge of its falsity and with a similar intent was to commit the crime of uttering it ...”

In the present case, there is no other purpose for the accused to have brought the false transfer document into existence, other than to deceive the Mukono Lands registry into transferring the property into the accused’s name.

Further, Section 2(cc) of the Penal Code Act Cap 120 defines the term “utter” to mean and include “using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with or act upon the thing in question.” Clearly, the accused used and dealt with the false transfer document in the present case by offering it to the Mukono Lands Registry for transfer. In addition, in the case of *Tom Bwete vs. Uganda* HCCA 22/94 (Kampala), the court held in effect that to utter a false document, a person does not need to have forged the false document himself; if he knowingly uses or deals with a false document forged by someone else, then he may be found guilty of the criminal offence of uttering a false document.

In this case, the court also held that a person may commit the offence of uttering a false document through someone else (for example, his advocate), if he instructs them to utter the document. Id. Thus, in the present case, the accused’s instructions to the Mukono Lands Registry to use the false transfer document is sufficient to find the accused guilty of uttering a false document, and the accused’s claim that he did not forge the transfer document would not be a defence.



## 7.2 Obtaining Registration by False Pretence

### 7.2.1 Statutory Language

*Penal Code Act, Section 312 – Obtaining registration, etc. by false pretence*

Any person who wilfully procures or attempts to procure for himself or herself or any other person any registration, licence or certificate

under any law by any false pretence commits a misdemeanour and is liable to imprisonment for one year.

### 7.2.2 Elements of the Offence

1. Procuring (or attempts to procure) registration under any law
2. Wilfully
3. For oneself or another
4. By false pretence

### 7.2.3 Definitions and Notes

*Penal Code Act, Section 304 – Definition of false pretence*

Any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.

### 7.2.4 Key Cases

*Mukasa Lubanga Charles v Uganda C.A.Cr.A. 166-2011, decided on 1/9/15.*

*Key Principle: There are three elements: (1) that there was procuring of registration under any law, (2) for oneself or another, (3) by false pretence.*

The court held that there are three elements for obtaining registration by false pretences:

- That there was procuring of registration under any law;
- For oneself or another;
- By false pretence.

The Court of Appeal went on to define procure to mean “to acquire, to secure or to obtain.” The fact of registration can be established without calling the Registrar of Titles. Additionally, it does not matter that the appellant submitted the documents through an agent, his lawyer; submitting documents through an agent did not absolve him of culpability for the crime.

### 7.2.5 Example Arguments for Potential Defences

These are examples of ways in which DPP staff have presented legal submissions on issues that have arisen in cases of obtaining registration by false pretences.

See the definition of ‘wilfully’ in Section 9.1 of this book.



## Property Grabbing Crimes

### Defence claims he made no false representation to be a beneficiary

On the two transfer forms signed by the accused for the plots of land, the accused is referred to as the “Beneficiary” of such plots. This representation is false, as the accused is not the beneficiary of a plot under the late’s will. Further, such representations were made on transfer forms signed by the accused and filed by him in the Land Registry Mukono. Thus, such representations were made by the accused in writing, or if the accused claims that he did not write the word “Beneficiary” on the forms, then he certainly made such representations by his conduct when he filed such forms to transfer the plots to himself.

In this regard, the High Court of Uganda has stated that “whenever a person places a signature on a document he is implying intent on his part to agree with the circumstances that are provided in the document.” See Uganda v. Kazinda. Finally, as the administrator of the late’s estate, the accused had knowledge of the late’s will, and who the beneficiaries of the plots were under that will. Therefore, he had knowledge that his representations that he was the beneficiary of the plots were false.

### Defence claims she made no false representation to be the administrator

On the accused’s application to be registered as proprietor of the land, dated May 21, 2010, the accused represented that she was the sole administrator and entitled to be registered as the sole proprietor of land. However, such representation was false, as the accused was only one of the administrators of the late’s estate. Further, the accused clearly knew that such representation was false, since she had received the LOAs, under which the accused and 5 of the late’s children were appointed as administrators of the late’s estate. Thus, such representation by the accused was a false pretence.

In addition, the accused knowingly made a false representation through her conduct of attaching the revoked 2007 LOAs to her Application to be registered as proprietor of the land. Through her conduct, the accused represented that the 2007 LOAs were still valid and effective and gave her the authority to be registered as the sole proprietor. However, as discussed above, the accused knew that the 2007 LOAs had been revoked and were no longer effective. Thus, such representation by the accused through her conduct was a false pretence.



## 7.3 Making a False Declaration Relating to Land

### 7.3.1 Statutory Language

Land Act, Section 92 Offences and penalties.

(1) A person who—

(b) makes a false declaration in any manner relating to land;

... commits an offence

(3) A person convicted of an offence specified in subsection (1)

(b) is liable to a fine not exceeding twenty-five currency points or imprisonment not exceeding one year or both.

### 7.3.2 Elements of the Offence

1. Makes a declaration in any manner
2. That is false
3. Relating to land

### 7.3.3 Key Cases

*Uganda v Joyce Namugenyi Kisito Mutasiga [2015] H.C.Cr.A. 46-2014*

The accused obtained Letters of Administration for her husband's estate but falsely represented herself and her children to be the only beneficiaries of the estate, despite knowing that her late husband had 14 other children. These Letters of Administration were revoked, and a family consent agreement was entered into, where the accused was given land containing the matrimonial home and the other children were given the deceased's land in Nakayaga. Despite this agreement, the accused used her revoked Letters of Administration to obtain title for the Nakayaga property and then sold that land.

In the sale agreement, the accused falsely stated that she had an interest in the Nakayaga property as the deceased's widow and falsely stated that the land was only being used by her children, when the deceased's other children were the ones using the land in accordance with the family consent agreement. The accused was convicted of making a false declaration relating to land, uttering a cancelled document, obtaining money by false pretence by the trial magistrate and received a caution for all three accounts. The sentence was appealed by the State, and the High Court found that the sentence did not serve the interests of justice and sentenced the respondent to 3 years.



### 8.1 Domestic Violence

#### 8.1.1 Statutory Language

*Domestic Violence Act 2010, Section 4 Prohibition of Domestic Violence*

- (1) A person in a domestic relationship shall not engage in domestic violence.
- (2) A person in a domestic relationship who engages in domestic violence commits an offence and is liable on conviction to a fine not exceeding forty eight currency points or imprisonment not exceeding two years or to both.
- (3) The court may, in addition to imposing a fine or imprisonment, order the offender in a case of domestic violence to pay compensation to the victim of an amount determined by the court.
- (4) In determining the compensation under subsection (3), the court shall be guided by the principles in the Second Schedule.

#### 8.1.2 Elements of the Offence

1. In a domestic relationship
2. Engages in domestic violence

#### 8.1.3 Definitions and Notes

*Domestic Violence Act 2010, Section 2 Interpretations*

“domestic violence” constitutes any act or omission of a perpetrator which—

- (a) harms, injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the victim or tends to do so and includes causing physical abuse, sexual abuse, emotional, verbal and psychological abuse and economic abuse;
- (b) harasses, harms, injures or endangers the victim with a view to coercing him or her or any other person related to him or her to meet an unlawful demand for any property or valuable security;
- (c) has the effect of threatening the victim or any person related to the victim by any conduct mentioned in paragraph (a) or

(b); or

- (d) otherwise injures or causes harm, whether physical or mental, to the victim.

*Domestic Violence Act 2010, Section 3 Domestic Relationships*

- (1) A domestic relationship means a family relationship, a relationship similar to a family relationship or a relationship in a domestic setting that exists or existed between a victim and a perpetrator and includes a relationship where—
- a. the victim is or has been married to the perpetrator
  - b. the perpetrator and the victim are family members related by consanguinity, affinity or kinship;
  - c. the perpetrator and the victim share or shared the same residence;
  - d. the victim is employed by the perpetrator as a domestic worker or house servant and the victim does or does not reside with the perpetrator.
  - e. the victim is an employer of the perpetrator and does or does not reside with perpetrator; or
  - f. the victim is or was in a relationship determined by the court to be a domestic relationship.

Black's Law Dictionary, (8th Edition) defines 'consanguinity' as "[t]he relationship of persons of the same blood or origin", 'affinity' as "the relation that one spouse has to the blood relatives of the other spouse; relationship by marriage" and 'kinship' as "relationship by blood, marriage, or adoption".



## 9 LEGAL DEFINITIONS

### 9.1 Wilful and Unlawful

In *Muhwezi Jackson v Uganda* High Court Criminal Appeal No 10. Of 2008, the Hon. Mr. Justice E.S. Lugayizi discussed the definitions of ‘unlawfully’ and ‘wilfully’ in the context of a malicious damage to property case. He said:

The word “**unlawfully**” is an adverb; and it is derived from the word “**unlawful**”, which is an adjective. **WORDS AND PHRASES legally defined (Third edition (R-Z) at page 359**, agrees that the more accurate use of the word “**unlawful**” conveys this meaning: i.e. “**contrary to law**”. Therefore, when a person has done something “**unlawfully**” it means that he or she has done that thing in a manner that is contrary to the law.

At page 435, the above book also defines the word “wilfully” to mean an act “**done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it**”.

He held that the appellant had unlawfully and wilfully knocked down the complainant’s house by doing it without a court order and had come with a grader to knock down the buildings in daylight. This decision was overturned by the court of appeal, but the court of appeal did not question these definitions. The decision to overturn was due to a lack of sufficient evidence.

### 9.2 Intent to Defraud

In many property grabbing cases, intent to defraud is a requisite element to prove. The Penal Code contains a definition and presumption of intent to defraud.

*Penal Code Act, Section 346 – Intent to defraud:*

An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained, capable of being defrauded by it, and this presumption is



not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he or she had, or thought he or she had, a right to the thing to be obtained by the false document.

Intention, more generally, can be gathered from the circumstances of the case and is distinguishable from simply a wish or desire (*Kigorogolo v Rueshereka* [1969] E.A. 426). According to section 346 above, intention may be presumed where there was someone capable of being defrauded at the time the document was made.

The intention is crucial: “falsity of any document is a matter of fact but the materiality of the falsity is normally inextricably related to the intent with which the document is made” (*Uganda Breweries Limited v Gilbert Afarao*, Court of Appeal No 45 of 2005).

The classic definition of ‘to defraud’ is set out in *George Woodgate v R* [1959] EALR 525 at 529:

To be defrauded, then, a person must either have been deprived, which has been held to mean deprived of something having some economic value (however small), or he must have been induced to act to his own injury, not necessarily an economic injury; and both from common-sense and from the decided authorities it seems clear that, for this purpose, being induced to act would include being induced to remain inactive.

The fact that ‘intent to defraud’ is not limited to intending to cause economic loss is also reaffirmed in *Samuels v Republic* [1968] EALR 1 and *Uganda v Geoffrey Kazinda* [2012] HCT 00 SC 138.

The difference between ‘to deceive’ and ‘to defraud’ was explored in *Re London and Globe Finance Corporation Ltd. (1)* [1903] 1 Ch. 728 at page 732-2 (and endorsed in *George Woodgate v R* (see above) and *Uganda v Schoof* HCT-00-CR-SC-0168-2008. See also *Jani v Republic* [1966] EALR 319):

‘To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by



## Property Grabbing Crimes

falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.' Buckley J in *Re London and Globe Finance Corporation Ltd.* (1) (1903) 1 Ch. 728 at page 732-2. This passage is the generally accepted definition.

In the case of documents, it is immaterial whether or not forged documents were put to use or not. What is important is whether they were deceitful or capable of defrauding anyone (*Uganda v Geoffrey Kazinda* [2012] HCT 00 SC 138).

## 10 TRIAL ISSUES AND OBSTACLES

This section covers a range of issues and obstacles that you may be faced with in the trial phase of prosecuting criminal offences, particularly for those offences outside the criminal code and that the court may be less familiar with. The issues and obstacles that the DPP has frequently encountered in the prosecution of property grabbing offences are:

1. The court is unclear on the distinction and overlap between civil and criminal wrongs, mistakenly believing that land-related matters should solely be dealt with as civil disputes regardless of any criminal elements.
2. The court dismisses a case on its own initiative because of confusion over the law or legal defences involved.
3. The accused alleges that they own the land or that the crime was committed with a claim of right, and the court finds in favour of the accused without properly evaluating the strength of the accused's allegation.
4. The court or defendant does not distinguish between relevant and irrelevant evidence, resulting in case delays and distractions from the legal issues being litigated.
5. The court relies on section 160 of the Magistrates Courts Act and orders the matter be reconciled and dismisses the case.

The following sections contain some points to consider when faced with one of these situations, and some principals of law and legal theory that you can draw upon in making submissions to the court.



### 10.1 Distinction and overlap of civil and criminal wrongs

There is often confusion over the distinction between civil and criminal wrongs, particularly in matters involving land disputes. In some cases, courts have dismissed cases or given adverse rulings to the State because the court did not think a crime had occurred.<sup>22</sup> The following arguments and information can be helpful in submissions and arguments to the court where the line between civil and criminal is unclear.

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<sup>22</sup> See *Okello & Anor v Uganda* (CRIMINAL APPEAL NO. 0035/2013) [2014] UGHCCRD 37 (22 August 2014), where the court held that a criminal trespass claim should be dismissed as it was a land dispute and thus a civil claim.



For this reason, it is always a good idea to refer to your argument, submissions or case as the 'State's' rather than 'your' or 'the complainant's'. For example, 'it is the State's view ...' or 'it is the State's submission'. This helps to remind all present that you are not acting for the victim, or yourself, but that you represent the State.

## Property Grabbing Crimes

A crime is described by Halsbury's Laws of England to be "an unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment".<sup>23</sup> Some acts are so damaging to society that they have been declared against the public interest, as a crime against the State and punished by the State.<sup>24</sup> This is why the vast majority of criminal cases are brought in the name of Uganda, as set out in Article 250 of the Constitution.

It's not always easy to distinguish when something is a crime, as opposed to a civil wrong. Some acts, like assault, can be both a civil wrong and a crime at the same time.<sup>25</sup> In civil matters, the defendant can only be ordered to pay for loss or damage he has caused, while in criminal matters the defendant can be ordered to a custodial sentence. Furthermore, in civil cases it is the injured party who institutes proceedings and who may discontinue the proceedings at will. However, in criminal cases, it is the State who institutes proceedings, and the proceedings can continue regardless of the victim's wishes or receipt of compensation.<sup>26</sup>

The fact that an act or event has both civil and criminal elements is not a reason to dismiss or ignore the criminal elements. Eviction is a civil wrong where victims can receive compensation and/or reinstatement to the land,<sup>27</sup> but it is also a crime in certain circumstances.<sup>28</sup> If an administrator or executor breaches their fiduciary obligations, an estate's beneficiaries can seek equitable compensation or an account of profits.<sup>29</sup> However, where the administrator or executor disposes of estate property fraudulently, this is also a crime.<sup>30</sup>

A land dispute can be both civil and criminal at the same time. In Uganda, the State has been sufficiently concerned about land disputes and evictions to criminalise a number of behaviours and

23 *Board of Trade v Owen* [1957] A.C. 602, 631 citing Halsbury's Laws of England, 3rd Edition, Volume 10, p. 271.

24 Francis J Ayume, *Criminal Procedure and Law in Uganda*, (1986), 1.

25 Legal Services Commission. *The Law Handbook*. "What is a crime?" <http://www.lawhandbook.sa.gov.au/ch12s01.php>. Accessed 8-12-2015.

26 Richard Card, Card, *Cross and Jones Criminal Law* (2010, 19th Edn; 2010), 2-3.

27 Land Act Cap 227, sections 31 and 35; *Kampala District Land Board and another v National Housing and Construction Corporation* [2005] 2 EA 69 (Supreme Court of Uganda)

28 Land Act Cap 227, s 92(1); Succession Act Cap 162, Second Schedule Rule 10

29 *Caffrey v Darby* [1801] 31 ER 1159; *Brenda Bukirwa Kyagulanyi & Anor v Joshua Steff Kibirige & Anor* (High Court Civil Suit No.45 Of 2005).

30 Anti-Corruption Act (2009) s 21.

actions commonly associated with these. In order to deter further property grabbing and educate the community about the seriousness with which the State views property grabbing, the criminal elements of property grabbing should be properly prosecuted and victims can separately seek compensation if they wish.



## 10.2 Dismissal of a Case

A magistrate's court does not have power to dismiss a case whenever it sees fit.<sup>31</sup> Although a magistrate's court has the power to amend, substitute, or add to the charges, it does not have the power to quash an indictment.<sup>32</sup> The procedure for a criminal trial is set out in the Magistrates Courts Act and provides for when a case can be dismissed.

The court may dismiss a case prior to the hearing of the charge if the accused is present, but the prosecutor, who has notice of the time and date of the hearing, is absent.<sup>33</sup> However, if both parties are present, the court **shall** proceed to hear the case.<sup>34</sup> Once the accused has been charged, and if the accused pleaded not guilty, section 126 of the Magistrates Courts Act provides that 'the court **shall** proceed to hear the evidence of the prosecution' (emphasis added). This is not discretionary, but obligatory.<sup>35</sup>

After commencement of the trial, the proceedings can be withdrawn **by the prosecutor**, with the consent of the court or on instructions by the Director of Public Prosecutions, any time before judgment is pronounced.<sup>36</sup> The court may dismiss a case if the complainant does not appear at court following an adjournment.<sup>37</sup> The court may also dismiss a case if, at the close of the prosecution's case, it appears that there is no case for the accused to answer.<sup>38</sup> These are the only circumstances in which a magistrate's court can dismiss a case. While it is not unheard of for a magistrate to dismiss a case in other circumstances, this should be argued against as being outside the magistrates' power. Even if the magistrate feels that the case is

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31 This is not the case for High Courts, which are able to discharge offenders without punishment and dismiss a case under section 119 of the Trial on Indictments Act, Cap 23.

32 *Henry Kayondo v Uganda* [1993] S.C.C.A. 35 of 1992.

33 Magistrates Courts Act Cap 16, s 119(1). Note that the court 'shall' dismiss the case, unless it appears to the court proper to adjourn.

34 Magistrates Courts Act Cap 16, s 120.

35 See 10.5.1 below.

36 Magistrates Courts Act Cap 16, s 121; Constitution of 1995, article 120(3)(d).

37 Magistrates Courts Act Cap 16, s 123(1).

38 Magistrates Courts Act Cap 16, s 127.



## Property Grabbing Crimes

Weak or should be dealt with through the civil courts, the magistrate must hear the prosecution's case. The magistrate can then acquit the accused or put them on their defence.

### 10.3 Land Disputes and Claim of Right

In many property grabbing offences, the accused will make a claim of right argument to excuse their criminal conduct; however, the claim of right defence does not automatically grant impunity to criminal acts. Even if an accused asserts claim of right as a defence, the court has an obligation to evaluate the merits of his or her claim and to decide whether a claim of right defence is even relevant to the crime at hand.

#### Land Disputes and Criminal Law

It is common for property grabbing offences to occur in the context of a land dispute, where parties are each alleging some form of ownership in the land. Sometimes there is a genuine dispute that needs to be resolved through the civil courts, but there are often cases where one party is either trying to justify their behaviour by claiming to own the land or trying to take land they do not have a valid claim to by criminal means. Regardless of the situation, where the State is bringing criminal charges, the courts have an obligation to evaluate the evidence against the criminal elements to determine whether the State has proved the charge beyond a reasonable doubt.

It is, unfortunately, all too common for a magistrate to refuse to examine the evidence because both parties claimed an interest in land, even though one party's interest was lacking any legal or evidentiary basis. The High Court's contempt of this behaviour is evident in case law.

In *Uganda v Nakibi* HCT-04-CR-CN-0051 of 2013, the respondent had previously brought a civil suit against the complainant and other family members, claiming ownership of the land in question. The respondent lost the suit, and the court ordered the land be given to the complainant and boundary marks be erected. Subsequently, the respondent removed the court-ordered boundary marks and was charged, convicted and fined. Despite this, the respondent continued to dig the land and again removed the boundary marks. He was charged with criminal trespass and removing boundary marks.

The trial magistrate held that both parties were claiming ownership of the land and such a dispute could not be resolved in a criminal case. The High Court found this type of analysis flawed. The High

Court stated “[i]f someone moves to another man’s land and starts digging it, yet it had been shown that the same party had twice before been convicted over trespassing thereon and for removing boundary marks thereon; I do not understand what type of assessment of evidence that the Magistrate employed. It was obviously flawed.” The High Court held that, as the respondent was well aware that the land had been decreed to the appellant and yet entered the property and removed the boundary marks anyway, the trial magistrate ought to have found the ingredient proved.

### Claim of Right Defence

Sometimes the accused will have a genuine belief that they own land. This will be a defence in certain circumstances.

#### *Penal Code Act, Section 7 – Claim of Right*

A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

In order to successfully assert a claim of right defence, the following elements need to be established:

- An action was done or omitted,
- With respect to the property, and
- Under an honest claim of right.

Note that there are three limits within statute for raising this defence:

- The offence must relate to property (so the defence would not apply, for example, to offences such as assault, perjury, rape and murder).
- The claim of right must be honest.
- The action must be taken without intent to defraud.

In *Byekwaso Mayanja Sebalija v Uganda* [1991] HCB 15, the court held that an honest belief, whether justifiable or not, that the property is the appellant’s own would negate the element of mens rea. In this case, the appellant was the customary tenant on the complainant’s property and was accused of uprooting trees that the complainant had planted. He successfully raised the defence of an honest belief that the land on which the trees were planted was his. In *Wejuli v Uganda* HCT-04-CR-CN-0040-2009, the court re-stated the principal in *Byekwaso* as “[t]he court must be satisfied that there is a possibility (a reasonable and not fanciful possibility) that there were



## Property Grabbing Crimes

grounds on which the accused could believe the property belonged to them”.

The case of *Muhwezi Jackson v Uganda* Court of Appeal Criminal Appeal No 149/08 is particularly relevant to claim of right defences. The court denied the claim of right defence where there was fraud on the defendant’s part and the land was subject to multiple interests.

In the *Muhwezi* case, the appellant was the registered owner of the land and was accused of malicious damage to property in organising a bulldozer to knock down the buildings belonging to kibanja holders on the land. The High Court held that claim of right was not available to the appellant, as the land was subject to multiple interests. While the appellant had an interest in the land, the complainants also had legitimate interests as kibanja holders, and the appellant should have respected that interest.

Further, there was fraud on the appellant’s part, as the appellant had been warned by the Administrator General against evicting the complainants, and the appellant ignored that warning in destroying the buildings and evicting the complainants. The case was appealed to the Court of Appeal, who upheld the High Court’s finding that the defence of claim of right was not available to the appellant. However, the Court of Appeal overturned the appellant’s conviction for evidentiary reasons.

### Examining the evidence of claim of right

When examining a claim of right defence, the judge needs to evaluate the claimed interests of the parties in the land (*Ssebina & Ors v Uganda* [2006] UGHC 21). The following three cases are examples of courts properly evaluating the strength of claim of right defences.

*Matovu Hamidu v Uganda* (Criminal Appeal No.10 of 2006)

*Key Principle: The accused did not have a genuine claim to a kibanja on the complainant’s land, as no such interest had been observed or recorded at the time of purchase and the complainant had done his due diligence.*

In this case, the complainant bought ten acres of land from Asuman Muwonge, who had inherited the land from his grandfather, Asuman Kalundu. Asuman Kalundu had also given 5 acres to his brother Ali Musoke. Prior to buying the land, the complainant visited the land and found that it had no kibanja holders on it. Other neighbours



and family members also attested to this fact. Further, the transfer form listed no encumbrances. The complainant then had the land surveyed, and encountered the accused and his father, who had inherited the neighbouring 5 acres from Ali Musoke. They wanted their land surveyed, and the complainant first surveyed their 5 acres before completing the survey of his own 10 acres. When the complainant went to clear the land, he found the accused making bricks on it and claiming that he had a kibanja on the land. The appellant was charged of criminal trespass and raised the defence of claim of right. He was convicted at the Magistrates Court and appealed to the High Court.

The High Court upheld the conviction against the accused. The court held that the accused did not have a genuine claim to a kibanja on the complainant's land, as no such interest had been observed or recorded at the time of purchase and the complainant had done his due diligence. Further, the complainant had surveyed the accused's land before surveying his own and the accused had not complained or raised the issue at that time.

*Uganda v Musoke* [1995] HC 06/1994

*Key Principle: A judgment by another court on ownership of land, including by land tribunals, LC courts and RC courts, will be good evidence in showing whether a claim of right is genuine.*

The DPP appealed the acquittal of the respondent on three charges, including criminal trespass and malicious damage to property. There were judgments from courts of the RCI and RCII that found that the land in question belonged to the respondent. As a result, the judge agreed with the magistrate that the decisions of the lower courts in favour of the respondent absolved him of criminal wrongdoing.

*Edonyu v Uganda* [2013] HC 25/2012

*Key Principle: A judgment by another court on ownership of land, including by land tribunals, LC courts and RC courts, will be good evidence in showing whether a claim of right is genuine.*

The defendant had entered onto his neighbour's land and began cultivating it. He asserted a claim of right defence when the neighbour brought criminal charges. The prosecutor tendered a decision by the LCII court finding that the neighbour owned the land. As a result, the judge found that the LCII judgment weakened the defendant's claim of right defence and held that he was properly convicted.



## Property Grabbing Crimes

### 10.4 Relevant Evidence

A property grabbing scenario often involves more than just a criminal offence; broader family disputes about marriage, paternity, ownership of land and clan roles are often caught up with property grabbing criminal offences. Not all of this background information will be relevant to the criminal offence and often witnesses will go into topics and issues that have no bearing on the trial. The Evidence Act lays out what relevant evidence is in section 4 as follows:

Subject to any other law, evidence may be given in any suit or proceeding of the existence or nonexistence of every fact in issue, and of such other facts as are hereafter declared to be relevant, and of no others.

At trial, the evidence should be focused on the facts in issue, unless it meets one of the listed criteria in the Evidence Act. Irrelevant facts should not be delved into during the criminal trial. Tsekooko, J (as he then was) in *Uganda v David Kamugisha & Anor* [1988-90] HCB 77 stated the following concerning relevant evidence:

The question of admissibility of a piece of evidence be it oral or documentary, basically depends on whether it is relevant to the issue before the court. Otherwise the court record will be filled with all types of evidence which is not sufficiently relevant and that may prolong trial unnecessary because of immaterial matter.

Some issues that defence counsel might try to bring up during trial are not relevant to the fact at issue and do not fall into one of the listed exceptions for relevance. For example, whether or not a child under the age of 14 consented to sex in a defilement case is irrelevant. See *Uganda v Ocitti* [2015] High Court 149-2014. Similarly, a claim of right defence is rarely relevant in a case of assault associated with a land dispute.

For property grabbing-related offences, issues that are relevant in some cases are clearly not relevant in others. Whether or not someone was properly married or whether a person was actually a child of the deceased may be relevant to eviction of a widow or orphan, but it is not relevant to criminal trespass or malicious damage to property. Having a clear understanding of what evidence is relevant to a criminal offence will help to build a clear case and prevent a trial from getting off track.

Often police and magistrates will focus on who has Letters of Administration. This is relevant to intermeddling, as one of the elements is that the accused does not have Letters of Administration. The fact that another person does have Letters of Administration is evidence that the accused does not. The accused must be shown to have Letters of Administration for Fraudulent Disposal of Trust Property or Exhibiting a False Inventory and Account, but Letters of Administration are not relevant at all to eviction of a widow.



## 10.5 Reconciliation provision

Given that the parties to a criminal proceeding are the State and the accused, a settlement between the victim and the accused is not normally considered a proper way of 'resolving' a criminal case. Plea bargaining, which involves a plea of guilty in exchange for an agreement to drop some charges, reduce charges or recommend a particular sentence, is a negotiation between the State and the accused, who are the two parties to the case. However, section 160 of the Magistrates Courts Act seems to provide an exception. As a large number of property-grabbing disputes involve family members or fellow community members, courts will sometimes want to dispose of cases through a negotiated settlement. Section 160 states:

In criminal cases, a magistrate's court may promote reconciliation, and encourage and facilitate the settlement in an amicable way, of proceedings for assault, or for any other offence of a personal or private nature, not amounting to felony and not aggravated in degree, in terms of payment of compensation or other terms approved by the court, and may, thereupon, order the proceedings to be stayed.

In understanding the scope and application of section 160, there are a few things to bear in mind:

1. The language is discretionary and gives the court the power to 'encourage', rather than order, reconciliation and settlement.
2. The court does not have this discretion in matters concerning offences that are felonies, aggravated in degree or public nature.
3. The court does not have the power to dismiss a case under this section, only to order the proceedings to be stayed.



In terms of exercising powers and duties granted by statute, Halsbury's Laws of England says the following:

A discretionary power is typically conferred by words and phrases such as 'may', 'it shall be lawful', 'if it thinks fit' or 'as it thinks fit'. A statutory discretion is not, however, necessarily or, indeed, usually absolute: it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken whether or how to act.<sup>39</sup>

Although the magistrate has the power to persuade, advise and support, this provision does not grant the magistrate the power to compel parties to reconcile or force a settlement.

Section 160 is discretionary in nature. The statute says that a magistrate may promote reconciliation, encourage and facilitate settlement and may order proceedings to be stayed. The statute does not mandate that the magistrate shall take any of those actions. The significance of using the word 'may' is highlighted in the case of *Uganda (DPP) v Col (Rtd) Dr. Kiiza Besigye* (Constitutional Reference No. 20 of 2005). The court used Black's Law Dictionary (6th Edition) to define 'may' as "stated to imply permissive, optional or discretionary and not mandatory . . ." and the opposite of 'may' as 'shall', which is "generally imperative or mandatory."

The power to promote reconciliation and order a proceeding to be stayed is a discretionary one and should only be used in cases where it will still serve the purposes of the criminal law as stated in Section 11.1 of this book. Even if a case is eligible for settlement, other factors such as likelihood of recurrence, vulnerability of the victims and need for deterrence can dissuade a magistrate from exercising this discretionary power.

The decision to prosecute is not in the hands of the magistrate but in the hands of State Attorneys and Prosecutors.

Another important distinction to recognise is the limited power this provision grants a magistrate. The reconciliation provision grants the power to promote reconciliation and encourage and facilitate settlement. The power here is to support, further the progress of and make easier reconciliation between the parties.<sup>40</sup> Crucially, although the magistrate has the power to persuade, advise and support, this

<sup>39</sup> Halsbury's Laws of England, Administrative Law (Volume 1) (2001 Reissue), Section 27. Duty and Discretion.

<sup>40</sup> The Oxford Dictionary has the following definition for these terms: 'Promote' is to support or actively encourage, further the progress of. 'Encourage' is to give support, confidence, or hope to (someone); to persuade (someone) to do or continue to do something by giving support and advice; to stimulate the development of (an activity, state or belief). 'Facilitate' is to make (an action or process) easy or easier.

provision does not grant the magistrate the power to compel parties to reconcile or force a settlement. Neither does this provision grant the magistrate the power to dismiss a case. The magistrate's role is to promote, encourage and facilitate reconciliation if the case warrants such an action. In the end, the decision to prosecute is not in the hands of the magistrate but in the hands of State Attorneys and Prosecutors.

### 10.5.2 Qualifications on the Section 160 of the MCA

Discretionary powers such as section 160 of the Magistrates Courts Act are often qualified by express legal duties. Section 160 expressly qualifies the power of the court to promote reconciliation and order a stay of proceeding in the following circumstances:

- For any offence personal or private in nature (therefore, not offences that are public in nature).
- Not amounting to a felony.
- Not aggravated in degree.

Note that many of the crimes included in this Handbook are not eligible for section 160. Most of the listed crimes in this Handbook are felonies. A number of these misdemeanours should not be considered private or personal, because they involve undermining or discrediting the reputation of public institutions. For example, failure to file an inventory and account<sup>41</sup> is a breach of a statutory duty, and exhibiting a false inventory or account<sup>42</sup> is perjury and therefore an offence against the court. Similarly, intermeddling<sup>43</sup> is an offence against the Administrator General and obtaining registration by false pretence is an offence<sup>44</sup> against the institution that grants the licence, certificate or registration. In these instances, it is the reputation and authority of the court, Administrator General or other public institution that is undermined and contravened.

If a magistrate proposes to apply this section to one of your cases, first ensure that they actually have the power to do so.

### 10.5.3 Section 160 and Property Grabbing

Where a magistrate proposes to apply this section, it is important to be active in advising the court whether it is an appropriate case for the magistrate to exercise its discretion. There are a number of public policy reasons why a magistrate should not exercise its discretion to encourage settlement of property grabbing cases.

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41 Succession Act Cap 162, s 278 and Penal Code Act Cap 120, s 116.

42 Succession Act Cap 162, s 278 and Penal Code Act Cap 120, s 94.

43 Administrator General's Act Cap 157, s 11.

44 Penal Code Act Cap 120, ss 304 & 312.



### Property Grabbing Crimes

Property grabbing usually occurs where there is a power disparity between the parties, where widows or orphans are pressured, intimidated and threatened into giving up their claim to land. Often those trying to take the land are relatives, and there are strong cultural and familial pressures on the women to abandon their rights. The tactic of ‘steal two acres, give one back’ is common, and perpetrators take advantage of clan and court-related reconciliation and mediations to force a compromise with the victims.<sup>45</sup> In such situations, the perpetrators have still gained land by their actions, and there is no disincentive for perpetrators to stop or alter their criminal behaviours.

**Steal two acres, give one back: “Genuine land disputes, where both parties believe they are in the right, are rare. ... This means that when ‘disputes’ arise which are not easily solved, they are usually deliberate attempts to grab land.”<sup>45</sup> It is a common tactic of property grabbers to steal land that they have no claim to, and if challenged, encourage a ‘settlement’ where the stolen land is presented as disputed and the rightful owner is pressured to cede half their land to the property grabber as a compromise. In this way, the property grabber has still gained some land and avoided all negative consequences for their actions.**

The purposes of criminal punishment are to punish perpetrators, prevent future crimes through deterrence and rehabilitation and to protect the public. Where perpetrators continue to benefit from their crimes—through gaining land, or at least not suffering any consequences from their actions—none of the purposes of criminal law are met.

## 11 SENTENCING



### 11.1 Purposes of Punishment in Criminal Law

There are five widely accepted purposes<sup>46</sup> of enforcement of criminal law through punishment:

- **Retribution:** Offenders have hurt either an individual or society and should suffer equal harm in society's name.
- **Deterrence:** There should be sufficient consequences imposed that will discourage both the individual and society generally from committing crime.
- **Incapacitation:** Prison is partly designed to remove offenders from society in order to protect society from the offender.
- **Rehabilitation:** Transform the offender so that they are able to safely re-enter society as a valuable member. The goal is to prevent further crime by convincing the offender that what they did was wrong.
- **Restitution:** The offender is made to pay financially, either to pay a fine to recover some of the costs of criminal prosecution or to help recompense the victim for their physical, emotional or financial loss.



### 11.2 Appropriate Sentencing

Property grabbing crimes are not seen as criminal acts in many communities because of distorted customs and traditions. Criminal violators are often treated with impunity as the vulnerable community members suffer. As a result, custodial sentences are necessary to effectively satisfy the basic principles of punishment.

A custodial sentence serves as a deterrent warning to the individual and the community that property grabbing is a crime that will not be tolerated within Ugandan society. With the prevalence of violence in property grabbing crimes, a custodial sentence is required to ensure the safety of victims and the community by incapacitating the offender.

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<sup>46</sup> Lisa M. Storm. *Criminal Law v 1.0* (2015, available at [http://catalog.flatworldknowledge.com/bookhub/reader/4373?e=storm\\_1.0-ch01\\_s05](http://catalog.flatworldknowledge.com/bookhub/reader/4373?e=storm_1.0-ch01_s05)), section 1.5.



## Property Grabbing Crimes

Additionally, the harm from property grabbing is so grave that it warrants a retributive punishment. Property grabbing has grave consequences for its victims, including loss of health, home and even life. But, the consequences from property grabbing are also systemic. When these types of crimes are committed, they often involve deceit, forgery or fraud and flout the judicial and administrative functions of government. The appellate judge in *Uganda v Joyce Namugenyi Kizito Mutasiga* H.C.Cr.A. 46-2014 considered both types of harms in a property grabbing case on appeal. He sentenced the respondent to a custodial sentence after finding that a non-custodial sentence did not serve the interests of justice, particularly given the gravity of both the individual and systemic harms.

A non-custodial sentence does not provide the necessary deterrence or rehabilitation for perpetrators of property grabbing. Where a perpetrator is only required to reconcile, there is no penalty to them that would successfully provide a deterrent effect or change their mind set regarding property grabbing. If perpetrators can gain land or property through illegal means and the only potential adverse effect would be to return the property, they have nothing to lose and everything to gain by committing property grabbing crimes. If a perpetrator does not believe that property grabbing is criminal, a non-custodial sentence will not reform the way they think.

For these reasons, custodial sentences should be the standard form of punishment in order to successfully accomplish the principles of criminal punishment.

### Restitution

In addition to a custodial sentence, restitution or compensation orders should be considered. Section 201 of the Magistrates Courts Act provides that where a person is charged with a property-related charge in chapters XXV through to XXX of the Penal Code Act, the property **shall** be restored to the victim. This includes theft or concealment of a will or deed, obtaining money or registration by false pretence, demanding property with menaces and criminal trespass.

The Magistrates Courts Act also provides for compensation to be paid to victims of crime, whether a witness or not, if the victim has suffered material loss or personal injury as a consequence of the offence and substantial compensation would be recoverable by a civil suit.<sup>47</sup>

The simple act of reminding the court to order the restoration of the property, and requesting compensation in appropriate cases, can have an enormous impact on an individual's life



This may be ordered in addition to any other lawful punishment. In *Elineo Mutyaba v Uganda*<sup>48</sup>, the accused was convicted of criminal trespass for evicting the owner of an apartment complex and the court ordered that the apartment complex be immediately returned to the rightful owner.

State Attorneys and Prosecutors are in a unique position to not only ensure that property grabbers are punished but to restore vulnerable victims, who rely on their property for their livelihood. The simple act of reminding the court to order the restoration of the property, and requesting compensation in appropriate cases, can have an enormous impact on an individual's life while furthering the interests of justice.



## 12 SUCCESSION LAW OVERVIEW

### 12.1 Introduction

Property grabbing offences frequently occur in relation to a deceased's estate, and so a basic knowledge of succession law is useful in understanding and prosecuting property grabbing offences. Property grabbing frequently occurs by means of forgery and fraud during the estate administration process, where someone sees the opportunity to take control of the estate for themselves. The steps involved in the estate administration process are set out below. Confusion in relation to the rights and obligations of administrators, executors and beneficiaries (particularly the customary heir) often leads to property grabbing crimes and can make prosecution difficult as the police and courts have often been confused themselves.

### 12.2 Obtaining Authorisation to Administer an Estate

To legally distribute the property of a deceased, someone must first be authorised to act on behalf of the deceased in administering the estate. The administration of an estate depends on whether the deceased died intestate or with a valid will.

#### 12.2.1 Intestate Estates: Obtaining Letters of Administration

The authority to administer the estate of a person who dies intestate comes with the grant of Letters of Administration.<sup>49</sup>

The Administrator General may choose to apply for Letters of Administration if the deceased died without a will.<sup>50</sup> However, in practice, the Administrator General will only do so in exceptional circumstances, for example, if the family members fail to agree on who will administer the estate.

The spouse of the deceased is the presumptive administrator of the deceased's estate and may apply directly to the court for Letters of

<sup>49</sup> Succession Act Cap 162, section 192.

<sup>50</sup> Section 4 of the Administrator General's Act. Their ability to choose to administer an estate is not unfettered. In *Administrator General v. Akello* [1996] II KALR 103 (Ug. Sup. Ct., Manyindo, J.), the widow and brother of the deceased applied to the Administrator General for a certificate of no objection. The AG declined and instead asked the court to grant LOAs to the AG's office. The specific question presented was whether the AG had "unfettered discretion" to administer any estate of a Ugandan who died intestate. *Akello* at 106. The High Court held that the AG did not.

Administration, without first applying to the Administrator General for permission.<sup>51</sup> A legal spouse includes someone who is married either in a civil, customary or religious ceremony. For the marriage to be legal, it must be between a consenting male and female over the age of eighteen, 21 days' notice of the marriage must be given and a civil or religious marriage must take place in a licensed place with two witnesses present.<sup>52</sup> Customary marriage is valid without registration so long as bride price has been paid.<sup>53</sup>

Relatives of the deceased who wish to administer the deceased's estate, other than the widow or widower, must receive permission from the Administrator General before applying for Letters of Administration.<sup>54</sup> The Administrator General authorises people to apply for Letters of Administration through the granting of a Certificate of No Objection.<sup>55</sup> The steps involved in obtaining a Certificate of No Objection from the Administrator General's office are:

1. Open a file with the Administrator General's office. Payment of a nominal fee, as well as the following documents are required to open a file: a death certificate, a letter of introduction from the LC I Chairperson, photocopy of an identity card and marriage certificate (if applicable).
2. The Administrator General's office will then call a family meeting and invite family members or request the district Chief Administrative Officer (CAO) to arrange a family meeting. One or more people will be nominated as administrators at the family meeting (usually a spouse,

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51 Administrator General's Act Cap 157, section 5(1). Although this is the statutory rule, in practice the court often also requests the Administrator General's permission before granting Letters of Administration to a spouse.

52 Section 31 of the Constitution of the Republic of Uganda 1995 provides that men and women over the age of 18 have the right to marry where both parties consent. Specific rules relating to civil, religious and customary marriages are set out in the Marriage Act, the Marriage and Divorce of Mohammedans Act and the Customary Marriage (Registration) Act. Further recognition of customary marriage can be found in *Alai v Uganda* [1967] 1 EA 596 and *Negulu v Serugga* Civil Appeal No. 103 of 2013.

53 *Negulu v Serugga* Civil Appeal No. 103 of 2013.

54 Administrator General's Act Cap 157, section 5(1). The Supreme Court in *Administrator General v Akello* [1996] II KALR 103 (Ug. Sup. Ct., Manyindo, J.) confirmed that: It is clear from [section 5(1) of the Administrator General's Act] that a widow or widower can apply for and obtain Letters of Administration of her or his deceased spouse's estate without reference to the Administrator General. . . . All other persons must serve the Administrator General with Notice of their intention to apply for Letters of Administration within the prescribed time. As the trial Judge pointed out, the widow (Joyce) did not have to seek the consent of the Administrator General.

55 *Administrator General v Bukirwa & Anor* [1992-1993] HCB 192



## Property Grabbing Crimes

if there is one), and a letter of consent showing that the family are all in agreement with the nominations will be forwarded to the Administrator General's office.

3. The nominated administrators will appear before the Administrator General for identification. If the Administrator General is satisfied with the identification of the persons nominated, the office will grant them a Certificate of No Objection.

The legal widow or the nominated administrators need to apply to the court to obtain Letters of Administration. The High Court has jurisdiction for granting Letters of Administration. However, the Magistrates Courts have jurisdiction for estates under 50 million shillings.<sup>56</sup> An application is to the court by way of petition, and in practice contains the following documents:

1. Petition: Which must include the time and place of death (and be accompanied by the death certificate),<sup>57</sup> the names of the family and relatives, the right of the petitioner to be granted Letters of Administration, that the deceased left property in the jurisdiction and the amount of the assets in the estate.<sup>58</sup>
2. Declaration: The petitioner must declare that the information is true<sup>59</sup> and may be punished for giving false evidence if the person knowingly includes false information in the petition.<sup>60</sup>
3. Notice of Application: This notice must then be published in a newspaper with wide circulation and readership so that all interested parties may know that an application for Letters of Administration has been made.<sup>61</sup>

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<sup>56</sup> Succession Act Cap 162, section 235. A Grade II Magistrate may hear cases involving estates under 500,000, a Grade I Magistrate has jurisdiction for estates worth up to 20 Million, and a Chief Magistrate has jurisdiction for estates worth up to 50 Million, under section 2(1) of the Administration of Estates (Small Estates) (Special Provisions) Act as amended by The Administration of Estates (Small Estates) (Special Provisions) (Amendment of Jurisdiction of Magistrates Courts) Order, 2009 No. 20.

<sup>57</sup> Rule 4 of Statutory Instrument 156—1 The Administration of Estates (Small Estates) (Special Provisions) (Probate and Administration) Rules.

<sup>58</sup> Succession Act Cap 162, section 246.

<sup>59</sup> Succession Act Cap 162, section 247.

<sup>60</sup> Succession Act Cap 162, section 249.

<sup>61</sup> *Sarah Sebowa v Peter Sebowa* [1991] HCB 95.

4. Administration Bond:<sup>62</sup> Either the registrar (in the High Court) or the magistrate (in a magistrate's court) determines the amount of the bond based on the value of the estate.
5. Court Identification Form: This form should be signed by an attorney or a LC I Chairperson. The court may, and in practice usually does, call the widow or the nominated administrators for verifying their identity prior to granting Letters of Administration.<sup>63</sup>

Letters of Administration must not be granted within thirty days from the date of death of the deceased.<sup>64</sup>

### 12.2.2 Testate Estates: Obtaining Probate

If there is a valid will that nominates an executor, the executor must obtain a Grant of Probate. If the will does not nominate an executor, then one or more beneficiary should seek to obtain Letters of Administration with the will annexed and apply generally in accordance with Section 12.2.1 of this Handbook.

Like with Letters of Administration, the High Court has jurisdiction for granting probate however, the Magistrates Courts have jurisdiction for estates under 50 million shillings.<sup>65</sup> The nominated executor must apply to the court to obtain probate, by filing the following documents:

1. The original will and an English translation of the same.<sup>66</sup>
2. Declaration: The petitioner must declare that the information is true,<sup>67</sup> and may be punished for giving false evidence if the person knowingly includes false information in the petition.<sup>68</sup>

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<sup>62</sup> Succession Act Cap 162, section 260.

<sup>63</sup> Rule 5(2) of Statutory Instrument 156—1 The Administration of Estates (Small Estates) (Special Provisions) (Probate and Administration) Rules.

<sup>64</sup> Rule 5(3) of Statutory Instrument 156—1 The Administration of Estates (Small Estates) (Special Provisions) (Probate and Administration) Rules.

<sup>65</sup> Succession Act Cap 162, section 235. A Grade II Magistrate may hear cases involving estates under 500,000, a Grade I Magistrate has jurisdiction for estates worth up to 20 Million, and a Chief Magistrate has jurisdiction for estates worth up to 50 Million, under section 2(1) of the Administration of Estates (Small Estates) (Special Provisions) Act as amended by The Administration of Estates (Small Estates) (Special Provisions) (Amendment of Jurisdiction of Magistrates Courts) Order, 2009 No. 20.

<sup>66</sup> Succession Act Cap 162, section 245.

<sup>67</sup> Succession Act Cap 162, section 247.

<sup>68</sup> Succession Act Cap 162, section 249.



## Property Grabbing Crimes

3. Petition: Which must include the time death (and be accompanied by the death certificate), that the writing annexed is the deceased's will duly executed, the amount of the assets in the estate and that the petitioner is the named executor in the will.<sup>69</sup>
4. Notice of Application: This notice must then be published in a newspaper with wide circulation and readership so that all interested parties may know that an application for Probate has been made.<sup>70</sup>
5. Administration Bond:<sup>71</sup> Either the registrar (in the High Court) or the magistrate (in a magistrate's court) determines the amount of the bond based on the value of the estate.
6. Court Identification Form: This form should be signed by an attorney or a LC I Chairperson. The court may, and in practice usually does, call the nominated executor for verifying their identity prior to issuing a Grant of Probate.<sup>72</sup>

## 12.3 Legal Rights of Executors, Administrators and Beneficiaries

### 12.3.1 Rights prior to a grant of Letters of Administration or Probate

The beneficiaries of an estate, including those nominated as executor or who may be entitled to be granted Letters of Administration, have no right that will be recognised by any court of justice until probate or Letters of Administration have been granted.<sup>73</sup> However, a beneficiary (under a will, or according the laws of succession) may bring an action for the protection and preservation of the estate without first obtaining probate or Letters of Administration.<sup>74</sup>

### 12.3.2 Rights of executor and administrators

Administrators and executors are the legal representative of the deceased. However, this does not mean that they are entitled to deal

<sup>69</sup> Succession Act Cap 162, section 244.

<sup>70</sup> *Sarah Sebowo v Peter Sebowo* [1991] HCB 95.

<sup>71</sup> Succession Act Cap 162, section 260.

<sup>72</sup> Rule 5(2) of Statutory Instrument 156—1 The Administration of Estates (Small Estates) (Special Provisions) (Probate and Administration) Rules.

<sup>73</sup> Succession Act Cap 162, sections 188 and 191.

<sup>74</sup> *Israel Kabwa v Martin Banoba Musiga* [1996] KALR 253 [Supreme Court Civil Appeal No. 52 of 1995]; *Kenya & 2 Ors v Nabikolo & 4 Ors* Civil Suit No 771 of 2007 (High Court, Land division).

with the deceased's property however they wish or for their own benefit; they are trustees and must act on behalf of the beneficiaries of the estate. Where the law calls for the trustee to distribute the property to the beneficiaries, the trustee cannot choose to take part of the estate for themselves; the estate must be distributed to the beneficiaries.

Upon Grant of Probate or Letters of Administration, the executor or administrator is the legal representative of the deceased for all purposes and the rights and property of the deceased vest in the executor or administrator.<sup>75</sup> These rights take effect from the date of death of the deceased and validate actions the executor or administrator has already taken, except for actions taken by an administrator tending to the diminution or damage of the intestate's estate.<sup>76</sup> While an executor or administrator is *legally* vested with the rights and property of the deceased, in equity they are bound to act only on trust for the beneficiaries of the estate.

For example, according to section 134(1) of the Registration of Titles Act, the administrator or executor of a deceased's estate can be registered as proprietor of any land belonging to the deceased, subject to the equities upon which the deceased held it and is deemed to be the absolute proprietor for the purpose of any dealings with the land. However, the court in *Kanyerezi & Ors v The Chief Registrar of Titles & Ors* Misc Cause No.919 of 1997 held that "the administrator/executor is deemed i.e. taken to be the absolute proprietor only for the purpose of any dealing therewith. It is not supposed to accrue for his personal benefit."<sup>77</sup> Section 278 of the Succession Act also requires an executor or administrator to account for their dealings with the estate.

### 12.3.3 Standing to bring a Criminal Complaint

We have frequently encountered judicial officers who have insisted that criminal complainants in succession-related crimes must have Letters of Administration or be the executors of a probated will to have standing to bring the complaint. However, there is no standing requirement for a complainant to report a criminal matter, as it is the Directorate of Public Prosecutions, on behalf of the State, who brings the case:

Prima facie a criminal offence is an offence against the State and the "complainant" is technically just one of

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<sup>75</sup> Succession Act Cap 162, sections 180, 189 and 192.

<sup>76</sup> Succession Act Cap 162, section 193.

<sup>77</sup> *Kanyerezi & Ors v The Chief Registrar of Titles & Ors* Misc Cause No.919 of 1997 as per Lady Justice Bossa at page 7.



## Property Grabbing Crimes

the witnesses. Without finally deciding, there is no requirement that a person who is aware that a crime has been committed or is about to be committed cannot file a complaint with the police for investigations. Whether or not the evidence gathered for the complaint would be sufficient to support a conviction against the applicant is another matter altogether and is a matter which only the trial Court is properly placed to determine.<sup>78</sup>

## 12.4 Distribution Rights of Beneficiaries

In 2007, Uganda's Constitutional Court invalidated parts of the Succession Act because they discriminated against women: Sections 2(n) (i) and (ii), 14, 15, 26, 27, 29, 43, and 44 of the Succession Act and Rules 1, 7, 8 and 9 of the Second Schedule.<sup>79</sup> The Court held that those sections of the Succession Act violated the Constitution by providing for the distribution of a man's property after death but not a woman's, and by requiring that widows, but not widowers, surrender the matrimonial home if they remarry. This left a gap in the law of succession; however, many aspects of the law remain in effect.

**Matrimonial Home:** Under the Succession Act prior to the Constitutional Court's decision in *Law Advocacy for Women in Uganda v Attorney General*, the principal residence, the items in it and the surrounding land remained in the possession of the legal wife (or husband) and minor children, who normally resided there during the deceased's lifetime.<sup>80</sup> Only after the widow's (or widower's) death, did the matrimonial home revert back to the estate to be distributed in accordance with the Succession Act. Note that if the wife was not a legal wife under the law, she was generally still entitled to stay in the house so long as she was the guardian for minor children of the deceased.

After the Constitutional Court's decision, there are still statutes that grant the wife and children of an intestate an interest in the matrimonial home. Under Rule 10 of the Second Schedule, it is an offence to:

<sup>78</sup> *Attorney General v Attorney General for and on Behalf of Inspector General of Police & 3 others ex-parte Thomas Ng'ang'a Munene* Misc. Application 166 of 2013 [2014] eKLR.

<sup>79</sup> *Law Advocacy for Women in Uganda v Attorney General* [2007] UGCC 1.

<sup>80</sup> Children are entitled to remain in the matrimonial home until 18 if they are male and 21 if they are female and unmarried: Succession Act Cap 162, section 26 and the Second Schedule.



[E]vict from a residential holding prior to the issue of a certificate under paragraph 4 of this Schedule any wife or child of an intestate who normally resided there at the date of death of the intestate or to do any act calculated to persuade or force any the wife or child to quit such holding prior to the issue of the certificate.

Rule 6 of the Second Schedule says that:

Occupancy of a residential holding hereunder shall be deemed to be an interest in land capable of protection by a caveat under the Registration of Titles Act, and the interest of any other person in the residential holding shall be subject to that interest and shall be incapable of alteration subject to that interest; but the occupancy shall not be a tenancy.

This means the occupancy by a wife or child is capable of protection by a caveat under the Registration of Titles Act if it meets the requirements in Rule 6.

Additionally, Rule 2 of the Second Schedule gives any spouse or child the right of cultivation in the land surrounding the matrimonial home:

Any wife, husband or child who normally cultivated, farmed or tilled any land adjoining a residential holding owned by an intestate prior to his or her death shall have the right to cultivate, farm and till the land as long as he or she continues to be resident.

Furthermore, in *Re: The Estate of the Late Yusuf Kalanzi* [2009] HC 009/2009 the court allowed an application under the nullified section 26 of the Succession Act. The court invoked section 98 of the Civil Procedure Act which stated that, “[n]othing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.” The court then found that a widow was entitled to stay in the residential holding.

In Britain, under the Inheritance and Trustees’ Powers Act of 2014,<sup>81</sup> a surviving spouse is entitled to the matrimonial home absolutely or retains the right to appropriate the matrimonial home, depending on whether or not the deceased left issue.<sup>82</sup> Where the intestate

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81 The Inheritance and Trustees’ Powers Act amended both the Intestates’ Estates Act 1952 and the Administration of Estates Act 1925.

82 See Administration of Estates Act 1925, Section 46, as amended by Inheritance and Trustees’ Powers Act 2014, Section 1.



## Property Grabbing Crimes

leaves no issue, the surviving spouse is entitled to the intestate's estate absolutely, and the estate includes the matrimonial home.<sup>83</sup> Where the intestate leaves issue, the surviving spouse is entitled to half of the intestate's residuary estate absolutely while the children inherit the other half.<sup>84</sup> The surviving spouse and the intestate's children accordingly share in the matrimonial home; however, the surviving spouse has the right to appropriate the house in or towards satisfaction of any of his or her absolute interest in the estate.<sup>85</sup> The court affirmed a widow's interest in the matrimonial home in *Lall v Lall*<sup>86</sup> and stated that the widow has a right to appropriate, or exercise control over, the matrimonial home.

In conclusion, although there were parts of the Succession Act that were revoked for constitutional reasons, the preservation of a matrimonial home for the widow or children of a deceased is still necessary for the ends of justice and in some cases is protected by the remaining Second Schedule Rules. Where there is a gap in Ugandan law, the British laws involving intestate succession can provide guidance in preserving a matrimonial home for the surviving spouse. The protections and procedure still active in the Second Schedule (like Rules 2 & 10) clearly show that justice demands protection for widows and children.

**Customary Heir:** The role of a customary heir is cultural rather than legal. The customary heir was entitled to only 1% of the late's estate, under the Succession Act prior to the Constitutional Court's holding. Following the ruling in 2007, the heir is only entitled to such land as he or she would otherwise be entitled to as a child or dependent relative under section 28. As noted above, the customary heir is not authorised to deal with the estate unless he has first obtained Letters of Administration. If a customary heir is designated the lawful administrator, he must distribute the property to the lawful beneficiaries, rather than utilise the estate for his personal benefit.

**Distribution of Remainder of the Estate:** Currently there are two main ways of distributing an intestate estate: (1) distributing the estate in equal shares to the beneficiaries of the estate or (2) for the beneficiaries to enter into a distribution scheme that they all agree to. The idea behind equal shares for all beneficiaries is rooted in

83 Administration of Estates Act 1925, Section 46, as amended by Inheritance and Trustees' Powers Act 2014, Section 1.

84 Administration of Estates Act 1925, Section 46, as amended by Inheritance and Trustees' Powers Act 2014, Section 1. Note that this only applies to estates greater than a statutorily fixed net sum.

85 Intestates' Estates Act 1952, Second Schedule, Section 1.

86 *Lall v Lall* [1965] 3 All ER 330, Chancery Div.

section 28 (1) of the Succession Act, which was not declared void:

All lineal descendants, wives and dependent relatives shall be entitled to share their proportion of a deceased intestate's property in equal shares.

A distribution scheme following this scheme will simply give an equal share to all beneficiaries, regardless of status or need. Alternatively, a distribution scheme may be entered into by the family, whereby the family agrees upon a distribution plan. An agreed upon distribution scheme does not need to distribute the estate in equal shares—beneficiaries are free to distribute to each according to need. However, beneficiaries must be in agreement over a distribution scheme if it does not grant equal shares. One beneficiary cannot be compelled, threatened or deceived into give up their lawful equal share by another beneficiary without breaking one of the property grabbing crimes discussed in this Handbook.

**Valid Will:** In a will, a person is free to distribute her property as she wishes so long as the spouse, all children and dependent relatives have been reasonably provided for. The above distribution does not bind a person who decides to make a will.



## 13 PROPERTY GRABBING OFFENCES CHART

Legislation	Offence	Elements	Penalty
Administrator General's Act, Section 11 and Succession Act, Sections 268 & 269	Intermeddling	<ol style="list-style-type: none"> <li>1. Takes possession of, causes to be moved, or otherwise intermeddles with</li> <li>2. Property left after the death of a person</li> <li>3. Without the authorisation of the law, the Administrator General or an agent</li> </ol> <p>OR</p> <ol style="list-style-type: none"> <li>1. A person unlawfully</li> <li>2. Refuses or neglects to deliver property to the Administrator General or his agent when called upon to do so</li> </ol>	<ol style="list-style-type: none"> <li>1. Imprisonment for a term not exceeding three months; or</li> <li>2. Fine not exceeding two hundred shillings; or</li> <li>3. Both such imprisonment and such fine.</li> </ol>
Anti-Corruption Act 2009, Section 21	Fraudulent Disposal of Trust Property	<ol style="list-style-type: none"> <li>1. An executor, administrator, or other person who is a trustee of any property</li> <li>2. Destroyed the property OR converted the property to an unauthorized use</li> <li>3. With intent to defraud</li> </ol>	<ol style="list-style-type: none"> <li>1. Imprisonment not exceeding seven years; or</li> <li>2. Fine not exceeding one hundred and sixty currency points; or</li> <li>3. Both such imprisonment and such fine.</li> </ol>

Domestic Violence Act 2010, Section 4	Domestic Violence	<ol style="list-style-type: none"> <li>1. In a domestic relationship</li> <li>2. Engages in domestic violence</li> </ol>	<ol style="list-style-type: none"> <li>1. Imprisonment not exceeding two years; or</li> <li>2. Fine not exceeding one forty eight currency points; or</li> <li>3. Both such imprisonment and such fine.</li> </ol>
Land Act, Section 92 (1)(b)	Making a False Declaration Relating to Land	<ol style="list-style-type: none"> <li>1. Makes a declaration in any manner</li> <li>2. That is false</li> <li>3. Relating to land</li> </ol>	<ol style="list-style-type: none"> <li>1. Imprisonment not exceeding one year; or</li> <li>2. Fine not exceeding twenty five currency points; or</li> <li>3. Both such imprisonment and such fine</li> </ol>
Land Act, Section 92 (1)(c)	Occupying Land without Consent	<ol style="list-style-type: none"> <li>1. Wilfully</li> <li>2. Occupying land</li> <li>3. Belonging to another</li> <li>4. Without the Consent of the owner</li> </ol>	<ol style="list-style-type: none"> <li>1. Imprisonment for a term not exceeding four years; or</li> <li>2. Fine not exceeding ninety six currency points; or</li> <li>3. Both such imprisonment and such fine</li> </ol>
Land Act, Section 92(1)(e)	Eviction or Attempted Eviction of a Lawful/Bona Fide Occupant	<ol style="list-style-type: none"> <li>1. Evicts or attempts to evict (includes participation in the eviction)</li> <li>2. From registered land</li> <li>3. Of a lawful or bona fide occupant</li> <li>4. Without an order of eviction</li> </ol>	<ol style="list-style-type: none"> <li>1. Imprisonment for a term not exceeding seven years; and</li> <li>2. Compensation or damages to the victim; or</li> <li>3. Restitution to the victim</li> </ol>
Penal Code Act, Section 254	Theft of a Will	<ol style="list-style-type: none"> <li>1. Taking or conversion of</li> <li>2. A will or other testamentary instrument</li> <li>3. Fraudulently and without claim of right</li> </ol>	Imprisonment for a term not exceeding ten years



## Property Grabbing Crimes

Penal Code Act, Section 277	Concealing a Will	<ol style="list-style-type: none"> <li>1. Concealment</li> <li>2. Of a will or other testamentary instrument</li> <li>3. With intent to defraud</li> </ol>	Imprisonment for a term not exceeding ten years
Penal Code Act, Section 278	Concealing a Deed	<ol style="list-style-type: none"> <li>1. Concealment of the whole or part</li> <li>2. Of a document which is evidence of title to land or estate in land</li> <li>3. With intent to defraud</li> </ol>	Imprisonment for a term not exceeding three years
Penal Code Act, Section 293	Demanding Property with Menaces	<ol style="list-style-type: none"> <li>1. Demands from a person</li> <li>2. Any valuable thing</li> <li>3. With menaces or force</li> <li>4. With intent to steal it</li> </ol>	Imprisonment for a term not exceeding five years
Penal Code Act, Section 302	Criminal Trespass	<ol style="list-style-type: none"> <li>1. Entrance onto or remaining upon property</li> <li>2. In the possession of another</li> <li>3. With intent to commit an offence or to intimidate, insult, or annoy a person</li> </ol>	Imprisonment for a term not exceeding one year
Penal Code Act, Section 312	Obtaining Registration by False Pretence	<ol style="list-style-type: none"> <li>1. Procuring (or attempts to procure) registration under any law</li> <li>2. Wilfully</li> <li>3. For oneself or another</li> <li>4. By false pretence</li> </ol>	Imprisonment for a term not exceeding one year
Penal Code Act, Section 335(1)	Malicious Damage of Property	<ol style="list-style-type: none"> <li>1. Wilful and unlawful act</li> <li>2. Causing the destruction or damage</li> <li>3. Of Property</li> </ol>	Imprisonment for a term not exceeding five years

<p>Penal Code Act, Section 335(1) &amp; (4)</p>	<p>Destroying or Damaging a Will</p>	<ol style="list-style-type: none"> <li>1. A wilful and unlawful act</li> <li>2. Causing the damage or destruction of (in whole or in part):             <ol style="list-style-type: none"> <li>a. A testamentary instrument, (whether or not the testator is deceased) OR</li> <li>b. Register authorised or required by law for authenticating or recording:</li> <li>c. A copy of any part of any such register</li> </ol> </li> </ol>	<p>Imprisonment for a term not exceeding fourteen years</p>
<p>Penal Code Act, Section 335(1) &amp; (8)</p>	<p>Destroying or Damaging a Deed</p>	<ol style="list-style-type: none"> <li>1. A wilful and unlawful act</li> <li>2. Causing the damage or destruction of (in whole or in part)</li> <li>3. A document evidencing title to or estate in land</li> </ol>	<p>Imprisonment for a term not exceeding seven years</p>
<p>Penal Code Act, Section 338</p>	<p>Removing boundary marks</p>	<ol style="list-style-type: none"> <li>1. A wilful and unlawful act</li> <li>2. Removing or Defacing</li> <li>3. A lawfully erected object or mark indicating a land boundary</li> <li>4. With intent to defraud</li> </ol>	<p>Imprisonment for a term not exceeding three years</p>

Penal Code Act, Section 339	Wilful damage, etc to survey and boundary marks	<ol style="list-style-type: none"> <li>1. A wilful act</li> <li>2. Removing, defacing, or injuring</li> <li>3. A survey or boundary mark authorised by the Government</li> </ol>	<ol style="list-style-type: none"> <li>1. Imprisonment for a term not exceeding three months; or</li> <li>2. Fine not exceeding four hundred shillings; and</li> <li>3. Pay the cost of repairing or replacing the mark.</li> </ol>
Penal Code Act, Sections 342, 347 and 348	Forgery of wills, etc	<ol style="list-style-type: none"> <li>1. Making a false document</li> <li>2. Being a will, document of title to land, judicial record, power of attorney, etc.</li> <li>3. With the intent to deceive or defraud</li> </ol>	Imprisonment for a life
Penal Code Act, Sections 342, 347 and 349	Forgery of judicial or official documents	<ol style="list-style-type: none"> <li>1. Making a false document</li> <li>2. Being a judicial or official document</li> <li>3. With the intent to deceive or defraud</li> </ol>	Imprisonment for a term not exceeding ten years
Penal Code Act, Section 351	Uttering a False Document	<ol style="list-style-type: none"> <li>1. Knowingly</li> <li>2. Utters</li> <li>3. A false document</li> <li>4. With intent to defraud</li> </ol>	Imprisonment for a term between three years and life, depending on the document.
Succession Act, Sections 278(1), (2) and (4) and Penal Code Act, Section 116	Failure to File Inventory and Account	<ol style="list-style-type: none"> <li>1. An Executor or Administrator</li> <li>2. Intentionally</li> <li>3. Omits to exhibit an inventory or account</li> <li>4. Within the time required by law or the Court</li> </ol>	Imprisonment for a term not exceeding two years
Succession Act, Sections 278(1), (2) and (5) and Penal Code Act, Section 94	Exhibiting a False Inventory or Account	<ol style="list-style-type: none"> <li>1. Executor or Administrator</li> <li>2. Intentionally</li> <li>3. Files a false inventory or account</li> </ol>	Imprisonment for a term not exceeding two years



<p>Succession Act, Second Schedule, Rule 10</p>	<p>Eviction or Attempted Eviction of Widow or Orphan</p>	<ol style="list-style-type: none"> <li>1. Evict or attempt to evict (includes acts calculated to persuade or force to quit)</li> <li>2. From a residential holding</li> <li>3. Any wife or child of an intestate who normally resided there at date of the intestate's death</li> <li>4. Prior to the issue of a certificate of occupancy</li> </ol>	<ol style="list-style-type: none"> <li>1. Imprisonment for a term not exceeding six months; or</li> <li>2. Fine not exceeding one thousand shillings; or</li> <li>3. Both such imprisonment and such fine.</li> </ol>
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**TABLE OF AUTHORITIES****Cases**

Administrator General v Akello [1996] II KALR 103 .....	73, 74
Administrator General v Bukirwa & Anor [1992-1993] HCB 192.....	74
Alai v Uganda [1967] 1 EA 596 .....	74
Attorney General v Attorney General for and on Behalf of Inspector General of Police & 3others ex-parte Thomas Ng'ang'a Munene Misc. Application 166 of 2013 [2014] eKLR.....	79
Baigumamu v Uganda [1973] EALR 26 .....	40
Board of Trade v Owen [1957] A.C. 602 .....	59
Brenda Kyagulanyi & Anor v Joshua Kibirige & Anor (High Court Civil Suit No.45 Of 2005).....	59
Byekwaso Mayanja Sebalija v Uganda [1991] HCB 15.....	17,18, 62
Caffrey v Darby [1801] 31 ER 115.....	59
Caxton Publishing Co. v Sutherland Publishing Co. (2), [1939] AC 178 .....	30
Cock v Cooke [1866] LR. 1 Pp & D 241 .....	42
Edonyu v Uganda [2013] HC 25/2012 .....	64
Elineo Mutyaba v Uganda High Court at Kampala, Criminal Appeal No 45 of 2011...	21, 72
George Woodgate v R [1959] EALR 525.....	56
Hamraj Lalji Shah v R [1958] 1 EA 332 (SCK).....	36
Henry Kayondo v Uganda [1993] S.C.C.A. 35 of 1992.....	60
Israel Kabwa v Martin Banoba Musiga [1996] KALR 253 .....	77
Josephati Kairu v Uganda C.A.Cr.A. No.10 of 1977 .....	19
Kamori Johnson v Uganda [1995] KALR 205.....	17
Kampala District Land Board and another v National Housing and Construction Corporation, [2005] 2 EA 69 (SCU) .....	13, 59
Kanyerezi & Ors v The Chief Registrar of Titles & Ors Misc Cause No.919 of 1997 .....	78
Karorero David v Uganda [2000] Criminal Appeal No. KAB-00-CR-CN-0004-2000 .....	25
Katusiime v Uganda H.C.Cr.A. 10 of 2013 .....	31
Kenya & 2 Ors v Nabikolo & 4 Ors Civil Suit No 771 of 2007.....	77
Kigorogolo v Rueshereka [1969] E.A. 426.....	21, 32, 56
Kilee v Republic [1967] EA 713 (K).....	47
Kityo v Uganda [1967] EA 23 .....	48
Lall v Lall [1965] 3 All ER 330, Chancery Div .....	81
Law Advocacy for Women in Uganda v Attorney General Constitutional Petitions Nos. 13/05 & 05/06 [2007] UGCC 1 (5 April 2007).....	15, 79
Maalim (Omar Abdulla Awadh) v R [1964] EA 672.....	43
Mahendra Raja Jani v Republic [1966] EA 319 .....	48, 56
Matovu Hamidu v Uganda Criminal Appeal No.10 of 2006.....	63
Mbande v Republic [1971] EA 553 .....	40
Muhwezi Jackson v Uganda [2009] UGCA 54 .....	55, 63
Mukasa Lubanga Charles v Uganda [2015] C.A.Cr.A. 166-2011.....	50
Negulu v Serugga Civil Appeal No. 103 of 2013 .....	74
Nkwine Jackson v Uganda [1995] KALR 117 .....	18

Opiyo v Republic [1970] EA 319 (K) .....	47
R v Burns [1958] EA 142 .....	30
Re London and Globe Finance Corporation Ltd. (1) [1903] 1 Ch. 728 .....	56
Re: The Estate of the Late Yusuf Kalanzi [2009] HC 009/2009.....	80
Re-Windsor [1965] 10 Cox 118.....	40
Samuels v Republic [1968] EALR 1.....	56
Sarah Sebowa v Peter Sebowa [1991] HCB 95 .....	75, 77
Silver Wakayinja and 2 Others v Petwa Babirye, High Court Uganda, Civil Suit No. 89 of 2014.....	33
Ssebina & Ors v Uganda [2006] UGHC 21.....	63
Sutton v Sutton [2015] HC 63-2013 .....	16
The Attorney-General of Uganda v Gaburriel Ottii [1957] EALR 341 .....	48
Tom Bwete v Uganda [1995] HCCA 22/94 .....	48, 49
Uganda (DPP) v Col (Rtd) Dr. Kiiza Besigye (Constitutional Reference No. 20 of 2005)....	67
Uganda Breweries Limited v Gilbert Afarao Court of Appeal No 45 of 2005.....	56
Uganda v Bamwise Patrick Kakaire [2015] H.C.Cr.S. 0002/2015 .....	29
Uganda v David Kamugisha & Anor [1988-90] HCB 77 .....	65
Uganda v Dungu Mutebi Erizmas Criminal Case 59 of 2013, Magistrate’s Court at Nakifuma .....	46
Uganda v Gastafasi Musoke [1995] UGHC 27.....	18, 64
Uganda v Geoffrey Kazinda [2012] HCT 00 SC 138 .....	40, 51, 56
Uganda v Joyce Namugenyi Kisito Mutasiga [2015] H.C.Cr.A. 46-2014 .....	52, 71
Uganda v Kakembo Fred Criminal Case No 935/2010 Chief Magistrate’s Court in Mukono .....	28
Uganda v Kavuma Freddie Schoof (HCT-00-CR-SC-0168-2008).....	39, 48, 56
Uganda v Kawooya Fred and Anor [2013] Chief Magistrate’s Court Mukono 0936/2011 .....	44
Uganda v Kiraala Sam and Tabitha Nakibuule [2013] Chief Magistrate’s Court Mukono .....	16
Uganda v Nakibi HCT-04-CR-CN-0051 of 2013 .....	61
Uganda v Ocitti [2015] High Court 149-2014 .....	65
Vaz v R. [1961] EA 320.....	19
Wejuli v Uganda HCT-04-CR-CN-0040-2009 .....	17, 18, 62
Welham v Director of Public Prosecutions [1961] AC 103.....	48
Zachary Kataryeba & 3 Ors v Uganda [1997] KALR 31.....	28
Zahida Ahamed and Anor v Uganda [2014] HCT-04-CR-CN-0057-2014 .....	47

## Statutes

Administrator General’s Act Cap 157 .....	27
Administrator General’s Act, Section 4.....	73
Administrator General’s Act, Section 5.....	76
Administrator General’s Act, Section 11.....	10, 26, 68
Administration of Estates (Small Estates) (Special Provisions) (Probate and Administration) Rules, Rule 4 .....	75
Administration of Estates (Small Estates) (Special Provisions) (Probate and Administration) Rules, Rule 5(2).....	76, 77



Administration of Estates (Small Estates) (Special Provisions) (Probate and Administration) Rules, Rule 5(3).....	76
Administration of Estates Act 1925 .....	80
Administration of Estates Act 1925, Section 46.....	80, 81
Anti-Corruption Act 2009, Section 21.....	29, 59
Civil Procedure Act, Section 98.....	80
Customary Marriage (Registration) Act .....	74
Domestic Violence Act 2010, Section 2 .....	53
Domestic Violence Act 2010, Section 3 .....	54
Domestic Violence Act 2010, Section 4 .....	53
Evidence Act, Section 4 .....	65
Inheritance and Trustees' Powers Act 2014 .....	80
Inheritance and Trustees' Powers Act 2014, Section 1.....	81
Intestates' Estates Act 1952 .....	80
Intestates' Estates Act 1952, Second Schedule, Section 1.....	80
Land (Amendment) Act 2010 .....	10, 12, 22
Land Act, Section 4 .....	44
Land Act, Section 32 .....	14
Land Act, Section 33 .....	44
Land Act, Section 35.....	59
Land Act, Section 92.....	12, 13, 14, 22, 52, 59
Magistrates Courts Act, Section 119 .....	60
Magistrates Courts Act, Section 120 .....	60
Magistrates Courts Act, Section 121 .....	60
Magistrates Courts Act, Section 123 .....	60
Magistrates Courts Act, Section 126 .....	60
Magistrates Courts Act, Section 127 .....	60
Magistrates Courts Act, Section 160 .....	58, 66, 67, 68
Magistrates Courts Act, Section 197 .....	71
Magistrates Courts Act, Section 201 .....	71
Marriage Act.....	74
Marriage and Divorce of Mohammedans Act .....	74
Penal Code Act, Section 2 .....	49
Penal Code Act, Section 7 .....	62
Penal Code Act, Section 22.....	35
Penal Code Act, Section 94.....	34, 35, 68
Penal Code Act, Section 98.....	34
Penal Code Act, Section 116.....	32, 68
Penal Code Act, Section 254.....	40
Penal Code Act, Section 262.....	41
Penal Code Act, Section 277.....	42
Penal Code Act, Section 278.....	43
Penal Code Act, Section 293.....	18
Penal Code Act, Section 302.....	20
Penal Code Act, Section 304.....	50, 68
Penal Code Act, Section 312.....	49, 68
Penal Code Act, Section 335.....	16, 44

Penal Code Act, Section 338.....	24, 25
Penal Code Act, Section 339.....	24, 25
Penal Code Act, Section 342.....	37
Penal Code Act, Section 345.....	38
Penal Code Act, Section 346.....	38, 46, 55
Penal Code Act, Section 347.....	37
Penal Code Act, Section 348.....	37
Penal Code Act, Section 349.....	37
Penal Code Act, Section 351.....	46
Registration of Titles Act, Section 59.....	44
Registration of Titles Act, Section 134.....	78
Succession Act, Section 28.....	81
Succession Act, Section 180.....	78
Succession Act, Section 188.....	77
Succession Act, Section 189.....	78
Succession Act, Section 191.....	77
Succession Act, Section 192.....	73, 78
Succession Act, Section 193.....	78
Succession Act, Section 235.....	75, 76
Succession Act, Section 244.....	77
Succession Act, Section 245.....	76
Succession Act, Section 246.....	75
Succession Act, Section 247.....	75, 76
Succession Act, Section 249.....	75, 76
Succession Act, Section 260.....	76, 77
Succession Act, Section 268.....	26
Succession Act, Section 269.....	27
Succession Act, Section 278.....	31, 33, 68, 78
Succession Act, Second Schedule, Rule 2.....	81
Succession Act, Second Schedule, Rule 4.....	14, 15
Succession Act, Second Schedule, Rule 6.....	79
Succession Act, Second Schedule, Rule 10.....	10, 14, 59, 79, 81
Trial on Indictments Act, Section 119.....	60

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Parliament of Uganda, Hansards, 2009, per Mr Omara Atubo..... 11, 12, 22, 23

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### Constitutional Provisions

Constitution of the Republic of Uganda (1995), Article 26..... 10

Constitution of the Republic of Uganda (1995), Article 31..... 74

Constitution of the Republic of Uganda (1995), Article 120..... 60

Constitution of the Republic of Uganda (1995), Article 250..... 59





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