



A Critical Examination of the Principles of Land Law in Uganda

Mukooli Hudson Masongole

School of Law Kampala International University, Uganda

ABSTRACT

This study examines the principles of land law in Uganda. Even under customary law and practice, individuals have rights in respect to the land in Uganda. However, those rights are typical of the way how those specific people in the custom behave. It is in this light that the article calls for the government to liberalize the process of land registration by not filing the process most especially where the members of the society do not comprehend it. More so, there should be more sensitization on land rights, both in customary and any other tenure, as it is evident that most people do not appreciate their rights. For purposes of ensuring that both men and women can own, use, access and control land, it is important to stress gender issues in the customary land system. By legislating for customary land holding, it is important to recognize the role played by traditional authorities in dispute resolution and land administration, failure to involve them would make it even more difficult for implementation. Finally, a one documentation system should be put in place for registration of all land transaction, introducing customary land in respect to mortgages, the law should impose a duty of care on the creditor exercising his or her powers of sale of a mortgaged land. This should be expressly stated in the law, the way it is known under the common law that it should be well advertised and publicly sold.

Keywords: Customary law, Land Act, Land ownership, Land reform, Land tenure system

INTRODUCTION

When Uganda became a British protectorate at the end of the nineteenth century, the land tenure and management system was profoundly changed creating 'haves' and 'have-nots' in land ownership [1]. The land reforms by the British in Buganda, the central part of the country, created a grossly unequal land tenure system. It gave large tracts of land to the political elite but turned most of the people of Buganda into tenant farmers [2, 3]. The colonial government entered into agreements with the Buganda, Ankole and Toro Kingdoms paving way for increased individualized ownership of land. Individualized ownership of land (the "freehold" system) made changed the focus of land use from communal grazing and farming into a means of supporting the industrial revolution in Europe and America with their huge demand for raw materials many of which came from Africa [4]. In 1900, the British government signed an agreement with the Kabaka of Buganda which fundamentally changed the land structure and market in Buganda and beyond. That agreement divided land in Buganda in two tracts: Mailo land and Crown land. Mailo land was doled out to the Kingship, the chiefs and some notables while Crown land was held for government purposes. Title was nominally vested in the Queen of England as "Custodian" [5]. This agreement with the Kabaka led to the first major displacement of Ugandan people from the land they had occupied for periods long before a British foot found its way into Uganda. The Mailo land system created a situation where both Baganda peasants and immigrants on large tracts of undeveloped land were legally rendered landless [6]. Their traditional customary unwritten right to use the land for grazing and farming was terminated. Instead, if they wished to use the land, they were supposed to pay 'Busuulu' and 'Envujjo' rent to the holders of certificates on the land they hitherto used by right of history and custom. This turned the bona fide occupants into tenants. Tenants were by law required to pay rent to their newly imposed owners. However, the landlords kept hiking the 'Busuulu' and 'Envujjo' rates. This forced the colonial government to intervene by enacting the Busuulu and Envujjo law of 1927 in Buganda followed by the Toro Landlord and Tenant Law of 1937 [7]. The land reforms enacted by the British colonialists brought about major advances in the individualization of land ownership in Uganda. Access to land was increased through direct purchase and through official alienation of hitherto communal land. Eventually, in areas where land tenure followed the British pattern, land became a commodity on the market. Plantations and estates were developed by non-Ugandans to supply export markets for tea, coffee and cotton. Mailo land suffered underdevelopment due to absent landlords. However, apart from Buganda and a few areas of Bunyoro, Toro and Ankole, the colonial changes in the land tenure system did not affect many rural areas

in Uganda. And indeed, the customary tenure remained very dominant with its demerits[8]. In short, the colonial period changed the traditional communal use of land and exposed it to market forces, that is, supply and demand. By distributing freehold interests in land to some individuals, social inequalities began to arise based on the British concept of ownership of land. In some cases, land was distributed to absentee landlords. This led to the evolution of squatters, people who settled, farmed and grazed animals on the undeveloped land of an absentee landlord but who could later be evicted by the landowners. As the population of Uganda continued to grow, the gap between land 'haves' and 'have-nots' grew even wider. Disputes over the use and ownership of land increased[9, 10].

In 1975, the Land Reform Decree [11] was passed during the reign of the late President Idi Amin Dada. Before the Land Reform Decree, the Public Land Act of 1969 [12] provided for the protection of customary land rights. (This Act tried to bridge the gap that was created by the colonialists by reinstating customary land ownership). The 1975 Land Reform Decree declared all land in Uganda public land and title to it was vested in the Uganda Land Commission (ULC). All free land, including Mailo, was converted into leaseholds. Customary occupants were deemed to hold the parcels of land at sufferance which could be terminated any time without notice. Rent payment by tenants was also removed. Evictions from land became rampant and customary occupants could be evicted at any time. However, occupants could be evicted upon payment of compensation, though cases of illegal evictions existed [13].

Conceptual view of land tenure system in Uganda

The evolution of the four main systems of land tenure that is to say Freehold, Leasehold, Mailo and Customary was mainly a product of the way in which the British colonial administration inter-acted with Uganda's pre-colonial tribal chiefs. Land has always been an important factor in Ugandan societies. Even before colonization, it played an important part in social relations of the kingdoms of Buganda, Busoga, Bunyoro and Toro, as well as among territorial societies such as the Karamojong [16]. When the British colonial administration established itself in Uganda it sought to gain control of Uganda's productive resources while at the same time striking deals with some local leaders to expand its political base of support [17]. The system of mailo tenure has its origins in the Uganda Agreement of 1900 between the British colonial administration and the chiefs of Buganda by which about half the kingdom's land was granted to these chiefs as private property, while the other half was expressly declared to belong to the British Crown. Mailo soon came to resemble freehold as a system of tenure. Although initially only a few privileged people owned mailo land this was gradually sub-divided by sale, donation and inheritance until there were several thousand mailo landholders[18]. Customary tenure also achieved some recognition during the colonial period. While technically all land except mailo was said to belong to the Crown, the Crown Lands Ordinance of 1903 granted indigenous Ugandans the 'right' to occupy 'unalienated' land (i.e. land that had not been granted to someone else through freehold or leasehold) in accordance with their customary law. Customary tenants had few rights if the British Governor chose to sell or lease their land to someone else and this precarious status was confirmed by the Public Lands Act 1962 which came into effect in the same year that Uganda achieved its independence from Britain[19]. One important legal development after independence was the Public Lands Act I 969, which extended the rights of those holding lands under customary tenure. Under this Act, land law fully occupied by customary tenants could no longer be alienated without the consent of its occupants. Any person applying for grant of public land was required to state in the application whether or not the land was occupied by customary tenants and, if so whether these had freely consented to the proposed alienation. The Act also gave customary tenants the right to apply for a lease over the lands that they occupied [20]. In 1971 Idi Amin overthrew Milton Obote in a coup to establish a military government. This Government passed the Land Reform Decree 1975, which declared all land in Uganda to be publicly owned and centrally vested with the Ugandan Land Commission. The Ugandan Land Commission was granted the sole power to manage and allocate land on behalf of the State. All previous forms of freehold were abolished and converted into leaseholds. The decree imposed development conditions against these leaseholds and failure to comply with them, within a specified time period, could result in forfeiture of the land to the Government. Sale or sub-lease or the converted leaseholds was forbidden without the express written permission of the Commission[21]. Customary tenants also lost the limited protections given to them by the Public Lands Act 1969. The Ugandan Land Commission was empowered to lease land occupied by customary tenants without their consent. The right of Ugandans to occupy unalienated public land by customary tenure without the Government's express permission, was also prohibited and became an offence punishable by up to one year's imprisonment. Customary tenants retained their right to sell or give away their tenure, provided that this did not vest any title in the transferee. Any transfer of customary land rights that did purport to grant such title became a criminal offence punishable by two years imprisonment [22].

The land was allocated in multiples of fractions of square miles and the term "mailo" emerged as a corruption of the English word. The only obligation was to pay compensation for any improvements that had been made by the occupants. The Land Reform Decree 1975 was intended to give the Government of Uganda greater control over the use and management of land. By making security of land tenure dependent on land use it was hoped that this would boost agricultural development and production. This reflected a general hostility towards both the concept

of private ownership and the social and economic position of rural small-holder producers which was shared by many post-colonial governments of the time. Although sometimes expressed in leftist language it masked a deep-seated prejudice against the 'backwardness' of the countryside by the new ruling elites who wished to develop their countries through rapid, centrally-planned economic growth[23].

Three years previously in 1972, Amin's Government had expropriated the properties of thousands of Ugandans of Asian extraction and expelled them from the country. The law for the management of these expropriated properties was consolidated into the Assets of Departing Asians Decree 1973. Although the Government did commit itself to paying some compensation to the previous owners, at a value to be determined by a Board of valuers, very little money was actually paid[24]. The final years of Amin's regime were marked by rapid economic decline and growing lawlessness and corruption. Most of the provisions of the Land Reform Decree 1975 were never implemented although it remained formally on the statute books until it was repealed by the Land Act 1998. This period coincided with Uganda's descent into a series of bloody conflicts, which greatly weakened the authority of its central government and led to a virtual collapse of the rule of law⁸ in parts of the country[25]. After the fall of Amin's regime in 1979, the new Government, under pressure from foreign donors such as Britain passed the Expropriated Properties Act 1982, which aimed to restore the businesses, land and other properties to those who had lost them under the previous Government. Attempts to enforce the provisions of this Act have led to numerous legal challenges, particularly where the property in question was held by non-Ugandan citizens[26]. A more general proposal to reform Uganda's system of land tenure was contained in a study on agricultural policy carried out by the Makerere Institute of Social Research, together with the Land Center of the University of Wisconsin in the mid 1980s.

The Report of the Ugandan

Constitutional Commission, chaired by Justice Odoke, which was published in 1992, also recommended similar reforms[27]. The Constitution[28] states that 'Any person who claims that a fundamental or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a rights and competent court for redress which may include compensation. Any person or organisation may bring an action against the violation of another person's or group's human rights. Any person aggrieved by any decision of the court may appeal to the appropriate court and Parliament shall make laws for the enforcement of the rights and freedoms under this Chapter. The Constitution also establishes the Ugandan Human Rights Commission to uphold these provisions and provide victims of human rights violations support in seeking redress. The Constitution also contains a Chapter devoted to land and the environment. This states that: 'Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.' Non-citizens are only permitted to lease land. The Constitution also provides for a Uganda Land Commission, District Land Boards and Land Tribunals whose functions are described [29]. The Constitution sets out some quite detailed provisions in relation to land rights, while leaving other provisions to be determined by subsequent legislation. It permits the Government, or a local government body, to acquire land in the public interest, subject to the provisions of Article 26 of the Constitution, which protects people from being arbitrarily deprived of their property rights. It states that the conditions governing such acquisition shall be as prescribed by Parliament[28]. The Constitution also states that 'the Government or a local government as determined by Parliament by law, shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens' 'Parliament shall make laws to enable urban authorities to enforce and to implement planning and development.' Any lease which was granted to a Ugandan citizen out of public land, including statutory leases to urban authorities, may be converted into freehold in accordance with a law which shall be made by Parliament [30]. The Constitution restores the four land tenure systems that existed before the Land Reform Decree 1975, namely: customary; freehold; mailo and leasehold. It also states that on the coming into force of this Constitution all Ugandan citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament and land under customary tenure may be converted to freehold land ownership by registration.' The Constitution guarantees that 'the lawful or bona fide occupants of mailo land, freehold or leasehold land shall enjoy security of occupancy on the land' until Parliament enacts an appropriate law regulating the relationship between the lawful or bona fide occupants of land and the registered owners of that land[8]. Such a law should be enacted 'within two years after the first sitting of Parliament elected under this Constitution.'
Legal framework

Uganda's Constitution

The Constitution of the Republic of Uganda was adopted in 1995. It contains one Chapter which provides extensive protection of human rights, including: the right to equality and freedom from discrimination; protection from deprivation of property; right to privacy of person, home and other property; right to a fair and public hearing; freedom of movement and assembly; right to marry and equal rights in marriage during marriage and at its dissolution' and a right to just and fair treatment in administrative decisions.¹² All of these rights, which are in

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line with international human rights standards, could have a potential bearing on land rights [30]. The Constitution also provides for 'affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.' It states that 'Women shall be accorded full and equal dignity of the person with men. Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities. Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited.' It guarantees children's rights and states that: 'the law shall accord special protection to orphans and other vulnerable children. It also upholds cultural rights, stating that every person has a right as applicable, to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others[28]. Uganda is a former British colony and the English legal system remains influential. Since achieving independence, Uganda has adopted three constitutions: the 1962 constitution, the 1967 constitution, and the 1995 Constitution which remains in force. The 1995 Constitution provides for an elected President and Parliament, an independent judiciary and a legal system based on English common law and Ugandan customary law. The highest court in Uganda is the Supreme Court, followed by the Court of Appeal (which also functions as the Constitutional Court for cases of first instance involving constitutional issues), the High Court, the Chief Magistrate's Court, and local council (LC) level 3 (sub-county) courts, LC level 2 (parish) courts, and LC level 1 (village) courts. The Judiciary is headed by the Chief Justice and deputized by the Deputy Chief Justice[30]. The President of Uganda nominates for the approval of Parliament, members of the Judicial Service Commission which makes recommendations on appointments to the High Court, the Court of Appeal and the Supreme Court. A minimum of six justices may sit on the Supreme Court and the Court of Appeal or Constitutional Court. In addition, there are a few specialized courts that deal with industrial and other matters. There are also Land Tribunals[31]. At the lowest level are three classes of courts presided over by magistrates. These LC courts have authority to settle civil disputes, including land ownership and payment of debts, and criminal cases involving children. They often settle cases by mediation. The LC courts should not hear criminal cases including murder and rape. The decisions of LC courts can be appealed to magistrates' courts and beyond through the rest of the Ugandan court system[32].

The Land Act

The Land Act came into force in 1998, following five years of vigorous and controversial debate. Most of its provisions had been previously signaled in the Constitution and the law was intended to give them practical effect. The two most important issues covered by the Land Act are ownership and tenure rights and land administration. Some more general principles of land law, which have an important impact on tenure rights in Uganda [33]. While the previous Land Reform Decree 1975 had sought to increase control over the land by central government and make tenure conditional on the land's development the Land Act 1998 is part of a very different policy. It expressly limits government owned land to that which was being used by the Government, when the Constitution of 1995 came into force. It stipulates that if the Government requires additional land it must purchase this, either from a willing seller or through compulsory acquisition in accordance with the rights to private property contained in the Constitution[28]. An underlying assumption of the Act[15] is that allowing a system of private individual ownership of land to develop in Uganda will boost the country's economic and social development. The Act also recognises customary ownership rights, while providing a mechanism to transform such land into freehold title. This has been criticised by some as providing a 'back-door' means for weakening the system of customary tenure[12] but this debate remains largely theoretical due to the lack of implementation of many of the Act's provisions. The Land Act 1998[15] defines 'freehold tenure' as a tenure that derives its legality from the Constitution and the written law. Freehold tenure may involve either a grant of land in perpetuity, or for a lesser specified time period. The Act specifies that the holder of land in freehold has full power of ownership of it. This means that he or she may use it for any lawful purpose and sell, rent, lease, dispose of it by will or transact it in any other way as he or she sees fit. No development conditions are imposed on the freeholder as the framers of the Land Act 1998 believed that the previous attempts to stimulate development through coercion were misguided. It is instead hoped that the 'psychological sense of responsibility arising from ownership' will be a more effective incentive for people to develop their land while market forces will prove sufficient to deal with those who prove unable or unwilling to do so[34].

Only citizens of Uganda are entitled to own land under freehold tenure. Non-citizens may lease it for a period up to 99 years. Leasehold tenure is a form of tenure whereby one party grants to another the right to exclusive possession of land for a specified period, usually in exchange for the payment of rent. Any owner of land in Uganda whether through freehold, mailo or customary tenure may grant a lease to another person. Unlike the previous Land Decree 1975, the Land Act 1998 does not specify any development conditions on the leasing of land nor that it is used in any particular way. It is left to the two parties to determine the conditions of the lease and subject to these, the leaseholder is entitled to use the land as he or she sees fit. In practice, much of the land that is leased was previously owned by government bodies, particularly the Land Commission and the District Land Boards and

these tend to impose some development conditions on the land's subsequent use [23]. Where the land was previously held by public authorities, the Land Act 1998 enables leaseholder to convert to freeholders subject to certain conditions. The leaseholder must be a citizen of Uganda. The original lease must have been granted lawfully under the terms of the Act and the leaseholder must have complied with all the conditions of the original lease[22]. The leaseholder must be able to satisfy a District Land Board that there were no customary tenants on the land at the time when the lease was granted. If there were such tenants the board must satisfy itself that these were duly compensated as required by law. Only land-holdings of under 100 hectares may be converted from leasehold to freehold unless the board is satisfied that such a conversion is in the public interest. Where a conversion involving land over 100 hectares is approved by the board the applicant must pay the market value of the land as determined by the Chief Government Valuer. The conversion is completed by appropriate registration under the Registration of Titles Act 1924[35]. The Land Act 1998 treats mailo tenure almost identically to freehold tenure. Registered land can be held in perpetuity and a mailo owner is entitled to enjoy all the powers of a freehold owner[15]. The Land Act 1998 sets out a procedure whereby people who were not 'lawful' or 'bona fide' occupants of land at the time when the 1995 Constitution came into force can regularize their occupancy. Mediators can be appointed by the authorities to help the two sides reach agreement, although there is nothing to compel a land owner to allow such occupants to remain on his or her land. These provisions do not apply to people who have occupied land without the permission of the owner after the date on which the 1995 Constitution came into force. Such people can be evicted at any time without notice, subject to some of the provisions discussed in Chapter Two of this Guide. The Land Act 1998 deems a bona fide or lawful occupant of land that is registered in someone else's name to be a 'tenant by occupancy'. Such a person is required to pay an annual rent to the owner. but this is deliberately set at a nominal level, which does not reflect the economic value of the land[15]. So long as a tenant by occupancy continues to pay this sum, continues to occupy the land and complies with the other terms and conditions relating to it, he or she enjoys secure tenure. A tenant may also apply for a 'certificate of occupancy', which provides documentary evidence that the named person has a right of occupancy over the subject land[36]. The Act gives both the tenant and the landowner the right of 'first refusal' to purchase one another's interest. This means that if either is considering a transaction involving the land, they must offer it to one another first. This enables a tenant to convert his or her right of occupancy to a mailo, freehold, leasehold or sub-lease, so long as the registered owner of the land consents. If the landowner sells or leases the land to someone else the tenant by occupancy retains his or her existing rights, irrespective of whether a certificate of occupancy has in fact been issued. This means that the new proprietor's title is subject to these rights, and this overrides the principle of indefeasibility" that is discussed in the next Chapter. It is the purchaser's responsibility to discover whether such tenant's exist even , when this has not been officially recorded on the certificate of title[15].

The Land Act and customary law

One of the most innovative aspects of the Land Act 1998 is in the recognition it gives to those who hold their land under customary tenure. With the exception of land in Buganda (which is mainly held under mailo) and urban areas (where it is held under freehold, or leasehold) most land in Uganda is held under customary tenure. The 1995 Constitution restored recognition of the rights of those who held such land and the Land Act explicitly recognized that customary law should regulate this form of land tenure[34]. The Government had previously enacted a law creating Local Council (LC) courts, which replaced the lower-level Magistrate courts and had the authority to deal with land rights issues. The LC courts were intended to be less formal and more accessible than the Magistrate courts and to enable local leaders to deliver justice to their own communities by drawing both on formal legal principles and customary law[37]. There are a number of different types of customary land tenure in different parts of Uganda. In some places the land is held communally, in some it belongs to a particular clan while in others it.

CONCLUSION

In general principle of land registration, possession, leases, mortgages and other principles have issues as they were analyzed above, however, a comprehensive study shows that such issues pertaining the said specific land principles could be harmonized through policy legislations. Even under customary law and practice, individuals have rights in respect to the land in Uganda, However, those rights are typical of the way how those specific people in the custom behave. It is in this light that the article calls for the government to liberalize the process of land registration by not filing the process most especially where the members of the society do not comprehend it. There should be more sensitization on land rights, both in customary and any other tenure, as it is evident that most people do not appreciate their rights. For purposes of ensuring that both men and women can own, use, access and control land, it is important to stress gender issues in the customary land system. By legislating for customary land holding, it is important to recognize the role played by traditional authorities in dispute resolution and land administration, failure to involve them would make it even more difficult for implementation. More so, a one documentation system should be put in place for registration of all land transaction, introducing customary land In respect to mortgages, the law should impose a duty of care on the creditor exercising his or her powers of

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sale of a mortgaged land. This should be expressly stated in the law, the way it is known under the common law that it should be well advertised and publicly sold. Finally, Uganda should separate the registration of titles legislation from general property law legislation to avoid more confusion of people's interests in land and the interments of registration, should be registered.

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