

**AN ANALYSIS OF LEGAL WORK ON CONVERGENCE
OF LAND IN UGANDA**

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**A RESEARCH DISSERTATION TO BE SUBMITTED TO THE FACULTY OF
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DECLARATION

JUWAHA ISAAC sincerely declare that this report is my own work and the details of the research conducted in this report describe my involvement in the research of land convergence in Uganda. All the information contained in this report is certain and correct to the best of my knowledge.

Signature.....
Date 2/11/2017.....

APPROVAL

This is to certify that this research report entitled "An analysis of legal work on convergence of land in Ugan-

da

MR. BWIRE WALTER
(SUPERVISOR)



Signature..... Date.....

70%

DEDICATION

want to give praise and thanks to the almighty God for guiding and seeing me through the successful completion of the research.

I dedicate this report to my parents Mr. Amwesiga Mkuru Didas and Mrs. Nkurunziiza Peace for their continuous counseling, guidance and encouragement that contributed a lot to have a successful research of this kind. Likewise this report is dedicated to my supervisor Mr. Bwire Walter who always encouraged and advised me throughout the research.

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ABSTRACT

Land is a valuable asset and also a valuable factor of production in modern era of economy. In many parts of the world land is a limited resource. In most countries, custodianship and ownership of land and landed properties tend to be generally guarded through meticulous capturing, recording and storage of appropriate data and information. Conveyancing is the method by which land is transferred from one person to another. The conveyancing process is usually commenced by the signing of a sale agreement for the purchase of land by the parties. The agreement must be in writing and duly signed by both parties (the Vendor and Purchaser). It is advisable to retain an Attorney from the beginning to prepare or vet the agreement and in the normal course the Purchaser's Attorney will be responsible for checking and approving the title to the property and preparing the final document which is called the conveyance. The most important aspect of the work by the Attorney completing the transfer is to make sure the Vendor has good title, and in order to ascertain this, he/she must conduct a title search. The way in which the search is conducted is determined by the manner in which the land is held or registered. A legislative provision for the transfer of custodianship and/or ownership requires involvement of different role players in the conveyancing processes that culminate in the registration of land and associated immovable property. In some countries, the conveyancing processes tend to be complex and cumbersome. Thus the proposition in this paper is that complex and cumbersome conveyancing processes and systems affect business activities that often involve the acquisition and/or transfer of custodianship and ownership rights to land and immovable property. This paper critically analyzes the legal frameworks on conveyancing processes of land.

CHAPTER ONE

0 Introduction

Conveyancing is the legal transfer of property from one owner to another.¹ Ownership is mostly in the form of a real right, although limited real rights may also exist in the form of servitudes or other rights in property, such as a creditor's right against the owner or registered leases.² From a pedagogical viewpoint, conveyance involves business processes traditionally designed to transfer land and or associated landed property from one owner to another. In civil society and in general, ownership is defined in terms of legal right hence conveyance is perceived as a legal convention. The reality is that the actual transactions and activities that result in the transfer of ownership are derived from specialized business processes of the various private firms and public agencies (role players) that are involved in conveyance. Processes exist regardless of the functional structure of the organization. Processes may also encompass sub-processes that may be endogenous (i.e. internal within the organization) or exogenous (i.e. linking to processes in other organizations). The first study is to analyze a process end-to-end so as to understand the interrelationships and value potential in conveyancing. The purpose of this paper is to critically analyze of the legal framework on conveyancing of land.

Background

In the modern era of globalization and a knowledge economy features very high levels of competition, thus innovative processes that improve business efficiencies (for example, reduce costs concurrently with increasing revenues) rapidly prevail. Conveyance processes broadly include: Valuation of property (e.g. by actuarial scientists, quantity surveyors, real estate agents, etc), Financing activities (e.g., by banks, financial institutions, etc.), Contracts (e.g., by attorneys, notaries, and conveyances), statutory registration (e.g., by municipal and local government agencies, internal revenue services, etc.) and of course custodians and owners (sellers and buyers). This above implies that conveyance processes involve the various types of business organizations identified (in the parentheses above) as role players. Acknowledging that conveyance processes link different role players, many countries have developed systems (either manual or electronic) for capturing, recording, transfer and storage of property related data and information arising out of the transactions and interactions between the activities of the respective business organizations involved. Inefficiencies within respective role player sub processes can readily make conveyance processes cumbersome by creating bottlenecks and further complicate the processing times of

¹ *Oxford's Law Dictionary (7th ed. 1999)*

² *van der Watt, A.J. and Penaar, G.J., (1999). Introduction to the Law of Property. 3rd Ed., Kenwyn: Juta & Co Ltd*

³ *D. and mooran.j(2010) operational process management in the financial services industry. Doi:10.4018/978-160566-669-3ch023.*

the interlinking manual or electronic systems.

2.2 The Constitutional and legal framework

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. ⁴The 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. ⁵The 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, which are discussed in greater details below. 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 could 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. ⁶

3 Statement of problem

The presence of existing system while automating seems particularly evident in most conveyance processes, including the Uganda conveyance processes. Each type of role player involved in the conveyance processes engineered their own internal sub processes. More often than not, the reengineering is not undertaken in conjunction with other stakeholders, thus increasing the complexity of the conveyance processes and the full supply chain. From a customer viewpoint (i.e. buyers and sellers), on-time and turnaround times are measured across all the sub processes that result in the successful transfer and registration of custodianship or ownership. Real value is added by removing unnecessary activities and aligning the entire chain of conveyance processes. This may be easier said than done because it could imply that some of the various types of organizations would

⁴Uganda Mahoro *Uganda's Legal System and Legal Sector*, Globalex, August 2006
⁵For details see, *The Jurist, Uganda, Uganda law, legal research, human rights*,
<http://jurist.law.pitt.edu/world>

⁶*Guidelines for Local Council Courts in the resolution of land disputes*, Ministry of Water, Lands and environment June 2005

need to align certain aspects of their corporate goals and strategies with the reengineering effort. Extrapolating from Malerba⁷ point of view, sectoral innovation may not be as far-fetched for the role players to work together to remove bottle necks that adversely influence the conveyance processes.

4 Objectives

The objective of the study is to critically analyze the legal framework on conveyance of land.

5 Justification

Transfer of land from one person to another must be effectively done to avoid controversies. This research aims at providing empirical evidence from Uganda where the process of land conveyancing is been done and hence intends to contribute to clarifying the debate that surrounds land conveyance. Land is a very important asset of urban and rural inhabitants since majority derive their source of livelihood from it. Access and security of such a valuable asset are important to them, and any government that practices democracy should promote security of land ownership of his people. This research helps to bring to the limelight the critical analysis of conveyance of land.

6 Research questions

How is sales agreement completed and signed?

How is original title deed supplied?

How is payment of purchase prices done?

How is investigation of title done by conveyancers?

7 Literature review

Operation is composed of processes designed to add value by transforming inputs into outputs.⁸ Davenport defines processes as a structured and measured set of activities designed to produce specific outputs for a particular consumer or market. Organizations pay particular attention to the design and management of their internal processes with successful practices becoming part of the business processes. Lampert, Stock and Ellram proposed that all firms within a supply chain must overcome their own functional silos and adopt a process approach in order to successfully implement supply chain management. We are therefore in agreement with Hammer and Champy who viewed processes as sets of activities with the logical internal/external relationship that they result in a product or service demanded by a customer.

⁷Malerba, F. (2002). Sectoral of systems of innovation and production. *Research policy*, 31(2), 247-264.

⁸Malerba, F. (2002). Sectoral of systems of innovation and production. *Research policy*, 31(2), 247-264.

⁹Davenport, T. H., (1993). *Process Innovation, Reengineering Work through information Technology*, Boston, MA:Harvard Business School Press.

The process therefore starts and ends with the customer chain management. Champy introduced the concept of reengineering as a fundamental rethinking and radical redesign of business processes to achieve dramatic improvements in critical, contemporary measures of performance, such as cost, quality, productivity and competitiveness. Instead of redesigning, some organizations merely computerize the manual processes and hence continue to follow the original logic, thus gaining no real improvement.¹⁰ An important redesign would involve the substitution of sequential activities with simultaneous activities in order to reduce the turnaround time in processes.

7.1 Review of conveyancing processes in three case study countries

The conveyance processes in Barbados, Netherlands, Australia, Taiwan and South Africa.

Some of the case study countries demonstrate conveyance processes which can be regarded as innovative with regard to land administration and transfer.

7.2 The conveyance processes in Barbados

It seems that landed property in Barbados largely exists in unregistered system of titles, although there are some districts where titles have been registered. This follows from direct telephonic interview with Hathirani and Savitri. They indicate that it would be advisable to use a local attorney-at-law when purchasing real estate in Barbados, so that the title can be properly investigated and other requirements properly dealt with. Tribal areas in Barbados present challenges, especially where land has been distributed in terms of family arrangements, which in fact are still regarded as communal properties. In terms of title registration, Barbados seems to have successfully migrated from an entirely manual system to a partly computerized conveyancing system.¹¹ The land administration system in Barbados is designed to a large extent for middle and upper income groups. The rising problem of squatting (occupation of land without the express permission and without the completion of any formal application to acquire rights), together with large unregistered areas, makes Barbados an interesting case study.

There are currently two systems of recording or registration of landed property in Barbados. These are the "common-law system" and the "registration system". Under the common law system, a title must be traced from owner to owner as far back as what is called "a good root of title" (usually a conveyance) which has to be at least 20 years old. A seller must be in possession of all the original title deeds from the date of the root to the date of the new transaction. The registration system does not include deeds but rather a simple certificate of

Julia, s.kettinger, W, sTeng, I. T.C (1993) *Business process Reengineering, information systems management* ,10:3.13-22
<http://sfrc.ifas.ufl.edu/geometrics/people/faculty/Dr.Barnes/Academic-CVlinks/Barbados-Reborts98.doc>

Barnes, G., (1998). *A Study of land tenure in Barbados*. InterAmerican Development Bank. Retrieved september 26, 2011,

title or charge, which contains all the information about the property. Land for which title has been registered, disposition is affected by a transfer, lease or other prescribed form in accordance with the relevant legislation.)¹²The title is backed by government; this means that Barbados follows a positive system of registration. The Land Register typically contains a brief description and plan of the land as well as the existing certificate.

7.3 The conveyancing processes in The Netherlands

In The Netherlands, the land registration and the cadastre i.e. a system of maps and diagrams, are combined into one organization. The Civil Code in the Netherlands provides for a closed system of real rights. The Netherlands operates on a negative system since the government does not guarantee the accuracy of the title register. The Land Register was computerized in 1999 and paper documents are scanned on receipt. The paper pre 1999 was scanned onto a microfilm and may be transferred into a digital format on request. The electronic recording of deeds started in 2005. Electronic copies and an advanced electronic signature are delivered together. The Registrar maintains a supervisory role and the conveyancer remains responsible for drafting and submitting the deed, as well as signing of the deed on behalf of the seller, buyer and other role players. The transaction is recorded in a national register as opposed to previous duplications in regional registers as well. Electronic dispatches are received a day earlier than paper documents and payment can be effected a day earlier. The same legal certainty exists as with the paper documents.¹³ A key feature of the conveyancing processes in the Netherlands is the significant role of the notary public in linking the other types of role players.¹⁴ The Netherlands makes use of electronic cadastral registers referred to as the Automated Cadastral Registers (AKR). Maps are kept in a survey and mapping information system (LKI). These two systems are appropriately inter-connected, especially to coordinate updating of the relevant data and information.¹⁵

7.4 The conveyancing processes in Australia

According to Garoupa the Torrens system introduced in Victoria, South Australia in 1862 is a method of recording and registering land ownership and interests on a single title document. As the land titles register maintains all the information of ownership, it is not necessary to prove ownership and other titles by other former documents such as the title deeds. Countries that use the Torrens system include Australia, New Zealand, Ireland, Malaysia, Singapore, Iran, Canada, Madagascar, England and Wales. The Torrens title system works on the following three principles:

The maintenance of a public register of titles and interests on land

¹² Newman, W., (2011). *E-Conveyancing in the Netherlands*. Chief Registrar of the Land register Cadastre and Mapping Agency Retrieved on September 26, 2011, from <http://www.landregistry.ie/uploadedfiles/conference2007/papers/s3p5.pdf>

¹³ West, A., (2012). *The South African Land Registration System and the future of going electronic*. Pretoria. *saSermon*. 30 Oct.

¹⁴ Dekker, W. vander molen, p. and Lemmen, c., (2003) *Land registration and Cadastre in the Netherlands and the role of cadastral and the role boundaries: The application of GPS technology in the survey of the cadastral boundaries*. Availability <http://www.isgi.poly.edu.hk/staff/sl.II/Vol-5-1/02-Holland.pdf>

The assurance that, once registered, a title or interest cannot be defeated

assurance that, once registered, a title or interest cannot be defeated

8 Methodology

8.1 Sampling

The respondents for this study were purposively sampled for holding a comparative advantage in knowledge about the subject under investigation. Primary qualitative data were collected through interviews, reviews and various publications. The study used a triangulation of qualitative research methods. Literature review on conveyance of land was done. Locally- based project documents were also reviewed. Key informant interviews were conducted with legal officers, government officials, NGO staff and local leaders. The research tools were questionnaires and interview guides.

This discourse is based on a review of available literature on international conveyancing processes and systems, as well as interviews with key stakeholders from a selection of international conveyancing systems. The narrative responses of the interviewees are summarized in the paper in order to critically analyze the legal framework of conveyance of land.

Geographical Scope

Geographically, the study was conducted studying critically the legal framework of conveyancing of land.

Data Analysis

Using qualitative content analysis, the data was sorted out and all responses categorized, compared and contrasted to establish the frequencies of the main views. After the compilation, inferences were made based on similarities and differences observed in the different findings.

CHAPTER TWO

LAND ADMINISTRATION SYSTEMS

2.0 Introduction

Land administration systems are concerned with the social, legal, economic and technical framework within which land managers and administrators must operate. ¹⁶These systems support efficient land markets and are at the same time concerned with the administration of land as a natural resource to ensure its sustainable development.

Land administration comprises of an extensive range of systems and processes to administer:

Land Tenure: The allocation and security of rights in lands the legal surveys to determine the parcel boundaries the transfer of property or use from one party to another through sale or lease; and the management and adjudication of doubts and disputes regarding rights and parcel boundaries.

Land Value: The assessment of the value of land and properties the gathering of revenues through taxation; and the management and adjudication of land valuation and taxation disputes.

Land-Use: The control of land- use through adoption of planning policies and land use regulations at national, regional/federal, and local levels; the enforcement of land-use regulations; and the management and adjudication of land- use conflicts.

Land Development: The building of new infrastructure, the implementation of construction planning, and change of land-use through planning permission and granting of permits. These four systems are interrelated. The actual economic and physical use of land and properties influences the land value. The land value is also influenced by the possible future use of land as determined through zoning and land- use planning regulations and permit granting processes. And the land-use planning and policies will, of course, determine and regulate future land development. ¹⁷

The information on land and properties permeates through the overall system and provides the basic infrastructure for running the systems within the four interrelated areas. The Land Information area should be organized to combine the cadastral and topographic data and thereby linking the built environment (including legal land rights) with the natural environment (including environmental and natural resource issues). Land information should be organized as a spatial data infrastructure at national, regional/federal and local levels based on relevant policies for data sharing, cost recovery, access to data, Standards, etc.

The design of adequate systems in the areas of Land Tenure and Land Value should lead to the establishment

an efficient land market. The design of adequate systems in the areas of Land-Use Control and Land Development should lead to an effective land use administration. The combination of an efficient land market and an effective land use administration should then form the basis for a sustainable approach to economic, social and environmental sustainability.

A modern land administration system acts within the environment of adopted land policies that fulfill political objectives with regard to land issues. It also acts within an institutional framework that imposes mandates and responsibilities on the various agencies and organizations. The foundation of any system of social order is the framework of laws, which reflect the Constitution of the country, governs the administrative processes, and expresses the rights and obligations to the citizen. In the case of land laws relating to land administration, the following indicates what should be included when drafting and enacting appropriate land laws.¹⁸

Land Information Management

A modern land administration system is concerned with detailed information at the individual land parcel level. As such it should service the needs of both the individual and the community at large. Benefits arise through its application to e.g. guarantee of ownership and security of tenure and credit; facilitate efficient land transfers and land markets; support management of assets; and provide basic information in the process of physical planning, land development and environmental control. This type of system acts as a kind of backbone in society. These ambitious goals will not be achieved unless there is a commitment to designing and implementing effective land administration infrastructures. These may be described as the organizations, standards, processes, information and dissemination systems and technologies required supporting the allocation, transfer, dealing and use of land.¹⁹ Information technology will play an increasingly important role both in constructing the necessary infrastructure and in providing effective citizen access to information. Also, there must be a total commitment to the maintenance and upgrading of the land administration infrastructure. City governments currently manage considerable collections of land related information. However, the traditional fragmentation of this information into different component themes. Combined with disjoint information management regimes, leads to a considerable loss in value of information as resource Comprehensive and Citywide Land Information Management (LIM) provides the means to technically and institutionally integrate these component themes of land information into a truly corporate information resource.²⁰ In Uganda, efforts to improve

*developed from UN-ECE 1998
/FIG, 1999
/UN-HABIT, 2002*

Land information management and land administration systems have been on for a long time. Some of the earliest studies such as Greenwood (1990) and Larsson (1990) made recommendations, some of which specifically focused on addressing problems of land information handling. Other studies undertaken later on such as Avede survey (1996) and Computer Supplies Ltd (1996) merely echoed the recommendations of the previous studies. As more studies and interventions gained momentum in the land sector, the government of Uganda decided to formulate a policy that would guide land management and land administration interventions and actions.

In fact, the Land Sector Strategic Plan (LSSP) of Uganda 2001-2011 was formulated by the government to help guide in the utilization of Uganda's Land Resources for Sustainable Development. Its Strategic objective number 4, which is considered to be the most relevant for land information management, is to increase availability, accessibility, affordability, and use of land information for planning and implementing development programs. One of the strategies to achieve the objective is to introduce a unified, relevant and accessible Land Information System. The other strategy is to implement systematic demarcation of land in Uganda.

One major action towards implementing objective no.4 is the Private Sector Competitiveness Project II (PSCP) which is a 5-year project funded under a credit arrangement from the World Bank to the Government of Uganda for developing a National Land Information System. Although the Strategic Plan is coming to the fifth year of its targeted implementation, it is still not clear to what extent it has impacted on land information management in Uganda. Despite this uncertainty, it is clear that the plan has paved way for the improvement of land information management in Uganda. Finally, in light of the above strategic plans and policies, it is clear that the government is increasingly acknowledging that improving accessibility to land information will lead to better utilization of Uganda's land resources for suitable development.

In Uganda, Land Information Management is principally tasked with some departments in the Ministry of Lands, Housing and Urban Development. However, under the Local Government Act, powers were given to other local governments, more especially at the district level to manage land information in their respective jurisdictions. Currently, there are 112 local governments of district status and each district is mandated to have its own land office. Stakeholders in land information are individuals, government and non government organizations.²¹

The government uses information generated by stakeholders for planning and to a less extent for taxation purposes

²¹UN-HABIT,2002

Amongst others. The public, who are the biggest users of land information, normally play a role for providing information to the land information management system through land transactions and conveyancing. They are therefore the priority beneficiaries for the improved land information management system.

2 Current status of land information in Uganda

Implementing policies on land to support economic growth is not possible if there is no good land information. ²²The government has for long tried to put in place different mechanisms to check and improve the land information management but these mechanisms have had a very minimal impact.

2.1 Status of Survey Information

Survey information mainly includes cadastral sheets, topographical base maps and Job record jackets for storing survey field data and computations. Cadastral data sheets are kept in paper form and compiled at scales ranging from 1:2,500 for urban areas to 1:10,000 and more for rural areas. Most of the sheets are geo referenced to the UTM projection Arc 1960 Datum and the grids are inserted on the sheets. Cadastral sheets for mailo surveys are not geo-referenced since UTM coordinates are not used for surveying parcels on mailo land tenure. Most sheets held by the Department of Surveys and Mapping and districts are in bad physical condition and a number of them are torn. Such torn maps are difficult to scan geo-reference and digitize. Topographical maps are also in paper form. The 1:50,000 scale maps cover the entire country but have not been updated since the 1960s where they were compiled by the Ordinance Survey of Great Britain. However, through Japan International

Cooperation Agency (JICA) project, some topographical maps covering Kampala and surrounding areas were updated. Most of these maps have been scanned and geo-referenced. ²³

Survey files also known as 'Job Jackets' or 'Job Record Jackets' are only updated in the case of the survey of freehold land. ²⁴ According to this report, these files are stored in the registry and have been distributed to the districts where the updates are made and the files are thus not synchronized with the head office. The survey files are sent to Lands and Surveys at Entebbe for checking and not returned to the district. The surveyors who receive information (control) for surveys on adjacent plots can access these files. The number of such survey files is estimated to be 7000-8,000.

2.2 Status of Land Registration Information

and registration provides an underlying structure on which ownership rights in land are recognized.²⁵ In addition, land registration also helps in resolving or reducing land disputes and provide information for processes like land valuation.²⁶ In Uganda, registration of land is voluntary. Mailo land is registered in a mailo register which uses a system of block and plot numbers as the land unit identifier. Freehold and leasehold are registered in a different register which uses the volume and folio numbers as a unit of identification. However, certificates of customary ownership are kept at the district by the District Land Board. Land registration information is still largely manually managed with some information missing from the register making it incomplete and outdated.

According to GIC Ltd (2007), 60% of the information in the land registry has never been updated. A study of the land registry²⁷ reported that high transfer costs and ignorance of the law were the major reasons why people preferred not to register their properties. Although there has been an initiative to improve the land registry through computerization by using software for automating the database called TRIM and scanning of land records under the

SAID-funded Support for Private Enterprise Expansion and Development (SPEED) project, it has not produced many positive results as far as land information management is concerned.

2.3 Status of Land Administration Information

Land administration information is important because it's on this information that land management is built. This information is used in preparation of the initial documents that are used to generate policies and laws in land matters. It also contains information used to generate reports on valuation of different properties in which government interest is involved. This information is also found at the land registry. The problem is that the room is full of dust and rain easily finds its way to the room.²⁸ This has caused damage on the files which are stored in the storage racks but efforts are being made to reconstruct them.

2.4 Challenges Facing the Current Land Information Management System and Processes

Numerous studies carried on in Uganda since 1990 show that there are problems of land information management and processes. The government has tried to come up with strategies like decentralization and computerization to overcome this problem but it has persisted. Good land information management should ensure that information can easily be accessed by the users at the same time; it should be easily shared from the producer

Dale and McLaughlin, 1999
Leudier, 2004
Greenwood, 1990.
Computer suppliers Ltd, 1996

the users and between the users.²⁹

Analogue system

Uganda has been using a manual system of land records management which are in poor shape. Reliance on this data can be misleading since it comes with different levels of inaccuracies and misrepresentation. The current system is slow, inefficient and puts information at risk of being lost due to wear and tear. This makes land information difficult to update, analyze, track changes and are also subject to constant wear and tear hence leading to critical data losses. This analogue system makes data sharing, dissemination and checking very difficult and cumbersome.

Legal Framework

There are various laws affecting land records management in Uganda. Examples of some of the laws and legislation affecting the management of land records include Registration of Titles Act 1924, National Records and Archives Act 2001, Land Act, Evidence Act 1909, Survey Act 1939 etc. Some of the laws are outdated and do not hold for the current situation while others are overlapping or duplicates. For example, according to Mubungi (2001), "The Evidence Act is ambiguous as to whether microfilm or electronic records are admissible as evidence in a court of law. Moreover, there does not appear to be any precedents in case law. If a computerized land information system is pursued in future, the legal admissibility of microfilmed or digital information will need to be clarified."

Lack of Integrated information

There are various institutions that require different types of land information for their day to day operation. They include, but are not limited to; National Environment Management Authority (NEMA), National Forestry Authority (NFA), Uganda Bureau of Statistics (UBOS), Ministry of Lands, Housing and Urban Development (MoLHUD). Since there is no centre for readily and accessible land information maintained by the government, different institutions generate their own data sets which they use to meet their institutional mandates. They do not readily share information with each other.³⁰ This has led to duplication of data and the accuracies of these data cannot be guaranteed. This does not only waste money, it can easily lead to disputes and conflicts due to mismatches in the information.³¹

Public Ignorance and Bureaucratic Procedures

Ignorance of the public coupled with bureaucratic procedures has caused land information inefficiency in

aku,1997
ings,2009
vango,2008.iLs inc,2010

ganda. Majority of public does not know the costs or even procedures for registering a property in case the property has changed hands whether through transaction, inheritance or gift. It is also very difficult to get land information from the registry. As a result, for one to get land information, they employ a chain of people which not only led to high costs but a breeding ground for theft and forgery. This has also made people lose trust and confidence in the system.³²

Staff Capacity

There are staffing problems facing offices in which land records are kept.³³ In most offices it is either that the number of staff recruited is less than the required number or the recruited staff do not have the required skills and the education levels for the positions they are occupying.

This has led to too much pressure and backlog of work. The end result is that the staff becomes inefficient and the whole process becomes slow. To make the situation worse, the staff is lowly motivated.³⁴

Proposed improvements

The way forward is based on the challenges identified in the previous sections. However it should be noted that the challenges being faced in the land information management system are not limited to those in section one above. Also principles of good governance in land administration as explained by Zakout et al (2009) and Williamson et al (2009) are being used as a basis for the way forward.

Staff training, development and recruitment

There is need to train more people to manage and administer land record practices in the various districts. People should be trained at both a lower (technicians) and higher (managerial) level since systems/technologies are dynamic and change at all times and levels. There is a need for people involved in land information management to have broader knowledge on land which will enable easy exchange and interaction of information. The staff can continually be trained through seminars, conferences, workshops, short and long courses. This will enable staff to be competent and well informed. There is also need to recruit the required number of staff in order to enable staff work without pressure resulting from much backlog.

Legal Reforms

For the Land Information System to operate effectively there is need to have a supportive legal and policy framework to regulate its operations and reduce any legal challenges that may arise. One of the possible ways of hav-

g an adequate legal frame work is by harmonizing and updating the current laws and regulations. The laws could be reviewed, amended and updated all the time as to meet the changing demands on land. For example laws governing the disciplines of land need to be updated to fit within the trends of modern technology and allow the use of such equipment such as Global Positioning System, Geographical Information System and eventually Land Information System.

Developing a National Land Information System

Mugustinus (2003) observes that unless Uganda gets an appropriate land management system, economic and social services will not be delivered to the citizens and worst still, sustainable and affordable security of tenure will never be offered. A land management system which is interlinked nationwide should be developed to enable easy sharing and transfer of data from the different parts of the country. However it should be noted that a Land Information System should be supplemented with other tasks which include; harmonizing and updating the legal frame work, updating the cadastre and land register, streamlining the land register, etc.

Decentralization of Local Land Record Offices

The government passed the Local Government Act of 1997, which provides the legal basis for decentralization and the devolution of functions, powers and services from the centre to local governments. This will increase transparency and governance of land information which will reduce on bureaucracies involved. It will also contribute greatly towards getting people interested in the system since services will be brought nearer to the public. It will help in the process of updating the registers. Decentralization can only work if there is capacity building in the land sector in terms of personnel who are qualified and highly motivated, equipment, office space and financial resources to kick start the initiative and also keep it going.

Public Involvement and sensitization

Public involvement is essential in any innovation if it is to succeed as it's the needs of the users of the proposed innovation that is focused on. Public involvement acts as an educator to the masses and an evaluation for the system that is being developed or used. It also makes the community feel they are important and so they will work together in order to ensure that any proposed development takes place. It also serves to make an innovation better since they could be having solutions to the problems. However there is need to for sensitization campaigns to increase the level of awareness and appreciation of land related

Incentives to have land registered

Currently, majority of land in Uganda is not registered. It is estimated that only 18% of land owners have ownership claims. ³⁵ Various studies have shown that some of the reasons individuals do not get their land registered is because of the high costs and time entailed. Government should work out a means of making sure that the public sees reasons to have their land or properties registered whenever a transfer or subdivision takes place. This will help in keeping land information up to date. Systematic demarcation should be encouraged by government in areas where land is not surveyed if an increase in formalization of land ownership in Uganda is to be achieved as fast as possible. With a higher number of registered properties, information will be readily available.

Strong Institutional Linkage

Strong institution linkages should be embraced to avoid data duplication and overlap. This will help streamline data and information in preparation for a land information system. Institution linkage will enable data sharing amongst institutions that use the same data. This linkage will enable institutions to not only generate information they can use internally, but generate information that can be used externally by other institutions. The other alternative to avoid duplication is that the ministry should be the sole provider of land information. The information between institutions and government could be shared; manually by using disks, electronic linkage through use of email and fax are by an integrated approach of wide area networks. This saves on the time and cost institutions would use to generate similar data sets. ³⁶

CHAPTER THREE

THE LAND ACT

0 Introduction

The Land Act came into force in 1998, following five years of vigorous and controversial debate.³⁷ 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, which are described below. Some more general principles of land law, which have an important impact on land administration in Uganda, are discussed in Chapter two above. 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.³⁹ An underlying assumption of the Act 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 recognizes customary ownership rights, while providing a mechanism to transform such land into freehold title. This has been criticized by some as providing a 'backdoor' means for weakening the system of customary tenure,⁴⁰ but this debate remains largely theoretical due to the lack of implementation of many of the Act's provisions. The Land Act 1998 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 over it. This means that he or she may use it for any lawful purpose and sell, rent, lease, dispose of it by will or otherwise 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.⁴¹ Only citizens of Uganda are entitled to own land under freehold tenure. Non-citizens

³⁷ M T Mugambwa, *Principles of Land Law in Uganda*, Fountain Publishers, 2006, p.8

³⁸ 2 September 1995

³⁹ Land Act 1998, section 43.

⁴⁰ Judo, 1997 wildlife Authority. see also Judyadoko and Ian Levine, *land matter in Displacement: The importance of human rights in acholi land and what there*, CSOPNU.2004

⁴¹ Mugambwa, 2005, p.8

may lease it for a period up to 99 years.⁴²

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 tenure⁴³ — 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.⁴⁴ Where the land was previously held by public authorities, the Land Act 1998 enables leaseholders 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. 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-holders of under 100 hectares may be converted from leasehold to freehold unless the board is satisfied that such conversion is in the public interest.⁴⁵ 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.

Which will be discussed further in the next chapter? The

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.⁴⁶ The only significant difference is that mailo owners should not use these powers against the interests of customary tenants, bona fide or lawful occupants.⁴⁷ This provision was introduced due to concern at the possible mass eviction of thousands of people who were occupying mailo land, as customary tenants or squatters, at the time when the Act was passed. A similar concern had led the framers of the 1995 Constitution to pass responsibility for determining who were 'lawful' and 'bonafide' occupants of land to the legislature.

Land Act 1998, section 41(3)

gambwa, 2006, p.9

gambwa, 2006, p.9

Land Act 1998, section 29(2)

Land Act 1998, section 4

Land Act 1998, section 4

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 in to force can regularize their occupancy. Mediators can be appointed by the authorities to help the two sides reach agreement,⁴⁸ although there is nothing to compel a landowner 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 before.

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. 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. 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 tenants 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's 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 tenants exist even when this has not been officially recorded on the certificate of title. The Land Act and customary law one of the most innovative aspects of the Land Act 1998 is the recognition it gives to those who hold their land under customary tenure. With the exception of land in Uganda (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. The Government had previously enacted a law creating Local Council (LC) courts, which replaced the lower level Magistrate courts and had

Land Act 1998, section 90

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.⁴⁹ 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 is held by individuals. The rules of customary law also vary in different parts of the country.

The Land Act 1998 states that customary land tenure shall be governed by rules generally accepted as binding by the particular community.⁵⁰ Anyone who acquires land in that community shall also be bound by the same rules.⁵¹ The exceptions to this are that no custom is permitted which is 'repugnant to natural justice, equity and good conscience, or being incompatible either directly or indirectly with any written law.'⁵² Customary law is also, obviously, subordinate to Uganda's constitutional provisions described above. The Land Act 1998 also specifically renders void any provision of customary rule or practice that denies women, children or disabled persons access to ownership or use of land.⁵³ Uganda's 1995 Constitution provides all holders of customary land with the right to obtain a Certificate of Customary Ownership (CCO)⁵⁴ and the Land Act 1998 specifies the procedure for how such certificates should be issued.⁵⁵ The Act provides for the issuing of individual, family and communal certificates and these will subsequently be taken as conclusive evidence of the customary rights and interests endorsed on the certificate.⁵⁶ It does not, however, change the nature of the land tenure system governing the land in question, which continues to be regulated by customary law. The issuing of Certificates of Customary Ownership was, however, intended to introduce more certainty into customary land tenure relations. Holders of such certificates could use them when carrying out transactions.

The Act requires financial institutions to accept Certificates of Customary Ownership as proof of title, which would enable holders to obtain credit on security of their land and use the title as collateral when borrowing money to invest. All transactions would need to be officially recorded and so it would become much easier to build up official records relating to a particular piece of land. If, for example, someone wished to purchase a plot, or borrow money against its value, it would be easier to conduct such transactions with certainty. In order to apply for a Certificate of Customary Ownership an applicant must first submit his or her application form, together with the required fee, to the District Land Committee in the local parish where the land is situated.

Guidelines for Local Council Courts in the Resolution of land disputes, Ministry of Water, Lands and Environment, June 2005. This provides a Guide to the Resistance Committee (Judicial Powers) Statute 1988, which created the IC courts
Ibid, section 4
Ibid, section 4

⁵²Judicature statute 1996, section 17(1)

⁵³Land Act 1998, section 27.5

⁵⁴Constitution of the Republic of Uganda 1995, Article 237(4)(a).

⁵⁵Land Act 1998, section 5

⁵⁶*Ibid, section 5 and 9*

The Land Committee is then supposed to survey the land in question and confirm its boundaries. The committee should also post a notice, in a prescribed form, in a prominent public place in the parish in which the land is situated. The notice should invite all concerned persons to a meeting, not less than two weeks from the date on which it was posted, to consider the claim.⁵⁷ Claims of any other person affected by the land, for example, rough rights of way, must also be heard and the Land Committee can adjourn its proceedings if necessary to carry out more detailed investigations. If a dispute arises the land committee is not bound to follow court room procedures, regarding the admissibility of evidence or examination for example, but it must observe rules of natural justice to answer that both sides' cases are fairly dealt with.

On the conclusion of its hearing the Land Committee is required to write a report setting out its findings with respect to the claim and its own conclusions and recommendations regarding the application. This report should be submitted to the relevant land board together with the original application. The Land Committee could recommend acceptance, rejection or conditional acceptance of this application.⁵⁸ On receipt of this report the relevant Land Board can then decide whether or not to issue a CCO.⁵⁹ The board is not bound to follow the committee's recommendation and it can also return the report to the committee to obtain further information. Once the board has made a decision it must communicate this to the Recorder. Where the board recommends that a certificate be issued the Recorder should do this, subject to any qualifications or restrictions required by the board.⁶⁰

The Act also makes provision for customary owners of land to convert their tenure to leasehold. It is not necessary to first obtain a Certificate of Customary Ownership in order to do this, but the procedure required is very similar to the one described above. The Land Act 1998 also provides for the formation of Communal Land Associations for the purposes of ownership and management of land under customary law or other law. A Communal Land Association may own land under a Certificate of Customary Ownership leasehold or a freehold. Members of the association can also hold some or all of the land within it in an individual capacity while other parts are set aside for common use.⁶³

⁵⁷Ibid.section 6.
⁵⁸Ibid.section 6.
⁵⁹Ibid.section 6.
⁶⁰Ibid.section 6.

⁶¹Ibid.section 6.
⁶²Ibid.section 6.
⁶³Ibid.section 6.

CHAPTER FOUR

REGISTRATION OF TITLES

4.0 Introduction

The system of registration of titles in Uganda is commonly known as the 'Torrens System', and is based on a system first developed in Australia, by Sir Robert Torrens. This aimed to provide a simple, fair way to operate, secure and register land and it was subsequently used in a number of other English colonies. ⁶⁴ It was introduced in Uganda by the Registration of Titles Act 1924, which repealed the earlier Registration of Titles Ordinance 1908 and the Equitable Mortgages Ordinance 1912. The Act automatically applies to all freehold, leasehold and mailo land. ⁶⁵ However, it does not recognize customary ownership. Owners of land under customary tenure who wish to register their lands under the provisions of the Act must first convert their tenure to freehold. The Registration of Titles Act 1924 creates a system of title registration based on a centralized Register Book containing a running record of deeds and documents relating to each separate parcel of land registered under the Act. ⁶⁶ Where a new parcel of land is registered the Registrar is required to prepare a certificate in duplicate. One copy of the certificate is kept in the Book while the other, referred to as the 'duplicate certificate', is given to the person who is registered as the 'proprietor' of the land or interest. ⁶⁷

The Act provides that a registered proprietor of any estate or interest wishing to transact, or transfer this must complete a prescribed form, which should be signed and witnessed and presented to the Registrar together with the duplicate certificate of title and any other necessary documents. ⁶⁸ Instruments not submitted in the appropriate form may be rejected at the discretion of the Registrar. ⁶⁹ Any subsequent transactions affecting registered land, such as a mortgage or lease, must be endorsed in the Register Book, the certificate of title and the duplicate certificate. ⁷⁰ This means that a future buyer will be able to check if, for example, a mortgage has been taken out against the land as this could obviously affect its value. Once the Registrar has entered the instrument in the Register Book, the person named in the certificate is deemed to be the duly registered proprietor. A certificate shall be conclusive evidence of title, and all its particulars, and the courts are obliged to treat it as such. ⁷¹ This provision prevails over all other unregistered interests or claims and registered title-holders are protected against unregistered interests. ⁷² This principle of 'indefeasibility' was intended to help create one central land registry and, thus, simplify and expedite future land transactions. ⁷³ It is possible to challenge the title of a registered proprietor on the basis of fraud, although this is difficult as will be discussed below. However, this only invalidates a registered title if the fraud has been perpetrated by that particular person. If, for

⁶⁴ Douglas Whalan, *The Torrens System in Australia*, Law Book Company, 1982 71, sections 38, 42 and 499 Ibid., section 56 10 Ibid., sections 61, 184 and 186
⁶⁵ Registration of Titles Act 1924, section 9.
⁶⁶ Registration of Titles Act 1924, section 37
⁶⁷ Ibid, section 38
⁶⁸ Ibid, section 82, 89, 100 and 144.
⁶⁹ Ibid, section 181

⁷⁰ Ibid, section 42

⁷¹ Ibid., sections 38, 42 and 49 9 Ibid., section 56

⁷² Ibid., sections 61, 184 and 186

⁷³ *Lwanga v The registrar of titles Misc cause No.7A of 1977; (1980) HCB 24(unreported)*

sample, someone fraudulently obtained a title and then sold it to an innocent third party, who duly registered, the initial fraud would not necessarily invalidate the subsequent title. As the Court noted in *Lwanga v The Registrar of Titles*, one of the paradoxes of registered conveyance is that though registration obtained by fraud void, it is capable of becoming a good root of title to a bona fide purchaser.⁷⁴

The fact that only a small minority of land in Uganda has ever been registered has also led to a number of legal conflicts about the relationship between this registration process and other contractual agreements. In *Ndigejjerawa v Isaka Kizito and Sabane Kubuiwamana* the court had to consider a case in which Kizito had sold the same parcel of land to both Ndigejjerawa and Kubulwamana and provided both with written agreements verifying the sale. The first sale was made to Kubuiwamana but Ndigejjerawa was the first to attempt to register his documents in the Register Book. The Registrar refused to accept either document because neither was submitted in the correct form. Ndigejjerawa argued that he should be recognized as owner of the land because he attempted to submit his documents first, while Kubuiwamana argued that he had received written documents in exchange for paying the purchase price first so he should be regarded as the legitimate owner.

The court ruled that neither could be regarded as the legitimate owners until their documents had been accepted by the Registrar.⁷⁵ However, in the absence of fraud, the first person to register a piece of land is granted title, even if the land has also been sold to someone else.⁷⁶ In another case, the Court of Appeal for Eastern Africa, in *Souza Figueirido & Co L v Moorings Hotel Co Ltd*, ruled that an unregistered written contract did have legal force. The case concerned a lease agreement which one side broke owing rent arrears. The Court reasoned that there is nothing in the Registration of Titles Act 1924 which specifically renders unregistered instruments effectual as contracts between two parties. The Court ruled that the respondent was entitled to the payment of the rent due for the period in which the appellant enjoyed possession of the land in question. However, it accepted the appellant's argument that the agreement could not be considered an 'equitable lease', due to the provisions of the Act. The latter view has not been followed by the Ugandan courts, which have ruled, in *Karikawe v Katwiremu and another*, that an 'equitable interest' is created by virtue of a contract between the parties, even where the documents have not been registered as an instrument under the Registration of Titles Act 1924.⁷⁷

Alibhai and another v Karia and another the respondent entered into contract with the appellants to pur-

See katarikawa v katwiremu and another CA No 53 Of 1995(Unreported)
See katarikawa v katwiremu and another CA No 53 Of 1995(Unreported)
See katarikawa v katwiremu and another CA No 53 Of 1995(Unreported)
See katarikawa v katwiremu and another CA No 53 Of 1995(Unreported)

purchase property from them, but, before he paid the purchase price, these were forced to flee the country following Amin's expulsion of Asians from Uganda. The land was subsequently taken over by the Departed Asians Property Custodian Board. The Board then awarded the land to the respondent and he was registered as the proprietor. The appellants sought an order for the transfer to be set aside claiming that the contract was invalid because the transfer was not registered. The Court rejected this claim arguing that the contract of sale, although not completed, created an 'equitable estate', which belonged to the respondent. Although the appellants retained the 'legal estate', because they were still the registered owners, they should now be regarded as trustees with a duty to transfer this to the respondent on completion of the contract.

This legal estate became vested in the Departed Asians Property Custodian Board, by virtue of the Assets of Departing Asians Decree 1973, and this had acted properly in transferring the estate to the respondent. The appellants had also claimed that they had been the victim of fraud, but one weakness of the Registration of Titles Act 1924 is that it does not define this term, which leaves it open to the courts to decide what standard of proof is necessary to prove that fraud has taken place. Ugandan law appears to state that, given the severity of the accusation, it must be proved strictly. In the above case the judge ruled that while it was not necessary to prove it 'beyond all reasonable doubt', something more than the 'balance of probabilities', that is generally applied in civil cases, was needed.⁷⁸

Given that the appellants had been dispossessed of their land by an arbitrary and discriminatory act of expulsion, it seems likely that some of the judge's reasoning could now be open to challenge on the basis of Uganda's 1995 Constitution and its international human rights obligations. This is discussed further in Chapter Four of this Guide. Title may also be challenged by possession and so, if a person acquires the title to a piece of land, it is his or her responsibility to check whether there are other people in occupation of it. In a case in Kenya, *MisseeMaweu and others v Kiu Ranching and Cooperative Society Ltd*,⁷⁹ the company in question obtained title to a property in 1961 and attempted to eject a group of people from the land who had settled there almost 30 years previously.

The lower court accepted the company's argument that certificate of title was conclusive proof of ownership, but the Kenyan Court of Appeal ruled that the time that the occupants had previously spent on the land gave them rights of ownership. In *Uganda Post and Telecommunications v AKM Lataaya* it was also held that the company's registered leasehold was subject to the rights of possession of a tenant who had been living on the land

⁷⁸See *katarikawa v katwiremu and another CA No 53 Of 1995(Unreported)*
⁷⁹See *katarikawa v katwiremu and another CA No 53 Of 1995(Unreported)*

with the consent of the landowner prior to the granting of the lease.⁸⁰

1.1 Possession

Possession is often said to be 'nine-tenths of the law'. A person who is in possession of land is assumed to have title to it and this title holds against everyone, except a person with a better claim.⁸¹ Even if someone is squatting on land without permission, he or she has the right to defend this occupancy against interference by a third party and could, for example, bring an action of trespass against this party. While someone remains in possession of land, he or she is free to enjoy the full rights of title, including the right to sell, lease or otherwise transfer it. Should the original owner wish to recover his or her land, he or she will first have to convince a court of the merit of his or her claim to title. After a certain period of uninterrupted occupancy, possession allows the occupant to claim title to the land in question.

This principle is known as 'adverse possession' and arises out of the principle in English common law that an action against trespass must be brought within a specified time. After that time has elapsed no further action can be taken against the occupant. The principle is linked to, although distinct from, the doctrine of 'acquiescence', whereby someone who fails to take active steps to assert their rights within a reasonable time period is held to have acquiesced in the violation. The principle of adverse possession, sometimes also called 'squatter's rights', is that it is better for land to be used than not used. The concept is similar to 'homesteading', which expresses the idea that if no one is using or possessing property, the first person to claim it and use it consistently over a period of time gains ownership. These principles pre-date modern property law, which has had to develop around them.⁸² Adverse possession is defined as when someone physically occupies land without the consent of the owner and uses it as his or her own.

A tenant, or caretaker, cannot claim adverse possession because the land owner has consented to this presence. If, after a lease has expired, someone remained on land after a lease had expired, the period for which they would be considered to be in adverse possession could start from that date. The owner of land, with a paper title to it is considered to be in possession of it, even if he or she is not physically occupying it.

However, if someone else takes physical occupancy of this land, with a clear intent to exclude the original owner, then, if the owner does not contest this after a certain period of time, he or she is considered to have voluntarily abandoned claim to it. The occupancy must be continuous throughout the period and if the occupant

see katarikawa v katwiremu and another CA No 53 Of 1995(Unreported)
sher v whtlock(1865) LRQB1
see Robert Guest, Theshckledcontinent,pan Book 2004,p.73-87.

acates the property at any point, even temporarily, than the 'clock goes back to zero.' The moment an original owner commences legal proceedings to recover the property the time period also stops and if an occupant acknowledges someone else to be the owner then this will also stop the clock.' A squatter could gain title to a property from a lessee, through adverse possession, but this would only be valid until the expiry of the lease, after which time it would need to be asserted again against the original owner.

After this time the original owner loses his or her right to re-enter, or sue to recover, the land. Unless the title to the property has been registered under the Registration of Titles Act 1924 this is also deemed to be extinguished. If the title has been registered, it is deemed to effectively be held 'in trust' by the previous owner for the benefit of the person who dispossessed him or her.⁸³ In either case the squatter does not gain the title from the person that he or she has dispossessed, but can now claim a new title from the Registrar. It has been argued that this would be a freehold title, even where the previous land was held under customary title as the principle of adverse possession is not recognized by Ugandan customary law.⁸⁴

In *Musoke Bafirawalav Jogga*, which is also discussed below, the Ugandan High Court ruled that the principle of adverse possession did not begin to apply until the landowner became aware of the unlawful possession. The court came to a similar conclusion in *Nambalu Kintu v Efulaimu Kamira*. In both cases the occupants had originally entered the property in question with the consent of the land owners and so clearly were not initially in adverse possession. In *Citamong v Olinga* the Ugandan High Court overturned the eviction of someone who had occupied and cultivated someone else's land for 30 years. The owner of the land was aware of the intrusion, but took no action to stop it and so was held to have acquiesced in the violation of his rights. The courts made similar rulings in *Wandira v Okeya* and *Lomolo v Kilembe Mines*, although the time periods here were only 10 and seven years respectively.

2 Leases

A lease is an agreement whereby one party grants to another exclusive possession of land for a period usually, but not exclusively, in return for a monetary consideration called rent. The common law definition of a lease has two essential features: 'certain duration' and 'exclusive possession', but the Ugandan Land Act 1998 dispenses with the second condition. A lease is defined as a form of tenure in which the landlord grants, or is deemed to grant the tenant exclusive possession. A lease may be created where there is no form of payment and it states that the duration of a lease is usually but not necessarily defined by reference to a date of commencement and

⁸³ See Robert Guest, *The shackled continent*, pan Book 2004, p.73-87.
⁸⁴ See Robert Guest, *The shackled continent*, pan Book 2004, p.73-87.

ending.⁸⁵

The distinguishing feature of a lease is, therefore, that it grants the holder the right of exclusive possession to a piece of land. This is different from a license where the holder is merely permitted access to the land and does not acquire any interest in it.

In two cases where the City Council of Kampala sued tenants, who it accused of sub-letting their premises to others in breach of their lease agreements, the courts drew out this distinction. In the first, *City Council of Kampala v Mukibi* the court found that a tenant had allowed a group of hairdressers to use his premises in return for a delay fee, but had not given them exclusive possession, or even their own key to the premises.⁸⁶ In *City Council of Kampala v Mukubira* and another, by contrast, the tenant was deemed to have parted possession because he provided no supervision over the use of the premises, which only visited occasionally.⁸⁷

Ugandan law does not specify that a lease must be in writing and so an oral contract could be deemed sufficient.

⁸⁸ A contract can also be inferred by the conduct of the parties. In *Mayanja v National Housing Corporation*, for example, a lease was inferred by the fact that one party took possession of land and started paying rent, which was accepted by the land owner. ⁸⁹ English common law has established the principle that where a person enters onto land as a tenant of another both parties are 'stopped' from denying that a lease exists. This principle is an accepted part of Ugandan law and the courts have found that it can be used to prevent either side using 'lack of title' as an argument in a dispute. In *Pardham Jivraj v -Dudley Whelpdale*, for example, even though a lease had not been registered under the Registration of Titles Ordinance, which preceded the 1924 Act, this did not provide grounds for arguing that it was defective, because the payment and acceptance of rent by the parties was held to prove that they regarded one another as landlord and tenant. ⁹⁰ Leases should be registered under the Registration of Titles Act 1924, but Uganda's courts do recognize the validity of leases over unregistered titles to function as a contract between the two parties, as discussed above. Some argue that this, in effect, gives them the status of equitable leases.⁹¹

Parties to a lease are free to incorporate any terms which they wish to, so long as they are lawful, and both sides are then bound by these terms. In addition, the common law implies that the landlord will respect the right of the tenant to the 'quiet enjoyment' of his possessions, 'non derogation' from the purpose of the lease and premises that are 'fit for habitation. Examples of violations of the 'right to peaceful enjoyment' can be found in *Opinya v Mukasa*, where it was held that a landlord was prohibited from removing the roof of a building in

⁸⁵ *Mugarnhwa*, 2000, p66.4 *Musoke Bafirawala v jogga* CS No 33 of 1973. (1976) HCB 26 unreported

⁸⁶ *Wandira v Okeya* CA No 100 of 1969 (1970) HCB 60

⁸⁷ *Lomolo v Kiembe Mines* CS No 395 of 197E (1978) HCB 157. 9 *Land Act 1998 sections 4 and 5. 26*

⁸⁸ *Lomolo v Kilembe Mines* CS No 395 of 1976; (1978) HCB 157. 9 *Land Act 1992 sections 4 and 5. 26*

⁸⁹ *Limitation Act (cap 70) section 6. 2 Registration of Titles Act 1969, section 30.*

⁹⁰ *Nambalu Kintu v Efulaimu Kamira* CA No 26 of 1973; (1975) HCB 221 (unreported).

⁹¹ *Citamong v Olinga* CA No 104 of 1982; (1985) HCB 86

an attempt to enforce an eviction,⁷ while in *The Kampala Cotton Co Ltd v PrivilinlMadhvani* the Court ruled against a landlord blocking its tenant's right of way.⁹²

The right of 'non-derogation' from the purpose of the tenancy could include subsequent actions by the landlord which made it impossible for the tenant to carry out the type of activities (of an agricultural or commercial nature, for example) that she or he had leased it for. Premises fit for human habitation means that they must be in a state that does not pose a risk to personal injury or to hygiene. It should be noted that the 'right to adequate housing' guaranteed under international human rights law, contains considerably more exacting standards. The tenant is, in return, expected to pay rent and all other charges, except those for which the landlord is expressly responsible, and also to keep the place tidy and in a reasonable state of repair. The landlord also has the right to carry out periodic inspection to check that this is being complied with.

These provisions are also contained or implied in Uganda's Registration of Titles Act 1924. The Act permits tenants to sub-lease or assign their leases to someone else, but this party will become responsible for all of the terms of the original lease. Where the landlord is in breach of contract, the tenant can sue him or her for damages or obtain an injunction to prevent future breaches. In the case of a fundamental breach a court may consider the agreement to have been repudiated by the landlord, which could result in a termination of the lease. A tenant cannot otherwise terminate the lease unless the agreement specifies such power.⁹⁴ A landlord may also sue a tenant for breach, which usually occurs due to a failure to pay rent on time, damage to the property because it is being used, or sub-let unlawfully or outside the terms of the lease agreement.

In practice tenants sometimes withhold rent during disputes while landlords may seize possessions from the tenant in lieu of rent. These can then become the subject of separate legal actions between landlord and tenant. The most common remedy for a breach of contract by a tenant is 'forfeiture' of the lease, which becomes null and void allowing the landlord to repossess the land or property. There is no provision in the Registration of Titles Act 1924, or other legislation in Uganda, setting out the procedures for repossession. Under the English Law of Property Act 1925, a landlord was required to provide advance written notification, but the application of this Act in Uganda was superseded by the Judicature Act 1967 and so it appears that this is no longer required.

Uganda v Kilemba Mines CS No, 395 act of 1976 (1978) HCB 157. 9 Land Act 1998 sections 4 and 5, 26
Council of Kampala v Mukibi (1967) EA 368 (U)
City Council of Kampala v Mukubira and another (1968) EA 497 (U).

The Ugandan courts have upheld the right of a landowner to evict squatters without notice and without compensation for any improvements that they may have carried out to the land that they occupied. ⁹⁵The common law specifies that a landlord may gain physical repossession, or 're-entry', of his or her land without a court order and using 'reasonable force' to eject the tenant.⁶ However, the Ugandan High Court has stated that where a tenant refuses to vacate it would be more advisable for the owner to apply for a judicial order of eviction than to attempt to forcibly evict him or her.⁷ The courts may also grant 'relief' from forfeiture. Which is usually granted where a tenant remedies the breach of his or her contract, such as payment of rent, and is able and willing to perform his or her obligations in the future.

3.3 Mortgages

A mortgage is a transaction whereby land is given as security for the repayment of a loan. The rules applying to mortgages are defined in both common and statutory law. The two most important laws regulating mortgages in Uganda are the Mortgage Decree 1974 and the Registration of Titles Act 1924. ⁹⁶A mortgage created under Ugandan law differs from common law rules in that it does not transfer the title of the land to the creditor, but makes him, or her, the proprietor of the mortgage, which theoretically provides the debtor with greater security. ⁹⁷The debtor remains the owner of the land, subject to his or her ability to pay off the loan. As well as being obliged to pay off the loan the debtor is obliged to maintain and repair the property and grant the creditor the right to inspect the property at any reasonable time. Where the debtor breaches these terms the creditor is entitled to take possession of the property, appoint a receiver, sell the property or foreclose the loan. He or she can also seize other assets of the debtor if this is necessary to recover the loan's original value.

In the case of *Barclays Bank of Uganda Ltd v Livingstone Katende Lutu*, the bank agreed to loan money to a third party after Lutu put his land up as collateral. When the third party defaulted the bank served notice of its intention to sell and advertised the land at a public auction. Lutu sought an injunction against the sale, which a court granted on the basis that this could not be done without a court order and because a discrepancy between the value of the land and the value of the money owed would cause Lutu 'irreparable loss'. However, this ruling was overturned by Uganda's Supreme Court, which held that the terms of the agreement meant the court had no power to prevent or postpone the sale. ⁹⁸ Ugandan law does not impose any duty of care on a creditor exercising his or her powers of sale of a mortgaged property. However, the common law rules that the property should be properly advertised and publicly sold. Uganda's courts have ruled that one advertisement,

³ Land act 1998 section 5. see also *Jama Noor shakiya v Hassanali Ahmed Jusub* (1965) and *mayaja-Nkangi v national housing corporation* (1972) 1 ULR 37.

⁴ *Mayanja v National Housing Corporation* [1972] 1 ULR 37. ⁵ *Pardhamjivraj v Dudley-Whelpadale* (1920) 1929) 3 ULR 193.

⁵ John T Mugambwa, *Principles of land in Uganda*, Fountain Publishers, 2006, p.97
⁶ *Opiya v Mukasa* CC No 167 of 1964, High court Digest, p.514

which specified the land for sale but omitted to mention that it had been developed and contained a house had the effect of under-valuing it.

In another case the selling of a property through private treaty rather than public auction also led to it fetching less than its market value. In both cases damages were awarded to the debtor. Mortgages should be officially registered under the Act, but Ugandan law also recognizes equitable mortgages so long as the certificate of title has been lodged with the Registrar. The Land Act 1998 also recognizes the right of customary owners of land to obtain mortgages using customary certificates of ownership although, as described in Chapter One, no such certificates have yet been issued.

The Ugandan courts have held that where the mortgaged land is not registered under the Registration of Titles Act 1924, the applicable law is English common law and the rules of equity.⁹⁹ In practice this makes it easier for a creditor to foreclose on a mortgage and to sell the land for profit. This makes it very difficult for holders of land under customary law to use this land as collateral for mortgages. It has been argued that there is a need to harmonize the Mortgage Decree 1974 with the Land Act 1998 to bring greater security to the practice of mortgaging land held under customary law.¹⁰⁰ This also needs to be seen in the context of the weaknesses surrounding the implementation of the Land Act 1998 discussed earlier. Land ownership and associated rights. The common law definition of land also includes that which attaches to it: the fixtures. There have been a number of cases which have sought to establish whether a person who builds structures or carried out on improvements on another person's land has any right to compensation from the original owner. The Ugandan High Court has ruled in two cases that such a right exists.

In *Babiruga v Karegyesa and others* the court based this ruling on the fact that the original owner had been aware that other people (his children in this case) had constructed a number of houses on his land, without his express permission. The Court ruled that, since he had acquiesced in this construction he had conceded their right to be on the land, which could only be terminated subject to him paying them compensation for the value of the houses.¹⁰¹ In *MusokeBafirawala vJoggathe* High Court ordered that a landowner pay compensation to someone who had been originally appointed as a caretaker to mind the land in his absence.

The owner went to live abroad, in 1960, while the caretaker managed the estate, collected rents and forwarded these on to the owner. After some years the caretaker abandoned this role and instead assumed ownership of the land himself.

*The kampala Cotton Co ltd v PrivilnalMagdhavani*CC No 485 of 1952, High Court Digest, p.511. 27

The kampala Cotton Co ltd v PrivilnalMagdhavani CC No 485 of 1952, High Court Digest, p.511. 27

*The kampala Cotton Co ltd v PrivilnalMagdhavani*CC No 485 of 1952, High Court Digest, p.511. 27

He carried out various improvements, including the construction of buildings on the land. The original owner returned to Uganda 10 years later and sought to regain possession of his land. The Court awarded it to him but specified that he must compensate his former caretaker for the improvements, even though the original owner does not seem to have been aware that these had been carried out. There is a continuing debate about whether or not a tenant or leaseholder has the right to remove fixtures installed during his or her occupation of land to become the property of the owner. A 'fixture' is defined as something which has been attached to the land with the intention of making a permanent improvement to it. A notice board screwed to a wall, electricity cables embedded into plaster or a rainwater tank held in place by concrete would all count as fixtures. It is generally accepted that 'trade fixtures, ornamental fixtures' and 'fixtures for household purposes' are treated as 'tenant fixtures' and may be removed.

However, fixtures attached for agricultural purposes, such as fences or sheds become the property of the owner of the land.¹⁰² A tenant must remove any fixtures to which he or she is entitled from the land before the expiry of the lease and must compensate the owner of the land for any damage caused during this process. The right of ownership of land is also commonly understood to include what is immediately above and below the surface. It has been established that this only extends to a height or depth which an owner might conceivably use. Uganda's Mining Act (cap 248) specifically excludes the right to ownership of any minerals that might be found beneath the land. It states that the entire property and control of all minerals and mineral oils in, under or upon any lands or waters in Uganda are and shall be vested in the Government.¹⁰⁴

6 Conclusion And Recommendations

It is widely assumed that customary law will be able to cope with the challenges of dealing with land crisis. The argument that 'people know where their land is' often gets made by both Ugandan politicians and many international aid workers. It is also supported by many displaced people themselves and is cited as a reason for not attempting to address the legal vacuum caused by the collapse of most official institutions dealing with land management in Uganda. However, a closer study of how customary law is currently coping with the administration of land tenure leads to less reassuring conclusions and suggests, at the very least, that this issue would benefit from further research. As one report has noted: Very little has ever been written on land and the conveyance of land in particular which is somewhat surprising since land is by far the most important asset. Customary rules governing it have never been written down and they are constantly changing and adapting to new

Uganda v Kampala Cotton Co Ltd v Pravinlal Magdhavani CC No 485 of 1952, High Court Digest, p.511. 27
Uganda v Kampala Cotton Co Ltd v Pravinlal Magdhavani CC No 485 of 1952, High Court Digest, p.511. 27
Uganda v Kampala Cotton Co Ltd v Pravinlal Magdhavani CC No 485 of 1952, High Court Digest, p.511. 27

circumstances. During the research, no single source was able to give a comprehensive overview of the current rules regarding conveyance of land, and different people gave sometimes quite different stories. It is widely accepted that there is a low level of awareness of the current statutory laws surrounding land tenure and a need for education campaigns to inform people of their rights.

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