

**THE RIGHTS OF LAWFUL AND BONAFIDE OCCUPANTS
ON MAILO LAND AND HOW SUCH RIGHTS ARE
VIOLATED IN UGANDA**

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DECLARATION

I Wafula Caroline, Reg. DIL/35864/113/DU solemnly declare that this research report entitled "*The Rights of Lawful and Bonafide Occupants on Mailo land and How such Rights are Violated in Uganda*" with the exception of the acknowledged References , ideas and concerns is my own original work and has never presented and submitted to any organization or higher institution of learning for award of diploma or any other Academic Award.

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APPROVAL

This is to approve that this Research Report prepared and presented by Wafula Caroline, Reg. DIL/35864/113/DU has been carried out under my close supervisor and is now ready for submission to the school of Law in Partial fulfillment of the requirements for the Diploma in Law of Kampala International University.

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Date

DEDICATION

I dedicate this research work to my beloved father Wafula Patrick, mother Wafula Aidah, sisters, brothers and friends who abundantly provided, supported and facilitated for my achievement to this status and towards the accomplishment of this task.

May God bless you abundantly.

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Kampala Bottlers Ltd v Damanico (U) Ltd SCCA No. 22/29

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Lukwago v Bawa Singh and Another (1956) E.A 282 at284

Musisi v Grindlays Bank (U) Ltd and Others CS No 869 of 1981(unreported): (1983) HCB 39

LIST OF ABBREVIATIONS /ACRONYMS

| | |
|-----|------------------------------|
| RTA | Registration of Titles Act |
| Art | Article |
| Sec | Section |
| NRM | National resistance movement |
| MPS | Members of parliament |
| LTA | Limitations act |
| PCA | Penal code act |

ABSTRACT

This study was about the rights of lawful and bonafide occupants on Mailo land and how such rights were violated in Uganda. This was carried out in Uganda with specific aims of examining: the rights of lawful and bonafide occupants on Mailo land: the abuse of the rights of the bonafide occupants on Mailo land: the effectiveness of the law governing bonafide occupancy on Mailo land: and suggesting improvements that can be made on bonafide occupancy rights on Mailo land. A review of related literature was carried out on existing information on the specific variables of this paper to comprehend the problem, enrich and supplement the study findings. The study established that lawful and bonafide occupants on Mailo land need to be provided with rights of purchase, derived tenure, rights of access to information on sale of land, right among others. However these rights had been abused through encumbrances put on land, they could not use it to secure loans, evictions without compensation moreover their purchase right was ignored. On the other hand much as this was the case, the law had managed to grant access rights to occupancy much as this remained controversial with interests of land owners. The study concluded that rights of lawful and bonafide occupants were still yet to be abused if parliament did not under take balance of interests of the occupants with that of the owners of land. While making any other attempts to review the tenure ship of Mailo land, then priority needed to be given to the issues that surround Mailo land. The study recommended that there was need to: set realistic time limits for the meeting of the district land boards: drawing legal supportive measures to enhance borrowing: seeking legal advice: sensitizing community on their land rights: establishing the degree of Subsidiarity granted: recognizing the legitimacy and dynamism of derived rights: need to regulate degree of autonomy to generate acceptance and sensitizing landlords on derived rights.

CHAPTER ONE

INTRODUCTION

1.0 Introduction

The research report discussed “rights of lawful and bonafide occupants on Mailo land how such rights were violated in Uganda” the study was carried out in Uganda.

This chapter gave a general overview of the study. It covered the Background of the study, statement of the problem, Purpose of the study, Research objectives, Research question, and scope of the study, Methodology, Literature Review and significance of the study.

1.1 Background of the study

The history of Mailo land originated from the 1900 Buganda Agreement signed between the British Colonial administration and the chiefs of Buganda¹. According to **Swartz**² Mailo land came to existence as colonial government allocated large tracts of land in perpetuity to local chiefs of Buganda in return for their political support to the British colonial administration to extend its rule in Buganda and some parts of Uganda.

Mailo land was registered and held in infinity with most of it located in the central part of Buganda and some parts of western Uganda³. Ownership of Mailo land was essentially feudal in nature with recognized occupancy of tenants and bibanja holders⁴.

Article 15 of the 1900 Buganda Agreement.

² Schwartz Julia, What should be done to enhance tenure security in Uganda and further development: the Land Amendment Bill (2007), its shortcomings and alternative policy suggestion, 2008

³ Schwartz Julia, What should be done to enhance tenure security in Uganda and further development: the Land Amendment Bill (2007), its shortcomings and alternative policy suggestion, 2008

⁴ Businge Gerald (2007), Uganda's Difficult Path towards an Agreeable Land Policy: Turning Land into a Real Development Tool, UgPulse, Kampala, Uganda.

This relationship with landlords was governed and guided by the provisions of the Constitution⁵ and Land Act⁶ Mailo land, like freehold was registered under the Registration of Titles Act⁷ as per the Torrens System.

The Torrens System was a system for the establishment of a title to real estate in which a claimant first acquired an abstract of title and then applied to court for the issuance of a title certificate which served as conclusive evidence of ownership. The Torrens system was named after Sir Robert Richard Torrens who played a leading role in its development and implementation in Australia in the 1850s⁸. The system was adopted in the United States⁹, Canada, Ireland, New Zealand, Philippines. Similarly in Uganda, the system was adopted to have all feudally held land transactions entered in a state guaranteed register at the land registry. This was to enable the holder of a Mailo land title to have absolute ownership of that land with temporary ownership given to occupants.¹⁰ This was formulated to help in combating problems of uncertainty, complexity and costs associated with the old system of title that depended on proof of an unbroken chain of title back to the good root of the title.¹¹

However, such rights of ownership were only lost if land was required to be used for national interests, but this of course was accompanied by compensation and peaceful relocation.

Uganda being a country of tremendous economic possibility, its history of colonialism left most of its potentials untapped with huge chunks of land resting in the possession of a few people who own miles and miles of land (Mailo land).¹² The British colonial masters distributed miles

⁵ The Constitution of the Republic of Uganda (1995) Article 237 (3) (c)

⁶ The Land Amendment Act (2010) Cap 227

⁷ The Registration of Title Act Cap 230

⁸ Douglas Whelan, Torrens System in Australia (Sydney, Law Book Company (1983), P50-12).

⁹ Bryan Garner, Black Law Dictionary, 9 Editions.

¹⁰ Rulekere, Gerald, 2008, Land Tenure policies complicating development in Kampala, Article in Uganda pulse.

¹¹ Businge Gerald (2007), Uganda's Difficult Path towards an Agreeable Land Policy: Turning Land into a Real Development Tool, UgPulse, Kampala, Uganda.

¹² Augustinius, Clarissa and Deininger, Klaus, 2005, Innovations in Land Tenure, Reform and

(Mailo) of land to the Buganda Local Chiefs most of which were left idle and unutilized, mainly because of the historical complications that always plagued Mailo land.¹³ However, given the contemporary economic situation, a high population growth rate and land shortage problems in Uganda, many ineligible owners started to migrate and occupy the parts that had hitherto remained idle for a long time developing those parts.

Because of the national need to promote development and alleviate poverty, the above situation required intervention to control possible evictions of occupants by landlords. The law therefore was necessary to introduce the security of tenure for the then ineligible occupants. These according to the law came to be identified as lawful and bonafide occupants.¹⁴

Where as a bonafide occupant was a person who before the 1998 Land Act had occupied and utilized land in an unchallenged situation by the registered owner of that land for a period of 12 years and above, or such occupiers who had been settled on this land by the Uganda government prior to 1995 Constitution.¹⁵ On the other hand, a lawful occupant was a person who entered into occupation of mailo, freehold or leasehold land with the consent of the land owner. He was a purchaser of land from the owner, a customary tenant who was not compensated at the time of leasing out the land, or a person occupying land by virtue of the Toro and Ankole landlord and tenant law or Busuulu and Envujjo Buganda Laws.¹⁶ Thus occupants settled on the Mailo land on different grounds with different registrable interests. To protect a registrable interest of the occupants required development of security of tenure.

Administration in Africa. UNDP International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action, Nairobi.

¹³ Augustinius, Clarissa and Deininger, Klaus, 2005, Innovations in Land Tenure, Reform and

Administration in Africa. UNDP International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action, Nairobi.

¹⁴ Businge, Gerald, 2007, Uganda's Difficult Path towards an Agreeable Land Policy, Article in Uganda Pulse.

¹⁵ Businge Gerald (2007). Uganda's Difficult Path towards an Agreeable Land Policy: Turning Land into a Real Development Tool. UgPulse, Kampala, Uganda.

¹⁶ Ibid

However, the security of tenure adopted had instead generated heated disagreements between the occupants and registered land owners. The law was not effectively drawn to generate acceptance from the registered land owners that ended up in many situations of unlawful evictions. And because the law was not effectively drawn, was a reason why there were repeated amendments on issues of occupancy.¹⁷

Eligible land owners became suspicious of the intentions of land policies and undertook to evade the gaps in the legal framework to evict occupants without due Compensation for developments made on the occupied land. Equally, the occupants evaded the same gaps to grab land from its rightful owners and acquired security of tenure in addition to selling it to other occupants¹⁸

In pretext of all this, it was argued that the Mailo land tenure system constrained the land market and created a land impasse.¹⁹ According to Ragadya, the problem with Mailo land was that it created legal ownership of land which the owner did not occupy and occupation of land that the occupant did not own, constrained land transactions.²⁰ Much of the Mailo land was occupied by either bonafide or lawful tenants who demanded a lot in compensation from potential land developers, yet those tenants occupied most of the land especially in central Buganda.²¹

This resulted in a situation where the Mailo land title holder would not sell the land or utilize it because he or she had to adequately compensate the tenants, while the tenants on the other hand were not comfortable enough to develop or sell land for they did not have a title, even though under customary law, could be owners of land.²²

Because the law governing rights of lawful and bonafide occupants on Mailo land were drawn from different legal statutory instruments as well as from customary law, it remained a complex.²³ To comprehend the weakness of this law there was need to unveil the underlying

¹⁷ Land Act 1998,2004,2007

¹⁸ Rulekere, Gerald, 2008, Land Tenure Policies Complicating Development in Kampala, Article in Uganda Pulse.

¹⁹ Ragadya, Land Reform: The Ugandan Experience (1999), p. 8

²⁰ Ibid

²¹ Rulekere, Gerald, 2008, Land Tenure Policies Complicating Development in Kampala, Article in Uganda Pulse.

²² Ministries of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3 (January 2007).

²³ The Constitution of Uganda, Registration of Titles Act and the Land Act 2010

philosophies that generate and impel the injustices arising from rights of occupancy of Mailo land by lawful and bonafide occupants. It was therefore, upon this background that the study sought to understand the rights of lawful and bonafide, occupants on Mailo land and how those rights were abused in Uganda.

1.2 Statement of the Problem

The 1995 constitution of the Republic of Uganda and the Land Act guaranteed the rights of lawful and bonafide occupants. However, even after the amendment of the Land Act²⁴, the rights of lawful and bonafide occupants remained widely abused either by the occupants themselves or by registered land owners. Historically, there was a registered misunderstanding over settlement on Mailo land, with policies continuously revised to promote their recognition. However those policies generated low acceptance.

Equally, registered owners undertook to pass property without any due notifications of the occupants,²⁵ who then were evicted, without due regard to contributions and developments made on the land.²⁶ The persistent eviction of the occupants was the best manifestation of the inadequacies reflected by the laws governing Mailo land. The policies therein were viewed as contradictory and conflicting with customary land rights,²⁷ raising suspicion and ending up in evictions. However, most of the evictions pursuant to acquisition carried out in Uganda were done with much force and with the help of the army and the police.²⁸ Although there were laws that prescribed the procedure that had to be followed before any eviction was carried out, there

²⁴ The Land Act (2010) Cap 227

²⁵ Deininger, Klaus and Mpuga, Paul, 2003, Land Markets in Uganda: incidence, impact, and Evolution over Time. Proceedings of the 25th International Conference of Agricultural Economists, Durban, South Africa.

²⁶ Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3 (January 2007).

²⁷ Kalema, Dr. William and Kayira, Duncan, 2008, Access to Housing Finance in Africa: Exploring the Issues, No. 4, Uganda, published for Fin Mark Trust.

²⁸ See fn 3

were still many evictions carried out by the state, registered owners and the occupants themselves

Based on the above research problem, the study raised the following questions:

What was the assessment on the law governing rights of lawful and bonafide occupants on Mailo land.

What were the possible means through which policy makers could revise the current legal framework to promote recognition of rights of lawful and bonafide occupants in Uganda

1.3 Research Objectives of the Study

1.3.1 General Objective

The overall objective of the study was to examine the law governing rights of lawful and bonafide occupants on Mailo land and how such rights were violated. The researcher carried out this study with an aim of providing possible solutions to curb injustices that culminated from the gaps in the supportive law.

1.3.2 Specific Objectives

- i. To examine the effectiveness of the law in securing rights of lawful and bonafide occupants on Mailo land.
- ii. To examine the circumstances that lead to the abuse of the rights of lawful and bonafide occupants on Mailo land.
- iii. To suggest possible reviews that could be made to improve on the recognition of the rights of lawful and bonafide occupancy on Mailo land.

1.4 Hypothesis of the Study

- i. The law effectively conferred rights of occupancy to lawful and bonafide occupants on Mailo land in Uganda.
- ii. There was persistent abuse of the rights of lawful and bonafide occupants on Mailo land despite the presence of the law on occupancy.
- iii. There were possible ways for the law to be revised to cover existing gaps in rights of occupancy of Mailo land by lawful and bonafide occupants.

1.5 Scope of the Study

The study was carried out in Uganda because it contained areas that had the coverage of Mailo tenure system. The study focused on the reflection of changes on the rights of occupancy and recognition of occupancy rights.

The study focused on the effectiveness of the law in securing rights of lawful and bonafide occupants of Mailo land and was limited to examining the rights of occupancy; circumstances that lead to the abuse of the rights of lawful and bonafide occupants in order to understand the gaps in the rights of occupancy as granted by the law to lawful and bonafide occupants to be able to recommend accordingly.

1.6 Significance of the Study

It was expected that when this study would be carried out and accomplished successfully, it would:

- i) Help to understand and comprehend on the concerns of occupancy on Mailo land by providing vital information to the policy makers on the identified loopholes in the rights of lawful and bonafide occupants.
- ii) The study was also expected to act as a database in facilitating future research and thus would be useful in closing the existing gaps on rights of lawful and bonafide occupants on Mailo land.
- iii) The study significantly contributed towards the revision of the Land Act to secure considerable justice for the lawful and bonafide occupants of Mailo land when it came to compensation.
- iv) The study was also expected to act as a database in facilitating future research and thus would be useful in closing the existing gaps on rights of lawful and bonafide occupants on Mailo land
- v) The study significantly contributed towards the revision of the Land Act to secure considerable justice for the lawful and bonafide occupants of Mailo land when it came to compensation.
- vi) The study would be of significance to the researcher in fulfillment for the requirements for award of a Diploma in law.

1.7 Methodology

The research methodology covered the ways in which the researcher gathered the required information on the topic under study and the tools and instruments which the researcher used to generate the required data.

To achieve the objectives of this study, the study was based on desk research. An analytic approach was adopted to ascertain the practical application of laws: references were made to internet-based resource such as electronically based newspapers and reports. In addition to book reviews that sought to establish the effectiveness of the law governing lawful and bonafide occupants of Mailo land.

The study was further based on information acquired from textbooks, journals and statutes and any other form of written relevant material like seminar papers and conferences papers for qualification of the research findings that were accessed from Kampala international University library.

1.8 Literature Review

Literature review covered what previous authors and scholars said about the subject in order to gain a handle on the study and thus served as secondary examination of the available information as previously published. Under this chapter a guided analysis of some of the major issues of the existing literature was made on the: effectiveness of the law in securing rights of lawful and bonafide occupants on Mailo land; circumstances that led to the abuse of the rights of lawful and bonafide occupants on Mailo land and possible suggestions that helped to improve on the recognition of the rights of lawful and bonafide occupancy on Mailo land.

Mailo tenure was part of the recognized systems of land ownership in Uganda. Uganda's Constitution²⁹ recognizes four land-holdings and tenure systems that was the freehold, Mailo, leasehold and customary each with its own rules and each bestowing different rights and responsibilities on concerned individuals. The Land Act defines Mailo land Ownership as a customary form of freehold tenure.

²⁹ The Constitution of the Republic of Uganda Article 231 (3) .

Thus it was “*the holding of registered land in perpetuity and having roots in the allotment of land pursuant to the 1900 Uganda Agreement and subject to statutory qualifications.*”³⁰

In Uganda, the land held under Mailo tenure system was mainly in Buganda and some parts of Western Uganda as provided under the 1900 Buganda Agreement. Under the Mailo tenure system, the holder of a Mailo land title had absolute ownership of that land.³¹

Before colonization, most of this land was controlled by the Kabaka who assigned it to his Bakungu and Batongole Chiefs³² and this land was occupied under a semi-feudal system by peasants who had to pay tribute to the chief or work for him in return.³³ he would neither mortgage nor sell land. However, his symbolic power was much greater than his overt political or legal rights: the *Kabaka* was a ‘symbol of order and meaning’ for the Baganda.

In the 1900 Agreement Buganda land was distributed between the British Protectorate Government and the Kabaka, the royal family and some thousand chiefs and notables. The Government’s land was called Crown land and the other part became known as Mailo land. As all this newly allocated land became legally inheritable as well, the 1900 Agreement thereby created a ‘hereditary ruling class’ in Buganda. As a result of the Uganda Agreement, the land tenure system in the Buganda area was formally transformed from a customary system based on a chief’s domain over land and community members’ rights to agricultural land, to a system approaching freehold tenure with one legislative decree, the Buganda Agreement of 1900. Thus approximately half of Buganda (more than 8,000 square miles) became formally privatized.

³⁰ The Land Act Cap 227 (Amended) (2010) Section 3(4)

³¹ Schwartz Julia. What should be done to enhance tenure security in Uganda and further development: the Land Amendment Bill (2007), its shortcomings and alternative policy suggestion, 2008

³² The rest was owned by heads of clans and sub-clans (bataka) under customary law and by some individuals cf. Justice Odoki, The Report of the Uganda Constitutional Commission (1992).

³³ Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3 (January 2007).

The local peasants or cultivators (bibanja holders) who had previously settled on Mailo land became tenants who had to pay ground rent (Busuulu) and tribute on produce (Envujjo) for the crops like cotton or coffee they grew.³⁴

Over the years, land lords increased their Busuulu and Envujjo which led to riots and the rest was owned by heads of clans and sub clans (bataka) under customary law and by some individuals. These laws fixed the busuulu and Envujjo at a certain rate and at the same time stipulated that no bibanja holder could be evicted by the owner except upon a court order and save for public purpose or for other good and sufficient causes.³⁵

However, there were regular appeals by citizens who had called upon the Government to put in place a comprehensive national land policy to guide land usage and streamline land ownership in Uganda, following continued land related conflicts and challenges in most parts of the country.³⁶ The 1995 Constitution of Uganda made outstanding provisions, vesting land in private citizens who would own land under one of the following tenure systems; Mailo leasehold, freehold or customary system.³⁷

In Toro and Ankole, the Toro Landlord and Tenant Law of 1937 and the Ankole Landlord and Tenant Law of 1947 introduced similar provisions for the relationship between tenants and registered owners.³⁸ By 1975 the laws were abolished by a Land Reform Decree which in theory, transformed all Mailo and freehold land into leasehold and left bibanja holders without security of tenure and owners without a right to charge Busuulu or Envujjo. This was not until when the 1995 Constitution was implemented and 1998 Land Act that both Mailo and freehold tenure were reintroduced with security of occupancy guaranteed again.

³⁴ Rugadya, Land Reform: The Ugandan Experience (1999), p. 4.

³⁵ Clause 11, Busuulu and Envujjo law

³⁶ Ibid

³⁷ Peter Mulira (2008) Towards an Equitable Land Regime in Uganda, the Land Amendment Bill and Related Legislation I

³⁸ (1947)

Thus the current law necessitates that eviction of a lawful and bona fide occupant can only be made on grounds of non- payment of rent and only by order of a Land Tribunal.

The constitutional provisions however had not adequately solved the historical conflict between Mailo landlords and tenants and neither had it clearly explained to citizens when and how the government would compulsorily acquire an individual's land. This put land owners in an insecure position more so if the land had occupants. This implied that at the time of relocation, their developed portion would not be accounted to belong to the possession of the real property owner.

Further amendments were made in **Section 31** of the Land Act as amended by **Section 14** of the 2004 amendment Act requiring the tenants to pay a nominal rent determined by the Land Boards as approved by the Minister which was to be non-commercial in nature and eviction was only eligible if tenant failed to pay for two consecutive years.

Much as this was the case, it was required that before evicting tenants, the owner had to follow a derailed procedure. Where a notice had to be sent to the tenant and the Land Committee and allow the tenant 6 months to provide good reason why the tenancy should not be ended for non-payment of rent. Only then would the owner apply to the Land Tribunal for an order terminating the tenancy Except for nonpayment of rent, the Land Act did not list any other grounds which would allow owners to evict lawful and bonafide occupants.³⁹ However the law did not grant the lawful and bonafide occupants full ownership of the land as they remained tenants despite the nominal rent that they paid⁴⁰

The regular reviews and amendments in the system of tenure had many to worry. Many people, especially landlords and the Buganda Kingdom who were the largest Mailo landlords had criticized the proposed National Land Policy, especially the recommendation to scrap the Mailo land tenure system. They saw this as an attempt by the government to take their land.⁴¹ By virtue of the act that huge chunks of land were issued, much of it remained idle for a long term, while it was needed by many for settlement and development. With the current development needs

³⁹ (cf. Section 31 (6) and (7) Land Act and Section 14 (c) 2004Amendment Act).

⁴⁰ Elliott, DG 'ethnicity and the politics of land Tenure Reform in Central Uganda', Development Studies Institute, London School of Economics and political science, Working paper, April 2005

⁴¹ Ibid

coupled by a shortage in land supply, occupants had undertaken to settle on the idle parts as either lawful or bonafide occupants. Most lawful and bonafide occupants were occupants of Mailo land situated in Buganda.⁴²

In her report Rugadya provided a historical perspective on land reform on Uganda and the challenges with the implementing the land act of 1998.⁴³ This was of importance to the study as it would help trace the origins on mailo land. The land originally belonged to the state until the adaption of the 1995 constitution which reversed the situation. However, she did not deal with impact of the constitution and land Act to ensure that the rights of lawful and bonafide occupants on mailo land were protected when it came to evictions.

The research by the Foundation for the Human Rights Initiative⁴⁴ analyses the conceptual frame work of the right to property and it gave a historical perspective on land system in Uganda. In addition to the above, it tackled the national laws that were used to protect the right to property in particular land. It further gave an over view of some of the evictions that occurred in some parts of Uganda. However, the report did not tackle on the implementation of national standards towards the protection lawful and bonafide occupants against evictions in Uganda.

Hunt provided an understanding of the 1998 Uganda Land Act.⁴⁵ She discussed the main aims and provisions of the Land Act and further highlighted the consequences that would arise from the Act. She furthermore gave the historical background of land ownership in Uganda. Even though the author discussed the Land Act, she did not deal with security of tenure to lawful and bonafide occupants on mailo land as set out in the Act and the protection afforded to them in terms of the Land Act.

⁴² Peter Mulira (2008) Towards an Equitable Land Regime in Uganda, the Land Amendment Bill and Related Legislation I.

⁴³ Rugadya, M 'Land use and villisisation' Workshop held at Hotel de mille coillines, Kigali 20-21 September 1999, Land Reform: The Ugandan Experience.

⁴⁴ Foundation for Human Rights Initiative, Land Rights, The Ugandan Experience, Report for the period of January-June 2008

⁴⁵ Hunt, D 'Unintended consequences of land right reform: the case of the 1998 Uganda land Act' (2004) 222 Development policy review pg 173-191.

Mugambwa dealt with the application of **Art 26(2)** of the Uganda constitution and the protection of private property.⁴⁶ He argued that there was no provision in the constitution that expressly allowed the state to deprive someone's property. However, this power was implied in **Art 26(2)**. He also discussed what deprivation meant and the circumstances under which it would take place in terms of the constitution.⁴⁷ However, he did not tackle other instances under which land would be taken away besides the compulsory deprivation provided for under the constitution.

But much as there was a law to guide the issues of occupancy and the land lords, the best way was consent of the landlord, since he had the first entitlement to his property as per the Constitutional provisions on the right to own property.

Circumstances that led to the abuse of rights of lawful and bonafide occupants

The cause of current eviction was not the lack of laws protecting occupants but rather those laws themselves, which created conflicting rights over land, as well as the lack of a functioning registration system and a coherent land policy that would guide land administration. The current provisions which allowed the owner to only charge a noncommercial rent and to only evict tenants for non-payment of this rent left the registered owners with practically no authority over "their" land. This would be understandable and opt for land which was occupied by tenants who were heirs of bibanja holders who already had been on the plot with authorization of the Busuulu and Envujjo Law of 1928 or the Toro or Ankole Landlord and Tenant Law.⁴⁸

It was however problematic for so called bonafide occupants who were given security of occupancy by the mere fact that they had been occupying land unchallenged by the owner for 12 years before the coming into force of the 1995 Constitution.

By providing security of tenure for lawful and bonafide occupants, the Land Act only seemed to replicate the position that already existed under the LTA. Where no action for recovery of land

⁴⁶ Mugambwa, J 'Article 26(2) of the 1995 constitution of Uganda and the right to property' (1997) 41 East African Journal of Peace and Human Rights pg 70-81

⁴⁷ Section 26(2) (a) and (b)

⁴⁸ The Uganda Land Alliance, The Land (Amendment) Bill: Transforming Power Relations on Land Equivocally. (March 2008), p. 6.

would be brought to court after expiration of 12 years from the time such rights arose. Under the Limitations Act the period of 12 years did not apply in case a person had a right of action under legal disability.

This meant it would not apply to landlords who, due to exile, displacement or being minor, were unable to enforce their rights.⁴⁹

In the Land Act no such provisions had been catered for, meanwhile land would be grabbed at the time when the rightful owner was not in position to claim it back within the prescribed period. In this way the study justified why owners would not be blamed for not claiming their rights within the prescribed period of time. Otherwise this was an injustice on the part of the owners when they were deprived of the right of authority to their land.

Additionally landlords were not identical with, and neither were they heirs of those to whom land was assigned by the 1900 Agreement for example in the case of **Lukwago v Bawa Singh and another**⁵⁰. Bennett J said it was the essence of the relationship between a mailo owner and the holder of a kibanja that the latter's right of occupancy inured for an indeterminate period and was heritable by his heir and successor.. But simply bought land from other persons and thus expected authority over their land as return for their investment. Thus to restrict those rights was more problematic particularly where landlords allowed occupants to settle without a special license contract for less than 12 years.⁵¹ Occupants even when allowed to temporarily settle on the land, qualified as lawful occupants under the Land Act and thus could not be evicted in case the owner would so happen to intend, to use his land differently. Moreover with such a situation

⁴⁹ Kakuru, Kenneth. 2004. *Land Compensation Policy, A Case for Uganda*, prepared for the Africa Biodiversity Collaborative Group (ABCG).

⁵⁰ (1959) E.A 282 at 284

⁵¹ Schwartz Julia. What should be done to enhance tenure security in Uganda and further development: the Land Amendment Bill (2007), its shortcomings and alternative policy suggestion, 2008

at hand land remained on a high demand particularly in the central region where it was steadily increasing in commercial value.⁵²

This was a complex and a hard to understand policy by the fact that it was through the consent of the very owner that the occupant settled and being that consent was given for a limited time, after that time, why then would it become difficult and complicated to claim one's own land back.

Similarly, this beat the understanding of the registered owners as to why they would have no authority over their land. With such oppressive consequences on security of tenure, registered land owners had instead resorted to circumventing the restrictions imposed on them by the law by selling their land titles to people who had the money to compensate the occupants or the army muscle to evict the tenants forcefully.⁵³

This therefore put it clear that the major cause of the evictions taking place was however not non-payment of rent as proposed by the law, but instead it was the conflict and wrangles that the law had introduced in form of rights of registered owners and occupants.

According to Deininger et al, conflicts of tenure over Mailo plots had become significantly higher than disputes over plots under customary law. Where according to Deininger et al, some cases of evictions had come up by flawed court judgments or because local authorities leased and sold land to investors even when such land was occupied by tenants or customary owners.

Registrars and magistrates also continued to issue eviction orders without visiting the land in question to establish what was on the ground without first seeking evidence from the person to be evicted.⁵⁴

⁵² Deininger et al., Legal knowledge and economic development: The case of land rights in Uganda (2006).

⁵³ Ibid

⁵⁴ Schwartz Julia, What should be done to enhance tenure security in Uganda and further development: the Land Amendment Bill (2007), its shortcomings and alternative policy suggestion, 2008 Quoting New Vision, Courts are to blame for the illegal evictions", The New Vision, April 1, 2008.

With this kind of legal regime it required Ministers to focus on training competent persons and to establish overview, mechanisms which insured better compliance, as ignorance of the law would not merely be redressed by simply transferring power to the Minister to determine land issues.

There was no functioned land titling system for Mailo land. According to Deininger, quoting the chairman of the Surveyors' Registration Board, 99 percent of the land conflicts mainly stemmed from unregistered occupants, to which effect titling Mailo land would reduce conflicts and unlawful evictions. However due to the existence of a vacuum that had been used by criminals to forge titles where an estimated 300 forged land titles were in circulation by the year 2008.⁵⁵ This was in contravention of Section 61⁵⁶ which provided that the title of a registered person was indefeasible save for fraud, just as held in *Musisi v Grindlays Bank (U) Ltd and others*.⁵⁷ Moreover the PCA Section 77 was against any forceful eviction of bonafide and lawful occupants and thus it held that this constituted a criminal offence. Yet those titles too were inaccurate thus owing to the lack of proper record keeping and persistent inaccuracies in the registry tenure insecurity had increased, particularly in the urban areas under Mailo tenure thus making evictions the order of the day.

However, even though the rights were effectively conferred on lawful and bonafide occupants, those rights were still violated due to circumstantial issues that offended the status of ownership of land. This was expressed as below;

Land reforms had affected the livelihood and survival of the people: Most of Ugandans derived their livelihood from land, with 80 percent of employment generated from land use⁵⁸. Any land tenure reform would affect wealth distribution and had implications for economic and agricultural development. Conflicts and tenure insecurity generally had a significant productivity reducing impact and discouraging land related investment.⁵⁹

⁵⁵ Schwartz Julia, What should be done to enhance tenure security in Uganda and further development: the Land Amendment Bill (2007), its shortcomings and alternative policy suggestion, 2008 Quoting Monitor Newspaper

⁵⁶ Registration of Title Act Cap 230

⁵⁷ CS No 869 of 1981(unreported); (1983) HCB 39

⁵⁸ Foundation for Human Rights Initiatives, Land Rights, The Ugandan Experience, Report for The period of January-June 2008

⁵⁹ Schwartz Julia, What should be done to enhance tenure security in Uganda and further development: the Land Amendment Bill (2007), its shortcomings and alternative policy suggestion, 2008

This made it clear that land was a sensitive issue in Uganda which needed, not to be reviewed without critical assessments and generated acceptance from the land owners who by law (Constitution) had an entitlement to their property. This was a great practical interest whether the lawful and bonafide occupants would gain temporary ownership claims in the face of a registered land owner, who would not wish to have those occupants on his land.

Intentions to pass issues in the controversial land bill; Government of Uganda on February 5, 2008 tabled a Land (Amendment) Bill⁶⁰ before Parliament which was scrutinized by the Committee on Physical Infrastructure and on Legal Affairs. Since and even before its tabling the Bill instigated a heated and controversial public and parliamentary debate.

The purpose of the Bill was to enhance tenure security and protect lawful and bonafide occupants and occupants under customary tenure from unlawful evictions in equalizing land rights, but then it seemed to be biased on the part of having occupants gain a claim over ownership.

According to Schwartz, both in Parliament and in the general public the proposed amendments generated hostility and rejection with allegations ranging from the claim that this was a threat to the stability of Uganda to the assertion that Museveni wanted to destroy the Buganda Kingdom. There was a general suspicion towards whatever the Government did regarding land matters as fed by reports that the Uganda Land Commission and other agencies were allocating big chunks of land to affiliates of the government or army generals. Moreover at the time parties MPs (NRM MPs) were threatened withdrawal of support by the president if they did not support the Land Bill.

This therefore seemed a sound reason for Mailo land owners to become suspicious as to evict lawful and bonafide occupants. Because why then would particular persons including the president tender so much interest against the interest of the land owners if there was no ill intention about this, was also an issue to explore about in the study. This would help to restore justice if justice was disputed to create justice, then it amounted to injustices of the right owners

⁶⁰ Schwartz Julia, What should be done to enhance tenure security in Uganda and further development: the Land Amendment Bill (2007), its shortcomings and alternative policy suggestion, 2008

of the property contrary to the provisions of Constitution⁶¹ on the right to own property and privacy.

Biases in customary tenure arrangements;⁶² In Uganda, customary tenure was becoming increasingly fragile. While customary tenure was equal to other forms of tenure in law, in actual practice it was often accorded a lesser status than other forms of tenure. For example, the cases of disputes statutory rules and forms of evidence often would over ride customary rules and evidence, adversely affecting those who subscribed to custom, yet the legitimacy of traditional leaders and institutions was increasingly being challenged as citizens sought out the authority of statutory institutions to administer land and resolve disputes. The fact that some local leaders were increasingly making decisions to advance personal interests and at the expense of the needs of communities, had further weakened the legitimacy of traditional authorities. As a result, it was becoming harder for traditional institutions to perform their roles, including implementation and enforcement of customary rules.

With such a situation the registered owners developed ill perceptions towards the tendency and intentions of the provision of temporary rights of the lawful and bonafide occupants on Mailo land. This most likely would end up in unlawful evictions when suspicion would over ride the intention of the law. The study was carried out to identify the discrepancies in the law in order to improve on the relationship and level of acceptance of the registered owner, and lawful and bonafide occupants on Mailo land.

Measures still had to be taken to draw legislation acceptable by both landlords and tenants to reduce the ability of conflict. Those included:

The need to re-focus the debates, on land from over-emphasized on property rights per Se, to land's essential value in development. The Government of Uganda wanted to see land positively contributing to the fight against poverty in Uganda. This paradigm shift required that the land

⁶¹ The Constitution of the Republic of Uganda Article 26 (1) and (2) and Article 27 (2)

⁶² Landesa, Women and Customary Land Rights: Focus on Land in Africa Brief, Uganda World Resources Institute, Landesa 2011

sector was to be fully integrated into the country's overall development planning through identification of effective linkages with other productive sectors.⁶³

1.9 Synopsis

Chapter one covered the background of the study, statement of the problem, objectives of the study, scope of the study, significance, methodology and literature review as well as hypothesis and chapterization.

Chapter two will give an overview of the law governing the rights of lawful and bona fide occupants on Mailo land and other supportive legal instruments.

Chapter three provided an evaluation of the law governing rights of lawful and bonafide occupant on Mailo land, lawful and bonafide occupancy *issues*, advantages and disadvantages of occupancy of lawful and bonafide occupants on Mailo land.

Chapter four was a presentation and discussion of the research findings about the rights of the lawful and bonafide occupants on Mailo land and how the law had secured them justice. It covered an analysis of how local council members, land tribunal commissioners and local community members interviewed interpreted the law and the rights of lawful and bonafide occupants on Mailo land.

Chapter five drew conclusions on the study findings and provided recommendations on the gaps identified.

⁶³ Deininger et al., Legal knowledge and economic development: The case of land rights in Uganda (2006).

CHAPTER TWO

AN OVERVIEW OF THE RIGHTS OF LAWFUL AND BONAFIDE OCCUPANTS

2.0 Introduction

This chapter provided for an overview of the available legislation, instruments and policies on lawful and bonafide occupants on mailo land to examine the applicability of the law and other legal supportive instruments.

2.1 Legislation on Land Tenure in Uganda

The major legislations that governed the land tenure system were the 1995 Constitution and the 2010 Land Act (Cap. 227). Further, the Registration of Titles Act (Cap. 230) was also relevant in many cases.

2.2 The Constitution of the Republic of Uganda (1995)

The Constitution established a Supreme Court, a Court of Appeal, and the high Court and provided for the setting up of subordinate courts. The subordinate courts that had been established include Magistrate's Courts (Chief Magistrate, Magistrate Grade I and Magistrate Grade II) and Land Tribunals to govern land issues.

The tenure ship on Mailo land was provided for under **Article 237** where ownership of land was to the citizens and vested in them in respect to any of the provisions of the land system followed.⁶⁴ The purpose of this law was to ensure that individual citizens take possession of the land subject to the provisions of holdings under **Article 237 Section (3) (a), (b), (c) and (d)**. That by owning land under those provisions, one became a legal owner of the land in question.

However, rights of mailo owners of the land in Uganda had been violated on grounds that land had been left idle and required to be developed. Mailo land tenure had been criticized for making

⁶⁴ The Constitution of the Republic of Uganda Article 237 (1)

lawful and bonafide occupants to be 'refugees on their own land'.⁶⁵ This had violated the provisions that provide individuals with a right to own property exclusively.⁶⁶

Ownership of land in Uganda was subject to **Article 237 Section (3) (a), (b), (c) and (d)** and was in form of customary, freehold, mailo or leasehold respectively. However this ownership was liable to termination with due compensation subject to situations where;

The government or local government, subject to **Article 26** of the Constitution needed to acquire land in public interest and provisions that accompanied such acquisitions were determinant by parliament.⁶⁷ In most cases in Uganda, land was being acquired from registered owners fraudulently especially by political elites who had evicted legal owners on second hand titles in disregard of the right certificates, having landlords evicted by support of the police forces.⁶⁸ There was no purpose for which land would be acquired forcefully, for individual interest other than public interest, from individual land owners, moreover with the aid of a government agency and yet without consent of the parliament which was charged with a duty to prescribe a way forward.

The law⁶⁹ further conferred parliament with a role of prescribing for non citizens the acquisition of leases in accordance with the definition of a non citizen for the purpose of this paragraph. However, non citizens especially investors had undertaken to purchase land permanently other

⁶⁵ -kayemba, E 'Who will bail out the landless peasants?' National Analyst, 7 March 1995

⁶⁶ The Constitution of the Republic of Uganda Article 26 (1)

⁶⁷ The Constitution of the Republic of Uganda, Article 237 Section (2) (a)

⁶⁸ Deininger et al., Legal knowledge and economic development: The case of land rights in Uganda (2006).

⁶⁹ The Constitution of the Republic of Uganda Article 237(2) (c)

than leasing for investment and development, but for their own settlement in disregard of the law.

Under **Article 237 Section (4)** it was conferred subject to **subsection (a)** that all Uganda citizens owning land under customary tenure would undertake to acquire certificates of ownership in a manner prescribed by parliament and subject to **subsection (b)** land under customary tenure would be converted to freehold land ownership by registration. However, on the contrary if land was already governed customarily and customary rule still reigned under the constitution subject to **Article 237 Section 3(a)** why would attempts be made to convert this land into freehold or dual existence was a matter of concern.

This concern arose where illegal occupants were provided-with security of entitlement or occupancy on mailo, freehold or leasehold land subject to **Article 237 (8)** and **Subsection 9 (b)** providing for registrable interest in land by the occupant. This was particularly true with illegal occupants because the policies adopted did not reflect sufficient protection of the law but instead generated more disagreements leading to more unlawful evictions of occupants.

The constitution did not mandate parliament to enact a Land Act in the fashion of the Land Act, 1908. It limited its intent to the relationship of registered owners and lawful or bonafide occupants of land. In this regard a correct interpretation would be that the intention of the constitution was to put in place a national law on the lines of the Busuulu and Envujjo Law or the Toro Landlord and Tenant Law, 1937, and the Ankole Landlord and Tenant Law, 1937⁷⁰

Art 238 provided the Uganda Land Commission with a mandate on land issues in regard to appointment and approval of the chairperson of commission.⁷¹ He was appointed by president and approved by parliament however why it was the duty of the president only to dismiss the

⁷⁰ Winfred Bikaako and Ssenkumba Gender, Land and Rights: Contemporary Debates in Law Policy and Practice in Uganda (2008)

⁷¹ The Constitution of the Republic of Uganda 1995 Article 238 (2)

commissioner.⁷² while parliament participated in the approval generated concern. This was in spite of the fact that incompetence had been experienced on various grounds with many forged and signed certificates found on the registry. For instance the base- where over 300 land titles were circulated in 2008⁷³ why such a commissioner would not be put to question to assess his competence remains a matter of concern.

2.3 The Land Act (2010) Cap 227

Tenure ship of Mailo land was provided for in **Section 3(4)** of the Land Act where it was defined as a form of tenure deriving its legality from the constitution and its incidents from the written law subject to the law,⁷⁴ involved the holding of registered land in perpetuity, permitted the separation of ownership of land from the ownership of developments on land made by a lawful or bonafide occupant; and enabled the holder, subject to the customary and statutory rights of those persons lawful or bonafide in occupation of the land at the time that the tenure was created and their successors in title, to exercise all the powers of ownership of the owner of land held of a freehold title set out in **Subsections (2) and (3)** and subject to the same possibility of conditions, restrictions and limitations, positive or negative in their application as were referred to in those subsections.

However subject to **Section 3(4) (c)** the law created a contradicted ownership of property while the Constitution allowed for individual property owners not to be deprived of their right. This appeared a deprivation of ownership to the rightful registered owner.

According to **Section 32 (a)** the law provided for lawful or bonafide occupants to be evicted only for non payment of ground rent whereof;

A lawful or bonafide occupant was not be evicted from registered land except upon an order of eviction issued by a court and only for non payment of the annual normal ground rent⁷⁵ with Court decisions subjected to **Section 31** of the Act. The purpose of this provision was to have the

⁷² 64 Ibid Section (5) (a), (b), (c)

⁷³ Schwartz Julia, What should be done to enhance tenure security in Uganda and further development: the Land Amendment Bill (2007), its shortcomings and alternative policy suggestion, 2008 Quoting Monitor Newspaper

⁷⁴ The Land Amendment Act 2010 Cap 227 Section 3 (4) (a) and (b)

⁷⁵ Amended Land Act (2010) Cap 227, Section 32 (1)

occupancy rights of lawful and bonafide occupants secured from unlawful evictions. But on the contrary this restricted the powers of the registered owner, who would end up selling the land without consulting the tenants for fear suspicious intentions.

Eviction of the lawful and bonafide occupants was further protected by the Act when it compelled the new owner to maintain the interests of the lawful and bonafide occupants prior to his purchase. Subject to **Section 35 (8)** where it was required that a change of ownership of title effected by the owner by sale, grant and succession or otherwise would not in anyway affect the existing lawful interests or bonafide occupant and the new owner would oblige to respect the existing interest.

This law was to ensure that new owners of the land did not come up with their own policies different from the relationship initially held by the tenants and former landlord. Thus had a duty to maintain the old relationship.

Section 35 was to the consequence of option to purchase. Thus subject to wishes of a tenant by occupancy, the land owner is required to give the first option of taking the assignment of the tenancy to the owner of the land.

In other words the law was to the effect of providing the first option for occupants to compensate, or pay him for the portion of land that they occupy, if this was not possible or opted for, then owner had the right to acquire a buyer who was not an occupant to compensate the occupants for their developments and then pay the landlord for this portion of land that had been occupied.

However, much as the occupants were given a priority in the purchase of land, they in most cases failed to afford, because at the time they settled on the land, it was relatively cheaper, but due to the appreciation and changes in the land market, land had become so costly. The landlords explored this benefit of the location of their land to hike land costs with intention of disproving the integrity of the law that the occupants would not redeem themselves, thus sell off to potential buyers.

But according to Deininger⁷⁶ those had violated the rights of occupants because on paying the landlord, they only gave a warning to the occupants to vacate. Being a poor portion of people and having a low voice in society, they ended up being evicted without the finances to pursue the case and with destroyed property.

Section 35 Subsection (ii) on the option to purchase provided that the owner of the land who wished to sell the reversionary interest in the land would subject to this section, gave the first option of buying that interest to the tenancy by occupancy while **subsection (iii)**. Any offer made under this section would be on a willing buyer and seller basis. But under most circumstances, because occupants did not possess land titles, they were not considered by landlords as a part of the willing buyer (being temporary holders) nor seller (being assumed owners).

However, **Subsection iv** provided that in case an option to buy was offered to any party under **subsection (i) or (ii)**, then whoever made the offer obliged to take responsibility to set out the terms of the offer with sufficient detail and clarity for the party to whom the offer was made to understand to draw appropriate responses to the offer. This was to the effect of introducing and clearly presenting the entitlements and obligations in the offer to the purchaser to avoid any misrepresentations in case purchase was made by a different person when tenant failed to meet his own redemption. Thus confirmation to the offers were subjected to the provisions in **subsection (v)** to be made within three months on receipt of the offer to enable meaningful negotiations to take place.

Under **Section 30** the law allowed mediation on behalf of the person who did not qualify to be a bonafide occupant subject to **Section 29** where that person was required to take reasonable steps to see and identify the registered owner of the land for the purpose of undertaking negotiations with that owner concerning his or her occupation of the land.

However, the gap in this was when the owner was interested in selling at higher profits to an already existing potential buyer. Then the registered owner would make the purchase complicated.

But subject to **Section 30 (2)** if negotiations failed within a prescribed time to reach agreement of

⁷⁶ Deininger et al. Legal knowledge and economic development: The case of land rights in Uganda (2006).

the occupation, then any of the two would involve a mediator in a prescribed manner to assist in negotiations. Where a mediator would upon being invited under **subsection (2)** and after satisfying himself or herself that there were reasonable prospects of reaching a satisfactory agreement between the parties accepted the invitation and gave all reasonable assistance to the parties to reach an agreement on the occupation.

Section 29 (2) defined a bonafide occupant to mean a person who before the coming into force of the constitution **Subsection (a)** had occupied and utilized or made developments on that land unchallenged by the registered owner or agent of the registered owner for a period of twelve years Alternatively under **Subsection (b)** that person would settle on land by the government or an agent of the government which would include a local authority.

In this, it was the duty of the government to, under **Section (29) (3) (a) (b) and (c)** 'in the case of **subsection (2) (b)** to undertake the compensation of the registered owner as required by whose land had been occupied by persons resettled by the government or an agent under the resettlement scheme; enabled the persons who had been resettled on the land to acquire a registrable interest in the land on which they were settled; or government to compensate the registered owner within five years after the coming into force of this Act.

Section (29) (5) any person who purchased or otherwise acquired the interest of the person qualified to be a bonafide became a bonafide occupant, implying that when purchase was made from a bonafide, the purchaser also became a bonafide occupant because no title was acquired.

2.4 The Registration of Titles Act Cap (230)

Security of occupancy was further entrenched in the Registration of Titles Act⁷⁷ which stipulated that land included in any certificate was subject to the interest of any tenant even if it was not specially notified as an encumbrance on the certificate. This meant that any buyer of titled land would buy subject to any encumbrance on it including rights of bonafide and lawful occupants. Thus, under current law, even a purchaser of land would carry out eviction only for non-payment

⁷⁷ The Registration of Titles Act Cap 230 Section 64 (2)

of rent and only upon court order. therefore, this meant that the proposed amendment, by stipulating that eviction would only take place on grounds of nonpayment of rent and only upon a court order **Section 32 (a)**, did not introduce any new rights for tenants, thus notwithstanding the current law, simply restated more clearly.

Section 64⁷⁸ provided that a title of registered owner was absolute as the same part of the land that wrongly was described on the boundaries. This was seen in the case of *Rwamutatiri v Kamono*⁷⁹ where plaintiff had sued for recovery of his piece of land due to encroachment by the defendant. The case failed on the ground that the plaintiff brought the action wrongly claiming for encroachment other than on grounds of ejecting. However, if the plaintiff had brought the action rightly the defendant's title and interest would have been indefeasible or impeached and thus the issue of title being of conclusive ownership would not have stood.

The RTA further goes ahead to protect the proprietors in the registered titles. Once a person was registered in the title as owner in the register then his or her interest would not be held indefeasible or would not be defeated unless under the exceptions provided under the Registration of Title Act. The main purpose of this principle was to provide security to duly registered proprietors and ease transactions against other interests. . The principle of indefeasibility was seen in *Lwanga v Registrar of Titles*⁸⁰ where land was bought and disputed land is issued as a gift, from the late Galiwango to Kalemba who later transferred land into his names and duly registered the land and later sold the same land to Ssalongo who became the registered proprietor thereof without notice of the forgeries by Kalemba. Court held that according to **Section 189**⁸¹ the title of a bonafide purchaser of value would not be impeached since he/she purchased land without notice of the forgeries of the vendor. So the bonafide. Purchaser for value was not party to the fraud and so on this basis he had an indefeasible title which would not be impeached or defeated.

⁷⁸ Registration of Title Act Cap 230

⁷⁹ Ibid

⁸⁰ 72 1980 HCB page 24

⁸¹ of RTA

In regard to termination of joint tenancy the law provided for three *ways* either by conversion into sole ownership, severance or by partition. Where of joint tenancy referred to the ownership of land in common by several persons with a right of survivorship that was to say at the death of one of the joint owners, land as a whole vested in the survivors and would only be disposed of by will by the last surviving owner. Every joint property was seized or possessed by the joint tenant "by the half and by the whole" in other words by every part and by the whole. Joint tenancy as a form of co-ownership had two distinguishing features that was; the right of survivorship and the four unities.

Conversion into sole ownership meant that, by virtue of the doctrine of survivorship when one or more of the joint tenants died, the survivor became the sole owner of the property. He or she would opt to be registered as the sole proprietor of the land by virtue of **S. 192 of the RTA Cap 230**

Severance occurred when a joint tenancy was converted into a tenancy in common. Since all joint tenants had a potential share in the property, they would sever the joint tenancy in their lifetime. Severance would not be affected by will. There were several reasons why co-owners would opt to sever the joint tenancy, but the most common event would bring severance was the breakdown in the relationship between co-owners. In these circumstances the likelihood was that each of the co-owners would no longer wish the other co-owner to take the property in its entirety but would prefer to leave his or her share to someone else. In situations where only one party desired to sever the joint tenancy only then an act of any party operating on his or her *own* share allowed unilateral severance of a joint tenancy.

With occupants on land, made it more complicated for joint owners where some of them would wish to sell while others desired to retain.

However, severance would be done in through unilateral severance where co-owner indulged in an act that destroys one of the four unities. For example, where one of the two co-owners transferred interest in the co-owned property to another, the severance would be effective when the transferee got registered under the RTA. But at equity, severance was effective before registration. It would also be by way of mutual agreement in this case when the parties were

registered as joint proprietors under the RTA, they would agree verbally or otherwise to sever their interest. This meant that they held property as tenants in common in equal shares which relinquished the joint interest and each party would then point to a particular share holding interest in this property.

It would further be in the course of dealing where there were circumstances that did not involve any agreement but where it would be inferred that parties had formed a common intention to hold their property as tenants in common. In other words where the conduct of the joint tenants towards each other revealed a mutual understanding that the joint tenancy would be severed and: Through partition; where the co-owners would decide to apply to court to have the land divided. However, this was a legal right and there was no way how one can stop this action. When a court granted a partition action for joint tenants with rights of survivorship, the property was either physically broken into parts and each owner was given a part of equal value or the property was sold and the proceeds were distributed equally between the co-owners

Among the powers given to the registrar, there was granting vesting orders in cases of completed purchase. Under **Section 166** of the R.T.A it was provided that whenever any person interested in land under the operation of the R.T.A or any estate or interest in the land appeared to the High Court to be a trustee of that land, estate or interest within the intent and meaning of any law for the time being in force relating to trusts and trustees and any vesting order was made in the premises by the High Court, the registrar on being served with the order or an office copy of the order, would enter in the Register Book and on the duplicate certificate of title and duplicate instrument, if any, the date of the order, the time of its production to him or her and the name and addition of the person in whom order purported to vest the land, estate or interest and upon the date of that registration as defined in **section 46 (3)** that person became the transferee and deemed to be the proprietor of the land, estate or interest.

Unless its registration was affected, the order had no effect or operation in transferring or otherwise vesting the land, estate or interest so was the case with Mailo land transferred to lawful occupants.

However, there were four conditions required of the register in exercising his powers of ranting vesting order as held in the case of *Aida Naijemba v Esther Mpagi*.⁸² Those conditions included:

- (a) Registering land under the provisions of the Registration of Titles Act and the purchaser must have paid the whole of the price to the vendor.
- (b) The purchaser or those claiming under him or her would have taken possession of the purchased land.
- (c) That the entry into possession by the purchaser would have been acquiesced by the vendor or his or her representative. –
- (d) The transfer of the property would not have been executed because the vendor was dead or was residing out of jurisdiction or he/she would not be found.

Still under **Section 167** of the Registration of Title Act, it was stated that if it was proved that to the satisfaction of the registrar that land under R.T.A had been sold by the owner and the whole of the purchase money paid, and that the purchaser had or those claiming under the purchaser had entered and taken possession under the purchase and that entry and possession had been acquiesced in by the vendor or his or her representatives, but that a transfer had never been executed by the vendor and would not be obtained by reason that the vendor was dead or residing out of the jurisdiction or would not be found, the registrar would make a vesting order in the premises and would include in the order a direction for the payment of such an additional fee in respect of assurance of title as he or she would think fit and the registrar upon the payment of that additional fee, if any, would affect the registration directed to be made *by Section 166* in the case of the vesting orders.

Mentioned there, and the effecting or the omission to effect that registration would be attended by the same results as declared by **Section 166** in respect of the vesting orders mentioned there. **Section 59**⁸³ was effect of protecting ownership of title. It meant that the registration of title would not be impeached. Thus after registering, the certificate of title was issued and saved for fraud such title would not be impeached even when there was fraud and fraud was outside the register it would not be impeached. This was seen in *Makerere University v St. Mark*⁸⁴ in this

⁸² Civil Appeal No. 74/05) [2009] (UGCA 22 Jan2009)

⁸³ The Registration of Title Act Cap 230

⁸⁴ HCCS 37/199

case. "Makerere University land at Katanga was freehold. A mailo land certificate of the same was created and sold to the defendant fraudulently. The defendant was ignorant." **Lugayizi J** held that fraud committed by predecessors in title could not affect the defendants as there was no evidence of notice, however, fraud here was committed outside the register and therefore the defendants received no title from the alleged mailo owner.

In the same way a bona fide purchaser would not be defeated if he would prove that he held the certificate of title he purchased in good faith he had no knowledge of fraud, he purchased for valuable consideration, and that the vendor had apparent valid title, he purchased without notice of fraud and he was not a party to fraud. The burden now rested upon the plaintiff to strictly prove that defendant was a party to the fraud or had knowledge about the fraud. Besides this, the Registration of Title Act under **Section 64** provided that estate of registered proprietor was paramount and **Section 181** under which the bona fide.

Purchasers were protected by the Act. However unregistered land was noteworthy, **Section 64 (2)** for *instance* disqualified the rights existing under adverse possession, public right of way and easement, but those were recognized under common law and would still be enforced although unregistered as seen in *Kampala City council V Mukibi*⁸⁵ the difference was that they were not indefeasible.

Similar to the provision of **Section 59** where after registration, the title would not be impeached is the case of *Obiero v Opio & Others* where plaintiff sought an injunction to restrain the defendants from trespassing on his land. They claimed to be owners under customary law yet the plaintiff was the registered owner and there were no encumbrances on the register. **Judge Bennett** held that, he was not satisfied that the defendants had any right under customary law and even if they did his opinion was that those rights would have been extinguished when the plaintiff became a registered owner.

This case emphasized that a title under the Torrens system was conclusive evidence of ownership. Any other unregistered interests, conditions or covenants would not override registered interests under the Kenyan law different from the Ugandan law where competing interests were created.

⁸⁵ Cs No 22 of 1995

The above status showed that the two features were interrelated and they were both essential to the Torrens system. Under the Torrens system, interest's in land were created or transferred not by execution of document as under common law, but by registration in a manner prescribed by Registration of Title Act. This showed that by following a Torrens system made it a fact that by having an indefeasible claim over land, its title had to be registered and thus no title would be acquired until one registers. This implied that no document such as a transfer or a mortgage was effectual to pass title or give rise to an interest in property unless until it fulfilled certain statutory requirements and only on registration. Thus the principle was that a title by registration expressed the indefeasibility of a registered interest rather than registration of title.

Pertaining to issues concerning conveyance of land by sale and transfer, it was held that if one who wished to buy or purchase land in Uganda, required seeking advice and helping of a lawyer or referring to the Uganda Land Alliance for land observatory process to confirm status of the land to be acquired. However, the main procedures involved during the said process were summarized hereunder for reference;⁸⁶

Title searches: Immediately after identifying the land there was need to conduct a search and this was done by making a written request addressed to the commissioner- land registration, giving the description of the land. The buyer needed to establish that the vendor had a "Clean" Title before he would proceed with a purchase or lease. Carrying out a Title search at the Land Registry Office confirmed true ownership and whether the said land was free from other claims or encumbrances and if so; the intending buyer was free to go on and buy the land.

Payment of deposit and executing of sale agreement: The terms of payment for the land in question would be set out in either a sale or lease agreement as the case may be. The sale and lease agreements were normally drafted and witnessed by lawyers/advocates and area local councilors in certain cases. The seller and the buyer plus their witnesses were required to sign the agreement.

⁸⁶ Kalema, Dr. William and Kayira, Duncan, 2008, *Access to Housing Finance in Africa: Exploring the Issues, No. 4, Uganda*, published for Fin Mark Trust.

Transfer forms: A sale agreement or lease agreement did not by itself constitute transfer of the land sold or leased. The seller of registered land would sign transfer forms to enable the buyer to have the registration of the land officially changed into the buyer's names. The transfer forms upon execution were registered with the Registrar of Titles.

Assessment and payment of stamp duty: this involved a stamp duty for transferring of land or lease, which would be paid before a transfer would be affected. The Uganda Revenue Authority assesses the stamp duty payable. The assessment was done after the land in question had been valued. The stamp duty payable on transfer of land was 1% of the value of such land. Once stamp duty had been paid, the original and the duplicate certificates of title were then presented to the Registrar of Titles to record the change. However, it would be noted that in Uganda only citizens had land ownership rights as stipulated by the 1995 constitution of the republic of Uganda. The constitution restricted non citizens to only acquiring leases in land. It would further be noted that, a person claiming any interest in registered land: for instance a lease or mortgage can lodge a caveat with the Registrar of titles. Any caveat lodged would be reflected on the certificate of title, on the encumbrance's page. The caveat forbids the registration of any person as transferee or proprietor by way of a sale, lease, mortgage or any other interest on land.

CHAPTER THREE

AN EVALUATION OF SECURITY OF TENURE ON MAILO LAND

3.0 Introduction

This chapter provided an evaluation of law of security of tenure in regard the rights of lawful and bonafide occupants on Mailo land, advantages and disadvantages, and conditions necessitating revision.

3.1 Evaluation of Rights of Lawful and Bona fide Occupants on Mailo Land

In 1995, the Constitution created security of occupancy for lawful and bonafide occupants of land. The Land Act passed in 1998 defined the terms 'lawful occupant' and 'bonafide occupant', and pursuant to the Constitution, provided for the security of occupancy of the tenants. It also provided for the issuance of certificates of occupancy to tenants.⁸⁷

The Constitution⁸⁸ and the Land Act recognized four systems of tenure, namely customary, Mailo, freehold and leasehold. Further they both guarantee security of occupancy of bonafide and lawful tenants living on registered Mailo, freehold or leasehold land.

3.2 Recognition of Mailo Land

Mailo land was evidenced by certificate of title hence, land well surveyed and it had been regulated to separate land ownership and developments made on land by bonafide or lawful occupants. Thus ownership exercised land rights subject to the rights of the bonafide and lawful occupants on the land, moreover it was only expected to be available to citizens only.⁸⁹ The

⁸⁷ Peter Mulira (2008) Towards an Equitable Land Regime in Uganda, the Land Amendment Bill and Related Legislation I.

⁸⁸ The Constitution of the Republic of Uganda Article 234 (3)

⁸⁹ Landesa, Women and Customary Land Rights: Focus on Land in Africa Brief, Uganda Word Resources Institute, Landesa 2011

advantage of Mailo land was that it was a reasonably secure form of land holding in which land ownership was easily ascertainable and yet on the other hand it was; acceptable as loan security.⁹⁰

3.2.1 Policy issues on lawful and bonafide occupancy

Public right of way upon registered land also vitiated the title being absolute and indefeasible for instance easements. The laws of Uganda protected intruders on registered land if the registered proprietor did not commence proceedings against him or her within a period of 12 years as set by the **Limitation Act Cap 80** laws of Uganda. This vitiated the principle of indefeasibility of title provide for under the Torrens system, this was proved s under **Section 10** of the Registration of Title Act.

The security of occupancy for bonafide occupants guaranteed that whereas no problems would seem to arise relating to the lawful occupants, the bonafide occupants created a set of problems that policy needs to sort out.⁹¹ They would exercise personal interest to steal portions of land from the registered owner upon the death of the owner, by claiming to have reached an agreement with the deceased on their settlement on land which indeed would not have been the case.

The disadvantage of Mailo land tenure was that it was an enjoyment and use of land-by-land owner which was subject to the rights of bonafide and lawful occupants. For the owner to enjoy his rights of sale had to consult with occupants to give them priority of the purchase before seeking other potential buyers. On the other hand it also required Land owners to undertake compensation for developments made by “bonafide” and “lawful” occupants which created an additional cost resulting in protracted and complex negotiations with non Ugandan citizens prohibited from acquiring Mailo land. Land being a development tool, Mailo land diminished the ability to enhance development when most land was left idle and subject to the decision of the title owner.

⁹⁰ Ibid

⁹¹ Winfred Bikaako and Ssenkumba Gender, Land and Rights: .Contemporary Debates in Law Policy and Practice in Uganda (2008).

Additionally, where the owner of land has been absent not by choice, for instance where registered owner had been in prison or exile, must he forfeit his/her rights to land because of the existence of a bonafide occupant was a question of concern.⁹² Because owner, was not able to develop this land as a matter of fact that he was not present, and neither did he sell or wish to sell, much as he would have intended to carry out development. His absence for that time was not a direct intention to keep land idle for others to express their registrable interest in his land., Another concern was why and whether the law should grant and guarantee the same occupancy rights to a lawful occupant as offered to a bonafide occupant.⁹³ In practice the occupancy of the two was different, whereas the 'bonafide occupant would seek consent of the owner to use land the lawful occupant seeks consent of the bonafide to settle on land.

By being granted a right to use the land did not mean that bonafide invited others to use the same land or share interest on property that did not belong to him. This was because the more they settle the more access they attained to the ownership and more likely their registrable interest increases, making it hard for the owner to further his own developments.

The rights of a bonafide were almost equivalent to those of the landowner, by being able to create a stalemate in the use of land as far as to pledge what he did not own as security for acquisition of his loan to which he would have or may not have made any contribution to the owner in form of reasonable payment, made bonafide occupant as if he were a joint owner.

It was no wonder that banks no longer take Mailo land for mortgaging because of the tenant landlord endless concerns.⁹⁴

The Land markets on Mailo land especially in central Uganda were affected by the impasse created on the land. Because of the restrictions on sell of land without the consent of the other, it was becoming more and more cumbersome to purchase Mailo land especially for development

⁹² Landesa, Women and Customary Land Rights: Focus on Land in Africa Brief, Uganda World Resources Institute, Landesa 2011

⁹³ Peter Mulira (2008) Towards an Equitable Land Regime in Uganda, the Land Amendment Bill and Related Legislation I

⁹⁴ Ibid

purposes.⁹⁵ This was reflected on the encumbrance of existing tenants by occupancy who would not be evicted.

3.2.2 The Concept of Bonafide Occupants

If you occupied land on basis of a license by the Owner, you're not a lawful or bonafide occupant. If you acquired interest from a bonafide occupant you would become a bonafide occupant and one would not become a bonafide occupant on unregistered land.⁹⁶

The concept of bonafide occupants was under **Section 29 (2)** of the Land Act and the confusion arose out of this concept and its application. Much as this section designed to protect the rights of tenants who were sitting on registered land such as; those who bought land from the registered owner (they change over time); those who were historically sitting on the land with the concept of the registered owner; those who are settled on registered land by government institutions regardless of the period of settlement and those who had been sitting on registered land without the challenge of the registered owner for twelve years between 1993 and 1995; many of those tenants were without legal support to qualify the category within which they follow.

This was because under the constitution the provision of land was held to belonging to the people, not the government. The situation of bonafide occupancy has led to many migrants to settle on land and thereafter begin to count the 12 years to create a category of tenants who claim rights on already registered land. This provision however is unfair and has created a challenge of sorting out who among the tenants falls in what category of bona fides. The tenants themselves have failed to make a distinction among the categories.⁹⁷

This shows that disagreements were more than bound, and were not about to end when tenants claim for ownership of tenure, which tenure they would not even express or defend as per the

⁹⁵ Landesa. Women and Customary Land Rights: Focus on Land in Africa Brief, Uganda World Resources Institute, Landesa 2011

⁹⁶ Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3 (January 2007).

⁹⁷ Winfred Bikaako and Ssenkumba Gender, Land and Rights: Contemporary Debates in Law Policy and Practice in Uganda (2008)

requirements of the law. This provided more room for land owners to explore the benefit of selling without consultation on the priority to the purchase of land as accorded to occupants.

The Land Act conflicted with the constitution whereby the constitution provided that everyone had right to property⁹⁸ if legally acquired while the Act attempts to take away this right by granting access to ownership rights on somebody's property. Thus if land was fraudulently acquired and this was proved, then the title or interest becomes indefeasible subject to **Section 61**⁹⁹ which provided that the title of a registered person was indefeasible save for fraud. This was expressed in the case of *Kampala Bottlers Ltd v Damanico (U) Ltd*¹⁰⁰ where CJ Wambuzi held that *"while the cardinal rule of registration of titles under the Act is that the register is everything, the court can go behind the fact of registration in cases of actual fraud on the part of the transferee."* Thus notwithstanding *Rurangaranga v Mbarara Municipal Council & Ors*¹⁰¹ CJ Wambuzi as he was by then, held that a proprietor who purchased land knowing that its grant to the vendor was not authorized acted fraudulently hence once the foregoing had been proved such title was deemed indefeasible.

The land Act further provided that the board would meet once every two months to discharge of its functions. This indeed was to render the board incompetent given the cases of land issues at hand. The number of times was too inadequate because land boards had a lot to handle; this was clear in the tasks assigned to the Board.

3.2.3 Functions of the District Land Boards

The District Land Boards were established under the constitution (1995) **Article 240** and **Section 56** of the Land Act (CAP. 227) which stated that there would be for each district a district land board and the board would be a body corporate with perpetual succession and common seal and would sue or be sued in its corporate name with duties to;

⁹⁸ Article 26 Subsection (1)

⁹⁹ Registration of Title Act Cap 230

¹⁰⁰ SCCA No 22/92

¹⁰¹ C.A No 10/1996

Hold and allocate land in the district which was not owned by any person or authority; to facilitate the registration and transfer of interests in land; to take over the role and exercise the powers of the lesser in the case of a lease granted by former controlling authority; to cause surveys, plans, maps, drawings and estimates to be made by or through its officers or agents; to compile and maintain a list of rates of compensation payable in respect of crops, buildings of a nonpermanent nature and any other thing that would be prescribed; to review every year the list of rates of compensation referred to in respect of crops, buildings of a nonpermanent nature and any other thing that would be prescribed subject to **Article 241** of the Constitution and **Section 59** of the Land Act.

The performance of which would be independent of the Uganda Land Commission and would not be subject to the direction or control of any person or authority but would take into account National and District council policy on land. However, the constitution accorded the people with a right and entitlement in the distribution of land, by assigning this right to the board, violated the rights conferred to the people by the constitution.

3.3 Disadvantages of Security of Tenure

Security of tenure led to conflicts and gross tenure insecurities which had a significant productivity reducing impact as it had discouraged investments on land. As regards Mailo land the law had logged out large areas of land from development process.¹⁰² Since owners of occupied land lack authority over their land and would not evict tenants, they were prevented from developing their land or from renting it out to tenants who might be more productive. Given the encumbrance on the land, selling and buying occupied Mailo or freehold land was also little attractive except for those who want to engage in illegal evictions.¹⁰³ Selling was further complicated, by the fact that owners lack certificates and had difficulties receiving one.

Reduced credibility in land pledged for collateral. It had become difficult for land owners to use their land as a financial security and thus allow money borrowing for new investments and

¹⁰² Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3 (January 2007).

¹⁰³ Winfred Bikaako and Ssenkumba Gender, Land and Rights: Contemporary Debates in Law Policy and Practice in Uganda (2008)

economic development. Financial institutions are hesitant to accept owners' titles as the law did not allow banks to evict tenants on land to recoup their money in case the borrower defaults. This implied that as long as land was occupied by tenants who only have to pay a non-commercial rent, its value was almost negligible as bank would not have an entitlement in case loan is defaulted. There was also a possibility of land owners to impose tenants on land to prevent seizure of such land when payment was defaulted¹⁰⁴.

There was too much chaos in the Land Registry. Occupants, on the other hand, who by law had the right to develop the land, either lack the resources or the will to develop the land. Given the chaos at the Land Registry, occupants had difficulties in acquiring certificates of occupancy, adding to their insecurity and making them more prone to being evicted.

Since insecurity generally discouraged land related investment, occupants who by law the ones are supposed to develop the land remain hesitant to engage in long term investments.¹⁰⁵ This hesitance was increased by ignorance of the legal provisions, moreover makes the issue of development of land to remain a dream, and then why not leave it to its rightful owners, as occupants also simply settle without furthering developments.

It was argued that more than 50 percent of Mailo tenants are not aware of the tenure security afforded to them under the law and almost 70 % mistakenly believe that the landlord can prevent them from land-improving investment.

Development of land was also hindered by the fact that most of Mailo occupants belong to low and medium income groups and thus lack the resources needed to develop their land or acquire more land to allow commercial agriculture and invest in modern farming methods¹⁰⁶

¹⁰⁴ Landesa. Women and Customary Land Rights: Focus on Land in Africa Brief. Uganda World Resources Institute, Landesa 2011

¹⁰⁵ Winfred Bikaako and Ssenkumba Gender, Land and Rights: Contemporary Debates in Law Policy and Practice in Uganda (2008)

¹⁰⁶ Ibid

This situation would require them to borrow while getting loans is difficult since most commercial banks did not lend to individual small scale borrowers due to the high administrative costs involved and the difficulties of selling such plots¹⁰⁷

¹⁰⁷ Landesa, Women and Customary Land Rights: Focus on Land in Africa Brief, Uganda World Resources institute, Landesa 2011

CHAPTER FOUR

PRESENTATION AND DISCUSSION OF THE RESEARCH FINDINGS

4.0 Introduction

This chapter presented and discussed the postulations on the overall nature of the rights of a lawful and bonafide occupants on Mailo land as generated from interview and discussion according to the study objectives.

4.1 The Law and the Rights of Lawful and Bonafide Occupants Mailo Land

In Uganda, Mailo land was a history of heated wrangles and conflicts in regard owners and occupants on this land. In order to deal with this problem **Article 237 (9)**¹⁰⁸ of the constitution directed parliament to pass a law regulating the relationship between the registered owners and the lawful or bonafide occupants of Mailo land. According to Musoke, it was held that most of the members of the community were confused as to who was who and who was entitled to what. The implication behind bonafide and lawful occupants caused a great confusion especially among the rural communities who remained ignorant of the law.¹⁰⁹

This however was contrary to the case of **Lwanga v Registrar of Titles**¹¹⁰ where despite the case that ignorance of the law was no defense Salongo Lwanga's acquired title could not be held defeasible.

However, the terms as applied in the constitution to refer to a registered owner and lawful occupant of land would not be a cause of any problem. A registered owner was one registered under the provisions of the Registration of Titles Act whereas a bonafide occupant must be one who came on the land with the permission of the registered owner irrespective of the knowledge

¹⁰⁸ The constitution of the republic of Uganda, article 237(5)

¹⁰⁹ Hajji Musoke Ahmed (local council 2) interviews held with LC2 Council chairman

¹¹⁰ 1980 HCB page 24

of the owner. A bonafide occupant must be one who lawfully claimed an interest in the land through a lawful occupant.

In this regard **Section 8 (1)**¹¹¹ provided that, “nothing in this law shall give any person the right to reside upon the land of a Mailo owner without first obtaining the consent of the Mailo owner except under the provisions of **Subsection I (a) and (b)**. “Notwithstanding this law shall give to the holder of a Kibanja the right to transfer or sublet his Kibanja to any other person”. According to Mulira¹¹² this was a clear exclusion of any impostor or a person who bought a Kibanja from a lawful occupier without the consent of the owner from the definition of a bonafide occupier. Thus lawful and bonafide occupants were entitled to equitable treatment, because they all had lawful claims.¹¹³

However, the concern would be that, since land was acquired on grounds of customary rules, while rules remain community specific so would be the location. Thus customary system applicable would first of all be identified before steps were undertaken to identify a bonafide occupant.

Further still according to the respondents, by stating that occupancy would have been challenged within the 12 years of bonafide occupancy, the law was not fair to the land owners, because nothing as such existed before had them question the presence of the occupants on their land. But it was a matter of being allowed to settle on a certain portion of land, but if the law so required, by then such arrangements would have been catered for. So its effecting had to commence prior the time of adoption of the Act, for land owners to have a clear way forward. **Section 30 (b)** defines a bonafide occupant as a person who occupied or developed any land unchallenged by the registered owner or his agent.

It was thus submitted that, there was an imbalance when this provision was made, the interests of the owner and bonafide occupant could come to measure because of this provision, thus their suspicion and motivation to evict bonafide occupants as land grabbers. Therefore much as the law was not present to ask for this challenge, then so was the reluctance of the land owners in questioning the existence of occupants on his her land. It is for such reasons that Mulira, referred

¹¹¹ Busuulu and Envujjo Law, (1928) section 8

¹¹² Peter Mulira (2008) Towards an Equitable Land Regime in Uganda, the Land Amendment Bill and Related Legislation

¹¹³ Schwartz Julia, what should be done to enhance tenure security in Uganda and further development: the land Amendment Bill (2007), its shortcomings and alternative policy suggestion, 2008

to such a law to be a retrospective legislation which was nowhere permitted in by the Constitution.¹¹⁴ Moreover the constitution is the supreme law of the land.

According to the study respondents, it was further emphasized that, by requiring the owner to make a challenge for twelve years prior to the coming into force the constitution was also wrong in view of the fact that an interest in land could not be taken away without compensation, just like the owner was not allowed to take it away from the occupants, so the occupants would not think of claiming an interest that was already possessed by the owner, simply by looking at the situation that no development had been made yet, thus undertook to settle.

Here the case was that preparations were underway for the owner, to either sale the land when its value appreciates, still looking for investable capital or otherwise waiting for some issues to be cleared. Thus for occupants to take interest they had to express this by compensating for how much interest the owner had on the land in question. In addition because a rightful deed was already registered under the RTA could not be cancelled the provision had the effect of creating two competing interests on the same land. Moreover one interest came up first and that was the interest of the owner who acquired first priority rights and entitlement to the land, and because he had not offered for sale his interest, then he needed not be deprived of his interest in his or her own property by engaging someone else to claim for the same interest.

Thus much as other laws provided for protection of private property especially the Constitution **Article 26, Section 30** of the Land Act conferred rights of access to property by a trespasser, without any determination to the size of the holding.

The constitution further attempted to provide registrable interests to both bonafide and lawful occupants. However, the concern lied in the fact that both bonafide and lawful occupancies were by nature customary, how the constitution made customary land interests registrable was a matter that generated concern.

This reflected a misrepresentation of the constitutional provisions by the Land Act because much as the constitution mandated parliament to develop a law regulating the relationship between lawful and bonafide occupants and registered owners, parliament erred. This was clearly expressed by Nawangwe and others¹¹⁵ who recognized that parliament did something different altogether given the preamble which stated “an Act to provide for the tenure, ownership and

¹¹⁴ Peter Mulira (2008) Towards an Equitable Land Regime in Uganda, the Land Amendment Bill and Related Legislation.

¹¹⁵ Peter Mulira (2008) towards an Equitable land regime in Uganda, the land amendment bill and related legislation

management of land, to amend and consolidate the law relating to tenure, ownership and management of land, and to provide for other related or incidental matters.” The constitution provided for the different tenures of land and one wonders what other tenure the Act was trying to provide for since ownership of land was governed by the Registration of Titles Act. According to Nawangwe and others the preamble was a far cry from the intentions of the constitution.¹¹⁶

Under the Torrens system as applied for land registration in Uganda, the title deed was supreme and would not be cancelled except under cases of fraud. But the Act created tenancy by occupancy under **Section 32**, this was not called for because the constitution simply directed parliament to create registrable interests not developing tenancies. This was because under the law, tenancy had not been reflected as an interest in land but simply created occupancy rights or user rights.

According to Nawangwe and others, the Act also introduced the principle of acquisition of land by prescription a principle which applied in Britain where ownership was evidenced by possession not in countries that followed the Australian Torrens system based on registration and certificate of title.¹¹⁷

4.2 The Abuse of the Rights of Lawful and Bonafide Occupants on Mailo Land

Passing of the impasse property was one way through which the rights of occupants were abused. Land was sold along with its occupants at the time when registered owner wished to pass his property, which indeed was in most cases done without notifying the occupants despite the provisions of the law to accord the occupants with the first purchasing rights, prior to the consideration of any other potential buyer. According to Bikaako and Ssenkumba¹¹⁸ it was noted that property purchase in Uganda had caused considerable misery to a number of buyers. Some had found that the property purchased had a squatter who could not be evicted because he was

¹¹⁶ Nawangwe et al (2002) Land Tenure and Administration Issues in Kampala City and their Effects on Urban Development. Research Report, Makerere University and the Swedish International Development Cooperation Agency (SIDA)

¹¹⁷ Nawangwe et al (2002) Land Tenure and Administration Issues in Kampala City and their Effects on Urban Development. Research Report, Makerere University and the Swedish International Development Cooperation Agency (SIDA)

¹¹⁸ Winfred Bikaako and Ssenkumba Gender, Land and Rights: Contemporary Debates in Law Policy and Practice in Uganda(2008)

protected by the land Act. On other occasions the land had been pledged as collateral without affecting bank payment and thus had been caveat as land would have been mortgaged to a financial institution until the institution had been paid off.¹¹⁹

This deprived the occupants of any further developments especially those who would wish to use the land as pledge for loan. Moreover the impatient people and those that were not law abiders undertook to evict them. This according to the respondents was mainly attributed to the corrupt tendencies of the rich who buy their way through with the court to pass judgment in favor of the rich to evict the poor occupants where through court the structures and developments of the poor were demolished within a split second. This reflected the fact that confidence and trust had been lost for Court in issues regarding to land transactions and occupancy, much as court would have worked as an intervener,

Further abuses were due to the complications that arose by virtue of the complex land tenure system in Uganda. According to Schwartz¹²⁰ By law non-citizens and foreign owned companies could not acquire an interest greater than leasehold. The leases were normally 49 years and it was common that more than three people were found to be legally enjoying different interest on the same piece of land. A Mailo landowner with 1 square mile piece of land would grant a 10-year lease on the land to the farmer. The farmer would obtain a land title in respect to the lease. Both these parties were free to sale their interest on the land and there would be nothing illegal about their transaction but they would have different implications on the purchaser. However, the person acquiring the lease would not be aware that there were occupants on the land that hindered his plan. With such arrangements and disappointments, there were so many unlawful evictions.

According to study respondents, the Kibanja holders found difficulties in negotiating with occupants, thus as a Kibanja holder turned to the Mailo owners to try to stop the evictions, but in most cases these disappeared from the scenario leaving the occupants to be evicted as the buyer

¹¹⁹ Payne, Geoffrey, Durand-Lasserve, Alain and Rakodi, Carole, May 2007, Social and Economic Impacts of Land Titling Programs in Urban and Peri-Urban Areas: A Review of the Literature, presented at the World Bank Urban Research Symposium.

¹²⁰ Schwartz Julia, what should be done to enhance tenure security in Uganda and further development: the land Amendment Bill (2007), its shortcomings and alternative policy suggestion, 2008

was made to believe that they were illegal occupants, moreover with the help of police protection to demolish houses.

This implied that land purchase in Uganda had become a serious complication to the purchaser and to the occupants, because the Mailo owners of land, upon selling pulled out and left the matter of negotiation between two strangers, the purchaser and the occupants.

Thus according to Bikaako and Ssenkumba¹²¹ costs involved were another particular cause of abuse and violation of the rights of occupants. This was because the actual purchase price was negotiated between vendor and purchaser and this would depend on the negotiating ability between contracting parties. The law did not govern the transaction costs and besides most occupants being poor could not afford to hire a valued person to evaluate their property. Thus when owner of the land offered it for sale, in most cases the property passed as per the development of the occupants was given little regard, thus compensation given was not equivalent. Whereas under other circumstances this was even non existent, as per the study respondents who held that you were either given an oral reminder to vacate the land within a given number of days or you insist on being served with a written document and you were instead forcefully evicted.

According to the respondents it was emphasized that the most confusing aspect was that the evictions were in all cases carried out by the knowledge and protection of the police. This therefore surprisingly appeared that, crime was supported by government, police being an agent of government.

¹²¹ Winfred Bikaako and Ssenkumba Gender, Land and Rights: Contemporary Debates in Law Policy and Practice in Uganda(2008)

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

The chapter presented the summary conclusions and recommendations of the study carried on the efficacy of the Domestic Violence Act in securing Justice to the victims of violence.

5.1 Conclusion

The study concluded that rights of lawful and bonafide occupants were being abused because parliament undertook to perform a duty of which it was not obliged by the Constitution. It surpassed the objective intended by the Constitution and instead led to more misunderstandings on the part of the landowners, who then were suspicious of land grabbing, thus sell land to avoid losing it. This was seen where occupants and tenants were evicted by new owners who so would not wish to follow the law that had brought confusion between occupancy and ownership.

This was because parliament focused on promoting and protecting interests of occupants, instead of focusing on identification of issues surrounding Mailo land to find answers on peoples way of life. Thus laws carried little substance and thus registered owners evaded them to dispose of the land that they thought would be grabbed without their consent or preparations, thus the earlier the better. Because of this situation there was a great deal of informal purchasing and selling of land and land rights, especially in Mailo areas. Land speculation was being driven by the lack of alternative investment opportunities.

5.2 Recommendations

Drawing on the findings in respect to the findings and conclusion drawn for this study, there was need to adopt the following;

5.2.1 Set Realistic Time Limits

In case of the board meetings, and given the nature of their tasks, it was recommended that the law sets more realistic timelines to enhance the ability of the district land boards to effectively implement their mandate and to reduce the incompetence that may come up.

5.2.2 Drawing Legal Supportive Legal Measures for Borrowing

One way to overcome the resource impasse of the poor occupants to enhance development would be to create legal advancements that granted them access to borrow reasonable money to invest on land.

5.2.3 Seeking Legal Advice

There was need for purchasers before making any purchase of land, to seek legal advice. This would help to reduce on the violation of the rights of lawful and bonafide occupants because their status was identified before the purchase was effected.

5.2.4 Sensitizing Community on their Land Rights

A more detailed understanding of land rights and how claims to land were actually made could make interventions far more responsive to the actual problems that people face. It was a regular practice that people (occupants) continued to lose their land rights in the same usual ways and local authorities illegally seizing land. Thus if people were sensitized more on their land rights, they find better defenses in the law, than appealing to individual members who connive to grab land instead.

5.2.5 Establishing the Degree of Subsidiarity Granted

There was need to determine the degree of Subsidiarity permitted in land management despite the provisions granted by customary land management policies. Policy needed to emphasize stipulation of mechanisms and determining the degree to which these institutions would be empowered to participate in land management.

5.3.6 Recognizing the legitimacy and dynamism of derived rights

There was need for review of policy to recognize the dynamics of customary land tenure and its capacity to adapt to changing circumstances. Other than determining policies that override the interests of the customs of the people much as the constitution was still representative of customary ideas and customary law. This would not be premised on establishing legal rights of

ownership, but the processes whereby rights and the assignment of these rights were recognized and guaranteed with clear procedures laid. This required the adoption of measures which enabled the achievement of greater security to the holders of the derived rights, without making registration and the attainment of a certificate the only procedure for achieving recognition of rights on land.

5.2.7 Need to Regulate Degree of Autonomy to Generate Acceptance

.There was need to determine the degree of autonomy allowed to traditional systems of managing customary land as well as to regulate the rights of ownership provided to the occupants. This was subject to **Section 28** on access rights of the vulnerable to be protected. Recourse was sought to the law where it was applicable despite the customary nature of the land. The policy should state the level of autonomy that those traditional institutions were granted in the administration of customary land and in dispute resolution.

5.2.8 Landlords would be sensitized on Accepting Derived Rights

Derived rights ensured access to land for those who would otherwise be regarded landless. Those rights, therefore, needed to be recognized as normal elements which existed in all land tenure systems and a positive factor in agricultural production, thus, reducing poverty among the landless and facilitating the land market.

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