

**A CRITIQUE OF THE RELATIONSHIP BETWEEN KIBANJA HOLDER (TENANCY  
BY OCCUPANCY) AND REGISTERED PROPRIETOR UNDER THE  
LAND ACT OF 1998 CAP 277.**

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### DECLARATION

I, KIZITO JOHNMIKE, declare that the work presented in this dissertation is original. It has not been presented to any other University or Institution. Where the work of other people has been used, references have been provided. It is in this regard that I declare this work as originally mine, and it is hereby presented in fulfillment of the requirements for the award of the LLB Degree at Kampala International University.

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“the relationship between the registered proprietor and Kibanja holder( tenancy by occupancy)  
under the land Act cap 227 of 1998. Submitted to Kampala international university by:

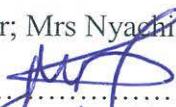
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## **DEDICATION**

This dissertation is dedicated to my father Mr and Mrs. Kizito for the very important role you played during my upbringing. My sister Mrs Damalie peace Jingo who has always been there for me and to all I shall remain indebted course mates for all the sacrifice, encouragement and support throughout my life and career. May God richly bless you all.

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## **ABSTRACT**

The study is about the relationship between kibanja holder (tenancy by occupancy) and registered proprietor under the land act 1998 cap 227 and establishes the rights of lawful and bonafide occupants on Mailo land and how such rights are violated, with specific aims of examining; the rights of lawful and bonafide occupants on Mailo land; the abuse of the rights on bonafide occupancy 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, right of access to information on sale of land, right among others however these rights have been abused when through encumbrances put on the land, they cannot use it to secure loans, evictions without compensation moreover their purchase right is ignored,. On the other hand much as this is the case, the law has managed to grant access rights to occupancy much as this remains controversial with the interests of the land owners. The study concludes that rights of a lawful and bonafide occupant are still yet to be abused if parliament does not undertake to balance the interests of the occupants with that of the owners of land. While making any other attempts to review the entrepreneurship of mailo land, then priority needs to be given the issues that surround mailo land.

The study recommends that there is need to; drawing legal supportive measures to enhance borrowing; seeking legal advice; sensitizing community on their land rights; establishing the degree of subsidiary granted; recognizing the legitimacy and dynamism of derived rights; need to regulate degree of autonomy to generate acceptance and sensitizing landlords on derived rights.

## **LIST OF ACRONYMS**

MPs: Members of Parliament

NRM: National Resistance Movement

RTA: Registration of Title Act

## TABLE OF CASES

Abdul Kharim vs L.T. Kabarebe High court Appeal No 33/91.

City council of Kampala verses Mukiibi (1967) E.A 368.

Gann verses free fisher of hiestable 11 ER 1305.

Getobed verses Primore (1970) 115 sol jo 78.

Lukwago verses Bawa sign (1971) 1QB 528 at 553.

Tehidy minerals ltd verses Norman (1933) 5 U.L.R, 97

Venansio Bamweyaka and 5 others verses Kampala District land Board and George Mitala. Civil  
Appeal no. 20<sup>th</sup> of 2002

Wamala verses Musoke (1920-1929) 3.L.R120



## **LIST OF STATUTES**

The Constitution of the Republic of Uganda, 1995

Land Act cap 227

Registration of titles Act cap 230

Forest Act cap 146.

National Environment Act cap 153

Land Acquisition Act 226

Busuulu and Evunju laws of 1928

Land Reform Decree 3 of 1928

## **CHAPTER ONE**

### **1.1 BACKGROUND OF THE STUDY**

Land is the base on which all other activities are carried out.

According to Black's law dictionary, the word "land" includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man as buildings and fences. Mott -v- Palmer<sup>1</sup>

Therefore in order to foster development in Uganda such as attaining food security and farm land, acquiring proper infrastructure, buildings and factories e.t.c, a favorable land tenure system has to be in place

### **1.2 INTERNATIONAL PERSPECTIVE.**

At the international level the history of English land law can be traced into Roman times and through the Dark Ages under Saxon monarchs where, as for most of human history, land was the dominant source of social wealth. English land law transformed from the industrial revolution and over the 19th century, as the political power of the landed aristocracy diminished, and modern legislation increasingly made land a social form of wealth, subject to extensive social regulation, such as for housing, national parks, and agriculture. Land, sometimes referred to as dry land, is the solid surface of the Earth that is not permanently covered by water.<sup>2</sup>The vast majority of human activity throughout history has occurred in land areas that support agriculture, habitat, and various natural resources. Some life forms (including terrestrial plants and terrestrial animals) have developed from predecessor species that lived in bodies of water Land area (sq. km)

Land area is a country's total area, excluding area under inland water bodies, national claims to continental shelf, and exclusive economic zones. In most cases the definition of inland water bodies includes major rivers and lakes. Earth is the third planet from the Sun, the densest planet in the Solar System, the largest of the Solar System's four terrestrial planets, and the only

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<sup>1</sup> 1 N.Y. 572.

<sup>2</sup> En. Wikipedia.org land site note 1

astronomical object known to harbor and inhabit life. The area size of the world is as expressed below.

Area: 196.9 million mi<sup>2</sup>

Distance from Sun: 92.96 million mi

Radius: 3,959 mi

Mass:  $5.972 \times 10^{24}$  kg

Surface area: 196.9 million.

The continents are the great land masses of the earth. There are seven continents on Earth now: Africa, Antarctica, Asia, Australia, Europe, North America, and South America.

Continent	Area in Square Miles (Square Km)	Percent of Total Land Area on Earth
The World	57,308,738 Sq. Miles (148,429,000 Sq. Km)	100%
Asia (including the Middle East)	17,212,000 Sq. Miles (44,579,000 Sq. Km)	30.0%
Africa	11,608,000 Sq. Miles (30,065,000 Sq. Km)	20.3%
North America	9,365,000 Sq. Miles (24,256,000 Sq. Km)	16.3%
South America	6,880,000 Sq. Miles (17,819,000 Sq. Km)	12.0%
Antarctica	5,100,000 Sq. Miles (13,209,000 Sq. Km)	8.9%
Europe	3,837,000 Sq. Miles (9,938,000 Sq. Km)	6.7%
Australia (plus Oceania)	2,968,000 Sq. Miles (7,687,000 Sq. Km)	5.2%

Uganda is located in eastern Africa, west of Kenya, south of South Sudan, east of the Democratic Republic of the Congo, and north of Rwanda and Tanzania. It is in the heart of the Great Lakes region, and is surrounded by three of them, Lake Edward, Lake Albert, and Lake Victoria. While much of its border is lakeshore, Uganda is landlocked with no access to the sea.

The regions of Uganda are known as Central, Western, Eastern, and Northern. These four regions are in turn divided into districts. There were 56 districts in 2002, which expanded into 111 districts plus one city (Kampala) by 2010<sup>3</sup>From Wikipedia, the free encyclopedia

Uganda is divided into 111 districts and one city (the capital city of Kampala), which are grouped into four administrative regions. Most districts are named after their main commercial and administrative towns, known as 'chief towns'. Since 2005, the Ugandan government has been in the process of dividing districts into smaller units, with the most recent change in August 2010. This decentralization is intended to prevent resources from being distributed primarily to chief towns and leaving the remainder of each district neglected.<sup>3</sup>

Each district is further divided into counties and municipalities, and each county is further divided into sub-counties. The head elected official in a district is the chairperson of the Local Council five (usually written with a Roman numeral V).

The country is mostly plateau with a rim of mountains.<sup>[4]</sup>

Uganda's 1995 Constitution enforces equality between men and women, including the acquisition and ownership of land. However, research from Women's Land Link Africa reveals that women remain excluded from land ownership due to customs and deeply ingrained cultural habits. Even when women save up enough money to purchase land, the land is signed in their husband's name, while women sign as the witness. Inheritance practices are a particular obstacle which reduces women empowerment, as well. Land is passed down through male lineage which reinforces women's exclusion from land ownership. Another detriment to equality, pointed out by Women's Land Link Africa, is that women lack sufficient knowledge about the rights they

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<sup>3</sup> Wiki.districts of Uganda cite note

<sup>4</sup> Wiki.geography of Uganda cite note

have under the law to own land. Rural, illiterate women do not even have access to the new constitution which guarantees them land rights.

Land means more than real estate. It isn't just a slice of earth, which can be farmed, inherited, built on, sold or bought. In most of Uganda, land equates to history, heritage, identity, belonging, rights and relationships. It creates social security and helps define social, cultural, religious values and beliefs systems. However, when these collide with the idea of commoditizing land, the people who live on and work the land suffer. 01 Oct 2015

### **Improving Land Management for Economic Growth in Uganda**

<sup>5</sup>The report states that the Ugandan government can promote more efficient land use to support the healthy transformation of the agricultural sector and a shift towards higher value economic activities located in urban areas by taking the following four actions:

- Strengthening institutions for land administration management
- Accelerating the process of registration of land, including that owned communally, by religious and cultural institutions, and by government
- Redesigning the Land Fund to enhance its efficiency and equity in supporting resolution of overlapping rights

Reviewing and prioritizing policy commitments to identify and close critical gaps such as in restrictions on rental markets, disincentives such as taxation for speculative holding of land, urban land use, and expropriation and compensation to promote equity and fairness in land transactions

Land in Uganda is owned in accordance with the following land tenure systems

a) Free hold land

b) Mailo land

c) Lease hold land

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<sup>5</sup> Wiki. World bank report on 01 oct 2015 land management for economic growth in Uganda

d) Customary land tenure is applicable to a specific area of land and governed by customary laws for instance in the north and in Buganda, where it is mainly found in the slum areas owned under "Kabaka"s land or "Kibanja" by low income earners. (My opinion with a disclaimer, is that is why these areas are underdeveloped) e.t.c

a) Free hold involves holding of registered land in perpetuity or less than perpetuity and enables the holder to exercise full powers of ownership.[

b) Mailo land involves the holding of land in perpetuity. It also permits the separation of ownership of the land from the ownership of developments on land made by a lawful or bonafide occupants.

c) Lease hold tenure is a form of tenure under which one person, namely the landlord or lessor, grants or is deemed to grant another person namely a lessor exclusive possession of the land for a specific period of time e.g 5, 45 & 99 years. The tenure is usually granted for a rent or a premium or both or for free.

Note: The landlord also holds the reversionary interest even if there are developments on the land.

There different kinds people who own land in different aspects as seen below

#### Family land

Defined under,<sup>6</sup>Family land means land on which is situated the ordinary residence of the family and from which the family derives sustenance and which the family freely and voluntarily agrees shall be treated as above and which is treated as family land in accordance with the culture, customs, traditions or religion of the family. Restrictions on the transfer of family land. A spouse or any or person shall not sell, exchange or transfer, pledge, mortgage, give away intervivos or enter into any other transaction in respect of family land except with prior consent of his spouse.

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<sup>6</sup> Section.38 of the land (amendment ) act 2004

N.B: A spouse is a wife/husband of a legally subsisting marriage. A transaction entered into without consent of the spouse is void ab initio or can be set aside.

### **Non- citizens**

A non-citizen can only hold land under leasehold tenure of not more than 99yrs..

N.B: Other tenures are not applicable to non-citizens.

### **Mortgage:**

A mortgage entered into without the consent of the other spouse is void. A spouse can lodge/register a caveat on the family land if he is not sure of his/her position to protect his/her interest in the land.

N.B: The caveat has to be registered before the mortgage.

### **The origins of land in Buganda**

The land laws have their origins from Buganda agreement where the British negotiated an agreement with the sub-imperialist Buganda on land tenure and fiscal support for the colonial administration. Through the 1900 Buganda agreement the Kabakaship was transformed into a constitutional monarchy and the Bakungu chiefs gained control over half of the land in Buganda. By Article 15 to 18 of the agreement Kabaka and other notables.

In the protectorate for instance, one thousand chiefs and private notables each received 8 square miles as private mailo<sup>7</sup>. Hence the ignoring of the peasants whose tenancy rights were recognized under the customary system of land tenure system. These people who had been occupying the land in different capacities, as (bibanja holders) tenants by occupancy at king's pleasure thus. They therefore could no longer hold their land as they traditionally did but under the dictates of the mailo system hence other persons had to settle by on terms as agreed by landlord. The tenants by occupancy were not recognised until they rioted in 1927<sup>8</sup>.

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<sup>7</sup> Mukwaya land tenure in Buganda published in 1953 pg 15

<sup>8</sup> Ibid.pg20

The Busuulu and Envujjo law 1928, hence showed the relationship between the mailo holder (registered proprietor) and the (Kibanja holder) tenants by occupancy such as provided as security, on land as set and limited on the fees which the peasants were required to pay to the mailo owner. Under this law, the rates were standardized and restricted and the peasants could not be forced off. Their Kibanja without an order of court hence which had jurisdiction<sup>9</sup>.

Buganda is also one of the regions in Uganda it is called the "central region". It lies astride the equator, on the North West, of Lake Victoria. The boundaries of Buganda region include Busoga in the north east, Bunyoro. In the west and Toro in the south, west, the total area excluding open water is given as 17292 square kilometers<sup>10</sup>

**In the pre-colonial Uganda**, there were three broad customary land tenure systems. There were communal or tribal tenure, clan tenure and nomadic tenure, clan tenure and nomadic tenure systems. Ownership of land was vested in the ruler as owner or trustee of the land for members of the tribe hence.<sup>11</sup>

The 1995 constitution of Uganda stipulates in its first schedule that Buganda has eight districts<sup>12</sup> however, Kampala is currently not recognized. Mailo land entails holding registered land in perpetuity.<sup>13</sup>

**Therefore in the post colonialism**, when Uganda became an independent state, customary tenants had no legal protection against eviction until the **under the 1975 when then President Idi Amin**<sup>14</sup>. The advent of the land reform decree in by Idi Amin 1975 led to the repeal of section 24 (2) of the land Act, (however, this provision is presently reflected in the land Act) Under section 3 (3). This the decree under section 1 (1) gave the commission had the sole power to manage and allocate land on behalf of the state, still mailo, native free hold and all other freeholds were abolished and automatically converted into 99 years leaseholds on for

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<sup>9</sup> Busuulu and Envunju laws of 1928, clause 11

<sup>10</sup> Mukwaya AB; Land tenure in Buganda Eagles press 1953, pg 2

<sup>11</sup> Obol.Ochola. customary land law and the economic development in Uganda supra pp 78-79

<sup>12</sup> Constitution of the Republic of Uganda 1995, schedule 1, pg 172-3

<sup>13</sup> Section 3 land Act cap 227

<sup>14</sup> Section 2 of the land reform decree

individuals holders and 99 years lease holds for public provides<sup>15</sup>. Where he vested all land of Uganda to be public land. Centrally under the Uganda land commission.

**Thus the enactment of the 1995 constitution<sup>16</sup>**, which provides that all Ugandan citizens owning tenure public land under customary tenure have a right to acquire a certificate of ownership of their land and convert their title into freehold in a manner prescribed by parliament more so the constitution gave lawful and bonafide” occupants of mailo land.

The 1995 Uganda constitution prescribes the underlying land law and tenure policy of the country. The constitution declares that land in Uganda is vested in the citizens of Uganda<sup>17</sup>. The constitution reinstates mailo and freehold tenures, which were abolished by the land reform Decree.

<sup>18</sup>The constitution of Uganda 1995 which was made by the National Resistance Movement which provides that, all Ugandan citizens owning former public land under customary tenure have a right to acquire a certificate of ownership of their land and convert their title to freehold in a manner prescribed by the parliament.

The constitution also gave ‘lawful’ and “bonafide” occupants to hold a mailo land, freehold and lease hold which are against eviction until parliament enacted an appropriate law to regulate their relationship with the registered owners of such land parliament was required to enact the appropriate legislation within a period of two years of its first session. The legislative provisions are contained in the land Act, 1998, hence still improving it by making land Act amendments, such as the 2010 amendment to enhance the security of occupancy of lawful and bonafide occupants on registered land Which is In accordance with Article 237<sup>19</sup> which stipulate that all land in Uganda belongs to the citizens of Uganda and shall vest in them with the land tenure system provided.

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<sup>15</sup> Section 21 of the land reform decree

<sup>16</sup> Article 237(1) of 1995 Uganda constitution

<sup>17</sup> Article 237 of the 1995 constitution of uganda

<sup>18</sup> Article 237(4) of the 1995 constitution of Uganda

<sup>19</sup> Of the 1995 Constitution Uganda as amended

### **1.3 Statement of the problem**

The study is concerned about the relationship of the (Kibanja holder) tenancy by occupancy and the registered proprietor under the land Act of 1998. The land Act does not stipulate the extent of the rights, obligations and the duties of the Kibanja holder still which does not stipulate the rights obligations duties of the registered proprietor under the Mailo tenure as a form of land ownership in Uganda<sup>20</sup>.

Therefore the land Act,<sup>21</sup> will lie idle such that most landlords will never accept to give consent for the issuing of the certificate of occupancy to the tenant. The land Act Cap 227 still created a problem of dual permanent land ownership<sup>22</sup>.

The land Act further <sup>23</sup>provides for the payments of shillings 1,000/= at the landlords without respect to the size on location of the landlord. The land lord cannot allow a tenant to occupy his land for a fee of shillings 1000/=. Therefore the legislation failed to clearly stipulate the rights of tenants and land lords on the said land.

There is also a problem of land sharing between the landlords and the tenants. There is still a problem of the circumstances in which the Kibanja holder may lose interests as per section 31 (1) of the land act.

### **1.4 Significance of the study**

The study deals with the most sensitive issues in Buganda region. The topic provides a framework for the management of land in the mailo land tenure system in Buganda. An the study is beneficial to both registered mailo landowners and Bibanja holders(tenancy by occupancy) especially in discussion of relationship between the (Kibanja holder) tenancy by occupancy and registered proprietor.

### **1.5 Objectives**

- i) To examine the relationship between the (Kibanja holder) tenancy by occupancy and registered proprietor.

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<sup>20</sup> Section 29 of the land Act cap 227

<sup>21</sup> Section 30 of the land Act cap 227

<sup>22</sup> Section 30(1) of the land Act cap 227

<sup>23</sup> Section 33 of the land Act cap 227

- ii) To examine the legal and institutional frame work governing the relationship between land lords and tenants by occupancy.
- iii) To examine, the rights and duties of the tenancy by occupancy, registered proprietor.
- iv) To discuss the efficacy of the law on the relationship between the landlord and the tenants.
- v) To discuss whether the enactment of the land Act 1998 has brought social unrest on developments.

### **1.6 RESEARCH QUESTION**

- i) What is the relationship between the tenancy by occupancy and registered proprietor?
- ii) What is the legal and institutional frame work governing the relationship between the land lords and tenancy by occupancy?
- iii) How are the rights and duties of tenancy by occupancy and registered proprietor exercised?
- iv) What is the efficacy of the law or the relationship between the landlords and the tenants?
- v) How has the enactment of the land Act 1998 brought about social unrest or developments?

### **1.7 Scope of the study**

The study covers only the Buganda region, which is the central region of Uganda. The researcher decided to start the study with Buganda because the land Act 1998 caused a lot of changes in mailo land holding in Buganda.

In Buganda's land history, the landlords had absolute powers over their land, which characterized evictions of tenants. However in other areas of Uganda, land was mostly held on communal basis.

The study shall involve an analysis of the land Act 1998, its nature, application, and any changes that have been made to it. The response of those who are affected by the applications of this law shall be taken into account.

The problems involved in the relationship between landlords and tenants shall be analyzed by studying the reasons for the same and other related aspects as to different people's view and requests on the matter.

Finally, viable solutions to the problems at hand shall be identified and these shall be based on the research findings.

It is important to note that the treatment of this study is not entirely, exhaustive, as the research involved would be voluminous and time does not allow for it.

## **1.8 METHODOLOGY**

The following methods of research and data collection were employed (i) Library and desk research: information was obtained from Articles, journals and textbooks. The libraries visited included: Uganda Christian University, Law Development Centre, Makerere University and Kampala City Council (KCC) main library.

(ii) Interviews: These were face-to-face conversations seeking information from various respondents, like the Land tribunal Chairpersons and other officials

(iii) Participatory observation: - the researcher attended land tribunal court proceedings to get a firsthand experience of some of the complaints that have arisen as a direct result of the impact of the Land Act 1998 on the Mailo land tenure system in B

## CHAPTER TWO

### 2.0 LITERATURE REVIEW

Literature review covers what previous authors and scholars have to say about the subject in order to gain a handle on the study and thus serves as a 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 is made on the: the relationship the tenancy by occupancy and registered proprietor under the land act. A mailo landowner has considerable proprietary rights in the land, which are limited only by the provisions of the Land Act 1998.

Mailo tenure is part of the recognized systems of land in Uganda. Uganda's <sup>24</sup> recognizes four land holdings tenure systems that is 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. Thus it is "the holding of registered land in perpetuity and having roots in the allotment of land pursuant to the 1900 Uganda agreement and said subject to statutory qualifications."<sup>25</sup>

Henry West in his book "Land policy in Uganda" gives a vivid description of this type of tenure and states that:

*"The title is vested in the mailo interest holder. He is free to sell his interest or give it away or pass it to his heirs on death, only he may grant or refuse a tenancy, but once the tenancy has been granted, owners power to eviction is severely circumscribed and his own right to resume the land for his own use is similarly limited. The tenant has the right to remain on that land so long as he cultivates it properly. The rent he pays is controlled by statute at a very low level and is his protection from arbitrary eviction. He holds only user rights, which may not be transferred or sublet, but it is inheritable and this gives him virtual permanence of occupation <sup>26</sup>."*

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<sup>24</sup> constitution of the republic of Uganda Article 237(3)

<sup>25</sup> The land Act cap 227( Amended 2010 section 3(4)

<sup>26</sup> As quoted in the Source Book of Uganda's Land Law, by John Mugambwa. Fountain Publishers 2002 Pg

Tenants on the mailo land enjoy a security of tenure, this has spurred development as a farmer, an investor and other moneyed people feel extremely secure to invest on the land whose title is in their hands, individually.

**Obola Ochola** in the thesis 'customary land law and economic development' pointed out that some of the indigenous progressive farmers feel very strongly about land title, and security of tenure as a necessary condition to their agricultural activities<sup>27</sup>.

**Obola- Ochola** also emphasised that absence of land tenure security may hinder a person from developing the land.

He suggested that a farmer after acquisition of a piece of land should be secure and free from molestation or eviction from the farmland.

According to the policy prevailing by then, the land belonged to everyone; **Ochola** submitted that ownership of land should depend on effective use.

However, effective use is not enough to be granted land title in Buganda. It is effective registration that counts; therefore his work did not describe well the mailo land tenure system in Buganda.

**P.M Walubiri**<sup>28</sup> Discusses the concept of 'lawful' and 'bonafide' occupants on mailo, freehold and leasehold land.

He argues that the word 'bonafide' and 'lawful' occupants are confusing and rather complex to comprehend as a basis or test in determining to whom the rights should be guaranteed.

He went ahead to analyse the concept in light of the then proposed land bill focusing on property rights.

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<sup>27</sup> James Obola Ochola, Ownership of Land in East Africa Customary Tenure: Land Law Reform, Milton Obote Foundation 1971, Chapter 1, Pg 21

<sup>28</sup> Walubiri: The Land Tenure and Control of the Land Bill, a paper presented at Colline Hotel on 21<sup>st</sup>-22 September 1994.

He called it “broad day light robbery” committed against landlords of their land. He argues that every person is entitled to the right to own property, and nobody should take it away from them. Therefore, **Walubiri** never wished the bonafide occupants to be given land rights.

However he never focused on instrumentals of a good tenure system as exhibited by the **Land Act 1998**, which does not alienate people from land. He did not also address his mind to the concept of security of tenure broadly and its influence on economic development.

**P.M.Walubiri**<sup>29</sup> highlights the importance of property rights and land rights. In particular he lays down the features and realities prevalent on the land holding system in Uganda and deals with the historical causes of such features on all tenures.

In addition he treats the provisional implications of the post- independence legislation to land issues.

He finalises with a discussion of proposed solutions to a general treatment on land rights and various tenure systems. Even so, while treating provisions and implications of the various legal instruments after independence,

He does not discuss them with particular reference to economic development. Above all,

He writes in the pre-1995 constitutional era and though some of his views still stand, the changes brought about by the 1995 Constitution call for further treatment on the subject of mailo land tenure system and land rights.

**J.Ssenkumba**<sup>30</sup>, discusses the mode of access to land and the tights of people in land whether such rights are reflections of security or insecurity and thus profound economic development.

He examined the trends of land use and investment in the sampled area and why such trends were taken.

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<sup>29</sup> “ Walubiri P.M: Land and Property Rights in Founding the Constitution and Uganda. Essays and Materials. By Okumu Wengi, Editor. Law Watch Kampala 1994, Pg 167-168

<sup>30</sup> Ssenkumba John: The Land Question and The Agrarian Crisis, The Case Study of Kalangala District, CGBK Publications 1993, Pg 7

He also studied the effects of state and policies on tenure and productivity and how the relationship between tenure and occupants determine the generation and flow of surplus.

He is therefore helpful on the issue of land and economic development. However, he is more concerned with agricultural issues particularly and does not address the concept of economic development vis — a vis land. His study was based on the small and sparsely populated district of Kalangala and therefore it is not representative enough of the entire Uganda.

**Elizabeth.S.Trout**<sup>31</sup> Discusses the right of access to agricultural land by emphasising the land markets especially in rural setting.

She also asserts that land tenure rules influence the operation of land markets, which in turn is a critical determinant of who obtains and holds land, the level of investment in agriculture and the degree of ownership. Land market is an import determinant of agricultural land distribution, use and growth rate in agricultural overall performance in the economy.

**Trout** has great interest in the aspect of individualisation of land rights and function markets as pre- conditions to agriculture development, which is actually her basic concern.

However, she writes prior to the enactment of the 1995 constitution and at that time the confusion caused by the Land Reform Decree was still present in Uganda.

Therefore she was not able to analyse the laws concerning land rights as they are today.

**“Elit Jacoby**<sup>32</sup> states that;

*“The struggle for Land and for the right to use land, the vicissitude of man ‘s relation to land are ever recurring features in the history of mankind”.*

He discusses, the pattern of land and ownership reflecting on the actual power structure.

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<sup>31</sup> Elizabeth Trout: Rural African Land Market and Access to Agricultural Land. The Central Region of Uganda. University of Wisconsin Maidison 1994, Pg 132

<sup>32</sup> Elit Jacoby: Man and Land Fundamental Issues on Development, Adro Doustch Publisher Ltd 1971, Pg 4

The fight for land between clans, tribes and owners, turned the life of the people and the defeated to tenants and serfs.

**Jacoby** further submits that, recorded history reveals current attempts to adjust land by distribution to the landless, is at least a slogan 30 years old. This was among the aims as to why the Land Act 1998 was enacted.

The state of Uganda currently is coming up with laws that are aimed at distribution of land to the landless.

Therefore **Jacoby** was good at prophesying the events, as they would unfold in Buganda.

**Plutarch**<sup>33</sup> state:

*“The free peasant disappeared in (he second century BC.. the Gracchi... tried to restore the old Order to society based on more equal distribution of land”*

His research concerns all developing countries, from the Far East to Africa and Latin America. Although he advanced a good argument for security of land tenure to the actual tiller on the land, the circumstance and conditions prevailing in these countries are not the same as those in Uganda.

**Mugabwa**<sup>34</sup> states that, mailo tenure entails holding requisitioned land in perpetuity, subject to the customary and statutory rights of ‘lawful’ and ‘bonafide’ occupants of the land.

The author argues that mailo land may also be subject to condition restrictions and limitation, which may affect its incidents of tenure.

This is an indication that the author acknowledges the significant changes caused by the Land Act 1998. However his work has become very inadequate in the area of economic development, he does not address the area of utilization of land for economic development yet it is one of the most important areas in Uganda.

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<sup>33</sup> Ibid, Pg6

<sup>34</sup> John T. Mugambwa: Principles of Land Law in Uganda, Fountain Publishers 2002, Pg 12

**Margret Rugadya**<sup>35</sup> Discusses the security of tenure to “lawful” and “bonafide” occupants as an incentive to invest on the land, and as a redress to historical imbalances, injustices in the ownership and control of land.

She does not substantiate as to whom, how and when to invest. While she cherished the security of tenure, she did not look at the side of a poor landlord in Buganda and how he is meant to survive.

**Morris and Read**<sup>36</sup>, discuss the mode of granting a certificate of title over land as an indication of ownership of property in the land, and whoever settles on that land is supposed to pay ground rent.

This argument can never be sustained today due to extensive legal restrictions on the rights of the landowner;

There are occupants on land without land titles and yet having interest in that land. In addition the authors published their work prior to the present economic condition in Buganda today. Therefore it has not stood the test of time.

**Mukwaya**<sup>37</sup> examines the powers of the Kabaka over land in Buganda, with specific emphasis on its allotment to individual owners.

He further examines the powers and user rights of the ‘Bibanja’ holders. He advances a good argument on the need for security of tenure to Bibanja holders, which is one of the cornerstones for development in Uganda.

However his work does not contain recent developments in land law brought about by the 1998 Land Act.

From the foregoing literature review, there is a clear vacuum in the area of examining the relationship between tenancy by occupancy and registered proprietor under the Land Act 1998

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<sup>35</sup> Margret Rugadya: Land Use and Villagisation Workshop, Hotel De Mile Coillines, Kigali, 20th2 1<sup>st</sup> September 1999

<sup>36</sup> Morris and Read: Uganda, the Development of its Laws and Constitution, Vol. 13, Steven and Sons 1966 Pg 348-35 1

<sup>37</sup> Mukwaya A.B. Land Tenure in Buganda, Eagles-press 1953

on the mailo land tenure system in Buganda, and this research is an attempt to fill in the gaps in this area.

According to **muyomba Nicholas** the kibanja land holding as a form of customary tenancy will continue to evolve over the years. The challenge is ensuring this transformation favours the harmonious co-exist between the landlord and his/her tenant.

## **CHAPTER THREE**

### **THE LEGAL AND INSTITUTIONAL FRAMEWORK ON THE TENANCY BY OCCUPANCY AND REGISTERED PROPRIETOR**

#### **3.0 INTRODUCTION**

This chapter covers an overview of the available legislation, instruments and policies on lawful and bonafide occupants on mailo land to examine the applicability of the law.

#### **3.1 Legislation s governing the land tenure system in Uganda**

1902 Order in council provide for the reception clause which introduced the land act which is still in 1998 land Act (cap 227) was enacted with a key objective of individualization of land through certificates of occupation and registrable interest that can be bought and sold. Underlying this orthodoxy is the idea that identifiable land Eights provide for security of tenure, which in turn creates efficient land markets that enhance access to finance and credit markets.<sup>38</sup>

#### **3.2 The constitution of the Republic of Uganda (1995)**

In 1995, the Constitution created security of occupancy for lawful and bona fide occupants of land. The Land Act passed in 1998 defined the terms 'lawful occupant' and 'bona fide 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<sup>39</sup>.The Constitution<sup>40</sup> and the Land Act recognize 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

#### **3.3 THE REGISTRATION OF TITTLES ACT CAP 230**

The Registration of Titles Act Cap 230 governs Land acquisition and leasing of registered land. Regardless of the land tenure system, the seller or lessor of land must be in possession of a certificate of title. A certificate of title in the names of a party is conclusive proof of ownership of the land in question.

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<sup>39</sup> Peter Mulira (2008) Towards an Equitable Land Regime in Uganda, the Land Amendment Bill and Related Legislation I.

<sup>40</sup> The Constitution of the Republic of Uganda Article 234 (3)

However, the Land Act 1998 Cap 227, including the Land Regulations is the principal land tenure legislation in Uganda. The Act contains principles such as rights of “bonafide” and “lawful” occupants who are given security of occupancy on land and rights of children and spouses in cases where land has to be sold, leased, subleased, mortgaged or dealt with in other forms.

According to the Land Act; under <sup>41</sup>a Lawful occupant means a person occupying land by virtue of the repealed *Busuulu* and *Envujjo* Law 1928, Toro Landlord and Tenant Law, Ankole Landlord and Tenant Law and a person who entered the land with the consent of the registered owner, and includes a purchaser or a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.

Whereas a bona fide occupant means a person who, before the coming into force of the Constitution had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more or has been settled on land by Government or agent of Government, which may include a local authority.

Complications arise by virtue of the complex land tenure systems that exist in Uganda. It is not strange to find for example that three different entities legally enjoy different interest on the same Piece of land for example a Mailo landowner and a leaseholder say a farmer. The farmer will obtain a land Title in respect to the lease. To the common man there will be no difference between the Mailo owner’s Title and the leasehold Title. Both these parties are free to sell their interest in the land and there will be nothing illegal about their transaction although the transaction will have different implications on the purchaser. If a purchaser were to buy the mailo interest, it would mean that he becomes the owner of the land. He also becomes the landlord of the lessee but most important of all, unless he is in the know, he will not take possession of the land until the expiry of the lease granted on the land.

On the other hand, a customary tenant (commonly known as *Kibanja* holder) may occupy the land. The Lessee in the example above may not have been aware of the presence of a *Kibanja*

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<sup>41</sup> Land act section 29 cap 227 of 1998

holder. Since his lease is for a specified period of time e.g. 10 years, his immediate intention would be to occupy the land and commence farming. His immediate reaction is to try and evict the *Kibanja* holder from the land. This however it's not possible as the *Kibanja* holder is also protected by the law, so he may turn to the registered owner to try and take possession of the purchased land bearing in mind that the owner of land who wishes to sell the reversionary interest in the land shall, give the first option of buying that interest to the tenant by occupancy.

### **Land occupancy and land reforms**

Lawful and Bonafide Occupants shall enjoy security of tenure. This legal guarantee of continued occupancy rights for the tenants by the Land Act is aimed at enhancing productivity and sustainable livelihoods, and to reduce recurring instances of massive evictions in the country. Tenants may acquire certificates of occupancy on the land they occupy if they so wish. This is evidence of their ascertained rights. However, not having one does not mean, one loses the right to the tenancy. This certificate of occupancy can be mortgaged, pledged, transferred or passed on by will with the permission of the landowner. In granting permission, the landowner may impose conditions, which must not discourage the transaction from taking place.

Tenancies may be terminated by mutual agreement or by failure to pay ground rent for two (2) consecutive years which results into notice of one year to the tenant to show sufficient reason for not paying. If after one year of notice, the tenant is still unable to pay, the Land Tribunal will terminate the tenancy. Tenancies by occupancy, although viewed by some as detrimental to development because both the land owner and the tenant do not put the land to optimal productive use, this opinion is countered by that of ensuring security of tenure to the citizens of Uganda; which in turn is a production incentive.

### **3.4 Policy issues on lawful and bonafide occupancy**

a) *The extent to which security of occupancy for Bonafide occupants should be guaranteed.*

Whereas no problems arise relating to the lawful occupants, the Bonafide occupants create a set of problems that policy should sort out.

Where the owner of land has been absent not by choice, e.g. has been in prison or exile, must he forfeit his/her rights to land because of the existence of a Bonafide occupant?

Should the law be guaranteeing the Bonafide occupants the same rights as the lawful occupants?

b) *The rights of the tenant can almost be equated to those of the landowner*, thus creating a stalemate in the use of land. Banks may fear to take Mailo land for mortgaging because of tenant landlord concerns.

c) *The Land markets especially in central Uganda are affected by the impasse created on the land.*

Because of the restrictions on sell of land without the consent of the other, it is becoming more and more cumbersome to purchase mailo land especially for development purposes. This is because of the encumbrance of existing tenants by occupancy who cannot be evicted. The provision was intended to be a temporary measure pending the enactment of the appropriate legislation within a period of two years of the first session of parliament.<sup>42</sup>

Public right of way upon registered land also vitiates the title being absolute and indefeasible for instance easements. The laws of Uganda protect intruders on registered land if the registered proprietor does 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 vitiates the principle of indefeasibility of title provide for under the Torrens system, this is proved so under Section 10 of the Registration of Title Act.

The security of occupancy for bonafide occupants guarantees that whereas no problems may seem to arise relating to the lawful occupants, the bonafide occupants create a set of problems that policy needs to sort out.<sup>43</sup> They may exercise personal interest to steal portions of land from the registered owner upon death of owner, by claiming to have reached an agreement with the deceased on their settlement on land which indeed may not or may not have been the case.

The disadvantage of Mailo land tenure is that it is an enjoyment and use of land-by-land owner which is subject to the rights of bonafide and lawful occupants. For the owner to enjoy his rights of sale, has to consult with occupants to give them priority of the purchase before seeking other potential buyers. On the other hand it also requires land owners to undertake compensation for developments made by “bonafide” and “lawful” occupants which creates an additional cost resulting in protracted and complex negotiations with non Ugandan citizens prohibited from

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<sup>42</sup> Article 237 (9) Constitution of the Republic of Uganda 1995

<sup>43</sup> Winfred Bikaako and Ssenkumba Gender, Land and Rights: Contemporary Debates in Law Policy and Practice in Uganda ( 2008)

acquiring Mailo land. Land being a development tool, Mailo land diminishes the ability to enhance development when most land is left idle and subject to the decision of the title owner.

Additionally, where the owner of land has been absent not by choice, for instance where registered owner has been in prison or exile, must he forfeit his/her rights to land because of the existence of a bonafide occupant is question of concern.<sup>44</sup> 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 is not a direct intention to keep land idle for others to express their registrable interest in his land.

Another concern is why and whether the law should grant and guarantee the same occupancy rights to a lawful occupant as offered to a bonafide occupant.<sup>45</sup> In practice the occupancy of the two is different, whereas the bonafide occupant may seeks consent of the owner to use latid the lawful occupant seeks consent of the bonafide to settle on land.

By being granted a right to use the land does not mean that bonafide invites others to use the same land or share interest on property that does not belong to him. This is because the more they settle the more access they attain 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 are 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 does not own as security for acquisition of his loan .to which he may have or may not have made any contribution to the owner in form of reasonable payment, makes bonafide occupant as if he was a joint owner.

It is no wonder that banks no longer take Mailo land for mortgaging because of the tenant landlord endless concerns.<sup>46</sup>

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<sup>44</sup> Landesa, Women and Customary Land Rights: Focus on Land in Africa Brief, Uganda World Resources Institute, Landesa 2011

<sup>45</sup> Peter Mulira (2008) Towards an Equitable Land Regime in Uganda, the Land Amendment Bill and Related Legislation I.

<sup>46</sup> Peter Mulira (2008) Towards an Equitable Land Regime in Uganda, the Land Amendment Bill and Related Legislation I.



The Land markets on mailo land especially in central Uganda are affected by the impasse created on the land. Because of the restrictions on sell of land without the consent of the other, it is becoming more and more cumbersome to purchase Mailo land especially for development purposes.<sup>47</sup> This is reflected on the encumbrance of existing tenants by occupancy who cannot be evicted.

### **3.5 Definition of various types of occupants. The Concept of Bonafide Occupants**

#### **3.5.1 LAWFUL OCCUPANT**

The new Land Act restores the Mailo tenure but subjects registered owners to the rights of the lawful and bonafide occupants. Section 29 of the land Act describes a ‘lawful’ occupant.

First it means persons occupying land by virtue of the Busuulu and Envujjo of 1928, the respective Torn and Mkole landlord and tenant laws of 1937.

Secondly, the term ‘lawful’ occupant, means a person who entered the land with the consent of the registered owner and includes a purchaser.<sup>48</sup> A registered owner is a person who is registered as proprietor of the land under the Registration of Titles Act.<sup>49</sup> The key requirement of the provision is that the person must have entered into possession with the consent of the registered owner of the land.

This obviously excludes a squatter. A licensee is also excluded by section 30 (4) of the Land Act, which expressly states that a person who is on the land on the basis of a licence from the owner shall not be taken to be a lawful occupant. Under the Land Act, such a purchaser is deemed a tenant by occupancy.

However section 30(1) (b) is silent on whether to qualify as a tenant by occupancy the purchaser must have paid the agreed purchase price. The probable inference is that payment is not a requisite.

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<sup>47</sup> Landesa, Women and Customary Land Rights: Focus on Land in Africa Brief, Uganda World Resources Institute, Landesa 2011

<sup>48</sup> Section 1 (a) *ibid*.

<sup>49</sup> Section 29 (1) (b) Land Act Cap 227.

### 3.5.2 BONA FIDE OCCUPANT

The term 'bona fide occupant' has two meanings. First, it refers to a person who before the coming into the effect of the 1995 constitution had occupied or improved certain land without being challenged by the registered owner of the land or by the agent of the owner.<sup>50</sup> Unlike a lawful occupant, a bonafide occupant entered the land without the consent of the landowner. So essentially, a bonafide occupier is a trespasser or a squatter.

My person who has purchased or otherwise acquired the interest of the person qualified to be a bonafide occupant should be taken to be a bonafide occupant.<sup>51</sup>

This means that land transacted by squatters (before the Act made them bonafide occupant) will be honored. However, a person who is on the basis of a license from the owner shall not be taken to be a lawful occupant.<sup>52</sup>

In the case of **Venanslo Bamweyaka and 5 others Vs. Kampala District Land Board and George Mitala**.<sup>53</sup> Court stated that the thread that runs through both sub- section 30 (1) and (2) of the land Act is that the occupied land must have been registered in the name of another person or authority for the occupant to claim to be either a lawful or bonafide occupant.

The period of twelve years of occupation corresponds with the twelve years limitation period prescribed by the Limitation Act Cap 80 for recovery of land.<sup>54</sup> It should be stressed that the provision requires that the person (or his predecessor in title) must have been on the land unchallenged by the registered owner for a complete period of twelve years.

Accordingly, if the landowner establishes that at any time before expiration of the twelve year period he challenged the person claiming to be a bonafide occupier, the provision would not apply. The same would be the case where the landowner physically evicted or attempted to evict the intruder from the land.<sup>55</sup>

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<sup>50</sup> Section 29 (2) Land Act Cap 227

<sup>51</sup> Section 29 (5) *ibid*.

<sup>52</sup> Section 29 (4) *ibid*.

<sup>53</sup> Civil Appeal No 20 of 2002

<sup>54</sup> Section 5 Limitation Act 230.

<sup>55</sup> John T. Mugambwa. Principles of Land Law in Uganda, Fountain Publishers 2002. Page 12

The second meaning of a 'bona fide', occupant is a person (or a successor in title of such a person) who had been settled on land by the government or its agent including a local authority.<sup>56</sup> Unlike the first definition of a bonafide occupant, in this instance there is no requirement that the person must have settled on the land for a particular minimum period. The main object of this provision was to protect from eviction hundreds of landless people, including asylum seekers who had been settled on certain land by the government under the Ranch Restructuring Scheme.<sup>57</sup> Most of the land was former public land owned in leasehold by various individual ranchers. Section 29 (3) (a) Land Act prescribes that where the government settled people on the land belonging to any person it must pay compensation to the registered owner of the land. The reason for this requirement was to avert possible legal challenge of the provision of the grounds that it deprives the ranchers of their property without compensation contrary to article 26 (2) of the Constitution of the Republic of Uganda 1995. Compensation must be paid within a period of five years from the date the Act came into effect.<sup>58</sup>

### **3.6 Terms and conditions regarding occupancy**

The Land Act deems a bonafide or lawful occupant of land to be a tenant by occupancy of the registered owner of the land.<sup>59</sup> A tenant by occupancy holds the land subject to such terms and conditions as are stated in the Act or may be prescribed by the minister.<sup>60</sup> For as long as a tenant by occupancy complies with those terms and conditions he enjoys a secure tenure, they include:

#### **i) Rent payment:**

According to<sup>61</sup> provide that for lawful or bonafide occupants to be evicted only for non payment of ground rent whereof:

A lawful or bonafide occupant shall not be evicted from registered land except upon an order of eviction issued by a court and only for non payment of annual normal ground rent<sup>62</sup>. With the decisions subjected to section 31 of the Act. The purpose of this provisions is to have the

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<sup>56</sup> Section 29(2) (b) Land Act Cap 227.

<sup>57</sup> Hansard, 20 June 1998, page. 4054.

<sup>58</sup> Section 29 (2) (c) Land Act Cap 227.

<sup>59</sup> Section 31(1) Ibid: see also Section 1 (Definition of tenants by Occupancy)

<sup>60</sup> Section 31(2) and 93 (d) Land Act Cap 227

<sup>61</sup> Section 32(a) Land Act cap 227

<sup>62</sup> 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 restricts the powers of the registered owner: who may end up selling the land without consulting the tenants for fear suspicious intentions. Evictions of the lawful and bonafide is further protected by the Act when the new owner has to maintain the interest of lawful and bonafide occupants prior to his purchase.

Tenant by occupancy is required to pay to the registered owner of the land an annual nominal ground rent as determined by the relevant district land board.<sup>63</sup> A tenant or landowner aggrieved by the board's determination is entitled to appeal against the decision to the land tribunal, which may reverse, vary or confirm the decision,<sup>64</sup> However the Act prescribes that no tenant by occupancy shall be required to pay ground rent in excess of one thousand shillings per annum irrespective of the size of the land or its location<sup>65</sup>. Parliament imposed only a nominal rent mainly because it did not want to over burden tenants by occupancy with payment of commercial rent, which the vast majority of them could not afford to pay and would have certainly led to social unrest.

Although many Mailo owners feel that the land Act unfairly deprived them of their source of income, in my view they are no worse off than they were prior to the Act. The main purpose of rent payment is not to provide income to the Mailo owners, but rather, it functions as an acknowledgement by the Kibanja holder of the Mailo owner's superior title. <sup>66</sup>The recognition, albeit symbolic is essential for maintaining the fabric of society, especially in hierarchical societies like Buganda..<sup>67</sup>The Act <sup>68</sup>provides that the ground rent may be revised every five years by regulations made under the Act.<sup>69</sup>

Where a tenant by occupancy defaults in payment of ground rent for a period exceeding two years, the registered owner is entitled to serve on him notice to show cause why the tenancy should not be terminated. The notice must be in the prescribed form and copy forwarded to the

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<sup>63</sup> Section 31(3) Land Act cap 227

<sup>64</sup> Section 31(4) Land Act Cap 227

<sup>65</sup> Section 31(5) Land Act Cap 227

<sup>66</sup> Hansard, 24 June 1998, page 4125

<sup>67</sup> Hansard, 22 June 1998, page 4090 Per Mrs Bitamazire M.P

<sup>68</sup> Section 31(8) Land Act Cap 227.

<sup>69</sup> I bid Section 31(6)

relevant land committee.<sup>70</sup> If the tenant disputes the notice he may refer the matter to the land tribunal within a period of six months after the date of service. Where the tenant does not challenge the notice within the prescribed period or pay the outstanding rent within a period of one year from the date of the notice, then the landowner may apply to the land tribunal for an order to terminate the tenancy for nonpayment of rent.<sup>71</sup>

Section 32 of the Land Act cap 277 prescribes the powers and matters to be taken into account by the tribunal when determining an application for termination of a tenancy for non-payment of rent which we shall not delve into, for purposes of keeping this paper within its limits in terms of length.

#### **(ii) Application for a certificate of occupancy:**

A tenant by occupancy may apply for a certificate of occupancy in respect of his plot. The certificate of occupancy is a registerable interest under the Registration of Titles Act Cap.<sup>72</sup> Section 34 of the Land Act provides that where a tenant wishes to acquire a certificate of occupancy he must make an application to the registered owner of the land for consent for the certificate to be issued. Upon receipt of the application, the landowner is required to forward it to the land committee<sup>73</sup> in the jurisdiction where the land is located. Section 33 (2) of the Land Act states that the committee must nominate a day when it will meet both parties at the site of the land in question. In adjudicating disputes, the land committee must observe the rules of natural justice.<sup>74</sup> After the land committee makes its determination, it must inform both parties of the outcome. An applicant for a certificate of occupancy shall not be entitled to be issued with a certificate of occupancy if his rent is in arrears.<sup>75</sup> Subject to this provision, section 33 (6) of the Land Act states that upon receipt of the committee's determination the landowner must immediately give his or her consent to the application.

The consent must be given in the prescribed form. If the landowner refuses or neglects to give his or her consent within a period of six months from the date he or she received the committee's

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<sup>70</sup> Ibid Section 31(7)

<sup>71</sup> Ibid

<sup>72</sup> Section 1 Land Act Definition of Registrable interest

<sup>73</sup> Land committees are established under Section 64 of the Land Act Cap 227.

<sup>74</sup> Section 33 (3) Land Act

<sup>75</sup> Ibid Section 33 (5)

determination, the tenant has a right to appeal to the land tribunal.<sup>76</sup> The land tribunal has power to give consent for the grant of a certificate of occupancy.

It would appear that parliament intended that the landowner shall not reject an application for a certificate of occupancy except on reasonable grounds. The consent will give the tenant a right to get a certificate of occupancy from the Recorder.<sup>77</sup> This is an office responsible for registering land and giving certificates of occupancy in every sub-county, urban area or city division. On being satisfied with the consent, the Recorder will give a certificate of occupancy to the applicant and inform or notice the registrar about it.

### (iii) Effect of a Certificate:

The registrar is required to recant the certificate as an encumbrance on the certificate of title of the landowner.<sup>78</sup> The effect of endorsing the certificate of occupancy on the landowner's certificate of title is that the tenant's interest in the land will bind any person who purchases or deals in that land. In other words, the land rights of the holder of a certificate of occupancy would constitute an exception to indefeasibility of title under the Registration of Titles Act.<sup>79</sup> In the case of **Abdul Kharim Vs L.T. Kabarebe**<sup>80</sup> court held that a certificate of title issued under the Registration of Titles Act is conclusive evidence that the person named in such title is the proprietor seized of the interest in the title.

However, it is submitted that even without endorsement a tenancy by occupancy constitutes an exception to indefeasibility of title. In the case of **Lukwago .v. Bawa Singh and another**<sup>81</sup>, it was held that title of a registered proprietor of Mailo land was subject to the interest of any "tenant" and that a Kibanja holder was a tenant within meaning of Section 59 of the Registration of Titles Act. Moreover, section 31(9) of the Land Act expressly declares that the security of tenure of a lawful or bonafide occupant is not to be prejudiced by reason only that he /she does not possess a certificate of occupancy. The latter provision makes it absolutely clear that except

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<sup>76</sup> IbidSection33 (7)

<sup>77</sup> Ibid Section 33 (8)

<sup>78</sup> Section 34(9) Land Cap 227

<sup>79</sup> Section 59 Registration of Titles Act Cap 228

<sup>80</sup> High Court Civil Appeal No. 373/91

<sup>81</sup> (1959) E.A 282 at 285

as provided by the Act, the security of tenure of lawful and bonafide occupants is guaranteed not only against the registered owner but also against subsequent dealers in the land.

Possession of a certificate of occupancy provides documentary evidence that the named person has a right of occupancy over the subject land. This undoubtedly will facilitate land transactions with respect to rights of occupancy. Moreover, since the certificate of occupancy is granted after verification and determination of the boundaries, it is likely to reduce future disputes over landownership and its boundaries. The Land Act however, does not say whether or not possession of a certificate of occupancy is deemed to be conclusive evidence that the holder is a bona fide or lawful occupant of the plot in question or that the requisite consent was properly obtained. It is noteworthy that section 8 (1) of the Land Act declares with reference to a certificate of customary ownership that it is conclusive evidence of the customary rights and interests specified in it.<sup>82</sup> If parliament intended a grant of a certificate of occupancy to be similarly conclusive, one would think it would have expressly stated so. Accordingly, in the absence of such provision it is thought that parliament did not intend the grant of a certificate of occupancy to be conclusive evidence of title. It is submitted, however, that as between the immediate land owner and tenant the certificate of occupancy is conclusive. In the absence of fraud, both parties will be estopped from re-opening matters that should have been raised and determined by the tribunal before the certificate was issued.

#### **(iv) Rights of a tenant by occupancy to enter into transactions**

The right of tenant by occupancy constitutes a proprietary interest in land. Just like other proprietary interest, a tenancy by occupancy is inheritable<sup>83</sup> and, subject to the provision of the Act, it could be sold, sublet, or pledged by the holder of the right occupancy.<sup>84</sup> Moreover, a tenant by occupancy may create third party rights in respect of his or her occupancy, sub-divide, and undertake any other lawful transaction in respect of the occupancy. However, the power of a tenant to deal with his or her right of occupancy is subject to the approval of the registered owner of the land. Section 34 -(3) of the Land Act states that prior to entering into any deals affecting the land the tenant must apply to the landowner in a prescribed form for his or her consent to the

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<sup>82</sup> Section 59 Registration of Titles Act, with respect to a certificate of Title Issued under that Act.

<sup>83</sup> Section 34 (2) Land Act Cap 227.

<sup>84</sup> Ibid Section 34(1)

transaction. The landowner has up to six weeks from the date of receipt of the application in which to respond.

The landowner may approve the transaction with or without attachment of conditions or refuse outright<sup>85</sup> Where the landowner refuses or imposes conditions, which are unacceptable to the tenant, or fails to communicate his or her decision to the tenant within a period of six weeks the tenant may appeal to the tribunal.<sup>86</sup> The tribunal has a wide range of powers that it may use in this regard. It may dismiss the appeal, allow the transaction without any conditions, or subject it to any conditions, including imposing fresh conditions. The land tribunal may also at its discretion adjourn the proceedings to allow further negotiations between the parties.

Where the landowner gives his or her consent to a transaction, the consent must be communicated to the tenant in the prescribed form duly signed by the landowner.<sup>87</sup> A copy of the consent signed by the landowner or secretary to the tribunal (if the tribunal gives the consent following an appeal) must be sent to the recorder. Under Section 34 (8) of the Land Act, the recorder must maintain in the prescribed form a record of consent. Section 34(9) of the Land Act declares that a transaction entered into by a tenant without the requisite consent shall not be effective to pass any interest in land. The section specifically prohibits the recorder from making any entry of a transaction of which there is no consent in the prescribed manner. The object of this rather elaborate procedure is to eliminate areas of potential disputes between the parties over whether, for example, consent was given or not or the terms under which it was given. It is submitted that where a tenant by occupancy purports to transfer his or her land without prior consent or despite the landowner's refusal to give his or her consent to the transaction, the landowner is entitled to treat the purported transferee as a trespasser and to evict him or her. The legal position is less clear as to whether the breach would entitle the landowner to terminate the tenant's right of occupancy. Under the general law of leases the landlord may terminate the lease if the tenant in breach of the lease agreement parts with possession without the landlord's consent<sup>88</sup>. It is thought that the legal position is different with respect to termination of a right of occupancy. The Land Act stipulates the circumstances in which a tenant by occupancy may be

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<sup>85</sup> Ibid Section 34(4)

<sup>86</sup> Ibid Section 34 (5) and (6)

<sup>87</sup> Ibid Section 34 (4)

<sup>88</sup> City Council of Kampala Vs Mukiibi (1967) E.A 368.

terminated or terminates. As we have seen, a tenancy by occupancy may be terminated where the tenant defaults in payment of rent<sup>89</sup>In addition, as we shall presently see it terminates where the tenant voluntarily abandons the land.<sup>90</sup> The Act does not mention any other ground for termination of tenancy by occupancy. In the view of Mugambwa John; parliament intended these to be the only grounds for termination of a tenancy by occupancy.<sup>91</sup> Accordingly, it is submitted that where the tenant purports to transfer his or her occupancy to another without consent, the landlord has no power to terminate the tenant's right of occupancy unless the tenant abandons the land or defaults in payment of rent.

#### **(v) Options to purchase:**

The Land Act gives a tenant by occupancy and the landowner a statutory right of first refusal to purchase each other's interest. Section 35(1) of the Land Act states that where a tenant by occupancy wishes to assign his or her right of occupancy, he or she must give the first option of purchasing it to the landowner. Section 35(2) of the land Act gives a tenant by occupancy a similar right where the landowner wishes to assign the land. Note that the provision only applies.

The Land (Amendment) Act of 2010 under section 35A and B respectively criminalizes or declares any transaction engaged in by the landlord without first option to the tenant or the tenant engaging in any transaction without giving first priority to the Land lord. The Land (Amendment) Act has however encountered resistance and generated debate in a wide section of the population. A lot of issues have been raised against it.

- It introduces criminal intent in a relationship that was previously civil in nature, a condition that furthers tensions between land owners and their occupants , on a willing - seller willing- buyer basis. <sup>92</sup>The object of the provision is to give either party the first opportunity to negotiate to purchase, where one of them decides to sell.

Where the parties enter into negotiations if after three months they have not reached an agreement then either party is free to refer the matter to the mediator to assist with the

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<sup>89</sup> Section 32 Land Act Cap 227.

<sup>90</sup> Ibid Section 37.

<sup>91</sup> On page 22:Principles of Land Law in Uganda.

<sup>92</sup> Ibid Section 35(3)



negotiations.<sup>93</sup> Under section 89 of the Land Act a mediator is a person appointed by the parties or the Land Tribunal to settle land disputes. If, after three months of negotiations, the mediator is unable to assist the parties to reach an agreement, he/she must make declaration to that effect. Thereafter, the party seeking to sell is free to dispose of the interest as he/she thinks fit.<sup>94</sup>

It is noteworthy that the above section does not expressly provide for the situation where the party to whom the offer is made ignores it or fails to respond within the prescribed three-month period. The question is whether in such a case the person who makes the offer would be entitled to treat the other's silence as rejection of his offer, and if so, whether he would be entitled to dispose of the land to any other person. It is suggested that if the landowner is the offeror he would be entitled to treat the tenant's silence as a rejection of the offer and there, he could sell the land to any other person. The reason is that, apart from this provision, there is no requirement under the Act for the landowner to seek the tenant's consent to dispose of his land. The legal position is less clear on whether tenant occupancy could do the same. This is because under section 34 of the Land Act Cap 227, as we have seen, a tenant by occupancy needs a consent of the landowner or of tribunal prior to undertaking any transaction affecting his right of occupancy. Indeed, a transaction entered into without requisite consent in the prescribed form is not effective to create any interest. It would seem that even if the landowner ignores or rejects the offer, the tenant must obtain the requisite consent prior to selling to another person otherwise the transaction would not be effective to transfer the interest.

**(vi) Subdivision and/or to- ownership between tenant and registered owner:**

A registered owner and a tenant by occupancy may by mutual agreement subdivide the land over which a tenant has a right of occupancy so that each acquires exclusive occupancy or ownership of a portion or portions of that land. The provision probably envisages a situation, for example where a tenant may wish to relinquish part of his plot to the landowner in exchange for exclusive ownership over the part retained. Another possible example is where the landowner wishes to build on part of the land occupied by the tenant. He may negotiate to the tenant to surrender to him that part of land in exchange for exclusive ownership over the remainder of the plot. The

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<sup>93</sup> Ibid Section 35 (6)

<sup>94</sup> Ibid Section 35(7)

object of the above provisions is to facilitate the parties to negotiate a mutually convenient land settlement.

Instead of subdivision, the tenant and landowner may agree to become co-owners of the land either in joint tenancy or tenancy in common as stated under Section 36(1) of the Land Act Cap 227. Where they decide to become tenants in common they should stipulate in their agreement the shares of each party and any other terms of their agreement, Co-ownership would be the best option for the parties where the plot is too small for subdivision or where the parties wish to conduct a joint venture such as building a house for rent or commercial farming.

Where the parties subdivide the land or agree to become co-owners they must inform the Registrar of Titles accordingly. Section 36(2) of the Land Act provides that the parties must submit to the registrar documentary evidence of their agreement and, where applicable, the certified survey plans. Upon the satisfaction that the parties have complied with all statutory requirements, the Registrar must make the appropriate entries on the certificate of title and issue to each party a fresh certificate. The registrar must inform the recorder of the changes that have to be made on the certificate of occupancy or have it cancelled.

It is submitted that where a plot is subdivided and each party is issued a certificate of title for its portion of the land, the effect is to extinguish prior existing rights and to create fresh rights. Thus the former tenant by occupancy becomes an absolute owner in mailo of the portion of the land he retained. Likewise, the portion of the plot allotted to the landowner becomes his absolutely freed from any claim by the previous tenant by occupancy. Where the parties agree to become co-owners of the land over which the tenant has a right of occupancy the nature of their interest depends on their agreement. For example, they may decide to co-own the tenant's plot as a "plot". On the other hand, they may agree to co-own the plot in mailo land tenure. It suggested that in order to avoid future disputes, when the parties submit their documents for registration the registrar should issue that the documents not only state the nature of co-ownership but also the tenure under which the land is co-owned. Where the agreement is to co-own the plot as a plot, appropriate changes will be made to the certificate of occupancy. If the agreement is to co-own the plot in free hold, they will be registered as such and the certificate of occupancy cancelled accordingly.

### 3.3 TERMINATION OF TENANCY BY OCCUPANCY.

As we have seen, a tenancy by occupancy may be terminated where the tenant defaults in payment of rent.<sup>95</sup> In addition, section 37 of the land Act Cap 227 provides that a tenancy by occupancy may be terminated where the tenant voluntarily abandons his occupancy or is ordered to vacate the land by statutory authority. There is no other provision in the land Act for termination of tenancy by occupancy. In my view, this means that a tenancy by occupancy cannot be terminated except on the ground of nonpayment of rent voluntary abandonment of the land and forced abandonment by statutory authority.

#### (i) Voluntary Abandonment

A tenant by occupancy voluntarily abandons or is deemed to have abandoned his right of occupancy in the following circumstances. First, a tenant abandons the land where he makes his intention known to the registered landowner.<sup>96</sup> In law, to abandon land means to give up all claims in relation to it with no intention of ever again asserting, claiming right, or interest over it.<sup>97</sup> Because abandonment entails voluntary relinquishment of one's property, the courts do not lightly infer the intention to abandon.<sup>98</sup> There must be evidence that clearly indicates that the owner freely intended to give up his property and never again to assert claim over it.<sup>99</sup> It is thought that in construing the provision the courts would apply an equally strictly test. The fact that a tenant by occupancy informed the landowner that he intended to abandon the land will not necessarily be treated as conclusive where evidence indicates, for example that the tenant was acting under some extraneous pressure or mistake. The courts may also investigate any possible motive for the alleged abandonment of the land to ensure that the tenant freely intended to abandon the land. In any case, if the subject land is family land within meaning of section 39 of the land Act Cap 227, it cannot be abandoned without the consent of the family members.<sup>100</sup>

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<sup>95</sup> Ibid Section 31 and 32

<sup>96</sup> Ibid Section 37 (2) (a)

<sup>97</sup> Tehidy Minerals L.t.d Vs Norman (1971) 1 QB 528 at 553 Per Buckley U

<sup>98</sup> Getobed Vs Pridmore (1970) 115 Sol Jo 7&

<sup>99</sup> Tehidy Minerals Ltd Vs Norman (1971) 1 QB 528 at 553

<sup>100</sup> The Opening Sentence of Section 37 (1) States that the Section is Subject to Section 27. it is thought that this is a typographical error, has Section 37 and Section 27 have nothing to do with each other. The provision should be subject to Section 39, which deals with restrictions on transfer of family land.

Secondly, a tenant by occupancy is deemed to have abandoned the land where he lives the whole land unattended to by himself or herself or family members or an agent for a period of three or more years.<sup>101</sup> It should be emphasised that the provision applies only where the tenant lives the whole land unattended to. Therefore, a tenant who attends only to part of his land and lives the rest derelict is not deemed to have abandoned the land. Where a tenant was unable to attend to the land due to disability and had no other family member or any other person to look after the land he could apply to the tribunal for extension of the three-year period.<sup>102</sup> What constitutes disability in this regard is not defined. It is suggested that it would include serious illness and bereavement. It may perhaps also include a situation where a tenant was in exile or prison. In all such cases, the tenant would be entitled to an extension of time, which is equivalent to the period he was under disability. It is thought that the extended period of grace would run from the date of the tribunal's judgment rather than the date the person ceased to be under disability.

The effect of voluntary abandonment is that tenant's right of occupancy ceased to be an encumbrance on the land and the registered owner is free to deal with the land formerly occupied by the tenant as he pleases. The Act allows the former tenant to remove any structures, buildings, and other things he placed on the land except dams and trees.<sup>103</sup> The landowner has no obligation to compensate the outgoing tenant for loss of his or her right of occupancy.<sup>104</sup>

The provision does not prescribe a time limit within which a former tenant must remove fixtures.

#### **(ii) Involuntary termination of occupancy in urban areas:**

Section 37(4) of the Land Act Cap 227 deals with a situation where a person or a body acting under statutory power condemns a tenant by occupancy's building or orders the building to be demolished. The section provides that where the land on which the building is situated is an urban area, the tenant's right of occupancy shall not be deemed to have been extinguished by such order.<sup>105</sup> However, if because of planning or building restrictions imposed under any legislation the tenant is unable to develop the land, he may assign his right of occupancy

<sup>101</sup> Section 37 (2) (b) Land Act Cap 227.

<sup>102</sup> Ibid Section 37 (3)

<sup>103</sup> The provision does not prescribe a time limit within which a former tenant must remove fixtures.

<sup>104</sup> Section 37 (1) (c) Land Act Cap 227.

<sup>105</sup> Section 37 (4) (a)



provided that the landowner has the first option to purchase.<sup>106</sup> Section 37(4) (c) of the land Act empowers the land owner, subject to the approval of the district board, to acquire the right of occupancy upon payment to the tenant for the right of occupancy and for the improvements on land as determined by a value appointed by the government.

### **3.4 Conversation of tenancy by occupancy to a registrable interest.**

Section 38 of the land Act empowers a tenant by occupancy to convert his right of occupancy to any one of the following registrable interests: mailo, freehold or sublease. The power to convert the tenancy is subject to approval of the registered owner of the land.

Section 38(2) of the land Act provides that a tenant by occupancy may apply to the registered landowner for permission to convert his tenancy. The landowner may grant his consent with or without any conditions<sup>107</sup>, or reject the application out right or invite the tenant to enter into negotiations. Unlike the application for a certificate of occupancy, where the tenant could appeal to the tribunal against the landowner's refusal to give consent, in this case, there is no such right. It would seem it is up to parties to reach to an agreement. Section 38(5) of the land Act provides that where the parties have agreed to negotiate either of them could invoke the assistance of the mediator to bring them a settlement. But if after a period of three months of negotiations the parties fail to reach an agreement, the mediator shall make a report to that effect and he may withdraw from the negotiations. However, the parties, if they so agree, may continue to negotiate.

### **3.5 CONCLUSION.**

in my conclusion therefore, a 'lawful' occupant enters the land with the consent of the registered owner. This obviously excludes a squatter. A licence is also excluded by section 29(4) of the land Act that expressly states that a person who is on the land on the basis of a licence from the owner shall not be taken to be lawful occupant. However a bonafide occupant enters the land without the consent of the landowner. So essentially a bonafide occupier is a trespasser or squatter. The land Act deems a bonafide or lawful occupant of land to be tenant by occupancy of the registered owner of the land. The tenant by occupancy holds the land subject to such terms and conditions, which include: rent payment, application for a certificate of occupancy, option to

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<sup>106</sup> Ibid 37 (4) (b)

<sup>107</sup> Ibid Section 39(3)

purchase and others. These are requisite to enjoying secure tenure in Buganda. However in instances where the landowners and tenants conflict the matter is referred to the land tribunal for resolution as discussed in next chapter.



## **CHAPTER FOUR**

### **THE RELATIONSHIP BETWEEN TENANCY BY OCCUPANCY AND REGISTERED PROPRIETORS**

#### **4.0 Introduction.**

From the commencement of the Land Act, 1998, courts, other than the High Court, ceased to have jurisdiction over land disputes. However the position has since changed as per the (amendment) of the land act 2004 which transferred all assets, liabilities and monies for the operation of Land Tribunals and the office of the Registrar of Land Tribunals to the Secretary to the Judiciary. The general powers of supervision over Land Tribunals were also transferred to the Chief Registrar.

#### **4.1 DISPUTE SETTLEMENT**

##### **4.1.1 Courts:**

As under<sup>108</sup> transferred all assets, liabilities and monies for the operation of Land Tribunals and the office of the Registrar of Land Tribunals to the Secretary to the Judiciary. The general powers of supervision over Land Tribunals were also transferred to the Chief Registrar. The Land Tribunals have jurisdiction to determine disputes relating to the grant, lease, repossession, transfer, or acquisition of land by individuals, the commission, or other authority with responsibility relating to land. To determine disputes as the Court of first instance in all land matters where the subject matter does not exceed two thousand five hundred currency points (Ug. Shs.50,000,000/=); and to determine any other dispute relating to land under the Act.

In the exercise of jurisdiction over land matters a District Land Tribunal has the power to grant decrees of specific performance, issue injunctions and make such orders and give such decisions against the operation of any action, notice, order, decree, or declaration made by any official or any Board or the Commission. It may grant relief and make all orders or give decisions on such conditions as to expenses, damages, compensation or any other relevant matter as it considers fit. However, a District

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<sup>108</sup> The land Act cap 227 as amended in 2004



Land Tribunal cannot make an order for cancellation of entries in a certificate of title and vesting title, but has to refer such cases to the High court for the necessary consequential orders.

**The Relationship between the Land Tribunals and the Courts:** The Parish or wards Executive

Committee Courts are the Courts of first instance in respect of land disputes. Every suit is instituted in the Court of the lowest grade competent to try and determine it. In case of a dispute over immovable property, a suit is instituted in a court within the local limits of whose jurisdiction the property is situate. Appeals from the Parish or ward Executive Committee Courts go to the Sub County or 28 Division Executive Committee courts. Appeals on Land Matters from Division or sub county Executive Committee Courts lie to the respective District Land Tribunal, and from the latter to the High court. An appeal lies from the judgments and orders of a sub county executive Committee Court to a Chief Magistrate's Court in other cases. The general powers of supervision over Magistrates Courts conferred upon the High Court by the Judicature Act are exercised by the High Court over the Executive committee courts.

The general powers of supervision over Land Tribunals and the office of the Registrar of Land Tribunals are exercised by the Chief Registrar of the High Court. There is no supervisory or monitoring linkage between LCII and LC III Courts and the District Land Tribunals. Since appeals on land matters from Division or sub county Executive Committee Courts lie to the District Land Tribunals, a Chief Magistrate may not feel concerned to call for and examine the record of proceedings in a land dispute before an LC II or LC III court. Yet he or she could do so in other cases where appeals still lie to a Chief Magistrate's Court. An appeal lies from the decision of a District Land Tribunal to the High Court. An appeal from the decision of a district land tribunal in exercise of its appellate jurisdiction also lies to the High Court.

#### **4.1.2 Pertinent issues of procedure.**

It is envisaged under the Act that the rules of procedure of the district land tribunals are not necessarily the ones ordinary courts follow. Section 78 (1) <sup>109</sup> provides that the land tribunals shall follow rules of procedure made by the Chief Justice.

The tribunal conducts its business between 8.00am and 500pm on official working days. The chairperson of the tribunal determines the place of hearing. The time and place decided should

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<sup>109</sup> Section 78 (1) of land act cap 227

give a reasonable opportunity for all parties to appear before the tribunal with as little inconvenience and expense as possible.’ Notice for the hearing of 21 days must be given to the parties. The chairperson and members compose a tribunal for a hearing. Where a chairperson or any member is unable through ill health or injury or death or other justifiable cause to sit on the proceedings before the matter is completed, the proceedings must be adjourned.

The chairperson or any member as the case may be notifies the Chief Justice who then assigns a temporary replacement within a period of sixty days. The proceedings may be completed or heard afresh by the tribunal when it is reconstituted. The members of a tribunal must be impartial and unbiased and should disclose any personal interest in a case and disqualify him or herself from hearing it. But also members must be disqualified from proceedings where a party to the proceedings objects to any one of them, hearing the case on the grounds of bias or partiality, if there are reasonable grounds for the objection. The chairperson or a member must notify the chief justice within two weeks of the decision of the tribunal. The rationale here is to eliminate unnecessary delays and thus, expedite justice delivery to the litigants.

The chief justice, within only thirty days of receiving the notification appoints a temporary replacement for the purpose of the proceedings, the tribunal may have to make any record of the proceedings before it as previously constituted, including a record of any evidence taken in that proceeding.

With regard to Tribunal cases, in the case of <sup>110</sup>. The Agriculture Co Ltd commenced proceedings by filing a statement of claim in writing to the Tribunal stating clearly grounds for the application being sought. The Agriculture Company bought land located at Nantabulirwa (3oma Sub-county in Mukono District on which Kyobe (one of the defendants) and others were settled. This land was registered in the Agriculture Company name and the company went ahead to sue Kyobe and others contending that they were trespassers on the land and had refused the simple compensation the company had offered.

In commencement of proceedings the claim was made to the Mukono District Land Tribunal on 7<sup>th</sup>/08/2003. The Tribunal accorded the parties an opportunity to amicably settle the claim before the hearing commenced. And in the process apart from Kyobe, sixteen of the respondents

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<sup>110</sup> Agriculture Export (u) ltd verses Mugambe and 16 others

allowed the compensation fees advanced to them by the Agriculture Company. The Tribunal gave a notice of hearing of twenty-One days to all the parties that are affected by the application, upon setting the hearing date proceedings before the tribunal was open to the public.<sup>44</sup> Twenty-one days are adequate for a defendant to prepare his defence, including consulting his lawyer if any. This is intended not to prejudice the parties to the case save for special circumstances where parties have agreed to hold a closed hearing.

Lubega, Mangeni and Company Advocates represented Kyobe at his own expense whereas M/s Serwango & Company advocates filed the suit on behalf of Agriculture Export (u) Ltd. Where an advocate represents a party to a claim or proceedings the scale of costs applicable before the Tribunal must be those prescribed in the Advocates (remuneration and Taxation of cost) (Amendment) Rules, 1996. This however, does not prevent the advocate, reducing the remuneration depending on a mutual agreement reached between him and his clients.

Kyobe was served with a copy of the claim duly dated and signed through his wife who received the summons on behalf of Kyobe (Husband).<sup>43</sup> The idea is to make sure defendant is served such that if he does not file a defence by the date specified in the summons, an *ex parte* judgment against him can justifiably be entered.

The process server Charles Ssenyimba from Lubega, Mangeni & Company advocates returned the original to the Tribunal handing the application with an affidavit stating how he fixed the copy, the circumstances under which it was done and the name and address of Kyobe if any, by whom the house was identified and the person who witnessed the affixation. The essence of this provision is to avoid any possibility by the defendant to deny service and further to save the inevitable costs that may be incurred and time while looking for him.

In this case court held that by virtue of<sup>111</sup>, which provides for the lawful occupant, "In the case before us, it is a fact that Kyobe does not qualify as a lawful Kibanja holder. Consequently it is the view of the Tribunal that the respondent Kyobe is a trespasser and deserves no compensation. The Tribunal relying upon the legal principal 'rules that Kyobe is a trespasser and must leave the land as he found it without any compensation being paid to him. He must remove his structure from the land and should he fail to do this, Within 30 days, from the date of this judgment, the

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<sup>111</sup> Section 30 of land act cap 227

claimant is empowered to employ the services of court brokers and the respondent Kyobe shall have to meet the expenses. The respondent Kyobe shall pay the costs arising out of this suit. An aggrieved party is free to appeal to the High Court within 30 days from the date of this judgment.”

In another case of Mrs. Yiga Beatrice Vs John Okumu Mrs. Yiga planted cassava on Okumu's land located at Seeta Bugoba Zone. John Okumu bought the land from Nampijja who had paid all the tenants on that land before the sale.

The Tribunal visited the land in dispute' and saw the vast cassava plantation; the members were taken around by Mr. Kiryowa in the presence of the Chairman Local Council 1 Mr. Walusimbi who knew the boundaries of the land and the Kibanja.

Ultimately judgment was read in favour of John Okumu and he was to be compensated through payment of costs by the respondent. Court stated, “Beatrice Yiga is hereby prohibited from committing further trespass. The claimant is declared the lawful owners of the suit comprised on Block 114 plot 10 Kyagwe situated at Seeta.”

The District Land Tribunal shall hear appeals from lower land tribunals within its jurisdiction established under section 80 and 82 of the land Act<sup>112</sup>.

An appeal against a decision of the District land Tribunal in exercise of its original or appellant's jurisdiction lies to the High Court.' In the case above Mrs. Yiga Beatrice appealed to the High Court against the whole ruling of the land Tribunal on ground that the Tribunal Court erred both in law and fact. However, he withdrew this appeal before it could be called on for hearing.

In execution of its duties, the tribunal faces a lot of challenges; first of all the tribunal has no enough funds to run its duties, secondly tribunal members do not attend court regularly to settle land cases. Therefore as a result there is inordinate delay in settling cases.

#### **4.2 MEDIATION**

In addition to land tribunals, an alternative dispute settlement, mediation and conciliation is vital and greater recourse is paid to them in the land dispute settlements in Uganda and especially in Buganda.

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<sup>112</sup> Section 80 and 82 of land act cap 227.

Mediation is a facilitative process in which disputing parties engage the assistance of a neutral third party who acts as mediator in their dispute. The neutral person has no authority to make any decisions, which are binding on them, but uses certain procedures, techniques and skills to help them to negotiate a resolution of their dispute by agreement without adjudication. The term 'mediation' is often used inter-changeably with 'conciliation'; sometimes however, mediation is understood to involve a process in which the Mediator is more pro-active and evaluative than in conciliation; and sometimes the reverse usage of these terms is used. In this paper, the terms will be treated as synonymous.

Even where the mediator expresses a view about the merits of the dispute, which may happen in some but not other models of mediations, mediators have the power to impose this view on the parties. Indeed, any such power would be contrary to the spirit of mediation, which is inherently consensual.

A mediator may be appointed by a land tribunal to assist parties to a land dispute to reach an amicable settlement. A mediator is not required to have special qualifications. Nevertheless, she or he must be a person of high moral character and proven integrity functions in accordance with the principles of natural justice and general principles of mediation.

The Land Act specifies two situations where a mediator appointed under <sup>113</sup>of the Land Act should be used. First, a mediator may be used in negotiations to regularise the relationship between registered owner and persons on his or her land who do not qualify to be bona fide occupants. Secondly, a mediator may be used to help a tenant by occupancy and the registered landowner enter into a negotiated settlement where either party wishes to assign his or her interest.

There are a number of common threads, which generally run through different forms of mediation; first, a mediator is supposed to be neutral and impartial. That is a mediator should not be associated or connected with any disputing parties in a way that would inhibit neutrality or effective intervention.

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<sup>113</sup> Section 89 of land act cap 227

Secondly, by nature mediation is a confidential process.’ It should be stressed that a mediator has no power to coerce the parties into agreement. The mediator’s role is to narrow down any disagreement between the parties. The only binding outcome of mediation is one on which all the parties agree. Any agreement, under which there is an imposed binding outcome, whether stipulated by a third party or arrived at in any way other than by the agreement of the parties, is not mediation. The mediator will be paid an allowance set by the regulations made under the law.

To do this a mediator needs to demonstrate skills of persuasion and conciliation. But in the end it is up to the parties to make up their minds. For example, in the negotiations between a landowner and a non-bona fide occupant to regularize their relationship, if, in spite of the mediator’s effort, the parties fail to agree it would seem that the landowner might evict the occupants. With respect to the negotiations between a tenant by occupancy and a registered owner, if after three months of negotiation the mediator is unable to assist the parties to reach an agreement, the party wishing to assign may proceed to dispose of his or her interest as he or she wishes.

Mediation as opposed to litigation is encouraged in other situations under the Land Act. For example, in the case of an application for a certificate of occupancy, the land committee is required to use its best endeavors to resolve conflicting claims by Although parties are free to agree that mediation is to be public or that this outcome is to be publicized in same way, one of the principles in all forms of mediation is that it is by nature a private and confidential process. The mediator will invariably offer confidentiality to the parties, who may be asked also to agree to mutual confidentiality.

In general, a mediator appointed under the Land Act can, most probably play a more active role in these parties’ negotiations. The concept of mediator as well as the process of mediation is not so much employed in Buganda. The method though recommendable be devilled a duty on the authorities in Buganda to sensitize the masses on the possibility to have their land grievances settled through mediation by the mediator.

#### **4.3 EXECUTIVE ARM OF GOVERNMENT**

Under the law the executive arm of Government is not supposed to interfere with the land dispute settlement. However in most cases the executive interferes in the settlement of land matters. For instance when President Yoweri Museveni was closing the National

Resistance Movement (NRM) National Delegates Conference at Mandela national Stadium, he stated that:

*“The government will not tolerate the eviction of tenants caused by the rulings of corrupt judges and magistrates. I will suspend any judicial officer and constitute a judicial commission of inquiry into his or her activities if there is evidence of any violation of the Land Act”.*

He further stated that:

*“peasants should use ggwanga mijje (community action) against landlords who take advantage of corrupt judges to evict them from their land”<sup>63</sup>. Notwithstanding the provisions of the Land*

Notwithstanding the provisions of the Land Act, with regard to procedures for landlords to evict errant occupants of land. The president further said:

*“the resident district commissioners are the ones responsible for monitoring and ensuring that the Land law is followed to the letter”*

This however leads to disrespect of the judiciary and the law itself. It incites mob justice against the landlords. And this ensures that no amicable settlement of land disputes can be achieved.

Given the fact that many government officials including Resident District Commissioners are not learned in the law, they tend to interfere with court’s independence, which is against the constitution provisions.

This instead promotes the landlord- tenant impasse, which is a major deterrence to peace and development in Uganda.

#### **4.5 PROBLEMS FACED DURING RESEARCH.**

- Tracing for the right material I needed was a bit cumbersome especially when it came to moving from one librarian to another, a number of librarians were not cooperative at all.

## **CHAPTER FIVE**

### **SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS**

#### **5.0 Summary of findings**

The land Act as principle legislation on land matters has played a noticeable role in harmonizing Mailo land tenure relations, especially between landowners and tenants by occupancy. There is every reason to believe that land disputes have to occur between landowners and tenants given the law that is in existence. Today the rent payable is clearly stipulated at rate of 1000/= annually, the moment anybody enters on the land belonging to a Mailo landowner on his! her consent, that person (who entered on the land) becomes a tenant by occupancy, where disputes arise between landowner and tenants; matters are referred to the land tribunals In the first instance the tribunal engages a mediator if the parties do not come to a consensus

#### **5.1 Conclusion**

The study concludes that the relationship of the (Kibanja holder) tenancy by occupancy and the registered proprietor is not provided for under the land Act of 1998 as amended. The land Act does not stipulate the extent of the rights, obligations and the duties of the Kibanja holder still it does not stipulate the extent of rights obligations duties of the registered proprietor under the Mailo tenure as a form of land ownership in Uganda. Therefore the land Act will lie idle such that most landlords will never accept to give consent for the issuing of the certificate of occupancy to the tenant.

The land Act further provides for the payments of shillings 1,000/= at the landlords without respect to the size on location of the landlord. The land lord cannot allow a tenant to occupy his land for a fee of shillings 1000/=. Therefore the legislation failed to clearly stipulate the rights of tenants and land lords on the said land, there has also been a manipulation of the problem of dual permanent land ownership in which parties mutually agree that the land in which a tenant by occupancy has an interest hence landlords cannot develop or use their land because they are in occupation.

## **5.2 Recommendations**

The landlord- tenant impasse still continues especially in the area of study. Therefore, there is need to ensure that these evils are fought against using the force they deserve and among others are the various recommendations.

### **5.2.1 Education of both Tenants and Landowners.**

The cause of the land disputes is usually ignorance of the rights of the contending parties. This has escalated the land wrangles to higher levels. Therefore, the Ministry of Water, Lands and Environment, needs to organize seminars and workshops to teach landowners and tenants their rights, duties, and obligations. This shall help to ameliorate the landlord- tenants' impasse.

### **5.2.2 Rent Payment.**

The major functions of rent payment are:- first it acts as acknowledgement by the Kibanja holder of the Mailo owner's superior title; secondly to provide income to the Mailo owner. The fact that the law currently puts a maximum rent payable at one thousand shillings only is totally unfair. Therefore, the tenants by occupancy should be required to pay to the registered owner of the land an annual nominal ground rent determined by the relevant district land boards, depending on the size and location of the land.

### **5.2.3 Public Interest.**

Government has a right to compulsorily acquire any land, so long as it is necessary for public interest. It all depends on the minister's discretion. This has led to the unfair treatment of some individuals especially those known not to support the incumbent government. Therefore to avoid unfair treatment, the court needs be the one having the discretion to decide whether or not the acquisition is for public interest.

### **5.2.4 Mediator.**

The mediator function was envisaged as open- ended and essentially private arrangement, this has the disadvantages that agreements reached are not recorded or binding in any way. A new structure should be put in place that allows for a more formal process of registering mediators, and recording the agreements reached with their assistance, thus reducing the opportunity for one of the parties to re- open the same dispute immediately through application to the appropriate tribunal.

#### **5.2.5 Courts.**

Courts are full of inordinate delays in hearing and dispensing cases, majorly caused due to poor funding by the government. Therefore, I recommend that enough funds should be provided so that members can attend regularly and their allowances paid in time. This shall avoid delays and justice shall be dispensed honorably.

#### **5.2.6 Set Realistic Time Limits**

In case of the board meetings, and given the nature of their tasks, it is 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.

#### **5.2.7 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 grant them access to borrow reasonable money to invest on land.

#### **5.2.8 Seeking Legal Advice**

There is need for purchasers before making any purchase of land, to seek legal advice.

This is will help to reduce on the violation of the rights of lawful and bonafide occupants because their status is identified before the purchase is effected.

#### **5.2.9 Sensitizing Community on their Land Rights**

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

#### **5.2.10 Establishing the Degree of Subsidiary Granted**

There is need to determine the degree of subsidiary permitted in land management despite the provisions granted by customary land management policies. Policy needs to emphasize

stipulation of mechanisms and determining the degree to which these institutions should be empowered to participate in land management.

#### **5.2.11 Recognizing the legitimacy and dynamism of derived rights**

There is 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 is still representative of customary ideas and customary law. This should not be premised on establishing legal rights of ownership, but the processes whereby rights and the assignment of these rights are recognized and guaranteed with clear procedures laid. This requires the adoption of measures which enable 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 in land.

#### **5.2.12 Need to Regulate Degree of Autonomy to Generate Acceptance**

There is 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 is subject to Section 28 on access rights of the vulnerable to be protected. Recourse must be sought to the law where it is applicable despite the customary nature of the land. The policy should state the level of autonomy that these traditional institutions are granted in the administration of customary land and in dispute resolution.

#### **5.2.13 Landlords should be sensitized on Accepting Derived Rights**

Derived rights ensure access to land for those who would otherwise have been regarded landless. These rights, therefore, need to be recognized as normal elements which exist in all land tenure systems and a positive factor in agricultural production, thus, reducing poverty among the landless and facilitating the land market.

### **5.3 Areas of further research**

Therefore there are different types of land tenures which should be consolidated into freehold and leasehold tenures to avoid the confusion in our land laws. This is because "Mailo" is a luganda word loosely translated as "Mile" whereby the British distributed land in Miles to the Baganda loyalist of the colonialist. Mailo land tenure is also owned in perpetuity like freehold tenure and so these two should be consolidated into Freehold tenure. Some forms of customary

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