AN EXAMINATION OF THE DISPUTE RESOLUTION MECHANISM IN LAND MATTERS AND ITS IMPACT IN UGANDA

A CASE STUDY OF KAMPALA DISTRICT

BY

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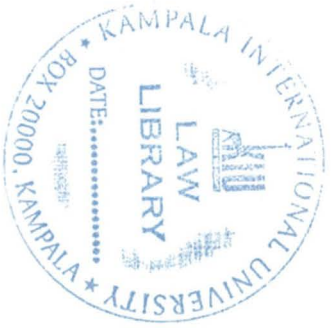

A DESSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWAED OF THE DEGREE OF BACHALOR OF LAWS OF KAMPALA INTERNATIONAL UNIVERSITY.

JULY 2011

DECLARATION

I FRED BAMWESIGYE BWANA declare that except for the reference to other peoples' work which I have only acknowledged, this work is my own and has never been submitted for any academic award in any other institution.

Signature _____

Date 07-03-2012

This dissertation is submitted with the approval of the supervisor

Pros./Dr./Mr./Ms./Miss ..... Tajudeen Sanni

Signature _____

Date 7-3-12

ACKNOWLEDGEMENT

I acknowledge the fact that due to factors beyond my control, it has taken a long time to get this research published since the writing started. The delay has been due to the unavailability of the necessary funds.

I'wou1d, particularly, like to single out my beloved relatives and thank them sincerely, not only for having given me financial assistance and initial encouragement, my uncle Henry Lulecera to read through the first draft aqs well as having allowed me access to his library, which was extremely useful. This research would have been in vain, had it not been for my friends whose contribution too in one way or another, lead towards its completion.

I register my sincere thanks and gratitude to my Supervisor Mr Sanni Tajudeen for having parted with his spare time to guide me as well as making corrections in the drafts, chapter by chapter until the final script was archived. I am also indebted in no small measure to Miss Vivian..... and Cpl Rutaro for having easily parted with their spare time in order to type and edit the various chapters. I cannot, of course forget to thank my long time friend Richard Sajabi whose comments and suggestions were extremely useful.

TABLE OF ABBREVIATIONS

1. S.	Section
2. Cap.	Chapter
3. Art.	Article
4. RTA	Registration of Titles Act
5. NEMA	National Environmental Management Authority
6. KCCA	Kampala City Council Authority
7. AC	Appeal cases
8. ALL ER	All England Law Reports
9. EA	East African Law Reports
10.QB	Queens Bench Division
11.KB	Kings Bench Division
12.KALR	Kampala Law Reports
13.HCB	High Court Bulletin

TABLE OF STATUTES

1. The Constitution of Uganda 1995 as amended.
2. The Land Cap 227.
3. The Registration of Titles Act Cap 230.
4. The Public Land Act, 1954 Revision, Cap 201.
5. The Acquisition Act Cap 226.
6. The Expropriated Act ------
7. The Succession Act Cap 162.
8. The Mining Act Cap 248.
9. National Environmental Act Cap 153

TABLE OF CONTENTS

DECLARATION ---------- (i)
DEDICATION ---------- (ii)
ACKNOLEDGEMENT ---------- (iii)
TABLE OF ABBREVIATIONS ---------- (iv)
TABLE OF STATUTES ---------- (v)
TABLE OF CASES ---------- (vi)

CHAPTER ONE

1.0 INTRODUCTION
1.1 Background to the Study.....
1.2 Statement of the Problem.....
1.3 Hypothesis.....
1.4 Scope of the Study.....
1.5 Objectives.....
1.6 Methodology.....

CHAPTER TWO

2.0 The Legal Regime on Land in Uganda

CHAPTER THREE

3.0 Land Tenures.....
3.1 Customary Land Tenure .....
3.2 Freehold Tenure.....

3.3 Mailo Tenure.....
3.4 Leasehold Tenure.....
3.5 Causes of Land Disputes.....
3.5.1 Fraud.....
3.5.2 Family Conflicts.....
3.5.3 Expropriated Property.....
3.5.4 Trespass.....
3.5.5 Lack of Property Planning.....
3.6 Effects of Land Disputes.....

CHAPTER FOUR

4.0 Land Dispute settlement Mechanism.....
4.1 Litigation .....
4.2 Alternative Dispute Resolution (ADR).....
4.2.1 Mediation.....
4.2.2 Arbitration.....
4.3 Access to Dispute Resolutions Mechanism.....

CHAPTER FIVE

5.0 Conclusions and Recommendations.....
5.1 Conclusion.....
5.2 Recommendations.....

CHAPTER ONE

1.0 INTRODUCTION

The sight of high rise building, tarmac roads, traffic of both people and vehicles, people carrying business here and there, tells you that you are in the capital of Uganda. This is Kampala City, Center of Uganda's economy and administration, evidenced by the presence of Bank of Uganda and the Parliament respectively.

From time memorial, Kampala was the headquarters of the Kingdom Buganda with the King's palace on Mengo hill. The King of Buganda provided early initiatives for Kampala's economic development as they provided proper administration over their subjects through the Kabaka himself and his Parliament (the Lukiko). The coming of the colonialists brought a contribution that cannot be under scored by the when they introduced formal education which produced elites in the much needed fields of education, medicine, engineering, law and above all administrators. Today Kampala has become a cosmopolitan city, comprising of all people from all ethnicities of Uganda and Africa such as, the Bantu, Hamites, Nilotics, Nilohamites, Luos, not to mention people from all over the world.

Since 1986 after the National Resistance Army liberation war, development in the city has been increasing steadily the demand of land for development. This rise in demand for land has been reflected in the rise of monetary value. Land is basically a big asset in Uganda and vests in the owners with pride and most importantly wealth. With this importance attached to land, people are willing to make war or peace in the spirit of guarding whatever interest - they may have in a piece of land. Any interference in one's interest in land usually first starts with mutual resolution but where this fails people become violent to the extent of killing each other.

Land is generally defined as any ground, soil, or earth including fields, meadows, pastures, woods, waters, swamps, mashes and rocks. This definition of land also presents land as the cardinal requirement in development as it's the basis upon which constructions take place, where minerals later used as raw materials are obtained, where roads are constructed and thus the importance of land is indispensable for economic development.

The population of Uganda has been increasing and so is that of Kampala. Both civil strife in Kasese and in the Northern parts of Uganda plus industrial development has greatly contributed to this as people come to live and/or work in peace in the city. Other factors for the shifting of people to Kampala are; Diseases, poverty, lack of social services in rural areas. Therefore people come to the city in hope of attaining a better standard of living. However the envisaged safe heaven of such people, desperate or not, has in most cases turned out to be disappointing. They have become squatters on other people's land, for instance in the slums of Banda, Kivulu, Katanga, Kisenyi and other areas especially where there are absentee land owners. In turn they have conflicted with the City Council in regard to the plan of their buildings and/or the owners who later turn up.

It should be noted that Kampala is located on the shores of Lake Victoria hence a big portion of land in the city is regarded as wetland. People who have settled on such land have ended up conflicting with the NEMA.[1] It however remains to be seen how such people get their plans approved by the KCCA who are empowered to approve or disapprove any construction plan and yet these wet lands are gazetted. Failure to resolve conflicts in land amicably has hindered economic

[1] Cap 153.

development in the city. Against the background of land disputes, the Constitution of the Republic of Uganda, establishes the Uganda Land Commission,[2] and District Land Tribunals,[3] empowered to manage and resolve land disputes. The government has strengthened these organs that are provided for in the Constitution and Acts of Parliament, through ensuring their independence, proper remuneration, recruitment of professional staff, ensuring transparency, checking on corruption through the Inspector General of Government, [4] and strengthening courts.

1.1 Background to the Study

Kampala is located at an altitude of 0 20°N 32°E and is surrounded by Wakiso, Mukono districts and Lake Victoria. The population of Kampala is approximately 1.5million people. The city center is located at 7Km to the North of Port Bell on the shore of Lake Victoria. The average height above sea level is 1.230meters. It is a friendly city and has always been known for its greenery but this has changed in recent times.

The name Kampala came from a Bantu word Mpala meaning a type of Antelope which it is said, the Buganda Chiefs used to keep on the slope of a hill near Mengo Palace. The name Kampala was given to a small hill on which a British Administrator established his fort. [5] At the fort, which was also an administrative post, Lugard hoisted the Imperial East African company flag,[6] which was replaced by the Union Jack. [7] The fort at Kampala (now known as Old Kampala hill) attracted several hundred people and a small township developed. As time went on,

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[2] Art 238 Constitution of Uganda 1995 as amended.
[3] Art 240 ibid.
[4] Art. 223 ibid.
[5] Captain Fredrick Lord Lugard, December in 1890.
[6] In 1890.
[7] In 1893.

traders elected shops at the base of the hill and by 1900, the confines of the fort had become too small for administrative purposes and it was decided that the colonial offices and government residences that were in Kampala (at this time most offices were at Entebbe) should be moved to Nakasero hill. The shops and other commercial premises followed. Kampala grew and the town spread over the surrounding hills until it became known like Rome to be built on seven hills. These historical hills are Rubaga, Namirembe (Mengo), Makerere, Kololo, Kibuli, Old Kampala and Mulago.

Kampala was declared a township [8] and the Railway joining Kampala with the coast of Mombasa reached in 1915. It was raised to a municipality status and later it became a capital city.[9] The city has continued to grow and now covers 23 hills over an area of nearly 200Sq Km. In the shadow of these developments lies the slums of Katanga, Soweto, Makerere-Kivulu, Makerere-Kikoni, Kakajjo, Katwe, Kibuye, Ndeeba, Banda, Bweyogerere, Kireka, Bwaise, Kisenyi, Kikubamutwe, Kawempe, Kazo, Nabweru, Nakulabye, Kasubi, Kawala, Jinja-Kalooli, Namungoona, Mengo-Kakiika, Kinawataka, to mention but a few and these have become a dent to the city, a source of Land disputes and are a manifestation of the extremity of wealth as well as poverty, prominent in most African cities. Important to note is that most of these slums are under the Mailo land tenure system.[10] Subsequently, Chiefs were granted large chunks of land and also the Kabaka's Government. **Micheal Hodd** writes that, "***The agreement led to important changes in land tenure. It won over the majority of Chiefs by giving them land***

[8] In 1906.
[9] In 1949 &1962 respectively.
[10] Introduced by the 1900 Buganda Agreement.

grants known as Mailo, and in doing so it recognized that land was a marketable commodity."[11]

The concept of attaching monetary value to the land led to the chiefs selling some of their land such that they get money to engage in lucrative activities like coffee growing, whereupon they began sending their children to school. These people above all attained a westernized life style.

The negativity of this new concept of land as a commodity and its being increased in value, made it important and whoever interrupted ones possession could prompt strong resistance hence bringing a new phenomenon of land disputes and struggles. The 1908 Land Law was then enacted in an effort to resolving these problems. Subsequent legislation have followed suit.[12] The spirit of these statutes was to harmonize the usage of land and decrease conflicts in land.

This study is thus aimed at analyzing the effectiveness of the mechanisms set out in these statutes in resolving the dynamic land deputes and their impact on economic development in Kampala.

[11] East Africa Hand Book at Page 472.

[12] The Registration of Titles Act Cap 230 of 1924, Registration of Land Titles Ordinance 1908, Public Lands Act 1964 (revision cap 201), The Land Act 1998 (The Land Amendment Act 2004 currently), The 1995 Constitution as amended.

1.2 Statement of the Problem

The Constitution of Uganda 1995 established Land Tribunals.[13] These are empowered and mandated to deal with land disputes. They should, therefore, be sought for by everyone to try and resolve their problems in land and they are capable of doing so when managed properly. It is pertinent however, that despite the numerous land wrangles and their impact on the social economic circumstances of the people, there is an apparent inactivity of the Land Tribunals.[14]

1.3 Hypothesis

Land as already noted is a valuable asset and consequently a source of wealth. Like all other assets, it should be protected and managed properly to ensure that those who own it benefit fully. If this is not ensured, a lot of disastrous impacts could befall those who feel their rights are being entrenched upon. Incidents of conflicts, murder, and witchcraft will still rage on among the affected parties as sometimes the law does not seem to resolve fully their problems. It is therefore, inevitable that immediate attention should be focused on the independence of the dispute resolution mechanisms to indemnify the loss in terms of the economical, political and social well being and on the whole decrease disgruntlement among the populace.

1.4 Scope of the Study

The research is from the year 1900 to the present. The Buganda Agreement was signed outlining the meaning of Mailo tenure system, of land management and

[13] Art 243 supra.
[14] Practice Directions No. 1 of 2006.

ownership. The focus of the study is Kampala, the capital city of Uganda. Due to the geographical setting, most of the areas are accessible hence selection of areas of study is random. The study deals with the effectiveness of the dispute resolution mechanism and how it has impacted on economic development.

1.5 Objectives

- The study is intended towards highlighting the conflicting interests in occupation of land and to investigate as to which interest is recognized by the law.
- To find out the effect of the increasing disputes in land ownership on economic development of Kampala
- The study aims at provision of solutions to the disputes.
- To investigate the effectiveness of the different bodies of government entrusted with authority to resolve the conflicts.

1.6 Methodology

The study is focused on Kampala. The procedure of sampling was simultaneous in all the divisions of the city.

- Data was sourced from land tribunals, libraries, news papers, statutes and the internet.
- Questionnaires were distributed widely to ensure that views from different people were balanced.
- Oral interviews were also conducted.

1.7 Literature Review.

Land is defined as, "Land includes messages, tenements, hereditaments, corporeal or incorporeal; and in every certificate of title, transfer and lease issued or made

under this Act, "land" also includes all easements and appurtenances appertaining to it".[15] Though the this definition describes all the forms and interests exercisable by the land owner, it does not state the extent to which the land owner may exercise his/her right over the air space or underground. However, it was Held in the case of **KELSEN V IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND.**[16] That 'an intrusion into the air space of another whether insignificant or causes no damage to the land, constitutes trespass'. In this case, the defendants had erected an advertising sign post on their building, which projected 8 inches over the plaintiff's building. The former were held liable for trespass. The case of **BERSTEIN OF LEIGH (BARON) V SKY VIEWS AND GENERAL LIMITED,**[17] also held that, 'the surface owner's rights are probably limited to such depth as is necessary for his /her ordinary use and enjoyment of the structures there in. below the depth, the land owner has no greater rights than members of the public'. The Mining Act[18] however creates an exception that the land owner's rights do not include minerals.

[15] S.1 (i) of the RTA Cap 230
[16] (1957) 2 QB 334
[17] [1978] QB 479, [1977] 2 AL ER 902
[18] Cap 248, S.3

CHAPTER TWO

THE LEGAL REGIME ON LAND IN UGANDA

Proper management of land is mandatory in resolving land disputes which could lead to interference with economic development. Land Laws were enacted with a view of indemnifying damage from land disputes as exemplified by this preamble to an act.[19]

"We have seen that the subject of people holding land has become difficult, it is therefore ordered as follows;- "The law may be called, The Land Law 1908---"

Subsequent laws have thus followed suit with a view of addressing land in its entirety. ***"Land in Uganda belongs to the citizens of Uganda and shall vest tenure system provided for in this Constitution", notwithstanding clause (1) of this article-***

(a) the Government or a local government may, subject to article 26 of this Constitution, acquire land in the public interest; and the conditions governing such acquisition shall be as prescribed by Parliament;

(b) the Government or a local government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens;

(c) noncitizens may acquire leases in land in accordance with the laws prescribed by Parliament, and the laws so prescribed shall define a noncitizen for the purposes of this paragraph.

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[19] 1908 Land Law.

Land in Uganda shall be owned in accordance with the following land tenure systems-

(a) customary;

(b) freehold;

(c) Mailo; and

(d) Leasehold.

On the coming into force of this Constitution-

(a) all Ugandan citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament; and

(b) land under customary tenure may be converted to freehold land ownership by registration.---.[20]

There existed people occupying the Mailo land, freehold or leasehold land which belonged to others who would be rendered homeless by the legal owners after the coming into force of the Constitution but this was catered for by introducing lawful and/or bonafide security of occupancy on land.[21]

However there is an exception as far as depriving people of their land The property or interest in or right over property of a person should be deprived of him or her when the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health. One whose property is taken over should receive prompt payment of fair and

[20] Art 237 (1) (2) (3) and (4) supra.

[21] Art 237 (8) (9) ibid and S.------ Land Act 1998 (The Land Amendment Act 2004 currently).

adequate compensation prior to the taking of possession or acquisition of the property .A right of access to a court of law by any person who has an interest or right over the property should also be considered .[22]

The minister power to enter or and examine land in order to ascertain the suitability of land for a public purpose.[23] The same law provides for compensation for a person whose estate or interest in the land is extinguished[24] and provides for Temporary occupation of waste or Arable land for public purpose. Government can occupy land for less than three years but pay compensation for any losses.[25] The question of the compensation which is worth the value of the land by those whose land is acquired by the government is vital and emphasizes that land belongs to citizens of Uganda.

The land acquired by the government is managed by the Uganda Land Commission.[26] The other functions of the commission are set out in the Land Act. One of them is that where applicable, the commission shall hold and manage any land acquired by the government abroad, except that the Commission may delegate the management of such land to Uganda's missions abroad. The other function is to procure certificates of title for any land vested in or acquired by the government. The Commission shall manage the land fund and is entrusted with the role of giving loans to tenants by occupancy to enable them acquire register able interests.

The fund shall be used by the government to purchase or acquire registered land to enable tenants by occupancy to acquire registered interest pursuant to the

[22] Art 26 ibid
[23] S.2 (1) of the Land Acquisition Act Cap 226
[24] S.2 (1) of the Land Acquisition Act Cap 226
[25] S. 10 ibid
[26] Art 239 supra

constitution. To rest the persons who have been rendered landless by government action, natural disaster or any other cause. Finally the fund shall be utilized to assist other persons to acquire titles. However, the commission shall perform such other functions as may be prescribed by or under this Act of any other enactment.[27]

Another body of government that deals with land is the District Land Board.[28] The board shall own land within the district which is not owned by any person or authority.[29] The board shall take over the role and exercise the powers of the leaser in the case of a lease granted by a former controlling authority. Further to cause surveys, plans, maps, drawings and estimates to be made by or through its officers or agents. Also the board shall compile and maintain a list of rates of compensation payable in respect of crops, buildings of a non permanent nature and any other thing that maybe prescribed.[30] The board shall review every year the list of rates of compensation.[31] The board is also empowered to deal with any matter which is incidental or connected to the other functions.[32]

The Act also establishes land committees. A land committee consisting of a chairperson and three other members appointed by the district council on the recommendation of the sub county council shall be for each parish. A similar committee shall be for each gazetted urban area and be for each division in the case of a city except that members will be recommended by the urban council and in the case of a city or recommendation of the city division council.[33] The committee shall determine, verify and mark boundaries of customary land

[27] S.49 (b) of the Land Act Cap 227 and Art 237 clause 9(b)
[28] Art 240 supra
[29] Art 241 (1) (a) ibid
[30] S.59 (1) (e) ibid
[31] S.59 (1) (f) ibid
[32] supra
[33] S.64 (2) ibid

situated cords parish which is the subject of an application for a certificate of customary ownership and to recommend to the board whether to grant the certificate.[34] The committee exercises a similar function with respect to application for conversion of customary tenure to freehold.[35] The committee plays an advisory role to the district land board on matters of customary land law applicable in its parish. Also the committee shall safeguard the interests in land in respect of which application of women, absent persons, minors and persons with or under a disability. The committee will also take into account of any interest in land in respect of which, for any reason, no claim has been made. As earlier mentioned, the land committee receives applications for certificate of customary ownership. A comprehensive procedure is out lined in S.6 of application of the certificate. The committee makes a report and recommendations which are submitted to the board. A copy of the report is availed within the parish for inspection by all persons who submitted claims to or who were heard by the committee.[36]

The procedure and functions of a district board on application for a certificate of customary ownership is provided for and the recorder shall issue a certificate in terms of the decision of the board to the applicant where the decision of the board is to issue a certificate of customary ownership without conditions, restrictions or limitations[37]. A recorder who is provided for is responsible for keeping records relating to certificates of customary ownership and certificates of occupancy.[38]

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[34] S.5 supra
[35] S.9 ibid
[36] S.9 ibid
[37] S.7 (5) ibid
[38] S.68 (2) ibid

Owners of land in lease of free hold, Mailo registered under this Act which is not less than ten years are unexpired may be brought under the operation of this Act as near as may be in the manner and subject to lands alienated before the Registration of Land Titles Ordinance,[39] and the provisions of this Act shall, with such adaptations or may be necessary, extend and apply accordingly.[40]

The certificates of title are issued to owners of land by the registrar as proof ownership of land by the registrar.[41] The most important aspect of registration of land is to keep record of owner ship and transactions in land. The Torrens system, which originated from Australia and was introduced in Uganda[42] still applies to all registered land. It revolves around a centralized "Register Book" and interests in land are created or transferred by registration prescribed by the RTA which provides that no instrument shall be effectual to pass any estate or interest in any land until it's registered.[43]

The Torrens system also has an essential feature, the principle of indefeasibility of Title, which means that once a person is registered as a proprietor of an estate or interest in land, his or her interest in land can't be impeached, except in cases stipulated under the RTA. The registered proprietor is protected against eviction, except in cases provided for which inter alia, include fraud, but does not mention selling without family members' or spouses' consent. [44]

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[39] 1908 Land Law
[40] S.36 (1) supra
[41] S.38 ibid
[42] RTA enacted in 1922
[43] Section 54 ibid
[44] supra

These provisions were up Held in the case of **KAMPALA OTTERS LED V. DAMANIC (U) LTD.**[45], where it was stated that in these provisions, production by a person of a certificate of title in his or her name is deemed to be an absolute bar and estoppels against any legal action. Parties claiming any estate or interest in land described in any notice issued by the registrar under the Act may before the registration of the certificate lodge a caveat to block the bringing of that land under the Act.[46]

The registrar has power to cancel a certificate of title registered in the register book and may register a certificate of title in any of the forms prescribed under this Act in view of that certificate.[47] The cancellation may be due to fraud and such certificate shall be void.[48] Persons who have claims regarding land matters may bring them forward before the expiration of twelve years from the date of realization of the cause of action accruing to him or her, if it first accrued to some person through whom he or she claims to that person.[49] There is however, an extension of the period in case of disability.[50] Another postponement of the limitation period is in case of fraud or mistake.[51]

[45] C.A NO.22 of 1992
[46] S.20 supra
[47] S.38 (4) ibid
[48] S.77 ibid
[49] S.5 of the Limitation Act Cap 80
[50] S.22 (d) ibid
[51] S.6 ibid

CHAPTER THREE

3.0 LAND TENURES AND EFFECTS OF LAND IN KAMPALA

Land tenure refers to the manner in which land is owned, occupied and disposed of within a community. A properly defined and managed land tenure system is essential to ensure balanced and sustainable development. Until 1975, there were four types of land tenure systems in Uganda: Customary, Milo, Freehold and Leasehold. Following the Land Reform Decree of 1975, all land was declared as belonging to Government, people being allowed to settle wherever they wished for as long as they could mage the land effectively. However, the land tenure systems were later on restored by the 1995 Constitution of the Republic of Uganda.

The colonization of Uganda by the British implied that all land in the Protectorate of Uganda was deemed to have become crown land. To the back ground of the existing land tenure systems in Kampala today, **Justice Benjamin Odoki** writes that; ***"The colonial state in Uganda was built on the official philosophy of protectorate and indirect rule rather than colony, territory or direct rule. The colonial state did not introduce radical changes in the system of customary tenure in Uganda. Elsewhere in the African continent there had been resistance from Africans to borrowed policies of change introduced by the colonialists. The dominant economic structure chosen for Uganda by the colonial masters was one of small peasant agriculture under the prevailing customary tenure. It was considered dangerous to modify customs as arbitrary imposition of change would cause a total failure of efforts to administer the local indigenous population."***

However, in order to appease the local chiefs of Buganda and get local political allies in the effective administration of the country, the Colonial Administration

introduced other land policies which could accommodate customary tenure. Thus, besides the preservation of Customary tenure, Mailo land tenure that was created for token purposes to allies of the Colonial administrators and the Kabaka of Buganda, Freehold and Lease hold tenures were introduced.[52]

3.1 Customary Land Tenure System

The customary land tenure is the most dominant in Uganda. This is the system whereby land is owned and disposed of in accordance with customary regulations. Often customary tenure varies according to ethnic groups and regions. This tenure system also exists on its own as communal land ownership. One advantage of this tenure system is that people have lived with it for a long time and therefore understand it. One disadvantage is that it does not encourage record keeping often making it difficult to resolve land use conflicts. Environmentally, the main disadvantage is that it generates little personal interest in the status of land tenure (the tragedy of the commons), leading to mismanagement and degradation. Previously, when human populations were low, the environment could absorb the impacts of human activities. It now appears however, that the assimilative capacity of Uganda's environment under customary tenure is exceeded in several areas of the Country. Customary tenure is a system of land regulated by customary rules which are limited in their operation to a particular description or class of persons.[53]

Certificates of ownership are issued to owners of land in this form of tenure.[54] Therefore owners of customary land are protected by law as any other form of land

[52] Source Book of Uganda Law by John T. Mugambwa at Page 4 & Art 237 (3) supra
[53] S.1 (1), S. 3 and S. 27 of the Land Act Cap 227.
[54] S.4 supra

tenure. This was also illustrated in the case of **LOMOLO Vs KILEMBE MINES LTD**,[55] where it was **Held** that;

"However, where customary tenants whose rights are guaranteed by law, exist, the situation is different. The public lands Act, 1969 defines "customary tenure by laws or customs which are limited in their operation, description or class of persons; this means the nature of land holding prevalent among the tribes of Uganda. Once a person develops vacant land he is said to hold land under customary tenure." It was further* Held *that the owner of land under customary tenure is protected and is entitled to compensation on his land being acquired compulsorily for a public purpose or where the controlling authority grants a lease to someone else.

The new lessee is duty bound to compensate any person occupying the land by customary tenure.[56] However, it is not lawful to establish customary tenure on public land where a tenancy or right of occupancy has been created in respect of it.[57] If a person attempts to occupy leased land, the lessee is entitled to treat him as a trespasser and can evict him.

- Applicable to a specific area of land and a specific description or class of persons.
- Subject to S.27 of the Land Act governed by rules generally accepted as binding and authoritative by the class of persons to which it applies.
- Applicable to any persons acquiring land in that area in accordance with those rules.
- Subject to S.27, characterized by local customary regulation.

[55] [1978] HCB 159
[56] S.24 (4) Public Lands Act and S.3 (3) (b) (iv) Land Reform Decree.
[57] S.24 (1) (b) of the Public Lands Act,

- Applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in land.
- Providing for communal ownership and use of land.
- In which parcels of land may be recognized as subdivisions belong to a person, a family or a traditional institution.
- This is owned in perpetuity.

3.2 Freehold Tenure

This refers to the holding of registered land in perpetuity subject to statutory and common law qualifications the incidents.[58] This tenure derives its origins in the ancient tenures of England service men such as those serving in the military or navy who were entitled to land which they held by virtue of and in return for their services. It was a holding of land in reward for services, "which a free man would not think it derogatory to perform".

In the freehold tenure system, ownership is also in perpetuity, and a certificate of title is issued. The system was originally established to a address limit and quite specific requirements or requests, say by religious organizations. Freehold tenure was also granted as a result of the Toro Agreement of 1900, Ankore Agreement of 1901 and Bunyoro Agreement of 1933. The Crown Lands Ordinance of 1903 gave the British colonial authorities power to alienate land in freehold. This system is mainly found in the Eastern and Western parts of Uganda. Apart from parcels of land under the freehold system being smaller, it has many similarities with mailo tenure and shares the same environmental management problems. In addition, due to heavier population pressures in parts of Uganda where freehold exists, land fragmentation is a common occurrence. Land fragmentation has contributed to significant environmental degradation, although concrete data is lacking.

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[58] S.358

The 1903 Crown Land Ordinance gave power to the Governor to grant any crown land in freehold or leasehold to individuals both Africans and non Africans. However, in 1916, the Secretary of State decreed that there should be no further alienation of land in freehold to non Africans because Uganda was a protectorate and not a settlement colony. Freehold tenure came to fall into the category of estate after the inception of the Norman Conquest and William the conquerors reign, freehold ceased to constitute an ultimate absolute ownership of all land in England.

Freehold tenure therefore came to fall into category of estates which are;

(i) **Fee Tail**. This comprised land granted in freehold to a man and his heirs. A general tail comprised a situation where male or female and irrespective of the mothers. A special tail would restrict inheritance only to specific heirs say those born to a specific woman or to male heirs only or female heirs only respectively.

(ii) **Fee simple**: This comprised land granted in freehold to a man clear of any conditions, limited or restricted and inheritable by any heir whether male or female.

(iii) **Lineal or collateral or otherwise.**

(iv) **Fee simple absolute**: This is a partially continuous tenure and is not determinable. This comprises of Uganda's freehold tenure and is also unrestrained by estate.

3.3 Mailo Tenure

This is the most prominent tenure in Kampala. It is defined as the holding of registered land in perpetuity and having roots in the land pursuant to the 1900

Buganda Agreement and subject to statutory qualifications.[59] Mailo tenure was introduced as a result of the 1900 Buganda Agreement. Under this agreement, land was divided between the Kabaka (King) of Buganda, other Notables and the Protectorate Government. The basic unit of sub-division was a square mile (hence the name Mailo). Originally, there were two categories of ownership under the Mailo system (private and official Mailo). Official mail land was transformed into Public Land in 1967. Under this system, land is held in perpetuity and a certificate of title is issued. The principal advantage of this is that it provides security of tenure, thus allowing long time investments including those related to conservation. Absentee Landlordism and lack of access by regulatory agencies are disadvantages that limit sound environmental management. Absentee Landlordism encourages squatters on Mailo land. These squatters have no incentives for the sustainable management of a land resource they do not own. To the extent that Mailo land is private, resource management regulatory agencies have limited authority over what happens on it for instance, much of the deforestation occurring in the districts of Buganda is on Mailo land. There are no clear mechanisms, which allow the Uganda Forest Department to regulate the private forests on these lands.

The origin of Mailo tenure was the 1900 Buganda Agreement. The Agreement divided the 19600 square miles in Buganda as follows; the 9.000Sq miles of cultivated or uncultivated land occupied without prior gift of the Kabaka or Chiefs by Bakopi or Strangers were vested in Her Majesty the Queen or the understanding that the revenue derived from such lands would form part of the general revenue of the Uganda Protectorate. 1.500Sq miles of forests were also vested in the Uganda administration in addition to 50Sq miles of land occupied for government purposes. The Kabaka and his relatives were to be given 8Sq miles and in addition

[59] S.1 (t) supra

each had 8Sq miles of official estates. Each of the three regents received 16 Sq miles as official estates. The three missionary societies were granted 92Sq miles as private property. As regards the allotment of 8.000Sq miles among the 1.000 private land owners, this would be a matter left to the decision of the Lukiiko with an appeal to the Kabaka. The total amount of land thus allotted amongst the chiefs and accorded to native land owners to the country would not exceed 8.000Sq miles.[60]

The features of Mailo tenure are;

(a) It involves the holding of registered land in perpetuity.

(b) Permits the separation of ownership of land from the ownership of developments on land made by a lawful or bonafide occupant.

(c) Enables the holder, subject to the customary and statutory rights of those persons lawful or bonafide in occupation of the land at the time that the tenure was created and their successors in title, to exercise all powers of ownership of the owner of land held of a freehold title set out in subsections (2) and (3) and restrictions and limitations, positive or negative in their application, as are referred to in those subsections.[61]

In the case of **Lukwago V Bawa Singh And Another**[62] **Bennet J** (as he then was), said that; ***"it was the essence of the relationship between a Mailo owner and the holder of a Kibanja that the latter's right of occupancy occurs for an undetermined period and is heritable by his heir and successor."*** Owners of Mailo land therefore enjoy a permanent right of occupancy and exercise all powers of ownership like those of a freehold title.

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[60] 1900 Buganda Agreement at page 6.
[61] S.3 (4) supra
[62] (1959) EA 282

3.4 Leasehold tenure

The Kampala District Land Board owns about 15% of the land in Kampala. Most of this land is granted to people under lease. (Information from the Land Officer at KCCA Land Office during my interview with her). Leasehold may be created in respect of any land held under any other tenure or which is held by any controlling authority such as the Buganda Land Board, Uganda Land Commission, District Land Board or other land boards. Non Ugandan citizens may not be granted a lease in excess of 99 years. A holder of leasehold may exercise the powers of a freeholder as appropriate in respect of developing the land [63]

A lease in its simplest possible form is the grant of a leasehold interest in land. But in practice leases are almost invariably bilateral contracts in which the tenant is not only given an estate in land but also himself gives covenants for example to pay rent and execute repairs. Leases must now be distinguished from other contracts concerning the use of land, for there are an infinite variety of such contracts which are not leases. Parties may make any bargain they like between themselves, and enforce it between themselves as a contract. But if one wishes to give the other an estate, that is to say a proprietary interest which will bind not only the grantor but also the rest of the world, then that interest must conform to the requirement which the law limits the kinds of estates which can be created. For example, if A gives B a mere license to use A's land, even though for payment and then A sells the land to X, B can sue A for damages for breach of contract but he has no right over the land as against X at any rate at common law. But if X grants B a lease, then B has a legal estate subject to which X takes, so that B can enforce his rights against X as well as against A. It is therefore, of great importance to know what transactions

[63] The Law of Real Property 5th Edition pg. 632

come with the definition of a lease. Leasehold tenure is the system where land is held based on an agreement between the Lessor and the Lessee. There are two types of leasehold tenure arrangements, namely; private leases given to individual Landlords and official or statutory leases given to individuals and/or corporate groups under public act terms. The advantage of the leasehold system is that the Lesser can attach conditions to the Leases and has the right to revoke ownership in case of abuse. The main disadvantages are that leases are costly and cumbersome to obtain, and hither to, the leases awarded have not addressed environmental concerns.

The 1975 Land Reform Decree sought to improve upon tenure arrangements for land. The Decree substantially changed the legal basis of land tenure in Uganda by declaring all land in Uganda as public land administered by the Uganda Land Commission. Freehold and mailo lands were converted into leases of 99 and 199 years for individual and public/ religious bodies, respectively. The provision, which required consent of the customary tenant before grant of freehold (or lease) on public land, was, abolished.

Prior to the 1995 Constitution of the Republic of Uganda, it was realized that the provisions of the Land Reform Decree of 1975 had not been fully implemented due to among others, lack of budgetary provisions and personnel, and resistance by landowners under the previous system. Consequently, both landowners and administrators continued to behave as if they were in the pre-Decree period. It was recognized therefore, that the Country had reached a stage where it had to

Government intends to introduce a new land Bill in Parliament. The new Bill aims at streamlining the tenure systems in accordance with the provisions of Chapter 15 of the Constitution.

3.5 CAUSES OF LAND DISPUTES

"Land is a very delicate and extremely troublesome issue. This is supported by a reasoning of **His Lordship Justice Bahigaine**, in the case of **Christopher Katongole V Yusufu Ssewanyana.**[64]

> ***"that the nature of land presents a lot of problems which in turn lead to disputes and these are brought about by a number of reasons which are diverse and complicated to be analyzed exhaustively."***

3.5.1 FRAUD

Fraud is knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.[65] There are various forms of fraud in land, from that in the land office to fraud by individuals. It is said that peoples land titles have been transferred into other names without the owner's consent all because of corruption and bribery in the land registry. To date, there are over 4.000 fake land titles,[66] as to how and where these titles are made remains a big dilemma.

Some people masquerade to be land owners and con people off their money. There are instances of land owners who sell the same land to different buyers and these only realize that they have been conned when they request for transfer of title.

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[64] CA No. 50/59 (1990-1991) KALR 41
[65] Black's Law Dictionary pg. 685
[66] The Daily Monitor, April 27, 2006

In the case of **Sir John Bagaire Vs Ausi Matovu**.[67] The appellant claimed to have purchased the suit land from the respondent but the respondent denied knowledge of the appellant himself. The appellant pleaded that he was a bonafide purchaser of the suit property without notice of fraud. At the trial the appellant himself admitted not to have purchased the suit property from the respondent **"Ausi Matovu"** but a different *"Ausi Matovu"*. In the event the learned trial judge found in favor of the respondent, finding that the appellant was not a bonafide purchaser as he had notice of the fraud. But on appeal it was **Held** that; ***'the trial judge erred in not finding that the appellant was a bonafide purchaser.'***

It was further **Held** that;

> ***'the trial judge was according to the evidence available entitled to hold that the appellant was not a bonafide purchaser because the applicant had not discharged the burden of proving his plea that he purchased the land from the respondent.'*** Appeal was thus dismissed with costs.

The law therefore protects bonafide purchasers for value and they cannot be ejected on ground of fraud, unless he knew or was part of the fraud under which the land was transferred.[68] This was upheld in the case of **Lwanga Vs Registrar Of Titles**,[69]

In that case, the applicant's late father bought the suit property in 1920, but the title was never transferred into the deceased's name. After his death, one Katamba fraudulently caused the land to be transferred and registered in his name. Later Katamba sold the land to one Salongo, an innocent purchaser, who was registered as the owner. The magistrate's court ordered that the suit property be transferred to the applicant, but the registrar refused to comply. The applicant instituted

[67] C.A CA 7/96; (1998) 2 KALR 135

[68] S. 176 (c) supra

[69] (1980) HCB 24

proceedings in the High Court against the Registrar. **Odoki Ag. J**,(as he then was) **Held** that;

> *'Salongo was a bonafide purchaser for value, and his title could not be impeached or cancelled not withstanding that he acquired his title from a forger. He observed that one of the paradoxes of a registered conveyance is that though registration obtained by fraud is void; it is capable of becoming a good root of title to a bonafide purchaser for value.'*

3.5.2 FAMILY CONFLICTS

Another cause of conflicts in land arises from transactions in family land. Husbands usually use their position as heads of families to sell, exchange, transfer, mortgage or lease family land without consent the wives and yet the law requires the spouses consent.[70] Disputes here usually arise from succession and transfer of land. Women in most Ugandan traditions were not supposed to inherit property but this position has changed over the years but some dogma still hold the old traditional views yielding to conflicts with the widows. The succession Act provides for a procedure for distribution of property of a male intestate hence a battle between tradition and the law.[71]

3.5.3 EXPROPRIATED PROPERTY

Idi Amin Dada announced an economic war leading to expulsion of Asians. This was as a result of the Asians dominance in retail trade in the major cities like Kampala, Jinja to the detriment of the local Ugandans. Soon the people became disgruntled and although the colonial government tried to indemnify these problems for instance by setting up cooperative movements to enable Africans

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[70] S.39 of the Land Act Cap 227(as amended 2004)
[71] S.27 supra..

engage in organized production and marketing, setting up the Uganda credit and savings Bank to facilitate loans. The above integration of Africans in the economy and other political measures did not terminate the Asians dominance in commerce.[72]

Immense properties like land, buildings belonging to the Asians were expropriated by the government and were put under the Departed Asians property custodian Board. Departed Asians covered all types of Asians provided they left their properties in this country in a manner that necessitated the government taking over such properties in the public interest. The Expropriated Act 1982 was enacted with the view of returning the properties to their former owners and transferring the property to the ministry of finance.[73] The above process has brought antagonism with the people who occupied and utilized the property after the departure of the Asians. In the case of **Pyrary Shunji Ganyi And 3 Ors V Coffee Development Authority**.[74] The appellants were Asians who were the registered proprietors of the suit property, which they sold to M/S East Mengo Groups Co-operative and signed a transfer in favor of the purchasers upon their payment of a deposit of UShs.150.000/=. Before the purchasers could pay the balance of USh.1, 350,000/= the vendors were expelled from Uganda by the Military Government. Meanwhile the purchasers had taken possession of the property and eventually paid the balance to the departed Asians property custodian board and the board authorized the registration of the transfer. The property changed hands several times till the respondent acquired it. In 1993 the respondent returned to Uganda and sought to repossess their property under the Expropriated Properties Act. Government

[72] Principles of Land Law by John T. Mugambwa, at page 157.
[73] Long Title to the Expropriated Properties Act 1982
[74] (1998) 2 KALR.

informed the appellants it had never expropriated the property and could therefore not issue a certificate of Repossession under the Expropriated Properties Act.

The appellants filed a suit against the respondent in the High Court before **Justice Bahigaine** for declarations that they were the rightful owners of the suit property. The trial court held that the suit property had never been expropriated under the Expropriated Properties Act and that the property belonged to the respondent. Hence this appeal ground inter alia that Judge erred not to have held that the registration of the transfer of the suit property had been nullified by the provisions of the Expropriated Properties Act and that the appellants had a legal interest which was expropriated. It was inter alia **Held** that; ***'Once a transfer is executed there is a binding contract inter-party and the time to register the transfer is not of essence. In the instant case the sale of the property and execution of transfer were concluded before the expulsion Decrees came into force. Therefore the appellants did not have the property to be expropriated as the property had passed to the purchasers and in the same vain the appellants could not repossess the property, as they had no interest there in.' Appeal dismissed with costs***

3.5.4 TRESPASS.

Trespass on land is unjustifiable interference with possession of it.[75] This perhaps is the most common cause of dispute in land in Kampala today. Trespass on land consists of entering upon possession of the plaintiff, remaining on such land, placing or throwing material objects upon it. The lack of property planning in the city means that people cannot find parking space, where to dump rubbish, easements, and this has prompted their encroachment on other peoples land

[75] Law on Tort by J.A Jolowicz MA and Ellis Lewis P. 328

sparking off disputes. It's common today in Kampala to find posters with words like, "parking fine 10,000", and "urinating fine 20,000".

This problem has by the increasing population in Kampala city which over the years has led to the creation of slums with squatters on other peoples land and encroachment on swamps. However, some of these squatters have a status of bonafide occupancy,[76] and are thus protected by the law.

A bonafide occupant means a person who before the coming into force of the constitution has occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more.[77]

A person who had been settled on land by the government or an agent of the Government, which may include a local authority.[78] The question of a trespass was illustrated in the case of **Sheikh Mohammed Lubowa V Kitara Enterprises Ltd**[79] where it was **Held** that;

1. ***The respondent's entry on the appellants land was unlawful as it was not done with the consent of the appellant. The respondents company entered negotiations after realizing that they had no claim of interest in the land. Even the alleged agreement of sale could not validate the original entry which was clearly unlawful.***
2. ***There was in fact no valid agreement of sale. The purported agreement was merely an attempt to regularize the illegal occupation in the part of***

[76] S.29 supra
[77] ibid
[78] ibid
[79] Civil Appeal No. 4 of 1987.

3.6 EFFECTS OF LAND DISPUTES.

Africans have always treasured their land considering its cultural and economic value and many conflicts like revoked around land economic value and A disputes for instance the Mau-Mau rebellion, Took place in 1954 in Kenya between Africans and Whites due to the Whites occupation of the fertile highland soils in Kenya Maji-Maji rebellion and to date conflicts between Somalia and Ethiopia.

It should be noted that these conflicts have led to displacement of people, destruction to property and above all led to loss of lives causing immense suffering to the people. Little wonder, we hear of murders, quarrels, witchcraft prevailing in Kampala today all in the name of a dispute in land. A story in the Monitor Newspaper illustrates such hostilities; "Husband abandons wife for another woman and poured acid on his wife when she tried to stop him from selling their land". The effect of such conflicts is that production is retarded thus causing unemployment in turn causing a lot of poverty. Conflicts are also costly in terms of resolution considering the time spent in courts, costs of hiring lawyers all these working to the detriment of economic development. Government and City Council programs are halted due to land disputes. The case in point is the delay in construction of Nsoba Road in Kawempe division. The people contend that they have not been compensated for their land and have vowed not to move till duly compensated. However, positive disputes in land have been an eye opener to legislators in regard to drawing up policies and measures for efficient management of land. The recognition of the status of women in regard to land ownership,[81] and the proposed introduction of computerized land titles,[82] are all a show of sensitivity to land conflicts by legislators.

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[81] S.39 Land Act Cap 227, as amended.
[82] Daily Monitor of April 27, 2006

CHAPTER FOUR

4.0 LAND DISPUTE SETTLEMENT MECHANISM.

Upon the abolition of the land tribunals the disputes thereof were forwarded to the Chief Magistrates Court,[83] however those on customary land may be heard by the Local Councils.[84] Other Courts of Judicature remained with their jurisdiction on land matters.

4.1 ALTERNATIVE DISPUTE RESOLUTION (ADR).

Apart from the land tribunals seen above there are other alternative mechanisms for resolving land disputes and it is provided that nothing in this part shall be taken to prevent or hinder or limit the exercise by traditional authorities of the functions of determining disputes over customary tenure or acting as a mediator between persons who are in dispute over any matters arising out of customary tenure.[85]
The provision was enacted after consultation with the local people who felt comfortable using traditional set up in solving some of the disputes many of them did not want the idea of automatically going to the land tribunal.[86]

4.1.1 MEDIATORS

A mediator is provided for in of the land Act that shall be appointed on an adhoc basis. For a person to be appointed as a mediator, the person must be of high moral character and proved integrity and by virtue of his or her knowledge, work, reputation or standing in society, must be capable of assisting or likely to assist

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[83] Practice Directions No. 1 supra.
[84] Local Council(Judicial Court) Act Cap.....
[85] S.88 (1) supra Cap 227 as amended by Act 2004
[86] S.87 (2) and S.89 (1) ibid

parties to a land dispute to reach an amicable settlement.[87] First, a mediator may be used in negotiations to regularize the relationship between a registered owner and persons on his or her land who do not qualify to be bonafide occupants.[88].Secondly, a mediator may be used to help a tenant by occupancy and the registered land owner enter into a negotiated settlement where either wishes to assign his or her interest,[89] a mediator's role is strictly reconciliatory and shall not coerce any party to reach a conclusion or decision.[90]

4.1.2 ARBITRATION

Arbitration is a simplified version of a trial involving no discovery and simplified rules of evidence. Either both sides agree on one arbitrator, or each side selects one arbitrator and the two arbitrators elect the third to comprise a panel. Arbitration hearing usually last only a few hours and the opinions are not public record. Arbitration has long been used in labour, construction, and securities regulation, but is now gaining popularity in other business disputes.

Q: What is Arbitration?

A: Arbitration is an adversarial system of justice designed to present a disputed case to a neutral and impartial third party for decision. It is very much like the adjudicatory (court) process, but a bit less formal. Arbitration is however, even more binding than a court decision in that, in arbitration, you give up our rights to appeal in favour of getting the matter resolved.

B: Arbitration can also be defined as the investigation and determination of the matter or matters of difference between contending parties, by one or unofficial persons, chosen either by the parties or by an appointing authority or person agreed on by the parties or as directed by court.

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[87] Source Book on Uganda's Land Law by John T. Mugambwa at page. 110 & Mutyaba, mp, Harsard, pp. 4351-4352
[88] S. 89 (2) supra
[89] S. 30 (2) ibid.
[90] S. 35 (6) ibid.

C: Arbitration is an Adjudicatory dispute resolution process in which one or more arbitrators issues a judgment on the merits (which may be binding or non-binding) after an expedited, adversarial hearing in which each party has the opportunity to present proofs and arguments. Arbitration is procedurally less formal than court adjudication; procedural rules and substantive law may be set by the parties.

In Uganda, there are two forms of Arbitration:

1. Arbitration under court's direction
2. Arbitration as a result of an agreement between the parties deriving from the contract.

Arbitration under court's direction.

Under the Judicature Act Cap 13 Section gives the high court powers in accordance with its rules to refer to an official or special referee for inquiry and report any question arising in any cause or matter other than a criminal proceeding.

Under section: it provides that where in any case or matter other than a crimininal proceeding:

- All the parties who are not under disability consent
- The cause or matter requires any prolonged examination of the document or any scientific legal investigation which cannot in the opinion of court conveniently be conducted by court or
- The question in dispute consists wholly or partly of accounts, the high court may at any time refer the matter to arbitration.

Under O.47 of the Civil Procedure Rules SI 65-3

- 0.47r1
- R. 2 provides that the arbitrator shall be appointed in such manner as may be agreed upon between the parties.

- R. 3 empowers court on appointing an arbitrator to fix such time as it may think reasonable with in which the arbitral award should be made. This issue was discussed in **Bhagwanji Raja V Swaran Singh**[91] by consent of both parties, an arbitrator was appointed by order of court among others specified that the arbitrator should make his award by the 7th August and file it on 8th August 1958. This was not done and in an application to set the award aside this was one of the arguments that were advanced. That the court by specifying the time with, in which the award should be filed, effectively limited the time for its being made. **Sir Forbes V.P** (as he then was) **Held** that ***"I accept that the making of an award is not the same as filling of an award... In my opinion however, the order in the instant case that the award be filed by a given date is sufficient compliance with the rule, though an indirect one..."***
    - Court is empowered under rule 8 to extend time with in which the award should be made if the arbitrator or umpire has reasonable grounds for not complying with the order.
    - R 5 provides for appointment in instances where the parties fail to appoint.
    - R7 the court is under duly to facilitate the investigation by issue of the same process as that issue by court and any contempt attracts the same penalties as those imposed by court.

Stages of arbitration under court's direction

- The matter must be in court other than a criminal matter
- Either in the opinion of the parties or court the matter is one suitable for arbitration.

[91] (1962) EA.288

- Appointment of the arbitration and the term of arbitrator. The arbitrator can be appointed by the parties agree or by court
- An award is made
- The award has to be filed by the arbitration
- Judgment being entered on that award
- A decree is extracts, which is enforced like any other decree.

Arbitral proceedings pursuant to the agreement of the parties

The parties may be agreement under take to submit a dispute to arbitration by inclusion of an arbitration clause.

Standard Arbitration Clauses

Parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by a mutually acceptable arbitrator, under the rules of the American Arbitration Association. The award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following;

We, the undersigned parties, hereby agree to submit to arbitration administered by a mutually acceptable arbitrator, under the rules of the American arbitration association we further agree that the above controversy be submitted to an (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the

arbitrator(s) and that a judgment of any court having jurisdiction may be entered on the award.

The arbitration, unless the matter otherwise first settles, will be concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

This is governed by the **Arbitration and Conciliation Act Cap. S.3** of the Act defines an arbitration agreement to mean an agreement by the parties to submit to arbitration or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It may be in respect of future dispute or certain dispute defined.

S.4 (1) provided that an arbitration agreement may be in a form of an arbitration clause or in the form of a separate agreement.

S.4 (2) the agreement must be put in writing.

S.12 (2) the parties are free to agree on a procedure of appointing the arbitrator or arbitrators but if there is no such agreement the Act provided that in arbitration with three arbitrators so appointed shall appoint the third arbitrator. In arbitration with one arbitrator the parties shall agree on the person to be appointed.

S.12 (3) If the parties do not appoint an arbitrator then the appointment shall be made by an appointing authority.

Court based ADR can be defined a process by which parties who have filed their dispute in court are given an opportunity at an early age before the hearing of the dispute by the judge to have the said dispute referred to ADR first with a view to finalizing it or narrowing the issues involved.

A close look at ADR would suggest that it is not as new as it sounds. In African culture the use of a third party neutral in the resolution of disputes is still very common today. The neutral is normally appointed because of his/her stature and respect within society decisions reached with the intervention of the third party are implemented in good faith and are normally widely supported in the community. Under continental law the principle of "ex aequo et bon" (injustice and good faith) or "Amiable composition" where a decision is reached on principles that appear to be fair and just as opposed to legal, has been part of the judicial system for some time. The Chinese people have traditionally been way of litigation and have preferred to resolve their disputes informally either directly or with the help of a third party. It would therefore appear that it is the common law jurisdictions that are now coming to terms with ADR.

Traditional Perceptions about ADR

To fully understand court based ADR in Uganda one would have to make an appreciation of the evolution of ADR in Uganda first.

There can be no doubt that when a legal dispute arises then the claimants will go to their lawyers and about 85% of these lawyers will issue a notice of intention to sue the other party in court. It is difficult to say whether this is the preferred route of the claimant or it is the desired route for the lawyer. One can almost say with certainty that almost without thinking it has become the automatic route. This is not to say that litigation has been sole alternative open to claimants in Uganda. Uganda for example first got an Arbitration Act in 1930 but it was seldom used. Furthermore order 43 of the civil procedure rules S.1 63-3 (first promulgated by General Notice 607 of 1928) provided for Arbitration under order of a court but this also has seldom been. This could be referred to as the first "court based ADR"

however it is important to observe that for a court to make an order of a reference to arbitration it would first have to make an inquiry and satisfy itself that the parties making the application were not under some disability. This test clearly threw a negative connection to the choice of arbitration so one had to first be in aright thinking state of mind in order to use arbitration an alternative to litigation.

It can therefore be argued that there was a traditional perception that alternative dispute mechanisms/procedures like arbitration were somewhat inferior to litigation and therefore they could only be allowed after due inquiry as of the state of mind of the parties.

Secondly there was a traditional perception under the common law system that disputes had to be resolved through an adversarial method of dispute resolution. This appears to be a direct result of the training given to lawyers and judicial officers. The training is such that a dispute is resolved on a win/lose formula and any sign of concession is evidence of weakness. Judgment is given for a party and against another. This may not always work when parties seek dispute resolution through ADR.

A third reason is that since courts of law (and in particular The High Court) have unlimited jurisdiction any attempt by a party to remove a dispute from a court to an ADR process was perceived as an attempt to oust the court's jurisdiction contrary to Article 139 of the Uganda Constitution 1995. A good example of this is the case of **Ruth Bemba & Anor V DAPCB**[92]

In recent times section 9 of the new Arbitration and conciliation Act Cap 4 has come under similar criticism as being inconsistent with Article 139 of the 1995

[92] HCCS 833 of 1989

constitution in the case of **Iraqi Fund for External Development V A.G**[93] Fourthly it was generally perceived that for justice to be seen to be done alternative dispute resolution procedures had to be closely supervised by the High Court. This was the philosophy behind the notorious section 11 of the old Arbitration Act (Cap 55) that generally, allowed an award of an Arbitral tribunal to be remitted for reconsideration.

Courts have routinely interfered with arbitral awards where they were perceived not to have been determined by the legal rights of the parties but rather what appeared to be fair reasonable or appropriate in the circumstances.

National Union of Clerical Commercial and Technical Employees Vs Uganda Bookshop[94]

In other cases the whole award would be set aside under S.12 of The Arbitration Act Cap 55 This gave rise to uncertainty as to the actual penalty of an award when procured.

Another and perhaps even more critical traditional perception was that ADR decisions were not capable of being enforced as decree of court. This meant that where a losing party chose not to recognize an ADR decision that was the end of the matter. There was and still is a lot of merit in this traditional perception. ADR decisions are not binding by the nature of their definition and are only acted upon in "good faith" by the parties. Most authorities on the subject advise that ADR decision should be reduced into writings as contracts between the parties so that on default a party can sue on the contract for its enforcement.

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[93] HCCS 1391 of 2000

[94] [1965] EA 533

In the case of the old Arbitration Act (Cap 55) an arbitral award would have to be filed in court to be enforced as a decree of court under section 13 (1). Even then it would only be filed according to that section if it was not first remitted for reconsideration or set aside for an arbitral award to be enforceable id had to first pass the test of "non-remission and setting aside." This made the enforcement of ADR decisions on the whole long and burdensome.

4.2 ACCESS TO DISPUTE RESOLUTIONS MECHANISM

Access was viewed from the multi faceted dimension of physical, technical, financial and psychological. JLOS has made a number of efforts to address the physical access side of the equation. A number of Courts and Justice Institutions have been opened up country wide though much has to be done. Table 1 below shows the access to various Justice Institutions. It is evident that the most accessed institutions are the informal justice institutions as compared to the formal justice ones.

Table 1: Percentage Distribution of Households by Distance to Nearest Institution/Court

Institution	Less than 1km	1 – 5km	>than 5 – 10km
Customary Courts	62.2	28.6	3.6
LC I	67.0	32.2	0.4
LCII	28.6	62.4	7.0
LCIII	12.4	51.7	22.4
Local Administration Police.	10.5	50.0	22.6
Central Police	8.2	37.4	20.6
Prisons	3.9	28.1	21.0
Magistrates Courts	4.3	28.6	18.3

District Land Tribunal	3.0	18.9	12.2
High Court	1.3	12.4	6.3

Source: National Service Delivery Survey 2006.

It is evidence from the above table that the Local Council Courts (Executive Council Courts) are the courts of first choice or instant for most Ugandans. A recent joint survey on operations of Local Council Courts and Legal Aid Providers confirms this.[95] These courts are the most accessible and people have confidence in them compared to the main stream courts. In addition, if we view access from the supply side we shall notice big gaps. For example, with regard to the police, we about 16,000 police for a population of 27 million meaning that the ratio 1: 1600 well below the international ratio of 1: 1500. We have 1:6 prisoner/warder ratios well below the international of 1:3. In the Judiciary we have about 414 members of the bench at various levels.[96] On the prosecution side, there are 71 State Attorneys and 162 State Prosecutors.[97]

One problematic area in terms of access for the poor to dispute resolutions mechanism is the technical nature of the proceedings. The official language of court and government is English. While provision for interpreters is there, most ordinary people cannot follow court proceedings or read the various law

[95] Legal Aid Basket Fund and UNPD/UNCDF, June [draft] 2006: Joint survey on operations of Legal Council Courts and Lagal Aid Providers, pages 9-10.

[96] Supreme Court Justices 6, Court of Appeal Justices 8, High Court Judges 27, Chief Magistrates 23, Magistrates Grade one 102, Magistrates Grade two 248. Figure from JLOS, June 2006.

[97] Justice, Law and Order Institutional reports June 2006.