

**THE CUSTOMARY LAND TENURE AND THE IMPORTANCE OF CERTIFICATE OF
CUSTOMARY LAND OWNERSHIP.**

A CASE STUDY IN ACHOLI-MADI SUB- REGION.

By

MAWADRI MATHEW DOUGLAS

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DECLARATION

I **Mawadri Mathew Douglas** declare that this research dissertation is my own work and it has never been submitted elsewhere for the award of degree or any academic credentials.

Signature:.....



Date:



APPROVAL

This is to certify that this dissertation presented by **Mawadri Mathew Douglas** was carried out under my supervision is now ready for submission with my approval.

Signature

Date

27/08/2013.

Patricia Okumu Ringa

(SUPERVISOR)



70%

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CHAPTER ONE

RESEARCH BACKGROUND

This contains the problem that the researcher intends to address, the objectives of the research paper and the methods the researcher will use to collect data while in the field as well as an analysis of the similar prior research undertaken by scholars towards the same subject matter. To the best of the knowledge of the researcher, as the title of the research reads “The customary land tenure and the importance of certificate of customary land ownership”, cases study of the Acholi-Madi Sub-region”.

From the library literature and any other literatures or thesis on customary land tenure, not much has been written and researched on the subject matter, thus this research has been provoked to unearth, discover and pave a way forward through a legal research the importance of the customary land tenure or title, as most land in the regions of Acholi-Madi corridors/ sub-region of northern Uganda are held under customary tenure system which then brings the question of the relevance of customary tenure and the importance of certificate of customary land ownership to the holders or occupants of land held under customary tenure system and other tenure systems at large under the Land Act.

The research intends to investigate the procedure used to acquire certificate of customary land ownership under customary tenure and the respective roles of the respective native authorities’ in the grant of the certificate of customary ownership of land under customary tenure system.

The research study also undertakes to find out the reason for conversion of the customary land tenure system to freehold tenure system and the benefits that accrue from holding land title under freehold tenure.

A further study under the research intends to look at the authorities responsible to the administration of land systems and grant of certificate of customary land ownership under customary land tenure in the scope of the research, having looked at the various factors that affect the administration of the land systems in the said areas, as well as the changing government policies about land in Uganda.

The research paper shall be divided into five chapters. Chapter one shall contain the introduction, background, the problem statement, objectives, research questions methodology and literature review. Chapter two contains the provisions of the Constitution, Land Act as Amended, the Registration of the Titles Act and any other legislation and journals that provides for customary land tenure and acquisition of ownership of certificate under customary land tenure and other relevant authorities to customary land tenure system. Chapter three contains the methodology the researcher used to collect data and analyze data from the field. Chapter four contains finding from the field and the reflections of the thoughts of the respondents as well as the observations of the researcher from the field about holding land under customary tenure in the scope of the research. Chapter five contains the conclusions and recommendations of the research as envisioned by the researcher in the objectives and significance of the study as well as the views of the respondents.

1.1 Background of the study.

1.1.1 The historical/ pre-colonial era of the land.

Before the coming of the colonialists, Uganda did not have a uniform land tenure system; different ethnic groups had varied customs whose land management is administered by the various clan leaders over the ancestral ground. The communities recognized individual rights to

possess and utilize land subject to the sanctions of the family, clan and communities¹. The clan and family had the power and right to settle disputes, exercise the right or option to buy any land offered by its members, prohibit the sale of clan land to undesirable person and declare void any land transaction which had not received any approval. The community had the right to graze communally, but any damage to the crops had to be made good (compensated)². The community also had access to salt licks, watering cattle and access to water from spring and other common rights; therefore customary tenure in pre-colonial Uganda recognized both individual and communal interests in the land and the parties acquire an equitable interests for those who have used the land for a long time uninterrupted under the family, clan and customary setup. The specific terms of the tenure vary according to the ethnic group and region of the country.³

It is also important to note that under the historical era, land acquired under the customary land tenure did not have any legal protection under the law as there were no properly established offices or authorities to carry out the registration process and ensure authenticity of titles.

1.1.2 Colonial Uganda.

Uganda was declared a protectorate in 1892 by the British and with it brought about the introduction of an indirect rule in Uganda. The colonial government to a greater extent retained the overall administrative oversight function and on the other hand, it maintained the existing African institutions to assist in the day to day running of the colony.

¹ Section 24(4), Crown Lands Ordinance 1903 (repealed).

² Justice Odoki, The Report of the Uganda Constitutional Commission (1992)

³ Morris/Read, Uganda: The Development of its Laws and Constitution (1966), pp. 353-359

The 1900 Buganda agreement is of a significant importance that was introduced for the first time in Uganda's history two types of land tenure systems namely the Crown land and mailo tenure systems.⁴

Under the Crown,⁵ land vested the radical title in the Crown where the land is held as a property and mercy of the King of England⁶ a single alluvial land ownership was introduced "mailo" where the Crown Lands Ordinance vested allodia title in individual mailo owner by the special recognition shall be transferable and disposed off by will or customary successions to Africans of Uganda. The customary land tenure co-existed side by side with mailo tenure system.⁷

In 1907, the Colonial government also introduced the Torrens system of land registration which influenced the registration of the documents relating to land ownership to be replaced by system of registration of title with a guarantee of indefeasibility on the lines of the Torrens System of Registration⁸.

1.1.3. Post-colonial Uganda

Under the Post-colonial Uganda, there were various land legislations such as the Public Lands Act 1962⁹, which had a semi-federal set-up that controlled the structure and administration of land and vested land formally under the Crown as a freehold tenure in control of the Uganda Land Commission and the Crown land in Buganda under the Buganda Lands Board.

⁴ Legal Notice of 1908.

⁵ Queen's government

⁶ Crown Lands Ordinance 1903

⁷ The Buganda Land Law 1903.

⁸ The 1907 committee on Land resettlement report

⁹ Which is an outcome of the 1961 constitutional Conference on land matter, it repealed the Crown Land Ordinance 1903

Under the 1969 Public Lands Act¹⁰ the land remained vested in the Uganda Lands Commission. It introduced the concept of leases and allowed the creation of leases on the former Crown land, which was former public land tenure under the control of the Uganda Lands Commission.

The 1969 Public Land Act also alleviated the position of customary tenant on public land and provided that land lawfully occupied by customary tenants could no longer be alienated without the consent of the occupants. Any person applying for grant of lease over the public land had to state in the application whether or not the land was wholly or partially occupied by customary tenants and if so, whether they had freely consented to the proposed alienation and further gave the customary land a right to apply for a lease over the land they occupy.¹¹

Under the post-colonial Uganda, the Land Reform Degree 1975, was the major land mark law in the history of Uganda that declared all land a public land and was vested right of control under the Uganda Land Commission¹².

The decree saved customary tenure but reduced it to tenancy at sufferance and gave Uganda Land Commission powers to lease such land to any person. Occupants on Mailo land and native freeholds became tenants at sufferance on Public land under the decree.¹³

1.1.4 The Constitution 1995 and the Land Act 1998

Under the Constitution of the Republic of Uganda 1995, land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in the Constitution¹⁴. The constitution provided for tenure systems as customary, freehold, mailo and

¹⁰ As repealed by the 1962 Public Lands Act

¹¹ Section 24 of the 1969 Public Lands Act.

¹² The 1962 Public Lands Act.

¹³ Section 3 of the 1975 Land Reform Decree.

¹⁴ Article 237 (1) of the Constitution.

leasehold tenure systems and that on the coming into force of the constitution¹⁵, all citizens owning land under customary tenure may acquire certificate of customary ownership in a manner prescribed by the Parliament and land under customary tenure may be converted to freehold land ownership by registration¹⁶.

The Constitution further provides that the within two years after the coming into force of the constitution, Parliament shall enact laws to protect and regulate relationship between the lawful and bona fide occupants of land and provide acquisition of registrable interest in the land by the occupant¹⁷.

The constitution further created offices for the administration of land matters, *inter alia*, the Uganda Land Commission¹⁸, the District Land Boards¹⁹ and the Land Tribunals²⁰

Land Act 1998 reiterated the Article of the Constitution that all land in Uganda shall vest in the citizens of Uganda and shall be owned in accordance with the tenure systems of customary, freehold, mailo and leasehold²¹. The Land Act further created the protection for customary land tenure by the creation of certificate for customary land ownership²² and security of equitable interests for legal and bona fide interests in the land²³.

¹⁵ Article 237 (3) of the Constitution.

¹⁶ Article 237(4) of the Constitution.

¹⁷ Article 237 of the Constitution.

¹⁸ Article 238 of the Constitution.

¹⁹ Article 240 Of the Constitution.

²⁰ Article 234 of the Constitution.

²¹ Section 2 of the Land Act

²² Section 4 of the Land Act.

²³ Section 29 of the Land Act

1.2 Statement of the Problem.

The 1995 constitution vested the ownership of land in the citizens of the Uganda in accordance with the land tenure systems of customary, mailo, freehold and leasehold²⁴. The Constitution further provides for that all Ugandan citizens' acquiring land under customary tenure to acquire certificates of customary ownership and that land under customary tenure may be converted to freehold land ownership by registration²⁵.

The Land Act 1998 provides the process for obtaining a certificate of customary land ownership²⁶ as well as conversion of customary tenure to freehold tenure system on a former public land²⁷ through application to the District land Boards, Land committees and an establishment of Land tribunal and other mechanisms at a sub-county, parish or communal systems to administer land disputes and wrangles and questions arising out of ownership and use of land.

However, these institutions and authorities are non-functional/ non-operationalized or not in place to administer their mandates to grant certificates of customary ownership and control over land held under customary tenure on a former public land or which are subject to local customary regulations and provides for communal and individual or household ownership²⁸. These had arisen so during the two decade era of the LRA bush war which displaced the occupants of the land.

It has also emerged that customary land tenure system seem obsolete since freehold tenure system is opted for as compared to customary land tenure system by the majority, or more rights

²⁴ Section 2 of the Land Act

²⁵ Article 237 (4) (a) of the Constitution.

²⁶ Section 4 of the Land Act.

²⁷ Section 9 of the Land Act.

²⁸ African Peer Review Mechanism, Uganda country self-assessment report (November 2007) pg. 459

and interests accrue to freehold tenure, thus the question why the majority opt to convert of freehold tenure.

1.3 The conceptual framework.

Over the years, customary land tenure system has been faced with many challenges and problems. These problems has been attributed to many factors both legal and non-legal in the administration of land matters *interalia*, the lack of proper legal status to regulate customary land, lack of proper documentations to identify ownership and title, the obsolete nature of customary tenure system as compared to the other tenure systems and lack of proper legal systems in place to oversee, manage and adjudicate matters of customary land tenure systems in Acholi-Madi Sub region for the last two decade.

The causes for lack of proper acquisition of customary land tenure documentation are being categorized as legal and non-legal. The legal factors in variances of the tenure systems such freehold that are largely easily accessible unlike customary tenure, the procedures of acquisition of documentation of customary land, the conflicting interests between the legal and *bonafide* occupants, the number of people whom a certificate of customary ownership vests and their respective interests there under, the non-functional or dysfunctional systems of land administration.

The non-legal causes *interalia* are the two decade LRA (Lord's Resistance Army) bush war which displaced thousands of people who had occupied land held under customary land, the dysfunctional or non-operational local traditional systems of administration, the lack of good will to acquire proper certificates of ownership from the occupants, the improper channels of inheritance of land, the absence of proper functional clan/traditional leaders or institutions.

The aforementioned factors have had effects on the legal framework, ownership, proprietorship and usage of the land for economic development purposes since there are no proper channels for acquisitions of certificates of customary ownership, poor administration of land matters and disputes, rampant disputes and wrangles over the use and ownership, as well as irregular emergency or policies prejudicial to the interests of the occupiers of customary land tenure.

1.4 Objectives of the study.

- ❖ To establish the importance and relevance of a certificate of customary ownership to a person holding land under customary land tenure.
- ❖ To establish the relevance of the bodies charged with the management of land.
- ❖ To compare the customary tenure system to freehold tenure systems and identify the relevance of the same.
- ❖ To compare reforms that might be brought about by the participation of cultural/traditional leaders in the management of customary land.
- ❖ To identify the hindrance of the acquisition of certificates of land ownership under customary land tenure.
- ❖ To identify the cause of the land disputes and wrangles.
- ❖ To recommend for measures of land wrangles as a result of communal holding customary tenure.

1.5 Research questions.

The researcher will identify questions that will suit the interests of the research to be able to identify the relevance of customary land tenure to the people of northern Uganda.

- ❖ Whether persons occupying customary land tenure system enjoy any particular interest on the particular parcel of land.
- ❖ Whether the land regulatory authorities charged with the issuance of proper documentations of customary land ownership and acquisition are operational and performing in accordance to the expectations of the people and according to the law or laid down procedures.
- ❖ Whether the interests of a particular group accruing to the holding of a communal or clan ownership are addressed under such title.
- ❖ Whether a customary land tenure system is still a valid land tenure holding system to last a test of time.
- ❖ Why the obsolescence of customary tenure and an option for a freehold land tenure system over customary tenure.

1.6 Scope of the study.

The research paper will be approached from a legal point of view other than social research. It's important to note that customary land tenure system is a practice of the customs and regulated by traditional institutions.

The research shall therefore be conducted in in northern Uganda in the areas of Acholi-Madi Sub region where customary land is the most popular form of tenure by practice where land is largely held under customary land tenure system.

The research further looks at cases where land disputes and wrangles are rampant as the media reports and often times the some tribal conflicts escalate over parcel of land whose ownership is

questioned as a result of the 20 year old LRA bush war which displaced majority of the settlers on the land.

1.7 Significance of the study.

This research paper is intended to define the specific interest that accrues as a result of holding land under customary land tenure and whether or not the interests of the holders are appropriately addressed through the tenure system. Whether individual titles to land were the way forward, and whether customary land tenure impedes economic development and that is it possible to achieve economic development under customary land tenure.

The paper also aims at finding the causes for the disputes and the land wrangles arising from the land customary tenure. The paper also entangles at the availability and effectiveness of the administrative systems charged with the responsibility of these administrative bodies in addressing questions around land acquisition, conversion and proper use of land under the customary land tenure system and find out why these administrative systems have become non-functional and dysfunctional in provision of appropriate remedies.

Finally, the research paper intends to investigate why customary land tenure system has become obsolete land tenure as compared to the freehold, as well as the legal and non-legal factors affecting acquisition of certificate of customary ownership under customary land tenure system.

1.8 Conclusions.

The core reason behind this research paper is therefore to find out the relevance and importance of certificate of customary ownership of land to the people of Acholi-Madi sub region where land is predominantly held under customary land tenure. It is also therefore important to identify

the core causes for improper documentation of land held under customary land tenure system in northern Uganda where the land is largely held under customary land tenure system.

CHAPTER TWO.

LITERATURE REVIEW.

INTRODUCTION.

The chapter contains the laws of Uganda that provides for the management of land in Uganda from the historical, colonial and postcolonial eras. It focuses on the importance of titles of land, the procedures and prerequisites for acquisition of titles and of certificate of customary land ownership under the laws of Uganda. The Chapter has provisions of the Ugandan Constitutions 1995 as amended, The Land Act 1998 as Amended, The Registration of Titles Act and Journals and any publications on customary land tenure.

2.1 The prior legislations on customary land tenure before the 1995 Constitution and the 1998 Land Act (as amended).

The word tenure in land law refers to the nature or manner of ownership or holding of land. It answers the question of how land was held and by who held. In England since about 1066, with the inception of the reign King William the conqueror, all land vested to the crown. This is even the position today and whoever holds land is considered to do so at the pleasure of the crown and as a reward for services rendered while the crown hold the ultimate title.

Hence the colonization in Uganda by the British, all the land in the protectorate was deemed to have become crown land²⁹. It defined Crown land to comprise “any land acquired by the crown through treaties with native rulers and land under the control of the crown by virtue of the protection. In the same vain, the crown lands³⁰ provides that all the land in the protectorate of Uganda and any rights there in vested and are presumed to be property of the crown of England

²⁹ The Crown lands Ordinance of 1903 made under the Uganda order in Council of 1902

³⁰ declaration ordinance 1922),

unless recognized by government by document to be the property of any person or until the contrary was proved.

Uganda's land law emanated mainly from the English Law of Real Property. The law did not take into consideration the customs, traditions and practices of the then indigenous communities of Uganda with regard to land ownership, occupancy and utilization. Through the coming of the colonialist and the English Law of Real Property, the biggest percentage of the land in Uganda was vested in the crown and the occupiers legally occupy it at the pleasure of the Queen of England.

Whereas before the advent of colonialism, the customary laws governed land ownership, occupation access, which varies from area to area. There are however similarities in the application of the customary laws, which included *interalia*, Everyone had access to land through his/her family or clan; individual ownership was unknown but each individual had rights, to use the land so in the pre-colonial Uganda, there were no landless people; the concept of individual land ownership was not recognized; land holding systems were basically communal and rights in land were vested in clan, families, chiefs and or kings; it's the then clan family structures that allocated land and even settle land disputes; the dealing in land by way of selling, lease or mortgage was generally non-existent in the pre-industrial societies/communities; the general community had access to common lands of the common interests such as water, grazing, firewood, pasture leisure, etc.

There was far less important class of rights over land; these are basically hereditary rights and interests. These claims were based on either on long occupation of a particular holding confirmed by the king or an original grant of one to an individual chief or peasant by the king. So

chiefs and peasants with the same opportunity to have a permanent claim to have a particular piece of land were recognized over the small but valuable piece of land, hence have permanent interest and with the rights in that particular piece of land.

With the developments and the colonial activities, there have been other interests developed in land. The 1900 Buganda Agreement introduced the alien concept of interests in land *inter alia* the Freehold, Mailo, and Leasehold deleting the previous systems of tenure and the peasant's rights of interests in land were entirely ignored in the 1900 Agreement³¹.

With the development of laws and legislations such as the Land Reform Decree of 1975, which was a major landmark in the history of land law in Uganda, the decree vested all land in Uganda to be public land centrally controlled by the Uganda Land Commission to manage and allocate land on behalf of the state. All the other tenure systems *inter alia*, Mailo, Freeholds were abolished and automatically converted into 99-year leasehold for public bodies. "With effect from the commencement of the Decree, all land in Uganda shall be Public land to be administered by the Uganda land commission in accordance with the Public Lands Act of 1969, subject to such modifications as may be necessary to bring that Act in Conformity with this Decree"

The 1975 Decree saved customary land tenure system in Uganda but reduced it to tenancy at sufferance gave Uganda Land Commission powers to lease such land to any person. The Act also abolished the right of Ugandans to occupy an alienated public land by customary tenure without a license granted by government.

³¹ The Busulu and Envujjo Laws of 1928.

At common law, a tenant at sufferance can be evicted any time and only enjoys the land at the pleasure of his landlord. The provision therefore meant that a lease could be granted over a tenant's land without his consent³², customary tenancy could be terminated on conditions approved by the Land Commission, which included payment of compensation (also presently reflected in the Land Act).³³

In terminating these customary tenancies on Public Land, a procedure was set out in the Land Reform Regulations³⁴. Under these regulations, the period of notice and amount of compensation were to be approved by the sub county land committee before termination of tenancy. Unfortunately the Committees were never set up, making the whole procedure difficult.

2.1.1 The Sources and recognition of customary land law in Uganda after the 1995 Constitution and the 1998 Land Act (as amended).

There are many sources of customary law in Uganda *inter alia*, The Constitution of the Republic of Uganda 1995 as amended, The Land Act Cap 227 as amended, The Registration of Titles Act Cap 230 and the Mortgage Act 2009.

2.1.2 The Constitution of the Republic of Uganda (1995).

The Constitution is the supreme law of the land of Uganda and shall have a binding force on all authorities and persons throughout Uganda. If any other law or custom is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law or custom shall to the extent of its inconsistency be void³⁵.

³² Section 24 of the 1969 Public Lands Act.

³³ Land Reform Decree 1975, section 3(1).

³⁴ Statutory Instrument No. 26 of 1976.

³⁵ Article 2 of the Constitution.

The Constitution under the national objectives and directive principles of state policy provides that in the furtherance of social justice, the state may regulate the acquisition, ownership, use and disposition of land and other property in accordance with the Constitution³⁶.

The Constitution further provides that Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the tenure systems provided for in the Constitution³⁷, that land in Uganda shall be owned in accordance with the following tenure systems *inter alia* customary, freehold, mailo and leasehold tenure systems³⁸. The Constitution further provides that on coming into force of the Constitution, all Ugandans owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament, and land under customary tenure may be converted to freehold land ownership by registration³⁹.

The Constitution provides for district land boards for each district⁴⁰, these district land boards are to hold and allocate land in the district which is not owned by any person or authority, facilitate the registration and transfer of interests in land and deal with other interests connected with the land in the district in accordance with the laws made by Parliament. In the performance of their functions, a district land board shall be independent of the Uganda Land Commission and shall not be subject to direction or control of any person or authority but shall take into account national and district council policy on land⁴¹.

The Constitution in addition to the district land boards provides for land tribunals, that the Parliament shall by law provide for establishment of land tribunals; among its function is the

³⁶ National objectives and directive principles of State Policy No. XI (iii).

³⁷ Article 237 (1)

³⁸ Article 237 (3)

³⁹ Article 237 (4) (a) of the Constitution.

⁴⁰ Article 240 of the Constitution.

⁴¹ Article 241 of the Constitution.

determination of disputes relating to the grant, lease, repossession, transfer or acquisition of land by individuals, the Uganda land commission or other authority with responsibility to land, and the determination of any disputes relating to the amount of compensation to be paid for land acquired⁴².

The Constitution also recognizes the right to property that every person has a right to property either individually or in association with others and no person shall be compulsorily deprived of property or any interest in or right over property of any description⁴³.

2.1.3 The Land Act Cap 227(as amended) (1998).

The Land Act recognizes land ownership subject to the Constitution⁴⁴ that all land in Uganda shall vest in the citizens of Uganda and shall be owned in accordance with the tenure systems of customary, freehold, mailo and leasehold⁴⁵.

The Land Act recognizes customary tenure as a form of tenure applicable to a specific area of land and a specific description or class of persons; subject to section 27, 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 other rules; characterized by local customary regulation; applying to local customary regulation and management to individual and household ownership, use and occupation of, and transaction in land; providing for communal ownership and use of land; in which parcels of land may be recognized as

⁴² Article 243 of the Constitution.

⁴³ Article 26 of the Constitution.

⁴⁴ Article 237 of the Constitution.

⁴⁵ Section 2 of the Land Act.

subdivisions belonging to a person, a family or a traditional institution; and which is owned in perpetuity⁴⁶.

Customary tenure applies to former public land that has not been registered in any form; is regulated by local customary rules which however have to be in line with Section 28 of this Act; provides for communal ownership, occupation and use of land; also provides for individual and household ownership, use and occupation of (and rights and interests in) land according to the customs and rules of the community; an individual, family or traditional institution may occupy a specific area (recognized as a subdivision) of communal land; and the land is owned forever.⁴⁷

Whereas Freehold tenure applies to where the landholder is registered as the owner; the land is owned in perpetuity (or for a shorter period fixed by a condition); the land can be used for any lawful purpose; the owner may sell, lease, mortgage, pledge, sub-divide, create rights and interests for other people and create trusts of land; the owner may dispose of the land to any person by will.⁴⁸

A freehold tenure is therefore a title created by which is subject to conditions, restrictions or limitations which may be positive or negative in their applications, applicable to any of the incidents of the tenure.⁴⁹

2.1.4 The Registration of Titles Act Cap 230.

⁴⁶ Section 3 of the Land Act.

⁴⁷ Section 3 (1) of the Land Act.

⁴⁸ Section 3(2) of the Land Act.

⁴⁹ Section 3(3) of the Land Act.

The definition of land is said to include misusages, tenements and hereditaments corporeal or incorporeal; and in every certificate of title, transfer and lease issued or made under the RTA, land also includes all easements and appurtenances appertaining to the land described therein or reputed to be part of that land appurtenant to it⁵⁰. In general land includes all the buildings erected upon it but to this general rule there are some exceptions. It is true that if a stranger voluntarily erects buildings on another's land they will belong to the owner of the land and will become part of it yet cases are not wanting where it has been decided that such an erection under peculiar circumstances would be considered personal property.

All documents relating to land which was alienated in fee or for years by or on behalf of the Crown before the commencement of the Registration of Land Titles Ordinance, 1908, shall immediately on the commencement of this Act be collected from the district offices and lodged for custody in the office of titles, and the following procedure shall be adopted with regard to that land;⁵¹

Where after the commencement of the a Registration of Titles Act, an instrument affecting land referred to in subsection (1) or any interest in that land is presented for registration, the registrar shall proceed to bring the whole of that land under the operation of this Act in the same manner as hereafter prescribed on an application to bring that land under the Act; but if any such land has not been surveyed, the registrar may call upon the person entitled to a certificate of title under this Act to have that land surveyed;⁵² All land within the meaning of this section may be brought under the operation of this Act on an application in Form I of the First Schedule to this Act, which application may be made by any of the following persons— (a) the person claiming to be

⁵⁰ Section 1 (7)(1) of the Registration of Titles Act Cap

⁵¹ Section 9 (1) of the Registration of Titles Act

⁵² Section 9 (2) of the Registration of Titles Act

the owner of the fee simple or term of years either at law or equity; (b) persons who collectively claim to be the owners of the fee simple or term of years either at law or in equity; (c) persons who have the power of appointing or disposing of the fee simple or term of years; (d) the guardian of any infant or the committee of any lunatic or person of unsound mind unable to govern his or her estate so, however, that the application is made on behalf of that infant, lunatic or person and the certificate of title is directed to issue in his or her name.⁵³

Notwithstanding subsection (3), a mortgagor shall not be entitled to make such application unless the mortgagee consents to the application; nor a mortgagee unless in the exercise of his or her power of sale, and unless the certificate of title is directed to issue in the purchaser's name; and the attorney of any corporation, howsoever and whosoever incorporated, whether already constituted or hereafter to be constituted by a power of attorney under a seal purporting to be the common seal of the corporation giving the power may make such application for or on behalf of the corporation of which he or she is the attorney, and may make the requisite declaration to the best of his or her knowledge, information and belief, and may subscribe the application in his or her own name.⁵⁴

⁵³ Section 9(3) of the Registration of Titles Act.

⁵⁴ Section 9 (4) of the Registration of Titles Act.

2.1.5 The Mortgage Act 2009, Act 8

The Mortgage Act provides that the creation and operation of mortgages on customary land shall continue to be in accordance with customary law applicable to the land in respect to which the mortgage on customary land is created.⁵⁵

Where the mortgage on a customary land seeks to exercise any customary remedy which involves or may involve the mortgage being dispossessed or permanently deprived of the occupation of the mortgaged land, the mortgagee shall, after using the services of the mediator to try and mediate on the application of the proposed or any other remedy, make an application to the court for an order authorizing the exercise of that remedy; and the court shall, in determining whether to authorize the exercise of that remedy be guided by an application for relief by the mortgagor⁵⁶.

The mortgagor under the mortgage on customary land may after making use of the services of the mediator to try and mediate on the matter use of the services of the mediator to try and mediate on the matter with the mortgage, apply to the court for the mortgage to be reopened on the ground that the terms of the mortgage are unconscionable; or an unreasonable departure from the normal terms of a mortgage on the customary land applicable in the area where the land is located; or disadvantageous to the interests of the dependents of the mortgagor.⁵⁷

In any case concerning a mortgage on customary land, the court determining the case determining the case shall, where it appears to be the court that the customary law applicable to that mortgage is inadequate and no other system of customary law makes adequate or any

⁵⁵ Section 7(1) of the Mortgage Act.

⁵⁶ Section 7(2) of the Mortgage Act.

⁵⁷ Section 7(3) of the Mortgage Act.

provision for the matter in question, be guided by the relevant provisions of the Act, common law and the doctrines of equity.⁵⁸

This section shall not apply to customary land which is owed by community,⁵⁹ and in case of customary land which is owned by a family, the land mortgaged may only be mortgaged with the consent of the spouse or spouses and the children of the mortgagor.⁶⁰

2.1.6 Common law and cases.

Uganda is formerly a British Colony, and as such, the English legal system and law are predominant in Uganda. Uganda's legal system is based on English Common Law and African customary law. However, customary law is in effect only when it does not conflict with statutory law⁶¹. The laws applicable in Uganda are statutory law, common law, doctrines of equity and customary law.

Common law, also known as caselaw or precedent, is law developed by judges through decisions of courts and similar tribunals rather than through legislative statutes or executive branch action. A common law system is a legal system that gives great precedential weight to common law on the principle that is unfair to treat similar facts differently on different occasions. The body of precedent is called "common law" and it binds future decisions. In cases where the parties disagree on what the law is, an idealized common law court looks to past precedential decisions of relevant courts. If a similar dispute has been resolved in the past, the court is bound to follow the reasoning used in the prior decision (this principle is known as stare decisis). If, however, the court finds that the current dispute is fundamentally distinct from all previous cases (called a

⁵⁸ Section 7(4) of the Mortgage Act.

⁵⁹ Section 7(5) of the Mortgage Act.

⁶⁰ Section 7(6) of the Mortgage Act.

⁶¹ Article 2 (2) of the Constitution.

"matter of first impression"), judges have the authority and duty to make law by creating precedent. Thereafter, the new decision becomes precedent, and will bind future courts.

The decisions of a court are binding only in a particular jurisdiction and even within a given jurisdiction some courts have more power than others. For example, in most jurisdictions, decisions by appellate courts are binding on lower courts in the same jurisdiction and on future decisions of the same appellate court, but decisions of lower courts are only non-binding persuasive authority. Interactions between common law, constitutional law, statutory law and regulatory law also give rise to considerable complexity. However *stare decisis*, the principle that similar cases should be decided according to consistent principled rules so that they will reach similar results, lies at the heart of all common law systems.

Paul Kisekka Saku vs. Seventh Day Adventist Church Association, Supreme Court Civil Appeal⁶², and this case demonstrates the precarious state of Customary Law in Uganda. In a very unprecedented interpretation of the convoluted Land Decree, 1975 by which the military government had by a stroke of the pen nationalized land rights in Uganda, the Supreme Court ignored land rights in existence for centuries and upheld the Decree provisions which rendered void all customary land rights. The Appellant had acquired a fully recognized customary right to land through a voluntary purchase from a rightful holder of customary tenure, albeit subsumed under the Mailo land tenure which the Decree abolished. Having converted the Mailo Land Tenure to leasehold while preserving all existing customary tenure rights, it is astonishing that the court found that the Appellant was occupying public land. Obviously the leaseholder acquired rights such as were tolerated under the Decree subject to the customary rights of those in occupation. The Appellant bought the land following and fulfilling all the requirements

⁶²No. 8 of 1993.

prescribed under customary law and his title was valid, to hold otherwise is a total disregard of customary law which under the Judicature Act is recognized and which courts are bound to apply.

Mkungu v. Mbui⁶³, his was a case of the Court of Appeal of Kenya dealing with the effect of the Registered Land Act on customary tenure. In an effort to replace traditional land ownership under customary law by registered titles under the Registered Land Act, the colonial Government had embarked on massive registration of land which had disastrous results in rural areas. Traditionally land passes by inheritance from one generation to another under well-established rules whereby the designated "heir" in effect acquires mere stewardship over the land for the benefit of the family. With the registration of land, these "heirs" came forward to register as "owners" resulting in total obliteration of any rights in the land by other family members. The Courts in a stroke of genius constructed the notion of a "trust" to rectify an obvious injustice resulting from the wholesale adoption of a totally alien system of tenure whereby individual land ownership supersedes communal ownership that prevailed for generations. The effort by the Court in this case is in marked contrast with the total disregard of customary land rights by the Supreme Court in Uganda, in Saku's case.

Customary law can therefore be imposed from above by some coercive authority, such as a king, a legislature, or a Supreme Court or law can develop "from the ground" as customs and practice evolve. Law imposed from the top is authoritarian law and typically requires the support of a powerful minority, and law developed from the bottom up thus customary law requires widespread acceptance. Alternatively, if a minority coercively imposes law from above, then that law will require much more force to maintain social order than is required when law develops

⁶³ [2000] LLR 4317 (CAK).

from the bottom through mutual recognition and acceptance. Customary law is recognized, not because it is backed by the power of some strong individual or institution, but because each individual recognizes the benefits of behaving in accordance with other individuals' expectations, given that others also behave as they expect.; whether the parties have abused anybody's will, but whether their actions have conformed to expectations which other parties had reasonably formed because they corresponded to the practices on which the everyday conduct of the members of the group was based.

The significance of customs is that they give rise to expectations that guide people's actions, and what will be regarded as binding will therefore be those practices that everybody counts on being observed and which thereby condition the success of most activities. Because the source of recognition of customary law is reciprocity, private property rights and the rights of individuals are likely to constitute the most important primary rules of conduct in such legal systems. After all, voluntary recognition of laws and participation in their enforcement is likely to arise only when substantial benefits from doing so can be internalized by each individual. Punishment is frequently the threat that induces recognition of law imposed from above, but incentives must be largely positive when customary law prevails. Individuals must expect to gain as much or more than the costs they bear from voluntary involvement in the legal system. Protection of personal property and individual rights is a very attractive benefit.

A judgment under customary law is typically enforceable because of an effective threat of total ostracism by the community (e.g., the primitive tribe, the merchant community). Reciprocities

between the groups, recognizing the high cost of refusal to accept good judgments, take those who refuse such a judgment outside their support group and they become outcasts or "outlaws."⁶⁴

2.2 Certificate of customary ownership and protection of customary tenure system

The Land Act recognizes certificated of customary ownership, that any person, family or community holding land under customary tenure on a former public land may acquire a certificate of customary ownership in respect of that land in accordance with the Land Act⁶⁵. The certificate for customary ownership shall be in a prescribed form and shall be issued by the board⁶⁶. An application for a certificate of customary ownership shall be in a prescribed form and shall be submitted, together with the prescribed fee, to the parish in which the land subject of the application is situated.⁶⁷

A certificate of customary ownership of land is acquired through an application to the Parish Land Committee, which receives the applications for a certificate of customary ownership. In order to come to its decision, this Committee will apply customary law. However, it is obliged to safeguard the interests and rights in such land, which is the subject of the application of women, absent persons, minors and persons under a disability.⁶⁸

Communal Land Associations are group of persons may form a Communal Land Association for any purpose connected with communal ownership and management of land, whether under customary law or otherwise, and that one-third of the officers of such an Association needs to be

⁶⁴Land law and its process-general analysis.

⁶⁵ Section 4(1) of the Land Act.

⁶⁶ Section 4 (2) of the Land Act.

⁶⁷ Section 4 (3) of the Land Act.

⁶⁸ Section 27of the Land Act

women⁶⁹. But if an individual or a family belonging to such Association wishes to own in their own capacity, they may apply for a certificate of customary ownership or a freehold title. Any person, family, community or Association holding land under customary tenure on former public land may convert the customary tenure into freehold tenure⁷⁰.

2.3 Procedure for the acquisition of certificates of customary ownership.

The procedure for the acquisition of certificate of customary ownership of land is through the chairperson of the committee at parish in which the land is situated.⁷¹

The Chairperson of the committee shall be responsible for ensuring that the procedure to be followed by the committee as set out in the section this section and any other procedures that may be prescribed are complied with⁷². Where an application has been submitted to the committee, a notice in a prescribed form shall be published and posted in a prominent place in the parish and the land which is the subject of the application; specifying the location and approximate area of the land; requiring all persons who claim any interests in the land or in adjacent land which may be affected by the application including in respect of any adjacent land claims as to the boundaries of the land to attend a meeting of the committee at a specific time and out forward their claims, and the time specified shall be not less than two weeks from the date on which the notice is published and posted as required.

The committee shall hear and determine or adjourn and request the land officer from the district land officer, any other person or group of persons recognized within the parish as having

⁶⁹ Section 17 of the Land Act

⁷⁰ Section 9 of the Land Act

⁷¹ Section 4(3) of the Land Act.

⁷² Section 6 (1) of the Land Act.

knowledge about land and its incidents of tenure within the parish to conduct further investigations into that claim.

The committee shall use its best endeavors to mediate between and reconcile parties having conflicting claims to the land.⁷³

The committee shall prepare a report on the application recording all claims to interests and rights in the land or to the occupation and use of the land and its opinion on whether whose claims have been proved to exist, setting its findings and recommendations with reasons on the application, including all the cases whether the application should be approved with or without conditions, restrictions or limitations endorsed on the certificate and forming part of the incidents of customary ownership evidenced by the certificate or refused, and all claims made in relation to the application; give or send a copy of the report to the applicant; submit the report to the board; make a copy of the report available within the parish for inspection by all persons who submitted claims to or who were heard by the committee.⁷⁴

On receipt of an application for a certificate of customary ownership, the committee shall determine, verify and mark the boundaries of all the interests in the land which is the subject of the application;⁷⁵ demarcate the rights of way and other easements over the land the subject of the application and any adjacent land such as land or which benefit or burden or are reputed to the benefit or burden of any such land or which it considers will be necessary for the more beneficial occupation of any such land in respect of which an application may be granted or any adjacent land.⁷⁶

⁷³ Section 6(4) of the Land Act.

⁷⁴ Section 6 (5) of the Land Act

⁷⁵ Section 5 (1) (a) of the Land Act.

⁷⁶ Section 5 (1) (b) of the Land Act.

The committee may adjourn upon and decide in accordance with and applying customary law any question or matter concerning the land referred to it by any person with an interest in land which is the subject of the application or any adjacent to it, including the question of whether the customary law applicable to the land the subject of the application recognizes individual rights to the occupation and use and if so, subject to what conditions and limitations.⁷⁷

The committee at the parish also records that if any person has or two or more persons have exercised rights under customary law over the land the subject of the application that should be recognized as ownership of that land, that person or those persons, as the case may be shall prima facie, be entitled to be issued with a certificate of customary ownership and in the case of two or more persons, the shares of each person and the nature of the ownership;⁷⁸ if any persons have a right over the land or any part of it or are entitled to any interest in the land or part of it not amounting to ownership, including lease, right of occupation or use, charge, pledge or other encumbrance whether by virtue of customary law or otherwise (third parties), record the nature, incidents and extent of that third party right and the persons entitled to the benefit of it.⁷⁹

The Committee of the parish also advises the board upon any question of customary law;⁸⁰ safeguard the interests and rights in the land which is the subject of the application of women, absent persons, minors and persons with or under disability;⁸¹ take account of any interest in the

⁷⁷ Section 5(1) (c) of the Land Act.

⁷⁸ Section 5 (1) (d) of the Land Act.

⁷⁹ Section 5 (1) (e) of the Land Act.

⁸⁰ Section 5 (1)(f) of the Land Act

⁸¹ Section 5 (1)(g) of the Land act

land in respect of which, for any reason, no claim has been made⁸²; exercise such functions as may be prescribed.⁸³

The Parish land committee in the exercise of their powers involve a hearing, comply with the rules of natural justice and subject to that duty may hear evidence which would otherwise not be admissible in a court of law, call evidence of its own motion, use evidence contained in any official record or adduce any other claim, refer any matters to any customary institution habitually accepted within the parish as an institution with functions over land for its advice and where relevant use with or without adaptations and additions, customary procedures relating to the settlement of disputes over land recognized and in general use within the community where the land is situated and generally determine its own procedures.⁸⁴

The Chairperson of the committee shall have power to administer oaths and to issue summons, notice and orders requiring the attendance of such person and the production of such documents as he or she may consider necessary for carrying out the functions of the committee.⁸⁵

The board on receipt of the application for a certificate of customary ownership of parish land committee shall consider in light with the report and recommendation confirm, issue, return or reject the recommendation of the committee, with or without conditions, restrictions, limitations, vary the recommendations of the committee and issue a certificate of customary ownership, with

⁸² Section 5 (1)(h) of the Land Act.

⁸³ Section 5 (1)(i) of the Land Act

⁸⁴ Section 5 (2) of the Land Act.

⁸⁵ Section 5 (3) of the Land Act.

or without conditions, restrictions or limitations accordance with any such variations as it may make.⁸⁶

2.3 Freehold Tenure systems.

Freehold is a form of tenure deriving from the Constitution and its incidents from the written law which involved the holding of registered land in perpetuity or for a period less than perpetuity which may be fixed by a condition; enables the holder to exercise, subject to the law, full powers of ownership of land, including but not necessarily limited to using and developing the land for any lawful purpose; taking and using any and all produce from the land; entering into any transactions in connection with the land including but not limited to selling, leasing, mortgaging, or pledging, subdividing, creating rights and interests for other people in the land and creating trusts of the land; disposing of the land to any person by will.⁸⁷

2.4 The Authorities mandated and charged with management of land and acquisition of certificates of customary ownership.

The Constitution provides that on coming into force of the Constitution, all citizens owning land under customary tenure may acquire certificates of ownership in manner prescribed by Parliament; and land under customary tenure may be converted to freehold land ownership by registration⁸⁸

The Constitution therefore provides for authorities that are charged with the management of land, both nationally for the state as well as small portions of land for the acquired by individuals for

⁸⁶ Section 7 of the Land Act.

⁸⁷ Section 3 (4) land Act.

⁸⁸ Article 237 (4) of the Constitution.

development purposes. The Uganda Land Commission⁸⁹, which is charged with the responsibility to hold and manage land in Uganda vested in or acquired by the government of Uganda.⁹⁰ The Land Act provides for the Uganda Land Commission with powers to acquire by purchase or exchange or otherwise hold land rights, easements or interest in land; erect, alter enlarge, improve or demolish any building or other erection on any land held by it; sell, lease or otherwise deal with the land held by it; cause surveys, plans, maps, drawings and estimates to be made by or through its officers or agents; and do such other things as may be necessary for or incidental to the exercise of those powers and the performances of those functions.⁹¹

The District Land Boards⁹² shall be at each district and are charged with the responsibility to hold and allocate land in the district which is not owned by any person or authority, facilitate the registration and transfer of interests in land; and to deal with other matters connected with land in the district in accordance with the laws made by Parliament.⁹³ However in the performance of its functions, a district land board shall be independent of the Uganda Land Commission and shall not be subject to the direction or control of any person or authority but shall take into account national and district council policy on land.⁹⁴ The Land Act provides that the district land board within the district may in the performance of its functions do so under the name of the institution of a traditional leader existing under Article 246 (1) (a) of the Constitution in relation to that district⁹⁵, who shall be construed as conferring on the traditional leader or cultural leader the power to of direction or control over the board.

⁸⁹ Article 238 of the Constitution.

⁹⁰ Article 239 of the Constitution.

⁹¹ Section 53 of the land Act.

⁹² Article 240 of the Constitution.

⁹³ Article 241 of the Constitution.

⁹⁴ Ibid

⁹⁵ Section 59 of the Land Act.

The constitution further provides for the Land Tribunals as shall be established by the parliament which shall have jurisdiction of determination of disputes relating to grant, lease, repossession, transfer or acquisition of land by individuals, the Uganda Land Board, or any other authority with the responsibility relating to land; and the determination of any disputes relating to the amount of the compensation to be paid to land acquired.⁹⁶ Similarly, the Land Act provides for the district land tribunals. The same position has been reiterated in the Land Act⁹⁷.

The district land tribunal shall have all powers to grant decrees of specific performance and issue of jurisdictions and generally shall have power to grant relief, 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 any committee or any association or the commission as the circumstances of the case require and without limiting the generality of that power, may cancel any action, notice, order, decree or declaration; vary the operation of any action, notice, order, decree or declaration; postpone the operation of any action, notice, decree or declaration; substitute a different decision for the one determined by any official, board, committee, association, or the commission; confirm any action, notice, order, decree or declaration made, notwithstanding that some procedural errors took place during the making of that action, notice, order, decree or declaration if the district land tribunal satisfied that the person applying for relief was made fully aware of the substance of the action, notice, order, decree or declaration and no injustice will be done by confirming that action, notice, order, decree or declaration may grant that relief and all others made and decisions given on such condition if any, as expenses, damages, compensation or any other relevant matter as the district land tribunal considers fit.⁹⁸

⁹⁶ Article 243 of the Constitution.

⁹⁷ Section 76 of the Land Act.

⁹⁸ Section 76 (2) of the Land Act.

The Land Act provides for land committees which shall be established for each parish consisting of a chairperson and three other members of the committee appointed by the district council on the recommendation of the sub county council.⁹⁹ The land committees are mandated to assist the district land board in an advisory matters relating to the land, including ascertaining rights in land, and shall perform any other function as shall be conferred upon it.¹⁰⁰

The Land Act also establishes recorders for the issuance of certificates of customary land ownership¹⁰¹ and certificate of occupancy¹⁰² for each sub-county, each gazetted area and each division in the case of the city who shall be answerable to the board. The recorder shall be responsible to keeping records relating to certificates of customary ownership and certificates of occupancy. The copy of each certificate shall be deposited with the board.¹⁰³

2.5 Conversion of customary tenure and grant of freehold tenure.

The Constitution provides that land under customary tenure may be converted to freehold land ownership by registration¹⁰⁴ and that any lease which was granted to a Uganda citizen out of a public land may be converted into freehold in accordance with a law which shall be made by the Parliament.¹⁰⁵

The Land Act makes provisions for owners of land under customary tenure to change their tenure to freehold and for the grant of land in freehold out of former public land. A person who wishes to be granted a freehold shall apply in the prescribed form to the board.¹⁰⁶ The decision of

⁹⁹ Section 64(1) of the Land Act

¹⁰⁰ Section 64(6) of the Land Act.

¹⁰¹ Section 4 of the Land Act.

¹⁰² Section 33 of the Land Act.

¹⁰³ Section 68 of the Land Act.

¹⁰⁴ Article 237 (4) (b) of the Constitution.

¹⁰⁵ Article 237 (5) of the Constitution.

¹⁰⁶ Section 10 of the Land Act.

the board approving the conversion of freehold tenure shall be in a prescribed form¹⁰⁷, submitted together with a prescribed fee, to a committee of the parish in which the land the subject of the application is situated¹⁰⁸.

A holder of a certificate of customary land owner can directly apply to convert his or her tenure to freehold instead of applying for a certificate of customary ownership.

2.6 The Procedure for application.

The procedure for tenure conversion from customary tenure to freehold tenure by way of application of any person, family, community or association holding land on a former public land to the board where the land is situated in a prescribed form¹⁰⁹. On receipt of the report and recommendation of the committee, the board shall cause the land of which the application is made to be surveyed before approving the application.¹¹⁰ When the board approves the application for conversion, the board may attach conditions to the conversion.¹¹¹

The Land Act prescribes the same procedure to be followed by a person applying for a freehold over unowned former public land¹¹². The constitution prescribes a duty of the district land board as to hold and allocate land in the district which no individual group or other identified entity owns.¹¹³

¹⁰⁷ Section 9 (2) of the Land Act

¹⁰⁸ Section 9(3) of the Land Act.

¹⁰⁹ Ibid

¹¹⁰ Section 9 (4) of the Land Act.

¹¹¹ Section 9(5) of the Land Act.

¹¹² Section 11 (1) of the Land A

¹¹³ Article 241 (1) (a) of the Constitution.

The district lands board is to consider the application for conversion of customary tenure to freehold or for grant of a freehold in light of the committees report and recommendation.¹¹⁴

On receipt of a decision of the board approving an application for conversion of customary tenure to freehold or approving a grant of land in freehold accompanied by a certified survey plan, registrar shall issue a freehold certificate of title to the applicant.¹¹⁵

The registrar, may in accordance with section 39 of the Registration of the Titles Act, on the advice of the commissioner of surveys and mapping, issue to the applicant a certificate of title endorsed with the words “Limited as to Parcels”¹¹⁶, and where the decision of the board includes a request to the registrar to issues a certificate of freehold title to the applicant in terms of the decisions endorsing on the title as an incumbrance any condition or limitation, that registrar shall endorse the certificate of title with an incumbrance so as to give effect to a restriction, condition or limitation on the freehold title, the registrar shall give effect to the request.¹¹⁷

2.7 Dispute Resolution Mechanism.

The Land Act provides for the customary dispute settlement and mediations that nothing shall be taken to prevent or hinder the limit exercise of the traditional authorities of the functions of determining disputes over customary tenure or acting as a mediator between persons who are in dispute over any matter arising out of customary tenure and on the commencement of the case or any time during the hearing of the case, a land tribunal may advise the parties to use the case, in its opinion, the nature of the case is such that the parties would be better served by using mediation to resolve their differences than by continuing with litigation in the tribunal; and

¹¹⁴ Section 13 of the Land Act.

¹¹⁵ Section 14 (1) of the Land Act.

¹¹⁶ Section 14 (2) of the Land Act.

¹¹⁷ Section 14 (3) of the Land Act.

where such period as it considers fit to enable the parties to use the services of the traditional authorities or the mediator or some other person to mediate in the dispute.¹¹⁸

In the performance of its function, the mediator shall be appointed by the land tribunal and the appointment shall be on ad hoc basis. The mediator shall be a person of a high moral character and proven integrity who by virtue of his skill, knowledge, work, standing, or reputation in the society is capable and likely to be able to bring parties who are in disagreement or dispute about an issue over land arising out of the any matter provided for to be negotiated, and reach a mutually satisfactory agreement or accommodation on that matter. The mediator shall have a function as conferred on him by regulations and in the exercise of the functions, the mediator shall be independent and shall not be subject to the direction or control of any other person and shall be guided by the principles of natural justice, general principles of mediation and the desirability of assisting the parties to reconcile their differences, understand each other's point of view and be prepared to compromise to reach an agreement, but the mediator shall compel or direct any party to a mediation to arrive at any particular conclusion or decision or any matter the subject of the decision. The mediator shall in each case be a person agreed by the two parties and shall be paid such allowances as may be prescribed.¹¹⁹

With few if any possessions to start a new life, land has become a very prized and fiercely defended possession for the returnees, "Escalating Land Grabbing In Post-conflict Regions of Northern Uganda", But some of the returnees found their land, which they had presumed was lying idle, occupied by strangers, family members with no rights to the land, and people who left

¹¹⁸Section 88 of the Land Act.

¹¹⁹Section 89 of the Land Act

the protected villages before those with rights to the land¹²⁰. “During the debates of the Land Bill, President Museveni reportedly rubbished customary law saying that they were backward and should not be encouraged in the new bill, arguing that customary laws refused to operate when we were still under populated in 1956 with a population of only 14 million. How can it operate now with the population of over 20 million? Don’t use it in backwardness, use it to increase production. The president stressed that the law must change to increase production and transform society”¹²¹.

2.8 Conclusions.

There have been a handful of legislations that provided for the administration of land, in particular customary land in Uganda right from historical, colonial and post-colonial independence Uganda. Largely the Constitution 1995 and the Land Act 1998 (as amended) have provided comprehensively the administration of land, procedures of acquisition of land documents of ownership by individuals holding land under respective tenures.

However, the question of documentation of customary land ownership in Uganda remains in abeyance, the authorities seemed not to use the laws to administer land and there seemed other dysfunctional systems in place to remedy the issues that arise from ownership and administration of customary land.

¹²⁰<http://www.irinnews.org/Report/95322/UGANDA-Land-disputes-threaten-northern-peace>

¹²¹(Monitor Newspaper, 25 April 1998 Mugambwa’s *The Source Book of Uganda’s Land Law*, page 71.

process of field data collection, different technique such as a focus group discussion, face to face interviews self-administered questionnaires and observations were used.

3.5.2 Focus group discussion

Focus group discussion encourages participants to voice their own opinions on the subject of discussion¹²⁷. It was therefore on this background that the researcher applied this technique to gather data related to the feelings and opinions of various groups of participants involved in research regarding ownership of land under customary land tenure system and the importance of certificate of customary land ownership and use. The researcher also used focus group because it enabled him to explore in detail issues concerning the subject matter that were not easily obtained from the other techniques used during the data collection process.

3.5.3 Interviews

The case study was conducted in the Acholi-Madi sub region in Northern Uganda where land is largely owned and administered under customary land tenure system. By using interviews as a method of data collection, the researcher was in position to involve and engage the key respondents about the issues concerning the subject matter of the study. The classes of key informants interviewed were mainly the principal stakeholders on the land administration and management of customary land.

These included clan leaders, district land officers, community members, land owners. An interview guide with specific open-ended questions was used for this purpose to interview them. Respondents interviewed using this technique is regarded as being knowledgeable skilled and able to express their views explicitly on the subject being discussed.

¹²⁷ Baumgartner, T.A and Strong, C.H., Conducting and Reading Research in Human Health Performance, 2nd ed,(1998).

3.6 Questionnaire

A questionnaire is a list of carefully structured questions chosen after considerable testing, with the view of eliciting reliable responses from chosen sample.¹²⁸ Semi-structured and structured questionnaires were developed. These questionnaires were used to assess and explore the understanding of key stakeholders regarding the legal and institutional framework of customary land tenure and subsequently the importance of certificate of customary ownership of land.

3.7 Limitation of the study

The researcher experienced the following limitations during the course of data collection in the field. And these include; financial constraints, the exercise of data collection process became very expensive to bear since it was being financed by researcher himself. This entails paying some of the respondents for their time while they were being interviewed. The researcher was also faced with problem of locating some key respondents. Inability to meet some key organizational and government officials for interviews despite making prior arrangements and number of visits to their offices. The unwillingness of some of the would be respondents to co-operate and be interviewed because they argued that the study was a waste of time.

3.8 Ethical statement

During the data collection process and report writing the researcher ensured that the following ethical considerations were observed

- (i) Protecting identities and the interest of all respondents
- (ii) Acknowledging all the sources of data used and quotations in the report.
- (iii) Explanation of the purpose of the research to the participants beforehand and seeking permission to use the information gathered from them in writing.

¹²⁸ Hussey, J.& Hussey, Supra note 29 page 161

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- (iv) The researcher conducted himself in a respectful way with all participants throughout the research and finally thanked them at the end of each interview. He also ensured that those who wanted to withdraw at any time from the interview were allowed to do so.

3.9 Time frame

This data was collected in three months of February, March and April 2013.

3.10 Conclusions

The above chapter elaborated on scope of the study, the research methods used and their importance in relation to this research and the justification for using largely qualitative research methods. Finally it points out the limitations of the study, ethical issues that were followed by the researcher as well as the time frame in which interviews and field work were undertaken.

CHAPTER FOUR

FIELD FINDINGS.

4.0 The nature of the respondents. I.e. nature, knowledge and age of the respondents.

The respondents are selected at random across sections of land occupants on customary land tenure system, land authorities and sections of key informants on land matters.

4.1 Respondents and response rate.

A total of 40 interviews and questionnaires were administered and a response rate of 70% of the responses was registered by the researcher. So the bases of the research analysis are done on the data received from the field.

4.1.2 Nature of the respondents.

The data collected by the research from the field covers a cross section of persons. The people covered under the research are the occupiers of land presumed to be customary land, under the former public land, key informants about land in the respective areas of scope of the research. The research also covers people of varied age difference and no particular interest was paid to the respondents at the initial stage of data collection. The selection of the nature of the respondents is therefore on merit of qualification and availability to give information.

4.1.3 Age of the respondents.

Information was sought on the age of the respondents using the interview guide and a questionnaire. The information obtained from the field indicates that the majority of the respondents is between 25-40 years old and makes a half of the respondents interviewed, a few of the respondents are above the age of 40 as well as between 15-25 years of age. This therefore shows that the age brackets of the respondents were mature enough to respond to the

questionnaire and at least know about customary land tenure and certificate of customary ownership.

4.1.4 Education level of the respondents.

The researcher found out that the majority of the respondents about 60% are illiterate about customary tenure and certificates of customary ownership. These are largely the occupants of customary land in rural areas who acquired land from family, community and clan kinships and are therefore do not have any idea about the land documentation and ownership.

4.2.1 Knowledge on the laws.

The majority of the field data collected indicates that the majority of the respondents are not aware of the laws that govern the land they occupy, though the land is believed to be largely occupied under customary rules and to a lesser extent, an authority by the former chiefs who had exercised some authority, which lately are not recognized.

However, a few of the respondents in the level of land management authority are quite knowledgeable about land laws and policies for management of land. A mention of the Constitution, the Land Act was recognized among other policies and bye laws at village levels.

4.2.2 Documents of titles/prove of ownership.

The research shows that a few of the respondents had documents of title under customary tenure of certificate of customary ownership. The least number of the occupants had documents inform of agreements from the local council and the traditional or clan leaders. The majority of the occupants on the customary land/former public land had no documents of ownership. This implies that the occupants under customary tenure do not legally have ownership of the land they occupy and are most likely not aware of the fact that they should possess documents that would

prove ownership of the respective land formerly as the public land as provided for under the Constitution and the land Act.

RwotLugayi, who is also the acting Paramount Chief, instead called on the Acholi people to come up with their own customary land policy that best serves their interests. “We don’t need more bloodshed in Acholi. Our people should not be hurriedly pushed to get customary titles for their land”, said the Rwot

There’s a big problem with land ownership in Acholi and people tell lies to acquire land but with the issuing of the certificates, we shall be able to tell right ownership and end land wrangles,” said Mr.Oketta.

4.2 Acquisition of land.

Majority of the respondents interviewed agree that the land they occupy is held under customary land tenure system. They further believed that the land they occupy is acquired as a result of inheritance from their grandparents, who in turn acquired it through inheritance from their great grandparents. Thus the land is acquired through family lineage and most of the land occupants argued that the land they occupy is as a result is inheritance but the state only plays a central role of the protection of the state boundaries from inversion. However, a small portion of the land owners do believe that the land was initially owned by the state before they had acquired titles and any other documents which enable them to possess the land and use it for lawful purposes. They uphold that the land they occupy is at the mercy of the state given the fact that the state has the major title for the whole country. “In Acholi sub region, where land is customarily owned and where many people are still regaining their land after almost two decades of the LRA

conflict, several conflicts over who owns which part of land are common” said by an Acholi elder.

Some respondents do believe that the name customary land tenure emanates from the fact that, the land is regulated by customary rules. The communal use of the land by the occupants for grazing and any lawful purpose uphold the position of the Land Act provision where the land belongs to a person, family or a traditional institution being regulated and managed by the particular group of people. Its regulation is based on their universal believes as reiterated in the Land Act.

4.4 Recognition of rights over customary land tenure and certificate of customary ownership.

The field report indicate that very few of the occupants of land under customary tenure do believe that the land the occupy is at the mercy of the state and they do recognize that for one legally occupy and have interests in the land, there should be a document to that effect and such a document has been identified as certificate of customary ownership. Therefore very few of the respondents believe in documents of ownership in customary tenure while the 90 % do not believe in acquisition of certificates of customary ownership of land, which they strongly believe that it is occupied at the instance of the clan and therefore documents of ownership is unknown.

The Deputy Paramount Chief said. “We don’t want certificates of Customary land Ownership in Acholi land yet, we have to be careful by letting the people know the right things first,” saying the exercise could be a recipe for bloodshed among the communities still recovering from the LRA insurgency.

4.5 Willingness to apply and acquire a certificate for customary ownership.

The analysis of the data collected from the field indicate that about 20 % of the respondents that occupy customary land were willing to apply for a grant of certificate of customary ownership, while the majority of the respondents argue that it is not necessary to have a certificate of customary ownership since they can demarcate their parcels of land.

“We are for a regional tier which will see that we manage our land for development, certificates will further complicate issues,” he said

However, Prime Minister Kenneth Oketta, of Acholi Ker KalKwaro, a cultural organization, said as an institution, they are in support of the idea as it will clearly document Acholi land and its true ownership.

4.6 Procedures of acquisition of certificate of customary ownership and conversion of occupancy.

The data collected by the researcher shows that over 70% of the occupants of the land occupied under the customary tenure or former public land do not know about the procedures set under the Land Act for acquisition of certificate of customary ownership and conversion from customary tenure to freehold tenure where the such a person enjoys all the interests in the land.

Nwoya District chairperson Mr.Oryema, in an interview told the researcher that the process of acquiring the certificates should be slow and smooth as majority of the people are not aware of its procedures. He added that the process should demarcate clear land boundaries and ownership of the land.

“We are for a regional tier which will see that we manage our land for development, certificates will further complicate issues,” he said

4.8. Knowledge on the authorities mandated or charged with management of land.

The data collected indicate that the authorities mandated to carry out the activities of management of land in the scope of the research are lacking and the majority of the authorities have become non-functional during the two decade Lord's Resistance Army, due to the fear of insurgency. These authorities are especially the authorities at the grass root level, the sub-county and parish land committees, communal land committee persons, as well as clan leaders who were of a very great importance in the identification demarcations and members who belong to the various clans and communities around the scope of the research.

"The management of land is under the district and boards, area land committees and the recorders who play a very definitive role for customary land tenure and the description of its incidents in the Land Act, point to the need to actively involve traditional institutions" a KI in Gulu District Land office.

It is also evident from the onset that the traditional means of land administration which originally are charged with the responsibility of settling clan and communal land issues are dysfunctional, this emanates to the fact that the two decade bush war has scattered all the potential leaders and subsequently the traditional means are lost.

As is evident from the above, the procedure for applying for a certificate is long and cumbersome. Given the lack of functioning Land Boards and Committees, until 2006 not one certificate of customary ownership had been issued, echoed a sub-county land committee member, being interviewed as a KI.

4.9.Conclusions.

The research study findings are composed of both legal factors as well as non-legal factors largely on customary land tenure and certificate of customary ownership of land as the core interest of the research study. It was established that the majority turn out of the research respondents are illiterate and therefore are unaware of the tenure under which the land they occupy is governed or administered as well as the laws governing customary land tenure system.

The majority of the authorities for land administration in the scope of the research were obsolete and are just recovering from the two decade LRA bush war which has enormously affected the operation of the committees and any land management authorities as well as the traditional systems of the leadership established in the areas to handle emerging issues arising out of the land question, as such very few people legally poses documents under customary land tenure for prove of ownership and the majority if faced with any challenge, they can hardly prove ownership of the land.

It is therefore without question that the customary land tenure is just an authority in the statutes, without impacting so much to the people who occupy parcels of land under the customary tenure system as the occupants are unaware of the laws, the procedure of acquisition of legal documents and subsequently conversion into freehold tenure system of land holding.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS.

5.0 Introduction

This chapter covers the conclusions and recommendations based on the field findings on the interests of customary tenure and the importance of the interests of the occupants, acquisition of ownership under a customary tenure and the conversion from customary tenure to freehold tenure.

5.1 Conclusion

The data collected from the field shows a laity of the occupants on customary land tenure where their interests in the land are not conclusive without the inclusion of an important role the traditional or cultural leaders play in the management of land in particular, in the acquisition of the proper certificates of ownership under customary tenure to be able to realize the very importance of customary land tenure since the traditional leaders play a significant role in the acquisition, demarcation, dispute resolution, mediation which are unexploited in the formal process.

The research study concludes that the LRA played a negative role in the land management systems of customary land tenure where made it hard and for the authorities of customary land tenure system and the grant of proper documentation for the land very impossible for the occupiers of the land to realized over the years the importance of the customary tenure systems has existed in the Constitution and the statutes. The majority of the persons displaced by the LRA and persons occupying land under a former public land, who do not possess proper

documentation for the land they occupy and thus they could not use these land for any economic interest as a factor production.

The study concludes lack of political will in the implementation of some procedural process and conditions manned in the acquisition of certificate of customary land ownership, which are so stringent to include the traditional leaders and the procedures be translated in the local languages to enable the occupants understand and participate in land matters.

In general conclusion, customary land tenure is as good as nothing since it's not realizable under by the occupiers on customary land as envisaged under the Land Act as long as the legal authorities mandated to run the process of acquisition of ownership continued to be flawed and state actions to strengthen the existing systems such as the inclusiveness of traditional systems in the management of the land is in abeyance as well as lack of political will to grant documents for some parcels of land, which then sparks up land disputes.

5.2 Recommendation

The researcher recommends that the traditional methods of solving disputes through community, clan and tribal elders where traditional dispute resolution systems are to supplement the formal mechanisms, which have been taken by the national land policy and the court systems as well as mediators and arbiters set and created by the National Land Board under the Ministry of Lands. The traditional mechanisms of dispute resolution are therefore very important to complement the modern court tribunal systems for inclusiveness of the people directly affected as well as for being evidence based from primary source. The new institutions should be able to harmonize the traditional institutions and the formal institutions so as to pave a way forward to the existing lacunar that was not addresses by the Land Act.

The research recommends that the provisions in the Land Act, relevant to customary land tenure system, be translated into the local language and published to help educate the people to enable them act knowingly. This is to enable the people to understand and appreciate the land they occupy and be able to follow government policies in the land management for a proper development of the land as a factor of production. Proper scrutiny and sensitization of the people on the matter is desirable as land matters are still crucial in the region. Policy-makers need to think in terms of a long transition period and how land will be administered during this time. Building up a strong grassroots system will take time, and more support should therefore be given to the only system in place which can cope during this period and the majority of the clan members recommend that the formal legal system should work hand in hand with the traditional or customary leaders in the conflict resolutions and issuance of the certificates and proper establishment of demarcation of the boundaries.

The policy makers should recognize certificate of customary titles as a title to customary land and should equate it to the titles as acquired in freehold tenure to avoid all the hustles and processes in conversion to freehold and make transfer as well as conversion flexible.

The study can also reveal that the provisions of the Land Act in adjudication of land matters dispute resolution, mediation and inclusiveness of land tribunals has to be strengthened as well as acquisitions of certificate of customary titles under customary tenure since this play a significant role in the process of land ownership. The research therefore recommends that the traditional leaders be strengthened and included in the adjudication of customary land matter right at the beginning and should be part and parcel of the Land Act.

The research recommends that the interests of the various individuals created under the clan, communal and family land interest should be identifiable to give rights to the individual occupants having interest in the land to avoid wrangle and disputes over land emerging largely from the communal ownership of land. It has also been identified that the interests of some individuals having shares in the communal land are not the same as the other members in the community as so; conflict of interest is created by the process.

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Questionnaire for Research.

Dear Respondent; this is an academic research to establish the relevance of the customary tenure system to persons holding a certificate of customary tenure. You have been selected to participate in this study, and are kindly requested to complete this questionnaire. All the information given will be treated with confidentiality and will be strictly used for academic purposes only.

Thank you.

A. PERSONAL INFORMATION

1. Give the following information about yourself.

- a) District.....
.....
- b) Age.....
.....
- c) Level of
education.....
- d) Sex.....
.....
- e) Occupation.....
.....
- f) Residence.

B. GENERAL KNOWLEGDE ON LAND LAW AND CUSTOMARY TENURE SYSTEM

2. Have you ever heard of laws that protect your land?

Yes.....

No.....

3. If yes, what is the law (S)?

4. Do you have a guarantee that your land is safe from the laws?

5. Have you obtained any documentation for holding such a land?

6. We are the importance of the documentation?

7. Do you feel that the law and documentation has addressed the law questions/wrangles?

8. What do you do when someone claims ownership of your land?

9. Are your local customary laws and regulations relevant to the changing situation and do you think it can last the test of time?

10. Have you ever engaged your local leaders on issues of land questions?

11. In your view, do you think the laws are relevant to address your issues?

12. Are people in your community aware of the laws that protect your land and other land questions?

13. What rights to you have over you had over your land?

14. Do you think these rights are conclusive and address all your queries as far as your land is concerned?

KNOWLEDGE ON THE AUTHORITIES THAT HANDLE LAND ISSUES

15. What are the authorities that handle issues in your area?

16. How relevant are the authorities?

17. Does your authority give your documentations over your own piece of land?

18. Do you have title over your land legally protected in law?

19. Are your titles registered anywhere?

20. Who has custody over your titles?

21. Do you still think that that the traditional clan courts are relevant and functional?

RECOMMENDATIONS

22. What are the shortcomings of the current legal system?
23. What would you like to see changed in the systems of land administration?
24. What avenues do you think are the best for handling land wrangles?
25. What authorities do you think are relevant to handle the issues of land in your area?
26. What lessons did you learn from the authorities that handle your land questions?
27. Which specific rights do you think is not accorded to you under the