

# TENANCY BY OCCUPANCY: IS IT A TENANCY OR A TENURE?

(The Incidences of Section 29 of the Land Act,  
CAP. 227)

By

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## Introduction

Ownership of land is a much-prized aspect for many Ugandans. This is not only because land is the basis on which every human activity happens or even rotates but also due to the fact that Uganda is a subsistence agricultural economy or society making ownership or even access to land a matter of life and death. The Constitution of the Republic of Uganda, under Article 237, provides that land belongs to the citizens of Uganda who would hold it under four different tenures. The tenures are customary, freehold, mailo, and leasehold.

Much as the Constitution entrenches the radical title into the citizens of Uganda, it does not spell out how they are to exercise the powers and authority that go along with it; but that is another long argument outside the envisaged scope of this paper. These citizens, in whom the radical title to land is vested, do not all own land nor do they all have access to utilization of any land. The type of land ownership or occupancy that is of interest to this paper: the tenancy by occupancy which is provided for in the Constitution<sup>1</sup> but it also has its roots partly in the historical evolution of Uganda's land law and practice. These constitutional provisions are operationalized in the Land Act, more especially under section 29 thereof.<sup>2</sup>

The arguments advanced for or against a tenancy by occupancy are benchmarked against the common law understanding of a tenancy. Megarry describes a tenancy as a

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<sup>1</sup> Article 237(8) and (9) of the Constitution of the Republic of Uganda, 1995.

<sup>2</sup> Land Act. Chapter 227, Laws of Uganda was enacted in 1998.

periodical utilization of land determinable by the landowner or the law applicable or both.<sup>3</sup>

### Section 29 of the Land Act

Section 29 of the Land Act (Cap 227)<sup>4</sup> introduces in the land law of Uganda but peculiar to land registered under the Registration of Titles Act, known as tenancy by occupancy. In the event that by October 8<sup>th</sup>, 1995 a particular piece of land was owned or held under customary tenure, then it is free from the perpetual tenancy created under Article 237 of the Constitution of the Republic of Uganda 1995 and Sections 29, 31, 33 and 34 of the Land Act.

Section 29 provides:

*29. Meaning of “lawful occupant” and “bona fide occupant”.*

*(1) “Lawful occupant” means—*

*a person occupying land by virtue of the repealed— (i) Busuulu and Envujjo Law of 1928; (ii) Toro Landlord and Tenant Law of 1937; (iii) Ankole Landlord and Tenant Law of 1937;*

*a person who entered the land with the consent of the registered owner, and includes a purchaser; or*

*a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.*

*(2) “Bona fide occupant” means a person who before the coming into force of the Constitution had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or had been settled on land by the Government or an agent of the Government, which may include a local authority.*

*(3) In the case of subsection (2)(b)—*

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<sup>3</sup> Robert E. Megarry, David J. Hayton (1982), Megarrys’ Manual of the Law of Real Property, 6<sup>th</sup> Ed., Stevens, London.

<sup>4</sup>a perpetual succession tenancy

*the Government shall compensate the registered owner whose land has been occupied by persons resettled by the Government or an agent of the Government under the resettlement scheme;*

*persons resettled on registered land may be enabled to acquire registrable interest in the land on which they are settled; and*

*the Government shall pay compensation to the registered owner within five years after the coming into force of this Act.*

*For the avoidance of doubt, a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bona fide occupant under this section.*

*Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this section shall be taken to be a bona fide occupant for the purposes of this Act.*

S. 29 creates a lawful occupant and a bonafide occupant who are collectively known as tenants by occupancy. We will here consider them under two categories, the categorization follows the packaging or clustering within the parent section, having the first category dealing with section 29(1) and the second category dealing with subsection (2) of section 29.

### **First Category**

Those who occupied (also inherited) by virtue of:

- the Busulu and Envujjo Law 1928;
- the Toro Landlord and Tenant Law 1937; and
- the Ankole Landlord and Tenant Law 1937
- those who purchased from, or entered with the consent of, the registered owner
- those who held land as Customary tenants on former public land but when the Uganda Land Commission granted leases over their land they were not compensated by the registered owner or their tenancy was not disclosed.

The first category or cluster is, according to Art. 237 of the Constitution and section 29 of the Land Act known as

### **Lawful Occupants.**

## Second Category

This category includes a person who had occupied and utilised or developed any land unchallenged by the registered owner of the land or the agent or representative of the registered owner twelve (12) years (before October 1983) or more before the 1995 Constitution came into force.<sup>5</sup>

This category also includes a person who had been settled on land by the Government or an agent of the Government, which may include a local authority. The law further recognized any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under section 29 who shall be taken to be a bona fide occupant for the purposes of the Land Act. This category of land occupiers is, according to Art.237 of the Constitution and section 29 of the Land Act known as **Bonafide Occupants**. The first and second categories are collectively known as tenants by occupancy.

### The Historical Underpinnings of Section 29 of the Land Act

Section 29 carries or is loaded with a lot of Uganda's land law history running right from the 1900 land settlement under the 1900 Buganda agreement now known as 1900 Uganda Agreement.

S. 29(1) provides: "Lawful occupant means a person occupying land by virtue of the Busulu and Envujjo Law 1928"<sup>6</sup>

The Busuulu and Envujjo Law of 1928 in a nutshell came about as a product of the peculiar or skewed land settlement under the 1900 Agreement.<sup>7</sup> Under the 1900 Buganda Agreement the Buganda Chiefs and notables were allotted and allocated land in measures of square miles. The word '*Mailo*' which denotes the peculiar tenure, mailo tenure in central Uganda came from the English word "mile". The local Baganda customized the English word 'mile' to fit into their Luganda language thus 'mailo' and consequentially 'mailo tenure'. Majorly, the concept behind this naming was due to the fact that the land allocations and allotment

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<sup>5</sup> The 1995 Constitution of the Republic of Uganda came into force on the 8<sup>th</sup> October, 1995.

<sup>6</sup>Busulu means rent and Envujjo means tithe of the crops grown by the tenant payable to the mailo land owner as by law.

<sup>7</sup> The British Crown entered into agreement with the Regents of Buganda Kingdom outlining, inter alia, the governance of ownership and management of land in Buganda under Articles 15-17, thereof.

were made in measures of square miles.<sup>8</sup> A square mile is equivalent to 640 acres straddling over a pretty large area in relation to a peasant subsistence economy.

The lands so allotted were not vacant; they were occupied by hundreds and in some cases thousands of Baganda peasants (and some non-Baganda migrants). By a stroke of the pen these so many peasants became the tenants of the square mile (mailo) allottees. The Mailoallottee was eventually issued with a certificate of title under the Registration of Titles Ordinance.<sup>9</sup> The Registration of Titles Act (RTA) is the Torrens legislation in Uganda. Under the Torrens system of land registration the basic features are title by registration and indefeasibility of title. So the moment the mailoallottee was issued with a certificate of title, he was paramount over all other occupants of that land. The allottees' title is not only paramount but cannot be impeached except for fraud.<sup>10</sup> More to that, a certificate of title issued under the Torrens legislation is conclusive evidence that the person named therein is the registered proprietor.<sup>11</sup>

It followed from all the above tenets that the occupants of the land owned by a mailoallottee had no specific protection under the law. Some mailoallottees went ahead to evict the occupants whereupon the Protectorate Government came in to protect the occupants. The mode of protection was through the passing of the Busuulu and Envujjo Law, 1928, under which law the occupants were designated as tenants of the mailoallottee now mailo owner. The tenants under the 1928 Busuulu and Envujjo Law, had a duty to pay Busuulu (rental) and Envujjo (tithe of the products of their respective pieces of land) to the mailo owner. The mailo owner would issue *Busuulu* receipts but also obliged to recognize and respect occupancy rights of the occupants.

The mailo owner also had a duty to recognize a successor in title to a deceased occupant but only after such successor was formally introduced to him or her. This introduction had to be done

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<sup>8</sup>Mugambwa John T (1987): The Legal Aspects of the 1900 Buganda Agreement Revisited, in the Journal of Legal Pluralism, pp. 243-274 at p.257.

<sup>9</sup> The Registration of Titles Ordinance Cap 205 is the present day Registration of Titles Act, Cap. 230 adopted from Australia by the colonial government to regulate land ownership.

<sup>10</sup> Section 64 RTA.

<sup>11</sup> Section 59 of the RTA.

with payment known as “ekanzu” plus a cock.<sup>12</sup> The same formality applied in case the occupant sold part of his occupancy (kibanja) or completely assigned ownership of the occupancy to another (new) occupant. The occupancy rights were passed on to generations in this manner and the Busuulu and Envujjo payment also continued as an obligation on the part of the occupant (tenant) until 1975 when it was abolished by the Land Reform Decree. This landlord-tenant relationship in Buganda was replicated, although with slight legal modifications, in Toro and Ankole (Western Uganda).

Section 29(i)(a)(ii) and (iii) provides thus that a “Lawful occupant” also means: a person occupying land by virtue of the repealed Toro Landlord and Tenant Law of 1937 or repealed Ankole Landlord and Tenant Law of 1937

A similar set up of registered owners and peasant occupants existed in Toro and some parts of Ankole. The only slight legal difference is that in Ankole and Toro registered owners held the land under freehold tenure. Freehold tenure meant, legally, that the radical title is vested in the crown (colonial government) whereas with mailo tenure the radical title is vested in the individual mailo owner. According to Morris and Read under the Ankole and Toro Agreements private freeholds were granted to a few of the most senior chiefs but these grants were regarded as carved out of Crown land.<sup>13</sup>

The underlying reasons that led to enactment of the Busuulu and Envujjo law were no different from those that led to the enactment of the Toro Landlord and Tenant law, 1937; and the Ankole Landlord and Tenant Law 1937. The rights of the occupants (tenants) on the freeholds of Toro and Ankole were no different from their counterparts in Buganda. These tenants too had to pay rent to the freehold owners. This rental payment just like Busuulu and Envujjo was abolished by the 1975 Land Reform Decree. The effect of the 1975 Land Reform Decree, inter alia, was the abolition of mailo and freehold and conversion of the same into leases for 99 years. Mailo and freehold owners became lessees

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<sup>12</sup> ‘Ekanzu’ means, literally, a long white tunic worn by men, introduced then by Arab traders, given to the land owner as a sign of respect and promising allegiance to him as the landlord.

<sup>13</sup> Morris and Read (1961), Uganda: the development of its Laws, Sweet & Maxwell, London, p. 341

on conversion. The radical title of mailo too was now vested in the State.

The occupants (tenants) much as they were relieved from payment of rent (annual) had their legal position on the land become precarious. They became tenants at sufferance. Some people argue that they actually became “squatters”.<sup>14</sup> The term squatter, which is rather derogatory, still lingers on up to today. The tenants’ position became precarious due to the fact that a lessee on conversion, as by law, could issue a three months’ notice to the occupant, pay compensation for the occupant’s developments on the land and the occupant had to vacate the land. That was the legal status until October 8<sup>th</sup> 1995 when the Constitution came into force.

The Constitution, under Article 237, not only recognized customary ownership of land as a tenure, for the first time in Uganda’s land law history, but also resurrected the mailo tenure and freehold tenure from the “limbo” where they had been thrown by the Land Reform Decree of 1975 as leases on conversion. With this resurrection, the Constitution further attended to the shaky position of the occupants of registered land but who happen not to be the registered owners of the land which they occupy, thus the lawful occupants. This takes us to yet another category of registered land who may be referred to as lawful occupants.

Section 29(i)(b) provides for land occupants who purchased from, or entered with the consent of the registered owner.

Still under the category of lawful occupant, is a person who purchased from the registered owner of the land. This provision envisages a land occupant, entering into a written or unwritten agreement with the registered owner, the later allowing the purchaser to occupy land and utilize it in accordance with the sale agreement. Under this type of agreement, the type of development on the land would be specified and if not specified would be inferred from the conduct of the parties. According to Henry West, the construction of permanent houses would usually

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<sup>14</sup> In the case of Kampala District Land Board and another versus Babweyaka and others, Supreme Court Civil Appeal 2 Of 2007 (unreported), their Lordships observed that the term “squatters” is derogatorily used by land lawyers to refer to tenants by occupancy.

not be allowed by the mailo owner.<sup>15</sup> The fact of purchase was not the only way a person would gain occupancy of land. It could possibly come about as a gift *inter vivos* or just a mere consent of the registered owner to one's occupancy of the land. This then takes us to yet another type of lawful occupant.

### **Those who entered with the Consent of the Registered Owner**

A registered owner would allow any person of his choice to occupy and utilize a particular part of the land within a specified area. A person who entered on the land with the consent of the registered owner is protected as a lawful occupant and can secure a certificate of occupancy. However, the developments by the tenant, allowed onto the land by the registered owner would determine whether one were a tenant for life, in fee or a licensee.

The Land Act architects did take care of a licensee<sup>16</sup> but did not take care of a tenant for life. A tenancy for life terminates with the termination of the natural life of the tenant and at that time the land reverts to the registered owner (read landlord). There are instances where licensees have claimed to be tenants by occupancy.<sup>17</sup> It is imperative, therefore, that courts should be vigilant to trace that somewhat mythical line between a tenant by occupancy and a contractual licensee who has utilised the land for many years.

Section 29(i)(c) gives a further angle to lawful occupant to include a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.

This type of land occupiers is to be found on land known as former public land which was under the control of the then Uganda Land Commission.<sup>18</sup> This type of occupiers held land as customary tenants on former public land; but when the Uganda Land Commission (ULC) granted leases over their land to developers they (occupiers) were not compensated by the registered owner or their tenancy was not disclosed.

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<sup>15</sup> Henry West, 1969, *Mailo Land in Buganda*, Oxford University Press.

<sup>16</sup>Section 29(6) Land Act.

<sup>17</sup>Kampala District Land Board & another versus Babweyaka & others, *supra*.

<sup>18</sup>Section 59 Land Act.

The Uganda Land Commission prior to the 1995 Constitution had authority to manage all land in Uganda according to the Land Reform Decree, 1975 (LRD). In so doing, the ULC had to manage such land in conformity with the Public Land Act, 1969. Under the LRD, all land in Uganda was vested in the Government of Uganda and the ULC managed it on behalf of the Government. So, with the exception of registered land (mailo, freehold and leaseholds) all the other land in Uganda was available for allocation to any applicant by the ULC.

In the event of an application for grant of a lease over public land, the applicant had to notify of the presence of customary tenants thereon to the ULC. The customary tenants would have to be compensated or even resettled when the land in issue was granted by ULC in leasehold to the applicant. There was a possibility that the customary tenants' interests were not disclosed at the time the ULC granted a lease over the land. The other possibility would be where the customary tenant was not compensated at the time of granting the lease by ULC. In the latter case, the customary tenant would continue occupying the land until such compensation. So the Land Act envisages that either scenario subsisted until the promulgation of the 1995 Constitution and thus designated these kind of land occupiers as lawful occupants.

As earlier stated, all the above land occupiers who fall under the first category are, by law, known as lawful occupants. We will now consider the second category.

### **Second Category of Tenants by Occupancy:**

The Land Act, section 29(2) provides for a bona fide occupant. This category includes a person who had occupied and utilised or developed any land unchallenged by the registered owner of the land or the agent or representative of the registered owner 12 years (before October 1983) or more before the 1995 Constitution came into force.<sup>19</sup>

With this type of bona fide occupants, the legislators envisaged an absentee land owner for years. In that intervening period a person in need of using the land would settle thereon for over twelve year without challenge from the registered land owner

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<sup>19</sup> The 1995 Constitution of the Republic of Uganda came into force on the 8<sup>th</sup> October, 1995.

or the agent or representative of the registered owner. The twelve years computed by this provision of the law is not any twelve years, but twelve years before the coming into force of the 1995 Constitution. The law makers, in this type of land occupancy, borrowed and customized the common-law concepts of acquiescence and adverse possession to some extent.

First the concept of **acquiescence** means that a person gets onto the land, occupies it in the verily belief that it is part of his or her land adjacent thereto. Then the land owner gets to know about the occupiers' presence onto his or her land but does not object to such occupation. In other words, the land owner acquiesces with the intruder's continued occupation of the land; and thereafter the landowner is estopped from denying this fact. In the context of section 29(2) (bonafide occupant), the concept of **acquiescence** arises (and is borrowed) in that the registered owner did not challenge the continued occupancy of the land by the tenant. Challenge ought to have been done by the registered owner himself or herself or through an agent or representative. So, in this case, the registered owner acquiesced with the continued occupancy by the tenant and the tenant continued occupying in the verily belief that he or she had a right to so occupy.

The concept of **adverse possession** means that a stranger to land can claim ownership of it if he or she is in possession of that land for a period of twelve years and above. However, in the case of adverse possession, four factors must be satisfied and these are: possession of the whole parcel of registered land, not part of it; possessing it to the exclusion of all others including the registered owner (*animus possidendi*); the adverse possessor must have come to the land as an intruder or stranger; and possessing for over twelve years. So, **adverse possession** in the context of section 29(2) can be inferred in relation to the period of twelve years of the occupancy on the one part, having come onto the land as an intruder, and the intent of *animus possidendi*. Although the other factor of adverse possession, to wit, occupying the whole parcel of the land as registered (and not part of it) is missing or need not be satisfied, still the other factors as above mentioned are very visible in the ingredients that constitute a bonafide occupant under section 29(2).

This second category also includes a person who had been settled on land by the Government or an agent of the Government,

which may include a local authority. The law further recognized any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under section 29(2) who shall be taken to be a bona fide occupant for the purposes of the Land Act.

The first category – lawful occupants, and the second category – bonafide occupants, are collectively referred to as “tenants by occupancy”. It is the peculiar status given to them by the law which by far departs from tenancies as known under common law, that this paper treats them as perpetual tenancies.

### **Creation of Perpetual Tenancies**

The law designates these tenants by occupancy as tenants of the registered owner or the registered owner’s successor in title, be it by way of purchase or inheritance. There is no time limit as to the duration for the tenancy thus making it perpetual. Further the law creates security of occupancy for the tenants by occupancy in several ways:

**First:** through provisions enabling the tenant to get certificates of occupancy which is registrable as an encumbrance on the title of the registered owner of the land.<sup>20</sup> A certificate of occupancy would act as an indicia of title for the tenant by occupancy over that particular area of the land he occupies over the registered owner’s land.

Where a tenant by occupancy is desirous of getting a certificate of occupancy, he or she would apply to the registered owner for consent to process it through the established land management institutions.<sup>21</sup> In the event that the land owner declines or neglects to grant the consent, the tenant by occupancy would appeal to the land tribunal. The land tribunal is by law clothed with authority to grant consent to the certificate of occupancy as if it were the owner of the land. With consent granted by the land tribunal the tenant by occupancy shall be granted a certificate of occupancy by the Recorder.<sup>22</sup> The language of the law to this effect is mandatory:

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<sup>20</sup>Section 33 of the Land Act.

<sup>21</sup> The tenant’s application has to be forwarded to the area land committee to adjudicate the land, and to the District Land Board to authorise issue of a certificate by occupancy by the Recorder; section 33, sub-sections (2), (7), (8), and (9).

<sup>22</sup>Sub-section (8) of section 33.

“Section 33(8) A grant of consent shall entitle the tenant by occupancy to be issued with a certificate of occupancy by the recorder, and the recorder shall, .... Issue a certificate of occupancy to the tenant by occupancy who presented the grant of consent to the recorder.”

By the law overstepping the registered owner of land and granting powers to the land tribunal to grant consent, it amounts to a negation of the fundamentals of the Torrens system of land registration as espoused in sections 59 and 64 of the RTA. Specifically that the certificate is conclusive evidence of title, and that the estate of the registered proprietor is paramount, respectively. It is a negation because, inter alia, this certificate of occupancy is registrable as an encumbrance on the title of the registered owner. Since it is not the type of encumbrance that can be withdrawn like a caveat, it literally makes the registered owner's title defeasible. This certificate of occupancy, as an encumbrance, would last on the title for as long as the tenancy lasts. As pointed out at the outset of this paper, a tenancy by occupancy, unlike other types of tenancies, including a lease, has no specified period or a period that is capable of being determined. Thus becoming a perpetual tenancy.

**Second:** provision enabling a tenant by occupancy to lodge a caveat on the title of the registered owner, which caveat does not lapse as long as the occupancy rights subsist.<sup>23</sup> Where a tenant by occupancy chooses to lodge a caveat on the title of the registered owner, such caveat would not lapse and will endure for as long as the tenancy by occupancy still endures. For example, if the tenant by occupancy dies, the successor in title to the occupancy would enjoy protection of such caveat as if it were lodged by him or her. Additionally, in the event that the registered owner chooses to sell the reversionary interest to another person other than the tenant by occupancy, still the caveat will subsist. The change of ownership of the reversionary interest could be by way of grant or succession, still the caveat of a tenant by occupancy will endure irrespective of the changed reversionary owner.<sup>24</sup>

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<sup>23</sup> Sections 31 and 34 of the Land Act, as amended by the Land (amendment) Act, No. 1 of 2004

<sup>24</sup>Section 35(8) of the Land Act, as amended by Act No.1 of 2010.

**Third:** Criminalising eviction of a tenant by occupancy if such eviction is done without a Court Order. Where one is convicted of illegal eviction of a tenant by occupancy he or she can be imprisoned. Securing a court order to evict a tenant by occupancy is a tedious exercise and the grounds upon which it can be issued are also onerous such that getting one is near to impossible. Amendment of the principal Act, ushered in section 32A which provides:<sup>25</sup>

Lawful or bona fide occupants to be evicted only for non-payment of ground rent.

- 1) A lawful or bona fide occupant shall not be evicted from registered land except upon an order of eviction issued by a court and only for non-payment of the annual nominal ground rent.
- 2) A court shall, before making an order of eviction under this section, take into consideration the matters specified in section 32(1).
- 3) When making an order for eviction, the court shall state in the order, the date, being not less than six months after the date of the order, by which the person to be evicted shall vacate the land and may grant any other order as to expenses, damages, compensation, or any other matter as the court thinks fit.

**Fourth:** by being silent on the life span of a tenancy by occupancy, thus making it perpetual. There is no provision providing or intimating on the duration of a tenancy by occupancy just like the case for long term tenancies like leases. For example, the law clearly spells out that no lease would endure beyond 99 years.<sup>26</sup> It follows therefore that a tenancy by occupancy can subsist and outlive a lease whose duration cannot last beyond 99 years.

**Fifth:** in the event that the registered owner wishes to sell the reversionary interest in land he or she shall give the first option of buying the interest to a tenant by occupancy.<sup>27</sup> The language of the law is mandatory requiring that the land owner shall not sell his or her land to any other person before giving the first option to the tenant by occupancy.

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<sup>25</sup>Land (amendment) Act, No. 1 of 2010, section 2 thereof.

<sup>26</sup>Section 40 Land Act. (as amended by Act No. 1 of 2004).

<sup>27</sup>Section 35, *ibid*.

**Sixth:** in case the registered owner transfers the reversionary interest, a tenant by occupancy becomes a tenant of the transferee of the reversionary interest or lease in that case as by law.

It is for those reasons that I make the argument that S. 29 introduced and actually created a perpetual tenancy over land that happened to be registered by 8<sup>th</sup> October, 1995. Much as the Land Act Cap 227 came into force in 1998, it was only expounding on the tenements pronounced by the 1995 Constitution of the Republic of Uganda. The unregistered perpetual owner.

### **Dilution or negation of the Torrens System of Land Registration**

This perpetual tenancy dilutes and almost negates the cardinal features of the Torrens system of land registration; to wit, title by registration and indefeasibility of title. Specifically, a tenant by occupancy does not appear on the certificate of title as a proprietor. By making this assertion, it should be noted that where a tenant by occupancy is issued with a certificate of occupancy, the certificate can be noted on the charges register of the title.<sup>28</sup> This being registered land, the cardinal feature is that a proprietor ought to be registered. However, this is not the case for a tenant by occupancy but he or she has proprietary interests in the land that are perpetual in nature. There is no mandatory requirement for a tenant by occupancy to obtain a certificate of occupancy; and the fact of not having one does not legally prejudice the interests of the tenant by occupancy.<sup>29</sup>

*Note: In case of a lease granted out of former public land, where there are tenants by occupancy within the meaning of S. 29 (1)(c); such lease would expire and revert to the district land Board, but the tenancy by occupancy would endure, and endure perpetually.*

The perpetual nature of a tenancy by occupancy can best be demonstrated in respect of one found on a lease granted out of former public land. A tenancy by occupancy on a lease on former public land, can outlive the duration of the lease. Where for example a lease was granted by the ULC in 1970 for 49 years and there was a customary tenant whose interest was not disclosed or

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<sup>28</sup>The charges register is commonly referred to as the encumbrance page of the certificate of title.

<sup>29</sup>Section 31(9) land Act.

compensated. This, hitherto customary tenant, is now a lawful occupant who can be issued with certificate of occupancy. The lease would expire in 2019 and the reversionary interest would revert to the respective District Land Board.<sup>30</sup> The tenancy by occupancy will outlive the lease and the tenant by occupancy will become a tenant of the District Land Board.

### **The Legal and Social Implications of a Perpetual Tenancy**

Tenancies in their very nature are a creature of common law where the reversionary owners or a land lord or landowner exercises proprietary interest to create lesser interest in his or her land with the powers to terminate either by law or by agreement. Tenancies, including leases, are for a specified period or for a period that can be determined or is determinable by assessing the relationship between the landowner and the tenant. None of these features exist in a tenancy by occupancy, why, because it is an imposition of the law onto the land owner, and neither the law nor the land owner can determine its duration.

It is not surprising, therefore, that a new trend is developing where periodic tenants (monthly or yearly tenancies) refuse to vacate premises when their tenancies are terminated. At times, they even argue that they are entitled to be given an option to purchase! Why? It is because they imagine that after twelve years of occupying the same premises they are some sort of (the perpetual) tenants by occupancy.

Another common occurrence is where several people collude and connive to concoct a tenancy by occupancy. They create a buyer and seller and in the middle of all this they plant some elderly person, 70 years and above who purports to have occupied the land since the 1960s and then he sells his occupancy rights to a purchaser. For example, in the case of *Joint Medical Store v. Kanakulya*<sup>31</sup> the defendant who fenced off the plaintiffs' two undeveloped plots of land over Christmas recess of 2009 (one plot under freehold and another under lease, but adjacent to each other) claimed that he bought the land in 1999 from an elderly man who apparently owned it since the 1960s. The defendants' supposed sale agreement of 1999 was drawn by a firm of lawyers whose chambers are situated in a building in the city centre

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<sup>30</sup>Section 59 Land Act.

<sup>31</sup>High Court Civil Suit 217 of 2010 (unreported)

(Kampala) which was built between 2003 and 2005. The supposed vendor he bought from never sought consent from the plaintiff (the registered owner of both plots of land since 1989) to sell to the defendant which omission is supposed to vitiate the transaction.<sup>32</sup>

This rather peculiar legal privilege conferred onto a tenant by occupancy, especially bonafide occupant 12 years before the coming into force of the 1995 constitution is not extended to a lessee on expiry of a lease. When a lease expires, the lessee becomes a tenant at sufferance occupying at the pleasure of the landlord. This tenancy at sufferance can be terminated any time without notice and no compensation is payable for developments on land. In *Daphine Negesa Musoke v. Samu Investment Limited*,<sup>33</sup> the plaintiff was the leasehold owner granted by ULC over former public land. When the lease expired in 2003, the Kampala District Land Board (successor in title of ULC) granted it to the defendant without the knowledge of the plaintiff who was in occupation of the land since expiry of the lease. The plaintiff lost the case in both the High Court and the Court of Appeal. The contention of Court was that the lease had expired and as such the lessee had no legal right on the property and is a mere trespasser. That the lessors' right to possession of land, in the event of an expired lease, is automatic.

## Conclusion

Ownership of land would make a lot of sense if it is registered, not only for the statistic of the country but also for the owner. In our case, registration of land under the RTA is, legally, a right in rem. A legal right and a conferment of an indefeasible title within the meaning of the Torrens system of land registration. However, in the event that registered land is encumbered with a tenant or tenants by occupancy, then the supposed indefeasibility of title is negated. It is instead the tenancy that becomes indefeasible irrespective of the fact that it is not registered. The law protects a tenancy by occupancy irrespective of whether it is noted on the register or not. The onerous provisions to secure a court order to evict a tenant by occupancy, under the Land Amendment Act, No. 1 of 2010, guarantee the perpetual nature of

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<sup>32</sup>Section 34 Land Act.

<sup>33</sup>Court of Appeal Civil Appeal 85 of 2003,

the tenancy. Given the fact that a tenant by occupancy can only be evicted for non-payment of rent, through a court process which lasts for nearly a year, it makes the venture very unattractive. It also means that the tenant by occupancy can cause environmental degradation but that by itself cannot be used as reason for eviction.

The fact that a tenancy by occupancy can outlive a lease, for example, leaves little room to argue that it is actually a tenancy as enumerated under the long-standing principles of landlord and tenant law or the law of tenancies. A tenancy by occupancy is only but a tenure save for the legislators cajoling the language of the statute to console but also comfort the registered landowners on whose land there happens to be tenants by occupancy occupying it. Call it a tenure and close the fallacy!!

