

LEGAL OPINION

PILOTING THE PROTECTION OF RIGHTS TO CUSTOMARY LAND OWNERSHIP IN ACHOLI LAND.

Existing Tenure Options For
Protection Of Customary Land
Owners.

SUBMITTED TO TRÓCAIRE AND JOINT ACHOLI
SUB-REGION LEADERS' FORUM (JASLF)

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FACTUAL BACKGROUND

The Joint Acholi Sub-Regional (JASLF) rolled out a project on piloting the protection of rights to customary land tenure in Acholi Land in 2015. This project is funded by Democratic Governance Facility, and it is implemented through Trócaire. The project is intended to among others; investigate existing and possible legal mechanisms to secure customary land rights in Acholi land.

Arcadia Advocates was contracted as the consultants on this project to look more specifically into the existing tenure options under Uganda's law and in particular explore alternatives such as certificates of customary ownership, communal land associations and land trusts on the protection of customary rights and how the same can be used to secure the customary land rights of Land owners in Acholi land.

This report therefore analyses the different tenure options under Uganda Law with the overall aim of advising on the most viable option that can effectively protect the rights of customary land owners.

QUESTIONS FOR DETERMINATION

- 1. Whether the existing land tenure options under existing Ugandan Law including but not limited to CCOs, CLAs and Land Trusts offer or could be revised to offer security of tenure for customary land tenure owners in Acholi Land.**
- 2. What is the best option to register rights of customary land owners?**

LAW APPLICABLE

1. The 1995 Constitution of Uganda
2. The Land Act, Cap 227
3. Registration of Titles Act, Cap 230
4. The Uganda National Land Policy, February, 2013
5. The Trustee Incorporation Act Cap 165
6. The Land Regulations, 2004

DETERMINATION OF ISSUES

1. Whether the existing land tenure options under existing Ugandan Law including but not limited to CCOs, CLAs and Land Trusts offer or could be revised to offer security of tenure for customary land tenure owners in Acholi Land

Customary land is owned by indigenous communities and administered in accordance with their customs and cultures. With the exception of land in Buganda and urban areas, most land in Uganda is owned under customary tenure. Until the enactment of the 1995 Constitution, customary tenure had not been soundly provided for under the laws of Uganda. In the previous legal regimes customary tenants were regarded as occupiers of land. As such, they were merely tenants at sufferance from the state who could evict them after a three month notice period with compensation for any developments on the land.¹ The Constitution of the Republic of Uganda, 1995 brought about fundamental changes in land holding arrangements in Uganda.

The Constitution vests all land in Uganda in the citizens of Uganda according to four land tenure systems: customary; freehold; mailo; and leasehold.² By vesting all land in the citizens of Uganda and recognising customary tenure rights to land, the Constitution is revolutionary in that it affirms the land rights of people who own land under the customary tenure.

In as much as the Constitution provides for the recognition of customary land tenure as one of the modes of land ownership, the subsequent enabling legal regime, in particular the Land Act as confirmed by the Research Report commissioned under the project to investigate and document how Acholi customary and communal land is controlled, managed and administered, did not capture the aspirations of the Constitution. Customary tenure according to the land policy continues to be; (i) Regarded and treated as inferior in practice, to other forms of registered property rights, denying it opportunity for greater and deeper transformation; (ii) Assessed as lesser regarding dispute resolution and mediation compared to the Statutory system; (iii) Assessed as lesser to other tenures that have titles for proof of ownership in courts of law in the administration of justice; (iv) Converted to freehold before it attains the totality of the bundle of rights inherent in all other registered tenures that are held in perpetuity; (v) Disparaged and sabotaged in preference for other forms of registered tenures, denying it the opportunity to progressively evolve.³

1 The effect of the Land Reform Decree of 1975 declared all land in Uganda as public land. To this end, it declared all customary occupants of former public land, tenants at sufferance and were eligible to eviction at any time.

2 Article 237(3), 1995 Constitution of Uganda.

3 The Uganda National land Policy, February 2013 page 17

It is important to note that these perspectives reflect the mindset of the design of the current Land Act and the provisions related to Customary Tenure. The current Land Act calls for formalization of tenurial property with emphasis on titling and registration as the thrust to land reform.

We will now examine the existing options with the above in mind and in particular to identify the most viable option from the existing legal options that can best secure the interest of customary owners.

Option A. The Certificate of Customary Ownership

Customary Land tenure is defined under the Land Act to mean a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons. The Constitution provides for customary certificates of ownership (CCO). It provides that Ugandan citizens owning land under customary tenure may acquire Certificates of Customary Ownership.⁴ The Land Act 1998 understood this constitutional provision to mean that any person, family or community holding land under customary tenure on former public land may acquire a certificate of customary ownership in respect of that land.⁵ Therefore any person, family or community holding land under customary tenure on former public land may acquire a certificate of customary ownership in respect of that land. Further still, certificates granted under customary ownership may be leased, mortgaged and pledged where the customs of the community allow.

An application for a certificate of customary ownership is made in the prescribed form provided for under **Regulation 3**⁶. This application is made to the Area Land Committee where the land is situated. Upon receipt of the application; the Area Land Committee shall determine the boundaries; other interests existing on the land and shall settle any disputes on the land subject to the application or the land adjacent to it; If all the requirements are in existence then the Area Land Committee shall make a report and send it to the District Land Board stating all the findings about the land including the interests and the Board shall approve the issuance of a certificate by the recorder⁷ or reject the report of the area committee with reasons.

Upon issuance of the certificate of customary ownership, it is conclusive evidence of customary rights over that particular piece of land and entitles the holder to use for any transaction including leasing, mortgaging, selling as provided for in **Section 8** of the Land Act.

⁴ Article 237(4) (a) of the Constitution of Uganda, 1995

⁵ Section 4 of the Land Act, Cap 227

⁶ Land Regulations, 2004

⁷ Section 68 of the Land Act defines a recorder to be a sub county chief in rural areas, a town clerk in a gazetted urban area and an assistant town clerk in a division of a city

In addition the Land Act provides that any person, family, community or association holding land under customary tenure on former public land may convert the customary tenure into freehold. Immediate title can be obtained under the regime in the same way as other tenure without having to go through the conversion process.

Arguments for Certificates of Customary Ownership

1. Some of the benefits conferred by a CCO on the holder of the certificate include the right to undertake any dealings with the land in question for example leasing the land or part of it, mortgaging, selling, transferring the land, among others. This is done subject to the conditions, restrictions and limitation contained in the certificate.
2. A certificate is much cheaper, quicker and easier to obtain and to amend than a title, since it is administered at the sub-county by a recorder.
3. The CCO has a map attached to it, so it also proves where your land boundaries are. Mapping is a public process and it involves stakeholders including neighbours which is very important because it reduces the possibility of boundary conflicts.

Arguments Against Certificates of Customary Ownership

1. Despite the elaborate process of CCOs provided in the Act the same have been resisted as there is a lot of work required to elaborate how they will work. For instance it is not clear how the Courts will consider and treat the certificates in particular whether a certificate will be equated to a title; how the rights of different people to use the land will be protected and how the inaccuracies in the boundaries will be handled; what procedures will be used for updating the certificates when there are land sales or upon inheritance when the certificate holder dies.
2. The Land Act failed to capture the intention of the Constitution. The constitution provides that all Uganda citizens owning land under customary may acquire Certificates of ownership, the Land Act however provides for Certificates of Customary Ownership. One might argue that this is not one in the same thing.
The discrepancy under the law on exactly what kind of Certificate should be issued to customary land owners is perhaps what has birthed the recommendation in the land policy for the creation of a registry to issue certificates of customary tenure.

3. The Land Act delimits the role of traditional institutions. The Act provides for Area Land Committees rather than customary institutions as the key driver of land matters. Under Section 5 (1) C, the Area land Committee is given the function of adjudicating upon and deciding **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 an application or any land 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 of land , and if so what conditions and limitations.** In addition, S 5 (2) d provides that; **the Committee shall in the exercise of any of its powers under this section which involve a hearing, comply with the rules of natural justice and , subject to that duty, may refer any matters to any customary institution habitually accepted within the area 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. Making Area Land Committees independent and with authority over the traditional institutions on matters of customary land was always going problematic.**
4. In as much as **Section 27 of the Land Act** states that decisions in regard to customary land that have the effect of depriving women, children and the disabled of land are null, the reality is that there are no mechanisms under the CCO system to protect these groups.
5. Additionally the implementation of CCOs has been done in a manner that suggests that Government is not serious about this option. There is lack of clarity in the guidelines and procedures for application in terms of Administrative/Procedural issues, in the areas of but not limited to: how to capture the aspect of ‘managing’ land in trust for family members, how to register polygamous families and future heirs, how to record changes in the marital status, how to capture movements and migration of family members of the applicants, up to how many CCOs can be applied for per family /unit. There are no systemic demarcation guidelines and standardized sketch maps and as well no recording of these rights on existing maps. There is no assistance to documentation of boundaries and land transactions. There are no guidelines on how to settle boundary disputes and conflicting claims.

6. The procedures for the issuance of certificates of customary ownership are complicated and involve, according to law, a local level Land Committee, a District Land Board and, finally, a recorder, who is to issue the certificate.⁸ Still, the certificates are not accepted as collateral by financial institutions.⁹ The introduction of new formal land committees and boards create a parallel structure, which will compete with the existing customary land institutions and this to a large extent has led to the resistance to CCOs.¹⁰
7. Additionally this is not helped by the fact that MLHUD is under resourced and underfunded. Area Land Committees (ALCs) are not set up in all Districts and sub-county chiefs are not working as recorders. Nationwide, NGOs such as Norwegian Refugee Council and ZOA are the drivers of CCOs as opposed to Government.

The problems in the design of the Land Act partly led to the policy shift in the land policy which aimed at addressing some of these issues. **The Uganda Land Policy provides for ways that CCOs can be revised to provide security of tenure for customary land tenure owners. It provides that government should;**¹¹ a) Design and implement a land registry system to support the registration of land rights under customary tenure. b) Issue certificates of title of customary ownership based on a customary land registry that confers rights equivalent to freehold. c) Promote systematic demarcation as a measure to reduce the cost of registering rights under customary tenure. d) Modify the rules of transmission of land rights under customary land tenure to guarantee gender equality and equity. e) Provide for registration of customary land held under trusteeship by traditional institutions or cultural leaders on behalf of communities in the names of the trustees.

We opine that CCOs in their current state remain a weak mechanism for the protection of the land rights of customary land owners unless and until they are streamlined in the manner proposed by the land policy.

⁸ Olanya, D.R (2011), *Colonial Legacy, Access, Political Economy of Land, and Legal Pluralism in Uganda 1900 – 2010*. Paper presented at ECAS 4 Conference June 2011, Uppsala, Sweden.

⁹ Bashaasha, B. (2011). *A review of Land Tenure and Land Use planning in the Kagera (Transboundary Agro – ecosystem Management Project) districts in Uganda*, Study commissioned by FAO (Food and Agriculture Organisation of the United Nations). September 2011.

¹⁰ Rugadya, M.A 2009. *Escalating Land Conflicts in Uganda. A review of Evidence from Recent Studies and Surveys*. The International Republican Institute, The Uganda Round Table Foundation

¹¹ *The Uganda National Land Policy - February 2013*

Option B. Communal Land Associations

The Land Act enables holders of customary tenure, who wish to use land as a group, to establish common land associations to manage and protect their interests in the communal land.

The Land Act of 1998 allows communities to form Communal Land Associations (CLAs) to own and manage land as a community. **Section 15 of the Land Act** establishes communal land associations. A communal land association may be formed by any group of persons in accordance with the Land Act for any purpose connected with communal ownership and management of land, whether under customary law or otherwise. Within each district, the district registrar of titles performs such functions relating to communal land associations as are conferred on that officer by the Land Act or as may be prescribed.

The district registrar of titles shall, on receipt of an application convene a meeting of the group of persons which determines whether to incorporate themselves into an association whereby not less than 60% of the group determine so to incorporate themselves, elect not more than nine nor less than three persons of whom not less than one third shall be women to be the officers of the association. The district registrar of titles or an authorized officer presides at the meeting convened.

The district registrar of titles keeps a public register of associations in the prescribed form and exercises a broad and general supervision over the administration of the associations within his or her district in order to ensure that they comply with their constitutions and manage the communal land under their control with due regard to the interests of the members of the association and without limiting the generality of that function.

He or she may at any time that he or she considers it necessary for the proper performance of his or her functions or that it is in the public interest so to do, give direction to any officer of the association as to the proper performance of his or her duties and that officer shall be under a duty to comply with any such order.

Arguments for Communal Land Associations

1. CLAs are democratic institutions through which communal land users can participate in land governance and engage with other stake holders which brings about inclusive decision making.
2. CLAs through providing a framework for a common land management scheme exercise jurisdiction over communal land and resources on behalf of the land users and this ensures optimal utilization of communal land.
3. In terms of Administrative/procedural issues, The MLHUD has since implemented measures to ensure clarity of some procedures in the processing of applications such as: developing new guidelines, manuals and formats i.e application forms, marking of boundaries, issues for public hearing, verification of the names of the applicants.
4. It provides for flexibility in membership- it could be a clan, tribe, or individuals near a particular resource like a forest or a park.
5. Systematic demarcation approach to the CLAs is cheaper and can give the community bargaining power if boundaries are known.

Arguments Against Communal Land Associations

1. No clarity of the law and its subsequent guidelines on how to protect the rights of women and other marginalized groups like the youth.
2. Individual interest vs communal interest. The line between individual and community interests is not clear and may even be complicated in Acholi where the rights remain in the hands of the community.
3. In terms of Administrative/procedural issues, there is lack of clarity in the guidelines and procedures for application, in areas of but not limited to how to capture the aspect of managing a trust for community members, how to record changes in the marital status, how to capture movements and migration of community members of the applicants, up to how many CLAs can be applied for per community.
4. There are no systematic demarcation guidelines and standardized sketch maps and as well no recording of these communal rights on the existing maps. There is no assistance to documentation of boundaries and there are no guidelines on how to settle boundary disputes and conflicting claims.

We opine that just like CCOs, CLAs remain a weak mechanism for the protection of the land rights of Acholi customary land owners because they only deal with a segment of Acholi customary land law i.e. areas communally owned as opposed to the many facets of the Acholi Customary land law.

Option C. Land Trust

Lewin on Trusts (17th Edition 2000 at 3) in **Graham Moffat Trusts Law; Text and Materials** (2005) (Cambridge) at 3 defines a trust and states that it:

“Refers to the duty or aggregate accumulation of obligations that rest upon a person described as a trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence the administration will be in such a manner that the consequential benefits and advantage accrue, not to the trustee, but to the persons called cestuis que trust or beneficiaries, if there be any; if not, for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest.”

Therefore a trust will arise:

- (a) As a result of a conscious act/declaration of the settler/founder, creator, donor;
- (b) However, where there is no conscious act/declaration, then a trust can be imputed as a result of particular statutory provisions or as a result of decisions of court.
- (c) This can be as many settlers, trustees or even beneficiaries save as express provisions of the law may otherwise limit. However, generally the practice of having a single person acting as a settler, trustee and beneficiary will be discouraged.
- (d) Trust property can be anything ranging from tangible property to intangible property such as intellectual property.

- (e) Generally, the trustee will hold the legal title to the property.
- (f) The consequential benefits to the beneficiaries may be property in kind or income. The entitlement may be at some future date, it may be hinged on the discretion of the trustee or it may even be based on a contingency. The trustee may have power to hold onto particular income during a specified period of time.

The trust option is a trust for management of customary land. “Land trust” means any express agreement or arrangement whereof a use, confidence or trust is declared of any land, or of any charge upon land, for the use or benefit of any beneficiary, under which the title to real property, both legal and equitable, is held by a trustee, subject only to the execution of the trust, which may be enforced by the beneficiaries who have the exclusive right to manage and control the real estate, to have possession thereof, to receive the net proceeds from the rental, sale, hypothecation or other disposition thereof, and under which the interest of the beneficiary is personal property only.¹² **Section 1 of the Trustee Incorporation Act (T.I.A)** provides for creation of a trust over land. It provides that Trustees or a trustee may be appointed by anybody or association of persons established and such trustees or trustee may apply to the Minister for a certificate of registration of the trustees or trustee of such body or association of persons as a corporate body. If the Minister, having regard to the extent, nature and objects and other circumstances of such body or association of persons, considers that incorporation expedient, he or she may grant such certificate accordingly, the trustees or trustee shall thereupon become a body corporate.¹³

The trustees or trustee shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in the corporate name, and subject to the conditions and directions contained in the certificate to hold and acquire, and, by instruments under the common seal, to convey, assign and demise any land or any interest in land now or hereafter belonging to, or held for the benefit of, such body or association of persons, in such and the like manner, and subject to such restrictions and provisions, as such trustees or trustee might, without such incorporation, hold or acquire, convey or assign, or demise the same for the purposes of such body or association of persons.¹⁴

¹² *The Use of Land Trusts and Business Trusts in Real Estate Transactions* By John C. Murray 2010

¹³ Section 1(2) TIA Cap 165

¹⁴ Section 1(3) TIA Cap 165

Arguments For The Trusts

- 1) The advantage of a trust is that it is a very flexible tool which can be used to invite the customary land system into the formal legal system without destroying its tenets. A trust enables the infusion of the Acholi Customary Tenure into the legal system easily as it enables the use of Principles designed by the communities in a way best understood by them. This will align the law to the definition of customary tenure under Section 3(1)(a) of the Land Act which provides that customary tenure is a form of tenure applicable to a specific area of land and a specific description or class of persons. Additionally registration makes them a body corporate and as a body corporate they are able to protect their land.
- 2) Under a land trust, the land is registered in the names of the Trust and certificate of incorporation helps the trust to be able to protect its land which is not the case at the moment. Additionally registration makes them a body corporate and as a body corporate they are able to protect their land.
- 3) Under a land trust, the trust affords a framework of accountability. The Trustees act in the interest of the beneficiaries and the beneficiaries can hold them accountable.

Arguments Against Land Trusts

The following are the disadvantages of having a trust:

- 1) Additional Administration – If you establish a trust, you need to allow for the time and cost involved with meeting the trust’s annual accounting and administrative requirements.
- 2) Cost of Formation of the Trust/Transfer of Assets – There are costs involved with establishing a trust. This will depend on the complexity of the trust and the nature of the assets to be transferred.
- 3) Future Law Changes – Possible changes to legislation of trust law may remove or affect some of the original objectives for the trust formation.

2. What is the best option to register rights of customary land owners?

We recommend land trusts as the best system for protecting rights of customary land owners to cure the flaws of the current law as identified.

In making a recommendation of Trusts, we are persuaded by the pilot project undertaken by the Center For Public Interest Law, to transform traditional communal institutions into corporate entities in order to enhance the protection and promotion of rights to ownership and usage of land by marginalized grassroots war affected communities in Acholi land.

CEPIL successfully transformed the Bwobo Clan in Amuru district into a corporate entity and the clan was awarded a Certificate of Incorporation for the Bwobo Land Development Trust. CEPIL undertook a long, guided, gradual and often sensitive process including consultation meetings between CEPIL and Bwobo Cultural Cabinet, Bwobo Cabinet consensus building meetings for corporatization, wider sensitization of clan members by Bwobo Cabinet, CEPIL/Bwobo advocacy meetings with the Ministry of Lands and registration of trust deed finally culminated into the Bwobo Land Development Trust.

From the CEPIL work with Bwobo the following are the key lessons and best practices that will help out in rolling out this model.

- 1) The need for comprehensive consultation and sensitization on project tenet at every level; grassroots, clan, district and regional level. This is aimed at avoiding negative suspicion and unnecessary politicking on an issue as sensitive as land in Northern Uganda.
- 2) Corporatization of a clan is a rather long and sometimes hectic process which requires consistent and adequate consultations across key stakeholders of the project for sustained momentum. Due to the vast project area and scattered settlements all over Acholi land, the preferred and most effective means of sensitization of the masses is radio talk shows on the local FM Stations. It is a guaranteed fact that these local stations have coverage to most parts of the sub-region and may be a very good medium of educating the masses on the benefits of corporatizing a community institution.¹⁵

- 3) CEPIL faced a few challenges in the Process of Incorporation for examples;
- a) the resistance from the political leaders who are opposing the organization of these trusts because they do not want many power centers.
 - b) Because of the vastness of the geographical area of the clan coupled with limited resources, not enough consultations have been done among all the Bwobo people regarding the trust issue.
 - c) The land to be managed by the trust will be difficult to alienate because of the lack of finances to prepare the lands and to survey the same so that the freehold title is issued in the names of Bwobo Land Development Trust.
 - d) There is need for more sensitization of the people on the importance of owning land under trusts. Many people are disillusioned after the war and are easily misled.
 - e) Resistance by land grabbers who had taken advantage of the absence of organized clans to grab land have a fear that the land will be taken away from them.¹⁶

Despite the challenges that may come with setting up of a trust, the various benefits far outweigh the disadvantages when compared to CCOs and CLAs.

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CONCLUSION

In light of the above discussion, we highly recommend land trusts as the most viable legal option for protection of customary land rights under the current legal regime. This recommendation is further buttressed by the findings of the research team that indicate that the organization of land in Acholi is still heavily tilted towards clan leadership. Clan leaders from the past to today understand that they are trustees for the land and that the land is held in trust for both the previous, current and future generations.

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