

3. Why is the legal system failing to protect people's land rights?

How does Ugandan law protect land rights?

Ugandan Land Law is one of the best in Africa at protecting people's rights. The law recognises private ownership, whether by individuals, families or communities, and the State cannot take away any land, without paying full compensation. Both the law and the Constitution recognise people's customary rights to land. Not only is actual ownership of land recognised but the customary rules for protecting vulnerable people are also respected – the rights of a widow to succeed her husband's control over all his landⁱ, of orphans to inherit all of their parents' land, of divorcees to a share of their parents' land, etc. Giving legal recognition to these rights means that the State's own courts have the responsibility to uphold and to help enforce the customary rights. Parliament has even made the wilful occupation of someone else's land a criminal offenceⁱⁱ, and has given the Courts the powers to order eviction and restitution of land taken from the rightful owners.

The State recognises the powers of the customary authorities to determine any land disputes according to customary rules (provided they do not discriminate, e.g. against women). In addition, it has put at the disposal of citizens a State justice system which is accessible to everyone: land cases are taken to the LC2 (parish) executive committee and the fee is just 1,500 shillings. The LC justice system is designed to be user-friendly: LC courts are instructed by the lawⁱⁱⁱ not to get "unduly" worried about technicalities, and no lawyers are allowed, in order to make the proceedings run in the most culturally appropriate way and to maximise the use of common sense rather than exploitation of technicalities. With customary rules that guarantee protection of land rights for all, reinforced by such strong State protection, how can protection of land rights possibly fail?

ⁱ There is a common mis-perception that a brother-in-law inherits a deceased man's land under customary law. This is false: they have no claim on the estate, if there is a surviving spouse or child. For further details on rights under customary law, see *What land rights do people have under the rules of customary tenure?*

ⁱⁱ **Land Act, section 91 (1).**

ⁱⁱⁱ Local Council Courts Act no 13 of 2006.

The actual situation

And yet, despite everything, land grabbing^{iv} in almost every village is rampant. Some cases make the press headlines – when District officials grant themselves leases on other people's land, or when the powerful expropriate large areas of land. However, the most common form of land grabbing is unnoticed: not hidden, but simply ignored because no-one is interested. In every village there are inequalities of power – those who have more money, status or connections, those who are physically stronger, or are feared because they have weapons. It is normal practice for these more 'powerful' people simply to take over the land of the less powerful (the old, the very young, widows, and the poor). They do this in a variety of ways: they occasionally use violence, but more commonly threats and intimidation are sufficient to make their victims give up and abandon the land to the land grabbers^v. Brothers-in-law take over a widow's land, leaving her and her children destitute; uncles, supposedly acting as guardians of orphans, grab their land and sell it for themselves, leaving the children with no independent future; divorced women are chased away by their brothers, left with no way to support themselves except to beg every day for a chance to dig other people's land. These are not isolated incidents. In Lango, between a half and three-quarters of all widows face difficulties in enjoying their legal land rights; over 80% of divorcees or unmarried women are denied their legal rights to land.

Land grabbing is one of the single biggest causes of extreme poverty. However, unlike other causes of poverty, land grabbing is illegal and there are authorities or courts in every village, every parish and every sub-county to stop it. Sadly, greed is a part of every society. What demands explanation is why the greedy are given impunity to trample the vulnerable into destitution. Why has a legal system that goes right down to the LC2 level failed to curb

^{iv} Land grabbing means illegally depriving someone of their land rights. It includes taking other people's fields, encroaching onto their land, selling someone else's land and depriving someone of their legal right to be allocated land or their rightful inheritance

^v For more details on the processes of land grabbing, see *How does land grabbing happen?* in this pack.

the cancer of land grabbing and exploitation in any way?

Our research has revealed several explanations. One lies in the weaknesses of the land administration. (These problems are discussed in the accompanying paper, “*why is the land administration failing to protect land rights?*”). Part of the responsibility lies in the failure of the customary authorities to protect rights. (This is discussed more fully in the accompanying paper *Why is customary protection failing to prevent land grabbing?*) This paper looks at the responsibility that lies with State justice system.

What’s going wrong?

Most people in the north and east of Uganda take their cases first to the clan authorities. Where this fails, they then go to the LCs. Some people don’t take their cases to court at all. Many people who do go to court fail to get their rights restored. Why are the intentions of Parliament and the Government, to provide cheap and accessible justice that protects land rights, being frustrated?

The four most common problems are as follows:

1. Sometimes the verdicts of the Courts fail to uphold rights.
2. Sometimes Courts fail to give verdicts at all.
3. Often Courts give good verdicts, but there is no enforcement of the judgement.
4. A fourth problem is that some people can’t afford court at all.

Why courts don’t always give just judgements

Someone with legal rights may not get a judgement in their favour. Sometimes this is an honest error: LC court members have not been trained and are not experts on either State or customary law. For example, they are nearly all under the misconception that if you have occupied land for 12 years, the land automatically belongs to you, and they are as susceptible as anyone else to the misperceptions that persist about women’s rights in particular.

Frequently, though, there are other reasons for poor judgements. (The records of the judgements almost never refer to either the evidence or provisions of law, and so it is not always easy to know why conclusions were made. In fact, Court secretaries often ‘get tired’ and simply stop writing down witness evidence after a while,

making any sensible appeal process or oversight impossible.) Simple bribery is common – this is openly admitted by most LCs. Other reasons for bias are political (who voted for whom), family and clan relationships, or simply an unwillingness to challenge the powerful. Bizarrely, most courts were using ‘witnesses’ as a voting panel, and were awarding the case to the person who could bring the most witnesses or for whom the ‘audience’ voted. It is not easy for a local court to judge against the powerful or popular sentiment. However, if they cannot provide justice, then their powers should be passed on to those who can.

Why courts fail to give judgements

Most cases which go up to the Magistrate’s Courts are still awaiting judgement years later. Delaying tactics are common by land-grabbers. They know the poor cannot keep paying transport costs to the District for more adjournments and they will eventually give up. Courts are also to blame. They have a practice of ‘being fair to everyone waiting’ by hearing one or two witnesses from all the cases pending, instead of finishing one case before moving on to the next. This only serves to drag everyone’s case out, making costs mount until the poor give up. If the Magistrates were actually hearing a real appeal, cases should be quick, since there would be no reason to re-hear the evidence of witnesses. In practice, the Magistrate’s Courts are often hearing the cases afresh, and ‘appeals’ are rarely based on proper grounds. (The most common reason given in filing an appeal is simply the catch-all “error in fact and in law”. Since LC courts don’t say how they reached their judgements, this may be inevitable.)

It can be just as hard to get a judgement from the lower (LC) courts, because they don’t like making unpopular decisions. They may either simply refuse to pronounce judgement (‘it has defeated us, take your case to a higher court’) or they may offer a ‘judgement’ – but if the loser doesn’t accept this, then they simply wash their hands of the case and tell the winner to take it up, at their own cost, in the next court. Their ‘judgement’ in this case was nothing more than an expensive opinion, since excessive ‘court fees’ have already been paid. LC Courts invariably refer to this as a ‘referral’. It must be stressed – this is the most normal outcome of a case in the lower courts. (Cases where a loser would accept defeat can be solved in the customary forum. What, then, are the LC courts for?)

Why a judgement doesn't often help

Many losers simply ignore verdicts against them, knowing that nothing will happen. If they are powerful enough to take over someone's land, they can also resist the 'opinion' of an LC court. LC courts have no idea what they can do to get enforcement of a judgement. Since few communities will unite to stand up for a widow's rights – and even fewer for a divorcee – they know that the matter will soon pass. LC courts don't even know how to advise the winning party beyond saying vaguely 'you take the matter to the next court'. The application is then to restart the original suit, not for enforcement of an existing judgement. This means a whole new set of costs, and a possibility for justice to be denied. The possibility of winning means little, since the judgements of the Sub-county Court are just as easily ignored. Going to the Magistrate's Court also involves re-hearing the case, since there are no known procedures for simply applying to this Court for enforcement of a judgement that was never appealed. Winning here has the possibility of getting enforcement, but court orders and bailiffs cost hundreds of thousands of shillings which must be paid up-front by the winner – and you need to know the procedures. Land grabbers will not bother trying to grab the land of people who can afford, and who know how, to do this.

The law does not clearly spell out the powers of enforcement of LC courts, except for cases where land has to be sold by the court to pay debts or compensation. The LCs are left in the dark. Higher courts, burdened by ever increasing case-loads, choose not to be proactive in enforcement.

Although the law provides for ordering the criminal prosecution of a land grabber (which is not at the cost of the victim), and the subsequent restitution of the land by the police, this is never used.

When cheap justice is not so cheap

Official fees are very reasonable, especially since they are recoverable by the winning side. Part of the problem is that all courts are charging illegal fees. LC1s with no rights to charge at all to 'hear' land cases charge around 5,000/-; LC2 courts charge around 30,000/-; and sub-county courts on average 50,000/-. (Many charge much more than this. Taking a case as far the sub-county can cost 2-3 months of total family income. If people were sure of getting justice at the LC2, more would be

willing to pay, but for the reasons discussed below, this is rare.) Most cases are dragged on up through the system, getting more and more expensive as it gets higher – until the richer party wins by default when the other gives up. (In theory, costs could be awarded to the winner at each level, even while the loser is pursuing an appeal. Courts fail to recognise how hard it is for many to pay out in the hope of eventually reclaiming money, and simply wait until the case is closed before awarding costs.)

What is to be done?

Uganda was rightly hailed for having a progressive Constitution and land law. Reality is letting the vision down. The situation can be put right, if enough attention is given to the actual problems on the ground. Some of the problems of land grabbing cannot be tackled by the State justice system. The rules of land administration and of the customary authorities and communities themselves are discussed in the accompanying papers. Much, though, can be done by the State Justice systems, which are the shared responsibility of the Ministries of Land, Housing and Urban Development, of Justice and Constitutional Affairs and of Local Government.

The problem of **excessive charges** can be tackled within the current legislative context. It is illegal to demand more than the fee set by ministerial regulation, and the criminal law could be used to stop this. However, this can only be done if LC courts are funded, since the fees are often used to cover the real expenses of the court, including to pay the legally allowed sitting allowances of court members. This will be expensive for the State. Costs would be reduced for everyone if cases were not constantly re-heard in several courts, and if higher courts were used solely for enforcement or for genuine appeals – at the cost of the appellant^{vi}. A choice is needed: if the State wants LC courts, it has to fund them, otherwise it should close them.

^{vi} Costs to the State could be reduced even more if the customary authorities were used to tackle most of the land case-load.

Power without accountability is always dangerous. LC courts currently have the power to make **arbitrary decisions with no oversight**. Some form of supervision is essential. The law currently gives the Chief Magistrate's Court this power, but the task of supervising so many LC2 courts is huge and there are no resources dedicated to this. The challenge is to find a way of ensuring accountability in a way which is practical and affordable.

'Training' of court members has a role, but it cannot be a panacea, since **lack of knowledge** is not the only reason for difficulties. Training needs to be used to solve particular problems: lack of knowledge of customary land law; lack of knowledge of legal procedures (e.g. how to deal with people who don't turn up to court, how to enforce judgements).

Many of the deliberate delaying tactics of land grabbers can be fought by teaching LC courts how to use *ex parte* judgements, i.e. hearing a case in the absence of the party that refused to turn up to present their case. (This power must be carefully monitored, since it can be used by corrupt courts to support land grabbers.)

Most importantly of all, LC and Sub-county Court members must realise that their responsibility is not to offer opinions but to pass legal judgements. They have to be given clear rules on how they can enforce their judgements, which should include making appropriate use of criminal law – which puts at their disposal the powers of the police. The law always allows for proper appeals, but simple failure to respect a judgement should be treated as contempt of court or, in the case of occupying someone else's land, as implying a criminal offence.

The constant repetition of cases can be avoided by ensuring a smooth pathway between the courts that is widely known and adhered to. Disputes should not be re-starting as fresh cases further up the court system, either in parallel to existing old cases or as re-hearings of cases that have already been heard. This also entails making a decision

on how customary forums for determining disputes integrate into the State system. They, too, should not have power without accountability; and there is a need to avoid running cases in the customary and the LC systems in parallel. These two issues can be solved together, if, for example, the customary authorities are used as the first forum for disputes, with the sub-county court being given the power to review cases, to hear appeals or to order enforcement. Other options are possible: they simply have to address the issues of holding customary authorities accountable, enabling enforcement of the decisions of a customary authority where these are upheld, and establishing one clear pathway through the various courts that everyone has to follow.

Principles also need to be established for Magistrate's Courts to support the **early cost recovery** of the winning party, even while a case is being dragged out through appeals, and for establishing procedures of enforcement of judgement that are not paid for by the winner, but by the loser.

No court system can ever defend rights until it knows what rights people have. Unfortunately, neither LC nor Magistrate's Courts are trained in the land law which they are supposed to apply to land under customary tenure, i.e. customary law. For as long as the LCs and magistrates believe that widows can't inherit, that women don't own land, that land is individual and not family property, then justice will not be done.

Putting all of this right will be neither quick nor easy. Other people also have responsibility for fighting land grabbing – communities, customary authorities, and institutions of land administration. No-one in the country wants to see widows and orphans continue to be made destitute. This is a campaign where people of all walks of life and of all political persuasions can work together. The consequences of failure to act are too worrying to contemplate.