RISKS IN THE LAND ACT AS REGARDS REGISTRATION OF COMMUNAL LAND

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Land and Equity Movement in Uganda (LEMU)
Making land work for us all

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1. Introduction

The Land Act provides the practical measures for forming and registering a communal land association in the Sections and Forms under the Regulations to the Act. However, an analysis of the relevant sections of the Act shows that the practice puts the community members under a great risk of losing their land. Seven (7) key risks have been identified by the Land and Equity Movement in Uganda (LEMU), and are explored in detail below, alongside the specific sections of the law to which they relate.

2. Risks identified in existing legislation

i) Establishing a Community Land Association (Land Act 1998)

Section 15 to the Land Act (*Communal land associations) states:*

"A communal land association may be formed by any group of persons in accordance with this Act for any purpose connected with communal ownership and management of land, whether under customary law or otherwise."

Section 16 then provides that:

"A group of persons who wish to form themselves into an association may apply to the district registrar of titles to become an association under the Act."

The subsequent subsections provide the detailed procedure for the process. The application is in form 44 of the Land Regulations and it is to be signed by 5 representatives of the group.

In particular, subsection (4(b) further states that an association can be formed when not less than 60% of the group determines to incorporate themselves

RISK 1 - If 40% of land owners to community land do not want to incorporate, *they will be subject to a governance model that they did not agree to.*

ii) Governance of a Community Land Association (Land Act 1998)

Section 17 to the Land Act ("Constitution of an Association") states that:

(1) The officers elected under section 16 shall be responsible for preparing a constitution for the association.

(2) The district registrar of titles shall assist the officers in preparing a constitution for the association and may provide the officers with a model constitution containing such matters as may be prescribed.

(3) A constitution prepared by the officers shall be submitted to the district registrar of titles for his or her certification that it complies with such matters as may have been prescribed or where no matter has been prescribed, that it provides for a transparent and democratic process of management of the affairs of the association.

(4) Where the district registrar of titles is of the opinion that the constitution does not comply with subsection (3), above, he or she shall, within not more than thirty days from the receipt of that constitution, return it to the officers with a statement of reasons as to why he or she has rejected it.

(5) A constitution which has been rejected under subsection (4) may be revised and resubmitted for certification.

(6) A constitution which has been certified as complying with subsection (3) shall be put before and voted on by a meeting of the members of the association specifically convened for that purpose.

(7) A constitution shall be the approved constitution of the association when and only when it is approved by an absolute majority of all the members of that association at the meeting referred to in subsection (6).

(8) An approved constitution shall be binding on all members of the association.

RISK 2: The above section provides for preparation of the Constitution of the association by the elected committee members. The major risk with this area is that the law gives the elected committee members the power to prepare a constitution hence giving these nine individuals the power to include anything in the constitution which may be harmful to the rest of the members who may not be aware of this. Whilst the risk of the committee gaining approval for an unjust constitution is in part mitigated by having the registrar review the constitutions before approval, however; there is no resident registrar in the districts. It is particularly surprising that there is no quorum level required for the meeting described in subsection 6, to ensure proper checks and balances. Furthermore, the constitution is subject to change, so there is potential that even after the registration process, the chosen committee members may alter the constitution to their favor.

Section 18 to the Land Act ("Incorporation of officers as managing committee") states that:

(1) The officers of an association which has voted to approve a certified constitution shall apply to the district registrar of titles on the prescribed form to be incorporated under this Act.

(2) On receiving an application under subsection (1), the district registrar of titles shall, if he or she is satisfied that the requirements of this Act and any regulations made under this Act have been complied with, issue a certificate of incorporation of the officers of the association in the prescribed form, subject to such conditions and limitations as may be prescribed.

(3) Upon the issue of a certificate of incorporation, the persons named in it as the officers shall become a body corporate with the name specified in the certificate and shall have perpetual succession and a common seal.

(4) Where a certificate of incorporation has been issued subject to conditions and limitations, the officers may, with the approval of the district registrar of titles, vary any of those conditions or limitations.

RISK 3: The above section provides for incorporation of the committee members of the association. Incorporation refers to the act of joining one or more persons into one entity and who will be incorporated and issued a certificate, which therefore gives the nine members the legal right to the land. The name of the association will appear as that of the community but effectively the land will be the property of just the nine members incorporated. The certificate of title will bear the name of the association e.g. Okeng Communal Land Association which is the common name for the Association of all land owners AND the names of the nine elected committee members. Legally, this confuses who the owner of the land is - the Association or the nine individual members?

iii) Certificates as evidence of title (Registration of Titles Act 1924)

Section 59 to the Registration of Titles Act ("Certificates to be conclusive evidence of title") provides that:

"No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and

shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power."

This section states that the name that appears on the Certificate of Title is evidence that the person named in it is the proprietor/owner of that land. Further risk lies in the fact that where there is a conflict between the Registration of Titles Act and the Land Act as far as registered land is concerned then the Registration of Titles Act prevails.

RISK 4: In the event that the nine or so committee members become greedy and choose to sell the land, the title will be exclusively in their names and as the above section notes, the name on the title is conclusive evidence of proprietorship above any other form of evidence otherwise.

It is worth noting that Section 19 of the Land Act ("Powers of managing committee") provides some safety net. This section states that *"where land is held...by the managing committee on behalf of an association, no transactions of any kind in respect of the land or any part of the land shall be entered into or undertaken or concluded by the management committee unless a majority convened for the purpose approve the specific transactions which are the subject of the meeting, and any transaction which is concluded which does not comply with this subsection shall be null and void and shall give rise to no rights or interest in the land."*

Whilst this provides some protection, the fact that the management committee are the ones with the power to sue and be sued puts the community land owners at risk if the management committees are the ones who have abused their responsibilities. The high level of corruption in Uganda makes the risk of abuse by the management committee much higher.

iv) Which laws will apply to CLAs?

S. 3 of The Land Act ("Incidents of forms of tenure") says the customary laws will continue to apply to land under customary land tenure. However these customs are not written down in most parts of Uganda where customary land tenure exists. Besides, it is not clear if the customs or the clans can continue to hear land disputes over land that has certificates. If the communities choose to register their land as a Freehold Title, the Registration of Titles Act will apply to any subsequent transactions. This would mean that land under customary tenure has been converted to Freehold land tenure, just as before customary land tenure was legally recognized by the Constitution in 1995.

RISK 5: It is not clear how customary land laws will continue to apply to land that has Certificates of Ownership or Freehold Title.

RISK 6: Committees who choose to apply for Freehold titles now have to understand four sets of laws that will affect them - customary laws; the Land Act, the Mortgage Act and the Registration of Titles Act. Can communities who are mostly not able to read and write manage this documentation processes? What happens if there are differences in customs, the Land Act, the Mortgage Act and the Registration of Titles Act?

v) The National Land Policy (2013)

Policy 39 (a) of this policy states that *"The State shall recognize customary tenure in its own form to be at par (same level) with other tenure systems"*

Strategy 40 (iii) of the policy will therefore *"facilitate conversion of customary land which is already privatized and individualized into Freehold". For customary land, the State will "facilitate the evolution and development of customary tenure in relation to social, economic, political and other factors." Government will "issue Certificates of Title of customary Ownership based on a customary land registry that confers rights equivalent to freehold tenure."*

RISK 7: The Land Act (which provides for the formation of CLAs) was passed in 1998, prior to the NLP. The NLP subsequently recognized customary land tenure to be equal to Freehold, contrary to provisions in the Land Act for conversion of customary land. Policy has now changed and does not allow conversion of customary tenure for land that is family or community owned. Laws must still be passed to operationalize the NLP, meaning that the existing legislation is contrary to the NLP and also undermines customary land tenure system. Despite this, LEMU proposes that some aspects of the Land Act can still be applied to improve security of community land under customary land tenure.

3. Proposals to the leaders and community land owners in Uganda

Proposal 1 – The process of forming CLA as a means to improve security of tenure of communally owned land is not likely to change, and is not problematic in principle. This involves:

a) identifying and documenting names of owners of land, (groups);
b) agreeing rules to govern the land;
c) electing leaders; agreeing and marking land boundaries with locally available trees;
d) agreeing traditional land governance; and
e) resolving any land disputes on the land.

LEMU proposes that any Community land protection work should still follow this process but not require incorporation to become a legal entity under the Land Act, in order to avoid the risks outlined in this paper.

Proposal 2 – That the Land Act should be amended to declare communities a legal entity the same way Section 22 of the Land Act does in relation to family land: "*For the purpose of holding land under customary tenure, a family shall be deemed to be a legal person represented by the head of the family".*
For example, the amendment could state that "a community shall be deemed to be a legal person represented by their elected office bearers". In the alternative, the communities could register as Community Based Organisation (CBOs) under the Non-Governmental Organisations Act, 2016 which enables communities to operate at sub county levels.

Proposal 3 – That LEMU (and/or other stakeholders interested in facilitating CLAs) work with traditional institutions and their leaders to identify appropriate management structures for customary land from communities to their current apex levels. Understanding these governance methods should then inform how CLA management committees are elected.

Proposal 4: That LEMU (and/or other stakeholders interested in facilitating CLAs) should work with traditional institutions and their leaders to document customary laws for family and community lands since the family land has relations to community land.

Proposal 5: That LEMU (and/or other stakeholders interested in facilitating CLAs) promote wide understanding of the provisions of the Land Act and the NLP to communities so that they make informed decisions. A better understanding of the NLP would create the environment for communities to participate in dialogue with government to propose the types of titles and laws they want for family and community land, and the potential for a register of community land.

Proposal 6: That communities and their leaders are empowered to lobby for the design of appropriate titles, registries and state laws to support customary land tenure and to operationalize registries, laws supporting customary land tenure systems.

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