The proposed Land Act Amendment and its implications for customary land in Uganda:

LEMU's Contribution to the "consultation on the proposed amendment to the Land Act CAP 227" 2023

22nd May, 2023

"PROTECTING CUSTOMARY LAND TENURE, GROWING STRONGER"

Submitted to the Ministry of Lands, Housing and Urban Development (MLHUD)

Introduction

On 13th April 2023, The Ministry of Lands, Housing and Urban Development (MLHUD) in Uganda sent out a call for consultations from Civil Society Organizations (CSO) and traditional institutions working in the land sector in Uganda. The consultation process is meant to inform the Ministry's process of reviewing the 1998 Land Act, Cap 227. A number of areas in the current Land Act have been identified for reform. The proposed areas of reform include:-

1. *Proposals to strengthen the rights and obligations of Lawful and Bonafide Occupants on registered land to curb illegal land evictions by Amending the Act to provide for the following;*
    - i. *Where to deposit nominal ground rent (Busuulu) in instances where the landlord is absent; rejects the ground rent; and where landlord cannot be found.*
    - ii. *The Registration of landlords and their respective tenants through a register that shall be kept at the Sub-County.*
    - iii. *Establishment of Mediation Committees in Landlord-tenant areas to mediate disputes.*
    - iv. *The mandatory visiting of locus by judicial officers in all cases before an order of eviction is granted and;*
    - v. *Reviewing the provisions on ground rent to provide for economic rent in urban areas as opposed to nominal rent in rural areas.*

2. *Amending the Land Act to streamline the functionality of Land Management institutions namely; District Land Boards, City Land Boards, Area Land Committees, District Land offices and traditional land management institutions in respect to the following:-*
    - i. *Inspection, allocation and management of land in districts and cities.*
    - ii. *Reviewing of membership and qualifications for members of Land Management Institutions taking into account the new administrative boundaries of cities and districts.*
    - iii. *Establishing of City Land Boards and their membership.*
    - iv. *Providing for approval of District/ City Land Boards by the Minister responsible for Lands upon appointment by District Councils. (In printing of the Land Act Section 58(1) was inadvertently omitted yet it was passed by parliament).*
    - v. *Reviewing the qualifications roles and responsibilities of the Secretary to the District/City Land Board.*
    - vi. *Reviewing the role of City/District Land Boards in relation to compensation rates.*
    - vii. *Providing for the role of Chief Government Valuer in approval of compensation rates.*
    - viii. *Reviewing the mandate of technical officers at the District Land office visa-viz the technical officers at the Ministry Zonal Offices.*
    - ix. *Providing for the Role of Chief Administrative Officer/Town clerk in the management of Land under their jurisdiction as provided for under the Public Finance Management Act., 2015.*

3. *Amending the Act to provide for establishment of a Customary land register and create the proposed Customary Certificate of Title in the National Land Policy 2013 as a form of registration for land held under Customary Tenure.*
4. *Providing for the management, allocation, renewal, surrender and variation of leases under the Management of Uganda Land Commission, District Land Boards and City Land Boards.*
5. *Providing for land use planning in Land Administration.*
6. *Providing the role of traditional leaders in land dispute resolution.*
7. *Reviewing membership, powers and regulations on Communal Land Associations.*
8. *Others.*

Out of the seven areas of the land reform identified by the Uganda government as outlined above, four areas fall directly within LEMU's areas of work, around customary land tenure in Uganda since 2003. These four proposed areas of reform also have direct implications for customary land tenure. This paper therefore contributes to the areas of reform that have direct implications for customary land rights and how customary land tenure is governed in most parts of rural Uganda. These areas include; the proposed amendment number two (2) which seeks to amend the Land Act to streamline the functionality of Land Management institutions namely; District Land Boards, City Land Boards, Area Land Committees, District Land offices and traditional land management institutions; the proposed amendment number three (3) which seeks to provide for the establishment of a customary register and create the proposed customary certificate of Title, proposed amendment number six (6) which seeks to provide for the role of traditional leaders in land dispute resolution and, the proposed amendment number seven (7) on reviewing the membership, powers and regulations on Communal Land Associations. The paper therefore focuses on these four areas of reform that directly has implications for customary land tenure.

In preparation for this consultation, LEMU revisited some of it long standing advocacy messages on the same issues, held consultative meetings with traditional (clan) leaders from Teso, Lango, Acholi and Kuman regions of northern Uganda and widely consulted government land administrative officers and Communal Land Association committee members from the Karamoja region. Externally, LEMU consulted with its Board of Directors and the International Advisory Board composed of academic intellectuals who are land and development experts from around the world.

Despite the contribution being made below, it is important to note that the timing of the amendment of the Land Act does not take into account other processes that should contribute to the amendment, such as the ongoing review/evaluation of the National Land Policy implementation whose findings may have important considerations for the amendment of the Land Act. LEMU therefore recommends that there is a clear impetus to allow the review of the National Land Policy to be completed before progressing any of the potential reforms proposed in order that changes can be complete and coherent.

LEMU's responses to the proposed areas of amendment of the Land Act, CAP 227

Proposed amendment 2

Amending the Land Act to streamline the functionality of Land Management institutions namely; District Land Boards, City Land Boards, Area Land Committees, District Land offices and traditional land management institutions in respect to the following:-

i. *Inspection, allocation and management of land in districts and cities.*
ii. *Reviewing of membership and qualifications for members of Land Management Institutions taking into account the new administrative boundaries of cities and districts.*
iii. *Establishing of City Land Boards and their membership.*
iv. *Providing for approval of District/ City Land Boards by the Minister responsible for Lands upon appointment by District Councils. (In printing of the Land Act Section 58(1) was inadvertently omitted yet it was passed by parliament).*
v. *Reviewing the qualifications roles and responsibilities of the Secretary to the District/ City Land Board.*
vi. *Reviewing the role of City/District Land Boards in relation to compensation rates.*
vii. *Providing for the role of Chief Government valuer in approval of compensation rates.*
viii. *Reviewing the mandate of technical officers at the District Land office visa-viz the technical officers at the Ministry Zonal Offices.*
ix. *Providing for the Role of Chief Administrative Officer/Town clerk in the management of Land under their jurisdiction as provided for*

under the Public Finance Management Act., 2015.

Problem statement

The above proposal only mentioned streamlining the functionality of "traditional land management institutions" as one of the land management institutions in the heading of the amendment but is totally silent in the details. The details as above did not specify in what areas their functionality is to be streamlined, while this was done for the other land management institutions such as the district land boards, city land boards, and chief administrative officer, among others. In the management and administration of both rural and urban land therefore, the specific functions played by the "traditional land management institutions" will therefore be difficult to identify, besides the other institutions. It is also not clear if the "functionality" mentioned in the proposed amendment 2 above is entirely different from the "role" of traditional leaders mentioned proposed amendment 6, below. Because of the lack of clarity on from the text proposing what is actually means in terms of 'streamlining' the various institutions including traditional land management, it is impossible to give a comprehensive recommendation in this section. We hope that during future validation processes, there will be room to clarify on this and receive further proposals to inform the proposed amendment in this area.

Proposed amendment 3: *Amending the Act to provide for the establishment of a Customary Land Register and create the proposed Customary Certificate of Title in the National Land Policy as a form of registration of land held under Customary Tenure.*

Problem statement

Customary tenure is recognized by the 1995 Ugandan constitution, but the same Constitution provides for the conversion of customary tenure into freehold or leasehold. In the same view, the 1998 Land Act also recognized customary land tenure, but with the aim of converting it into other forms of tenure such as freehold. These two major provisions in the Law therefore treated customary tenure as inferior to other tenure systems in Uganda. The National Land Policy (2013) addressed this gap by making customary land tenure to be equal to other land tenure systems and providing for its registration in its own right through the creation of a Customary Certificate of Title. A decade later, its implementation in this area has not yet been fulfilled. Land registration under customary tenure therefore continues to focus conversion of customary land into other land tenure systems, an example is the continuous implementation of the Systematic Land Adjudication And Certification (SLAAC) being implemented in different parts of the country. A Customary Title (done properly) would therefore alter this conversion, and has the potential to place customary land tenure and freehold as true equivalents. However, while the principle of "equality" is great, there are specific matters that need to be dealt with carefully during the registration of customary land tenure under the proposed certificate of customary title (for example; listing family/clan/ community names as applicable in the certificate) in order for the benefits to be inclusive.

The second problem relates to individualization of land rights, whenever land registration is pursued. In a context where the majority of people access and hold customary land through families, clans and communities, any land registration initiative should endeavor to register those rights and interests as they exist, without trying to submerge the various rights and interests under particular individuals within the families, clans and communities because this is not only a breeding ground for future conflicts, but a recipe for land registration to become a means of alienating the majority of people whose names do not appear in the land titles from their customary land rights.

Evidence and justification

A carefully formulated law around registration of customary land through the Customary Certificate of Title would overcome the two problems identified above simultaneously. It would make customary land tenure equal with other tenure systems and protect the various layers of rights and claims and the flexibility that people enjoy within customary land tenure. For example, having community, clan or family titles under the customary certificate of title will ensure the inclusion of women, widows, divorced and unmarried women which case could be a lot different if customary land titles are issued to individuals. It is therefore fit that the process of a customary certificate of title should follow an inclusive process of identifying land owners and creating a registry that includes all their details. The process could entail: discussion and consensus about rights; identifying owners; marking boundaries of the land; drawing maps and setting registries with personal details of all identified owners and registration. The result of this process is more likely to lead to better protection of land rights of women and other

vulnerable groups, than the selfish individual titles which convert family and community land holdings into individualized form of tenure and alienates land from the majority of the population in the process. Some of the guiding questions to ensure inclusiveness during registration of land through the customary certificate of title may include; under whose names will the title be registered? What is the appropriate unit for registration of land under customary tenure, is it a family or clan given the diverse variations of these units across different regions? How will family and community land titles recognize clan governance which is central to managing customary land? How can customary certificate of titles reflect changes in the marital status of women and accord them rights accordingly? How will the title take care of the frequent and common sub-divisions and transactions that take place under customary land tenure?

Recommendations

i) A shift from creating a uniform customary certificate of title to having family and community titles, managed by trustees.

ii) The new amendments should provide for the role of traditional institutions/customary leaders/clans in conflict resolution and create referral pathways other than relying on only the formal judicial courts for resolution of customary land disputes, which have proved expensive and far-fetched from the local population. The role of state institutions should also be stipulated well in this amendment; these are key in the completion of different stages in customary land governance and dispute resolution; such as the role of police, courts, LCs, Area Land Committees, District Land Boards and/or land tribunals where applicable.

iii) If possible, the customary land registry should accommodate all names of rights holders (clans or families) in relation to customary land; women, widows, unmarried women and children that have direct or derive rights from anyone on customary land should be specified in the registration of a specific piece of land. Illustrations and descriptions of a well-documented and analyzed family land rights and lineage tree should also be a section in the customary certificate of titles. The roles and the extent of decision making - within the context of the clan and family - should also be summarized in the registry.

iv) The current process of acquiring certificates of customary ownerships or even titles should be changed into a process starting with recognized boundary demarcation, recording of land rights and eventual recording of land transactions, involving responsible traditional (clan leaders) at each stage. The document issued should be “Title” and not “certificates”, provide for the establishment of registry/zonal offices at the district level to make it easy for the rural people to access, verify and change their information.

v) The law should categorically state the existing customary laws, norms and practices currently used in the management of customary land, will continue to apply, even after the land is registered. It should also state that once communities have debated, written, and adopted their rules for managing the community/family/clan customary land, the courts and state enforcement should work hand in hand with customary land managers (the clan/traditional institutions) to protect rights to customary land within the family-communal context of how customary land is held.

vi) The map of the customary land being registered should be signed by the neighbors, and must be accompanied by the family tree which defines how the customary owners registering their interests derive rights to that specific land.

vii) The new amendment should make a provision stopping the conversion of customary land tenure to freehold or leasehold, but to maintain customary land (registration) within its own domain.

viii) The proposed Customary Certificate of Title should be issued to land holding units such as individuals, family trusts, community trust or Communal Land Associations, drawing from the pre-existing customary land holding units in a given community. The process of issuing customary certificate of title should therefore avoid conversion of family/clan/communally held land into individual lands (issued in the names of individuals) as this will promote fraud in the land registration processes.

ix) Ensuring that customary land tenure is equivalent to freehold and other land tenure systems, in law and in practice

x) Ensuing that the customary certificate of title works for customary land as it currently exists, by being able to incorporate all relevant interests within families, clans and communities and registration of customary land in the units (whether individual, family, clan or community) in which they are held, used or owned, rather than prioritizing individual rights over other forms of land holding that exists within customary land tenure.

Proposed amendment 6: *Providing the role of traditional leaders in the land dispute resolution*

Problem statement

The Land Act CAP 227 already provides for the role of traditional leaders in dispute resolution when it states it section 88 that *"nothing in this part shall be taken to prevent or hinder or limit the exercise by traditional authorities of the functions of determining disputes over customary tenure or acting as a mediator between two or more people who are in conflict over matters arising out of customary tenure"*.

The problem therefore is that the law only brought traditional leaders into land justice (dispute resolution) but excluded them from land administration (inheritance questions within families, land redistribution, boundary demarcations, playing roles in the process of land registration, making rules and enforcing customs around the management of customary land, women's interest in land, managing land sales/transactions), yet land disputes under customary land usually arise from contestations around land administration within families, clans and communities. The law is also unclear on the extent to which the "determination" of disputes by traditional leaders can be enforced, and whether or not these "determinations" can be considered as "judgement" by the persons to whom it applies. This is because currently the decision of the traditional leaders, arising from their roles in "determining" customary land disputes are treated merely as opinions and non-binding.

The second problem is that although the role of traditional leaders in the resolution of disputes under customary land tenure is recognized in the Land Act CAP 227 as stated above, there are other existing laws, such as the Local Council Courts Act which also stipulates LC2 courts as the courts of first instance for land disputes under customary land tenure. There is also no streamlined structure in how the traditional dispute resolution structures should relate with the formal justice systems, including the LC court system and the state judicial court system. Over the years therefore, the contradictory provisions in the law has created parallel structures where people with customary land disputes report their cases, in many instances, the operations of the LC and state court judicial systems undermine (rather than complement) the efforts of traditional leaders in land dispute resolution.

Evidence and justification

Studies have shown that traditional leaders (especially clans are highly involved the management and administration of customary land, especially in the north and eastern regions of Uganda). They carry out administrative roles such as regulating land sales, redistributing land to family members at the demise of the head of the family, overseeing boundary demarcations and land demarcation.

The second justification is that recent studies have also shown that traditional/informal justice systems currently resolves more than 80% of the disputes in Uganda, with the clan constituting 40% of the traditional systems of justice besides elders and opinion leaders at 18%, religious leaders at 17%, family heads at 16%, social structures at 6% and NGOs which makes only a minor contribution of 3%[1]. Taken together therefore, the traditional systems of justice constituted by clans and family heads resolve about 56% of disputes in Uganda. This therefore explains why there is need to give a critical role to the traditional leaders, especially represented by the clans, as the court of first instance in the resolution of customary land disputes.

Proposals and recommendations under the proposed amendment

i) Traditional leaders/clans should be given the mandate of administering customary land, such as ensuring spousal and family consent during land transactions, for example; land sales, exchange, mortgage, pledge, lease and transfer as a means to prevent land disputes that arise from such transactions when consent is not obtained. This will help to protect the interest of vulnerable sections of the population such as women, children and orphans when transactions take place on customary land.

ii) Traditional structures of dispute resolution (especially the clan) should be recognized as

[1]Uganda Law Reform Commission, 2018

the courts of first instance for the resolution of disputes under customary land tenure.

iii) There should be capacity building from competent institutions to ensure traditional leaders apply the principles of non-discrimination when they apply social norms, rules and principles of customary land governance to protect the interest of vulnerable groups such as women, children, and the elderly among others. The land regulations should therefore provide guidance on the role and administrative processes to be followed by traditional leaders in the process of dispute resolution.

iv) Provide for a clear referral pathway process for the traditional system, starting with the village level committee to the sub-county/ zonal committee to County and Council of Elders, to the level of traditional institutions and their jurisdictions of case

v) The decisions of traditional leaders should be considered as legally binding to the parties to whom it has been applied, and an appeal structure within the traditional structure should be created.

Proposed amendment 7: *Reviewing the membership, powers and regulations on Communal Land Associations (CLAs)*

Problem statement

Section 16 of the Land Act Cap 227 provides a detailed procedure for forming a communal land association and sub-section 4(b) further states that an association can be formed when not less than 60% of the group determines to incorporate themselves into a CLA. The problem is here is a question of the remaining 40% of land owners who might not be willing to be part of the CLA and will forcefully be the subject to a land governance model they didn't agree to.

Section 17 of the Land Act Cap 227 provides for preparation of the constitution of the association by the elected committee members. The major risk with this is that the law gives the elected committee members the power to prepare a CLA constitution, hence giving them powers to include anything in the constitution which may be against the interest of the rest of the members who are the majority owners of the community land. Whilst the risk of the committee gaining approval for an unjust constitution is partly mitigated by having the district registrar of titles review the constitutions before approval and incorporation, most of the districts in the north and north-east of Uganda where Communal Land Associations have been formed have not recruited registrar of titles. The absence of registrars in the districts where Communal Land Associations are being formed therefore leaves the committee to depend on NGOs staff whose knowledge, experience and training in this area may be deficient. At the end of the NGO process of facilitating the committee to develop their constitution, usually the registrar from the Ministry of Lands is invited for only a few hours of visit to review the CLA constitution, since these officers operate from Kampala. In the end, the legal guidance that the Act envisioned to be provided by the district registrar of titles is missed out. It is particularly surprising that there is no quorum level required for the meeting described in subsection 6 ("meeting to form an association and elect a managing committee"), to ensure proper checks and balances in the process of forming the association. Furthermore, the constitution is subject to change, so there is potential that even after the CLA is incorporated, the chosen committee members may alter the constitution in their favor.

Section 18 of the Land Act Cap 227 provides for incorporation of the committee members of the association. Incorporation refers to the act of joining one or more persons into one legal entity and who will be incorporated and issued a certificate, which therefore gives the members the legal right to the land. The Act further provides that the certificate of incorporation shall be issued in the names of the committee members and they shall become a body corporate.

Section 19 of the Land Act CAP 227 on "powers of the managing committee" is even more risky and breeds confusion. It provides that the certificate of incorporation shall also be provided in the names of the association and this regard, there are two certificates, one in the names of the association and the committee members (officers of the association), so this creates confusion on who the owner of the land is - the association or the committee members? So in the event that the committee members become greedy and choose to sell the land, the association may lose their land completely. Further risks are embedded in this section is that the committee is given powers to transact and make binding decisions and even dispose off the property of the association

on behalf of the members. In this regard, the creation/incorporation of the association takes away the customary land rights of the majority land owners and gives it to a few individuals with legal rights to make binding decisions on behalf of the majority, in the end the CLA becomes more of a risk than a means of securing the land tenure. In the event that the committee uses the certificate of incorporation issued in their names to obtain a land title, 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. In its current state therefore, the provision on the powers and roles of the committee members of a Communal Land Association can be used to facilitate corrupt transactions on land and alienate land from the original customary land owners who use it communally.

There are other contextual issues regarding the move from an oral system of communal land governance to a written legal entity that the Land Act CAP 227 did not put into consideration. For example, most communities use their oral rules for communal land management without external facilitation (by NGOs and a district registrar of titles), these communities that own customary land communally have not been in a position to form their communal land associations. In places where external actors, mainly NGOs such as LEMU have facilitated communities to form CLA and have them incorporated, several gaps have been noticed in the operations of the CLA management committee and need further guidance through the amendment of the Land Act. Some of the practical problems and risks that have arisen after the incorporation of the CLA associations include; the committee becomes weak and almost non-functional as they do not call for community-wide meetings years from the date of incorporation, committee members migrate from the community (mainly in the case of Karamoja) and are not replaced, committee members die and are not replaced, CLA incorporation certificates are lost by the secretaries or are damaged by poor weather conditions in the huts (again in Karamoja), the CLA register book showing the names and personal details of the land owners are taken away from the CLA secretary by other local government officials such as LCs and parish chiefs as sources of data for government program such as the parish Development Models (PDM), communities (pastoral communities in Karamoja) are resistant to the idea of boundary demarcation as it distorts the practice of nomadic pastoralism.

Evidence and justification

In most of the CLA constitutions facilitated by LEMU in the regions of Lango and Karamoja, the community land owners have reduced the powers of the committee members below the expectation of the Land Act CAP 2227. For example, most community constitutions state that land the CLA land management committee members cannot carry out any transaction on the community land or make any binding decision on behalf of the community without the consent of adult community members up to 90% of them.

Proposals and recommendations under the proposed amendment

i) The process of forming a CLA provided in the Land Act CAP 227 is more of an interaction between the district registrar of titles and the committee members, to the exclusion of the majority community members. We propose a more lengthy process which is aimed at improving the security of tenure of customary-communally owners. These involve community-wide participatory processes such as;

   a) Identifying and documenting names of all customary owners of the land (groups)

   b) Identify and documenting the seasonal users to the communal land

   c) Agreeing rules (the constitution) to govern the land according to the interest of the diverse groups that use the land (the youth, men, women, children, the elderly, religious groups, e.t.c); the rules can include traditional land uses and traditional practices of environmental protection.

   d) Election of the communal land leaders (the managing committee) by the majority communal land owners, not the registrar;

   e) Agreeing and marking land boundaries with locally available trees, sketch maps and by use of GPS maps;

   f) Resolving any land disputes on the land

   LEMU proposes that incorporation of any Communal Land Association (CLA) should come after a community land protection process above, before incorporation to become a legal entity under the Land Act, in order to avoid the risks outlined in this section of the paper.

ii) That the Land Act should be amended to declare communities as 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 organizations (CBOs) under the non-governmental organizations Act, 2016 which enables communities to operate at sub-county levels.

iii) The Land Act should be amended to reduce the powers of the managing committee on behalf of the members. Committee should not have any powers to transact on behalf of the association or make any binding decisions, outside the CLA constitution. Decision making and transactions should be based on a majority vote of up to 75% of the owners of the communal land.

iv) Decision making on whether or not to become an association, on transactions on the land should be amended from the current provision of 60% of the members to 75% of the members, to increase protection and security of tenure for the majority customary land owners of the land. But also to protect land rights of more people, since these are people whose livelihoods primarily depend on land.

v) The Land Act should be amended to state that the committee shall manage the land and be bound by the provisions of the CLA constitution (written and approved by 75% of the members) and any transactions or decision outside the CLA constitution shall be null and void.

vi) The Land Act should be amended to provide that a CLA can only be formed/incorporated if 75% of adult community land owners agree to form it. This is an increase from the current 60% provided in Land Act Cap 227.

vii) The Land Act to be amended to include the penalties, punishments and the personal liabilities of committee members who engage in fraudulent transactions to the detriment of the community – the loss should be to the individual members, not to the community through the loss of their land.

Conclusion: LEMU and her partners would be pleased to engage further on the proposed areas of amending the Land Act that have direct implications for customary land tenure. We are happy to share our expertise and research findings to enrich the process of amending the Land Act, CAP 227, to complement other ongoing efforts within the civil society and the ongoing review of the NLP work in order to ensure all changes to the Land Act are well informed and coherent.

Disclaimer: *This paper is part of LEMU's commitment towards the promotion, recognition and support towards customary Land Tenure in Uganda. The opinions expressed in this paper are those for the individual contributors within the institutions below, not of DanChurchAid (DCA) whose finance assistance to LEMU was used to fund the consultation process and the printing of this publication.*

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