Titles for land under customary tenure are yet to be designed and popularized

A publication of Land and Equity Movement in Uganda

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January, 2017

Land and Equity Movement in Uganda (LEMU)

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1. Introduction.

It is widely accepted that having a title to land gives security of tenure, but not all know the reasons why this is so. This paper gives this insight and then explains why titles in their current form cannot both give security to customary landowners *and* keep the land under customary tenure system. The paper will first explain and examine the types of titles available under the current Land Act of 1998 (CAP 227). It will then consider those that are envisaged under the 2013 Uganda National Land Policy (NLP) for land under customary tenure, whereby the customary land tenure system is to be treated as equal to Freehold Title.

2. Current Types of Titles under the Land Act 1998.

The Land Act legally recognizes four tenure systems: freehold, leasehold, mailo and customary. The freehold, mailo and leasehold systems are similar in that the owner of the land is usually an individual or a registered entity (such as a company, a trust, a cooperative, etc.). In contrast, land held under customary tenure is predominantly family and community owned (i.e. with more than one individual owner). Titles that are currently issued are designed to suit these circumstances of land owned individually or by a registered legal entity. The current titles therefore do not suit family or community land held under customary land tenure systems. This is hardly surprising: titles originated in the freehold system, and were designed to suit the circumstances of freehold land. They have also been used in Uganda to *convert* customary land to freehold.

Having legally recognized the status of the customary land tenure system, the Land Act of 1998 provides for a pseudo-title called a Certificate of Customary Ownership (CCO). However, in order for a CCO to in fact be of the same legal weight as a title for freehold/ mailo or leasehold land, it would need to be converted from CCO to a title. If the CCO is supposed to be the equivalent to "title" for families and communities, it falls short of this because it does not provide security of tenure in the same way that the title issued to freehold, leasehold and mailo would. The reasons for this are given in detail below.

3. Why do titles give security of tenure?

For a title to give security of tenure ALL the following five conditions must be met:

I. **Names recorded in the title** – For one to own land that has a title, the name of that owner must be recorded in the title. This is simple logic because it is the names in the title that will give a buyer security that the individual selling is the real owner of the land in a legitimate transaction. Those who own land as individuals have no difficulty meeting this condition. For family and community land that is not individually owned, the individual land title is inappropriate, since it cannot reflect the names of all those with rights to the land. Policy makers therefore need to discuss and agree with customary landowners whose names will be entered in the title for family land.

   S.22 (2) of the Land Act ("Individual holding of land created out of communal land") states: *"For the purpose of holding land under customary tenure, a family shall be deemed to be a legal person represented by the head of family"*. In other words, change will occur from family land being owned by all family members before grant of title to being owned by "head of family", an individual. For a title to give security of tenure to all those with rights to family land, a new document needs to be designed to include the names of all the family members.

   In the case of community land, the state legal regime requires that before community owners can own land, they must first register under other laws to become a legal entity with the ability to own land. Currently, the Land Act provides for this registration of the community owners in the names of elected individuals as the owners of the land on behalf of the community as well as in the name of the Association. A group of between three and nine individuals can be elected to hold this responsibility. Any title issued on community land following the current law is therefore unlikely to provide security of tenure to all the owners of community land. On the contrary, there is potential for rightful tenure to become *less* secure, since the individuals whose names are in the title, in practice, can sell the land

without the consent of the community landowners. Although there are checks in the laws to avoid this, it is common knowledge in Uganda that laws can be very good but its implementation very weak. It may be culturally very difficult for community members to challenge the named individuals on the title. Besides, defending a title might mean the cases are taken to the State courts where an advocate is necessary to represent the community. This might not be affordable or accessible for community members.

II. **Size and location of the land owned is defined** - Every title must have a map of the land owned to show the extent of ownership. The maps to freehold, mailo and leasehold titles are cadastral maps produced after surveys. They give exact measurements and place the land position in the world map. Consequently, there is a cost associated with their production. The Land Act allows for sketch maps to be permitted when a Certificate of Customary Ownership (CCO) is processed, and such maps are more cheaply produced within the communities. These are not very exact.

Policy makers have not given much guidance on these sketch maps. Whatever the reason, the Ministry of Lands, Housing and Urban Development (MLHUD) needs to discuss which maps will be issued for titles under customary land – cadastral maps that need surveyors and cost money or sketch maps that can be generated more cheaply and with clans' involvement? Will allowing sketch maps risk undermining the credibility of titles with sketch maps, and risk them not being seen as equivalent to freehold, mailo and leasehold? Policy makers must urgently give this matter further consideration.

III. **Rights and restrictions for the titleholders are known** – All titles have rights and restrictions. Some of these are specific to the type of title, whilst some are universal. These rights and restrictions may be conditions in the title itself, or are provided for by an Act of Parliament. For example, a restriction that is specific to the sale of mailo land is the requirement for the occupant to seek consent from the landlord/lady, and vice versa. Specific to Freehold tenure is that the land cannot be sold to non-citizens. Included within leasehold titles are development conditions. Finally, specific to customary land is that family and clan must give their consent when land is to be sold. Restrictions that apply to all tenure systems are the requirement for the consent of spouses when family land is to be sold. Although not specifically noted in any title, and under any tenure system can be compulsorily acquired where the Government declares it to be in the public interest. In addition, an important law for customary (family and community) land is that the managers must hold the land and manage it in trust for the family, community and future generations.

The laws that govern titles are currently provided for by the Registration of Titles Act 1920 (CAP 230). Since this law came into force before the 1998 Land Act, its provisions do not explicitly cater for customary land tenure as a system. This means that the laws that govern customary land tenure and CCOs are not catered for in the Registration of Titles Act. Section 8 (1) of The Land Act (on CCO) ("Incidents of certificate of customary ownership") states: *"… any transactions in respect of the land undertaken and any third party rights over the land (will be) exercised in accordance with customary law"*. However, the customary laws referred to are not defined, meaning that it is not clear where they are written or to be found. Without clarity on which laws apply to customary land titles and where they are to be found, any current title or CCO issued cannot provide security of tenure.

IV. **There is management to ensure the restrictions are obeyed** – The three individualized tenure systems are governed by institutions created under the Land Act, the Registration of Titles Act and other state laws. In contrast, the customary land tenure system (in Northern and Eastern Uganda) is governed and managed by the clan system. Does the Government understand how the clan land management system works? Without the managers ensuring the appropriate restrictions (such as the requirement of consent for sale) are obeyed, any titles to customary land cannot provide tenure security.

v. **Guarantee by the State that the information on the title is correct** – This last condition is probably the one that escapes the attention of most people – that the State has to give a guarantee that the information on the title is correct and if any buyer suffers damages because of misinformation in a title, the Government gives a guarantee to them damages. Section 59 of the Registration of Titles Act ("Certificate to be conclusive evidence of title") states: "[Certificate of Title] *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 gives a guarantee to the buyer that the person whose name is in the title is the owner of the land and therefore can enter into a transaction. However, this section does not apply to CCOs since this Act was passed before 1998. Who then will give the same guarantee to titles given to customary landowners or to CCOs? Will it be feasible and safe for the government or the state to give this guarantee when customary land is owned by citizens and managed by clans? Without this guarantee, the buyer of customary titled land will be insecure and this will mean the land market will be inefficient and affected negatively.

4. Conclusion

All stakeholders in land rights activities (the Ministry of Lands, Housing and Urban Development and Development actors) are promoting security of tenure, which has long since been construed to be having a title.

This paper has explained that "Titles" can only provide security for customary landowners if ALL of these conditions are met:

- All the names of family and community land owners are in the title;
- Cheaper maps drawn by the land owners are provided for by policy and considered equivalent to cadastral maps;
- The rights and restrictions governing customary family and community land are clearly understood, respected, documented and applied by all actors;
- The clans who are the managers of customary land rights and restrictions are given the space and legal authority to manage customary land effectively; and
- Policy makers and the traditional institutions discuss and agree who will give guarantee on the information in the titles to customary land.

Until the Government of Uganda engages the managers and owners of customary land to agree how to meet the above conditions, the current push to implement titles to customary land will only serve to convert customary land to the individualized tenure system. This will have the impact of freeing the land from the clans into the land market to have land sold, which will in turn lead to livelihood insecurity for the majority of Ugandans. This is contrary to the 2013 National Land Policy.

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A Publication of the Land & Equity Movement in Uganda (LEMU), with funding from TROCAIRE
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