

3. Understanding customary law

Most land in Uganda is owned under 'customary tenure'. The law recognises customary ownership as being equal to ownership with freehold title, and the landowners are entitled to the same compensation, whichever system of ownership they hold their land under.

However, people trying to acquire land for development need to understand that there are differences between titled (or registered) land and customary (or unregistered) land.

a) Customary land usually does not have any formal papers of ownership.

When land is titled, it should be fairly simple to establish the legal ownership, since the owner or owners should have their names on the title, and this can be verified at the Land Registry. (This is true in theory, but in practice, titles are often in the names of persons who have passed away, and the titles have not been updated with the names of those inheriting the land.) However, customary owners usually don't have any papers at all. Even if they bought land with a written sales agreement, signed by an LC official, this is not a formal State document proving ownership. When buying untitled land, the buyer has to check that the person selling the land is really the owner, and exercise what is called 'due diligence'. (This is a legal phrase meaning that you must do your best to check up that everything is being done properly.) This will entail going to the community to check who is considered to have the right to sell the land. The LCs in the village may not be aware of all of the complications of ownership in the history of the land, so it is best to check with both LCs and any customary authority (such as the *Rwot kweri* in Acholi or *Adwong wang tic* in Lango), who often work together to solve land disputes.

b) "Ownership" of customary land may not be vested in one person.

The administration of land according to custom is often quite different to the State administration

of freehold land. With title, the State retains the rights to set the laws governing ownership (e.g. restricting sale to non-citizens), and the rights to limit the use of land (planning permission, zoning, building regulations, etc.). All other rights are held by the person or persons whose names are on the title. In customary law, different people are said to 'own' land:

- the clan may be said to 'own' land, meaning that the land falls under the clan's 'sovereignty' and the clan elders may have the right to solve disputes or vet any land sales.
- the head of the family may be said to 'own' the land, meaning that they are responsible for protecting the land and ensuring that every family member gets rights to use some part of the land. He may also have the power to veto any land sales.
- an individual or household may be said to 'own' land because the land was allocated to them, to use permanently. This will include the right to allocate portions of the land to the next generation.

It may not be easy to understand with whom the local Government should negotiate any sale, but establishing who you are negotiating with and in what role is important. Local Government or other buyers are legally responsible for making sure they talk to the right people.

3. Customary land is governed by customary law.

Customary law is not the same as the law covering freehold land. It is harder for an outsider to understand because it is not always written down. However, this law is legally binding for all transactions involving customary law, and it affects the interpretation and procedures to be followed in the case of sales, gifts and rental agreements. Lawyers are not trained in customary law, and so it may not be easy to get good legal advice about how to proceed with land sales or leases on customary law.

Case Study: The need to understand customary law or “When is a gift not a gift?”

The World Relief Corporation (WRC) wanted to set up a community centre for IDPs in Wobacholi camp, Kitgum District in 2006. The community were very happy to receive the community centre. Mr Otim, a land owner in Wobacholi offered some of his land in the camp for the community centre. He did not have any title to this land, but owned it under customary tenure.

In 2007, the NGO handed the centre over to the district authorities to be used as a school. The district refurbished the centre and added another building on the land. The land was also fenced.

Mr Otim complains that he never gave the land to the district. The WRC project was for IDPs, and so he understood that once the displacement ended, the project would end and he would retake possession of his land. The District showed Mr Otim an agreement between WRC and the District, saying that the centre could be used as a school once the project had finished.

The Legal Position

The agreement between the District and the NGO is not really relevant – the question is whether or not the NGO had any right to make such an agreement with the District. Since there is no written agreement between the NGO and Mr Otim, it is very hard to establish exactly what conditions applied when he offered the land for the project.

Even if there were witnesses to the agreement, this may not help. This is because when people make a verbal agreement, they often do not mention all the conditions which they think will apply – these conditions are just understood, they are taken for granted. Under customary principles, when land is offered as “a gift”, it usually reverts back to the landowner after once the recipient no longer needs it. (If you give someone land to live on, when they move away, the land returns to you.) However, in the thinking of the NGO, when there is a ‘gift; this means that it is permanent, otherwise you would say you are ‘lending the land’.

According to the Land Act, the ‘gift’ of land to the project by Mr Otim should be governed by customary law. He may be able to prove that the expressions he used when offering the land would normally be interpreted by people in his community as meaning that the land would return to him when the project ended. (Since there may not have been any witnesses, this may be difficult to establish.) Also, since the verbal agreement may have been made in English or through translation, the State may try and prove that the word ‘give’ means to give permanently. This would be a difficult case to decide. It would also be unclear who has the authority to judge the case. Customary land should be heard by customary authorities, but the District would probably try and get the case heard in the Magistrates Court.

Whoever wins the case, someone must lose – either Mr Otim loses his land, or the District loses all its effort to build a school for the community. There was goodwill on all sides in this case. Mr Otim wanted to help the project, the NGO wanted to help the IDPs and the District wanted to provide a school to the community. No-one wanted to take away anyone else’s rights – but the result was conflict.

How could this have been done differently?

The NGO could have made a written agreement with Mr Otim. They could have obtained legal advice before using the land about which laws applied. Once they were told that customary law applied to their agreement, they could have tried to learn more about how land transactions work under customary law in that area. They could have taken the initiative to explain the different alternatives to Mr. Otim to see which he was intending and which he might prefer. They could have offered to buy his land, to rent or lease his land for the duration of the project or they could have made sure what kind of “gift” was being offered.

Mr Otim could have asked for a written agreement with the NGO. He could have made clear that he was offering land to the project and not as a permanent gift to the NGO.

The District could have confirmed with the NGO that it was the legal owner of the land before signing an agreement to take over the land and building a school. They could have insisted on seeing a sales agreement or agreement of a gift between the NGO and Mr Otim. (Of course, such an agreement might not have prevented the problem, if Mr Otim and the NGO had a different understanding of what was meant by the word ‘gift’ in the agreement)

