

A decade of National Land Policy Implementation in Uganda: a critical review of continued conversion of customary land tenure

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Background

Customary land tenure have long been held by pre-colonial societies of Uganda, but did not receive state legal recognition during the colonial and immediate post-colonial period until 1995, when Uganda's Constitution came into force. From 1995, customary land became a statutorily recognised tenure. The Constitution⁴ provided that:

“Land in Uganda shall be owned in accordance with the following tenure systems (a) Customary, (b) freehold; (c) Mailo, and (d) Leasehold.”

This provision as operationalized in 1998 through the Land Act⁵. The acknowledgement of customary tenure in the 1995 Constitution was seen by many land practitioners as a progressive step, however it must be noted that the Constitution also provided for:

“land under customary tenure ... to be converted to Freehold land ownership by registration”
(Art. 237 (4)(b))

Further, section 9 (1) of the Land Act provided that “Any person, family, community or association holding land under customary tenure on former public land may convert the customary tenure into freehold in accordance with this Act.

As a pioneering step, the Uganda Government produced a National Land Policy (“NLP”) in 2013 (fifteen years after the passing of the 1998 Land Act), which acknowledged that previous legislation in Uganda had treated customary land tenure as inferior. The NLP made commitments to shift the paradigm in the opposite direction, by acknowledging customary tenure as equal with other land tenure systems in Uganda. We quote the relevant section for emphasis as below.

In Chapter 4.3, the 2013 National Land Policy states that:

“the majority of Ugandans hold their land under customary tenure...The 1995 Constitution

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⁴Article 237 (3)(a) of the 1995 Constitution

⁵1998 Land Act (CAP 227, as amended)

and the Land Act (Cap 227) attempted to formalise customary tenure and were criticised for destabilising and undermining its progressive evolution. Despite these attempts, customary continues to be:

- (i) Regarded and treated as inferior in practice, to other forms of registered property rights, denying it opportunity for greater and deeper transformation; ...
- (ii) Assessed as lesser to other tenures that have titles for proof of ownership in courts of law in the administration of justice;
- (iii) Converted to freehold...
- (iv) Disparaged and sabotaged in preference for other forms of registered tenures, denying it the opportunity to progressively evolve". (Chapter 4.3)

To overcome these difficulties, the NLP made two policy statements promising that:

- (a) "The state shall recognise customary tenure in its own form to be at par (same level) with other tenure systems;
- (b) The state shall establish a land registry for the registration of land rights under customary tenure".

To achieve the above policy statements and shift the paradigm into a direction that considers customary land tenure as equal

to other land tenures in Uganda, the NLP promised three main strategies below; To:

- (i) "Design and implement a land registry to support the registration of land rights under customary tenure;
- (ii) Issue Certificates of Titles of Customary Ownership based on a customary land registry that confers rights equivalent to Freehold tenure;
- (iii) Facilitate conversion of customary land which is already privatised and individualised into freehold tenure".

To achieve the above, the NLP⁶ promised that Government shall:

- i) Amend the Land Act to permit only individually owned customary land to be converted to freehold;
- ii) Amend the Registration of Titles (CAP 230)¹⁰;
- iii) Modify the rules of transmission of land rights under land tenure to guarantee gender equality and equity;
- iv) Make provisions for joint ownership of family land by spouses;
- v) Recognise the role of customary institutions in making rules governing land, resolving disputes and protecting land

⁶National Land Policy (2013), Chapter 41

rights.”

The National Land Policy⁷ further promised to:

*“Strengthen traditional land management and administration institutions by taking measures to
(ii) Ensure full judicial backing for traditional institutions as mechanisms of first instance in respect of land rights allocations, land use regulation and land dispute for land under customary tenure”.*

After nine years of implementing the NLP by different actors in the land sector since 2013, this paper is written **A)** to assess, analyse and discuss the extent to which implementation of the NLP kept the policy promise to *“recognise customary tenure in its own form to be at par (same level) with other tenure systems”*; **B)** to set out some of the key issues arising and **C)** to make recommendations for the future. The paper is written in response to a call by the Ministry of Lands, Housing and Urban Development (MLHUD) for land actors in Uganda to submit papers and showcase their work towards the implementation of the National Land Policy as the Ministry embarks on different events and activities to review achievements, gaps, challenges and draw future recommendations from the first decade of NLP implementation in Uganda.

A) NLP promises versus implementation so far

A quick review of current implementation of land projects by both the state and non-state actors shows a focus on two main areas of land registration; freehold land

registration and Certificate of Customary Land Tenure (CCO). This paper focuses on freehold land registration geared towards ongoing conversion of customary land through the Systematic Land Adjudication And Certification (SLAAC) project, which has been championed by the Ministry of Lands Housing and Urban Development (MLHUD) and funded by the World Bank. Since 2018, the SLAAC is being implemented in the following districts; Mbarara, Ibanda, Kiruhura and Oyam while the same project has also been concluded in several other districts (Jinja, Iganga, Mbale, Ntungamo, Kibaale) in previous years. While the SLAAC project aims at increasing availability, accessibility and affordability of land information for planning and development and enabling effective utilization of Uganda’s land resources through systematic land adjudication, it is also the most systematic way of converting customary land tenure into freehold tenure because the process ends up in the issuance of freehold certificates of title to the applicants⁸.

The implementers of this project argue that it is demand driven, but local community members in Oyam district where LEMU works stated in July 2021 during community dialogues that during the sensitization meetings, they were informed that people who do not have land titles will not be able to transact in the near future, that a freehold land title was equated to a national identity card. If these statements are true, it points towards a one-way sensitization approach which compels

⁷National Land Policy (2013), Chapter 42

⁸Training Manual Ministry of Lands, Housing and Urban Development, Systematic Land Adjudication And Certification -August 2015

uninformed customary land owners to convert their customary land in a legal context where conversion is optional in the first place and secondly, where the NLP makes it clear that only individualized land should be converted. During the community dialogues, it was not clear whether the adjudication process distinguished between land which is already individualized from those what are still held either by families and communities and therefore ineligible for conversion. What was very clear is that most of the applications were filled in the names of male individual family heads (some dead fathers) thereby transforming these (male) heads of families who hold land in trust for family members under customary land tenure into individual freehold title owners. This practice therefore breaches the NLP provision (S. 41, i) that only individually owned customary land is to be converted to freehold.

The SLAAC project as is currently being implemented, therefore, risks contravening the NLP provisions that disallow conversion of customary family-communal land. It is clear the implementation of the SLAAC continued on the same line of conversion of customary land tenure to freehold as it did before the passing of the NLP. If the NLP kept its promise to bring customary tenure to be at par with the rest of the tenure systems, it would have first amended The 1995 Constitution, Land Act and the Registration of Titles Act. Broader structural changes such as the strengthening of the customary-traditional institutions to make rules for the governance of customary land tenure would have then

followed but these have not taken place. Other systemic changes such as the creation of a customary land registry and the design of Certificates of Title for customary owners based on a customary registry would have also been prioritized. A section of NGOs in Uganda have advocated for the creation of a customary land registry but this has not yet materialized and the customary land registry remains non-existent⁹. It should therefore be concluded that implementation of the NLP has focused on conversion of customary land (but without distinguishing between land that is already privatized and individualized from that which is not, as promised in the NLP).

B. Issues arising from current NLP implementation focus on conversion of customary land tenure

i) Misconception of customary land tenure

The continued inferior status of customary tenure is a result of misconception resulting from use of words and pitching Freehold Individualised tenure understanding of rights to judge customary family/community tenure system, yet the two tenures are fundamentally different. There has been no agreement on the definitions of “security of tenure”, women’s land rights, ownership, management, and land market. No in-depths research evidence has been provided to support the continued conversion of customary land tenure. The use of freehold tenure system to judge customary tenure has led to the criticisms of customary tenure as captured in the NLP¹⁰ statements that Customary tenure is often associated

⁹*Customary Land Registry Resource Book, Landnet, 2021*

¹⁰*National Land Policy, chapter 4.3*

with three problems: **(a)** it does not provide security of tenure for landowners; **(b)** it impedes the advancement of land markets; **(c)** it discriminates against women. We argue that these criticisms about customary land tenure are a result of misconceptions because no agreed definitions to overcome these misconceptions. These criticisms may have arisen out of misconceived definition of what customary land tenure is and what it is not, and imposition of concepts such as “ownership” and “property” which have different meanings under customary land tenure regimes from meanings implied under Freehold land tenure system. According to scholars on this question, such as Archie Mafeje, the concept of “ownership” of land and land as “property” are Western conceptions existing in European jurisprudence and confer elements of exclusive control on the holder, a condition which is not the case in African land regimes and understandings of ownership where the individual is not conceived as the “owner” but rather larger groups such as territorial or clan authority, lineages, households or other forms of production units¹¹. For land registration projects (such as SLAAC) to focus on conversion of customary land tenure in a manner that confers individual ownership rights on customary land (where owners understand and derive these rights in larger groups of families, households, clans and communities) is in itself a process of land alienation and dispossession of the majority customary land owners because

¹¹Archie Mafeje (2003) *“The Agrarian question, access to land, and peasant responses in the sub-Saharan Africa”*. Civil Society and Social Movements programme, Paper number 6. Geneva. United nations Research Institute for Social Development

once their names are missing on the freehold land titles, they have lost the legal rights to claim any rights to these lands. In order not to propagate misconception of what customary land “ownership” means to people who derive their land rights from this tenure system, LEMU in the last ten year of NLP implementation has focused on strengthening customary (family and communal) land rights through the promotion of use of simple tools such as family land rights and lineage trees to gauge claims of rights, promoting documentation of customary rules for land management including community by-laws and constitutions for the formation of Communal Land Associations, demarcation of customary land using traditional trees, sketch maps and GPS mapping. Other interventions included advocacy for recognition of clans and traditional authorities as first court of instance in customary land dispute cases.

ii) Economic gain and self-interests beyond the “security of tenure” argument

Much as the dominant argument for conversion through freehold land registration is stated to be improving security of tenure, this paper argues that there are other invisible interests by different categories of the stakeholders. The key implementers of the NLP – the donors, government, NGOs and educated elites have vested interests in pushing for conversion of customary land from family-communal land to individualised land because it makes land easy to sell in a market and is also a manner through which educated elites alienate land from their families and communities when they register the land as

individual freehold land. Through community dialogues during LEMU's Communal Land Association work in Karamoja for example, communities complained about their leaders (educated elites) who had "stolen" their land by registering it as their own individual land and fenced it off yet these are communal grazing territories on which rural pastoral communities depend for cattle keeping which their major source of livelihood¹². Besides the individual self-gain interests cited above, other actors (both state and non-state) also have other interests, which are more economic in nature and does not necessarily construe as "security of tenure".

Lawyers who are in the judiciary understand and earn money from land transactions when it has a title and is operating under the Land Registration Act (CAP 230) than when it operates under customs and land transactions are administered by clan/customary/traditional authorities. Conversion of customary land into Individual freehold tenure in the current context provides more security of tenure for the external land buyers and investors by providing a secure land market, as family-communal land rights would be more difficult to sell due to the high number of customary land owners from which consent would be required. NGOs and civil society actors on the other hand may implement conversion projects funded by donors mainly as sources of their financing without critical analysis of the implications of the change from customary land tenure to Freehold and the risks of land alienation of the already vulnerable community

¹²Irau and Auma (2021) "Communal Land Associations: Complexities, realities and challenges of implementing state land governance in communal land territories of Karamoja region". LEMU, Kampala www.land-in-uganda.org

members that they seek to represent.

iii) Who pays the price?

The social cost of trying to replace the culture of family and community tenure system with the culture of individual-market tenure system is on poor vulnerable individuals and families. Despite the attempts to convert customary land tenure to freehold, customary land tenure remains the most dominant form of land tenure with more than 80% of Uganda's land held under this system. In 2019, LEMU conducted a study in the regions of Lango and Teso regions which showed a growing interest by customary land owners to have documentary proof of their land ownership (such as the CCO), but on condition that the rules of customary land management continue to be customary rules which they are familiar with and that the state will not use the CCO as an avenue to convert their land from customary to freehold land tenure¹³. The conditional acceptance of land documentation points towards a perspective that the interest of the population is to remain under customary land tenure and approaches that support evolution (from within) may be more acceptable as opposed to approaches that lead to elimination of customary land tenure (such as conversion of family-communal land under the SLAAC project cited above).

Proponents of freehold land tenure give the reason of the high cost of acquiring a title and lack of knowledge among the population as the two reasons why customary tenure persists and conversion through freehold land

¹³Anthony Okech (2019) "Research to Explore Customary Land Owners' Perceptions of Titling in Lango and Teso Sub-regions", LEMU, Kampala.

registration is low. It is no wonder then that projects are designed with solutions to overcome these two constraints. The point which is not clearly explained in this narrative is that the push for freehold replaces customary land tenure (in most cases held at family and communal levels) with a more individual market oriented freehold system. The impact of not supporting customary tenure to be at par with the rest of other tenure systems therefore has fundamental negative impact on the vulnerable persons in families and communities that derive their land rights from customary land tenure. The law as it stands today has not created an enabling environment for traditional institutions to perform their roles in the three areas they are most needed – **(a)** to protect women’s land rights from abusive families; **(b)** to handle land disputes effectively and **(c)** to ensure that land sales are regulated through ensuring have family members’ consent. We therefore conclude in this paper that the National Land Policy (2013) recognition of customary tenure as equal with other tenure systems remains a “raw deal”, since conversion to freehold continues without a clear evidence that the land being converted is already privatized and only individually owned customary land.

C. RECOMMENDATIONS

1. The position of the government seems to be that the only support given to customary land owners is for those who want titles; those who chose to remain under customary tenure, are not supported in any way, which is contrary to the 2013 NLP. The traditional institutions

who have management roles are not given much legal-state power to manage customary land tenure. Supporting people who choose to remain under customary tenure and giving legal power to traditional institutions to manage customary tenure would promote the continuation of customary tenure to be at par with other tenures, as was the intention of the NLP. It is therefore recommended that government pass laws to ensure that there is co-existence between the state institutions of land management.

Specific support to traditional institutions to carry out customary land governance would include;

- a)** Inform people of the negative implication of registration of land without following the provisions of the NLP using the many life examples where families have been defrauded by individuals in the process of registering land, this will empower the population that is not fully informed and may lack capacity to question practices that may in the end lead to alienation of their customary land rights.
- b)** Ensure that justice prevails in families by applying agreed customary rules for land management and dispute resolution, as opposed to relying on state courts;
- c)** Promote physical boundary demarcation of land using available “fit for purpose technology” such as free hand sketch maps or use of GPS maps to define customary land boundaries and ensure that they are respected by the landowners and their neighbours;
- d)** Ensure written family consent is given

before land is sold, so as to prevent fraudulent transactions and disputes that arise from land sales;

e) Provide registration of sketch maps and/or GPS maps together with family land rights and lineage tree to support land disputes in families and land transactions.

2) The state and relevant actors need to go back to the drawing board and work with traditional institutions and/or clans to agree on definitions of key concepts around customary land tenure such as “security of tenure”, “ownership of land”, “women’s land rights” and this may lead to new definitions from the perspective of the customary land owners themselves, as opposed to the current definitions which seem far fetched and are imposed from above, through policies and legislations. These concepts inform how customary land tenure, as a regime is understood and also shapes the land governance practices that emanate from this tenure. Continued propagation of definitions that are incompatible with the realities of the people only spells a future of continued poor customary land governance, and unfortunately it is the poor and already vulnerable populations that pay the price.

3) Implement the NLP provisions to make customary tenure to be at par with Freehold, starting with amending the relevant laws.

4) National NGOs, Government workers (especially the judicial officials, donors, etc. need to understand how customary land tenure is held – the principles, practices, rights and responsibilities and the abuses that go on. In this case, land justice needs to be prioritized over land administration.

5) The development actors also need to take stock of the impact of their sensitisation work on individual women’s land rights to assess if all the energy and money poured into this work is bearing the anticipated fruits. They might be unpleasantly surprised and maybe decide to support customary land tenure in its own form to be at par (same level) with other tenure systems and not continue with the Conversion project so that the traditional institutions may protect family land rights of women, children and men.

6. The relevant laws need to first be amended to provide for registration of customary land rights, and the conventional conversion of customary land prior to the passing of the NLP halted until the law is passed.

