



# Catalyzing Innovation

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**“A LAND MARKET IS THE STRATEGY FOR ACCESS TO LAND FOR DEVELOPMENT”. WHICH LAND MARKET? FOR WHOSE BENEFIT?  
AN ANALYSIS OF THE UGANDAN CASE.**

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## **Abstract**

This paper suggests that the widely adopted strategy to make land accessible through the market to allow access land for development has a number of inherent risks for customary landowners. The paper therefore revisits and challenges the assumption that access to a land market will reduce poverty.

Based on the Ugandan case study, LEMU's analysis is that the strategy of creating a land market risks the replacement of customary tenure with tenures based on individual ownership, and that this does not provide a safety net for vulnerable landowners. The experience of the Land and Equity Movement in Uganda over many years has shown that customary approaches to land management cannot be accommodated in an individualized system. Despite this, the Ugandan Government appears to be set on converting customary rights to other systems, which is based on a misunderstanding of the means by which tenure security can be promoted.

**Key Words:** Community, Customary, Governance, Traditional, Uganda



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## Introduction

This paper suggests that the widely adopted strategy to make land accessible through the market to allow access to land for development has a number of inherent risks for customary landowners. The paper therefore revisits and challenges the assumption that access to a land market will reduce poverty. As a case study, it focuses on the application of land market policy to customary land in Uganda, however the matters raised are applicable to similar circumstances worldwide.

LEMU's extensive work on matters of customary tenure in Uganda has shown that there is an existing land market for customary land at community and national levels in Uganda. Since a market for customary land already exists in rural Uganda (a market which is currently unsupported by policies and laws), development actors' ambition to establish a 'land market' must have a more complex underlying meaning which we understand requires the ability to buy and sell land beyond the local and country levels and at a much higher global level.

We consider that there are a number of complex and interrelated outcomes typically targeted in pursuit of a global land market. Taken separately, there are elements of these that are incontestably positive, such as efforts to improve security of tenure. However, these are often wrapped together with other, problematic assumptions, such as an assumed preference for individualized ownership as a means to improve tenure security. These complex, separate but often related strands should not be conflated. LEMU's analysis is that the strategy of creating a land market risks the replacement of customary tenure with tenures based on individual ownership, and that this presents risks for vulnerable landowners by removing the safety net provided by properly administered customary tenure.

In order to consider these risks, this paper first describes the context for land in Uganda, including the legislative and policy background. It then goes on to consider the policies that have led to the pursuit of a 'land market'. Finally, it considers the risks inherent in these policy goals, and considers alternative means by which land rights can be protected to contribute to poverty reduction outcomes. It will end with recommendations for policy to focus on empowering landowners to establish innovative transaction models that will allow land to be put to productive use without customary landowners ceding total ownership. Alongside this, it recommends that policy should be supportive of customary tenure to create the enabling environment for customary tenure to evolve, rather than be replaced by individualized tenures.



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## 1. Land in Uganda

### 1.1 Context

Customary land is a term that is used to capture a broad range of land management arrangements in a number of countries. The defining features of customary land are that rights to land are legitimized by recognition in the wider community, that rights do not rely on documentation (although customary rights are documented in some circumstances) and that land is governed by the custom and traditional authorities relevant to that particular group. The majority of Uganda's 250sq km land is held under customary land tenure systems, making an understanding of these customary systems very important for any land reform proposals.

In Uganda, the majority of customary land is held by groups rather than individually, and is typically farmed by families for subsistence or for small-scale production. Approximately 85% of Ugandan customary land is owned by families, with the majority of the remainder owned by communities. It is important to recognize that family and community ownership in this context is not 'open access' land. Families and communities own their land as private property, which is governed by rights and responsibilities according to long held and evolving custom. The custom has been established over many years and is intended to ensure that the land is used, protected and maintained for future generations. Consequently, most custom holds that family members and traditional institutions have the rights to allow or disallow land sales.

Customary land is still considered by many development actors to be a barrier to economic development. In particular, its administration (with family and community ownership rather than individual ownership) and lack of documentation is considered to be a barrier to the creation of 'land markets' that some consider could contribute to poverty alleviation by bringing about the most efficient land uses by the most efficient users. Formal criticism of the customary land tenure model goes back to Uganda's colonial era. During this time, the British sought to replace customary tenure with their preferred individualized freehold tenure system. In practice the imposition of changes to land tenure were limited to the areas in which the colonial administration focused its efforts (the south and in Kigezi district, west of Uganda). The rural areas were mostly left to their own devices with limited interference, and continued to practice traditional land management. However, whilst not explicitly intervening in those areas, the 1955 East Africa Royal Commission reported that customary tenure, particularly under community ownership, was an impediment to development (East Africa Royal Commission, 1955) and The Commission



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recommended the adoption of programmes to individualize land ownership. Individual ownership was considered by the colonial administrators to be superior to family, community and joint ownership, and it was considered that private, individual land rights were an inevitable consequence of economic efficiency.

## 1.3 Legislative context

Although customary land tenure has been the practical reality for many Ugandans for centuries, it was not legally recognized as a legitimate land tenure until the 1995 Uganda Constitution (“The Constitution”). The Constitution set out that there are 4 tenure types in Uganda: customary, freehold, leasehold, and Mailo, thereby taking a radical step in acknowledging that customary tenure is a means of private landownership, not simply an occupation of public land. Whilst this is very significant in the history of customary land in Uganda, it is similarly important to note that after defining the 4 tenure types at paragraph 237 (3), at paragraph 237 (4) the Constitution states that customary land can be converted to freehold, implying an inherent inferiority of customary land. Indeed, the Constitutional Commission (convened to discuss the preparation of the Constitution) considered that there was a need for change from cultural approaches to owning land, to economic approaches, but acknowledged that this needed to be done gradually, to reduce the potential for economic shock (Mugumbwa, 2007).

The Constitution goes on to require that customary laws govern customary land, provided that certain individual rights are protected. This presents a complicated dimension, where national legislation recognizes and adopts the legitimacy of a different system alongside state law. Whilst the recognition of customary law in governing customary land is important, it does present risks of parallel legal systems, a matter outside the scope of this paper, but described further at length in “Falling Between Two Stools. How Women's Land Rights Are Lost between State and Customary Law in Apac District, Northern Uganda” (Adoko and Levine, 2008)<sup>1</sup>.

Building on the principles of the Constitution, the subsequent Land Act (1998) was adopted into law “to provide for the tenure, ownership and management of land; to amend and consolidate the law relating to tenure, ownership and management of land...”. Despite the text providing legislative recognition for

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<sup>1</sup> The research found that contrary to many misconceptions about women’s ability to own land, properly applied customary land tenure contains provisions for the protection of women’s land rights. As the Constitution brought customary land under national law to protect women’s rights, Uganda has the potential to create a very favorable environment for women’s land rights, with a dual system of protection. However, the authors found that privatization and increased individualization of land has led to women’s land rights failing to be protected in either system, with increased incidences of customary family land moving into individual male ownership, and thereby removing the protections offered to women under customary and state law.



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customary land, aspects of the 1955 East Africa Royal Commission's criticisms of the customary tenure model appeared in the formulation discussions that took place before the 1998 Land Act was passed. The principle underpinning the legislative provisions of the Land Act is the following:

*"A good land tenure system should support agricultural development and overall economic development through the functioning of a land market to enable progressive farmers which permits ...investors to gain access to land."*

Position Paper, Ministry of Lands 1997

In its text and underlying ambitions, the Land Act thus appears to both recognize the importance of customary tenure, whilst simultaneously aiming to stimulate a move towards titled freehold and a land market in which land is more easily transferred between buyers and sellers (Joireman, 2007), including beyond the local level. The provisions of the act demonstrated a preference for the individualization of property rights, and the ultimate creation of a land market.

Various provisions of the Land Act attempted to find ways to incorporate customary tenure into its emerging land market, for example through the creation of a customary 'title' document called a Certificate of Customary Ownership (CCO), which is intended, like a title, to be conclusive proof of rights, and thereby to allow transactions and borrowing against land as collateral. The Land Act requires that financial institutions accept CCO's as sufficient proof of title for credit (Foley, 2007). Further provisions in the Land Act permit the conversion of a CCO to a registered freehold title, which has led a number of practitioners (Hunt, 2004; Adoko and Levine, 2005; Mugumbwa, 2007) to consider that the Land Act is not pro-customary tenure (despite its recognition of the same) because of its consideration of customary tenure as a transitory tenure, *en route* to freehold.

Following the enactment of the Land Act, the Government sought to engage stakeholders on how to improve the land situation and adopted a 'National Land Policy' with these aims in 2013. The Policy aimed to provide a framework by which Uganda would transform to a modern and urbanised society (Ministry of Housing, Lands and Urban Development, 2013). As with the Constitution and the Land Act, the intention to create a land market to contribute to economic development is also reflected in the 2013 National Land Policy, which states:

*"The government shall promote, efficient, effective and equitable land markets in all land tenure regimes".*

Policy Statement 44, Uganda National Land Policy



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However, this National Land Policy sought to correct some of the provisions in the Land Act that had led to the treatment of customary tenure as inferior to the other systems. Section 4.3 on Customary Land is worth considering in full:

## ***“4.3 Customary Tenure***

*38. The majority of Ugandans hold their land under customary tenure. This tenure is often associated with three problems, (a) it does not provide security of tenure for landowners; (b) it impedes the advancement of land markets; and (c) it discriminates against women. The 1995 Constitution and the Land Act (Cap.227) attempted to formalize customary tenure and were criticized for destabilizing and undermining its progressive evolution. Despite these attempts, customary tenure 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 regarding dispute resolution and mediation compared to the statutory system;*
- (iii) Assessed as lesser to other tenures that have titles for proof of ownership in courts of law in the administration of justice;*
- (iv) Converted to freehold before it attains the totality of the bundle of rights inherent in all other registered tenures, denying it the opportunity to progressively evolve.*

## ***Policy Statements***

***39. (a) The State shall recognize customary tenure in its own form to be at par (same level) with other tenure systems;***

***(b) The State shall establish a land registry system for the registration of land rights under customary tenure.***

## ***Strategies***

*40. To facilitate the evolution and development of customary tenure in relation to social, economic, political and other factors, Government shall take measures to:*

- (i) Design and implement a land registry system to support the registration of land rights under customary tenure;*
- (ii) Issue certifications of Title 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 privatized and individualized into*



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*freehold tenure;*

*(iv) Document customary land tenure rules applicable to specific communities at the district or sub-county levels;*

*(v) Promote systematic demarcation as a measure to reduce the cost of registering rights under customary tenure; and*

*(vi) Make an inventory of common property resources owned by communities and vest these resources in the communities to be managed under their customary law.*

*41. To facilitate the design and evolution of a legislative framework for customary tenure, Government shall:*

*(i) Amend the Land Act (Cap 227) to permit only individually owned customary land to be converted to freehold;*

*(ii) Amend the Registration of Titles Act (Cap 230) to place customary tenure at par (same level) with other tenure systems;*

*(iii) Modify the rules of transmission of land rights under customary land tenure to guarantee gender equality and equity;*

*(iv) Make provision for joint ownership of family land by spouses;*

*(v) Recognize the role of customary institutions in making rules governing land, resolving disputes and protecting land rights;*

*(vi) Define family and individual land rights, from communal rights under customary land tenure and distinguish the rights and obligations of customary institutions vis-à-vis those of the community and individuals; and*

*(vii) Provide for registration of customary land held under trusteeship by traditional institutions or cultural leaders on behalf of communities in the name of trustees*

*42. To strengthen traditional land management and administration institutions, Government will take measures to:*

*(i) Recognize and enforce decisions of traditional land management institutions by local government and state institutions;*

*(ii) Ensure full judicial backing for traditional institutions as mechanisms of first instance in respect of land rights allocation, land use regulation and land dispute for land under customary tenure;*





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- (iii) Ensure that the decisions of traditional land management institutions uphold constitutional rights and obligations with regard to gender equity;*
- (iv) Develop guidelines and procedures under customary land law for the allocation and distribution of land complying with the principles of equality and natural justice.”*

The opening paragraph to the policy identifies three criticisms leveled at customary land. It suggests that the measures introduced in the Constitution and the Land Act were to make improvements in these regards, thereby improving security of tenure, contributing towards moves to land markets and improving land rights of women. However, it goes on to recognise that the changes adopted in those acts actually undermined customary tenure. The Policy seeks therefore to provide for a supportive environment in which customary land tenure could continue to evolve. However, 6 years on from the publication of the policy, its status is not clear. The legislative amendments planned in these clauses of the NLP (to the Land Act and the Registration of Titles Act) have not yet been put in place. Not only is the statutory status of the Policy alongside existing legislation unclear (which has contributed to a lack of clarity on land matters), it seems that the Policy cannot be implemented alongside existing legislation, as there are current laws that contradict the policies of the NLP; in addition, laws which implement the NLP must be passed. In the implementation of the NLP since 2013, these are the two areas that the Ministry reported in the review of the implementation of the NLP in 2018, to have scored poorly. Given the long history of the intention to convert customary tenure to Freehold one has to ask is there a will amongst the Ministry and the funders of the Ministry to support customary land tenure to evolve in accordance with the NLP? This question will be answered in the subsequent chapter below, particularly in the context of land market policy.

A point worthy of further consideration is the challenge leveled at customary tenure at paragraph 38 (a) of the NLP: that it does not provide security of tenure. To many outsiders used to titled systems, this will indeed appear the case. However, to the extent that it is possible, research has shown that customary landowners typically feel secure on their land. For example, one indicator of perceived tenure security is the planting of perennial crops, which has been shown to take place extensively on customary land (Adoko and Levine, 2005). The same research also recorded instances of people having their land surveyed as though to process for titling, but not actually processing the title application: instead they wanted to have a survey in order to be clear (and for adjacent landowners to be clear) where the boundaries were (*ibid*), but did not consider that the title documentation would afford them any additional security. LEMU's experience has shown that where there is insecurity within communities which have a



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system of customary tenure, this is an abuse of the system itself, rather than an inherent drawback within that system. Similar challenges can be made to abuses of titling, where systems might be corrupt or inadequately administered.

Although the intentions in the NLP to formalize a customary land tenure record system are welcome in putting customary land on a par with freehold and leasehold (which already have a records system), the impact remains to be seen in terms of ‘on the ground’ outcomes. USAID have undertaken research in sub-Saharan Africa (albeit not in Uganda) to levels of land disputes amongst those with undocumented customary rights, and shown that levels of disputes are not necessarily significantly higher than amongst those with documented rights (Stickler and Huntington, 2015), concluding that a legal recognition of customary rights is likely to have more impact than documentation. There have been a number of active projects promoting adoption of CCO, predominantly by international NGOs. The long term impacts of these recently implemented projects remain to be seen, particularly whether they are leading to greater lending to customary landowners or to greater sales of their land, and the impacts of such lending and land sales. Key to the establishing of customary tenure as an equal to other tenures will be ensuring that the documentation and record system is fit for purpose, supported with land administration and taken as seriously as the freehold system.

## **2 Land markets**

Land market policy is based on the premise that if land rights can be easily transacted, land will be put to its most productive use. As noted in previous sections, a market for land rights is a stated ambition of the Ugandan Government, and is supported by the World Bank through a number of their initiatives (including the current ‘Enabling Business for Agriculture’ project).

An efficient land market requires at least two key elements:

- (i) tradable bundles of rights (and the more standardized those bundles, the better);
- (ii) security for the purchaser that rights purchased will be honored.

It is worth considering these principles against Ugandan customary land to identify where there are barriers to customary land being traded in a global market. Doing so makes clear the reasons that customary land is not supported by policy makers, since it becomes clear that there is a gulf between



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customary land practices and what is required for a land market. (Whether it is a fair assessment that customary tenure is a barrier to economic development is a separate matter).

Firstly, turning to the types of rights typically owned by customary landowners. Rights under customary land tenure are not standardized in the same way that freehold or leasehold title is standard between different incidences of ownership. In one circumstance of customary tenure, a rights holder might share their rights with five family members, in another, they might share rights with a wider community. In each instance, there will be different rules and responsibilities that are carried along with those rights. Whilst rights could in principle be traded even if not standardized, standardization makes for a more efficient market, since purchasers and sellers can rely on a well-established and recognized principle and know clearly what they are buying. In order to achieve standardization, the proponents of land market policy would prefer to see a move away from community and family rights towards individual, private rights to ease transactions.

However, it has been argued that these standardized bundles can make resource-use less efficient. For example, in the freehold model someone seeking to have exclusive rights to harvest timber from a given piece of land will need to buy the freehold or long leasehold interest, even if they have no intention to exploit the other rights this entails (Scott, 1983). Historically, various economists (such as David Ricardo) have argued that private ownership of land leads to an unproductive monopoly. This remains relevant today: Deininger and Binswanger (1999) have argued that greater efficiencies might be achieved through a land rental market and consider that further work should be done on the matter. As developing economies evolve and establish formal tenure systems, there is a clear opportunity to reflect on the best possible formal tenure system taking into account the experiences of economies with established formal tenure systems, and a potential for innovation. In Uganda, custom prefers people to rent rather than sell their land, in order that they can retain a long-term interest and connection to their family land. There are opportunities here for innovation in poverty reduction by empowering customary landowners to participate in a land market through agreeing to rent their land for a period. This could open up access to land for investors, especially from within the community and the country, without the land falling out of the ownership of its historic owner, who could retain an income stream.

The second dimension identified above is that a potential purchaser requires sufficient confidence that the purchased rights will be upheld. Customary land in Uganda presents a second difficulty here in the trading of land rights. Security of ongoing rights in a customary context comes from proximity to a community and trust in the governance mechanisms. An international buyer could not realistically take



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on a bundle of rights from a community (or part of a community) and be able to trust that those rights would be upheld, since they are not part of that community. In order for land market proponents to be confident that land rights will continue to be respected, even without proximity to the community, then an official system of documentation is required, and it must be guaranteed by some power outside the community (usually the state). As a policy ambition, the notion of establishing a confidence of what is being purchased in a land transaction is often conflated with the notion of ‘security of tenure’ for a current rights holder. However, it is important to recognize that whilst these are related, they are not the same thing: security of tenure for a current rights holder relates to the confidence that they can have that they will not be arbitrarily dispossessed from that land by outside parties or by the state; security of tenure for a purchaser encompasses this principle but also extends to the extent to which the purchase considers current arrangements will be extended to include their ongoing protection even if they are not permanently occupying the land and able to physically defend it. For this reason, buyers (and particularly those not proximate to the land itself) typically do want to benefit from a recognized system of documentation, since they may not benefit from the trust or social capital required to rely on orally held records of rights. This means that transactions are likely to lead to a greater level of need for documentation backed by the state rather than by communities.

In some institutions this strategy has been wrongly interpreted to mean that improving security of tenure for purchasers of customary land is the same as improving security in for the landowner, without realizing that this strategy is replacing customary tenure with individualized land rights and taking it to Freehold land tenure system which most of the uneducated community members do not understand. This risks undermining the existing structures that promote customary tenure for customary landowners and introducing future insecurity to customary landowners, which they do not see currently. Since the conversion from customary tenure to freehold is supposed to facilitate a smooth land market, maybe the policy consideration is not that the land owners are secure but that selling the land is made easier and the land buyer feels secure to buy freehold land or land with some sort of documentation of ownership, rather than customary land that has no paper evidence of ownership.

A further dimension worthy of consideration is the laws and governance of land. As set out in the previous section, the Land Act requires that customary land is governed by the customs relevant to that community, as long as they do not contravene the laws of Uganda. In the circumstance that customary land was sold to a party outside the community that follows a particular custom, it is not clear whether (or how) that party would then be subject to the laws of that community. It is clear that any sale of



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customary land to a party outside of the relevant community effectively amounts to a removal of that piece of land from the customary system.

It is worth recalling that an underlying principle of customary tenure is to keep land in the family as far as possible and protect it for future generations (Adoko and Levine, 2005), whilst the land market wants land to be a marketable commodity that is traded to achieve efficiency and growth. Where land sales currently take place in customary land circumstances, they are typically ‘distress’ sales where emergency income is needed. There are a variety of reasons that people may be unwilling to sell, including “because their customary rules preclude disposal of land outside the family or clan, others are reluctant because land is their major source of livelihood or security of last resort; others want to keep their land for the future generation.” (ibid). It may be the case that these values change over time as people seek to capitalize on growth opportunities. However, that should be part of the evolution of customary tenure, and not artificially hastened by forcing all land into a land market. It is crucial to recognize the importance of the cultural and social norms that shape preferences, which may not, as economists assume, be based on the desire to maximize land value through transactions (Musembi, 2007). These are some of the reasons that customary tenure is considered to be at odds with the creation of a global land market.

### **3. What is the cost of the change? Who feels the benefit?**

The most insurmountable problem in attempting to reconcile customary tenure with land market policy is conflicting underlying principles. In Uganda’s customary law-led communities, land is an important source of income and livelihood. A key underlying principle of customary tenure is that the land is held in trust for future generations, with sales restricted to particular circumstances (often distress sales). This fundamentally restricts the concept of transacting land for a short-term capital gain, which is the underlying principle of a market transaction. Attempting to streamline customary tenure, by putting in place measures to make it a marketable commodity beyond are therefore doomed either to fail, or to replace the customary system entirely. In the meantime, as customary tenure is undermined through the move towards a land market, opportunities are created for the strong to abuse the land rights of the more vulnerable members of families and communities. Through reducing the power of the traditional institutions, their power to protect weaker members of the community in line with customary law is reduced.

Proponents of land market policy may identify this as being part of the problem that they are trying to address. However, the cultural importance of land should not be underestimated. Individuals see the



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location of their ancestral land to be hugely important, even if they have migrated to cities for work, and children are expected to be able to identify the location of relatives' graves. These important cultural ties sit uneasily with a capitalist model of land markets, which cannot accommodate objectives other than maximizing returns: "Community with its ties of kinship and affection sits, very uneasily [Patterjee] argues, with the demands of capital for 'efficiency' and 'homogenised individuals'" (Williams and Young, 1994, p. 96).

The connection between land tenure and economic output is not simple. However it is clear that smallholders will not suddenly be able to produce at commercial levels because of an administrative change to their land rights. A significant change to agricultural output would require a more seismic reordering of the economy, including fewer, large producers and a need for alternative income sources for former workers of the land. Potential risks include the concentration of land in a few hands, and an increasing landless class who may not have alternative employment skills (Adoko and Levine, 2005), potentially leading to requirements for state intervention through welfare provision. Whilst development policy accounts for potential economic growth through increased investment arising from formalized rights, it does not appear to account for these costs.

## 4. Recommendations

In order to work towards poverty reduction goals without undermining the dominant land tenure in Uganda, LEMU makes 3 principal recommendations:

- 1) Amend the Land Act to implement the provisions of the NLP that will support customary tenure to evolve, rather than remain a 'secondary' tenure to be replaced.
- 2) Support land rentals rather than land sales in tandem with the customary land tenure principle to keep land in the family for future generation and as a means to encourage productive use of land whilst retaining a long term income for traditional owners.
- 3) Improve documentation for customary landowners so as to provide for land market for rural community and Uganda at large. Documentation need to be simple enough through support to traditional leaders to manage such as planting boundary trees, drawing sketch maps and names of family and community land owners.



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## 5. Conclusions

Land tenure is ultimately a question of who controls resources, whether that resource is housing, food supply, oil, and so on. This is a political question, since it determines sources of power and power relations. In the absence of a strong state system, many people prefer to rely on local governance, which is both familiar and proximate to them – this has been seen in the Ugandan case, where customary tenure remains the majority tenure.

It is recognized that there are individual policy ambitions in pursuit of a land market that may lead to better outcomes. Tenure security is the most obvious of these. Land market proponents require an environment of secure tenure, in order that purchasers will undertake transactions, safe in the knowledge that their purchased rights will be upheld. To the extent this improves current landowners tenure security, so much the better. However, formalization and documentation are neither necessary nor sufficient to engender absolute security of tenure, which must at root have responsible governance and fair and accessible methods of recourse. The challenges faced by rural Ugandans aren't through lack of access to a global land market, they are through lack of secure income and lack of political representation at a national level. Policy makers should focus on policies and laws to deal with these realities, rather than risk creating further problems based on a misunderstanding of the relationship between land markets, customary tenure and poverty reduction.



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