

LAND LAW REFORM IN UGANDA: Exploring the loose ends

By Anthony C.K. Kakooza^{*}

Abstract

This paper addresses the present composition of land laws in Uganda and the need for reform. It does not particularly provide a critique on each of the land law legislations neither does it particularly focus on case law principles on the same, a venture which is quite lengthy, to say the least. It however attempts to highlight the pertinent concerns on the most notorious provisions under some of the prevalent land law legislations which can and should be simplified for the convenience of the public. It also provides a doorway for new legislations and regulations that can be harmonized within the present land laws with a view of bringing the general land law up to date with the present concerns.

The Paper thus serves the general purpose of convincing on the need to harmonize or replace archaic and sometimes discordant land sector laws, so as to bring them in line with the new legal order and thus to implement the new constitutional provisions for protection of land and property rights.

Introduction.

Land is every household's most important asset. Under Article 237 of the 1995 Constitution, it states: "*Land in Uganda belongs to the citizens of Uganda and*

^{*} LL.B (Hons) (M.U), Dip. L.P (LDC), LL.M (Warwick), Advocate and Lecturer in Law. A paper presented at the Uganda Christian University Law Society Workshop on the theme, "*The Future of Uganda in the Legal, Political and Social Spheres*", dated 18th January 2008. The writer is presently a sub-consultant and Research Associate with M/s Kalenge, Bwanika, Kimuli Advocates, as part of the on-going project on "*The Review of the Legal Framework for Land Administration*" for the Private Sector Foundation, Uganda & the Ministry of Lands, Housing and Urban Development. As such, in addition to his own material, the writer has also made reference to a compilation of research from other Consultants on the project, notably Prof. Peter Butt, Dr. John Mugambwa, Mr. Robert Ssawa, Dr. Moses Musinguzi and Mr. Peter Walubiri among others.

shall vest in them in accordance with the land tenure systems provided for in this Constitution”¹.

The same article goes on to provide for the general exceptions under which the aforementioned right of ownership may be curtailed² and mentions the land tenure systems under which land can be owned in Uganda³. These are: Customary; freehold; mailo; and leasehold.

Following the passing of the Constitution of Uganda, 1995, and the Land Act, 1998⁴, and with the development of the Land Sector Strategic Plan **2001-2011** (LSSP), the insecurity of property rights that can arise from inappropriate or unclear legislation was addressed by Government. The pertinent issues are now within the premise of:

- non-existent or ambiguous land records; and
- the inability to enforce existing land rights.

Today, the most commonly referred to legislations in land law practice and conveyance matters are the Registration of Titles Act⁵, the Land Act⁶ and the Mortgage Act⁷. This is principally because the interests pertaining to the aforementioned tenure systems are mainly addressed in these laws, though inevitably, the same interests cut across all the other relevant laws, such as the Land Acquisition Act⁸ and the Survey Act⁹. Loopholes and uncertainties in these laws adversely affect, *inter alia*, business competitiveness, private sector

¹ Sub-article 1, article 237

² Sub-article 2

³ Sub-article 3

⁴ Chapter 227, Laws of Uganda, Revised Edition, 2000, as amended by the Land (Amendment) Act No.1 of 2004

⁵ Cap. 230, Laws of Uganda, 2000 Ed.

⁶ Supra, note 5

⁷ Cap. 229, Laws of Uganda, 2000 Ed.

⁸ Cap. 226

⁹ Cap. 232

development, and Uganda's economic life in general. This paper thus mainly focuses on the Registration of Titles Act (R.T.A) and advocates for a modification and harmonizing of this law with the Land Act and the Mortgage Act because the Register of titles which is regulated by the R.T.A, is currently the main record and source of land information. Limited reference will also be made to the impending amendments to the Land Act and the Mortgage Act since these are still subject to further debate.

It should further be noted, that Uganda is presently experiencing an inefficient title registration system characterized by poor administration and maintenance. The inadequate security of the physical files has paved way for fraudulent and corrupt activity negatively affecting the integrity of the title registry. Such challenging factors in the land registry derail proper verification of the status of the land which inevitably affects the ability to sell the land and associated real estate. Furthermore, financial institutions also find it difficult to transact with unsatisfactory land interests presented as collateral¹⁰.

This paper therefore specifically addresses a few common aspects in the Registration of Titles Act, the Land Act and the Mortgage Act, and attempts at offering suggestions as to how these laws can be modified to create better harmony and practical convenience in land law matters.

Overview of the law and the need for reform

The Registration of Titles Act, Cap. 230, has been in force in Uganda since 1924 and is based on a 1915 Statute from the Australian State of Victoria. It is a "Torrens Title" Statute, that is, it reflects the underpinning concept of State-guaranteed title

¹⁰ **Project Appraisal Document on a Proposed Credit to the Government of Uganda for a Second Private Sector Competitiveness Project**, Report Number: 29639-UG, dated July 7, 2004 available at <http://go.worldbank.org/T8HCFC4KC0> or at <http://www-wds.worldbank.org/external/default/main> (last visited 8/7/07)

(usually called “indefeasibility of title”)¹¹. This is a stagnant law that needs to be modified and brought up to date with Torrens statutes in other jurisdictions. As we focus on harmonizing this law *inter alia*, with the Land Act and the Mortgage Act, areas requiring modification include the following:

(a) Computerization

The Register is kept entirely in manual form as reflected in the Act. However, with due consideration to the technology age we are in, our land laws, particularly the Registration of Titles Act, need to be amended to cater for technological progress such as paperless conveyance, on-line transactions and searches, and lodging of documents electronically. This would allow for the development of a comprehensive Land Information System as well as help to curb down on fraudulent practices in the Land Registry as shall be discussed further below. The development of an integrated Land Information System (LIS) which combines all major land-related information would go at great lengths in simplifying the operation of the Land Registry.

(b) Decentralization of the Land Registry

Another consideration is the amendment of the Registration of Titles Act or in the alternative, coming up with new legislation on land to cater for the decentralization of the land registry. This would involve dislocating it from a few central locations and having it strategically located in various localities. This, as a government policy, should obviously bear in mind challenges in management and coordination. However, with a well established and coordinated Land Information System, this obstacle would be easily overcome. Implementing this recommendation would make accessibility to the registry easier by the poorer members of the community for whom basic costs and transport are important issues.

¹¹ Section 64, Registration of Titles Act, Cap.230

(c) Addressing fraud in the operation of the land registry

Incidences of fraud are every land law practitioner's worst nightmare. The two most common incidences are illustrated below:

- **Situation 1:** *A person acquires an interest in land by means of their own fraud.* To illustrate: assume that A is the registered proprietor of land. Now assume that X steals A's certificate of title, then forges A's signature on a transfer of the land in favour of himself (X) and then becomes registered as proprietor of the land. In this situation, the *Registration of Titles Act* does not guarantee X's title: A may set it aside on the ground of X's fraud¹².
- **Situation 2:** *An innocent person acquires an interest in land by means of the fraud of a third party.* To illustrate: assume that A is the registered proprietor of land. Now assume that a third party (X) steals A's certificate of title, impersonates A to sell the land to B who is ignorant of the fraud, and then forges A's signature on a transfer in favour B, who becomes registered. Here, the *Registration of Titles Act* guarantees B's title. A cannot set it aside¹³.

The result in *Situation 1* is straightforward, and accords with justice and common sense. X cannot acquire a good title by means of his or her own fraud. By way of distinguishing, this was discussed in the case of **John Katarikawe v W. Katwiremu & Ors**¹⁴ in which it was held that: If a person procures registration to defeat an existing unregistered interest on the part of another person of which he is proved to have knowledge, then such a person is guilty of fraud.

However, the result in *Situation 2* is more controversial. Someone must lose out because of X's fraud: but is it to be A or B? Over the years, courts have come to different conclusions.

¹² Sections 176 & 177 R.T.A

¹³ Sec. 181, R.T.A

¹⁴ (1977) H.C.B 187

In the case of **F. Zaabwe v Orient Bank Ltd, Mars Trading Co. Ltd & Ors¹⁵**, while addressing the issue of a purchaser bona fide or not vis-a vis third party rights, the Court pointed out two underlying principles. Katureebe, JSC, for instance, followed the decision in David Sejjaka Nalima v Rebecca Musoke¹⁶, to the effect that: The principle that a bonafide purchaser for value cannot have his transfer defeated by fraud only applies where the purchaser was not a party to the fraud or he had no knowledge of the fraud at the time when he purchased.

In the ***Zaabwe*** case, the first defendants' Counsel had full knowledge of the dispute and the allegations of fraud on the suit property. The Honourable Katureebe, JSC thus stated: "*The Sejjaka case supra, is authority for the principle that where an Advocate acts for a party and he has knowledge or notice of alleged fraud, that knowledge or notice will be imputed to his client unless the client himself is defrauded by the advocate*".

(d) The need for effective compensation for loss of land

Most Torrens title statutes provide that persons who lose land, or an interest in land, through the workings of the registration system, should have access to statutory compensation¹⁷. Often, the compensation is payable out of a statutory fund, called the "Assurance Fund". The right to compensation is seen as an important parallel to "immediate" indefeasibility of title. The following example illustrates the need for compensation:

Assume that A is the registered proprietor. X steals A's certificate of title and forges A's signature on a transfer of the land in favour of B, an innocent purchaser. B pays the full purchase price to X, who then disappears. B registers and obtains an (immediately) indefeasible title. A has lost the land. Technically, A has an action against X, but X has disappeared. A has no action

¹⁵ Supreme Court Civil Appeal No. 4 of 2006

¹⁶ SCCA 12/85 [1992]V KALR

¹⁷ Sec. 178, R.T.A

against B. Therefore, under standard Torrens title provisions, A can recover from the Assurance Fund the value of the land under a scheme of statutory compensation.

The *Registration of Titles Act* has a series of sections that, together, would give A rights to recover from the Government: sections 178, 179, 180, 183-187. This equates to a right to recover from a “fund”. However, these provisions appear excessively complex and (in some respects) unclear in their operation. This can undermine confidence in the land registration system, for a person deprived of land by fraud is uncertain of the right to compensation.

It can therefore be argued that in order to underpin confidence in Uganda’s title registration system, the compensation provisions of the *Registration of Titles Act* should be redrafted in order to free up access to compensation and to make clear the circumstances in which claims can be made.

The assumption is that one reason why people do not make claims for compensation is because they believe that it is only through court proceedings that they can effect recovery. This belief is not entirely correct, as section 186 (R.T.A) allows the Registrar (if the Minister agrees) to pay a claim before court action is initiated.

However, in order to expedite the process and cut on the bureaucracies, the Registration of Titles Act should be amended to allow the Registrar to pay claims, without needing Ministerial approval. It should not be necessary for parties to bear the costs or suffer the delays in court proceedings for recovery. The Office of the Registrar should be given the confidence to exercise the expertise in deciding

on claims. Where this expertise is abused, there would remain the right under the existing Act to challenge the Registrar's decision in court¹⁸.

(e) Registered interests vis-à-vis unregistered interests

This is a controversial issue that cuts across the Registration of Titles Act, Mortgage Act and the Land Act. A few practical examples would suffice:

- **Example 1**: Assume that the owner of land (A) has given a mortgage to a lender (B). Assume that the mortgage is unregistered, and that B has not protected the mortgage by caveat or by taking possession of the certificate of title. Now assume that A sells the land to a purchaser (P), who has notice of the mortgage. P becomes registered. Does P take free of the mortgage?
- **Example 2**: Assume that the owner of land (A) enters into a contract to sell the land to a purchaser, P, who does not register or lodge a caveat. Now assume that the owner then enters into a contract to sell the same land to another purchaser, Q. Assume that Q knows of P's interest. Q becomes registered. Does Q take free of P's interest?

Some Ugandan case law would hold that in examples such as these, the registered interest would defeat the unregistered. Specifically, they would hold that in Example 1, P takes free of B's interest, and that in Example 2, Q takes free of P's interest. The reasoning is that, under the *Registration of Titles Act*, a registered interest defeats an unregistered interest, despite notice—and that to take with notice of an unregistered interest is not to act fraudulently (as the term “fraud” is understood in the context of Torrens title statutes).¹⁹ But other Ugandan case law would hold to the contrary: namely, that in Example 1, P takes subject to B's

¹⁸ See Sec. 185 R.T.A

¹⁹ An example is *Shah v Modern Sweet Mart Ltd* (1956-1957) 8 ULR 99, discussed in Mugambwa, *Principles of Land Law in Uganda*, Fountain Publishers, 2000, p 76.

interest and in Example 2, Q takes subject to P's interest. This is based on the reasoning that registration in the face of knowledge of an unregistered interest is fraudulent.²⁰

In the appreciation of legal interests versus equitable interests, I would argue that the former view is correct. That is, a registered interest defeats an unregistered interest, despite notice. Specifically, to become registered as the holder of an interest with notice of an existing unregistered interest is not to act fraudulently (as the term "fraud" is understood in the context of Torrens title statutes). This result is compelled by section 136 of the *Registration of Titles Act*.

Furthermore, it is evident that this result not only accords with the philosophy of the Torrens system but also helps promote a confident land market. The Torrens title system assumes that persons will register the interests they acquire in land—or else take the risk of losing out at the hands of a later interest-holder who becomes registered (even with notice). One of the system's strengths is the premise that persons acquiring an interest in land should be able to rely on the Register as a "mirror" of the title: that is, they should be able to assume that the land is bound only by the interests currently registered or caveated, and therefore ascertainable by search of the Register. They should not be bound by interests that are unregistered or uncaveated—and which, by definition, are not ascertainable by search of the Register. In short, they should not be concerned about unregistered interests whose holders have not sought the protection of registration or caveat.

Therefore, the considered view is one of exercising due diligence. In other words, under the *Registration of Titles Act* a person taking an interest in land should be expected to register it, to avoid losing out to someone who later acquires a

²⁰ An early example is *Katarikawe v Katwiremu* [1977] HCB 187. This seems now to be the approach taken generally; for example, see per Odoki CJ and other members of the Supreme Court, in *Kampala District Land Board v N.H.C.C* (Civil Appeal No 2 of 2004). Also see sec. 64 (1) R.T.A

registered interest in the land. The unregistered holder's remedy lies in their own hands: they can register²¹. Of course, some interests are inherently unregistrable; and other interests, though inherently registrable, might be embodied in documents that, for one reason or another, are not in registrable form²². But such interests can always be protected by caveat—a protection which, though not equivalent to registration, is sufficient to prevent extinction of the interest as a result of registration of a competing interest through exercise of due diligence by someone intending to register his or her interest on the land.

This result, of course, would not affect the operation of the principles relating to fraud. If the later interest holder has been fraudulent in acquiring the interest, then their registered title is liable to defeasance for fraud. But, as section 136 of the *Registration of Titles Act* states, notice, of itself, is not fraud. Nor would the result affect the principles relating to “personal equities”. That is, if the later holder has engaged in unconscionable conduct of a kind that would lead a court to require his or her title to be subject to an earlier unregistered interest, then registration of the later interest will not destroy the earlier. But subject to such matters, section 136 of the *Registration of Titles Act* should be allowed free reign. It is central to the aim of encouraging a confident land market.

However, this argument leaves vulnerable persons unprotected. Uganda has seen a proliferation of unregistered interests, whose owners will know little or nothing of the need to register or caveat to protect the interests from defeat at the hands of later registered holders. Such vulnerable persons fall within or include the bracket of the so-called “bibanja” owners and other customary land owners constituting over 60% of land holders in Uganda.

²¹ Lawful and bonafide occupants on land (tenants by occupancy) can also register their interests under the provision of section 38 of the Land Act.

²² Such as Land bequeathed through the registered proprietor's last will and testament.

However, it is impossible to protect all "vulnerable" persons; if we tried to do so, the *Registration of Titles Act* and the *Land Act* would become unworkable, to the detriment of persons dealing in land and to Uganda's land market. There must be a balance between competing interests (ie, between dealers or potential land dealers and other claimants).

The "numerous" unregistered interests include interests of "bona fide" and "lawful occupants" under sec. 29 of the *Land Act*. There are new proposals under the *Land (Amendment) Bill*²³ to protect such interests on registered land. However, and importantly, those interests are already protected as exceptions to indefeasibility under the amendments to section 64 of the *Registration of Titles Act* proposed by the 2005 amending legislation²⁴. Similarly the rights in relation to "family land" are protected under the new section 64(3), inserted by the same amending legislation (Family land is also protected in the *Mortgage Bill*, 2007 discussed below).

Furthermore, the aforementioned provisions in the proposed *Land (Amendment) Bill* seem to contradict the provisions of sections 64 and 136 of the *Registration of Titles Act* in as far as the estate of the registered proprietor is concerned. Much as the *Land Act* would seem to override the *Registration of Titles Act*, this is nevertheless likely to cause unnecessary public confusion.

(f) The need for spousal consent in dealings with family land

This is also yet another contentious issue. Recent amendments proposed to the *Registration of Titles Act* (by the *Registration of Titles (Amendment) Bill* 2005) introduce a requirement for spousal consent to dealings with family land. These amendments affect, inter alia, the following sections of the *Registration of Titles Act*:

- section 92 (no transfer of family land without spousal consent)

²³ Bill No. 27 of 2007

²⁴ The *Registration of Titles (Amendment) Bill*, 2005

- sections 101 and 109 (no lease or sublease of family land without spousal consent)
- sections 115 and 129 (no mortgage, including equitable mortgage, of family land without spousal consent)

These amendments were presumably made with section 39 of the *Land Act* in mind. However, there are some important differences between section 39 and the relevant provisions of the *Registration of Titles Act*. In particular:

- section 39 (as amended)²⁵ protects a much wider category of persons than merely spouses (eg, it protects dependent children of majority age; and in some circumstances protects minors and orphans);
- Section 39 expressly makes transactions without consent void, even in favour of innocent purchasers; whereas the *Registration of Titles Act* is silent on the effect of the absence of consent.²⁶

Again, as aforementioned, the assumption is that given the importance of the *Land Act* in Ugandan social and legislative history, if an inconsistency occurs between the provisions of the *Land Act* and the provisions of the *Registration of Titles Act*, the *Land Act* was intended to prevail. Accordingly, the law should be streamlined to avoid the apparent conflict in relation to spousal consent within the two laws and to ensure that the provisions of the *Land Act* are paramount.

Section 39 of the *Land Act* also places mortgages in a special realm as far as spousal consent is concerned²⁷. It is on the strength of this provision that her Lordship Justice Arach Amoko rejected the Respondent's claim to an equitable

²⁵ The Land (Amendment) Act, No. 1 of 2004

²⁶ Under normal Torrens title principles, an innocent purchaser under a transaction where consent appeared to have been given but was not in fact given (eg, where a spouse's consent was obtained by deception or duress, or where a person impersonated the spouse), would take free of the need for consent: see, eg, *Boyd v Mayor of Wellington* [1924] NZLR 1174.

²⁷ See sub Section 3 thereof

interest in the suit property in the case of **Sentongo Producers & Coffee Farmers Ltd v Rose Nakafuma Muyiisa**²⁸. The Respondent had claimed an equitable interest on the suit property on the basis of having contributed money and materials for the construction of the house thereon. The Court's holding was to the effect that the restrictions on land transfer under section 39 of the Land Act do not affect a legal mortgage and secondly, that co-ownership can not be conferred by marriage.

As a further comment on this issue, I would add that the Mortgage Bill, which was drafted partly in response to the recommendations of the Uganda Law Reform Commission²⁹, is yet to be passed in Parliament. However, the Commission had recommended, in part³⁰, that section 39 of the Land Act be amended to provide for co-ownership of family land.

It is understandable that the rationale behind this recommendation is to protect the rights of women to land interests and avoid court decisions similar to that of **Rose Nakafuma Muiyisa** above and it is truly supported. However, it can be argued that this automatic co-ownership is impracticable. This is because it would introduce substantial complexity to land holdings. It would import into the relationship between spouses the entire law of co-ownership—an area of law that is renowned for its complexity and difficulty. As such, on the contrary, the spousal right to lodge a caveat, granted by section 39 of the Land Act, is sufficient protection. If a caveat is lodged, no mortgagee can claim to be ignorant of the need for consent; and under clause 5(2) of the *Mortgage Bill*, through due diligence, it is the mortgagee's obligation to satisfy itself whether a prospective mortgagor has a spouse or not.

²⁸ HC MSC No. 690 of 1999

²⁹ *Study Report on Reform of the Laws Relating to Mortgage Transactions* (U Law Reform Commission Publication No 22 of 2004)

³⁰ Ibid, Commission recommendation No. 12

(g) Creating a general property law statute outside the Registration of Titles Act

Most jurisdictions with Torrens title registration principles comparable to those in Uganda separate the registration of titles legislation from general property law legislation. This makes for a convenient division of subject-matter: the Torrens statute deals with the registration of interests in land, while the general property law statute (or statutes, for often there is more than one) deals with more technical and discrete property law principles. A reader who wants to find out about the registration of title goes to the registration of titles Act; but a reader who wants to find out about more general and underlying principles relating to land—such as the general principles regulating leases, mortgages, easements, covenants, and the like—goes to the general property statute.

Unusually, the Ugandan *Registration of Titles Act* covers both registration of title and general property law issues. This makes it a large, complex and somewhat unwieldy statute, and one that needs to be amended every time an amendment is desired to any of the “general” property law issues it covers. Streamlining the legislation, by stripping out general property law provisions, would make it easier to amend—as well as easier to use.

Apparently, the process of stripping-out is already happening. For example, the *Mortgage Decree* (1974), while it existed, regulated some aspects of mortgage law. More recently, the *Mortgage Bill* takes from the *Registration of Titles Act* almost all of the general provisions regulating mortgages and puts them into a stand-alone mortgage statute. Likewise, the Uganda Law Reform Commission’s recent work on landlord and tenant law is likely to lead to a “stand-alone” code of landlord and tenant law, divorced from the registration of titles legislation.

Conclusion:

As mentioned at the onset, there are a variety of land laws that need to be

addressed to bring them into conformity with the Constitution and the Land Act. This paper can not exhaustively cover all these laws. However, an appreciation needs to be made of the fact that even the constant amendments made to the most significant laws, that is, the Registration of Titles Act, the Land Act and the Mortgage Act, should be in line with the “*needs*” of the people of Uganda and not necessarily their “*wants*”. The laws should also be drafted so as to ensure that ***all*** interests are taken care of in a balanced and convenient manner.

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