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LEGAL ALERT

CUSTOMARY LAND OWNERS' RIGHTS AFFIRMED-NO LONGER LESSEES ON THEIR LAND.

Constitutional Court decision on Customary Tenure and powers of District Land Boards: Hon (Rtd.) Justice Galdino Okello in Omoro & 4 Others v. Attorney General & 8 Others, Constitutional Petition No 28/2019



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Following the promulgation of Article 237 of the 1995 Constitution of Uganda, there is no public land in Uganda except the land held by Government and local government in public interest following conditions governing such acquisition, and land held in trust for the people for the common good of all citizens.

Background

The history of land ownership in Uganda has evolved from the pre-colonial times. Communities in Uganda had a form of land ownership which was changed when Uganda became a British protectorate (colonized by the British).

Ownership of land during colonial times was subjected to the authority of the colonial government (the Crown). When Uganda got independence, the post-independence government inherited the land ownership laws of the colonial government.

The land reforms under the post-colonial government maintained the notion that government had the ultimate control and ownership over land. Government would lease land to people who desired to have titles on 'public land'. During Amin's regime, a law was decreed in 1975 that made all land in Uganda to belong to the government.

In 1995, Uganda adopted a new Constitution which vested the land in Uganda in the citizens of Uganda. The Constitution changed the notion of government having the ultimate control and ownership over land, to empowering ownership of land by the people of Uganda.



WHY DID THE PETITIONERS GO TO COURT?

The Petitioners went to Constitutional Court in the public of interest of people of the Acholi sub-region, to challenge the constitutionality of District Land Boards leasing customary land. The Petitioners were concerned about how customary land that reverted to its original owners, was treated as former public land, over which the District Land Boards in Acholi sub-region had been asserting and exercising authority to lease the land.

The Petitioners also had concerns about provisions in the Land Act, enacted in 1998, which had the effect of leaving out meaningful participation of traditional institutions in the management of customary land. The Petitioners challenged what they contested to be the discriminatory nature of Certificates of Customary Ownership issued under the Land Act, and the failure of government to designate a central registry for registration of land held under customary tenure. It is worth noting that a large chunk of land in Uganda is not yet registered under the freehold, mailo or leasehold tenures. Customary tenure is the most common system of land ownership in Uganda.

The Petitioners sought to establish the intention of the Constitution was to vest all land in the citizens of Uganda.

DECISION OF THE COURT

The petition to a great extent succeeded in the remedies that the Petitioners had initially sought. The Court made very profound declarations that strengthen customary tenure as a form of land ownership in Uganda.

Whereas the Court upheld the provisions of the Land Act challenged by the Petitioners, the court declared that:

(a) Following the promulgation of Article 237 of the Constitution of Uganda 1995, *there is no public land in Uganda except the land held by the Government and local government in the public interest following conditions governing such acquisition as prescribed by Parliament* and land held by Government or local government in trust for the people for the commons good of all citizens.

(b) *The District Land Board cannot grant leases out the land which is not vested in them* and leases may be granted by the customary owners of the land and the lease grant facilitated by the District Land Board under Article 241(1)(b) of the Constitution.

(c) The practice of administering and leasing de-gazetted lands and former “public lands” by the District Land Boards, except for land that arises in terms of reversion from leases formerly granted to noncitizens or land which is proved by evidence to be land not owned by anybody or authority, contravenes (sic) is inconsistent with Article 237(1) and (3) of the Constitution.

(d) De-gazetted land which used to be owned by any customary owners, clan or community in the Acholi sub-region reverted back to the original customary owners under customary tenure where such ownership is proved.

(e) The ownership of land under customary tenure is not necessarily based upon or contingent upon occupation of land as customary ownership has to be conceived and understood in the context of and from the point of view of the customary conception of law relating to land ownership. The denial of registration or proprietary rights to customary owners on ground that the customary owners are not in occupation of the land would violate Article 26(1) & (2) as well as Article 237(1) of the Constitution.

(f) Article 237(1) of the Constitution vested land in the citizens and where it is held under customary law, such land reverted to the position it had in terms of its status prior to the land being vested in the government under the relevant legislations subject to legitimate transactions having occurred on the land over the years.

IMPLICATIONS OF THE DECISION:

ALP as the lead lawyers in the petition would like to highlight the following as the major implications of the petition, as captured in the remedies: -

1. The decision clarifies the role of District Land Boards as far as dealing with customary land ownership. The District Land Boards are supposed to manage such land for and on behalf of the customary land owners, and can only issue Certificates of Customary Ownership (CCOs) or freeholds as per the law now.
2. The District Land Boards can no longer issue leases over customary land on the basis that the same is treated as former public land. The land in these areas as properly interpreted by the Constitutional Court reverted to the owners by virtue of Article 237 (1) of the Constitution. This ownership must be traced to the period prior to colonisation.
3. The period prior to colonisation up to the present day can best be articulated by the traditional institutions. The decision provides for traditional institutions to play a greater role in confirming the ownership of land before the land is brought under the provisions of both the Land Act and Registration of Titles Act (RTA).

4. The Court noted that the law making power is with the Parliament and the Court could not enhance the role of traditional institutions as the Petitioners sought in the petition. The Court guided the Petitioners to petition Parliament to address the concerns they had, concerning the Certificates of Customary Ownership (CCOs), and the role of traditional institutions. This remains an area for reform as far as the Land Act is concerned.

5. As far as leases already issued by the District Land Boards of Agago, Amuru, Gulu, Kitgum, Lamwo, Nwoya, Omoro and Pader on the basis that customary land was former public land, the court left this to be determined on a case by case basis by the High Court. Those who have leases issued should seek remedies from High Court for enforcement on case by case basis.

6. However as from February 20, 2023, the date of judgment, the District Land Boards of Agago, Amuru, Gulu, Kitgum, Lamwo, Nwoya, Omoro and Pader should cease issuance of leases over customary land on the basis that such land is former public land. The Ministry of Lands, Housing & Urban Development should immediately issue guidelines in line with Court's Judgment to the District Land Boards.

WAY FORWARD

As noted by the Court, this is a matter of great public importance that affects many customary land tenure owners across the country.

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The team at ALP remains available to support the stakeholders in ensuring the effective implementation of the Court's Judgment, which is in fulfillment of the intention of the Constituent Assembly as far as Article 237 (1) of the Constitution is concerned.

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