



## **JUDICIARY MEMORANDUM TO THE LAND COMMISSION OF INQUIRY**

### **1.0 Introduction and Background**

In Uganda, 85% of Uganda's rural population depends on land for livelihood and survival. Land is a resource for all regardless of where you are. Everyone's life depends on land in one way or another for food, shelter, water, income, spirituality or culture. For some individuals, peoples and communities, land is intrinsically related to their identity and standard of living. While not explicitly recognized per se under international human rights law- with the exception of the right to land and territory of indigenous peoples- there is growing consensus that a human right to land needs to be codified in order to strengthen the protection of land users' rights and strengthen the protection of human rights which depend on access to land for their fulfilment.<sup>1</sup>

Access to land is necessary for the fulfilment of economic, social and cultural rights such as the right to an adequate standard of living, which include the rights to food, water, adequate housing

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<sup>1</sup> See Jermie Gilbert, 'Land Rights as Human Rights' (2013), UN General Assembly, *Report of the Special Rapporteur on the Right to Food to the UN General Assembly*, UN Document A/65/281, August 11, 2010.

and health as well as all other rights which can be indirectly affected.

According to the **2016 Justice Needs in Uganda Report-Hague Institute for the Innovation of Law in partnership with ACORD Uganda**: over a four year period, almost 90% of Ugandan people experienced one or more serious justice need(s) that were severe and difficult to resolve, the most prevalent related to land, with specifically high occurrences of disputes with neighbours over boundaries, rights of way or access to property, theft/robbery and domestic violence. Less than 5% of dispute resolution takes place in a court of law and in less than 1% of cases is a lawyer involved. More than 1/3 of the people faced with a problem did not take any steps to resolve it. This is mainly because people feel that they are unlikely to succeed in their efforts to solve the problem, either because of a lack of knowledge or because it entailed a high anticipated risk such as an aggravation of the relationship with the other party (especially in case of family problems), or high investment in terms of time and money. Very few people receive information and advice about their justice needs from qualified lawyers. Most turn to informal sources, LCCs or the police.

Most frequent problems around land include:-

- (a) Disputes with neighbours over boundaries, rights of way or access to property (36%);
- (a) Ownership/use of land (25%);

- (b) Disputes over title: missing, unclear or disputed land titles (4%);
- (c) Clashes between different land ownership rules:-
  - (i) Land grabbing (22%)
  - (ii) Disputes over land tenure (2%)
  - (iii) Nationalization/denationalization of land (1%)
  - (iv) Other land disputes (9%)

## **2.0 What is your opinion about the current status of access to land justice in Uganda?**

For one to appreciate the status of land justice in Uganda, it's important to consider the descriptive definition of justice. According to the Hague Institute for the Innovation of Law, Justice is fair, expeditious, timely, and free from corruption and in determining justice the following factors have to be evaluated:-

- (a) The costs of justice:
  - (i) Money spent: out-of-pocket costs for legal fees, travel, advisors;
  - (ii) Time spent: time spent to search for information, attend hearings, travel;
  - (iii) Stress and negative emotions.
  
- (b) The quality of the procedure:
  - (i) Voice & neutrality: process control, decision control, neutrality, consistent application of rules.
  - (ii) Respect: respect, politeness, proper communication.
  - (iii) Procedural clarity: timely explanation of procedures and rights.

- (c) The quality of the outcome:
  - (i) Fair distribution: distribution is fair according to needs, equity, and equality criteria;
  - (ii) Damage restoration: fair compensation for monetary damage, emotional harm, and damage to relationships;
  - (iii) Problem resolution: extent to which the problem is solved and the result has been enforced;
  - (iv) Outcome explanation: the extent to which the people receive access to outcome information.

### **3.0 Does our Land Justice system subscribe to the above?**

Access to land justice is governed by the provisions of the Constitution and other laws relating to land and the environment. **See Chapter 15 of the Constitution, the Registration of Titles Act Cap...., Land Act Cap., the Laws relating to the Environment, among others.** The status of access to land justice is also determined by the court system and court processes in place at a given time; together with the land policy, if any.

Article 126 of the Constitution emphasizes that:-

- a. "In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles—
  - (i) Justice shall be done to all irrespective of their social or economic status;
  - (ii) Justice shall not be delayed;

- (iii) Adequate compensation shall be awarded to victims of wrongs;
- (iv) Reconciliation between parties shall be promoted; and
- (v) Substantive justice shall be administered without undue regard to technicalities.

Considering the above, the status of access to land justice in Uganda is fluid and has considerable limitations. The majority population face serious difficulties and do not have free and unhampered access to justice. This is both in terms of physical and functional access to justice.

In terms of physical access for example, Magistrates Grade II Courts are being phased out, Local Council Courts are inoperative and yet these courts were nearer to the grass roots. In addition Land Tribunals which were specialised courts in land matters were ineffective and were eventually closed living behind a huge backlog. It is therefore necessary to have the Local council courts and Land tribunals operationalised.

In terms of functional access, magistrates are supposed to visit locus in quo before determination of land matters. But the facilitation is so limited to enable them to effectively undertake this assignment. This does not only cause unnecessary delays but also leads to unfair decisions by the magistrates. We have made proposals for provision of vehicles to magistrates for the purpose but, to date, the answer is that there is no money.

The other issue is affordability of justice by the majority population; the cost of running a dispute in court is so high and so is the cost of hiring legal services. Access to justice is also limited owing to ignorance of the law and legal rights on the part of the majority population. There is an overriding perception that a poor person cannot get a fair and favourable decision as against a more affluent person. With no comprehensive National Policy framework to support legal rights awareness and the provision of legal aid services for vulnerable and marginalized persons in Uganda, legal aid provision still relies extensively on private initiatives which are not sufficiently available to the population and higher in the urban areas. Although some NGOs and community based groups offer some form of legal advice, they are more inclined to service delivery. There is need to strengthen legal aid to enable greater access to justice by the indigent population. The Justice Centres Initiative by the Judiciary and JLOS was a good start but it needs to be supported. The cabinet also needs to expedite the Legal Aid Policy and the Legal Aid Bill.

#### **4.0 What are the major obstacles to land justice in Uganda?**

The persistence of disputes around land, serious gaps and contradictions in the legal framework, lack of clear regulation and enforcement mechanisms of the administration and justice systems, as well as discriminatory laws and practices, are major obstacles for people's claim to land, especially those of vulnerable groups like women and youth. This among others is attributed to the following:-

### 1. Lack of legal awareness or sensitization

On the part of the majority population about their rights vis – a vis the law both for landlords and tenants on land. From history, land law created a class system of land ownership influenced by the Landlord – Tenant relationship. Under the existing law, there is no equality of arms between the owners and users of the land. There is need for lawful or bonafide occupants to be recognised beyond mere protection on someone else's land and be conferred with registrable interest. In addition it is also important that all land in Uganda be parcelled and titled for purpose of easy identification of ownership which would significantly reduce land disputes and promote economic development.

### 2. Absence of a clear land policy

Uganda has no clear land policy and guidelines on land acquisition, land registration, land management, the issue of eviction, and utilisation of natural resources, among others. The land laws are supposed to be informed by a formal and clear land policy if the laws are to be consistent and progressive. Therefore there is need for a Clear land policy to inform land legislation in Uganda in regards to land acquisition, land registration, land management, eviction, and utilisation of natural resources, regularisation of the relationship between the owners and users of land in Uganda.

### 3. Protracted Court processes

There is a chronic delay in case disposal and a huge backlog in land matters. This can be attributed to a number of factors which

include: limited use of forensic evidence facilities, Unnecessary adjournments for unprepared lawyers, corruption, frivolous and vexatious filings, unnecessary injunctions for the purpose of delaying proceedings, unnecessary references to the Constitutional Court as a delay tactic, filing in multiple courts in order to forum shop, unavailability of witnesses (25% witness absence rate), failure to track witnesses (no fixed residence), loss of interest without notifying the court, often caused by poor witness protection program and failure to serve/prepare witnesses.

(a) Limited use of ADR in resolution of land disputes, criminalisation of land cases, poor record keeping in the courts, lack of a clear case management system, cumbersome rules of procedure, among others.

(b) Insufficient resourcing of the Judiciary and other Justice, Law and Order Sector institutions due to budgetary constraints denies the institutions the capacity to operate effectively thereby hampering access to justice by the Ugandan citizens. For example northern Uganda poor justice infrastructure was worsened by the insurgency, the justice delivery points are far apart rendering access to Justice difficult.

## **5.0 The mass return of internally displaced persons to their home villages**

As a result of the two decade conflict in northern Uganda, 1.8 million people were forced into Internally Displaced Persons (IDP) camps. In response, in 2004, the Government of Uganda **adopted**

**the National Policy for Internally Displaced Persons** (The National IDP Policy).<sup>2</sup> With the commencement of the Juba Peace Talks in 2006, the Government of Uganda started gaining control of the security situation in the region. As such, in 2005 the Government of Uganda issued a Directive to IDPs to leave the IDP camps and return to their homes. As a first step, IDPs were settled in temporary satellite camps gradually moving back to their original homes.<sup>3</sup>

This Directive was based on the assumption that; the IDPs were able to identify the land originally belonging to them and secondly, that this land was unoccupied. However, these assumptions were flawed. A number of IDPs were unable to locate their original homes for two reasons: First, some of the IDPs were born in or had moved to IDP camps at a young age and only grew up into adults while there. This category of IDPs did not have knowledge of where their original homes were located.

Secondly, some of the clan leaders and elders who were the custodians of customary laws relating to land ownership and exact land boundaries, had died during the conflict. This loss contributed to the knowledge gap. On the other hand, some of those IDPs who were able to identify their original homes, their land had been arbitrarily occupied by those that did not move to the IDP camps or by IDPs that had returned earlier. As such, some returnees

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<sup>2</sup> The Policy Goal is, 'To establish Institutions for managing IDPs situations: specify roles and responsibilities of the Institutions and Humanitarian and Development Agencies, the Displaced Community and other stakeholders while managing internal displacement.' The policy seeks to provide an enabling environment for upholding the rights and entitlements of IDPs during displacement, return and resettlement.

<sup>3</sup> Satellite camps were the first return movement sites created for IDPs as they were prepared for resettlement and reintegration in their original homes. They were located in a distance of about 2 to 3 kilometers away from their original homes.

were involved in the illegal occupation and sale of land that did not belong to them. These situations put together led to numerous land conflicts, episodes of violence and acts of counter aggression throughout Northern Uganda.<sup>4</sup>

This situation was further aggravated by two omissions: First, government did not conduct an impact assessment relating to the return, resettlement and reintegration of IDPs; secondly, although the National IDP Policy mandates Local Governments to *'assist IDPs to return, resettle and reintegrate, by acquiring or recovering their land'*, no strategies for this process are stated in the Policy and no implementation mechanisms are elaborated for Local Governments to follow. With no policy and institutional framework to mitigate the land conflicts that emerged to protect IDPs, some IDPs turned into squatters on their own land while others moved to neighbouring districts such as Kiryandongo, renting small pieces of land for their survival.<sup>5</sup>

**Comment on the effectiveness of the current law and institutional structures for Land Dispute Resolution in Uganda, specifically:-**

- (a) Local Councils
- (b) Specialised Courts (Land Division)
- (c) Others

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<sup>4</sup>Refugee Law Project, *Compendium of conflicts in Uganda* (2014)

<sup>5</sup> FHRI working paper on the views of victims on the future of Amnesty Law in Uganda, 2012.

The effectiveness of the current law and institutional structures for land dispute resolution in Uganda is considerably wanting in a number of respects, namely:-

- (a) There has been a failure, either through law or policy, to resolve the impasse between landlords and tenants (generally, land ownership vis – a vis land user-rights).
- (b) Insufficient funding to support specialised land courts, particularly the Land Division of the High Court and the Execution and Bailiffs Division. The concept of specialised courts or divisions is very effective. With experience from the Commercial Court and the Anti corruption Court we were able to achieve greater efficiency and effectiveness; we realised greater output, better case disposal rates, improved use of ADR, and generally, improved access to justice on the part of the court users.

It has not been possible to replicate these practices and to realise these benefits in the case of the Land Division because of a number of reasons. Due to limited resources the Land Division has been insufficient resourced in terms of human, finance and equipment. As such it has not been possible to exploit the full potential that would accrue from this kind of specialisation. It has also not been possible to extend this specialisation to the other areas of the country. It is therefore imperative that more resource allocations are made to the Judiciary to be able to have this court exploit its full potential in the adjudication of land matters.

- (c) Failure to operationalize the Local Council Courts; Local Council Courts are a particularly important avenue for protection and dispute resolution and are embedded in the communities and much more accessible than the regular courts of law. The Local Councils also play an instrumental role in facilitating land transactions at the local levels. If this role is well played, it has the effect of reducing the occurrence of land disputes or dealing with the root cause of the disputes.

The major value of these courts was to promote access to justice at the grass root and to decongest the formal court system. But these courts were capable of playing this role before the shift to the multi-party system. However, it is questionable whether local councils elected through parties would effectively constitute fair and impartial courts. There is need, in my view, to identify and adopt a different model for the appointment or election of Local Council Courts in the present circumstances.

Land Tribunals were ineffective and ended up creating immense backlog. They were however a necessary tool for fostering access to land justice. The concept therefore needs to be re-thought and refined.

- (d) Lack of a fool-proof land registration system and mechanism. A lot of disputes that come to the courts are a result of fraudulent and irregular land dealings which are reportedly

facilitated by the land registries. There is therefore serious ineffectiveness at this level.

## **6.0 What is your opinion on the allegations that corruption in Judiciary is a major impediment to access to land justice?**

There are numerous allegations of corruption, both real and perceived, in the Judiciary. Corruption is definitely an impediment to land justice but is not the major impediment. Some form of corruption is subtle and all this definitely impedes access to justice.

1. According to the **East Africa Bribery Index** (2014), 45% of respondents in Uganda indicated that paying a bribe was the only way to access various land services. Unfortunately, about ninety percent of the respondents that encountered a bribery incident did not report or make a complaint to any authority or person because they were beneficiaries of the bribery transaction and over 70% of the respondents said they had done nothing to fight corruption in the past twelve months. The real issue is the corruption at all levels of the society in Uganda. We cannot expect a clean Judiciary when the people who work in the Judiciary come from and interact with the same society that is infested with corruption. Citizens should be sensitized on the cost of corruption, corruption reporting channels, procedures and the impact corruption has in their lives. This will help them to acknowledge the role they have to play in

the fight against corruption. There is also need to establish and or strengthen avenues where citizens can lodge corruption complaints and seek redress. The existing mechanisms are seemingly unknown to the citizens or in cases where they are known, do not inspire public confidence. Government officials found culpable in acts of corruption need to face the law as prescribed and should not to be seen to go unpunished because of the positions they hold.

#### **7.0 What role do injunctive orders play in the administration of land justice in Uganda? Is there need for reform in this area of the law?**

Injunctive orders play a critical role in the administration of justice. They are a useful intervention between the time a party complains of a wrong and when such a dispute is resolved by the courts. As such they curtail illegal evictions and other extra-legal actions that would make it impossible for justice to be done even if the case was resolved in favour of the injured party. However in some instances they have been abused by some parties receiving such relief and sit back or actually make it difficult for the main suit to be resolved.

At times these orders are used as eviction orders and the worst abuse manifests itself by way of *ex parte* injunctive orders. This kind of abuse has often led to disobedience of court orders, unnecessary acrimony, and eventual loss of confidence in the courts. There is need for reform in this area of the law in the following aspects:-

2. Exparte Interim orders need to be granted in the rarest of the rare circumstances. A Practice Direction is being considered to guide the process of handling interim orders by the Courts. The Committee working on this Practice Direction is headed by the Principal Judge. Previously, the Principal Judge and the Head of Land Division (Justice Andrew Bashaija) have issued circulars in an attempt to guide the courts in the course of handling injunctive orders. These steps need to be concretized. The Civil Procedure Rules need to be amended to bring all injunction applications under the Powers of Registrars so that Judges' time and energy are saved for disposal of matters on merit as well as . Injunctions being given life spans. This will call for amendment of the Civil Procedure Rules to limit the number of applications that may be filed in land matters so that the court concentrates on substantive justice

**Comments on the execution of court orders arising out of land disputes in Uganda and challenges faced by the Judiciary during this process.**

- (a) Execution of court orders is the most acrimonious part of administration of justice. This is because land is an emotive issue which causes two extremes: resistance by the party against whom execution is supposed to be done on the one hand and ruthlessness on the part of the party in whose favour execution is done on the other hand.

- (b) Execution of court orders faces a number of challenges, namely:-
- (i) lack of sufficient legal knowledge and awareness on the part of not only the public but also some of the stakeholders like Court Bailiffs and security personnel who take part in the execution process;
  - (ii) corruption, misconduct, and impunity by Court Bailiffs and security personnel involved in the process. Court Bailiffs behave as if there are no Rules governing them to the extent that the civil debtors are charged exorbitant amounts that at times exceed the debt sought to be recovered;
  - (iii) politicisation of the execution process. Occasionally the courts are faced with political interference in the execution of court orders. The practice of vetting court orders by the police is an unacceptable interference with the independence of the courts. It also has the effect of increasing the cost of litigation. The police who are supposed to provide security during the execution exercise instead purport to review or amend the court orders and at times take over the process. The law on Court Bailiffs need to be reformed. Court Bailiffs needs to be brought under the direct control of the courts. There is also need to attach to the Bailiffs a special unit within the Police Force who would be trained in a bid to facilitate proper supervision of execution of court orders;

- (iv) indigence of many of the affected persons and inequality of arms between the litigants who appear in court. The more affluent members of the society influence the execution process to the disadvantage of the less privileged.

## **8.0 Suggest areas of reform for land justice in Uganda**

- 3. There is also need for uniformity in terms of land holding (tenure systems). Because of the different land tenure systems, the nature of land disputes differ from area to area which distorts planning for and management of land cases. The competing interests on land also thwarts effective commercial use of the land. All these aspects need to be streamlined through a clear land policy.
- 4. The use of Alternative Dispute Resolution needs to be strengthened and mainstreamed. A properly resolved dispute under ADR provides a win-win situation which affords a permanent solution to a dispute.
- 5. Deliberate effort be made to avoid criminalisation of land disputes. Having criminal offences on our statute books that are related to land use perpetuates rather than solving land disputes.
- 6. There is need to establish an environmental court/ division for better management of environment related cases.

7. There is need for greater skilling and capacity building of judicial officers in case management generally and land adjudication in particular. Many land disputes delay in the court system because of the limited capacity of especially junior magistrates in land adjudication.
8. We need to explore a re-development of the system of assessors and apply it to land cases. Because of the different land tenure systems, a judicial officer working in an area with alien cultural or traditional land practices and norms will find it difficult to make a quick and fair determination of such land disputes.
9. The new Judiciary structure needs to be urgently operationalised to increase access to justice points. Under The Judicature(Designation of High Court Circuits)Instrument NO.55 2016 High Court Circuits have been increased from 13 to 20 and under The Magistrate Courts (Magisterial Areas) Instrument, No.11 of 2017 Magisterial areas have been increased from 39 to 82. It is therefore important that we have these access points operational to be able to handle cases expeditiously.
10. There are weaknesses in evidence collection and processes i.e. limited capacity of the Government

Analytical Laboratory, in the entire country there are only 3 hand writing experts and yet most of the land cases involve allegations of fraud. The capacity of the Government Analytical Laboratory needs to be developed to facilitate the easy processing of fraud related land cases. Improved use of forensic evidence would shorten the time taken in resolving a single land dispute.

11. The land registration system needs to be transformed to eliminate the irregularities that breed numerous disputes.