



POLICY BRIEF

Certificates of Customary Ownership (CCOs) are not what they seem on the surface – risks to CCOs

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1. Introduction

Uganda's National Land Policy 2013 (NLP) sets out the principles and direction of the Government's approach to land policy. This document was published after the passing of the Land Act (1998) which leads to confusion between the law and policy, and which should be followed, although the Government has now published an implementation policy proposing to bring the NLP into legislation.

Section 237 of the 1995 Constitution provided for the recognition of four tenure systems – customary, freehold, leasehold and mailo and the 1998 Land Act operationalized this provision of the Constitution. Despite customary tenure's legal recognition by the 1995 Constitution, the NLP recognized that in 2013, customary land tenure "... continued to be regarded as inferior in practice to other forms of tenure and converted to Freehold"¹. To correct this wrong to the 80% of Ugandans who own land under customary land tenure, the NLP now promises that *"The state shall recognize customary tenure in its own form to be at par with other tenure systems (freehold, leasehold, and Mailo)"*² *"... establish a land registry system for the registration of land rights under customary tenure"*³ and *"...issue certificates of Titles of Customary Ownership based on a customary land registry that confers rights equivalent to freehold tenure."*

Despite this fundamental change from the current law, since the approval of the NLP, a few development actors have promoted and facilitated the issue of Certificates of Customary Ownership (CCOs) in Kasese and Nwoya districts, respectively. The sensitization that usually accompanies projects to issue CCOs focused on only one or two issues – that it provides one with better security and collateral for bank loans. CCOs can bring far reaching changes to the land rights of many people in a family and community, so it is important that there is a much fuller understanding of the pros and cons, especially as there is no doubt that the customary land tenure system needs to be supported with a title that is equal to Freehold; that can provide evidence of land rights, provide security of tenure and that can be used as collateral for bank loans. This paper is written to highlight some of the risks to CCOs, as they are currently implemented. The paper is also written to help communities and other stakeholders understand the risks in CCOs so that they can make informed decisions. The paper also proposes solutions to the risks.

1 Uganda's 2013 National Land Policy (NLP), Chapter 4(4.3).

2 NLP, Policy Statement 39 (a).

3 NLP, Policy Statement 39 (b).

2. Risks in CCOs and recommended solutions.

The risk	Proposed solutions to the risk
<p>1. Whose names will be in the CCO? – According to LEMU’s research, 85% of the land in Lango and Teso is family owned. This means that in order to reflect the existing rights structure, the CCO must have the names of all the family members, whether or not they are living on the land at the time. Facilitators of CCOs are very unlikely to be able to independently verify the information they are provided with. Given the greed for land that allows land grabbing within families between the powerful members (men, the wealthy, the educated and the politically connected) and the vulnerable members (women, children, HIV sick, the aged) the risk of the CCO is that the powerful members of the family can deliberately leave out the names of other members from the CCO. The legal implication will then be that those whose names are not in the CCOs do not own the land anymore.</p> <p>Similarly, under customary land tenure, land is managed in trust by the head of family defined as a married man, a widow, divorced woman and unmarried woman. In some instances, the head of family, not understanding the legal implication, might in good faith, decide to register the land in their names only to the exclusion of the family members, believing still to hold the family land in trust for the family. The legal change that takes place at registration is lost on the head of family and members.</p>	<p>Independent of the process and issue of the CCO, families should be facilitated to document their community and Family Land Rights and Lineage Tree (FLR&LT) which captures parents and the order of birth, death and marriage (for girls) of their children and community land owners This would provide a good tool for verification before the clan of the family and community land owners before any rights are documented.</p>
<p>2. Women’s land rights – Under customary law, there is a very strong assumption and expectation that “all girls will marry and all girls will not divorce but die in their marriages”, and because of this, they do not need the land in their maiden homes. This assumption is now misinterpreted by many people to be that “customs does not allow women to own land”. The risk in this is that the names of girls will be left out of the CCOs in the maiden home because of the expectation that she will one day marry and also from the CCO of the marital home because “one day she might divorce” and leave the marital family.</p> <p>Secondly, under customary tenure, men who produce children outside marriage are given opportunities to do the right thing by: a) marrying the mother, not marrying her but accepting to be the father and to give the child his clan name and land rights. If he refuses both options, the child born belongs to the clan of the mother and gets land rights from the mother’s family. Facilitating the issue of CCOs without understanding customary land rights and proceedings will risk the children born out of marriage being rejected by both families of the man responsible and the mother and their names left out of the CCOs. They therefore risk becoming landless.</p>	<p>There needs to be a discussion with the traditional institutions on the registration of owners of land in CCOs, especially of women and children in the two families – maiden and marital.</p> <p>There needs to be an active registry for CCOs that can reflect all the changes in the CCOs. The registry should be designed, understood before CCOs are issued.</p> <p>It appears to be the ambition of the NLP that such a registry is created for customary titles.</p>

3. Exclusion of traditional governance

One of the most important principles under customary land tenure is that land is held in trust for the present and future generation and because of this land is not for sale except by explicit consent of the family members and of the clan. The clan responsibilities in land administration after the issue of CCOs and in particular in protecting the rights of all family members could be lost. The danger is then that nobody else will take up this protection function.

The second risk is that policy makers will not be concerned with the CCO owners selling the land irresponsibly and without other family and community members and clan consents because an efficient land market is one of the strategies advocated for Uganda to have economic growth. NLP policy statements No 83 and 84 state that “The Government shall promote efficient, effective and equitable land markets in all land tenure regimes in support of the socio-economic and cultural needs of land users”. The risk is that land will be sold irresponsibly by few family members, leaving other family members landless. It will also increase conflicts in families and communities.

All titles have conditions under which they are issued. Leasehold titles have conditions in the titles; Freehold titles have conditions in the Registration of Titles Act and other laws. The CCO should have conditions that govern it. These conditions should be universal for all CCOs and they should stem from customary land laws. They should either be in the CCO certificates or by an Act of Parliament or agreed and known customs. Examples of these conditions are managing community and family land in trust; not selling land without family and clan consent, etc.

Rather than make use of the existing (and lacking) form that CCOs take, these points could be addressed in the drafting of a form of customary title.

Implement Strategy. 41 (v) of the NLP to “Recognise the role of customary institutions in making rules governing land, resolving disputes and protecting land rights”

4. Which laws and systems will apply to CCOs? S.3 (e) of the Land Act of 1998 defines customary tenure as a form of tenure “applying local customary regulation and management to individual and household ownership, use and occupation of and transactions in land”. Apart from Lango, Teso, Bunyoro regions and Alur, Aringa and Lugbara who have documented their Principles, Practices, Rights and Responsibilities (PPRR) that capture their customs, in the rest of the country, these customs remain oral. Even for the regions and communities who have documented their customs, these are not known to and used by the state organs. The risk is therefore that CCOs will not have clear laws to apply to it, especially in regards to post CCO issue land transactions. For example, if someone whose name is in a CCO dies - will the registrar (recorder) accept a letter from the clan to the effect that the person has died and their name should be cancelled or will the registrar expect a letter of administration from a court of law appointing an administrator of the dead person before agreeing to record the change?

Furthermore, there are differences in the state and customary land tenure system. The one most notable is the requirement for consent to be given before land is sold. The state requires consent from only the husband and wife to sell family land while the customary tenure requires consent of all family members and the clan to sell land. In this case, which laws will apply to CCO land transactions?

Where regions have documented their laws in the PPRR, these laws need to be accepted, understood and used by the state organs with differences understood and where possible, harmonized with state laws.

Where the laws are not as yet documented, the state should implement Strategy 40 (iv) of the NLP and “Document customary land tenure rules applicable to specific communities at the district or sub county levels”

The state should extract the principles underpinning customary land tenure systems from the PPRR that are not likely to change over time (i.e. managing family land in trust, definition of “head of family” need for family and clan consent, etc.) and pass this as state law for the whole country. In the alternative, different districts could pass the laws as ordinances – using the same laws all over the country.

S.9 (6) of the Land Act states that “any party aggrieved by the decision of the board (in converting land from CCO to freehold) may appeal to the land tribunal (magistrates court); and the tribunal/court may confirm, reverse, vary or modify the decision and make such orders as it is empowered to make by this Act.”

In the case what happens if the parents, who are managers of family land object to the conversion of the customary land – and wants the clan committee to hear the case as it is also provided for under S.3 (e) (which says customary law applies to customary land) and S. 88 of the Land Act (which says traditional authorities may determine and mediate land disputes)? – which law will apply? The CCO and its conversion therefore risks bringing customary law and institutions in conflict with the provisions of the Land Act. The risk in this is also that the CCO will cause confusion and can increase conflict amongst the family members. It will lead to family members choosing between customs and state laws that suit their selfish interests, usually also leading to loss of land rights of other family members.

5. Distorting of governance role and land rights of “head of family”. Customary land tenure governance and family land rights are vested in the institution called “head of family”. They have the responsibility to protect land rights of family members; to protect the land from irresponsible land sales and to allocate land to the family members. The CCO enters all the names of head of family and family members. This distorts the role of management and land rights and makes them all appear as equal and of the same level and role.

Furthermore, as land is divided amongst children and grandchildren, the size of land allocated gets smaller and smaller. By entering the names of all family members in a CCO document without differentiating parents from children and children from grandchildren the CCO is distorting land rights. The risk is that this will lead to conflict at the time of land allocation.

The CCO should only be issued to those with land rights of the same level of birth. The CCO should capture the names of the managers as managers. If the FLR< is adopted as part of the CCO or any title, the parents and those who replace them should be recorded so that they continue to consent to land transactions of the CCO.

Any title or CCO issued should spell out how the owners will share the land. Under customary land tenure, land is held jointly but this is only so if the family members are of the same level of birth (i.e. children in same level, grandchildren also the same level, etc.)

6. No functional registry to record changes in the CCO- In many places, there are no functional registries to record changes in CCOs. The risk is therefore that land with CCO can be sold and the names of the owners remain unchanged. This will lead to multiple sales of the same land and to land conflict. The people who buy land with CCOs are also at risk because S. 8 (2 (4) of The Land Act states that “no transaction shall have the effect of passing any interest in the land to which the transaction relates unless it is registered by the recorder ...”

All the three tenure systems – Freehold, Mailo, and Leasehold have main registries in the Kampala office in the Ministry of Lands and branches in some districts. It is only customary land tenure system that has its registry at the sub counties. Most of these registries have not been supported to operate efficiently. The NLP proposes to “... establish a land registry system for the registration of land rights under customary tenure”.

The Ministry of Lands should discuss with stakeholders, including traditional institutions the modalities to have these registries set up and operationalized in line with the NLP.

7. Who will guarantee that the information in the CCO is correct? – S. 59 of the Registration of Titles (RTA) Act (Cap 230), states that “No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate....” The Land Act of 1998 was passed AFTER the registration of Titles Act and so this section of the RTA does not apply to CCOs. The risk is therefore that the Government will not be responsible for mistakes made in the information on the CCOs. This means that the buyers of land with CCOs are not protected and can be parties of conflict they were not prepared for.

If the CCO is intended to serve the purpose of being equivalent to title, then it should benefit from the same protections. The Ministry of Lands needs to lead the discussion on this with all stakeholders, including with traditional institutions, so that the government guarantees the CCO or customary land title, the same way S.59 of the RTA guarantees Freehold titles. This assurance is what will give security of tenure to the buyer of land with a CCO.

8. Conversion of customary land to Freehold – According to Policy Statement 39 of the NLP, (a) The State shall recognize customary tenure in its own form to be at par (same level) with other tenure systems.

The fact that the CCO was provided for by the Land Act before the NLP and the fact that S.9 of the Land Act provides for conversion of the CCO to Freehold implies that the CCO is inferior. The risk is that continuing to issue CCOs is continuing to treat customary tenure as inferior and yet this tenure provides land from which 80% of Ugandans derive their livelihoods. The risk is treating customary tenure as inferior means the Uganda Government will not address the many problems the system has- lack of support, misunderstanding of its rights and governance, fighting for space with the State systems. The result of this is seen in many land dispute cases clogging courts and clan forums and having many land related criminal cases. This deters development.

The National land policy provides for a title for customary land that is equal to Freehold. Customary land is majorly held in unit of family and community land rights. There is therefore need to design and operationalize appropriate titles for customary land. It is important that all of this goes together because the risks are higher when issuing CCO’s on their own in an administrative and legislative vacuum. The provision of S.41 of the NLP should therefore be implemented. This Section states – “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” (iv) make provisions 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, etc.

3. Conclusion

The policy aim to support customary land tenure as an equal to Freehold tenure was set out in the National Land Policy. From the above risks, it is not obvious that the CCO, as is currently provided for in the law and implementation, will provide an appropriate title and security of customary land tenure that will allow the tenure system to evolve and remain within its unique and different system, alongside the other 3 tenure systems – Freehold, Mailo and Leasehold. The feedback LEMU has had from clan heads and communities in Lango, a few NGOs in Teso is that the appropriate titles for customary land are family and community land titles and not individual titles. These have never been designed or issued before in Uganda and therefore need wider discussion on the form they should take. The communities and clans do not want the customary land tenure system converted towards a Freehold through the process of issuing CCOs that can be converted to Freehold or issuing individual titles.; they do not want the governance of customary land tenure to be taken over by the State institutions but they would like the government to support their system to evolve. Their interest is now supported by the National Land Policy, unlike before. Members of Parliament can represent their constituencies by calling on Government of Uganda to implement the 2013 National Land Policy in favour of evolution of customary land tenure system.

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