THE CHALLENGE OF PROVING CUSTOMARY TENURE IN COURTS OF LAW IN UGANDA: REVIEW OF THE CASE OF HON. OCULA MICHAEL & OTHERS V. AMURU DISTRICT LAND BOARD, MAJOR GENERAL OKETA JULIUS, CH…

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Rose Nakayi*

Abstract

Customary tenure is prevalent in northern Uganda. This system is mainly characterized by a lack of registration of land that is predominantly held by individuals or communities in accordance with custom. The over two decades armed conflict that ravaged this region and the displacement of people from their land that followed, ushered in an era of unique issues in the arena of claims to customary land in that region. Most important, return from displacement brought about increased contestations on land between and among members of communities, yet there was also high demand for land to be used in post-conflict reconstruction and development by investors and the government. This case by Hon. Ocula is illustrative of the above situation. This article offers a review of the facts, evidence and decision in this case. Besides aiming to highlight the precarious situation of claims to customary land in the context of highly imperfect situations characterized by armed conflict and displacement, this article analyses what the case tells us about the general situation and the challenges of proving customary claims to land in Uganda. The analysis shows that currently in Uganda, it is rare that customary claimants will succeed in cases adjudicated in a highly procedural and technical environment of a court of law.

I. INTRODUCTION

Northern Uganda has in the post-conflict phase (since 2008) witnessed an increase in disputes over land. This has been at various levels including: the horizontal, between and among ordinary/non-elite individuals or groups of individuals; the vertical-between the ordinary person or community on the one hand, and powerful actors such as those connected to the state or, corporate entities and/or government institutions.

The case under review here was decided by Justice W.M. Musene, Judge of the High Court of Uganda sitting at Gulu District in northern Uganda. It is a case by Hon. Ocula Michael, Hon. Aciro Concy, Hon. Pentytoo David, Uma Zakeo and Obalim Jack Welaya verses Amuru District Land Board, Major General Oketa Julius, Christine Atimango and Amuru Sugar Limited Works. Hearing of the case started in 2008 and it was decided on 2nd February, 2012. In general the applicants were challenging the authority of the Gulu District Land Board to give away land (by sale or lease), to the respondents. The land in issue is alleged to be customary land that belongs to some communities in northern Uganda. The applicants on the whole lost the case to the respondents. Be that as it may, the indispensable value of this case goes beyond the likely grief that the applicants suffered from the loss and the benefit that the respondents may have garnered from the win. Rather, the proceedings/evidence and judgment in the case give us an insight into the challenges associated with proving rights to land embedded in customary tenure (in formal courts of law). Customary rights and tenure in contemporary northern Uganda exist in

the milieu of high levels of informality and imperfections such as armed conflict and displacement, factors likely to be ignored if cases arising from it are adjudicated in formal courts of law.

The conceptualization of customary land tenure in some cases and Uganda's law(s) does not necessarily reflect its realities on the ground. At the same time, the realities are not adequately reflected in the court processes that are so tied down by technical imperatives of a procedure driven system, as embedded in law on rules of evidence and procedure. This trend is indicative of the wobbly future of customary tenure and claims to rights under it. This is more so since much of its "norms" and detail is neither written down nor incorporated in law, but inscribed on the mental memory of humans, managed in the customary spaces with mainly local normative systems and socio-political processes. Note that accessibility, flexible nature of processes, inclination toward mediation or reconciliation is cited to be among the good or positive attributes of customary systems of land tenure or dispute resolution.[1]

The analysis below shows that for holders of customary land to benefit from the existing legal system, it is important for courts to adopt a holistic approach that is not exclusively grounded in the law and technical rules of procedure; but one that goes beyond to incorporate in the case analysis/judgment, on-the-ground realities in the customary space in which customary tenure exists. For northern Uganda, armed conflict and the fact of displacement may be a part of the factors to guide the conceptualization of customary tenure and vindication of rights arising from it in courts of law. In this commentary the author makes a review/critique of some selected main points in the given case, but also offers an insight into what these tell us about the general situation.

In short, this commentary sets out to show what this specific case tell us about the general situation of customary land in Uganda in some selected areas that include: (i) continuity& proof of customary rights to land in the wake of armed conflict (ii) institutions that deal with disputes on customary land and can testify about its existence (iii)level of knowledge/insight advocates have on matters of customary land tenure (iv) issue of proving customary land in courts of law in Uganda and; (v) to what extent rules of evidence or procedure should be enforced in such cases. These will not be presented in any chronology but will arise in the analysis of the case.

II. THE CONTEXT

Land issues in northern Uganda have in recent times been given much attention in scholarly literature and the media.[2] The analyses have mainly concentrated on the nature of customary

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[1] Erica Harper *et al*, Conclusion: Enhancing Legal Empowerment through Engagement with Customary Justice Systems, in WORKING WITH CUSTOMARY JUSTICE SYSTEMS: POST-CONFLICT AND FRAGILE STATES (Erica Harper ed., 2011), at 172; Also see, E. WOJKOWSKA, DOING JUSTICE: HOW INFORMAL SYSTEMS CAN CONTRIBUTE (2006).

[2] *See*, Ron Atkinson, *Land Issue in Acholi in the Transition from War to Peace*, 4 THE EXAMINER (2008), at 3-9, 17-25; WORLD BANK, UGANDA: POST-CONFLICT LAND POLICY AND ADMINISTRATION OPTIONS: THE CASE OF NORTHERN UGANDA, REPORT NO. 46110- UG MAY 2009; Chris Huggins, *Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform And Development*, in Transitional Justice and Development (Pablo De Greiff and Roger Duthie eds., 2009), 332- 374; Margaret Rugadya *et al, Analysis of Post Conflict Land Policy and Land Administration Issues and Lessons: A Survey of IDP Return and Resettlement Issues and Lesson: Acholi and Lango Regions*, Northern Uganda Land Study for the World Bank, to input into Northern Uganda Peace, Recovery and Development Plan (PRDP) and the

claims to land in Acholi culture, and cause-effect relationship between armed conflict and land disputes.[3] Beyond that, there has been a keen interest in the study of how internal displacement as a result of the armed conflict has shaped contestations on land in Acholi sub-region and northern Uganda in general.[4] The above concentration on mainly issues of customary land tenure in northern Uganda is partly a result of the prevalent nature of customary land in both the region and the country.

Customary tenure accounts for over 75 percent of land in Uganda, and 90 % of land in northern Uganda.[5] Customary tenure in the northern region is not uniform. It differs from sub-region to sub-region, tribe to tribe and there are instances of peculiarities that differ from one clan to another within the same tribe. The cross cutting attributes of customary tenure and customary land law are many. Customary land law is unwritten law; it is found in the customs and traditions of the people.[6] Not necessarily wired to run in conformity with set bureaucratic legal rules cast away in book volumes and paper bundles; customary tenure is mainly controlled by tacit /latent codes. Many of the codes are not consciously imbued in a given culture, but are routinely followed and are more implicit than explicit. Some of the elderly are the custodians of these customary rules and also play a key role in dispute resolution and protection of customary land rights. These elderly persons could be those that have distinguished themselves and earned respect from the community either by virtue of the fact that they were born into a certain respectable lineage, or by their works in and for the community. In Acholi sub-region, these are chiefs, clan heads and Rwodis.

Reliance on the knowledge of human beings like elders or family and community members increases the possibility of inconsistencies in the information regarding customary land rights issues and the fact that they are mortal human beings could affect continuity of the knowledge. Further characteristics of customary tenure in Acholi sub-region include: much of the land is not surveyed or registered; and thereby the boundaries are unclear/not permanent. Land ownership is claimed at various levels: communal, clan, sub-clan, family and at times individual. Furthermore, Ollenu's idea (of stewardship) that customary land is held in trust for the living, the dead and future generations is not foreign to Acholi sub-region. In other words, land has to be used in such a way that does not contradict the ethos of the ancestors, and at the same time preserves it for the sons and daughters of the soil to be born in the future.[7]

The above description of the customary tenure system shows that it bends more toward the informal than the formal. This makes it vulnerable to becoming undermined or destabilized mainly as a result of the armed conflict that began in 1986 and ravaged the region for over two

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Draft National Land Policy, 21 (February 2008). Also see David Omara, *13 huts torched in revenge attack*, THE DAILY MONITOR, February 18, 2013.

[3] Margaret Rugadya *et al*, *id*., at 2; IOM, UNDP & NRC, LAND OR ELSE: LAND BASED CONFLICT, VULNERABILITY, AND DISINTEGRATION IN NORTHERN UGANDA STUDY (October 2010)

[4] IOM, UNDP & NRC, *supra* note 3.

[5] Margaret Rugadya *et al*, *id*., at 2. Also see, C.K. Petracco & J. Pender, *Evaluating the Impact of Land Tenure and Titling on Access to Credit in Uganda*, International Food Policy Research Institute (2009), who put the percentage of customary land in northern Uganda at 99.19%. *See*, Ker Kwaro Acholi, *Principles and Practices of Customary Tenure in Acholiland* (Gulu, Uganda: Ker Kwaro Acholi, June 2008), at 1, putting the percentage at 93 %.

[6] See The Land Act Cap. 227 Section 3 (1) (a).

[7] *See* N. A. OLLENNU, PRINCIPLES OF CUSTOMARY LAND LAW IN GHANA (1962).

decades, with various well documented ramifications on the people.[8] Displacement is one of them. Massive displacement (especially in the western half of Acholi) began in 1996 and lasted for over ten years. For example, writing in 2007, Baines says: "Up to 90 % of the population in Acholi *(Acholi land consists of the districts of Gulu, Kitgum, Pader and Amuru)* land are confined to IDP camps, cut off from agricultural production on their land and dependent entirely on food assistance from the United Nations."[9] *(Emphasis added and in brackets is an original footnote inserted in brackets).* This means that displacement rendered much of the land in the region inaccessible for residence, or agriculture. The causes of displacement vary. Some people voluntarily moved off their land and settled on others' land for fear of the Lord's Resistance Army (LRA) attacks, whereas others were forcefully displaced by government forces, for security and other reasons.[10] For example, with the Uganda Peoples Defense Forces (UPDF) Operation Iron Fist came accelerated attacks and violence and in October 2002, the people in Gulu, Pader and Kitgum were given 48 hours to move to protected villages that numbered over 50 in the region.[11] As a result of displacement, movement in and out of the protected villages is said to have become cumbersome, thereby limiting access to land for agriculture; the result was poverty and limited livelihood.[12] Cultivation was only authorized within a radius of 2 kilometers from a camp.[13] According to a study conducted in 2004, 50% of the Internally Displaced Peoples (IDPs) interviewed had access to less than half of an acre and in general only 13 % had access to land.[14] The implication for the foregoing is that over 80% of the IDPs did not have access to land. Although the actual intentions on the part of the government have not been fully

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[8] *See*, ADAM BRANCH, DISPLACING HUMAN RIGHTS: WAR AND INTERVENTION IN NORTHERN UGANDA (2011); CHRIS DOLAN, SOCIAL TORTURE: THE CASE OF NORTHERN UGANDA, *1986-2006* (2009); SVERKER FINNSTRÖM, LIVING WITH BAD SURROUNDINGS: WAR, HISTORY, AND EVERY DAY MOMENTS IN NORTHERN UGANDA (2008); Ronald R. Atkinson, *supra* note 2. Erin K. Baines, *The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda,* 1 THE INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE (2007), at 101-102; More is also seen in various research reports such as; HUMAN RIGHTS WATCH, UP ROOTED AND FORGOTTEN: IMPUNITY AND HUMAN RIGHTS ABUSES IN NORTHERN UGANDA, HUMAN RIGHTS WATCH REPORT, VOL. 17, NO. 12(A) (SEPTEMBER 2005); HUMAN RIGHTS WATCH, ABDUCTED AND ABUSED: RENEWED CONFLICT IN NORTHERN UGANDA, VOL. 15, N0. 12 (A) (July 2003).

[9] Baines, *supra* note 7, at 95.

[10] Land and Equity Movement in Uganda (here in after "LEMU"), *Land Matters in Displacement: The Importance of Land Rights in Acholiland and what Threatens them*, A study conducted for Civil Society Organizations for Peace in Northern Uganda (CSOPNU) 5 (December 2004), at 20 & 21. The study revealed that force was applied mostly to the earlier incidents of displacement in 1996, and in some of those cases, land owners were given no choice but to accept camps of their land.

[11] IRIN, In-Depth: Civilian Protection in Armed Conflict in Uganda: Civilians targeted by their own people, available at, http://www.irinnews.org/InDepthMain.aspx?InDepthId=31&ReportId=70561&Country=Yes accessed March 4th, 2010.

[12] Zachary Lomo and Lucy Hovil, *Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda,* Refugee Law Project (here in after RLP) Working Paper No. 11, (February 2004), at 26. Also see, Finnström, *supra* note 7, on the general bad conditions of living in camps.

[13] LEMU, *supra* note 10, at xii.

[14] LEMU, *supra* note 10, at xii. Note however that the same report casts doubt on the figures, later on in its text (at 25). It says "…Although it is difficult to establish reliable figures for those without access to land, it is even more difficult to establish just how much land people do cultivate."

proven, research on the situation shows heightened suspicion among the local population that the government/some government officials were interested in land that was left behind by the displaced people- i.e., grab it while people are away in the camps.[15]

The end of the armed conflict and displacement, and return home, have greatly tested claims to customary land rights and brought about diverse new issues concerning such rights in the context of a society transitioning from war to peace. Tindifa argues that the period of return presents a high likelihood of land disputes associated with unclear boundaries.[16] Mistrust and general belief that government has a hidden agenda to grab land and belief that the sub-region has oil deposits in some areas increased peoples' interest to guard/protect their land.[17]

Heightened tension as a result of a conglomeration of factors like the above has led to many land disputes in the communities.[18] The case under review here is one of them. Some of these cases are informative of many issues. These include the politics around land disputes; i.e., that they have in some cases been used as political capital for key/powerful politicians; they promote land disputes, and then help in their settlement in such a way that they come out as heroes or saviors to the disputants.[19] They front such a record of "performance" to garner support for re-election into political office. This is not unique to northern Uganda, but the case with other communities where land disputes are predominant, say; among the pastoralist communities in Kenya.[20] Aside from that, for northern Uganda, the inter-connectedness of land disputes and crime has also been displayed.[21]

In the circumstances, some politicians and large sections of the local population are very skeptical about foreigners acquiring land for alleged investment; they are suspicious of the investors and also doubt the genuineness of the government in promoting investment in the north.[22] On the other hand, some politicians like Ogenga Latigo (former leader of the opposition in Parliament) have supported the acquisition of big chunks of land to promote agriculture, create employment, as one of the ways to fight poverty.[23] Land is a very important resource to

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[15] *See*, Rugadya *et al*, *supra* note 2, at 23. Some of these suspicions heightened when government made attempts to encourage investors to invest in the region in an alleged bid to develop the area and create employment for the people of the region. One such incidence is the proposal to offer land in Amuru District for sugar cane growing to an investor - Madhivani.

[16] Sam B. Tindifa, *Land Rights and Peace-building in Gulu District, Northern Uganda: Towards an Holistic Approach,* Huripec Working Paper No.7, 28 (May 2007), at 25.

[17] Indeed there are recent reports on oil discoveries in Nwoya District. *See*, Oil Review Africa, *Total Discovers Oil in Uganda Nwoya District,* available at oilreviewafrica.com/exploration (accessed March 5, 2013).

[18] *See* for example, David Omara, *13 Huts Torched in Revenge attack*, DAILY MONITOR, February 18, 2013; Simon Peter Emwamu, *Amuria Residents Protest Over Planned Land Takeover*, DAILY MONITOR, February 18, 2013.

[19] *See*, Harriet Anena, *Let the north hold the hoe to break the soil and not break away from Uganda*, DAILY MONITOR, February 27, 2013.

[20] Esther Mwangi, *Bumbling Bureaucrats, Slugigish Courts and Forum-Shopping Elites: Unending Conflict and Competition in the Transition to Private Property,* 22 EUROPEAN JOURNAL OF DEVELOPMENT RESEARCH (2010), at 718.

[21] Chris Ocowun, Two Amuru Girls burnt to death over land disputes, available at http://news.jonzu.com/z_middle-east_two-amuru-girls-burnt-to-death-over-land-disputes.html, (Accessed March 7, 2011).

[22] *See*, Tindifa, *supra* note 16, at 24.

[23] *Id.*, at 24.

facilitate the movement of the north to recovery, in economic and other terms. Yet, allegations of land grabbing by the powerful does not help the situation.

For instance, during the displacement, there were documented instances of land grabbing by state connected actors; in which it was alleged that the army was farming land left behind by the displaced, logging from it, etc.[24] Projects aimed at facilitating recovery were feared by some to be conduits of land grabbing. The above was evident in one of the cases in which the president's brother, Caleb Akandwanaho (a.k.a Salim Saleh), started a Security and Production Programme (SSP) which was feared to be a conduit through which land would be grabbed.[25] Although the project was started on land whose owners consented, it is highly unlikely that the negotiations between the two unequal parties would leave the owners with an option to turn down an offer if they wished. There is actually no resource and space for psychological political or material balance to bring about more balanced negotiations. This situation also has a high likelihood of being shaped by poverty, power asymmetries and armed conflict hindering/undermining fair and balanced outcomes in land negotiations.

The timing of the promotion of registration and certification rights to land is another factor that contributed to the tension on land and zealousness in guarding it. Such efforts are not new, having been recommended in the 1980s, in a study funded by the World Bank and the United States Agency for International Development (USAID), conducted by the Makerere Institute of Social Research (MISR) and Land Tenure Center at Wisconsin, about the land question in Uganda.[26] It advocated for the adoption of freehold as a uniform system for Uganda and an open market for land; i.e., a private property system.[27] Although criticized by some as having made only skin deep investigations into the deeply rooted controversies over land for example in Buganda; and coming up with a recommendation to make land a commodity on the market, the study proved influential, for various reasons. On its basis, among others, some provisions were inserted in the Land Act, 1998 (Cap. 227) to facilitate conversion of the customary to freehold or its certification.[28] On the basis of the Land Act cap 227, customary rights holders have an option to register their interests in land, or convert it to freehold.[29] As of

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[24] For details see, LEMU, *supra* note 10, at 16.

[25] Lomo & Hovil, *supra* note 12, at 27; Tindifa, *supra* note 16, at 23. This Project was officially intended to facilitate mechanized agriculture on land close to the camp in order to boost food security for the people in the area. The pilot was according to a report by LEMU, *supra* note 10, in Awer Camp in Gulu district.

[26] MAKERERE INSTITUTE OF SOCIAL RESEACH (MISR) AND UNIVERSITY OF WISCONSIN LAND TENURE CENTER, LAND TENURE AND AGRICULTURAL DEVELOPMENT (1990).

[27] *See,* Simon Coldam, *Land Reform and Customary Rights: The case of Uganda*, JOURNAL OF AFRICAN LAW *(*2000), at 68.

[28] Patrick MacAuslan*, As good as it gets: Politics and markets in the making of Uganda's Land Act, 1998,in* BRINGING THE LAW BACK IN: ESSAYS IN LAND, LAW AND DEVELOPMENENT (Patrick Mcauslan ed., 2003) 275-309 at 292 .

In Roman terms, land is made *Res Commercii.*

[29] *See,* The Land Act Cap. 227, Sections 5, 6 and 9. The government has promoted certification of customary land first in Acholi and Lango sub-regions on the basis of a belief that they are demanded by the people as a cure to the rampant land disputes. *See* Sarah Tumwebaze, *Minister advises land owners to register their property*, THE MONITOR, Thursday, March 15, 2012. Note however that there are a number of voices against certification in these areas. The reasons for these include: (i) it might bring about land theft, (ii) that the processes thus far exclude traditional authorities, (iii) the processes leading to

January 2013, this was yet to be implemented. The reasons for this vary. First of all, people have not been keen to secure certificates, due to high levels of suspicion of the process, limited efforts to sensitize people on the advantages that accrue from certification of land. Also some of the institutions supposed to handle the certification procedures were at the time of writing this article not in place in Acholiland and other parts of the country.[30] In addition, the process has also been hampered by the lack of funds.

At the intersection of the above, there is heightened fear for many reasons: (a) that the government might not be genuine in its pursuit of land to facilitate investment in the region; (b) politicians and other powerful actors could be using their positions/power to grab land from the people; (c) That the registration and certification procedures could be used by successful grabbers to escape responsibility once they register and get titles to formerly unregistered customary land. At the same time, there are genuine needs for land use to facilitate movement of the region and its people from emergency to recovery.

This case under review here arises within the above context. Therefore, the decision ought to have been guided/informed within this context. The case further presents a challenge of adjudicating cases anchored in the customary space, within the legal sphere; in courts run according to technical rules of procedure and laws. It is telling about many more aspects of customary land rights in Acholi sub-region and Uganda in general.

III. ABRIDGED FACTS

The land in contention is located at Omee Lujor, Lwak Obito, Pailyec Parish, in Amuru Sub County in Amuru District. It was allocated to the other respondents by Amuru District Land Board. The applicants in this case claim to be the customary owners of the land, thereby contesting the authority of the first respondent; Amuru District Land Board to allocate it as it did. The major ground of contention is the allocation of the land without the consent or involvement of the customary owners was a violation of their customary right to it; and therefore in breach of the constitution of Uganda that guarantees this right.[31] On the other hand, the respondents argue that the land in question is not customary but public land. They produced pieces of evidence to show that this land was initially a gazette by the colonial government as Aswa Lolim Game Reserve in 1959 according to Legal Notice No. 217 of 1959. That made it a habitation free area

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certification are complicated and incomprehensible by the locals, and (iv) that the masses have not been sensitized on these processes and the good in certification. *See*, Jacky Adure & Cissy Makumbi, *Government move to issue land certificates draws mixed reactions*, THE MONITOR, Thursday, March 29 2012; Francis Gimara, *Customary certificates of title good pain killers but not the right cure*, THE MONITOR, Tuesday April 3, 2012.

[30] The Norwegian Refugee Council (NRC) has been assisting people interested in acquiring certificates of customary ownership for their land through their Information, Counseling and Legal Assistance Project (ICLA). According to information got from one of their officers (in an interview on October 12, 2010 at their offices in Gulu), There are some Land Committees established to deal with the applications but not in all areas where they are supposed to be. Also, not all Land Boards are in place and operating. In a few places where the Land Boards are, they cannot fully function for lack of quorum. This means that applications cannot go beyond the Land Board, NRC has assisted some people through the process of acquiring certificates, but no certificate has been issued so far for reason of dysfunctional institutions to deal with the applications.

[31] The Constitution of Uganda guarantees the right to property under Article26 and also provides for customary tenure under Article 237 (3) (a).

until it was degazetted in 1972 according to section 1 No. 55 of the Game (Kilak) hunting area of 1972 (Revocation) Order, 1972.[32] On the basis of this, they claimed that the 1st respondent, Amuru District Land Board, has the authority over it as public land and also to allocate it to the respondents without violating any constitutional rights of the applicants.

The applicants sought a declaration that: (i) the allocation of the land to the respondents is null and void and should be cancelled or stopped; (ii) that the said allocation violated the Constitutional rights of the customary owners of the land; that it amounted to deprivation of their rights to own property and was a trespass. Further, the applicants sought a permanent injunction, payment of general damages and costs of the suit.

The case was brought by Notice of Motion under article 50(1) and (2) and 139(1) of the Constitution of Uganda and Rule 1 and 8 of the Fundamental Rights Freedoms (Enforcement Procedure) Rules.

All the respondents took part in the case save for a one, Mr. Opio Michael who did not file any affidavit in reply and neither did he appear during the hearing, an indication that he had lost interest in the case.

Affidavits were filed by either side of the parties in support of their cases. For the applicants, the following filed affidavits of evidence: Hon. Penytoo David, Uma Zakeo and Obalim Jack Waleya. On the respondent side, they were by: Mr. Alex Okwonga (chairperson of Amuru District Land Board), Major General Oketta Julius, Christine Atimango, K.P Eswar, the Director of Corporate Affairs, Amuru Sugar Works Ltd. It should be noted that Major General Julius Oketta filed six affidavits to support his case. Also in support of Christine Atimango's case was an affidavit filed by the Gulu District Land Surveyor called Kioko Robert. Up to nine issues were framed in this case and these include:

1. Whether the application adopted the right procedure.
2. Whether the Application discloses a cause of action against the Respondents jointly and severally.
3. Whether the Applicants have *locus standi* in bringing the application.
4. Whether the suit land is customary or public land.
5. Whether the 1st Respondent had the authority to allocate the disputed land; and if so.
6. Whether the1st Respondent acted lawfully in allocating the disputed land to the other Respondents.
7. Whether the applicants are entitled to the remedies that they have requested for.

Many aspects of the facts of this case, evidence presented and judgment rendered are imbued with telling signs of the precarious situation of customary tenure in Uganda as seen below.

IV. REFLECTING INTO CUSTOMARY TENURE AND CUSTOMARY LAND RIGHTS

A. The Status/Position of Customary Land/Rights: A General perspective

The passing of 1995 Constitution ushered in a new era, in which customary tenure is accorded (at least on paper) equal status of recognition with other tenures. Article 237 (2) of the Constitution legitimizes customary tenure; land in Uganda can be owned in accordance to customary tenure rules, or as mailo, freehold, and leasehold. This legal validation of customary tenure (in law and principle) displaces its previous unwarrantable situation mired with

[32] See., page 26 of the case report.

uncertainty and insecurity on land for customary rights claimants that was set in previous land laws in Uganda, and finally set in the Land Reform Decree of 1975. Under the 1903 Crown Lands Ordinance all un- allienated customary land was vested in the Crown (in England) as Crown land (and in the Uganda Land Commission after independence). By implication, the authority to alienate, sale or transfer this land vested in an authority other than the customary occupier/ "owner". The 1975 Land Reform Decree that made customary occupiers tenants at sufferance that could be evicted any time deeper entrenched the precarious situation until the status-quo was toppled by the 1995 Constitution.

The corollary of the above is that recognition in the law makes customary law (on land in this case) part of the *corpus juris* of Uganda; making land rights rooted in custom also legally defensible.[33] Hart has made an argument that some rules of law originate in custom without any legislative backing.[34] This holds true for Uganda, i.e., custom that is not inconsistent to the spirit of the constitution is recognized as making binding law among people that ascribe to it. Among the incidents of customary tenure seen in section 3 (d) of the Land Act is that land has to be held according to "local customary regulation". The customs that make up that regulation have to be in line with the spirit of the Constitution or else they are void,[35] and also are sensitive to the rights of marginalized groups such as children, women and persons with disability.[36] In short, for custom to be recognized by law, it has to be in line with the Consitituion and also protective of rights of the marginalized in society., as Hart suggests.

In Uganda however, there is a gap between the expected implication of such legal inclusion about the customary and the practice on the ground. A critical look at the Constitution, Land Act, and the motives behind some provisions on customary tenure reveals the protection given to the customary is not as tangible as it looks on paper. To scholars like Simon Coldham, provisions in the Constitution (Article 237 (4) (a)) and the Land Act (Section 9) stipulating the possibility to convert customary tenure to freehold are indicative of the government's long term plan to move away from the customary to private *register-able* claims on all land in Uganda.[37] This is more so since there is great importance or value attached to tenure security in land.[38] It is believed, and erroneously so, that tenure security and customary tenure are mutually exclusive, thereby justifying its conversion to freehold. In the same arena are other theories propounded to the effect that with private property rights (such as those from freehold) you get tenure security, and if you add investment to the equation there are high chances of economic development.[39] The above are amplified by De Soto's (widely criticized) theory; the more a country reduces its informal sector by say promoting private property rights, the wider it's propensity to produce

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[33] H.L.A. HART, THE CONCEPT OF LAW (1990), at 48

[34] *Id.*, at 48

[35] The Constitution of Uganda, Article 2 (2).

[36] See, The Land Act Cap 227, Section 27.

[37] Coldam, *supra* note 27, at 67.

[38] See, Migot-Adholla, Shem & John Bruce, *Are indigenous African tenure systems insecure?* in SEARCHING FOR LAND TENURE SECURITY IN AFRICA (J.W. Bruce & S.E. Migot-Adholla eds., 1994), at 1-14.

[39] See for example: Shipton Parker, How Private Property Emerges in Africa – Directed and Undirected Land Tenure Reforms in Densely Settled Areas South of the Sahara, Boston, Harvard University (HIID & Dept. of Anthropology (1989a). Shipton Parker, Land and the Limits of Individualism, Population Growth and Tenure Reforms South of the Sahara (Cambridge, Harvard Institute for International Development, Discussion Paper no. 320.1989b).

capital for economic development.[40] This imperative to use land for purposes of economic development exists (for Uganda and other places where customary tenure is prevalent) in an arena where it is not only economic development that should matter, but also other purposes which land serve, e.g., Customary tenure could be protected and promoted for a well-articulated reason that it is more inclusive (albeit than exclusive); with access rights based on kinship among others.[41] In the customary is a social vestment of shelter and safety for some generally marginalized groups like widows, orphans and at times children. As mentioned earlier, customary tenure is the widest/commonest tenure in Uganda, and in the north of the country it accounts for about over 90% of the land.[42] It therefore means that well calculated efforts to introduce changes to land tenure relations in an effort to bring about a specific kind of material development could have a wider reach and great impact for sections of the population if somewhat effective/successful. At the same time, the negative consequences of any efforts that are not well crafted can have the same impact on a wider community. It thus becomes pertinent to seek a balance in all matters concerning claims to customary land in the post-conflict setting of northern Uganda.

Although according to the court in this case the applicants did not prove customary tenure, this case confirms the secondary position of customary or perceived customary claims to land compared to other claims rooted in other tenures. This is more so where the customary cannot concretely be proved, and is in competition with other claims to land and the imperative of promoting economic development. Clearly, capitalist development based on private property, commercial markets for land etc., is the model that the government/donors/domestic elites seem to favor.

In this case, the applicants claim customary tenure that they cannot prove, yet the respondents acquired a better claim in a leasehold type tenure that they could, by document prove. Some of the land in issue would be used for large-scale agriculture for economic development of the region.

B. Authority over and Knowledge about customary land

There are distinct institutions that deal with land matters that arise in the customary spaces, from those that handle cases in the spaces controlled by the state. The fact that a contention is on customary land does not mean that state institutions or courts cannot deal with it. Note however that where customary tenure on land exits, having cases in this customary space decided by

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[40] *See*, HERNANDO DE SOTO, THE MYSTERY OF CAPITAL:WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000). Among the works that have criticized De soto's works include: Diane Hunt, Unintended Consequences of Land Rights Reform: The Case of the 1998 Uganda Land' Act, Development Policy Review, 2004, 22 (2): 173-191, at 175, 190; H. W. Okoth Ogendo, The Perils of land tenure reform: the case of Kenya, at 12-14, available at http://fimbo.org/attachments/059_The%20perils%20of%20land%20tenure%20reform-%20the%20case%20of%20Kenya.pdf, accessed June 14, 2010; Rexford A. Ahene, Measures to Improve Access to Land Resources and Related Benefits in Uganda Private Sector Competitiveness Project II, Land Component, World Bank/Private Sector Foundation Uganda 2-3 (September 2004).

[41] *See*, Migot-Adholla, Shem & John Bruce, *supra* note 8. Also see, Berry Sara, *Social institutions and access to resources in African agriculture* 59(1) AFRICA (1989), at 41-55.

[42] See *supra* note 2.

statutory institutions or land administered by government institutions has an effect of abdicating traditional authority and power of the people over their land. The determination of the question whether or not the land in question is customary land or not is important as a precursor on who or which institution had authority to pass on title to the land in issue. In the case under review, Penytoo, one of the applicants, alleged that since the land that was given to Amuru sugar works belonged to the community as customary land, the District Land Board did not have authority to lease it to other respondents. Instead, he claims the application for the land should have been to the community that owns the land.[43] The fact was refuted by the court in these terms:

> … [i]t has not been stated under what Law Amuru Sugar Works Ltd should have applied to the community. The Land Act, Chapter 227 Laws of Uganda, under Land Management provides for the Uganda Land Commission, Section 46-55, the District Land Boards, Section 56-63, and Area Land Committees, Section 64-68. *The authority of the Communities over land is not provided for in the Land Act, and Parliament, of which Hon. David Penytoo was a member, could not create parrel authorities.* To do so would be a recipe for confusion and chaos, which is not how an orderly society is run? (*emphasis is mine*)

This statement in this case is an indication of the wider ulcer in the legal profession or general perspective. It is typical of some lawyers, to be hang-up in mindsets where the law is the beginning and end of everything, all-encompassing and proving all answers to all questions; everything should be sanctioned by law. Customary tenure is highly informal and greatly managed in informal spaces; it is unrealistic to expect the law to deal with all issues touching it. Indeed, the Land Act Cap. 227 provides for the institutions in the above quotation as the ones mandated to deal with land. The same Land Act under section 3 recognizes customary land tenure and indeed it's peculiar nature; differing from community to community: (1) (b) "governed by rules generally accepted as binding and authoritative by the class of persons to which it applies" and (1) (e) "applying local customary regulation and management…." The law does not get into the details of the customary law on land in Uganda, and neither does it engage with matters of detail to do with institutions that are mandated to deal with customary tenure. To do so would be a time and space consuming venture since there are as many customary rules and procedures as the communities/tribes/clans in Uganda. That notwithstanding, Article 237 of the constitution provides that all land in Uganda belongs to the people who should hold it according to the land tenure systems provided for in the constitution that include the customary. As owners, the people have authority over this land.[44] Section 88 of the Land Act preserves the power of traditional authorities "to determine disputes over customary tenure or act as a mediator between persons who are in dispute over any matters arising out of customary tenure."[45] This confirms that the authority to deal with land matters is not exclusively left to Land Commissions and District Land Boards (i.e. The state institutions), but traditional institutions recognized as such in the community where a matter arises can handle such cases with authority partly sanctioned from the Land Act and custom. The main point of contention in the circumstances

[43] *See.*, page 23 of the case.
[44] This authority extends to use/abuse and transfer of property.
[45] In Acholi Sub-region, the Rwodis are recognized as traditional authority bearers on matters of settlement of land disputes; *See*, Ker Kwaro Acholi, *supra* note 5.

should first of all have been whether or not Hon. Penytoo's people proved ownership of land in customary tenure; whereupon the right to be consulted or involvement in the transfer of land could be automatic. It is then that we would talk of the "authority of the Community" that is disputed in the case, but is implied in the provisions above, stipulating application of custom in the management of land held under customary tenure.

The above quotation from the case also raises more questions than answers, when we project on the future of the protection of customary tenure/land and rights: (i) Can non-customary institutions provided for in the laws of Uganda adequately deal with cases on customary tenure in the circumstances where the detail on customary tenure is not in statutory law? The legal system is constructed in such a way that a cause of action arises where there is a breached right that is guaranteed in law.[46] Not all matters of customary land tenure are written down, and later on in the national laws. (ii) To what extend should a judge engage her/his conscience on matters of customary law not fully provided for in the written law or where excessive application of the (pure written) law would be unjust to customary claimants? (iii) how far can the law be followed especially where its outcome might be (morally or customarily or politically) unjust?

Furthermore, strict application of the written law cannot lead to sufficient protection of customary rights to land. Societies usually have pillars or building blocks; strongly anchored on the ground and offering support to notions of law and related matters of say: procedure. Such pillars can be of a social, economic, historical, political, (etc.) nature. These can be seen factors that shape and also offer justification for passing a particular law and stipulating procedure. For example, assume that in society X land is a treasure held communally for the good of all members of the society. By custom, the pillars of authority, the elders are trusted to use their discretion to settle disputes for the good of every one without legalistic strict adherence to any procedural technicalities. This procedural mode of operation is supported by the normative structural/institutional set-up of this society. The question that arises then is: can one expect full fairness/justice if cases arising in this setting of society X are handled in another system that does not have the same normative/socio-cultural/political pillars to support it or factors that shape claims to land? This argument equally applies to situations where customary land issues are adjudicated in courts of judicature in Uganda run on western styled laws with western trained lawyers. The wider point here is that western styled courts are not conceptually and procedurally well equipped to adjudicate cases arising in the customary spaces to the satisfaction of the ethos of custom.

The laws are made by persons trained in western styled/constructed law schools, paying more attention to "law as written." Many times the law is written, applied/interpreted by persons mainly trained for the system of white color, western (i.e. Imported) jobs/institutions. To protect the customary calls for the need to find ways of impeding the likely destruction that might come from the preceding by creating avenues to step outside of the law and formal institutions, and get inside of the customary spaces for guidance. This is possible where there is room for exercise of discretion and the judge is fully aware of the above weaknesses of the customary, and at the

[46] *Sempa Mbabali v. Kizza and 4 others* (1985) High Court Bulletin (HCB) (Uganda) 46 at p.47, normally one must be able to prove that they had a right in the first place, the right was violated and that it is the defendant in court that violated it. This is more so where a matter is pursued as a civil claim.

same time recognizes the need to protect the customary. Customary rights to land should be promoted such that they become a part of the plethora of rights seen as common moral intuitions worth the attention of all judicial and quasi- judicial nature.

C. Proving Customary Land in this (High) Court and Application of Rules of Evidence or Procedure; Would Judicial Discretion Save the Case?

Among the pertinent questions in the case was the extent to which article 126 of the Constitution is applied for the benefit of the applicants in this case.[47] Among the evidence considered by the Court in this case was a letter written by the Secretary to the Uganda Land Commission, Mr. K.S.B. Mubbala, to Hon. Simon Oyet, the Member of Parliament for Nwoya County. In this letter, it was denied that there was any gazettment or degazettment of the land in question (in the last 40 years) by the Uganda Land Commission or Parliament, the latter being the institution that is mandated to do so.

This letter was rejected on a number of reasons, which leads one to put the blame on the counsels for the applicants. They did not call the letter writer as a witness, and neither did he swear an affidavit in support of the application. For this shortfall, there was no corroborative evidence from the applicants, to corroborate the contents of the letter and their case that the land in question is customary land and not public land. Such evidence would also counter the evidence produced by the respondents alleging that the land in issue is public land. This loophole on the part of the applicants and their counsel left the respondents' evidence standing that the land was initially a gazetted habitation free area until it was degazetted in 1972 according to section 1 No. 55 of the Game (Kilak hunting area) of 1972 (Revocation) Order, 1972.[48] In addition to rejecting the letter, the Court points out some minor inconsistencies, say; when the author says that there was no gazettement or degazettement in the last 40 years, yet, at the time of hearing the case in 2008, it was 36 years from the time of the said degazettement in 1972.

While much effort was put on scrutinizing the evidence of the applicants, the court missed an opportunity of asking pertinent questions, answers to which would throw more light on the cases of both the applicants and the respondents. Among these is; has this land been vacant since the alleged degazettement in 1972, and until the first wave of displacement of people in northern Uganda in 1996. If a similar (high) level of scrutiny as shown in the analysis of the applicant's case was engaged in scrutinizing the evidence of the respondents, gaps would be revealed. The spaces left by these gaps although not necessarily proving the case of the applicants, would leave open the possibility that (may be) the applicants' customary claims could be valid. Among the areas where deeper investigations could have brought to light gaps in the

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[47] Article 126 (1) provides:

> "Judicial power is derived from the people and shall be exercised by the courts established under this constitution in the name of the people and in conformity with law and with values, norms and aspirations of the people;
>
> (2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles- (e) substantive justice shall be administered without undue regard to technicalities."

[48] Page 26 of the case report.

evidence of the respondents is in the case of the evidence in an affidavit by Alex. S. Okwonga.[49] The court quotes:

> That I further wish to state that although the said Game Reserve was later degazetted by the government of Uganda in 1972 vide Section 1.No.55 otherwise called the Game (KILAK HUNTING AREA) OF 1972 (REVOCATION) order, 1972, ***It remained under the control of Uganda Land Commission, which started leasing it out to intending lessees.*** That following the removal of the said land from the control of Uganda Land Commission, the said land came under the control of the 1st Respondent which continued and still continues to lease it to interested persons…(*Emphasis is mine*)
>
> Having found no serious challenge to the affidavit evidence of the Chairman Amuru District Land Board, Mr. Okwonga, and in view of the statutory instruments and other laws cited, then the Court agrees with all the Advocates for the respondents that the land in question was public land after being degazzetted from its former status as a hunting area.

The court did not require the respondents to prove that indeed this land has ever been leased to anyone (so called "intending lessees") since 1972 and before the current leases in contention. If such evidence of the leases was produced, the possibility of there having existed customary rights to the land on the same land would have been reduced or totally decimated. In the absence of such proof, the customary claimants have the benefit of the doubt that they could have customary claims to the public land.

The history of Uganda's land laws does not defy the possibility of claiming customary tenure on public land. Right from the time when Uganda was a British colony, "Crown land" (public land) was available for occupation under customary tenure by virtue of the 1903 Crown Lands Ordinance. Since occupation of such land under customary tenure preceded the 1903 Ordinance above, it is only logical that there was no need for prior consent to be acquired before anyone occupied Crown land under customary tenure. That notwithstanding, occupation of such land on customary tenure was not unrestricted.[50] Among the other reigning laws during the later period (1972 -1975) was the Public Lands Act 1969. Under section 24 (1) of this law, customary tenants could occupy un-alienated public land in rural areas without any lease or license, and could apply for a leasehold estate of the land that they occupied from the Controlling Authority as per Section 25. Such customary occupants had to give consent to giving away their land to anyone else. Occupation of public land under customary tenure continued to be valid although on unsecure terms in the post-1975 period until before the passing of the 1995 Constitution. The Land Reform Decree of 1975 provided for the continuation of such occupation of land; "at sufferance", whereby the occupier(s) could be evicted any time with compensation. They had no title to land to transfer, but "improvements or developments" on the land. The possibility that the applicants in the present case claimed customary tenure on this public land in question is open. There is no evidence led or produced to totally exclude it. The failure of the applicants' counsel to make an effort to place the claim to any phase in the legal history of Uganda does not do the case any good. Doing so would be pertinent. Further, it is the duty of Court to probe for information that would help it come to an equitable judgment. Questions about when the applicants' alleged claims to the customary land started would be

[49] *Id.,* at 27.

[50] *See*., JOHN T. MUGAMBWA, PRINCIPLES OF LAND LAW IN UGANDA(2002), at 4.

important to clarify on a number of issues. Rather, the Court relied on the evidence produced by the respondents to rule in their favor, to the detriment of the applicant.

In the circumstances, it is likely that in the absence of adherence to high level technical rules of law in this case of a customary nature, the Court would find customary claims to this land either rooted in the period between 1972 and 1995 and beyond; after the land had been degazetted. They could have been claims of people that were terminated by the abrupt displacement that took place in this region (since 1996). Such claims ought to be put into account in contemporary transactions on land by the Amuru District Land Board.

The widely accepted argument in this case that the land in issue is public land and that Amuru District Land Board had powers to lease it calls for a deeper understanding or analysis of some issues, not only relevant to the case in question, but the position of customary land/rights in post-conflict northern Uganda and also in Uganda in general. These questions include: What is public land? Who is public in this case? The whole country, community where the land is located? Can a section of a given public object to any mode of use of land that is "public land"? In this case, can the Authorities such as District Land Boards suggest a mode of use of land that is contrary to what the public in the area thinks is the right mode of use? Whose idea should be considered to have a "trump" status; majority members of the public or the Authority?

Those questions notwithstanding, having the constellations of both claims grounded in written/statutory law and those in customary law in the same space of the courtroom, where written law is applied to both, in the absence of clear proof of ethos of the customary leaves the customary at a disadvantage.

D. Gaps in the Evidence to Prove Customary Tenure and Adopted Procedure

In civil matters of this nature, the Court relies on the evidence produced by either party to come to its judgment. The context of any given case would only be used as far as it throws more light or clarify the evidence presented. In short, the applicants had to produce the evidence relevant to prove their case; mainly that the land in issue is customary land, with guidance from their counsels. The court summarized the position of the law on customary tenure in the following terms:

> Customary Land Tenure refers to the terms and conditions on which land is held, used and transacted in accordance with the ethos and customs of a given community. The local customs govern ownership, use and occupation and transactions in land. They provide for communal ownership and use of land, in which parcels of land may be recognized as subdivisions belonging to a single person, family or a traditional institution. Land under customary tenure is owned in perpetuity. The land is not Registered under the registration of Titles Act or vested in the Local Government or Central Government of Uganda.[51]

The court cited Section 46 of the Evidence Act of Uganda, about proving custom.[52]

> When a Court had to form an opinion as to the existence of any general custom of right, the opinions as to the existence of that custom or right of persons who would be likely to know its existence if it existed are relevant.

[51] *See* page 10 of the case report. Also see the Land Act Cap.227 (Laws of Uganda).
[52] *See* page 14 of the case report.

The case under review cited Duffus. J.A, in *Ernest Kinyanjin Kimani v. Muira Gikanga*:[53] As a matter of necessity, the customary law must be accurately and definitely established… This might be done by reference to a book or a document of reference and would include a judicial decision but in my view, especially, of the present apparent lack in Kenya of authoritative textbooks on the subject or of any relevant case law, this would in practice, usually mean that a party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case.

All the above emphasize the importance of leading evidence to prove custom, if it comes up in a case before any court of law, just as it did in this case under review. From the above, evidence would be from experts or written literature on a given custom.

For this particular case, just like it was in the Kinyanjin case, the lack of an authoritative book written on Acholi customary law on land would not be insurmountable. It leaves the opinions of persons that are experts on this as good sources of evidence on the same. The role of elders/chiefs in proving customary law on land cannot therefore be underestimated;[54]

There are informal institutions in Acholiland that deal with a variety of issues among which is customary land. These institutions are comprised essentially of the traditional heads of pre-colonial chiefdoms (typically called *Rwodi Moo*, as they are smeared with oil – *moo* – when they are installed), clan elders and clan heads, and *Rwodi Kweri* ("chiefs of the hoe," a colonial innovation that developed to help organize customary land access and agricultural work, activities that they continue to perform in several villages).[55] Specifically in the area of land, the traditional institutions deal with boundary identification and clarification, act as custodians of customary knowledge on customary land tenure and advise their communities on this tenure, offer services as mediators or reconcilers of parties to land disputes within their jurisdiction.[56] They have in the past dealt with a number of cases involving land disputes and other matters such as witchcraft in relation to land use and land rights.[57]

The applicants in this case would have attached more affidavits of persons (such as Rwodi) that could prove that the land was indeed held customarily. According to the Court, they, failed; "…in the absence of any expert witness or documentary evidence to prove customary ownership as alleged by the applicants, this Court finds and holds that the disputed land is Public Land under the Management of Amuru District Land Board."[58] All in all, the applicants failed to produce the requisite (expert) evidence to prove customary tenure on this land and therefore their case which was that the land belonged to them.

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[53] (1965) East .Africa (EA).735 at 789.

[54] *See*, Maggi Carfield, *Land justice in Uganda: preserving peace, promoting integration*, in WORKING WITH CUSTOMARY JUSTICE SYSTEMS: POST-CONFLICT AND FRAGILE STATES (International Development Law Organization –IDLO 2011)127-144 at 128.

[55] *See*, THE ACHOLI RELIGIOUS LEADERS PEACE INITIATIVE (ARLPI), RESOLVING LAND CONFLICT IN ACHOLILAND: A GUIDE FOR COMMUNITY BASED STAKEHOLDERS (2010), at 19.

[56] *Id.*

[57] Example of these cases include: the Case between Roseneri Odoki and Uma Justine of Todora Clan. See., Rose Nakayi, The dynamics of Customary Land Rights and Transitional Justice; The Case of the Acholi Sub-region of Northern Uganda (SJD Dissertation, University of Notre Dame, May 2012), at 468.

[58] *See* page 31 of the case report.

Jack Obalim Weleya, one of the applicants alleged customary ownership of 5000 hectares of land inherited from the Lamia clan in Langolim which he claimed was grabbed by Major General Oketta, one of the respondents, who held a total of 1,800 hectares. Some of the alleged inconsistencies (and shortfalls) in his claim include: failure to identify the land he owns during the *locus in quo*, the land in dispute is in Amuru, but during cross examination he told Court that he was born in Olwal Parish, Lamogi Sub-county and which is not in Amuru.[59] The court discredited his evidence and the judge said:

> No affidavit was sworn by any elder or an expert conversant with the customary ownership of the land in dispute by jack Obalim Weleya. In the premises, this Court finds and holds that Mr. Jack Obalim Weleya had nothing **to show against Major General Julius Oketta, who has not only stayed on the land in dispute for over 15 years, but has acquired a leasehold over the same through the 1st Respondent, Amuru District Land Board.[60]**

He also alleged that 10000 hectares of land belonging to Christine Atimango rightly belongs to his (Weleya's) Pailyec people. This land, according to the respondents, was a apart of Kilak hunting area and was degazetted in 1972, and therefore making it a part of public land that the Amuru District Land Board would, within its mandate lease out to them.[61]

Further shortfalls in the applicants' ability to provide sufficient evidence are seen in the case against Amuru Sugar Works, in which David Paytoo, the third applicant, in his affidavit alleged that three traditional chiefs complained to him against the Amuru District Land Board's grant of 10000 hectares of customary land to Amuru Sugar Works. These three were not called to prove this and neither did they swear any affidavit to bring to Court. Further, despite allegations that this land belonged to the Lamogi people, no evidence was recorded from their elders in proof of this and no affidavit was sworn by any of them. The honorable Judge stated:

> The court finds that Hon. David Penytoo was knowledgeable and conversant with the clans of his people… That is not what the Court was interested in and not a mere narrative of the clans. At least one person from each of the mentioned clans should have sworn an affidavit in support of the claims by Hon. David Penytoo. There is none on record.[62]

Also the allegation that 500 hectares given to Christine Atimango (made by Penytoo) belonged to the people that were IDPs were not proved by anything like an affidavit. Yet, Christine Atimango in her affidavit allegedly proved that the land she was given was not occupied and was public land having been degazatted as per The Game (Kilak hunting Area) Order (Legal Notice 364 of 1963; Section 1.17 of 1964). As mentioned earlier, handling customary land claims in courts of law outside of the customary space puts such cases in a space where so many factors are at play; factors that tend to disadvantage customary logics and claims. These are of a political, procedural and other nature that might not necessarily go well with the customary that is traditionally embedded in a flexible customary space. It is therefore up to the applicants in such cases to go an extra mile to dispense with the heavy burden of proving their case; otherwise

[59] *Id.*, at 17.
[60] *Id.*, at 18.
[61] *Id.*, at 19.
[62] *Id.*, at 20.

it is likely to droop. It should also be noted further that the applicants in this case to some extent limited the space within which to operate procedurally, by bringing the case by Notice of Motion rather than Plaint. The counsels for the respondents argued that proceeding by Notice of Motion instead of Plaint was restricting since the parties on either side would be restricted to calling as witnesses the few people that swore affidavits and not any other.

In short, both applicants and respondents would be restricted. Unless either had a forward looking well-crafted litigation strategy, any of them was bound to be constrained if they wished to include witnesses that did not swear affidavits. The Court in this case tried to mitigate the likely negative effect of the preceding by making a record of the statements made by witnesses during the *locus in quo* proceedings, which were relied upon by counsels on both sides of the case in disposing off the other issues raised in the case.

Considering the likely constraints from procedural requirements arising in courts of law, the argument advanced in this commentary is that any presiding judge, fully aware of a given context within which customary land cases arise ought to be lenient in the interpretation of rules of procedure to the extent that it is legally possible in order to accommodate the peculiarities of the customary.

E. Occupation and continued utilization of customary land

Actual occupation and continuous utilization of customary land came out as key facts that must be proved if one is to make a good case in proof of their customary rights to land. In the circumstances, over emphasis on these requirements ignores armed conflict, displacement as potential stumbling blocks to occupation and the continued utilization of customary land in the north of Uganda.

Citing a number of authorities that set a precedent, the Court emphasized the need for one claiming customary rights over land to be in position to prove "to be in occupation of land and actively utilizing it."[63] Active utilization includes grazing animals or growing crops on the land and occupying it.[64] The learned Judge in this case was not convinced that the above requirements were met by the applicants in the case before him. The case report indicates that at the *locus in quo* that was conducted for two days, the Court saw only a few scattered (and may be negligible) hats and bushes on the land and no serious settlements or sign of agricultural activities taking place it.

It is clear that the dimension of armed conflict, displacement and everyday post-conflict realities is missing in the above analysis of the judge; yet it could be so informative in analyzing this case. Could the fact that the land is "...very vast, but empty, and bushy all the way up to the River Nile,"[65] as stated in the case be a result of the armed conflict that led to displacement of many? Massive displacement of populations in the north in general has been widely reported.[66]

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[63] *Kampala District Land Board and Another v. Vanansio Bwebulayaka & 3 others,* Supreme Court Civil Appeal No.2 of 2007.

[64] *See* the cases of *Marko Matovu & 2 others v. Mohammed Sseviri and another* (1979) H.C.B 174 and *Yoweri Bamulinga and others v. Fort port* , H.C.C.S No.68 of 2006.

[65] Page 29 of the case report.

[66] Baines, *supra* note 7.

Also, the tremendous suffering of the people of the region and the effects of the war - living in fear of abduction, actual abduction, rape, maiming, killing, destruction of property (by say burning villages etc.) - is widely acknowledged in the literature.[67] Huggins, for example, argues that the strain put on the social fabric of society by (armed) conflict most of the times affects the legitimacy of customary tenure, since customary rights usually have to be recognized and accepted by society; whose fabric is vitiated by armed conflict.[68] He cites interruption of access to land, disruption of customary institutions and displacement as common features of conflict that greatly affect the enjoyment of customary tenure.[69] The armed conflict in northern Uganda was described as the "the world's worst forgotten humanitarian crisis,[70] and one of "Africa's longest and most brutal conflicts."[71] No doubt therefore that its effects were also extreme, extending to various aspects of life of the people in the region including rights to land. In the language/words of FINNSTRÖM, during and after the over two decade internecine, multitudes were left "living in bad surroundings".[72] It is very possible that there is a relationship between the devastating effects of the conflict, the realities in the everyday lives of people in the post-conflict settings on the one hand and patterns of settlements on the land in northern Uganda generally.

The case report refers to "very few scattered huts of people," on the land that was earmarked for the Amuru sugar project. Further that they most likely were constructed in 2010 or 2011.[73] The omission to have an armed conflict/displacement dimension to the analysis creates a lacuna by which some information that would be pertinent in analyzing and judging the evidence is lost. For example the case (at least the record) does not contain any evidence that there was any deeper probing into who owns the "scattered huts", how and when they acquired the land on which the huts are constructed, and when they were constructed. Answers to these questions would be useful in ascertaining if the owners of the huts had pre-existing claims (of any sort) to the land prior to armed conflict and displacement, which they are only re-asserting in the post displacement era; after return. In the absence of any deeper probing, the record passes the "scattered huts" owners off as inconsequential and negligible "squatters" on the land.

Be it as it may that the land in question is public land under the care of the Amuru District Land Board, land rights usually come in a bundle, and property law conceptualizes them in the concept of "bundle of rights" of a different nature.[74] Rights to property like land can therefore include those to do with: ownership, possession, right to exclude and transfer control and enjoyment. Not all the above have to be fused in one person, but could be vested in different people (private or public) who simultaneously enjoy them on the same piece of land.[75] In the

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[67] *Id.*, at 101-102; Dolan, *supra* note 7; Finnström, *supra* note 7.

[68] Chris Huggins, *supra* note 2.

[69] *Id.*

[70] The description was given by Jan Egeland, the then United Nations Undersecretary for Humanitarian Affairs, while addressing the situation in northern Uganda to the BBC in 2006.

[71] INTERNATIONAL CRISIS GROUP, NORTHERN UGANDA: SEIZING THE OPPORTUNITY FOR PEACE, AFRICA REPORT NO. 124, at 2 (April 26, 2007) (in the Executive summary).

[72] Finnström, *supra* note 7, at 240.

[73] *See.*, page 30 of the case report.

[74] *See.*, Daniel B. Klein *et al, Property: A bundle of Rights? Prologue to the Property Symposium*, ECON JOURNAL WATCH (2011), 193-204.

[75] *See.*, COMMONS JOHN ROGERS, THE DISTRIBUTION OF WEALTH (1893).

case under review, these could include (ownership) rights of the District Land Board (amounting to property in the land), and other (may be lesser) rights claimed by the applicants. It is a possibility that these diverse rights could intersect and in other instances, some can suffocate or reduce the space for the others to survive on the same tenement. The bundle of rights concept for that matter goes beyond to factor in the need for regulating the relationships among all rights holders on the same tenement. In the case under review, it would be more about regulating the relationship of the District Land Board as owner of land, and others (in this case the applicants) in relation to the land, more than trumping the latter.[76] So however meager the claims of the scattered huts' owners are, it would be important to accord them some space, ascertain their nature, and give them a place in the bundle of rights to that land.

V. CONCLUSION

On the whole, the applicants lost the case. The Judge did not find any wrong doing on the part of Amuru District Land Board, which according to him lawfully allocated the land to the other respondents. Although the case was brought by a specific limited number of people that described their cause of action and set out to prove their case on various but limited issues, it is a very important case that gives us an insight into the wider picture; the general situation of claims to customary land in Uganda.

From history to date, there have been efforts to suffocate the traditional/customary tenure and institutions and replace them with state institutions run in accordance with western originated tenures, rules and institutions. This was clearer in the struggles between the "official" efforts to promote freehold tenure and the demands to preserve customary tenure.[77] This resulted in a compromise where the customary is provided for in the law, but without the necessary support for survival, and neither an enabling environment to remain strong on foot. The customary or traditional has survived to date, despite the difficult environment and relative neglect by the state. Mere mention in the law that customary tenure is recognized, without sufficient investment in the establishment of customary institutions that deal with disputes (and the detail) in those spaces is tantamount to neglect. If the state does not support communities to, in the first place establish customary institutions facilitate and promote them, customary cases end up in a precarious environment of state courts. How then can the customary that has evolved in those circumstances survive if it is the subject matter in a contentious case before a formal Court of law? On the onset, the court environment and its high standard of expectation of all cases that come before it runs to the detriment of the customary, that is not by normative nature and procedural requirements cut out for that. The environment is asymmetrical and skewed against the claims grounded in custom. Exercise of judicial discretion in such cases would to some extent alleviate the negative consequences of the above on the customary originated cases. Note although this would have to be done within the law, which is in the first place generally not in favor of the customary. Therefore, discretion may not bar the strict application of rules of evidence set for the court environment in a customary land case, if the case is properly filed in such a court.

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[76] STEPHEN HOLMES AND CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999), at 58.

[77] MISR & WISCONSIN, *supra* note 26; Also see., Nyangabyaki Bazaara, *Land Reform and Agrarian Structures in Uganda: Retrospect and Prospect*, Commission on Nomadic Peoples, Nomadic Peoples, Number 34/35, 1994, at 37-53 at 37.

Evidence is important, but at times other factors ought to be borne in mind in cases not fully grounded in a sphere where all matters are governed by well stipulated rules of law and evidence. Having the constellations of both claims grounded in written/statutory law and those in customary law in the same space of the courtroom, applying written law to both, in the absence of clear proof of ethos of the customary leaves the customary at a disadvantage.

Strict application of legal rules of procedure and evidence to customary land cases before courts of law leads to creation of illusions of legality, i.e., where courts run the risk of setting legal precedents whose application may elude justice. The customary is subjected to rules and principles of judgment that are outside its normative space and procedural evolution from which it derives less benefit, to the detriment of those of a customary or traditional nature from which it would benefit. Handling these cases in legal and political settings other than those for which they were in the first place formulated ignores power dynamics in the customary spaces. Indigenous elites may not necessarily appreciate these e.g., the role of elders prevents accurate analysis of the cases in some respects. Although they are bound by legal norms and procedural imperatives, judges in cases arising out of customary tenure should have a nuanced, context specific way of engaging with matters of evidence and procedure in such cases.

The environment in which these cases are handled (in formal courts of law) is foreign to the customary and many times lacks the requisite foundational building/supporting blocks to uphold the customary. Instead, we see a collision course where the customary clashes with the expectations of the formal laws in which it loses. To protect the customary calls for the need for judges and advocates to find ways of impeding the likely destruction that might come from the preceding, by creating avenues to step outside of the law and formal institutions, and get inside of the customary spaces for guidance. This is possible where there is room for exercise of discretion and the judge is fully aware of the above weaknesses of the customary, and at the same time recognizes the need to protect the customary.

The above described precarious situation could have been a contributing factor to the applicants' failure to prove customary tenure in this case. In the circumstances the burden of proving customary rights in courts of law seems heavy. For those wishing to see customary law strengthened/defended, there is need for lawyers to first of all equip themselves with the customs of the community in which the case arises, and also be innovative while crafting their litigation strategy. It is important to pay attention to the customary law of the communities in which the land is held, and go an extra mile in proving them in the courts of law. Perhaps, going beyond that, collective efforts are needed to come up with common arguments/techniques that can be used across cases. Other than that, it is hard to dispense with the burden of proof in those cases.

In addition, to some extent forestall the situation in which it is close to impossible to prove land cases arising in a context like this one, safeguards ought to be devised. This could partly be done through reasonable systemization of action points or principles that can guide the sitting judge to ensure utmost fairness to the customary claimants even where their rights seem mere allegations in the eyes of the (formal) law.

In the absence of this, there is a higher propensity for the customary rights claimants to lose, if their cases are adjudicated in non-customary or non-traditional institutions. The formal court (with all their shortfalls seen through customary lens) are the permanent and regular courts in the country, yet the traditional institutions operate but not necessarily with formal recognition from the state and not backed by sufficient financial, political and other support by the state.

All in all this is one decision in a case about land in a specific region, but is so telling in various aspects on the protection of customary land rights and tenure in Uganda.

One of the respondents in this case (Madhivani) acquired the land for large scale agriculture. Clearly, this case shows that many times, the interests behind large-scale capitalist projects and their proponents are incongruous to other forms of development and existence. Yet, notions of development paths/forms are contested and never straight forward. The state therefore needs to be more open and supportive to alternative versions of living/development, other than the approaches favored by the powerful capitalists through their large scale commercial agriculture. Land means more in terms of livelihoods for many in Uganda.