Understanding Tenancies by occupancy in Uganda

By Tuhairwe Herman*

Abstract

This paper explores the nature and scope of tenancies by occupancy in Uganda, a legal construct that permits dual interests over the same land. Although overlapping rights in land are not unique to Uganda, the Ugandan experience is shaped by a distinctive history that spans pre-colonial practices, the 1900 Buganda Agreement, colonial landlord–tenant legislation, and the post-independence reforms culminating in the 1995 Constitution and the Land Act 1998. The analysis highlights the statutory recognition of lawful and bona fide occupants, examining their qualifications, rights and obligations, and the legal protection they enjoy against eviction. Particular attention is given to the separation of land ownership from ownership of developments, a departure from the common law principle that what is affixed to the land passes with it. By combining historical context with statutory interpretation, the paper illustrates how tenancies by occupancy continue to generate tension between registered proprietors and occupants, and raises critical questions about the sustainability of this dual landholding system in contemporary Uganda.

Introduction

Land is considered one of the most important factors of production. To effectively utilize land therefore, there is need for a robust legal framework which clearly defines the interests of all stakeholders. Like many other aspects

of Uganda's *corpus juris,* the land tenure system is a muddle, a result of our complex history, societal needs and government interests. One of the legal framework's most fascinating aspects is the creation of dual perpetual interests on the same land through a tenancy by occupancy on mailo land. Failure to understand the rights and obligations of each party on the land has been a major source of conflict in Uganda.

Context in the land tenure systems

National Objective and Directive Principles of State Policy XI(iii) stipulates that "in furtherance of social justice, the State may regulate the acquisition, ownership, use and disposition of land and other property, in accordance with the Constitution. Article 237(1) of the Constitution of Uganda provides that land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in the Constitution. Title is vested in the people and not the government. The land tenure systems provided for in the Constitution are customary, freehold, leasehold and mailo.[1] The term "mailo" is a corruption of the English word "mile" and has its roots in the 1900 Buganda Agreement wherein allocation of land in square miles.

It is pertinent to appreciate that one can only be a tenant by occupancy on mailo land. Prior to the enactment of the Land Act, an individual could hold a tenancy by occupancy on mailo, freehold or leashold land. Article 237(8) of the Constitution provides that

---

* PhD Candidate, University of Cape Town, Faculty of Law & Lecturer, Faculty of Law, Cavendish University, Uganda.

[1] Article 237(3) of the Constitution of Uganda

> "Upon the coming into force of this Constitution and until Parliament enacts an appropriate law under clause (9) of this article, the lawful or bonafide occupants of mailo land, freehold or leasehold land shall enjoy security of occupancy on the land."

Parliament was then obligated to enact legislation;

(a) "regulating the relationship between the lawful or bonafide occupants of land referred to in clause (8) of this article and the registered owners of that land; and

(b) providing for the acquisition of registrable interest in the land by the occupant."

The relevant legislation enacted was the Land Act 1998. The Act recognized the four land tenure systems in the Constitution, that is, customary, freehold, leasehold and mailo. It laid down incidences for all the tenures. However, it was only in S.3(4) Land Act which provides for the incidences of the mailo land tenure system that the drafters recognized lawful and bona fide occupants. The registered holder of mailo land is granted legal authority to own it in perpetuity.[2] This is akin to a freehold title because it allows ownership of land for an unlimited period but subject to the interests of the tenant by occupancy. This leaves no inference other than the fact that tenancies by occupancy are only recognized on mailo land.

[2] S.3(4)(a) Land Act

Owner of developments?

Whereas both the mailo and freehold tenure systems allow an individual to own land in perpetuity, the mailo land tenure system differs from the freehold, when in S.3(4)(b) it "permits the separation of ownership of land from the ownership of developments on land made by a lawful or bona fide occupant". On the face of it, such bifurcation of ownership appears to run contrary to the well-established legal principle encapsulated in the Latin maxim *Quic quid plantatur, solo solo cedit*[3]. Derived from Roman law, the basic idea in the maxim is that if something is permanently attached to land, it becomes a fixture and is considered to be part of the land. As such, if a building is set up on the land and objects are permanently affixed to the building, the soil, building, and objects therein are all in the law considered to part of the land. They are considered to be fixtures. If however, an object is temporarily attached to the soil, it is considered a chattel and not part of the land. As to whether an object is a fixture or chattel is a question of law depending on the facts. In ***Holland v Hodgson*[4]**, Blackburn J noted that

> "There is no doubt that the general maxim of the law is that what is annexed to land becomes part of the land, but it is very difficult; if not impossible to say with precision what constitutes annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as

[3] "Whatever is affixed or attached to the soil belongs to the soil"
[4] (1817) L.R 7

indicating the intention, *viz* the degree of annexation and the object of annexation"

Can it be said that the tenant by occupancy since he or she is an "owner of developments" can only own chattels? As this article will show, the tenant by occupancy also owns fixtures on the land. Some scholars have even argued that because it grants rights in perpetuity, it amounts to a tenure.[5] As a common law doctrine, the notion of *quic quid platantur solo solo cedit* should only be invoked "subject to the written law and in so far as the written law does not apply". In regards to tenants by occupancy, the primary source of the doctrine therefore lies in written law.

Who is a tenant by occupancy

S.1 of the Land Act defines a tenant by occupancy as the lawful or *bona fide* occupant declared to be a tenant by occupancy by section 31 of the Land Act. S.31 Land Act however does not define the tenant by occupancy. Instead, it concentrates on the security of occupancy that the tenant is guaranteed. It is S.29 of the Land Act which lays down their eligibility for one to be classified as a tenant by occupancy either as a lawful or bona fide occupant.

[5] Sarah Banenya Mugalu, 'Tenancy by occupany: is it a tenancy or a tenure? (The incidences of section 29 of the land act, Cap 227)' [2017] Kampala International University Law Journal 4

Lawful occupants

Busuulu and Envujjo law of 1928; Toro Landlord and Tenant Law of 1937; Ankole Landlord and Tenant Law of 1937

S.29(1)(a) Land Act provides that A "Lawful occupant" means a person occupying land by virtue of the repealed —

(i) Busuulu and Envujjo Law of 1928;

(ii) Toro Landlord and Tenant Law of 1937;

(iii) Ankole Landlord and Tenant Law of 1937.

Whereas the Busuulu and Envujjo law was enacted in 1928, it remained in force until 1975 when it was repealed by the Land Reform Decree. It governed the creation and sustenance of the landlord tenant relationship for close to five decades requiring that one understands it fully. S.29(1)(a) of the Land Act which provides that a lawful occupant is one who currently occupies the land because of a law made a century or so ago requires one to understand the historical context.

As highlighted, the British entered into an Agreement in 1900 with the Kingdom of Buganda. Article 15 dealt with the issue of land. The land of Buganda was distributed to the Kabaka, members of the royal family, selected chiefs, religious institutions and the Protectorate Government. 1003 square miles of land were allotted to the Kabaka, his family and the prominent chiefs both in their political capacity and private ownership.[6] Another 8000 square miles were

[6] As a compensation to the Kabaka for the loss of his authority, and as a recognition of his superior position, he was allotted 350 square miles as official mailo and 150 square miles as private mailo

allotted to 1000 chiefs and landowners at the discretion of the Buganda *Lukiiko.* Because the allocation in square miles, the tenure system was henceforth known as “mailo”. The peasants who occupied the land were now considered tenants on private property.

The whole land of Buganda was therefore expropriated into square miles, for the benefit for the select individuals and institutions. Nothing in the Agreement considered the other people in the Kingdom who occupied or otherwise utilized the land at the time it was re-distributed. There are two possible reasons why the British chose to expropriate land from the masses, for the benefit of a few individuals/institutions.

The first is that they wanted to recreate the Enclosure movement from Britain and thus transform the Protectorate of Buganda from a peasant society to an industrial one. The Enclosure Movement was a push in the 18th and 19th centuries to seize land that was formerly owned in common by all members of a village or available for their public use. The land was then changed to privately owned land, with walls, hedges or fences around it.[7] The Enclosure Movement was used to end traditional rights over land and was enforced by law through the General Enclosure Act 1801 and the Enclosure Act 1845. The evictions were often forceful. The British government postulated that enclosing land would allow for better growing of crops and grazing of animals, especially sheep whose wool was needed for the industries. The government claimed that large fields would be better utilized by individuals for commercial farming.[8] The upgrading of

[7] Jeremy Burchardt, The Allotment Movement in England, 1793-1873 (Boydell & Brewer Group Ltd 2014).
[8] Donald McCloskey, 'The Prudent Peasant: New Findings on Open Fields' (1991) 51 J. of Econ. Hist. 343-355

agriculture was however not the sole reason for this expropriation; the other being that the royalty hoped that the value of the land would substantially increase where it was legally owned by a few.[9]

However, there is no historical record which indicates that a program similar to the Enclosure Movement was the reason for the expropriation from the masses. Secondly, the recipients of the land were neither directed nor encouraged on how to use the land; it was left to them. It was only after four decades, after the Second World War, that commercial farming emerged in Buganda.[10] There was no effort by the colonial government to raise an agrarian capitalist or commercial farming class in Uganda. The beneficiaries of mailo land simply became landlords, deriving their income from tenants' rent and not profit from utilization of the land. That leaves another, second possible explanation for re-distributing the land; it was meant to obtain the support of some key members of the population. A critical analysis of the list of recipients from the Agreement indicates that these were persons the British needed to enforce indirect rule.[11] The British colonial administration needed the Kabaka and chiefs to rule "through them". Considering that at the time, Buganda was largely a peasant society with most people dependent on the land for a living, gifts of land in square miles would be the most appropriate way of ensuring loyalty. A square mile is equivalent to 640 acres of land. Awarded to one individual, this is a very

---

[9] Gordon Mingay, *Parliamentary Enclosure in England: An Introduction to Its Causes, Incidence and Impact, 1750-1850* (1st edn, Routledge 2014).

[10] Nyangabyaki Bazaara, 'Land Reforms and Agrarian Structure in Uganda; Retrospect and Prospect' [1994] Nomadic Peoples No. 34/35, The Pastoral Land Crisis: Tenure and Dispossession in Eastern Africa, 37-53

[11] The philosophy of indirect rule was premised on the philosophy that Uganda was to be a protectorate, not a colony. See Beverly Gartrell, 'British Administrators, Colonial Chiefs, And the Comfort of Tradition: An Example from Uganda' (1983) 26 African Studies Review.

substantial area of land. When you consider that the pre-colonial ruling class in Bunyoro did not receive land because of their resistance to colonialism, it becomes clear that the land in Buganda was given as gifts

There have been arguments to the effect that the 1900 Buganda agreement did not redistribute land, but rather affirmed the existing tenure systems.[12] Proponents of this vies postulate that pre-colonial Buganda had the concept of dual interests on the same land.[13] Land relations were premised on a feudal system with land controlled by the Kabaka, on behalf of and in trust for the inhabitants of the kingdom. The Kabaka was the "source of rights relating to land…all such rights were deemed to stem initially from a royal grant."[14] From this grant flowed four rights of control over the land.

The first, known as "obutaka"[15] which was in regards to ancestry and clan land was vested in the clan head, who had the right to reside on the land, but other members of the clan had the right to be buried thereon after their death. The individual clan head had the power to allocate its use and receive from the land. But consent from the entire clan was always a prerequisite prior to any land transfers. Upon the death of the clan head, the land was transferred to his successor in the office, and not his children.[16] The clan leader had the authority to use the land and derive profits from it, in case it was occupied by tenants.

---

[12] Peter Mulira, 'The Land Question Was Settled Eighty Years Ago' (Monitor, 2018) <https://www.monitor.co.ug/uganda/oped/commentary/the-land-question-was-settled-eighty-years-ago-1743208> accessed 28 July 2022.
[13] *ibid.*
[14] Henry West, *Land Policy in Buganda,* (Cambridge University Press, 1972) 130
[15] "Obutaka" means "related to the soil"
[16] Justice Benjamin Odoki, *The Report of the Uganda Constitutional Commission: Analysis and Recommendations*, (1992)

The Obutaka was premised on original grants by the Kabaka or upon undisturbed occupation for more than one generation.[17] Some of the individual grants were for services rendered to the king, even by one's ancestors.[18]

The second was "obutongole"[19], which signified the rights granted to chiefs, by the Kabaka, for their various services to him. The recipients had the right to use the use and benefit from the land allocated to them. Where there were tenants on the land, the chief had the same authority as one who held "obutaka". However, the "obutongole" land was bound to the chief's position and where that position was lost, he could no longer hold the land.[20] The chief was but a steward of the Kabaka.[21] The estate was attached to a particular office and usufructuary rights terminated upon the death of the office holder

The third category was known as "obwesengeze[22]" and denoted the individual hereditary rights of control over land in pre-colonial Buganda. They were acquired by a chief or an individual tenant, either through grant by the Kabaka or lengthy undisputed occupation of the land. Because these rights were not political in nature, they could be passed to heirs of the right holders.[23]

The last was known as "ebibanja". These were rights granted to peasants for occupation of land under a chief. The chief was responsible for the welfare of

---

[17] Mukwaya, *Land Tenure in Buganda: Present Day Tendencies,* (Nairobi, Kampala, Dar es Salaam: The Eagle Press, 1953)
[18] See Saulo Lule v Yakobo Semiti *Katikiro we byalo bya Kabaka reports* No 13 of 1947
[19] "Obutongole" means related to an official position. Derived from "okutongola" which means "to come to the fore"
[20] Supra n.17
[21] *Ibid.*
[22] "Obwesengeze" means land rights given in perpetuity. Derived from "okusenga" which traditionally meant "joining a chief's village"
[23] Supra n.16

the peasants under his care while the peasants, in return had to pay tribute and provide labour. Maintaining one's "kibanja" was dependent on keeping the proper political and social behaviour.[24] The kibanja holder also had grazing rights, water rights and the right to remain in possession upon succession.[25]

This indeed confirms that even prior to the 1900 Buganda Agreement, usufructuary usage of another's land by a tenant was a known concept. The Agreement converted the usufructuary and political rights of the chiefs into a freehold system. However, the omission of such rights from the 1900 Buganda Agreement, whether by negligence or intentionally by the drafters meant that peasants were neither recognized nor protected. The Agreement did not define the relationship between the allottee of land and its inhabitant, leaving the relationship at the discretion of the landlord. By conferring individual ownership rights and absolute control over land to holders of mailo titles, the Colonial government also upset the kingdom's social order since the concept of individual ownership was in stark contrast to customary ownership, where the person granted rights over the land still had obligations to the Kabaka, the clan and tenants on his land.[26]

It is pertinent to also note that at the time the Agreement was signed, the British were not aware of the exact number of chiefs in Buganda. The number of 1000 included in the Agreement was merely a guess.[27] Furthermore, there were other

[24] Barbara Gärber, 'Caught between Customary and State Law: Women's Land Rights in Uganda in the Context of Increasing Privatization of Land Tenure Systems, (MA Thesis, University of Vienna, 2012)
[25] Supra n.17
[26] *Ibid.*
[27] *Ibid.*

individuals who benefitted from the allotment when they were not chiefs, but had the opportunity of being present when the property was shared. In effect therefore, over 3,700 individuals obtained land.[28]

The (Buganda) negotiators of the Agreement may have intended that it only confers a permanent form of the ancient rights and privileges.[29] They soon thereafter however realized that they rights conferred on the new land owners constituted a fundamental change in the traditional system. To legalise these rights therefore, and differentiate them from those of freeholders under English Common law, the Land Law of 1908[30] was enacted. It created the *mailo* land tenure system and its primary provisions were;

a) that the mailo owner could transfer land by sale, gift or will to another person of the Protectorate but could not transfer land or lease it to anyone who is not of the Protectorate without the special permission of the Lukiiko and the Governor;
b) that where a person leaves no will, succession will be ascertained by customary rules of succession;
c) the mailo land owner would not be compelled to give a chief who is superior to him any portion of the produce in money or in kind; and
d) that customary rights of the people to the use of roads, running waters and springs are preserved.

[28] Harold Beken Thomas and Albert Edward Spencer, *A History of Uganda Land and Surveys and of the Uganda Land and Survey Department* (1938, Entebbe)
[29] Supra n.17
[30] Buganda Possession of Land Law 1908, Revised Laws, 1951, vol. viii p.1219

The effects of the Agreement and the Land Law were to, on the one hand confer proprietary rights in perpetuity that were no longer associated with political functions on a section of the population. On the other hand, it freed peasants from all obligations to the land-owner except those of the landlord tenant relationship.

In the first instance Provisional Certificates were issued to all *mailo* owners whose claims had been roughly marked on the ground. In the event of gift or sale a certificate of ownership was issued by the Lukiiko as an instrument of transfer. A comprehensive Registration of Titles Ordinance was enacted in 1922 to bring mailo titles into the system of registration. S.9(2) of the Ordinance stipulated that

> "All land included in the final mailo certificate shall after the commencement of this Ordinance be subject to the operation of this Ordinance and shall be deemed to have been registered thereunder..."

With surveying of the kingdom concluded, the allotees of land were issued certificates of title as proof as proof of their ownership. As Banenya has noted, the certificate of title was granted

> "under the Registration of Titles Ordinance The Registration of Titles Act (RTA) is the Torrens legislation in Uganda. Under the Torrens system of land registration the basic features are title by registration and indefeasibility of title. So the moment the mailo allottee was issued with a certificate of title, he was paramount over all other occupants of that land. The allottees' title is not only paramount but cannot be impeached

except for fraud.10 More to that, a certificate of title issued under the Torrens legislation is conclusive evidence that the person named therein is the registered proprietor."[31]

The allocation of freehold land meant that the chiefs were at liberty to sell, mortgage or even abuse the land.[32] The relationship between the mailo owners and peasants had not been defined by the Buganda Agreement or Land Law 1908. The peasants continued to assume the same feudal relationship with the mailo owners as they had done under the pre-1900 arrangement. At first, this was not particularly difficult since many of the same individuals who had been chiefs were now mailo owners. The mailo owners largely continued to respect the tenants and dispensed justice in the traditional manner they always did. They expected, in return the same dues and services the tenants were obliged to give.[33]

A new situation arose however with the introduction of cotton as an economic peasant crop after World War I, when its price rose. The tenants began to grow the crop on their land and the mailo owners, intending to cash in on the profit began to exploit them by demanding high portions of the produce as rent or its money equivalent. Other mailo owners demanded that peasants offer labour on their (mailo owner's) fields. Some of the allotees began to evict occupants on the land so that they could give it to tenants willing to grow cotton. Many of the mailo owners had chosen to use the land as a source of

[31] Supra n.5
[32] Supra n.10
[33] Supra n.17

revenue because their estates were distributed piecemeal in many counties. It was therefore cost-effective for them to not utilize the land themselves but derive income from it.

Such disenfranchisement is bound to lead to discontent, which the tenants openly voiced. To therefore protect the tenants and govern their relationship with the landlord, the Protectorate government enacted the Busullu and Envujjo law of 1928. The primary effect of this law was to consolidate the customary rights into legal form. Where the law was silent on a point, ancient custom was applicable.[34] But where the custom and the law were in conflict, the Law was deemed to prevail. In ***Kiwanuka v Ntwatwa,***[35] the Court stated that

> "Whatever may have been the rights of the appellant by ancient custom to claim that the piece of land occupied by his relatives reverted to him when they ceased to use the land, that ancient custom has been done away with by the Busulu and Envujjo Law"

The key provisions of the Busulu and Envujjo law were that

i) The tenant could only occupy the land with the consent of the landlord
ii) Each tenant had to pay Busulu of sh 10 per annum
iii) Each tenant had to pay envujjo according to a schedule dependent on the crop and also sh2 per brew of beer
iv) The tenant had to render respect and obedience designed by custom

[34] For example, it did not recognize the Obutaka, Obwesengeze and Obutongole systems of land rights. In regards to the Bibanja system, it primarily gave security of tenure to the peasant, but subject to payment of rent/tithe.
[35] Principal Court Civil Appeal No 1 of 1948

The Busulu and Envujjo law laid down the following rights for tenants

i) No peasant holder was to be evicted save for public purposes or unless a court tried the matter and made an order of eviction;
ii) The court granted compensation for improvements;
iii) a peasant holder had the right to cut trees and to get firewood, and the right to access pasturage, and salt licks;
iv) a peasant holder in succession to the holding had the right to remain in possession; and
v) no change in ownership of mailo land could affect the status of a peasant in his holding

For the tenant to occupy a kibanja, he or she had to seek the consent of the landlord. S.8 of the Busulu and Envujjo law provided that

(1) Nothing in this law shall give any person the right to reside upon the land of a mailo owner without first obtaining the consent of the mailo owner upon except–

a) The wife or child of the holder of a Kibanja; or

b) A person who succeeds to a Kibanja in accordance with native custom upon the death of the holder thereof.

(2) Nothing in this law shall give to the holder of a Kibanja the right to transfer or sub-let his Kibanja to any other person

It is pertinent to recall at this point that S.29(1)(a) of the Land Act which creates the tenancy by occupancy stipulates that a person should be occupying the

land by virtue of the repealed Busulu and Envujjo law. The repealed law provided as to how someone could be a tenant, and that was with the landlord's consent.

The landlord's consent prior to occupation of the kibanja was pertinent.[36] He had the right to refuse to allot any portion of his land and reserve it for his own present or future use. He also had the authority to allot to whomever he or she wished and determine the boundaries.[37]

How then was the landlord's consent obtained? Considering the low levels of literacy then existing, rarely did the parties enter into written agreements. The general practice was for landlords to parcel out the land into small holdings and allot them to the holders.[38] The extent of the kibanja was as determined by the landlord. In some instances however, the tenant would be allocated virgin/uncultivated bush. The custom was that his rights then extended to all such land as he could bring under cultivation with the uncultivated bush belonging to the landowner.[39] Having received the kibanja, the tenant was expected to either build a house on it and/or grow crops on the land. He was also expected to pay rent and tithe to the owner. It is these three aspects,

[36] In Muluta Joseph v Katama Sylvano Supreme Court Civil Appeal No 11 of 1999, the Supreme Court noted that an agreement purporting to sell and transfer a kibanja was void for lack of consent from the mailo owner
[37] In Ndazizale v Womereka Principal Court Civil Appeal No 46 of 1947, the holder Ndazizale cultivated an area larger than what the owner had allotted to him. He claimed he needed the extra three acres to grow economic crops. The court held that the law did not impose a duty on the landlord to provide land.
[38] Supra n.17
[39] In Musoke v Kalinabiri Principal Court Civil Appeal No 6 of 1967, the tenant was granted an unspecified tract without any boundaries. Court held that his kibanja would be "limited to the space needed for building a house and for the cultivation of what might be called household crops"

namely the allotment, occupation and payment of rent/tithe which established one as a tenant.

The tenant had to undertake effective occupation within a reasonable time. Failure to do would be interpreted to mean that he or she had abandoned the tenancy. In ***Nakayima v Kamulegeya***[40] the plaintiff had been allotted to a kibanja. She began constructing a house thereon but did not complete it. She also did not pay rent for two consecutive years. The Court noted that her tenancy had not been established on the land since "she neither built a house…nor lived on it, nor paid the dues".

The tenancy could also be obtained by acquiescence. Where a tenant established himself on the land, but the landlord did not do anything to stop him from occupying the land, even where consent wasn't obtained prior to occupation, the tenant would be deemed to have acquired the tenancy. This of course was dependent on the landlord knowing that the tenant had in fact occupied the said land. In ***Semuto v Sebabunga***[41] the tenant's holding was only 100 yards way from that of the landlord. The latter did not sue the former for trespass or make any attempt to evict him. Court held that "it was difficult for the landowner to explain the fact that the tenant lived on his land and planted crops on it for a year without his permission and he did not complain to the courts about it.

[40] The Saza Court, Kyadondo, Civil Case No 20 of 1950
[41] The Saza Court, Kyadondo Civil Case No 31 of 1950

Because many of the landlords had received tracts of land in different parts of the kingdom and couldn't supervise all of them at the same time, they appointed stewards in some areas. These stewards had the authority to grant bibanja, even if they acted contrary to the orders of the landlord. This was keeping in line with the doctrines of agency where the actions of an agent are binding on the principal. In ***Nsereko v Sekajugo***[42] a steward offered a second holding of land to a tenant without the landlord's knowledge. When the landlord attempted to evict the tenant, Court held that

> "There is evidence that the previous steward had power to give holdings to tenants without reference to the landowner. The holding was therefore given to the tenant in the proper manner. He cannot be evicted."

As S.8 of the Busulu and Envujjo law already highlighted indicates, the kibanja would also be obtained upon succession "in accordance with native custom upon the death of the holder thereof." The custom decreed that the intention to keep the holding be communicated to the landowner on the last day of the funeral.[43] The successor in title to the tenant had to introduce himself to the landlord with a tunic and a cock. Where the heir was a minor, a guardian would occupy or otherwise preserve the rights of the tenant by cultivation and payment of dues until the heir was of age.[44]

The grant of a tenancy under the Busulu and Envujjo law was not necessarily in perpetuity. The landlord had the right of reversion where the tenant left the

[42] The Saza Court, Kyadondo Civil Case No 41 of 1950
[43] Supra n.17
[44] *Ibid.*

holding derelict for more than six months with no other occupant approved by the mailo owner or without the consent of the mailo owner.[45] The power to evict a tenant lay in the courts of law and it was a criminal offence for the landlord to carry out an unlawful eviction.[46]

Even then, the courts were hesitant to grant orders of eviction and sought to always preserve the tenant's occupancy. In ***Mukasa v Mpigwa***[47] the landlord applied for an order of eviction against a tenant who had not paid busulu for three years. Court however stopped the eviction because the tenant could after three years afford and was willing to pay the rent, notwithstanding his inability before.

S.29(1)(a) of the Land Act also recognizes those who occupy the land because of the Toro Landlord and Tenant Law of 1937 plus the Ankole Landlord and Tenant Law of 1937.

In 1900 the British signed the Toro Agreement with the Kingdom of Tooro and in 1901 the Ankole Agreement with the kingdom of Ankole. As was the case in Buganda, chiefs were granted ownership rights over private and official estates of land. The Omugabe (King) of Ankore received 50 square miles while the

[45] S.12 Busulu and Envujo law. The owner had the right to give the holding to another person, even though he had to first report the abandonment to the *gombolola* (subcounty). In ***Kirabira v Musisi*** **The** Saza Court, Kyadondo Civil Case No 19 of 1950 the plaintiff had been living on land for 24 years when he left it vacant for two years. Court held that he had forfeited his rights by neglect.

[46] The offence was punishable with a fine not exceeding Sh100 or in default, to imprisonment for not more than three months.

[47] Principal Court Civil Appeal No 24 of 1951

Enganzi (Prime Minister) obtained 16 square miles. The ten most senior chiefs also received 10 square miles each.[48]

The authority of the chiefs in Toro and Ankole was however restricted since the allodial title vested in the Protectorate Government. The titles had been carved out of Crown land.[49] This was because the titles were granted on freehold and not *mailo* land. As Banenya,

> "Freehold tenure meant, legally, that the radical title is vested in the crown (colonial government) whereas with mailo tenure the radical title is vested in the individual mailo owner"[50]

But even then, the chiefs began to evict the occupants of the land necessitating a law to protect the interests of the tenants. The provisions of the Toro and Ankore laws were no different in substance from the Busulu and Envujjo law. One had to enter onto the land with the consent of the landlord and had to pay rent. As with the Busulu and Envujjo law, the Toro and Ankore laws were repealed by the Land Reform decree.

There has not been much litigation arising from those who occupied the land because of the Toro Landlord and Tenant Law of 1937 and the Ankole Landlord and Tenant Law of 1937. This is probably because tenancies by occupancy were, upon resurrection in the 1995 Constitution only recognized on mailo land.

---

[48] Martin Doornbos and Michael Loftie, 'Ranching and scheming; A case study of the Ankole Ranching Scheme' in Michael Loftie (ed), *The State of the Nations: Constraints to Development in Independent Africa.* (1971, University of California Press, Berkeley)
[49] Supra n5. See also Henry Francis Morris and James Stracey Read, *Uganda; The Development Of Its Laws* (Sweet & Maxwell, London 1966), 341
[50] Supra n.5

Yet as already indicated, many of the tenancies in Ankore and Toro were created on freehold land leaving few pockets of mailo land in the two regions.

The Busuulu and Envujjo law of 1928, Toro Landlord and Tenant Law of 1937 and Ankole Landlord and Tenant Law of 1937 were repealed by the Land Reform Decree of 1975.[51] Whereas they were relieved from the payment of rent or tithe, they no longer had security of occupancy. the Decree required that all mailo and freehold titles be converted into leases. Upon conversion however, the landlord had the right to issue a three months' notice to the occupant, pay compensation to him or her for development on the land and the tenant had to vacate the land. The bibanja holders in effect became tenants at sufferance[52] until the 1995 Constitution came into force.

Entered land with consent of registered owner

A lawful occupant also refers to a person who entered the land with the consent of the registered owner, and includes a purchaser.[53] This provision does not require a historical perspective. The tenancy is created when a landlord allows a person onto their land. Its definition includes a person who purchases the tenancy, whether or not a written agreement exists.[54] For a person to be

[51] S.3 Land Reform Decree, No 3 of 1975
[52] S.3(2) Land Reform Decree provided that "For the avoidance of doubt, a customary occupation of public land shall, notwithstanding anything contained in any other written law, be only at sufferance and a lease of any such land may be granted by the Commission to any person, including the holder of the tenure, in accordance with this Decree."
[53] S.29(1)(b) Land Act
[54] In Sarah Mugalu Namboowa v Dubai Kavuma Bukenya High Court Civil Suit No 134 of 2017, the parties entered into a written memorandum for the sale of a kibanja. Court held that the defendant had entered onto the land with the consent of the owner.

considered a lawful tenant under this provision, it is pertinent to prove that he or she obtained the consent of the land owner, prior to occupying it.

Cognizant of the fact that landowners may choose to allow licensees onto their land, and that such licensees might be interpreted as tenants by occupancy, the drafters of the Land Act included S.29(4) which stipulates that

> "For the avoidance of doubt, a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bona fide occupant under this section."

A licence in law, in relation to land, is permission granted by the landlord to the licensee to use it for a specified purpose or for purposes which are included in the licence.[55] This however raises a question; how does court distinguish between a licensee and a tenant by occupancy? Doesn't it raise the possibility that a registered owner will admit a person as licensee and the latter will claim to be a tenant by occupancy? A tenant by occupancy enjoys lifetime security of occupation and pass on his or her interest to successors in title, unlike the licensee, making the former position more desirable for those who do not own the land. It is therefore pertinent to appreciate the difference between the tenant by occupancy and the licensee.

An owner of land may allow any person to occupy a portion of their land under a license. A licensee is one who has permission to enter or use another's

[55] Dina Okidi v George Will Odwong Court of Appeal Civil Appeal No 233 of 2015

premises, but only for one's own purposes and not for the occupier's benefit.[56] The license creates no rights on the owner's land. The term "license" simply means permission. Because the registered proprietor has a legal interest in the land, every other person in the world is *prima facie* under a duty to use the proprietor's land. By granting permission however to utilize one's land, the registered proprietor allows what would otherwise have been unlawful. In ***Thomas v Sorrell***[57] Vaughan CJ while considering the meaning of the term license noted that

> "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which, without it, had been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which without licence, had been unlawful."

Suffice to say that a licence allows one to do something which would otherwise be tantamount to trespass. It gives the licensee the liberty to use the proprietor's land but no accompanying rights are granted. A tenancy by occupancy, on the other hand, grants the tenant extensive rights to occupy the land and use it for any purpose he or she desires. Only the latter may be inherited by successors in title.[58]

---

[56] Bryan A Garner, *Blacks Law Dictionary*, (9th edn A Thomson Reuters Business, 2009) 1004
[57] (1673) Vaugh 330, Exchequer Chamber
[58] S.29(5), 34 Land Act

In ***Musisi Gabriel v Edco Limited***[59] the plaintiff's father had been invited by the owner of the land to look after it and assist in the collection of rent from the tenants on the landlord's behalf. He occupied 18 acres and when given the option to purchase a kibanja, paid for only two acres. He did not complete payment for the rest of the land. Court ruled that upon his death, the successors could not inherit the license. Bashaija J noted that a licensee is

> "simply authorized to do a particular act or series of acts upon the other's land without possessing any estate therein. Secondly, it is founded on personal confidence and is generally not assignable or transferable. Thirdly, no proprietary interest passes to the licensee, who is merely not a trespasser; and fourthly, it is revocable at will by the property owner"

Because both relationships are created by agreement between two parties, a court should examine the written agreement to determine what the intention of the parties. Where no agreement exists, court should examine the relationship that the parties have to determine whether one is a licensee or a tenant by occupancy. For example, a tenant by occupancy is entitled to a certificate of occupancy.[60] This certificate is granted by the registered proprietor. Where the latter has issued such a certificate to a tenant, he or she is estopped from later arguing that the relationship is a license.

In addition, a tenant by occupancy is obligated to pay annual ground rent which is determined by the relevant District Land Board, with approval from the

[59] High Court Civil Appeal No 52 of 2010
[60] S.33 Land Act

Minister of Lands.[61] On the other land, the rent to paid by a licensee is determined by agreement between the two individuals. Transactions by a tenant by occupancy are also determined by law[62] while those of a licence are largely regulated by agreement.

Occupied land as customary tenant but tenancy wasn't disclosed

The last criterion for a lawful occupant is a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.[63]

This provision also requires an understanding of the historical context. In 1975, then President Idi Amin enacted the Land Reform Decree.[64] Enacted without debate from the public, the law declared all land in Uganda public land, vested in the Central government and administered by the Uganda Land Commission.[65] The law was aimed at introducing a uniform tenure system of leasehold through out the country. All existing mailo and freehold estates were converted into leaseholds of either 99 or 199 years based on whether they were vested in individuals or public bodies.[66] All other legislation which regulated the relationship between landlords and tenants (including the Busuulu and Envujjo Law of 1928, Toro Landlord and Tenant Law of 1937, Ankole Landlord and Tenant

[61] S.31(3) Land Act
[62] S.34 Land Act
[63] S.29(1)(c) Land Act
[64] No 3 of 1975
[65] S.12 Land Reform Decree
[66] S.3 Land Reform Decree Decree

Law of 1937 were abolished.[67] By the Decree, tenants were exempted from paying busuulu, envujjo or any other rent. The law was however a double-edged sword. Whereas they could now occupy the land without having to pay ground rent, they had no security of tenure. The Decree had rendered them tenants at sufferance and their tenancies could be terminated with six months' notice in consideration of compensation.[68] Following the ideology of the government then in power, the Land Reform Decree was militant. All customary tenants in the way of development would be evicted to allow for agrarian capitalism or planned development.

Some tenants however continued to occupy the land. In ***Tifu Lukwago v Samwiri Mudde Kizza***[69] Court noted that

> "The Land Reform Decree, 1975 converted mailo land into public land, and the mailo land owner into a lessee on conversion. It preserved kibanja holding as a customary tenure on public land without any apparent liability or obligation, on the part of the kibanja holder, to the lessee on conversion…the customary practice of introduction and giving a kanzu was for the purpose of soliciting such consent. The position after the Decree therefore was that while the customary tenure was continued, the customary rights and obligations previously appertaining to that tenure were not preserved"

[67] S.3(4) Decree
[68] Walubiri 1994
[69] Supreme Court Civil Appeal No 13 of 1996

Regulation 8(1) of the Land Reform Regulations[70] provided that

> "Every person who, immediately before or on commencement of the Decree, was in occupation of land by customary tenure, by virtue of either the Public Lands Act or the Decree, shall, within 24 months from such commencement apply to the subcounty Land Committee through the sub county chief in charge of the areas where the land is situated for the purpose of being registered in respect of such occupation."

As such, a person who previously owned a kibanja was now a customary tenant on public land. The individual however had to apply to the Subcounty land committee to be registered. This was to streamline the process of compensation by the Commission and the individuals granted leasehold titles.

The customary tenure could be transferred from one person to another subject to the condition that such transfer would not vest title in the land to the transferee except the improvements or developments carried out on the land.[71] Any agreement purporting to transfer customary tenure as if it were actual title to the land was void.[72] To acquire customary tenancy in the time when the Land Reform Decree was in force, one needed the written consent of the Uganda Land Commission.[73]

---

[70] 1976
[71] S.4(1) Land Reform Decree
[72] S.4(2) Land Reform Decree
[73] S.5(1) Land Reform Decree. Customary occupation without the consent of the authority was unlawful. See Paul Kisekka Ssaku v Seventh Day Adventist Church Civil Appeal No 8 of 1993

The Uganda Land Commission had the authority to manage all land in Uganda, in accordance with the Public Lands Act.[74] All land that previously wasn't registered (that is, mailo, freehold and leasehold) was available to any applicant, for allocation by the Commission. Where a person was applying for the grant of a lease over public land, he or she had to notify the Commission of the presence of tenants on the land.[75] The tenants were then compensated or resettled prior to the grant of a leasehold interest to the applicant.

It is pertinent to emphasise that a claim for customary tenancy can not be sustained for land that was in an urban area. S.24 Public Land Act had abolished customary tenure in public areas.[76] In addition, for one to be a customary tenant, they had to be occupying the land in line with established customs in the area[77]. This raises an additional question of how to prove customs since they are largely unwritten. Whomever seeks to rely on a custom has the burden to prove its existence.[78] In ***Marko Matovu vs Mohammed Sseviiri***[79]

> "There is no definition of customary tenure perhaps because it is so well understood by the people. Where a person has a kibanja, it is generally accepted that he thereby established customary tenure on public land. But not all people live on a kibanja. In many areas people grow seasonal

[74] 1969
[75] S.2 Land Reform Decree
[76] See Kampala District Land Board v Venasio Babweyaka
[77] Kampala District Land Board v Venasio Babweyaka
[78] Tifu Lukwago v Samwiri Mudde Civil Appeal No 13 of 1996. See also ***Ernest Kinyanjui Kimani v. Muira Gikanga*** [1965] E.A. 735
[79] Court of Appeal Civil Appeal No 7/788

crops on the land they occupy and in other places some use the land for grazing cattle only. Yet all these people also enjoy customary rights over land they use."

Scholars have questioned why the drafters of the Land Act revived "lawful occupants" yet the Land Reform Decree had appeared to streamline ownership by creating only one interest on land. It should be noted however that instead of enhancing security of tenure, the Decree worsened it. Some landlords, upon converting their titles into freehold sold their land to government officials who, through the use of force evicted the tenants. Other landlords began to demand more rent from their tenants even though the law had abolished the collection of rent.

These tenants at sufferance continued to occupy the land, but with no legal protection. It was for this reason that 23 years later, when the Land Act was enacted, tenants by occupancy were granted protection by the law. The customary tenants on leasehold were granted protection under the Land Act because the Land Reform Decree exposed the tenants to illegal rent extortion or eviction.

Bona fide occupant

S.29(2) also lays down another category of tenants by occupancy, that is, the bona fide occupant. A "*bona fide* occupant" means a person who before the coming into force of the Constitution —

(a) had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or

(b) had been settled on land by the Government or an agent of the Government, which may include a local authority. [80]

A person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant shall be taken to be a bona fide occupant.[81]

Bona fide is a Latin term for "in good faith".[82] The creation of bona fide occupants was also in part due to historical reasons. From the 1960's, Uganda faced political and social instability which forced many Ugandans into exile. Many of the Ugandans who went into exile were registered proprietors of land. With the nation gaining relative stability in the early 1990s, many of the persons in exile returned and sought to reclaim their land. Other owners had remained in Uganda but were absentee landlords, owning tracts of land in different parts of the country. They were not using this land despite being the registered proprietors.

These different tracts of land were however not entirely vacant. They had been occupied and utilized by other individuals with no challenge from the registered owners. In some cases, neither the registered proprietor nor the person in occupation was aware of the existence of the other party. To protect

[80] S.29(2) Land Act
[81] S.29(5) Land Act
[82] Supra n.52 199

the interests of both the owners and persons in occupation, the drafters of the Land Act sought to create a relationship having modified the common law doctrine of "adverse possession"[83].

Adverse possession is the idea that a person obtains an interest in land because of long use. The doctrine has its roots in the notion of relativity of title and the operation of limitation periods at common law. At common law, there was no concept of absolute title; title was relative and based on possession. If a dispute arose between two parties, court had to determine which one had the stronger claim to possession. For an individual to obtain rights through adverse possession, he or she must prove that he or she is in possession of the land, he or she had an intention to possess and the possession is adverse, that is without the consent of the original owner. Not every act of entering another's land amounts to possession; it must be the kind which indicates an ownership claim by the adverse possessor.[84] The intending claimant should also indicate an intention to possess the said land, to the exclusion of all others. He or she should not merely intend to utilize the land for a limited period, but rather more or less own it.[85] The claimant should also prove that his or her occupation of the land was not with the consent of the owner.[86] Having fulfilled these conditions, over a lengthy period of time, one is deemed an adverse possessor and defeats the interest of the registered proprietor[87].

---

[83] Supra n.5
[84] See Red House Farms (Thorndon) Ltd v Catchpole [1977] 2 EGLR 125.
[85] Buckinghamshire CC v Moran [1990] Ch 623.
[86] JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419.
[87] See Powell v McFarlane (1979) 38 P&CR 452

In regards to a bona fide occupant, the law considers that a person who, for at least 12 years prior to 1995, occupied the land without objection from the landlord is entitled to protection[88]. If the landlord did not keep an eye on his or her land to ensure that no person is utilizing it without consent, it would be unfair to the person in occupation to be evicted. Having occupied the land since at least 1983, the drafters clothed the possessor with security of occupancy as a bonafide occupant.

The rationale for protecting such a person who would otherwise be a trespasser lies in the idea that land is finite resource. If the owner therefore has lost interest or abandoned it, with another showing interest and taking possession of the same for a lengthy of period, the latter should be protected from arbitrary eviction.

In ***Kampala District Land Board and Chemical Distributors vs National Housing and Construction***[89], the respondent in that case had occupied the suit land since 1970 and had used the land *inter alia* as a playground for children residing in its adjoining estate. It had fenced off the land and constructed a sanitary facility on it. The 1st appellant however granted a lease over the suit land to the 2nd appellant ignoring the objections of the respondent and local council officials of the area. The respondent sued the appellants claiming that the grant of the lease to the 2nd appellant was unlawful because it sought to

[88] See Prince Kefa Waswa v Joseph Kiyimba High Court Civil Suit No 482 of 2011 where the plaintiff had been settled on the land in 1986 by a princess of Buganda Kingdom, as a reward for his contribution in building the kingdoms' palaces. Court held that he was not a bona fide occupant, having stayed on the land for a period less than 12 years prior to the 1995 Constitution.
[89] Civil Appeal No. 2 of 2004

trump their interest as a bona fide occupant. The respondents' claim was upheld. In the lead judgment, Odoki CJ opined that

> "I have already held that the respondent had been in occupation or possession of the suit land for more than twelve years at the time of coming into force of the 1995 Constitution. The respondent had not only occupied the land but also utilised it, without any challenge from Kampala City Council. The respondent was entitled to enjoy its occupancy in accordance with Article 237(8) of the Constitution and Section 31(1) of the Land Act, if the suit land was registered land... A bona fide occupant was given security of tenure and his interest could not be alienated except as provided by the law."

The second type of individuals who qualify as bona fide occupants are those who, prior to the coming into force of the 1995 Constitution had been settled on land by government or its agents. For a person to qualify as a bona fide occupant in this regard, he or she should show that his or her settlement was done by a government agent and that it was prior to the enactment of the 1995 Constitution.

Conclusion

The concept of a tenant by occupancy is a montage created from English common law and customary law. It is questionable if it is still relevant, in the 21st century, to preserve such a feudal system of land ownership. By creating two interests on the same land, neither of the holders is able to fully utilize it. There

is need for reform by the Government to streamline ownership, given the increasing pressure on land from the population.