

RESEARCH ARTICLE

Certificate of Title: A Discussion of Contemporary Challenges to the Protection of Land Interests in Uganda

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Abstract

Certificates of title are a feature of the Torrens system of land registration which originated in Australia and which operates in Uganda. The system confers primary responsibility to register title, and guarantee its security, upon the state. A certificate of title is indefeasible and conclusive evidence of ownership, except in cases of fraud by the registered proprietor. This article uses a doctrinal legal research approach to analyse the legal framework on certificates of title, citing court decisions to give an interpretive lens to the law. It finds that the almost century-old system remains immature and its actualization is hampered by the socio-political context of Uganda. Certificates of title are a feature of a capitalist order and produce unfavourable outcomes, including fraud through double titling, illegal entries in the register and spurious caveats. Government needs to address the socio-political and administrative challenges inhibiting the evolution and practical application of the Torrens system in Uganda.

Keywords: Torrens system; certificate of title; fraud; land; Uganda

Introduction

Debates on the certification of interests in land are current in the developing countries of sub-Saharan Africa. Customary tenure has been predominant in most African states since precolonial days.¹ Colonial administrators were preoccupied with the improvement of tenure security through the ascertainment of parcels of land by survey, recordation, certification and promotion of private property rights.² Uganda applies the Torrens system of land registration whereby a certificate of title is “conclusive evidence of proprietorship”.³ Under this system, a certificate of title is (i) issued at the end of the registration process; (ii) evidence that the named person is the owner and proprietor of the interest described; (iii) confirmation that the processes of registration followed the law; and (iv) the conclusion of a lawful state-controlled registration process through which title to land is acquired.⁴

Land registration is topical in academic discourse and in many countries. It is seen as facilitating tenure security and access to credit.⁵ This argument is based on a wrong assumption that credit

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1 JW Bruce and SE Migot-Adholla (eds) *Searching for Land Tenure Security in Africa* (1994, Kendall/Hunt).

2 LK Agbosu “Land registration in Ghana: Past, present and the future” (1990) 34/2 *Journal of African Law* 104; HWO Okoth-Ogendo “African land tenure reform” in J Heyer et al (eds) *Agricultural Development in Kenya: An Economic Perspective* (1976, Oxford University Press).

3 See *Re An Application by GNM Mallo* [1964] vol 1 East Africa at 31.

4 Laws of Uganda, Registration of Titles Act (RTA), cap 230, sec 59.

5 G Feder and T Onchan “Land ownership security and investment in Thailand” (1987) 69/2 *American Journal of Agricultural Economics* 311.

institutions will lend on security of title, which may not always be the case. Also, good land governance and strong institutions of land administration are a prerequisite of tenure security, while poor land governance erodes security.⁶ In post-conflict settings such as Burundi, land registration has intensified land disputes and has heightened competition for resources, authority and legitimacy among institutions.⁷ Other arguments advanced for certification include that it (i) increases productivity on land; (ii) promotes agricultural investment through access to credit; (iii) improves optimal land utilization; and (iv) makes decision-making easy with private title.⁸ Tenure security through certification increases land on the market, unlike informal tenures which lock it outside the market, where it fails to produce capital.⁹ For these reasons, the World Bank was preoccupied in the late 1980s and 1990s with formalization of land in countries such as Uganda and Tanzania. Under the Land Act of Uganda, area land committees and district land boards have engaged in processes leading to the registration and conversion of customary land into freehold.¹⁰

This article makes a critical analysis of the discourse on certificates of title and protection of interests in land. Since the notion is embedded in the Torrens system of land registration, it interrogates the application and relevance of that system to Uganda, within the context of its legal realities and polity. It shows how offshoots of capitalist market orientations and Uganda's socio-political context affect the operation of the Torrens system, and argues that application of the system tampers with the socio-political context of Uganda. This context is mainly shaped by high levels of informality in land transactions, and as a result it impedes effective implementation of the Torrens system. The article begins by constructing a conceptual frame and situating its argument in the literature on land registration and certification, market- and investment-oriented arguments on certificates of title, and traditional concepts of title. The second part deals with certification of interests using Torrens titles, while the third part places the Torrens titles within Uganda's context (legal and socio-political) and shows how these impact on application of the concept. Lastly, it discusses the contemporary challenges affecting the system, followed by recommendations. It refers in brief to how trends in Uganda connect to worldwide (capitalist) trends shaping notions on land registration. Evidence has been gathered using qualitative desk review and the doctrinal approach to research. Judicial decisions on the Torrens system are used to offer an interpretive lens to the law.

The literature

The discourse on land registration and certificates of title

Registered land in Uganda is estimated at being about 20 per cent,¹¹ while formal tenure in Africa covers less than 10 per cent.¹² Therefore, much of Africa's land is unregistered and is accessed through informal arrangements embedded in customary systems built on kinship. These provide limited tenure security in the face of globalization, increasing population, renewed interest in

6 P To, S Mahanty and A Wells-Deng "From 'land to the tiller' to the 'new landlords'? The debate over Vietnam's latest land reforms" (2019) 8/8 *Land* 120, doi: 10.3390/land8080120, available at: <www.mdpi.com/journal/land> (last accessed 7 October 2022).

7 R Tchatchoua-Djomo et al "Defusing land disputes? The politics of land certification and dispute resolution in Burundi" (2020) 51/6 *Development and Change* 1454 at 1456, 1480.

8 *Ibid.*

9 H De Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000, Basic Books).

10 *Id* at 10; Makerere Institute of Social Research and the Land Tenure Center, *Land Tenure and Agricultural Development in Uganda* (June 1989).

11 J Oloka-Onyango *When Courts Do Politics: Public Interest Law and Litigation in East Africa* (2017, Cambridge Scholars Publishing) at 206.

12 K Deininger *Land Policies for Growth and Poverty Reduction: World Bank Policy Research Report* (2003, World Bank and Oxford University Press) at xxi.

large-scale land acquisition in Africa, and migration.¹³ This explains the need to improve tenure security in some African countries through formalization of title. To Kanji and others, “While land registration systems vary considerably across and even within countries, they involve some form of documentation of interests in land, with a view to providing legal protection of those interests. Land titling is the strongest legal form that registration of land rights can take, with titles usually guaranteed by the state.”¹⁴

To others, land registration has in practice favoured the rich and the elites against the poor, who can barely afford the costs of land registration.¹⁵ Formalization of land rights in a systematic and prescriptive manner without understanding the on-the-ground realities leading to insecurity of tenure is a top-down approach that may not solve the problem.¹⁶ Considering the colonial history of many African countries, land distribution denoted power, not market orientations to determine who gets what.¹⁷ Shivji has described the colonial land project as the foulest kind of land grabbing and the pauperization of majority natives on land.¹⁸ In the post-independence era, the locally powerful and the elites have played a large role in land distribution, and registration may therefore confirm the skewed patterns of land distribution against the poor.¹⁹

That notwithstanding, if property rights are registered and guaranteed by the state, there is a public record, and no need to spend a lot of resources guarding them.²⁰ In Ghana, the predominance of competing claims to customary land has led to an increase in the phenomenon of land guards: unemployed youths guarding land against potential grabbers.²¹ Formalized land rights can also facilitate land-use planning and offer accurate information to government entities, on the basis of which they may deliver services after land acquisition.²²

Land registration and investment

Land registration and sustainable land use (and land-based investment) are related.²³ Registration offers information relied on in land transactions. Accurate records facilitate transactions between strangers, thereby reducing forgeries and fraud. A land registry with up-to-date records on ownership and transactions increases access to credit, with land as collateral.²⁴ Access to credit may,

13 N Kanji, L Cotula, T Hilhorst, C Toulmin and W Witten “Can land registration serve poor and marginalized groups?” (2005, International Institute for Environment and Development) at 1, available at: <<https://pubs.iied.org/pdfs/12518IIED.pdf>> (last accessed 6 December 2020).

14 Id at 2.

15 SE Migot-Adholla, F Place and W Oluoch-Kosura “Security of tenure and land productivity in Kenya” in Bruce and Migot-Adholla (eds) *Searching for Land Tenure Security in Africa*, above at note 1; JK Green “Evaluating the impact of consolidation of holdings, individualization of tenure, and registration of title: Lessons from Kenya” (1987, Land Tenure Center, University of Wisconsin–Madison paper 129); JP Plateau “Does Africa need land reform?” in C Toulmin and J Quan (eds) *Evolving Land Rights, Policy and Tenure in Africa* (2000, IIED).

16 W Easterly “Institutions: Top down and bottom up?” (2008) 98/2 *American Economic Review* 95.

17 K Deininger and G Feder *Land Registration, Governance, and Development: Evidence and Implications for Policy* (2009, Oxford University Press) at 325.

18 I Shivji “Lawyers in neoliberalism: Authority’s professional supplicants or society’s amateurish conscience”, at 11, 17–19, available at: <<http://mokoro.co.uk/land-rights-article/lawyers-in-neoliberalism-authoritys-professional-supplicants-or-societys-amateurish-conscience/>> (last accessed 19 October 2022).

19 JM Baland and JA Robinson “Land and power” (2003, Centre for Economic Policy Research discussion paper 3800).

20 D Allen and D Lueck “Contract choice in modern agriculture: Cash rent versus crop share” (1992) 35/2 *Journal of Law and Economics* 397.

21 L Darkwa and P Attuquayefio “Killing to protect? Land guards, state subordination and human rights in Ghana” (2012) 9/17 *Sur International Journal on Human Rights* 141 at 143, 146–49.

22 Deininger and Feder *Land Registration*, above at note 17.

23 T Besley “Property rights and investment incentives: Theory and evidence from Ghana” (1995) 103/5 *Journal of Political Economy* 903.

24 Deininger and Feder *Land Registration*, above at note 17.

however, depend on other factors, “such as liquidity of land markets and the presence of credit-worthy projects that may not hold in practice”.²⁵

Despite the advantages of land registration, in reality they can only be achieved in the context of ideal land governance frameworks that promote access to institutions and information.²⁶ Deininger and Feder opine that:

“Without institutions to enforce property rights effectively, the rights presumably protected by the land registry may exist only on paper ... A land registration system can be rendered ineffective by the absence of a judiciary that is accessible and impartial ... by ineffective government institutions with overlapping mandates that may issue conflicting documents regarding the same plot, and by unclear and contradictory policies that make enforcement unpredictable and costly. In such situations, it would be difficult to rely on state-issued documents and uncertainty of property rights, the elimination of which was the goal of setting up a registry system ... Often, it will be the weaker and poorer segments of society which suffer the negative consequences of land titling in situations of ineffective and dishonest government.”²⁷

Deininger and Feder’s statement is reflective of Uganda’s situation.

The traditional concept of title and land transfer

The traditional concept of title and land transfer is imbued in Uganda’s history. Before the signing of the 1900 Agreement between the king of Buganda and the British, land registration and transfers based on certificates of title were unknown to Ugandan societies.²⁸ The key features of land tenure in Buganda have been described by West and Mukwaya; in brief, the king (the *Kabaka* or *Ssaabataka*)²⁹ was the ultimate authority on land, and clan heads and appointed chiefs were his land administrators who gave usufructs to their community members.³⁰ Land transfers were by application of *Ganda* customs such as “showing the land” that involved the physical appearance of the giver (the chief’s or king’s representative), the receiver and witnesses on the ground, showing the receiver the land and demarcating boundaries.³¹ Evidence of attestation to this process was left to the memory of the witnesses; there were no physical records of it. In Buganda political authorities allocated land on behalf of the king.³² They exercised power and control over land, received tribute from its users, received services and collected taxes for the king from land users.³³

The introduction of a land registration system in Buganda was intended to formalize processes of land transfer and ownership through survey, registration and issuance of title.³⁴ Under the 1900 Agreement individual titles were issued, in an environment of predominantly African tenure

25 Id at 256.

26 Id at 238.

27 Id at 329.

28 Before the formation of Uganda as a sovereign entity, Buganda was one of the kingdoms that existed in the 19th century to the north of what came to be known as Lake Victoria in the East Africa region. It had a relatively organized political system and occupied a dominant political place in colonial Uganda and at independence. The kingdom of Buganda still exists as a recognized cultural institution under the laws of Uganda.

29 Meaning “ultimate owner of all land”.

30 HW West *The Mailo System in Buganda: A Preliminary Case Study in African Land Tenure* (1964, Government Printer) at 2–7; AB Mukwaya *Land Tenure in Buganda: Present-day Tendencies* (1953, East African Institute of Social Research / The Eagle Press no 1) at 12.

31 H Hanson “A historical perspective on land transfer: ‘Showing the land’, survey, and registration in (B)Uganda from 1900–1950” (2011) 17/1 *East African Journal of Peace and Human Rights* 285 at 286–87; West *The Mailo System*, above at note 30 at 5.

32 Ibid; Hanson, *ibid*.

33 West, *id* at 5 and 9; Hanson, *id* at 3.

34 Ibid.

characteristics, leading to mixed outcomes.³⁵ Prior to the Agreement, individual ownership was unknown until the king started granting unregistered interests in land to his significant loyal servants (a system known as *Obutongole*).³⁶ The 1900 Agreement introduced freehold estates, where individuals with exclusive ownership rights had power to make decisions about land.³⁷ There were similar trends in East Africa: through the Masai agreements in Kenya, strategic lands were reserved for white settlers.³⁸ The East African Royal Commission later recommended land registration (modelled on the English system), leading to individual titles as a way to secure holders and promote agriculture in East Africa.³⁹

The above situation distorted the pre-existing communal tenures (universal access to land) in East Africa. In Kenya, customary tenure was considered a hindrance to agriculture, and it was believed that the new system would promote agriculture by increased security of tenure and access to credit.⁴⁰ In Buganda, Butaka lands were for communal use of the clan and could not freely be disposed of. Some were given to individual Bataka under the 1900 Agreement, and the Bataka could freely dispose of the estates to anyone, including non-natives.⁴¹ The individualization of land disintegrated universal access and created a new class system of “haves” and “have nots”.

Certification of interests with Torrens titles

The Torrens system of land registration – derivation and rationale

Named after its founder Sir Robert Torrens, the Torrens system was described in a 1900 piece of literature as one where indefeasible title to land is acquired by registration.⁴² While he was in South Australia (from 1840), Torrens’ career spanned multiple responsibilities: collector of customs (from 1841), House of Assembly representative for Adelaide (from 1857) and premier. His system applied principles of shipping laws to land registration, using the Torrens Act in 1858 in South Australia and later adopting it for the whole of Australia in 1862.⁴³

Prior to the Torrens system, a complicated double-index system was used to record and track interests in land. The grantor’s index contained details of grantors (names and land) and the grantee index had details of grantees.⁴⁴ The principle of *nemo dat quod non habet* applied to the system: possession of deeds signified ownership of land and the power to transfer it. Both indexes had to be searched to verify whether the vendor had valid title to transfer to a purchaser.

The system was cumbersome in both land administration and transactions. Torrens developed a single-tract index replacement system which was reliable, simple, low-cost, fast and suitable. In 1900, EC Massie said, “[t]he system has grown steadily in popularity and efficiency, and probably 90 per cent of all the lands of Australia have now been brought under its provisions and

35 Id at 1.

36 West *The Mailo System*, above at note 30 at 2.

37 Id at 6.

38 Oloka-Onyango, *When Courts Do Politics*, above at note 11 at 188.

39 East Africa Royal Commission Report: *East Africa Royal Commission, 1953–1955* (1955, HMSO), chap 23.

40 S Coldham “The effects of registration of title upon customary land rights in Kenya” (1978) 22/2 *Journal of African Law* 91.

41 West *The Mailo System*, above at note 30; *Timoni Mwenge v Serwano Migade, miscellaneous cause no 19* [1933] 5 ULR at 97.

42 EC Massie “The Torrens system of land registration and transfer” (1900) 6/4 *Virginia Law Review* 214 at 215, 221.

43 *Ibid*; Real Property Act of 1858 (South Australia) 21 Vict c15, available at: <https://www.foundingdocs.gov.au/resources/transcripts/sa8_doc_1858.pdf> (last accessed 21 October 2022).

44 B Goldner “The Torrens system of title registration: A new proposal for effective implementation” (1981) 29/661 *UCLA Law Review* 661 at 663–66.

registered”.⁴⁵ The system was fully developed and implemented, unlike in Uganda, where it is only partially developed and applies to about 20 per cent of land.⁴⁶ Torrens’ object was “to simplify, quicken, and cheapen transfer of real estate, and to render titles safe and indefeasible”.⁴⁷ Five of the seven justifications for his system are:

“First. It has substituted security for insecurity; second ... reduced the cost of conveyancing from pounds to shillings and the time occupied from months to days. Third ... substituted clearness and brevity for obscurity and verbiage. Fourth ... simplified ordinary dealings that any person who has mastered the three Rs can transact his own conveyancing. Fifth ... It affords protection against the largest class of frauds.”⁴⁸

These are still valid justifications for the system. It was also intended to reflect ownership through registration:

“[O]ur present system only provides for the registration of certain *evidences of title, and actually perpetuates defects upon the record*. It is the peculiar distinction of the ‘Torrens System’ that it provides for the registration of titles, absolute and indefeasible, leaving no room for anything to appear in derogation thereof.”⁴⁹

The system facilitates transactions in land, gives easy transferability and improves land markets for development:⁵⁰

“Any law that prevents the free use and transfer of property curtails to that extent the liberties of the people ... Any law that operates for the benefit of one class of citizens at the expense of another is outrageous. Any law that may deprive one man of his property without notice and bestow it upon another is intolerable. Our present land laws do all these things.”⁵¹

The system was meant to cure these deficiencies in the law.

Some jurisdictions faced challenges before the introduction of a similar system. In Virginia, for instance, the following issues bedevilled the system of land registration: (i) the record could not be used to verify signatures and boundaries of land; (ii) there was no notice of unrecorded deeds; (iii) examination of titles alone could not give the true state of the land; and (iv) too many records of deeds had to be searched to verify ownership of land. Furthermore, before the Torrens system was applied, accidental failure to examine a piece of information led to losses and related costly outcomes.⁵² Other loopholes were the promotion of suits against the owner and the appearance of surprise claims by widows, which were costly and time-consuming.⁵³ Extra caution had to be taken by going beyond the record to verify ownership of land. To Massie, “it is absolutely necessary particularly in the examination of title to large tracts of land, to be familiar with the land itself and to learn its history from those who have spent their lives in the neighbourhood”.⁵⁴

45 Massie “The Torrens system”, above at note 42 at 215.

46 Oloka-Onyango, *When Courts Do Politics*, above at note 11.

47 Sir R Torrens *An Essay on the Transfer of Land by Registration* (1882, Cobden Club), cited in Massie “The Torrens system”, above at note 42 at 216.

48 *Ibid.*

49 Massie “The Torrens system”, above at note 42 at 220.

50 E Massie “Reform of our land laws” (Sept 1905) 11/5 *The Virginia Law Register* 359 at 365.

51 *Id.* at 367.

52 *Id.* at 364.

53 DH Van Doren “The Torrens system of land registration” (April 1917) 17/4 *Columbia Law Review* 354 at 355.

54 Massie “The Torrens system”, above note 42 at 218.

Before Torrens, gaps in the records were filled by information obtained from those who knew the land, causing delays.⁵⁵ Visiting the *locus in quo* was necessitated by the loopholes in the land registration system prior to Torrens. In Uganda, with inchoate processes of development and application of the Torrens system, visiting the *locus in quo* is considered invaluable, since the system is not error-proof. However, section 136 of the Registration of Titles Act, chapter 205, in Uganda (“the RTA”) explicitly excludes such searches and rights (on ground but not on title), and they do not affect registered interests. Some practitioners have labelled judicial officers promoting physical searches as activists, engaging in law-making which is not within their mandate.⁵⁶

Historically, the Torrens system was unpopular with lawyers since they financially benefited from repetitive investigation of titles prior to its introduction; it simplified their work but reduced their workload. Massie said that “[a]t first blush this may appear to a legal audience like a formidable array of blessings, calculated to create a famine among the race of lawyers”.⁵⁷ Insurance companies also strongly opposed it.⁵⁸ In Virginia there was resistance through courts of law to challenge acts of registrars.⁵⁹ The system was, however, adopted in Queensland, Victoria and New South Wales, and by 1875 many of its features were applied in England (after Lord Cairn’s Act).⁶⁰ Uganda received it in the 1920s.

Introduction and development of the Torrens system in Uganda

The 1900 Agreement was the launch pad for the Torrens system in Uganda. Afterwards, the British embarked on surveying, titling and setting up land registration offices.⁶¹ Surveys commenced in Ssingoo County (in 1904) and ended in the Buvuma Islands (in 1936). The *Lukiiko* (the parliament of the Kingdom of Buganda) had to confirm allotments of land prior to demarcation and survey, following which “provisional certificates” were issued.⁶² From 1900 to 1911 these bore the name of the holder and a sketch map of the land.⁶³ Final certificates were issued on the basis of maps drawn in accordance with cadastral survey principles in 1909, under the Registration of Titles Ordinance of 1908.⁶⁴ The system was introduced piecemeal, starting with the compulsory registration of documents as proof of rights to land in the district where the land was located.⁶⁵ Similarly, registration of evidence of title, rather than title itself, was the trailblazer of the Torrens system in Australia.

In Uganda, the Torrens system was not given time to evolve into a robust system by long usage and modification in response to changing circumstances, yet it was good for the country.⁶⁶ It preserved *Ganda* cultures (and social relationships) on land better than the English “fee simple”.⁶⁷ The newly introduced concepts of survey, title and registration did not wholly lead to the extinction of pre-existing, traditional modes of transfer (inheritance and showing the land); rather, they interacted with the social realities in Buganda and the new system was to some extent transformed.⁶⁸

55 Ibid.

56 J Nangwala, personal remark on paper by P Walubiri “Indefeasibility of title: An eroded concept in Uganda” (paper presented at The Bar-Bench Engagement organized by the Uganda Law Society, 6 November 2020).

57 Massie “The Torrens system”, above at note 42 at 216.

58 Van Doren, “The Torrens system”, above at note 53 at 355.

59 E Massie, RG Brown and AV Cannon “Report of the Committee on the Torrens system and registration of title to land” (1914) 20/7 *The Virginia Law Register* 481 at 482–85.

60 Massie “Reform of our land laws”, above at note 50 at 365.

61 Hanson “A historical perspective”, above at note 31 at 288.

62 West *The Mailo System*, above at note 30 at 12–13.

63 Hanson “A historical perspective”, above at note 31 at 288.

64 West *The Mailo System*, above at note 30 at 165.

65 Registration of Documents Ordinance 1904, sec 4.

66 West *The Mailo System*, above at note 30 at 13.

67 HB Thomas and AE Spencer *A History of Uganda Land and Surveys, and of the Uganda Land and Survey Department* (1938, Government Printer) at 52.

68 Hanson “A historical perspective”, above at note 31 at 298.

Buganda was a testing ground for land registration and the colonial government needed details to inform the process. Sir William Morris Carter headed a team that inquired into land tenure in Buganda in 1906; in 1907 they recommended replacement of registration of documents with registration of indefeasible titles under the Torrens system.⁶⁹ This was implemented starting in 1909 and was modified in 1922.⁷⁰ On 1 May 1924, a new law based on the Transfer of Land Acts 1915 and 1916 of the State of Victoria in Australia repealed the 1908 Registration of Land Ordinance of Uganda. To HW West it was “a highly sophisticated and complex Ordinance designed for use under conditions very different from those obtaining there”.⁷¹ The Torrens system was introduced in Uganda through the Registration of Titles Ordinance 1922, chapter 102, now the RTA, chapter 230.⁷² All earlier interest in land – mailo, freehold and leasehold – were to be brought under the Ordinance. Its section 9(3) provided that no interest in land would be passed on without registration. Loss of land was reported for some mailo owners in the process of moving from the old to the new register under the Registration of Titles Ordinance.⁷³

Entrenchment of the system triggered the hybrid system, based on both tradition and law, and heightened conflicts on land.⁷⁴ It destroyed the social fabric whereby ownership of land meant social obligations, transformed social relationships between the landowner and the people on the land into commercial relationships, and marked the beginning of an ineffective land market in Buganda.⁷⁵ The system faced resistance, leading to social unrest, for example the Bataka movement against individualization and exploitation. This resulted in the Busuulu and Envujjo Law of 1928, which reformed relations between landlord and tenant.⁷⁶ The Torrens system could not be fully developed and applied beyond the pilot; there were 150,000 unregistered transactions by 1946.⁷⁷ To date, land registration processes are inchoate and the system is not running ideally.

Principles and prerequisites to apply the system using the RTA

The Torrens system has three principles: firstly, the mirror principle sees the register of titles as a mirror which accurately reflects current facts about title beyond doubt. With exceptions, the title is free from adverse burdens and qualifications which are not registered. Secondly the curtain principle means that the register is the “curtain” against any obligation to look behind it for information about trust and equities. The register is the only source of information for intending purchasers. Thirdly is the insurance principle; if the mirror principle fails to reflect the actual situation of the land on the title and one suffers as a result, one must be indemnified.⁷⁸ There were a number of prerequisites for the system to take off in Uganda, including the establishment of a land office and a register book.

Officers of the Land Office

Establishing a land office and appointing its officers were among the prerequisites for the Torrens system. A registrar of titles was appointed to “exercise the powers and perform the duties” stipulated under the Act, assisted by the deputy registrar, as per sections 1(m) and 3 of the RTA. Reference to

69 West *The Mailo System*, above at note 30 at 13–14.

70 Id at 165.

71 Id at 18.

72 Ibid; JT Mugambwa *Source Book of Uganda's Land Law* (2002, Fountain Publishers) at 142.

73 LA Willy “Compulsory acquisition a constitutional matter: The case of Africa” (2018) 62/1 *Journal of African Law* 77 at 98 defines mailo as “a legal form of landlordism developed in the 1900s to reward certain kingdoms ... under which ... land was allocated in square miles”.

74 Hanson “A historical perspective”, above at note 31 at 292.

75 Id at 11, 4, 1.

76 West *The Mailo System*, above at note 30 at 20–21.

77 Ibid.

78 SR Simpson *Land Law & Registration* (1976) at 22.

the registrar under the law is *mutatis mutandis* reference to “commissioner land registration”.⁷⁹ This followed an amendment of the RTA in 2004 by the Land (Amendment) Act, which substituted the registrar with the commissioner for land registration (also including the assistant commissioner, the principal registrar of titles, the senior registrar of titles, the registrar of titles or the district registrar of titles). All can perform the duties set out in the Act and other laws.⁸⁰ The commissioner for land registration (“the CLR”) keeps the register up to date and rectifies any errors.⁸¹

The Land Act introduces “special powers” for the commissioner, exercisable without recourse to court. Under section 91(1), the CLR can “give effect to this Act, whether by endorsement or alteration or cancellation of certificates of title, issue fresh certificates of title or otherwise”. The most contentious section has been section 91(2), containing the power to cancel a certificate of title if “it was issued in error; contains a mis-description of land or boundaries; contains an entry or endorsement made in error, contains an illegal endorsement, [or] is illegally or wrongfully obtained”.⁸² Persons likely to be affected by the CLR’s action are entitled to a prior notice of 21 days.⁸³

Section 91(1) states that it is “subject to the RTA”, but gives the CLR wider discretionary powers to cancel title. In the exercise of such powers, the CLR should follow principles of natural justice and pay heed to section 91 Land Act and the RTA. In *Patel v Commissioner for Land Registration*, the applicant was the registered proprietor of the land that was in issue in the case, having purchased it from Mugoya Guster, who was later alleged to have obtained it through fraud.⁸⁴ The CLR confiscated the special certificate of title of the land from the applicant on the pretext of investigating it, but cancelled it without the applicant’s knowledge, hence this suit. On whether the cancellation followed procedure, the High Court found non-compliance with section 91 Land (Amendment) Act, since the CLR did not give notice of intention to cancel the plaintiff’s certificate of title, contrary to section 91(2), hence violating the right to fair hearing.

In *Olivia Sanyu and Another v Commissioner for Land Registration*,⁸⁵ the Court of Appeal reiterated the position that the power to deal with issues regarding fraud in land dealings under the RTA and the Land Act is vested with the High Court. It found that the CLR had acted outside her legal mandate, making her decision null and ultra vires. The office of CLR is central to the Torrens system; allowing it to make assessments about fraud is tantamount to sitting in its own case, hindering fair outcomes. *Hilda Namusoke* (at the Supreme Court) characterizes a contemporary challenge of distinguishing between mere “errors”, on which the CLR can act under section 91 (2), and fraud.⁸⁶ It sets a precedent by which “fraud” can be reduced to “mere errors”, thereby allowing the CLR to act, yet they do not have the capacity to appropriately assess cases of fraud.⁸⁷ Corruption, which renders the office of the CLR a marketplace, affects outcomes from the exercise of powers granted by the law.⁸⁸

The above issues persist, as seen from the recently concluded Commission of Inquiry into land, which investigated and inquired into the law, policies and processes of land administration and registration in Uganda.⁸⁹ It revealed that public officers in the land office perpetrated errors on the register in many ways, such as issuing special titles without following proper processes, issuing

79 Land (Amendment) Act 2004, secs 3(a) and 41.

80 Land (Amendment) Act 2004, sec 41.

81 See the RTA, secs 71–75.

82 *Id.*, sec 37.

83 *Ibid.*

84 High Court civil suit no 87 of 2009.

85 Civil appeal no 6 of 2013.

86 Civil appeal no 15 of 2017.

87 Walubiri “Indefeasibility of title”, above at note 56.

88 R Agaba, “Interdicted Lands Commissioner Kulata to face trial” (3 December 2018) *PML Daily*, available at: <<https://www.pmldaily.com/news/2018/12/>> (last accessed 30 December 2020).

89 The Commission of Inquiries Act, cap 166, Legal Notice no 2 of 2017.

private titles in forest reserves held by the government in trust for the general public, and unjustly cancelling titles.⁹⁰

The register book

The register book contains certificates of title and other land transactions required to be registered by law and is kept by the commissioner in a public office or registry. Entries are made in a way that preserves the priority of transactions.⁹¹ It is an authoritative record of interests in land warranted by the state and limitations.⁹²

A purchaser of registered land acquires it subject to rights on the register and free from those unregistered.⁹³ Due to Uganda's socio-political realities, there are exceptions, some of which are statutory. For example, the unregistered interest of a "tenant by occupancy" encumbers the mailo holder's title. These tenants are either successors in title of persons who, through traditional tenure, had usufructuary rights to land in Buganda before it was registered for individuals, or who occupied land unchallenged for twelve years before the promulgation of the 1995 Constitution.⁹⁴ According to the Land Act, a tenant by occupancy can apply to the registered proprietor for a certificate of occupancy, which is registered on the title as an encumbrance.⁹⁵ This is an unpopular provision among title holders and has not been implemented. The mailo register is therefore not up to date as it lacks information about certificates of occupancy. In *Zion Construction Ltd v Abahaire and Others*, the High Court stated that one must do a physical search on the land for any physical encumbrances, for the register is insufficient.⁹⁶

The Ministry of Lands Zonal Offices in the regions of Uganda keep registers, and registrars there record transactions. Transactions are separated into registers for mailo, freehold and leasehold. This can facilitate fraud, for example, a person transacting on mailo or freehold land subject to a lease may not be aware of the lease if they do not search beyond the freehold or mailo register.

Certificates of title in law and the socio-political context

Strength

A certificate of title is the seal of registration. Under the Torrens system, registration is the basis on which "the complete property in the land warranted by the state passes".⁹⁷ The RTA points to the strength of certificate of title. According to section 54, an instrument cannot pass on title or interest to land until it is registered. Section 2 defines "instrument" to include "any document in pursuance of which an entry is made in the register". Any document purporting to transfer ownership or interest in land can only be effective after registration.

The lodgement of instruments of transfer with the registrar without actual registration does not amount to registration. In *Ndigejjerawa v Kizito and Kubulwamwana*, Kizito sold the same land first to Sabane and later to Ndigejjerawa.⁹⁸ Both purchasers lodged their documents (not in the legally required format) with the registrar, but Ndigejjerawa (the second purchaser) was first. The High Court held that Ndigejjerawa could not claim ownership as prior lodgement of an instrument of transfer which is not registrable did not pass title to him, since title only passes upon registration.

90 J Olanyo, "Land Registrar admits to issuing fake land titles" (1 December 2018) *The Observer*, available at: <<https://observer.ug/news/headlines/59374-land-registrar-admits-to-issuing-fake-land-titles>> (last accessed 10 May 2022).

91 RTA, sec 37(1).

92 Simpson *Land Law & Registration*, above at note 78 at 16.

93 B Perrins *Understanding Land Law* (3rd ed, 2000, Cavendish Publishing Ltd) at 69.

94 Land Act, secs 29 and 31 (as amended).

95 Id, secs 33(1) and 33(9).

96 Civil suit no 241 of 2015.

97 J Hogg "Registration of title to land" (1918) 28/1 *The Yale Law Journal* 50 at 58.

98 [1953] 7 ULR 31.

This is of limited application in Uganda's social context, with its high levels of informality and vast customary tenure.⁹⁹

Section 59 RTA alludes to strength of title: (i) no certificate of title should be "impeached or defeasible" for failure to follow procedures or any irregularity in processes leading to its registration; (ii) a certificate of title is the best evidence of all the information on its face and of its registration; (iii) it is acceptable in all courts as evidence of its contents; and (iv) it is "conclusive evidence" of proprietorship of land. These are attributes of the Torrens system, espousing the "title by registration" principle enshrined in section 54 RTA.

The registration of interests results in stronger legal rights and guarantees access to legal remedies. Documents executed without registration result in equitable rights and remedies.¹⁰⁰ Unregistered contractual arrangements intended to transfer interests in land are enforced as contracts between parties and not transfer of title, as was the case in *Souza Figueiredo and Co Ltd v Moorings Hotel Co Ltd*.¹⁰¹ Registration trumps previous unregistered claims and interests, except those under limitation or prescription which are subsequent to registration. This breeds unfairness and ignores the fact that before the Torrens system in African settings, there were traditional, communal, social and welfarist ways of passing title, devoid of registration.

Courts have perpetuated this unfairness. In *Kristofer Zimbe v Tokana Kamanza*, two people consecutively bought the same land from a vendor; the first purchaser attempted to get registered by presenting a purchase agreement and the vendor's final certificate (bearing a wrong serial number); the later purchaser presented proper documents and secured registration.¹⁰² In an appeal to the High Court, the court concluded that the later purchaser was entitled to the land. Under section 48 RTA, where interests are competing, priority is determined on the basis of the date of registration of an instrument of transfer, and not the date of execution or signature.

Title at times defeats pre-existing socially entrenched customary claims to land. In *Obiero v Opiyo and Others* (at the High Court of Kenya), the rights of customary long-term occupiers of land were trumped by a title acquired in 1968, under the Kenyan Registered Land Act, section 28 (equivalent to section 64(1) RTA in Uganda).¹⁰³ Under this section, only registered interests encumber such a title. Persons in Uganda claiming unregistered interests in land (subject to the RTA) can register a caveat under section 139, which is "a statutory injunction and a warning preventing the registration of dealings inconsistent with the existing equitable interest, and warning prospective dealers of that interest's existence".¹⁰⁴ Caveats encumber certificates of title and the leverage of the registered proprietor to transact in land.

Impeachability / indefeasibility of title

A registered certificate of title is indefeasible.¹⁰⁵ Indefeasibility means (i) the state guarantees title; (ii) title holders can only be divested of it in a few exceptional circumstances in the law; (iii) government guarantees indemnity for title holders for losses arising from registrars' mistakes; and (iv) only registered interests affect title.¹⁰⁶

The indefeasibility principle aims at simplifying dealings in registered land by making the register the exclusive and mandatory place to verify ownership. Under section 64 RTA, the estate of a

99 AM Tripp "Women's movements, customary law, and land rights in Africa: The case of Uganda" (2004) 36/4 *Africa Studies Quarterly* 2.

100 *Ndigejjerawa v Kizito and Kubulwamwana* [1953] 7 ULR 31.

101 [1960] EA 926(U).

102 [1954] 7 ULR 68.

103 [1972] EA 227.

104 P Stubbs "Equitable priorities and the failure to caveat" (1989) 6/2 *Auckland University Law Review* 199 at 199.

105 RTA, secs 59, 64 and 176.

106 *Id*, sec 183.

registered proprietor is paramount, who “shall, except in the case of fraud, hold the land or estate or interest in land subject to such encumbrances as are notified on the folium of the Register”. This limits searches to verify ownership to the register, hence saving time and money and facilitating land markets. Section 64 gives exceptions to the indefeasibility principle: fraud by the title holder or existence of a prior registered title. This should be read together with the exceptions listed in section 176, where sub-section (e) provides that if more than one certificate of title affects the same land, a registered proprietor of a certificate prior in date cannot be ejected. In *St Mark Education Centre and Another v Makerere University*, Makerere University received a grant of land from the colonial government in 1943.¹⁰⁷ Later, George Kagimu acquired a land title on the same land. Determining the rightful “owner” of the land, the Court of Appeal stated that the title that is first in time prevails over the later. Makerere University could not be ejected since its title was superior. According to the High Court of Uganda in *Charles Nkojo Amooti v Kyazze Francis*, the later title had to be cancelled where land was included in the claimant’s certificate of title by wrong description and where another person(s) holding the titled land under adverse possession existed.¹⁰⁸ Under sections 6 and 17 Limitation Act an intruder or adverse possessor is protected against indefeasibility where the title holder does not file a suit against the intruder within 12 years.¹⁰⁹

Similarly, a bona fide purchaser for valuable consideration who acquired land from a proprietor whose interest was tainted with fraud is protected from any action for ejectment, as long as s/he is not a party to the fraud. In other jurisdictions, such as California, the situation has been different for a long time: as early as the 1920s, a Torrens title was paramount, but it was acknowledged that it may have defects that cannot be easily detectable in the register book. It therefore becomes impeachable by direct or collateral attack.¹¹⁰ A bona fide purchaser’s title “is not invulnerable”. It is unconstitutional in California to give absolute protection to a bona fide purchaser against one with an interest in the land who was not notified of the impending registration of the bona fide purchaser as required by the law.¹¹¹ For Uganda, a title, although not impeachable, may be affected by defects (off the register book) arising after its registration. Under section 64(2) RTA, these include unpaid monies or dues owing to government (eg stamp duty),¹¹² easements and rights under adverse possession.

Compensation requirements to the registered person deprived of land through fraud points to indefeasibility. S/he is entitled to damages and costs of the suit.¹¹³ In *Mary Buyondo v Equity Bank (U) Ltd, Nanteza Miriam and Finance Trust Uganda Ltd*, the plaintiff mortgaged property to the first defendant to secure a loan.¹¹⁴ She repaid it but failed to secure release of the mortgage and return of her clean title. The title was purportedly lost but fraudulently sold to the second defendant, who mortgaged it to the third defendant (Finance Trust Uganda Ltd) and then defaulted. The plaintiff learnt about this when the property was advertised for sale on default. Meanwhile, the first defendant had given her another forged title instead of her genuine one. The plaintiff won the case in the High Court, was awarded damages and costs and an order reinstating her as the registered proprietor of the land.

107 Civil appeal no 40 of 1997.

108 Civil suit no 536 of 2012.

109 *Nambalu Kintu v Efulaimu* [1975] HCB 221.

110 TRM “Property: registration of land titles: Inconclusiveness of a Torrens title” (1923) 12/1 *California Law Review* at 49.

111 *Follette v Pacific Light and Power Corp* [1922] 64 Cal Doc 7 208 Pac 295; also TRM, above at note 110 at 51.

112 Walubiri “Indefeasibility of title”, above at note 56.

113 RTA, sec 178.

114 Civil suit no 2890 of 2016.

More limitations to indefeasibility of title

Limitations to indefeasibility of title aim to preserve social relations on land, contribute to the broader political agenda to protect the poor and address inequitable access and distribution of land.¹¹⁵ However, the Land Act contains some exceptions.¹¹⁶ These apply to land registered under the RTA despite its section 2(1) providing that “except so far as is expressly enacted to the contrary, no act or rule so far as inconsistent with this Act shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Act”. The question of whether statutory provisions in other laws override the principle of indefeasibility in the RTA is a matter of statutory interpretation. In *Sejjaka Nalima v Rebecca Musoke*, the Supreme Court held that where provisions of a later statute are inconsistent with those of an earlier act, the later prevails.¹¹⁷ The Land Act therefore overrides the RTA of 1922 on matters pertaining to registered land. The Land Act is partly intended to put the RTA in tandem with current socio-political realities pertaining to land. It takes care of new developments in the law, such as protection of tenants by occupancy who are either lawful or bona fide occupants.¹¹⁸ In *Kampala Districts Land Board & Chemical Distributors v National Housing Construction*, the court found the respondents to be the rightful owners of the land, but their title was subject to the interests of the bona fide occupants.¹¹⁹

Section 31(a) Land (Amendment) Act 2010 guarantees security of tenure for tenants by occupancy with or without a certificate of occupancy. This provision implies that the title of the registered proprietor is subject to the interests of the tenant, thereby vitiating the concept of indefeasibility. The registered proprietor cannot sell “clean title”; any purchaser of such land buys it subject to the occupancy rights of the occupiers and is bound to respect them.¹²⁰ Occupants can only be evicted for non-payment of rent.¹²¹ The title holder is also limited in his/her choice of purchasers if his/her land has tenants by occupancy, and the first option to purchase has to be given to them.¹²² This changes free-market economics by using social imperatives to restrict the seller’s choice of whom to sell to. In *Kampala District Land Board and Another v Venancio Babweyaka*, the Supreme Court found the respondents to be tenants by occupancy, and therefore the appellants could not transact in the land without giving them first priority.¹²³

The imperative to protect the vulnerable (such as women and children) also affects indefeasibility of title. Inequality in access to land for such groups is entrenched in the law, disproportionately affecting women.¹²⁴ The Land Act provides for the protection of family land under section 39(1), restricting transfer of family property without spousal consent. Section 39(4) provides that even where one is a bona fide purchaser for value, without notice that section 39(1) has not been complied with, the transaction is void and the title should be cancelled.

From the above, the general rule is that certificates of title are conclusive and indefeasible, but socio-political realities have led to exceptions that may render them defective and impeachable. The loopholes in the old system of recordation still exist; Torrens titles have to be searched to ensure their validity and it is good to insure them, just like before. The time and expense involved is almost

115 OXFAM, “Locked out: How unjust land systems are driving inequality in Uganda”, 2019, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/Land%20and%20inequality%20in%20Uganda_November%202019.pdf> (last accessed 18 August 2021).

116 Secs 31, 35.

117 Civil appeal no 12 of 1985.

118 Land Act, sec 29(2); Land (Amendment) Act, sec 3(a).

119 Civil appeal no 2 of 2004.

120 Land (Amendment) Act 2010, sec 3(b).

121 Id, sec 32(a).

122 Land Act, sec 35(2).

123 Civil appeal no 2 of 2007.

124 OXFAM “Locked out”, above at note 115 at 11.

the same as was associated with the old recordation system.¹²⁵ In Uganda the register is not forgery-proof. Courts have recommended due diligence by the intending purchaser visiting the land and investigating its proprietorship to rule out fraud.¹²⁶ Maladministration also affects the full functioning of the Torrens system, leading to land conflicts and evictions.¹²⁷ To streamline the processes of eviction and to protect property rights, the Chief Justice of Uganda has issued guidelines on evictions.¹²⁸

Fraud on certificate of title

Fraud obliterates the concept of indefeasibility of title, but cannot be evoked to challenge the title of a bona fide purchaser for valuable consideration without notice of it.¹²⁹ According to *Sejjaka Nalima v Rebecca Musoke*, to qualify as a bona fide purchaser, one must (i) have a valid title from a person registered as a proprietor; (ii) have paid valuable consideration; and (iii) have acted in good faith without notice of fraud (actual or constructive).¹³⁰ Section 77 RTA provides that “[a]ny certificate of title, entry, removal of encumbrances, or cancellation, in the register book, procured or made by fraud, shall be void as against all parties or privies to the fraud”.

Frederick JK Zaabwe v Orient Bank and 5 Others emphasizes the importance of always ascertaining what fraud is, its perpetrators and whether the respondents were aware of it.¹³¹ The appellant borrowed money from Sewanyana and executed a power of attorney in respect of his land to the second respondent company, where Sewanyana was director and shareholder. In return he got a check for UGX 1 million, which was not honoured. The company used the power of attorney to borrow money from the first respondent and defaulted on the mortgage. The first respondent sold the land to Ali Hussein. Kanyeihamba JSC challenged the title of Hussein on account of fraud. The case used a law dictionary definition of fraud:

“An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. ... Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or ... whether it is by direct falsehood ... innuendo by speech ... silence, word of mouth ... includes ... any unfair way by which another is cheated.”¹³²

“Fraudulent” actions are for personal financial gain and loss to another.¹³³ The court found that Sewanyana and the second respondent company acted fraudulently. The question of whose fraud should affect title was addressed in *Kampala Bottlers Ltd v Damanico (U) Ltd*: the transferee must have directly participated in the fraud, or fraud may be implied where the transferee has knowledge of another person’s fraud that she acts on for her own benefit.¹³⁴ In *Frederick JK Zaabwe*, at the time of execution of the agreement of sale to Hussein, the appellant had lodged a caveat on the title; Hussein’s advocates knew about this and wrote to the registrar about its removal. The Supreme Court imputed the advocates’ knowledge on Hussein; he had constructive notice of

125 TRM “Property”, above at note 110 at 52.

126 *Uganda Posts and Telecommunications v Lutaaya*, Supreme Court civil appeal no 36 of 1995.

127 TRM “Property”, above at note 110.

128 The Constitution (Land Evictions) (Practice) Directions, 2021 (Legal Notice no 2 of 2021), principles 3 and 5, available at: <<http://www.judiciary.go.ug/files/downloads/Land%20Evictions%20Practice%20Directions%202021.pdf>> (last accessed 6 May 2022).

129 RTA, secs 64(1), 176(c), 178(a) and 181.

130 Supreme Court civil appeal no 12 of 1985.

131 Supreme Court civil appeal no 4 of 2006.

132 HC Black *Black’s Law Dictionary* (6th ed, 1994, Publisher’s Editorial Staff) at 600. Also see the case note at 22.

133 *Ibid.*

134 Supreme Court civil appeal no 22 of 1992, Wambuzi CJ at 7.

the appellant's interest in the land.¹³⁵ Hussein was not a bona fide purchaser for value without notice.

Courts have modified the Torrens system in response to social realities. Beyond searching the register, one must visit the land and consult occupants and neighbours about its ownership. In *Mary Buyondo*, discussed above, the purchaser of the property on default of the mortgage did not qualify as bona fide for value without notice, since the appellant and genuine owner was in occupation of the land sold by the bank.¹³⁶ If the purchaser had talked to her, ownership would have been verified. Since she did not, notice of another competing claim was imputed on her. This is also the principle enunciated by the High Court in *Konde Mathias Zimula v Byarugaba*: “a purchaser who knows or who ought to have found out that the property purchased is in the hands or occupation of some person other than the vendor is affected with constructive notice ... abstention from inquiry evidences a want of good faith.”¹³⁷

Contemporary challenges to protection by certificates of title

The socio-political context

Challenges arise from the nature of the Torrens system and its interaction with the socio-political context of Uganda. Customary tenure is the most widely used system in Uganda, mainly composed of unregistered land regulated by traditional norms.¹³⁸ In the 1980s, the World Bank and the International Monetary Fund heralded market reforms as part of a broader agenda of capitalist transformation.¹³⁹ For Uganda's land sector, a 1989 World Bank-funded study report recommended registered tenure (freehold).¹⁴⁰ Unregistered land exists in an environment of competitive market economics favouring registered land, heightening demand for registration and certification. The neoliberal position backed land reforms, and political ideology also favours economic development using land.¹⁴¹ A capitalist orientation led to moral transformation (in the land sector as well) and new norms, such as individualism, self-preservation and self-interest, disregard of others and the communal good, and corruption.¹⁴² The wide gap between the rich and poor has also led to accumulation by dispossession, spearheaded by the rich.¹⁴³ Social inequality in ownership, access and use of land in sub-Saharan Africa is exacerbated by land-titling programmes.¹⁴⁴

Corruption is one of Uganda's biggest predicaments,¹⁴⁵ and it is escalating rather than reducing.¹⁴⁶ Land frauds have usually been perpetrated by persons in positions of power. Low levels

135 The appellant lived and ran a law firm on the land.

136 *Mary Buyondo*, above at note 114 at 13; *Uganda Posts*, above at note 126.

137 Civil suit no 66 of 2007.

138 Tripp “Women's movements”, above at note 99 at 2.

139 W Monteith and L Camfield “‘Don't you want us to eat?': The moral economy of a Ugandan marketplace” (2021) *Critical African Studies* at 5, doi: 10.1080/21681392.2021.1964996.

140 Makerere Institute of Social Research, *Land Tenure*, above at note 10.

141 R Nakayi “The politics of land law reforms in neoliberal Uganda” in J Wiegatz, G Martiniello and E Greco (eds) *The Making of Neoliberal Uganda: The Political Economy of State and Capital after 1986* (2018, ZED Books).

142 J Wiegatz *Neoliberal Moral Economy: Capitalism, Socio-Cultural Change and Fraud in Uganda* (2016, Rowman and Littlefield).

143 R Nakayi “The perceived protection of tenants on registered land against evictions: An assessment of the legal challenges faced by victims of land evictions in Kampala and Wakiso districts” (2016, PILAC working paper 4).

144 P Shipton “The Kenyan land tenure reform: Misunderstandings in the public creation of private property” in RE Downs and P Reyna (eds), *Land and Society in Contemporary Africa* (1988, University Press of New England).

145 Government of Uganda *Uganda Vision 2040* at 6, available at: <<http://www.npa.go.ug/wp-content/uploads/2021/02/VISION-2040.pdf>> (last accessed 21 October 2022).

146 Afrobarometer “A never-ending problem: Ugandans say corruption level has increased, rate government fight against corruption poorly” Dispatch no 435 of 24 March 2021, available at: <https://www.afrobarometer.org/wp-content/uploads/2022/02/ad435-most_ugandans_say_corruption_has_increased-afrobarometer_dispatch-22march21.pdf> (last accessed 21 October 2022).

of accountability for public officers (registrars) have facilitated land fraud on the register with impunity. Land frauds have also resulted from inadequate institutional capacity, an increasing population, the spiralling cost of living and weak laws. Socially invented and embedded stereotypes against women's land rights have flourished within the legal framework, perpetuating their deprivation of land.¹⁴⁷ The above context presents social, political and administrative inhibitions where the Torrens system can flourish.

The system's failure to adapt to local circumstances

The Torrens system was embedded in foreign statutes prior to its importation to Uganda. To what extent have local circumstances adapted to it, and vice versa? Proponents of the system had leverage to develop systems towards ensuring the adaptability of local circumstances to it and not the reverse. In the end, neither the local context fully adapted to the system nor the system to the local circumstances. It remained a foreign concept under experimentation, with Uganda as the laboratory.

The relationship between the Torrens system and customary tenure

A number of African countries recognize traditional customary tenure.¹⁴⁸ In Uganda, it predates the Torrens system. Customary tenure was abolished by the Land Reform Decree of 1975 but was reinstated in 1995.¹⁴⁹ Land rights under customary tenure are socially different from those "forcibly commodified and imposed by colonizers".¹⁵⁰ Customary tenure is incompatible with the Torrens system, and efforts to align them may bring about clashes.¹⁵¹ The Torrens system is about land registration, whereas customary land is predominantly unregistered. Customary land applies to a specific community, is governed by customary rules and regulations, is individually or communally held, and traditional institutions manage it.¹⁵² The Torrens system is run on the basis of statutory rules administered by state institutions. It offers an indefeasible title, whereas the system of recordation of customary rights results in a certificate of customary ownership (CCO), which is only evidence of customary rights in the land.¹⁵³ Indefeasible titles are considered more secure than CCOs. There is no registry for customary land at the moment, but setting it up is among the key policy agendas of the National Land Policy (NLP).¹⁵⁴

The two systems do not necessarily clash, but they create an environment where registered tenure types are preferred to customary tenure. The NLP suggests amending the RTA to "place customary tenure at par with other tenures".¹⁵⁵ With the intrinsic differences between Torrens-registered tenure types and customary tenure, the policy direction is another ambitious experiment, the results of which are not yet out. Until then, customary systems are transitory and relied on to promote a less conflicting registration and titling system.¹⁵⁶ Clashes between customary tenure and the Torrens

147 Transparency International Uganda, "A stakeholder's guide in the fight against corruption in Uganda's land sector" at 15, 9, available at: <<https://tiuganda.org/wp-content/uploads/2020/09/Land-and-Corruption-hand-book.pdf>> (last accessed 25 August 2021).

148 Tripp "Women's movements", above at note 99 at 1.

149 Constitution of Uganda, art 237(3); Land Act, sec 3.

150 O Odoom *The Commons in an Age of Uncertainty: Decolonizing Nature, Economy, and Society* (2020, University of Toronto Press) at xii.

151 R Ye "Torrens and customary land tenure: A case study of the Land Titles Registration Act 2008 of Samoa" (2009) 40 *Victoria University of Wellington Law Review* 827 at 851.

152 Land Act, secs 3, 88 and 27.

153 Id, secs 4 and 8.

154 Government of Uganda "The Uganda National Land Policy 2013", para 40, available at: <http://landportal.info/sites/default/files/the_uganda_national_land_policy_-_february_2013.pdf> (last accessed 13 August 2021).

155 Id, para 41(ii).

156 Tripp "Women's movements", above at note 99 at 1.

system are possible where customary tenure is converted into freehold.¹⁵⁷ This removes it from the customary space into that of the Torrens system, whose principles are pristine and unknown under custom. Application of custom is ousted in favour of the RTA, and over time, the extinction of customary tenure is plausible.

Underdeveloped survey systems affecting the accuracy of certificates

There is a relationship between the accuracy of surveys and the precision of the certificate of title. Part 9 RTA contains details about surveys, and section 151 provides that negligible errors do “not exceed one in five hundred or any encroachment, excess or deficit which does not exceed 1 per cent”. Uganda’s survey system does not always give accurate information on the basis of which to produce certificates of title. Certificates may be produced with errors, beyond what is acceptable.

Outdated survey legislation and dwindling professional standards

Surveyors provide the scientific information which constitutes the title and participate in processes leading to the creation of interests such as mortgages, boundary openings and subdivisions. The legal framework on surveyors includes the Survey Act 1939 (revised in 2000) and the Surveyors Registration Act 1974 (chapter 275). Since the passing of both laws, there have been a lot of changes in the legal, social and practical environment within which surveyors operate, making both Acts outdated. The “static” laws embrace analogue techniques (the manual drawing of lines and measurement of angles), yet surveyors today have embraced digital technologies.¹⁵⁸ They use modern techniques and instruments; 40 per cent use global positioning systems (GPS) while 90 per cent use a total station and not the traditional theodolites and steel bands.¹⁵⁹ Modern techniques and instruments were not envisaged in the above laws, leaving them unregulated. Systematic land adjudication and the electronic recordation of rights (in the Land Information System) are all new approaches not catered for by law.¹⁶⁰ The cadastral survey practices in Uganda done in accordance with the above laws are out of step with contemporary international practice and technological advancement.¹⁶¹

The Survey Act deals with matters of land surveyors and licensing, while the Surveyors Registration Act establishes the Surveyors Registration Board, a body corporate “to regulate and control the profession of surveyors and activities of registered surveyors”. The Board verifies and registers qualified surveyors, keeps the register, publishes it yearly and issues practising certificates. This is mainly to streamline the practice of surveying and to maintain standards. In Uganda, emphasis is on “quality control of cadastral surveys and the conduct of professionals engaged in cadastral surveys”.¹⁶² Other survey and mapping issues are not covered.

The Board’s disciplinary committee conducts inquiries and disciplines a registered surveyor who “commits acts amounting to improper or disgraceful conduct in a professional respect”. Section 22 of the Surveyors Registration Act sets the penalties, including a reprimand, caution or deregistration.

157 Land Act, sec 9.

158 M Musinguzi and M Kisakya “Discrepancy between survey practice and legislation in Uganda” (paper presented at First Conference on Advances in Geomatics Research, Kampala, August 2021) at 133–34, available at: <<https://cedat.mak.ac.ug/publications/discrepancy-between-survey-practice-and-legislation-in-uganda/>> (last accessed 30 November 2021).

159 Id at 136.

160 Id at 134.

161 R Chileshe and H Shamaoma “Examining the challenges of cadastral surveying practice in Zambia” (2014) 3/1 *South African Journal of Geomatics* at 53, 59, 60.

162 Private Sector Foundation Uganda (PSFU) “Review of the legal framework for land administration: surveying and mapping issues paper 2010”, available at: <<https://mlhud.go.ug/wp-content/uploads/2019/03/Draft-Final-Issues-Paper-Survey-and-Mapping-Workshop-Jan-2013.pdf>> (last accessed 28 August 2021).

These are not a sufficient deterrent, justifying the introduction of criminal sanctions for registered surveyors and those who pretend to be such. The Board only regulates registered surveyors, yet in practice the profession allows unregistered surveyors to work under registered surveyors who endorse their work. The profession is infiltrated by quacks (usually persons offering non-professional services to surveyors, such as chainmen). This has led to the issuance of erroneous titles based on fabricated data, or desk surveys without fieldwork. Indeed, “in the worst cases, titles are produced without any physical parcel on the ground” – flying titles.¹⁶³

Valuation surveyors have at times acted fraudulently to influence mortgage lending. In *KCB Bank Uganda Ltd v Sendagire Joseph, Eddie Nsamba Gayiyya and Others*, the bank lent the first defendant UGX 300 million, repayable in 48 months with 32 per cent interest per annum, on security of land.¹⁶⁴ The second defendant (the valuer) was hired to open boundaries and make a valuation report. He hired another surveyor who (fraudulently) surveyed another property instead of the security in this mortgage. He inflated the market value of the “security” (to UGX 650 million). The mortgage was executed. On default (a year later), another valuer revalued the property at market value (UGX 24 million). During the hearing, the second defendant confirmed that the surveyor he subcontracted lied about the values. The High Court found the second defendant liable in professional negligence. Such professional negligence vitiates the level of trust in the Torrens system and its assumption that title is sacrosanct. The NLP recommends law reform, modern technologies, the empowerment of the Board to handle errant professionals, and subsidizing survey costs as solutions to the problem in surveying.¹⁶⁵

Multiple titling to defraud

The Torrens system envisaged exclusive rights of ownership for the registered person and power to create lesser proprietary interests in land. Corruption and an inadequate legal and institutional framework to combat it have facilitated land fraud.¹⁶⁶ The issuance of multiple and overlapping certificates of title on the same land for different people is one exemplar of fraud. *Charles Nkojo Amooti v Kyazze Francis* illustrates this.¹⁶⁷ The second defendant (the custodian of government / public land) issued a lease of land to the plaintiff in 2007; in 2009, a certificate of title was issued to him. Before the lease expired, the same land was leased to the first defendant in 2008, and he too secured a certificate of title from the third defendant. The High Court found in favour of the plaintiff, based on the argument that a certificate of title is conclusive evidence of ownership in situations where there is no fraud on the part of the first person to be registered.

Under the Torrens system, government guarantees security of title. The involvement of two government entities here (the second and third defendants) shows that the custodians of the Torrens system are contributing to its dwindling relevance in securing title. The case was heard *ex parte*, so one cannot discern the arguments of the respondents for their respective actions.

Maladministration and corruption in the registry

The state has a role in securing property rights.¹⁶⁸ Maladministration is among the factors facilitating corruption and fraud on certificates of title. Public officers in the land registry have, by action or omission, perpetrated fraud by entering incorrect information in the register to defraud landowners and / or have failed to detect and prevent fraud.¹⁶⁹ *Sinba (K) Ltd and 4 Others v Uganda*

163 *Id* at 42–43.

164 High Court civil suit no 640 of 2013.

165 Government of Uganda “Uganda National Land Policy”, above at note 154, paras 107–10.

166 Transparency International “A stakeholder’s guide”, above at note 147 at iv and 15.

167 Above at note 108.

168 Deininger and Feder *Land Registration*, above at note 17 at 325.

169 M Wambi “I resisted hefty bribes – land registrar” (23 August 2017) *Uganda Radio Network*, available at: <<https://ugandaradionetwork.com/story/i-resisted-big-bribe-says-lands-senior-registrar>> (last accessed 10 May 2022).

Broadcasting Corporation (UBC) illustrates this.¹⁷⁰ The respondent is a government entity, and by law, any sale of its land has to be pursuant to ministerial consent.¹⁷¹ Its land was sold on 14 January 2011, and consent was secured later, on 8 April 2011. The third appellant (Deo & Sons) purchased the land from the second appellant (Haba Group), following which the sale to the second appellant was cancelled by UBC for illegality. The third appellant challenged the decision in the High Court, which confirmed the illegality, leading to an appeal at the Court of Appeal.¹⁷² Before hearing the appeal, the parties signed a consent judgment (for amicable settlement), and a deed of assignment was executed for the first appellant, which was used to get a warrant of attachment and sale before the land was sold to the fifth appellant on 30 December 2013.

The problematic registration issues in these transactions include that (i) UBC was presented as the owner of the land in the advert for sale, yet the land was still registered in the name of the third appellant; (ii) after the sale to the fifth appellant, UBC was reinstated as registered owner of the land on 10 January 2014 at 2.42PM; (iii) on the same day, at 2.44PM, a special certificate of title was issued;¹⁷³ and (iv) on the same day at 2.44PM, the fifth applicant was registered as proprietor of the land (two minutes after the first entry). Before registration, a number of processes have to take place, including signing transfer forms, the valuation of land by a government valuer and payment of stamp duty. These are time-consuming processes that could not have taken place in two minutes. To Justice Kakuru (Court of Appeal), “this may not be a finding of fact, but raises a red flag”. The court found a likelihood of collusion of the fifth applicant with government officials in the land registry and at UBC. The registration of the fifth applicant was declared null and void.

The NLP proposes restructuring the institutional framework for land administration and management to improve efficiency, transparency and accountability through use of modern technologies, setting up a state land agency and enforcing professional standards to curb irregularities.¹⁷⁴

Circumventing a conclusion of fraud

For it to affect the certificate of title, fraud has to be attributed to the transferee registered as proprietor, in any case challenging registration.¹⁷⁵ There are a number of creative ways to circumvent this rule through organized or syndicated fraud, such as in *Simba (K) Ltd and 4 Others v UBC*.¹⁷⁶ Circumvention can be by feigning ignorance about defects or infirmities in the title, prior adverse claims and neglecting to do proper due diligence before purchase, or lying about the consideration paid for the land. In *Gatsinzi and Another v Lwanga Steven*, the defendant purchased land after the vendor’s title had been challenged in court and an eviction order issued against him.¹⁷⁷ At the hearing, he feigned ignorance about defects in title, asserting that he was bona fide for value without notice, a defence that failed.

The system is unreliable

The Torrens system was intended to be self-sufficient, with the register book as the only source of information about registered land, unless there is a specific intention and provision in another law ousting its application.¹⁷⁸ Section 136 RTA states that:

170 Supreme Court civil appeal no 3 of 2014.

171 UBC Act, sec 6(a).

172 High Court civil suit no 326 of 2011; Civil appeal no 12 of 2014.

173 This is normally issued when the original is obliterated or cannot be found.

174 Government of Uganda “Uganda National Land Policy”, above at note 154, paras 104–106.

175 *Kampala Bottlers*, above at note 134.

176 Above at note 170.

177 Civil suit no 690 of 2004 [2014].

178 RTA, sec 2(1).

“Except in the case of fraud, no person ... proposing to take a transfer from the proprietor of any registered land, lease or mortgage ... shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

Courts have moved away from exclusive application of the RTA, requiring on-the-ground verification of proprietorship, or else notice is imputed on the purchaser.¹⁷⁹ Positivist legal practitioners are against this approach.¹⁸⁰ The approach is preventive and supplementary (rather than contradictory) to the law. The RTA applies in a different social, political and economic context, putting it out of sync with realities. It may not always detect sophisticated fraud, and therefore court decisions requiring extra caution while investigating title fill the gap. This causes delays in land markets, introduces extra steps for intending purchasers of land, and entrenches uncertainties in land transactions and the unpredictability of outcomes from courts.

Conclusion and recommendations

A certificate of title is the status indicator of land ownership and bestows to the holder power to transact in the land described. There is an increasing number of cases where genuine owners of land are left out when strangers acquire certificates and transact or sell their land or property. The key features of the Torrens system, such as indefeasibility of title, have been “eroded”.¹⁸¹ This article finds that the socio-political context of Uganda is mainly shaped by high levels of informality in land transactions, fraud and inequitable ownership of and access to land. It argues that the Torrens system clashes with this context and in return, its effective application is impeded, since it requires a high level of formality and strict adherence to legal rules and procedures. Registration has taken root including where customary tenure is predominant. Yet the socio-political context does not signal readiness to fully embrace the Torrens system in its ideal form.

This article was written following conclusion of a Commission of Inquiry into land registration, which made a number of recommendations. At the time of writing, its report is not public, but media reports indicate willingness to implement some of its recommendations.¹⁸² Against the above backdrop, this article recommends that:

- i. Government should expedite comprehensive and systematic review and amendment of all laws on land administration, registration, surveys and valuation to ensure consistency, clarity and synchronization with good practices and modern technologies.
- ii. To maintain the Torrens system, a national audit and verification of all certificates of title (on paper and on the ground) should be conducted, to gather authentic data with which to correct and update the register and the Land Information System.
- iii. A moratorium on expanding the geographical application of the Torrens system (eg through conversion of customary land into freehold) be implemented, until its deficiencies are addressed.
- iv. An alternative system and principles of land registration that take care of realities on the ground be developed. It may adopt some of the Torrens principles, in addition to more of an organic nature embedded in Uganda’s multiple tenure system.

¹⁷⁹ *Uganda Posts*, above at note 126.

¹⁸⁰ Walubiri “Indefeasibility of title”, above at note 56.

¹⁸¹ *Ibid.*

¹⁸² “Bamugemereire report on land to be turned into law – Museveni” (23 April 2022) *The Independent*, available at: <<https://www.independent.co.ug/bamugemereire-report-on-land-to-be-turned-into-law-museveni>> (last accessed 10 May 2022).

- v. The requirement of visiting the *locus in quo* should be embedded in law for predictability in application and consistency.
- vi. Government should overhaul institutions, strengthen accountability mechanisms for public officers and give stronger penalties for corruption. The recommended institutional safeguards include (i) online dealings in land transactions, as opposed to between person and officer; (ii) setting specific timelines for the conclusion of transactions, with guidelines on expedited services; and (iii) periodic assessment of public officers.

Conflicts of interest. The author served as a commissioner on the Commission of Inquiry into the effectiveness of the law, policies and processes of land acquisition, land administration, land management and land registration in Uganda (2017–20).