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LEGAL PROTECTION OF CUSTOMARY LAND RIGHTS IN TANZANIA

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ABSTRACT

Protection of customary land rights is very essential in Tanzania and other developing countries since most of rural residents occupy land based on customary rules. They have no written document to evidence their title over the subject. Even if registered and secured with certificate of customary certificate of rights of occupancy, they are yet weak as compared to granted right of occupancy. They cannot suffice without been back by strong and sufficient legal regime to protect their land rights. Customary land rights are always deemed to be weak and subordinate to statutory rights despite the fact that section 18(1) of the Village Land Act, 1999 declares it to be of the same status as granted right of occupancy. Therefore, the study is premised to assess the legal protection offered to the customary land rights in Tanzania through normative legal research. Nevertheless, the study find out that the Land Act, Urban Planning Act, Land Acquisition Act derogate such protection accorded to the customary land rights. The existing land laws in Tanzania, though to some extent has a considerable progress regarding protection of customary land rights, some gaps are identified that still weaken the status of customary land rights. Consequently, the study recommends for amendment some land laws that are inconsistency with the protection of customary land rights.

Key Words: Customary land rights; Legal protection; Land Law; Tanzania

1.1 Introduction

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Customary land rights refer to the enjoyment of some use of land that arises through customary, unwritten practice rather than through written codified law.² The system regulating customary land rights is called customary land tenure. Customary land tenure system has been a pinnacle of both rural and urban economies in all the African countries and yet the most vulnerable. As urban population grows, intermingling of people of different traditions and customs results. Cultural mixes and enhanced commercialization inhibit the survival of customary land tenure system. Customary land tenure system is treated with partisan as a darling of the entire land holding system and yet a bastard in practice.

Though customary land rights have been codified and legal recognized in Tanzania under the Village Land Act, 1999³, yet its protection is not so strong and adequate as compared to statutory rights. Most of the holders of customary land rights have no written document to evidence their title over the subject. Even those few who have registered and secured the certificate of customary rights of occupancy, are not protected against compulsory acquisition by the state⁴ and schemes of regularization. Their land rights cannot suffice without been backed by strong and sufficient legal regime to protect them.

Customary land rights are always deemed to be weak and subordinate to statutory rights despite the fact that section 18(1) of the Village Land Act, 1999⁵ declares it to be of the same status as granted right of occupancy. Nevertheless, the Land Act, Urban Planning Act, Land Acquisition Act derogate such protection accorded to the customary land rights.

Therefore, this paper seeks to conduct a thorough analysis of the existing legal framework regulating and governing customary land rights in Tanzania with the view to point out inconsistency and gaps in the law regarding protection of customary land rights.

1.2 Concept of Customary Land Rights

Customary rights to lands refers to patterns of long-standing community land and resource usage in accordance with Indigenous Peoples' and local communities' customary laws, values, customs, and traditions, including seasonal or cyclical use, rather than formal legal title to land and resources issued by the State.⁶

²<https://landportal.org/voc/landvoc/concept/customary-land-rights>

³ Act No 13 of 1999

⁴ Section 34(2) of the Land Act, 1999

⁵ Act No 6 of 1999

⁶ Willy L(2012), Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa,' - Brief #1 of 5, p. 5

Recognizing and protecting customary land rights is a critical component of protecting and defending the land rights of the rural poor. This study is founded upon the notion that despite the fact that customary land rights are now recognized and protected in statutory law, they are not adequately protected against intruders under the auspice of compulsory acquisition of land for public interest or for planning purpose with or without adequate compensation.

1.3 Rationale for Protection of Customary Land Rights

Based on the nature of the customary land rights being weak and lacks legal status of customary land rights in many African countries including Tanzania. Since most customary land are held under customs with or without certificate of title, governments often regard such lands as un-owned public lands or state property, making them particularly vulnerable to involuntary loss. A premise of this series is that most of these lands are rightfully the property of rural communities, in accordance with customary norms. This conflict of claim and interest directly affects most Tanzanians who greatly depend on off-farm natural resources. Just as importantly, many Tanzanian rural poor no longer have sufficient access to farmlands to compensate for the loss of their collective lands.⁷

Where customary systems have been eroded by social, economic, cultural and political change, government intervention may be needed to provide effective land management. Even where customary systems seem to work well at the local level, government intervention may be required as powerful outsiders that do not feel bound by those systems (e.g. urban elites, foreign investors) enter the land arena. In these cases, lack of legal protection for customary land rights based on customary systems may result in local resource users losing land access.

And, whether customary systems are still working well or not, government intervention may be needed to secure the resource claims of weaker and more vulnerable groups – who stand to lose out in ongoing processes of change in local land relations. Recent emphasis on the need for legislation to build on local practice is a major step forward compared to the past. Ongoing debates on the formalisation of land rights (which tend to be centred on individual land registration programmes) must avoid the trap of appealing but simplistic one-size-fits-all solutions. Where resource access rights are multiple and overlapping, as is the case in much of rural Africa.⁸

Land rights are social conventions about the distribution of benefits from land use. Governments play an important role by determining how property rights are defined, how they can be enforced, and how they evolve in line with changing economic conditions. This, in turn provides

⁷ Urassa J. A, (2020), Changing Customary Land Tenure Regimes in Tanzania, PhD Thesis, Ardhi University, p. 2

⁸ USAID, (2006), The Role of Property Right in Natural Resources Management, Good Governance and Empowerment of the Rural Poor, p. 3

a basis for the level of tenure security enjoyed by individual landowners and their ability and willingness to exchange such rights with others. All this suggests that property rights are a social construct. Property is not merely the assets themselves, but consensus between people about how these assets should be held, used, and exchanged. Moreover, property rights to land are not static, but evolve in response to changes in the economic and social environment.⁹

It has been selected because it has sound argument that seeks to recognise the pre-existing long holding of land right in Tanzania. Basing on section 3(1)(g) of the Village Land Act and Land Act, 1999 recognize the pre-existing land rights by virtue of deemed right of occupancy. While acknowledging the pre-existing land rights, the land law also seek to protect those rights against discriminatory customary law. In line with this provision, the theory will be used to examine the strength of the existing legal framework in regulating customary land rights.

1.4 Protection of Customary Land Rights

It has been revealed that customary land right is not only legal recognized but also protected by both constitution, Land Act and Village Land Act. It is the fundamental principle of land law that long standing occupation of land should be recognized and secured by law¹⁰ with the same status as granted rights of occupancy. Nevertheless, the position eroded by section 34 of the Land Act that prescribes some incidences that the customary land rights can be derogated by the state with compensation. Despite the fact that, law stress on the need to protect the customary land rights by granting the equal status to the granted land rights in practice, the law still embraces the some circumstances where customary land rights may be abrogated on favour of the granted rights.

1.5 Intrusion to Customary Land Rights in Tanzania

The protection of customary land rights is subjected to some incidences that permit a government to appropriate the right in favour of public interest or regularization of land rights. These incidences can be called as permissible intrusion to customary land rights. Among other things, both the Village Land Act and the Land Act allow taking of customary land rights for public interests, as well as for regularization subject to full, fair and prompt compensation to occupiers of the land so taken. But also village land (customary land) is liable to be converted to general or reserved land subject to procedures stipulated under section 4 of the Village Land Act. All these incidence are viewed as threatening to security of customary land rights unless they are backed with full, fair and prompt compensation. Even where compensation is paid,¹¹ in practice,

⁹ USAID, (2006), The Role of Property Right in Natural Resources Management, Good Governance and Empowerment of the Rural Poor, p. 3

¹⁰ Section 3(1)(g) of the Land Act and Village Land Act, 1999

¹¹ Toulmin C, (2009), Securing Land and Property Rights in Sub-Saharan Africa: The Role of Local Institutions; Land Use Policy, Vol 26(1) 10-19, p.15

compensation to the landowners or users is not only inadequate and late but also makes little or no provision for the value of the land itself.¹²

1.5.1 Compulsory Acquisition of Land

Compulsory acquisition of land in areas occupied by the poor, without providing an alternative resettlement area or paying full and fair compensation is likely to make the livelihoods of many households more precarious.¹³ Thus, compensation for compulsory acquisitions may be in terms of monetary or may entail relocation or alternative allocation. Items liable for compensation include the value of unexhausted improvement, disturbance allowance, allowance for transport and accommodation; and loss of profits. The Land Regulations do not provide for compensation for unoccupied land.¹⁴ Thus there is a real likelihood that undeveloped plots of land or farms, such as used for grazing, agriculture will not be compensated for the acquisition. Local do lose their ancestors land and cultural values where their land are compulsorily taken by the government.

1.5.2 Scheme of regularization

The Minister responsible for land matters is empowered under section 8 the Urban Planning Act to declare an areas for planning purposes. The purpose of a general planning scheme is to coordinate sustainable development of the area in order to promote health, safety, good order, amenity, convenience, and general welfare of such area as well as efficiency and economy in the process of such development.¹⁵

The occupier of the customary land rights is entitled to receive full, fair and prompt compensation from the loss or diminution of the value of that land and the buildings and other improvement on it once the land has been or is to be declared to be a part of any scheme¹⁶ which involves the extinguishing of all private rights in the land or any injury to the land or the occupation and its use.¹⁷ Determination of compensation on the land declared to as planning area is to be made in accordance with the provisions of the Land Act.¹⁸

Wherever the land is declared to be survey area or scheme of regularization, all customary land rights are thereafter extinguished. The Village Land Act qualifies the application of Part III of

¹² Section 12 of the Land Acquisition Act, 1999

¹³ Toulmin C, (2009), Securing Land and Property Rights in Sub-Saharan Africa: The Role of Local Institutions; Land Use Policy, Vol 26(1) 10-19, p.15

¹⁴ Regulation 12 of the Land (Assessment of the Value of Land for Compensation) 2001

¹⁵ Section 9 of the Urban Planning Act, 2007

¹⁶ *Ibid*, section 8

¹⁷ Section 14(2)(ii) of the Village Land Act, 1999

¹⁸ Section 63(1) of the Urban Planning Act, 2007

the Land Acquisition Act relating to development areas. Land can be acquired under a regularization scheme.¹⁹

1.5.3 Conversion of village land to General or Reserved Land

Conversely, the customary land rights are located in village land. In this regards, village land (customary land rights) are liable to be converted to general or reserved land subject to full and fair compensation to land holders whose their rights have been converted.²⁰ Also section 32 of the Village Land Act, 1999 allows foreigner investors to acquire land direct from village. Thereafter, investor is required to apply to the Tanzania Investment Centre for conversion of the land to general land for purpose of investment. The power to transfer village land to general or reserved land is vested to the president. Where the President is minded to transfer any area of village land to general or reserved for public interest, he may direct the Minister to proceed in accordance with the law.²¹ There is a greater possibility for village land to be acquired by the government moving it from the jurisdiction of the Village Council such as by allocating it to non-village organizations or to foreigners under the National Investment (Promotion and Protection) Act 1990.²² It should be noted that such transfer relinquish the customary land rights over or in the land and other cultural rights.

1.5.4 Management and Administration of Customary Land Right

It has been found that the village council is responsible for the management of all village land. The village council exercise its functions of management in accordance with the principles applicable to a trustee managing property on behalf of a beneficiary as if the council were a trustee of, and the villagers and other persons resident in the village were beneficiaries under a trust of the village land.²³ However such administration and management is subjected to some other higher authorities such s district council, District Land Officer, Commissioner for Land and Minister responsible for land matters.

Village Council is a toothless, unable to do anything without first obtaining the approval of the Commissioner; nor can they act until they hear from the Commissioner. For instance, in declaring the abandoned land, the council is obliged to have regard to the advice from the commissioner. Failure to do so may invalidate the whole process of declaring abandoned land. Most of the members of the village council are not conversant with the law particularly the Village Land Act and other land related laws

¹⁹ Section 8 &9 of the Urban Planning Act, 2007

²⁰ Section 4 of the Land Act, 1999

²¹ Section 4 of the Village Land Act, 1999

²² *Ibid.*

²³ Section 8 of the Village Land Act, 1999

1.6 Conclusion

Customary land rights in Tanzania though, are governed by the Village Land Act, but in most cases, customary law and general practices of the particular community is recognized as law govern and regulate them. The Village Land Act does not sufficiently cover each and every aspect of customary land rights such as derivative rights.

To some extent, the existing land laws have managed to recognize and protect customary land rights in Tanzania. They are registerable and treated as of equal status as granted (statutory) land rights in every aspects. However, some gaps have been identified such as unfair compensation once taken by the government for public interest and lack of clear and uniform rules regulating derivatives rights in customary land. Lack of protection of unoccupied or unused land as it is considered as vacant land.

To some extent, Tanzania is mentioned as one of the country with positive legal regime recognizing and protecting customary land rights. Most of the primary indicators for legal respect of customary land rights are well satisfied in the Tanzania legal framework. Nevertheless, the lesson learnt from Sudan is the best among of the identified state with good laws. It clearly set out in details the customary land rights and derivative rights therein.

1.7 Recommendations

From this conclusion, the study is therefore recommend as followings;-

- i. Harmonization of Land Acquisition Act, Urban Planning Act, and other law that seems to contradict with the Land Act in order to comply with the provisions of the land law. Amendment of Section 12 of the Land Acquisition Act, 1967 to provides for full compensation where the customary land rights are expropriated by the government for public interest.
- ii. Amendment of the Village Land Act, 1999 to incorporate framework regarding derivative rights under customary land rights as provided in the Sudan Land Act, 2009. Lease should not be left to be regulated with customary laws as there is no uniform of customary law among different communities.
- iii. Amendment of Village Land Act to recognize and protect unoccupied land such as area designated for grazing purpose and forest. They should be recognized and once expropriated, compensation should be paid to all interest parties whose rights have been interfered.

- iv. Amendment of Land (Compensation of Land Claims) Regulations, GN 79 of 2001 to incorporate the time frame within the payment of compensation should be made. The regulations should provide interest for delay of such payment to discourage the government from delaying in paying such compensation.
- v. Issuance of certificate of customary right of occupancy should be prioritised to ensure all customary land holders are secured with certificate of occupancy in all villages.

1.8 Author's Biography

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