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PROTECTION OF CUSTOMARY LAND RIGHTS IN TANZANIA

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ABSTRACT

In many developing countries, the majority of land is held under customary tenure. Despite the Constitutional and legislative guarantee on the recognition and protection of the customary land rights in Tanzania, customary land tenure suffers from inadequate legal protection. Section 18 (1) of the Village Land Act, 1999 provides that, a customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy. However, in the contrary, the Land Act, 1999 provides that, a customary right of occupancy can be uprooted in favour of the granted right of occupancy. The Land Act, 1999 also provides that, when granted right of occupancy conflicts with customary right of occupancy, the customary right of occupancy will be defeated. The study employed the doctrinal legal research to assess the protection of customary land right in Tanzania. The observations which were made in the course of this study revealed that, although majority of Tanzanians own their un-surveyed lands under customary right of occupancy, nevertheless, the land laws failed to serve the purpose of protecting the customary land rights against the granted right of occupancy. Thus, resulting to a total denial of the land rights of the majority of Tanzanians who own their lands under customary tenure. It is recommended that; the government should amend the laws which hinder the protection of the customary land rights in order to strengthen the protection of the customary land tenure in Tanzania.

Key words: Protection; customary land rights; Land laws; Tanzania.

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1.1 Introduction

Customary land tenure is believed to govern approximately 90 percent of Sub-Saharan Africa's land. However, despite its widespread use, customary tenure is often not adequately protected and recognized in statutory law which weakens its effectiveness. In 1999, Tanzania enacted the Village Land Act² and the Land Act³. The land tenure system of the country constitutes the granted right of occupancy and customary right of occupancy;⁴ the two types of land tenure form the right of occupancy.

Section 18 (1) of the Village Land Act⁵ guarantees equal status and effect on both right of occupancy. However, in the contrary the land laws⁶ outlaw the protection of the customary land rights; hence, the protection of customary land rights provided by the law⁷ seems to be more cosmetic rather than reality. This study seeks to make a thorough analysis of the current legal framework governing customary land rights in Tanzania. In particular, the study will find out whether the implementation of the laws governing the protection of the customary land rights is effective.

1.2 The Concept of Customary Land Rights

Customary land rights refer to the enjoyment of ownership of land which includes transfer and possession that arises from community's custom, norms, tradition and unwritten practice rather than through written codified law. Different communities have different ways of issuing land holding to its members through their norms, culture and customs.⁸ These are 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.⁹

1.3 Protection of Customary Land Rights in Tanzania

² Cap 114 R.E 2002.

³ Cap. 113 R.E 2002.

⁴ governed by the Village Land Act, 1999 and the granted right of occupancy governed by the Land Act, 1999.

⁵ Cap. 114 R.E 2002.

⁶ Land Act, 1999; Land Acquisition Act, 1967; and the Urban Planning Act, 2007.

⁷ Cap. 114 R.E 2002, s 18 (1).

⁸ Dr. Tenga, W.R and Sist, J.M., Manual on Land and Conveyancing in Tanzania, Dar es Salaam: Law Africa Publishing (T) Ltd, 2008. P. 42.

⁹ UNDP. UN-REDD Programme. Customary rights. 2008. <https://www.un-redd.org/glossary>. (Accessed on 14 October, 2023)

It has been observed that, the Constitution of the United Republic of Tanzania,¹⁰ as amended from time to time, guarantees every person to equal right to own property and declares deprivation of property unlawful, unless it is authorized by the law providing for fair and adequate compensation.¹¹ Nevertheless, there is no provision in the Tanzanian Constitution¹² which expressly provides for the land rights of customary land holders (indigenous people).

Also, it has been revealed that, the Village Land Act recognizes and protects the customary land rights by giving them equal status and effect to the granted rights.¹³ However, in practice the position is quite different as some provisions of the Land laws outlaw the protection of customary land rights.¹⁴ This study finds out that, the protection of the customary land rights as provided by the Village Land Act is more cosmetic than reality.

1.4 Rationale behind the protection of customary land rights

It is stated that, majority of the poor in Sub-Saharan Africa including Tanzania live in rural areas and make a livelihood from agriculture and other land-based production activities. Secure tenure to land is thus of fundamental importance for these people.¹⁵ Therefore, recognizing and protecting customary land rights is a critical component of protecting and defending the land rights of the rural poor. It is founded upon the notion that, protecting and enforcing the land claims of rural Africans may be best-done by-passing laws that elevate existing customary land claims up into nations' formal legal frameworks and make customary land rights equal in weight and validity to documented land claims.¹⁶ When land lacks adequate legal, institutional, and traditional or customary protection it becomes a commodity easily subject to manipulation and abuse. Weak governance leads to weak tenure systems, often depriving individuals and communities of essential rights and access to land and other natural assets and contributing to poor land and resource management which further degrades the limited resource base.¹⁷

Also, another important reason for protection of property rights is that, in its nature property is an asset, therefore, assets need to be regulated in term of usage, and control. How these landed assets can be exchanged controlled held and used is very important to be conveyed in the essence of protection of property rights. Notwithstanding the above, it is significant to note that property

¹⁰ Cap 2 R.E 2002

¹¹ *Ibid*, Article 24

¹² *Ibid*, Cap. 2

¹³ See Cap. 114 R.E 2002, s. 18 (1)

¹⁴ s. 34 (3) & s. 181 of the Land Act, 1999; s. 8 of the Urban Planning Act, 2007; s. 13 of the Town and Country Planning Act, 1967; and s. 3 of the Land Acquisition Act, 1967.

¹⁵ Krantz. L, *Securing Customary Land Rights in Sub – Saharan Africa*. Working papers in Human Geography, 2015:1. https://gupea.ub.gu.se/gupea_2077_38215_1. (Accessed 11 June 2022)

¹⁶ Knight. S.R. *Statutory Recognition of Customary Land Rights in Africa*, 2010. FAO Legislative Study 105, ISSN 1014 – 6679. <https://www.fao.org/publications/card>. (Accessed 04 June 2022).

¹⁷ USAID. Land Links. Land and conflict. <https://www.land-links.org>. (Accessed 20 October 2023).

to land is not always static regardless of the changes in response to vicissitudes in the economic and social environment.¹⁸

Furthermore, in Tanzania like other African countries, the legislative guarantees the protection of customary land rights. For instance, one of the specific objectives of the National Land Policy¹⁹ is to ensure the existing land rights, particularly customary rights are recognized and protected by the law. Consequently, the Village Land Act²⁰ also provide for recognition and protection of the customary land rights.²¹ Therefore, recognition and protection of the customary land rights is of vital importance.

1.5 Derogation of the Customary Land Rights by the Land Laws in Tanzania

Section 18 (1) of the Village Land Act²² guarantees equal status and effect on both right of occupancy. However, in the contrary some of the provisions of the Land Act, 1999; the Land Acquisition Act, 1967; and the Urban Planning Act, 2007 outlaw the protection of the customary land rights; hence, the protection of customary land rights provided by the Village Land Act, 1999 seems to be more cosmetic rather than reality.

1.5.1 The Land Act

The Land Act²³ is one of the principal laws that regulates land in Tanzania Mainland. The Land Act is the specific law to land matters other than village land, however, the Land Act contains some provisions relating to customary land rights as stipulated in some aspects. The Act among other things, provides for procedures for transfer of general land to village land,²⁴ sell of mortgaged land in village land.²⁵ It should be noted that where there are conflicts on a particular matter in relation to land, the Land Act prevails.²⁶

Nevertheless, the Land Act outlawed the principle under section 18 of the Village Land Act which provides for equal status and effect on both rights of occupancy as it allows the customary land rights to be uprooted in favour of the granted rights because it gives room for persons occupying the land under customary rights to be moved or relocated to other land where such land is subjected to granted right of occupancy.²⁷ It can be said that, the law gives the rights to the customary land holders by one

¹⁸ *Ibid*, USAID.

¹⁹ 1995.

²⁰ Cap. 114 R.E 2002.

²¹ *Ibid*, s.18 (1).

²² Cap. 114 R.E 2002

²³ Cap 113 R: E 2002.

²⁴ s. 5 of the Land Act. 1999.

²⁵ Cap 113 R: E 2002, s. 61.

²⁶ *Ibid*, s. 181.

²⁷ Cap 113 R: E 2002, s. 34 (3).

hand and take it away through another hand, the mentioned provision of the Land Act²⁸ hinders the protection of customary land rights.

Also, the Land Act under section 34(3) (b) imposes some conditions to the government when wants to acquire the customary land for public purpose. The provision among other things provides that, before evicting the customary land holders from their lands, the government should pay them prompt payment of full compensation.²⁹ However, the practice is quite different with what has been provided by the law, in many occasions the government forceful evict the customary land holders from their lands without fair, prompt and full compensation for their lands.³⁰

Furthermore, section 181 of the Land Act provides that, when the granted right of occupancy conflicts with the customary right of occupancy, the customary right of occupancy will be defeated. This provision provides *inter aria* that, “the Land Act which is the law governs the granted right of occupancy shall apply to all land in Mainland Tanzania and any provisions of any other written law applicable to land including the Village Land Act which governs the customary right of occupancy which conflict or are inconsistent with any of the provisions of the Land Act shall cease to be applicable to land or any matter connected with land in Mainland Tanzania”. This clearly shows that, some of the provisions of the Land Act weaken the protection of the customary land rights, thus defeat the principle on equal status for both rights of occupancy as provided under section 18 (1) of the Village Land Act.

1.5.2 The Village Land Act

This is also the principal law that regulates land in Tanzania Mainland. It is the main law which enacted for management and administration of the village land in the country.³¹ The village land is held under the customary right of occupancy.³² The Village Land Act³³ established the principle under section 18 (1) for recognition and protection of the customary land rights, it provides *inter alia* that, “...A customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy...”

Also, section 3 (1) (g) of the Village Land Act requires the State to pay full, fair and prompt compensation to the customary land holder who his customary land right is revoked or otherwise interfered with to their detriment by the State or is compulsory acquired by the government. However, this is quite different with the practice as in most cases the customary land holders have been forceful evicted from their lands without payment of compensation as required by the

²⁸ *Ibid.*

²⁹ s. 34(3) (b) (iv) of the Land Act. 1999.

³⁰ See the case of *Attorney General v Lohay Akonaay and Joseph Lohay* [1995] TLR 80.

³¹ s. 7 of the Village Land Act, 1999.

³² *Ibid.*, s. 14.

³³ Cap. 114 R.E 2002.

law as it was observed in the case of *Attorney General v Lohay Akonaay and Joseph Lohay*³⁴ and *Victor Robert Mkwavi v Juma Omary*³⁵ respectively.

Furthermore, the Village Land Act provides for the right to obtain Certificate of Customary Right of Occupancy to the customary land holders to strengthen protection of their land rights.³⁶ Nevertheless, most of land holders do not have Certificate of Customary Right of Occupancy for their lands because in many villages, the land use demarcation and mapping that are required in order to issue the Certificate of Customary Right of Occupancy have not yet completed.³⁷ Therefore, this affects the protection of the customary land as most of the holders have no Certificate of Customary Right of Occupancy to secure their lands

1.5.3 The Land Acquisition Act

It has been revealed that, the Land Acquisition Act³⁸ allows the President to acquire any land for any term for public purpose.³⁹ This study finds out that, the government could compulsorily acquire land, mostly unregistered held under customary tenure freely without requiring consent from the customary land holders.⁴⁰ Also, the position has been revealed in the case of *Mulbadaw Village Council and 67 Others v National Agricultural and Food Corporation*.⁴¹

Also, it has been revealed that the compulsory acquisition has been used by the government to take away the customary land from the land holders without or with little payments of compensation to them for justification of public interest,⁴² hence deprives their land rights. It has been stated that, compulsory acquisition of land without providing an alternative resettlement area or paying full and fair compensation in areas occupied by the poor, is likely to make the livelihoods of many households more hazardous.⁴³ Thus, some of the provisions of the Land Acquisition Act have been used by the government to weaken the protection of the land rights of the customary land holders.

³⁴ [1995] TLR 80.

³⁵ Civil appeal No. 222 of 2019, CAT Mwanza (*Unreported*).

³⁶ Cap. 114 R.E 2002, s. 25.

³⁷ Lauren P et al, Impacts of Customary Land Use Rights Formalization on Smallholder Tenure Security and Economic Outcomes: Midline Results from a RCT Impact Evaluation of USAID's Land Tenure Assistance Activity in Tanzania; Paper prepared for presentation at the "2018 WORLD BANK CONFERENCE ON LAND AND POVERTY" The World Bank - Washington DC, March 19-23, 2018, p. 2.

³⁸ Cap. 118 R.E 2002.

³⁹ Cap. 118 R.E 2002, s. 3.

⁴⁰ Dr. Tenga, W.R and Sist, J.M., Manual on Land and Conveyancing in Tanzania, Dar es Salaam: Law Africa Publishing (T) Ltd, 2008. p. 125.

⁴¹ [1984] TLR 15.

⁴² Lawry, S, *In Sub – Saharan Africa it's time to recognize customary land Rights*, 2014. <https://dai-global-developments.com/articles>. (Accessed 04 June 2022).

⁴³ 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.

1.5.4 The Urban Planning Act

The Urban Planning Act⁴⁴ provides that, the Minister for lands may, by order published in the Gazette, declare any area of land to be a planning area.⁴⁵ However, it has been revealed that, the mentioned declaration mostly affects the customary land which in most cases is not surveyed, thus after the mentioned declaration the customary land rights will be extinguished upon payment of compensation. This hinders the protection of customary land rights as many land holders left homeless with little or no compensation for their lands.⁴⁶

Also, it has been observed that, the Urban Planning Act provides that, a resolution by the relevant planning authority of intention to make a detailed planning scheme shall result to a transfer of land from village or reserved land to a general land.⁴⁷ This study finds out that, such transfer affects directly the customary land rights as the village land is held under the customary right of occupancy⁴⁸ and the customary land holders held their lands through customary tenure. Therefore, the transfer of village land to general land under the planning scheme has negative effects towards the pre-existing customary land rights.

1.5.5 The Town and Country Planning Act

The Town and Country planning Act⁴⁹ which was established in 1967 gives mandate to the minister responsible for land after consultation with the local government authority to declare the area to be a planning area.⁵⁰ However, this study finds out that, the mentioned declaration mostly affects the customary lands which in most cases is not surveyed, thus after the mentioned declaration the customary land rights will be extinguished upon payment of compensation. This hinders the protection of customary land rights as it has been revealed that, many land holders left homeless with little or no compensation for their lands.⁵¹

1.6 Conclusion

Section 18 (1) of the Village Land Act established the principle on the recognition and protection of customary land rights by giving equal status on both rights of occupancy in Tanzania, however, there are several legal challenges which need special attention in order to give full protection to the customary land holders. Those legal challenges include the following: -

⁴⁴ Act No. 8 of 2007.

⁴⁵ See s.8 of the Act.

⁴⁶ Lawry, S, *In Sub – Sabaran Africa it's time to recognize customary land Rights*, 2014. <https://dai-global-developments.com/articles>. (Accessed 04 June 2022).

⁴⁷ s.26 of the Urban Planning Act.

⁴⁸ *Ibid*, s. 14.

⁴⁹ Cap. 355 R.E 2002.

⁵⁰ See s. 13 of the Act.

⁵¹ Lawry, S, *In Sub – Sabaran Africa it's time to recognize customary land Rights*, 2014. <https://dai-global-developments.com/articles>. (Accessed 04 June 2022).

- i. The Land Act outlawed the principle established by the Village Land Act⁵² on the recognition and protection of customary land rights by giving equal status on both rights of occupancy in Tanzania,⁵³ In particular, the Land Act allows the customary land rights to be uprooted in favour of the granted rights.⁵⁴ Also, the Land Act gives a room for a customary right of occupancy to be defeated when conflicts with a granted right of occupancy.⁵⁵
- ii. The Constitution of the United Republic of Tanzania⁵⁶ as the supreme law of the country guarantees equality and recognition of every person before the law,⁵⁷ and provides for protection against any discrimination.⁵⁸ Nevertheless, there is no provision in the Tanzanian Constitution which expressly provides for the land rights of customary land holders.
- iii. The Land Acquisition Act⁵⁹ provides that, where any land is compulsory acquired by the President for public purpose, the government is required to pay compensation to the victims.⁶⁰ On the other hand, the Act restricts compensation to unexhausted improvements.⁶¹ However, in the contrary, the Land Act⁶² provides room for payment of compensation to vacant land.⁶³
- iv. The Village Land Act empowers the Village Council to grant Certificates of Customary Right of Occupancy (CCROs) to the customary land holders to strengthen protection of their land rights.⁶⁴ Nevertheless, in practice, most of customary land holders do not have CCROs for their lands because in many villages, the land use demarcation and mapping that are required in order to issue the CCROs have not yet completed.⁶⁵

⁵² Cap. 114 R.E 2002.

⁵³ *Ibid*, s. 18 (1).

⁵⁴ See Cap. 113 R.E 2002, s. 34 (3).

⁵⁵ *Ibid*, s. 181.

⁵⁶ Cap 2 R.E 2002.

⁵⁷ Article. 13(1) of the Constitution of the United Republic of Tanzania, 1977.

⁵⁸ *Ibid*.

⁵⁹ Cap. 118 R.E 2002.

⁶⁰ *Ibid*, s. 11.

⁶¹ See s. 12 of the Land Acquisition Act, 1967.

⁶² Cap. 113 R.E 2002.

⁶³ *Ibid*, s. 3 (1) (g) & s. 34 (3).

⁶⁴ Cap. 114 R.E 2002, s. 21 & 25 (1).

⁶⁵ Lauren P et al, Impacts of Customary Land Use Rights Formalization on Smallholder Tenure Security and Economic Outcomes: Midline Results from a RCT Impact Evaluation of USAID's Land Tenure Assistance Activity in Tanzania; Paper prepared for presentation at the "2018 WORLD BANK CONFERENCE ON LAND AND POVERTY" The World Bank - Washington DC, March 19-23, 2018, p. 2.

- v. The Village Land Act allows the village land (the customary land) to be transferred or converted to general or reserved land subject to the payment of full, fair and prompt compensation to the customary land holders.⁶⁶ However, in practice that is not the case because in most cases the payment of compensation to the customary land holders is insufficient, unfair and not prompt.⁶⁷
- vi. The Urban Planning Act⁶⁸ allows the Minister for lands by order published in the Gazette to declare any area of land to be a planning area.⁶⁹ However, the mentioned declaration mostly affects the customary land which in most cases is not surveyed, thus after the declaration the customary land rights will be extinguished upon payment of compensation.⁷⁰ Hence, in most cases the customary land holders left homeless or with insufficient and unfair compensation.
- vii. The Town and Country planning Act gives mandate to the minister responsible for land after consultation with the local government authority to declare the area to be a planning area.⁷¹ However, this study finds out that, the mentioned declaration mostly affects the customary lands which in most cases is not surveyed, thus after the mentioned declaration the customary land rights will be extinguished upon payment of compensation.

1.7 Recommendations

In line with the aforementioned weaknesses of the existing legal framework of the customary land rights, the researcher herein below recommends for the following measures: -

- i. The provisions of the Land Act⁷² which outlawed the principle established by the Village Land Act⁷³ on the recognition and protection of customary land rights⁷⁴ should be amended to support the mentioned principle in order to strengthen the protection of the customary land rights.

⁶⁶ Cap. 114 R.E 2002, s. 4.

⁶⁷ Refer the case of *Attorney General vs. Lohay Akonaay and Joseph Lohay* (1995) TLR 80.

⁶⁸ Act no. 8 of 2007.

⁶⁹ *Ibid* s. 8.

⁷⁰ Lawry, S, *In Sub – Sabaran Africa it's time to recognize customary land Rights*, 2014. <https://dai-global-developments.com/articles>. (Accessed 04 June 2022).

⁷¹ See s. 13 of the Act.

⁷² Cap. 113 R.E 2002.

⁷³ Cap. 114 R.E 2002.

⁷⁴ See Cap. 113 R.E 2002, s. 34 (3) & 181.

- ii. The Constitution of the United Republic of Tanzania⁷⁵ should be amended to include the provision which will expressly provide for the land rights of customary land holders (indigenous people).
- iii. The Land Acquisition Act⁷⁶ should be amended to differentiate the modes of assessing compensation on customary land, criteria to be used in paying compensation and mostly the Act should consider paying compensation on customary land basing on the value of land rather than the so-called unexhausted improvement.
- iv. The government should speed up the survey and registration of un-surveyed land, it should also complete the land use demarcation and mapping that are required in order to ensure all customary land holders are secured with the CCROs for their lands, hence strengthening the protection of customary land rights in the country.
- v. The government should ensure that, the customary land holders are paid full, fair and prompt compensation when their customary land is transferred or converted to general or reserved land.
- vi. The government should ensure that, the customary land holders are paid full, fair and prompt compensation when their village land is declared to be a planning area.

1.8 Author's Biography

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⁷⁵ Cap 2 R.E 2002.

⁷⁶ See s. 12 of the Land Acquisition Act, 1967.

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