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Threats of Statutory Tenure on Customary Land in Zambia Evidence from Chamuka Chiefdom in Chisamba District

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ABSTRACT

This article discusses threats of statutory tenure on customary land. The study was primarily qualitative in nature and adopted a case study approach. Using evidence from Chamuka Chiefdom in Chisamba District, Central Province, the paper concludes that there are various threats of statutory tenure on customary land. These include traditional leaders losing control over land, displacements, land disputes, traditional leaders' not consulting their community members, corruption, and tenure insecurity. To resolve these challenges, some villages have been enumerated and mapped using the Social Tenure Domain Model. STDM is aimed at providing Customary Land Holding Certificates. However, certificates issued through the Social Tenure Domain Model are not recognised by the land laws in Zambia. In view of the foregoing, the government and traditional leaders' should ensure that legal reforms are undertaken (for certificates issued through STDM to be recognised by the land laws); traditional leaders are equipped with knowledge and skills in land management; and zero tolerance to corruption.

Keywords:

*Displacement
Dual land governance
Customary land
Land tenure
State land
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1. INTRODUCTION

Secure land rights are essential to the livelihood of customary land users in Zambia. With tenure security, customary land users remain on land and make use of and profit from that land (Boudreax and Sacks, 2009). For instance, secure land rights enable users of customary land to *inter alia* built houses and grow food. Tenure security is thus a highly important issue in the pursuit of sustainable development (Graefen, 2012). Despite their importance, land rights of customary land users have been adversely affected in recent times due to the conversion of tenure from customary to statutory tenure provided for in the Lands Act of 1995 (Chu et al., 2015; Human Rights Watch, 2017). The conversion has been driven by the interests of local and foreign investors in agriculture, mining and tourism (Oakland Institute, 2011a). The Government of Zambia has been supporting the land conversion so as to encourage economic growth, employment creation and infrastructure development in rural areas (Mushinge and Mwando, 2016).

However, the conversions lead to land tenure problems such as displacements, socio-economic exclusion, land disputes, community disquiet, and enclosures of common pool resources such as forests, wetlands and water (Mushinge and Mulenga, 2016). These problems are often an important contributor to food insecurity, restricted livelihood opportunities, and therefore to poverty (FAO, 2002). It is from this background that this paper examines the threats of statutory tenure on customary land in Zambia. In so doing, this study answered four interrelated questions. Firstly, what are the threats of statutory tenure on customary land? Secondly, what recent innovative mechanisms are available to protect customary land rights? Thirdly, what is the legal basis for these innovative mechanisms? Fourthly, how can customary land rights be protected?

2. LAND TENURE AND DUAL LAND GOVERNANCE

2.1 Understanding Land Tenure

Land tenure is the relationship, whether customarily or legally defined among people with respect to land (FAO, 2002). There are two principal forms of land tenure systems found in most African countries, that is, customary and statutory tenure (UNECA, 2003). Customary land tenure system is governed by unwritten traditional rules and administered by traditional leaders (*ibid*). In many African countries, customary tenure is often applicable in rural, and in some cases peri-urban areas. In fact, looking at area coverage, customary tenure forms the most important tenure class in most African countries (Van Asperen, 2007), covering most of the land (Cotula, 2007). Statutory tenure on the other hand, entails formal registration of land ownership based on written laws and regulations and acts of centralised or decentralised government agencies (Cotula et al, 2004). It is often built on freehold or leasehold entitlements to the land and offers exclusive rights to the owner, which guarantee land tenure security (UNECA, 2003).

2.2 Dual Land Governance System

Dual land governance system refers to the coexistence of two land tenure systems such as customary tenure and statutory tenure. Two systems of law, statutory and customary law guiding land administration, are both in force at the same time. On one hand, statutory law is used to govern land under statutory tenure system while on the other hand customary law is used to govern land under customary tenure system.

Literature shows that the existence of two forms of land governance systems in most African countries presents problems (Cotula et al, 2004; Rutherford, 2017). For example, land under customary tenure has no documentary evidence in some African countries (Knight, 2010), making it susceptible to tenure insecurity (Deininger, 2003). For this reason, many researchers and international organisations, like the World Bank, strongly campaigned for the conversion of customary tenure system into the system of private property under statutory tenure (Bruce and Migot-Adholla, 1995). It is argued that tenure conversion promotes investment, economic development, and sustainable use of land (Adams et al., 1999). However, in the recent past tenure conversion has been questioned and reassessed in some sub Saharan African countries. Some researchers and organisations (for example, Oakland Institute, 2011b; Chu et al., 2015; Human Rights Watch, 2017) have shown that tenure conversion in Africa has not served the intended objectives and has instead led to land displacements, land disputes and social inequalities.

To protect customary land rights, international organisations such as Global Land Tool Network and UN-Habitat are promoting the use of innovative measures such as Fit-for Purpose and Social Tenure Domain Model to enable land documentation. These measures are a conceptual answer to the difficulties or challenges created by the failure of tenure conversion done under the conventional land administration systems which among other things are characterised by: (i) lack of high technology in data collection, (ii) storage, management, and dissemination of land information challenges, and (iii) capacity and workforce challenges in most sub-Saharan African countries (Williamson et al., 2010; Van Asperen, 2014; Salifu, 2018).

Innovative land measures are designed for the purpose of managing current land issues rather than being guided by high technical solutions and cost and time consuming field survey procedures (Enemark, 2013). There are four essential characteristics that are noticeable when innovative land measures are used for land documentation. The four characteristics are: general boundaries rather than fixed boundaries; satellite images/orthophotos rather than field surveys; accuracy relates the purpose rather than technical standards; and opportunities for updating, upgrading and improvement (*ibid*). Prominent aims of innovative land measures are: increase the cost-effectiveness of the use of the tools, speed or fastness in documenting land rights, easy to use, inclusiveness, flexibility and so on (Salifu, 2018).

3. EVOLUTION OF LAND TENURE SYSTEM IN ZAMBIA

Prior to the arrival of white settlers in 1890, the indigenous people held land under customary tenure (Lungu, 1994). During this period, traditional rulers (that is, chiefs or village headmen) administered land on behalf of the community in accordance with respective customary laws (Brown, 2005; Mvunga, 1980; Platteau, 1992). Customary laws regulated the manner and ways in which the indigenous people could acquire, exercise and enjoy rights over land (West, 1982).

Customary tenure system that existed before 1890 was affected by the arrival of the first European settlers. Colonialism led to the country's land being divided into three categories, namely Crown Land, Reserve Land and Trust Land (Mudenda, 2007). The Europeans settled on Crown Land, which was the most fertile and rich in minerals (Mushingo, 2015). This land was planned, surveyed, serviced with proper roads, water, sewer and electricity and landholders were issued certificates of title. Crown Land was administered under English (statutory) law, under which leasehold and freehold tenure systems were established and guaranteed (ibid). The indigenous people were not allowed to enjoy customary land rights over Crown Land (Mudenda, 2007). The natives were removed from Crown Land and consigned to Native Reserves (ibid). On the other hand, Native Reserves were set aside in perpetuity for the sole and exclusive use of indigenous Zambians while the Trust Land was set aside in perpetuity for the use or common benefit, direct or indirect, of indigenous Zambians (Mvunga, 1980). Native Reserves and Trust Land were held under customary tenure. It should be pointed out that the coming of the white settlers brought about a dual land tenure system (that is, statutory and customary tenures) in the country.

After independence in 1964, the first Zambian Government formed by the United National Independence Party (UNIP) retained both the colonial categorisation of land and dual land tenure system. The only change which was made was renaming Crown Land as State Land while Native Reserves and Trust Land were retained. However, Native Reserves and Trust Land were merged and named as Customary Land in 1995 through the Lands Act. Thus, from 1995, there are two types of land namely State Land (held under statutory tenure) and Customary Land (held under customary tenure). Figure 1 shows the land tenure categories in Zambia.

In terms of land sizes, Zambia covers a land area of 752,614 square kilometres of which 11,890 square kilometres is water area (Government of the Republic of Zambia [GRZ], 2017). State Land covers about 6% of the country while Customary Land covers the remaining 94% (Chileshe and Shamaoma, 2014). However, these are old estimates which do not take into account land conversions from customary tenure to statutory tenure which have been undertaken since 1995. Due to the conversions of tenure, State Land should be more than 6% while Customary Land should be less than 94%.

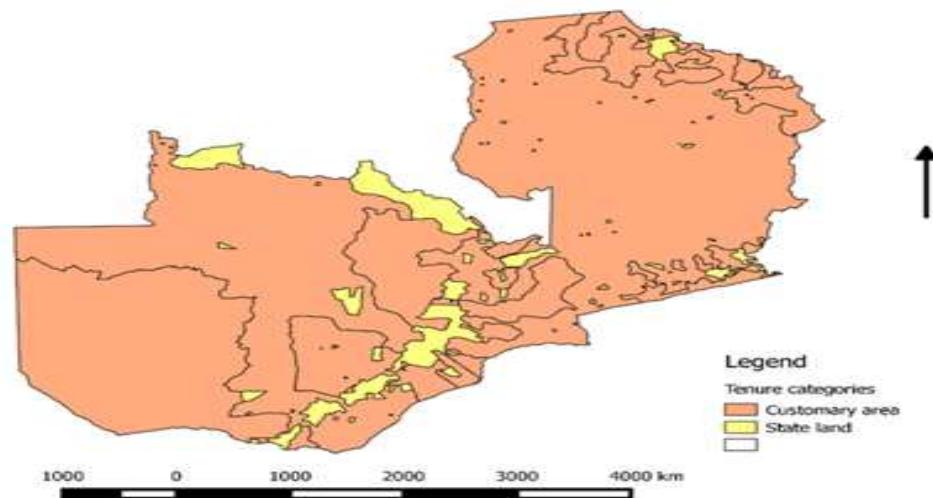


Figure 1: Land Categories in Land (Source: Mulolwa, 2016)

4. RESEARCH METHODOLOGY

The research was primarily qualitative in nature and adopted a case study approach, where Chamuka chiefdom in Chisamba District was studied (figure 2). Chamuka chiefdom, in particular, and Chisamba District, in general, was chosen as an ideal case that would provide empirical data on customary land rights due to an increase in the number of tenure conversions taking place.



Figure 2: Map showing Chisamba District (Source: Dreamstime.com, 2019)

Both primary and secondary data were collected. Primary data was collected from 9 respondents (3 employees from Ministry of Lands and Natural Resources, 2 employees from Chisamba District Council; 1 employee from Ministry of Chiefs and Traditional Affairs; 1 village headman; and 2 employees from Zambia Land Alliance). Semi-structured interviews were used to collect information from the foregoing respondents. Further, 6 focus group discussions (each comprising 8 participants) were conducted making the number of participants to be 48 in Chamuka Chiefdom. Focus group discussions were

conducted with indigenous local communities as customary land users in Chamuka chiefdom in order to determine the consistency of empirical data from other respondents, thereby also enhancing data validation and reliability.

In terms of sampling, the study adopted purposive sampling and convenience sampling techniques. Purposive sampling technique was used to select stakeholders that were known beforehand that they had a role to play in the conversion of tenure while convenience sampling technique was used to select rural communities. Fieldwork was conducted between September and November, 2019. Moreover, for secondary data, both published and grey literature was used. Six types of documents were considered for the review: (1) instruments for customary land governance in Zambia, (2) books, (3) theses, (4) peer-reviewed journal articles, (5) technical reports published by the Zambian Government, and (6) technical reports published by international organisations.

5. RESULTS AND DISCUSSION

5.1 Threats of Statutory Tenure on Customary Land

According to research findings, the holding of land under statutory tenure (land with certificate of title) always takes precedence over land held under customary tenure (land without documentation). Moreover, the term “squatter” is used in referring to occupants of customary land who have no formal, documented legal title (Human Rights Watch, 2017). Thus, the rights of customary land occupiers are not legally protected. In this regard, statutory tenure is more dominant than customary tenure. Consequently, the conversion of land from customary tenure to statutory tenure provided for in the 1995 Lands Act (that is, section 8 subsection 1) poses numerous threats on customary land. Threats posed by statutory tenure on customary land are discussed as follows.

5.1.1 Traditional leaders lose control over land

As explained earlier, the 1995 Lands Act provides for tenure conversion. The reason for government to introduce the conversion of tenure was its opinion that customary tenure lacks security of tenure because there is no documentation of rights (Chileshe, 2005). The conversion can be done by customary land occupiers as well as local and foreign investors. However, customary land occupiers are not well informed about the possibility of converting tenure, and the procedure is bureaucratic, complicated and expensive (Van Asperen and Mulolwa, 2006).

Thus, tenure conversion is in most cases done by local and foreign investors. Research findings showed that whenever investors convert land from customary to statutory tenure, it ceases to be in the powers of the traditional leaders as such their authority reduces. By allowing the investors to acquire private property rights on customary land, traditional leaders are losing control not just of land but also of rural communities. Due to recent scramble for customary land, worries are that almost all land in Zambia could become state land soon. Upon converting land from customary tenure to statutory tenure, it cannot be taken back to its original tenure ever again (Tucker, 2014; Hall et al., 2017).

5.1.2 Displacements

It was found that land is considered as a valuable resource which can be used in various ways (for example, farming, tourism and game ranching). Therefore, when customary land is converted to statutory tenure, local people are displaced from the land they have occupied for a number of years. In the face of this problem, the Zambian Government Developed Guidelines for the Compensation and Resettlement of Internally Displaced Persons in 2013 and came up with a National Resettlement Policy in 2015.

On the one hand, Guideline 18 subsection ii provides that in the event of displacement as a result of an investment or development project, the investor or developer shall provide permanent and mutually agreed upon dwellings following national standards to the displaced persons while Guideline 19 subsection iii provides that the absence of a formal legal title to land by some affected groups shall not be a hindrance to compensation (GRZ, 2013, p.9 and 10).

On the other hand, section 6 subsection C subsection i and ii of the National Resettlement Policy of 2015 provides that: (i) compensation should be paid to persons that are physically and/or economically displaced before commencement of the investment or development project causing displacement; and (ii) prompt and effective compensation at market and/or full replacement cost whichever is higher for losses of livelihoods must be paid to the displaced persons (GRZ, 2015, p.26). The foregoing instruments show that Zambia has protections against displacement and safeguards for those who are displaced. However, there is weak implementation of these instruments (Interview with a Zambia Land Alliance Employee, 2019). As a result, displacements do occur without compensation for losses of livelihoods and in instances where compensation is given, it is usually inadequate (Mushingo, 2017). This is also confirmed by Human Rights Watch (2017) which states that most customary land occupiers in Zambia received little or no compensation for their losses when displaced by commercial farmers.

Furthermore, The Zambian Government and traditional leaders give support to investors believing that the investment will bring among other things employment to the affected people (Interview with a Zambia Land Alliance Employee, 2019). However, this is not the case because the only available employment for displaced people is casual jobs (ibid).

5.1.3 Land disputes

According to research findings, the conversion of land from customary tenure to statutory tenure leads to land disputes between the local people and investors. There are a lot of land disputes resulting from the conversion of tenure (GRZ, 2017). The causes of disputes among others include people being denied access to natural resources such as forests and water, displacements and lack of compensation or inadequate compensation. For example, "when investors go to a customary area, they sometimes agree on paper that they will provide access to natural resources such as forests and water. However, over the years what was agreed is never done and thus people are denied access to natural resources" (Interview with a Chisamba District Council Employee, 2019). This leads to disputes.

5.1.4 Traditional leaders' lack of consultation with the community members

According to the Lands (Customary Tenure) (Conversion) Regulations, a traditional leader cannot approve the conversion of tenure without consultation with the members of the community (GRZ, 1995). However, research findings showed that this regulation is not being followed because in most cases traditional leaders approve tenure conversion without consulting the members of the community. This is because traditional leaders stand to benefit from land conversions and may be motivated by greed (Human Rights Watch, 2017). Unfortunately, traditional leaders are very powerful in their respective chiefdoms such that there is no redress mechanism for the violation of the regulations (Interview with a Zambia Land Alliance Employee, 2019).

5.1.5 Perception of corruption

There is corruption in the conversion of land from customary tenure to statutory tenure (Interview with Zambia Land Alliance Employee, 2019). In particular, bribes (in form of cash, vehicles, houses in the capital city and various other forms of incentives) are given to traditional leaders for them to authorise the investors (both foreign and local) to acquire large tracts of customary land (Mushingo and Mwando, 2016). This in turn leads to displacement of customary land occupiers who have lived on the land for many years (Mwando, 2016). Even at a smaller scale corruption is present when individuals are granted land by the traditional authorities in circumstances where they are not entitled to the land parcels (ibid).

5.1.6 Tenure Insecurity

One reason that communal land rights are often insecure is because land rights under communal or customary systems are often not secure in law (*de jure*), which can lead to vulnerability in practice (*de facto*) (Hall et al., 2017). For example, section 7 of the 1995 Lands Act provides for the recognition and continuation of customary land. In particular, section 7 (1) provides that:

Every piece of land in a customary area which immediately before the commencement of the Lands Act was vested in or held by any person under customary tenure shall continue to be so held and recognised.

This section in the Act appears to offer legal protection to customary land occupants, and thus entails that customary tenure is a legally recognised system of land ownership in Zambia (Mushingo and Mwando, 2016). Although customary tenure is a legally recognised form of land tenure, it does not offer security of tenure, leading to widespread displacements from customary land (Mushingo and Mulenga, 2016). Recognition of customary land is more or less super fiction (ibid). The recognition mentioned in the Lands Act is not there in reality because it does not provide entitlement (ibid).

In view of the above, it can be seen that in Zambia the recognition of customary land without any evidence of security of land ownership is thus artificial and has led to the many displacement cases in the country (Brown, 2005) as one can only be protected if they convert their land from customary to statutory tenure. In essence, therefore, ownership of customary land cannot be proved, let alone defended, by occupants of customary land when evicted (Mushingo and Mulenga, 2016).

5.2 Innovative Mechanisms Associated with Customary Land Governance

Chamuka chiefdom comprises 207 villages spanning a spatial extent of approximately 300,000 hectares. So far, eleven (11) villages have been enumerated and mapped using the Social Tenure Domain Model

(STDM. STDM is aimed at providing Customary Land Holding Certificates (CLHCs) to customary land occupiers. Customary Land Holding Certificates (CLHCs) is a document aimed at increasing and enhancing the tenure security of people living on land under customary tenure.

Research findings showed that Zambia Land Alliance and other Civil Society Organisations have been advocating for these certificates to be issued on customary land and that they must have the same power and authority as the certificate of title so that they are at the same level. This will in turn prevent displacements, land disputes and tenure insecurity in Zambia.

5.3 Legal basis for STDM

According to research findings, certificates issued through the Social Tenure Domain Model are not recognised by the land laws in Zambia. However, Civil Society Organisations such as Zambia Land Alliance and Civic Forum on Housing and Habitat are working towards ensuring that the law recognises and respects such a document, in order to ensure that customary land is maintained as it plays a major role in the land governance system of Zambia.

6. CONCLUSION AND RECOMMENDATIONS

Conversion of land from customary tenure to statutory tenure results in traditional leaders losing control over land, displacements, land disputes, traditional leaders' lack of consultation with the community members, corruption, and tenure insecurity. To provide security of tenure to local people, some villages have been enumerated and mapped using the Social Tenure Domain Model. STDM is aimed at providing Customary Land Holding Certificates. However, certificates issued through the Social Tenure Domain Model are not recognised by the land laws in Zambia.

In view of the foregoing, the government and traditional leaders' should ensure that: legal reforms are undertaken (for certificates issued through the Social Tenure Domain Model to be recognised by the land laws); traditional leaders are equipped with knowledge and skills in land management; and zero tolerance to corruption.

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9. ADDITIONAL READING

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10. KEYTERMS AND DEFINITIONS

Customary land: land under a tenure system which is governed by unwritten traditional rules and administered by traditional leaders.

State land: land under a tenure system which involves formal registration of land ownership based on written laws and is administered by government agencies.

Dual land governance: is the coexistence of two land tenure systems such as customary tenure and statutory tenure.