



The Right to Own Property: Towards a Just and Fair Compensation in Uganda's Oil Sector

RECOMMENDATIONS

- A law and policy should be in place specifying a clear resettlement plan and compensation process that are in conformity with the 1995 Constitution. Rather than the existing double-standard approach regarding surface rights of land owners, the rights should be precise and conform to the Constitution.
- Government officials and government-contracted agents should be sensitised on property rights, the expropriation procedure and the inalienable value of complying with the stipulated procedure.
- A great deal of effort should be spent on sensitising people, especially at grass-roots level, about their property rights, the processes involved and the remedies available. Additionally, the remedial process should be made simpler for and affordable and accessible to everyone, whether poor, rich, literate or illiterate.

Francis Tumusiime¹

EXECUTIVE SUMMARY

As Uganda prepares for the construction of an oil refinery, there is a need to acquire land both for the building of the refinery and for associated supporting infrastructure like roads. Alongside this lies the Constitutional right not to be deprived of one's property. Yet the law and policy is flawed; it does not comprehensively provide the procedure and process to follow and does not conform to the Constitution of Uganda of 1995. Worse still, most affected property owners do not understand their rights and the remedial process involved. This policy briefing argues for a fitting legal framework.

INTRODUCTION

The existence of hydrocarbons in Uganda was confirmed in 2006. Oil has been struck in 70 out of the 78 wells explored to date, amounting to a discovery of about 3.5 billion barrels. The government's policy to refine the oil domestically has created the need for land to set up a refinery and other associated infrastructure. Given the need to develop and tap the benefits associated with the extractive industry, development-induced displacement may be unavoidable. Related challenges include conflict over land; security of land tenure; the right not to be deprived of one's property; and the right to a fair and adequate compensation, which is the focus of this briefing.

THE RIGHT TO OWN PROPERTY

The right to own property encompasses the right to control property, to transfer or sell it and to exclude others, while enjoying protection of due

process and fair procedural rules governing compulsorily acquisition. In the case of such acquisition, owners are entitled to fair and adequate compensation amounting to no more or no less than the loss resulting from the expropriation of their property. The preferred measure of just compensation is a fair market value, which is the price that a willing but unpressured buyer would pay a willing but unpressured seller.

The Constitutional Court in Uganda has recognised that the right to property is the highest right a man can have over anything to which one claims ownership, from lands and tenements, to goods and chattels. The right extends to 'personal' as well as 'tangible property' (like debts),² and in no way depends on another man's courtesy. Furthermore, a threat to this right is considered a threat to one's means of subsistence and even to one's life. In South Africa, this right and its application to the mining sector has been tested in the Constitutional Court, which found that a holder of a mineral licence should not infringe on the ordinary use and enjoyment rights of land owners, and that adequate notice detailing the nature and purpose of any contemplated action that will materially and adversely affect the surface use of their land should be given.³

THE POLICY FRAMEWORK: AN ANALYSIS AND CHALLENGES

In Uganda, major laws and policies that regulate property rights in the oil sector are the Constitution of Uganda of 1995, the Land Act Chapter 227 Laws of Uganda as amended, the Petroleum (Exploration and Production) Act of 1985, the Land Acquisition Act Chapter 226 Laws of Uganda and the Land Regulations of 2004. These shall thus form the basis of the analysis.

The Constitution

As the highest law of the land, the Constitution guides all other legislation. Uganda's 1995 Constitution guarantees a right to own property either individually or in association with others. It prohibits compulsorily deprivation of property, except when such acquisition is necessary for

public use or national security, public safety, public order, public morality or public health. The acquisition must be made under a law which makes provision for prompt payment of fair and adequate compensation, prior to the acquisition. An aggrieved property owner has a right of access to the courts of law. However, these constitutional guarantees are not respected, whether in supporting laws and regulations or in practice.

The Land Act and Land Regulations

Under the Land Act, acquisition can be by mutual agreement. However, when no mutual agreement is reached, the line minister can compulsorily acquire the land. An appointed government official may enter private land by giving not less than three days' notice of the proposed entry to the owner or occupier of the land. The government must compensate the owner or occupier of the land for every day the land is encamped and for any inconvenience, any property taken from the land and any damage caused to the land. With the abolition of Land Tribunals, any disputes arising from this initial entry are handled by the Chief Magistrates Court – an institute beyond the reach of many poor and illiterate land owners.

The Land Act and Regulations furthermore fall short of specifying the due process to follow during expropriation. The compensation for crops serves as an example: The Land Act's guidelines for determining compensation for customary owners' standing crops are vague. Provision is made for the payment of a disturbance allowance,⁴ but excludes annual crops which can be harvested during the period of notice given to the owner. Similarly, the Land Regulations state that compensation does not apply to crops which are illegally grown; but they do not cater for crops grown during the usually long intervals between when the notice to acquire is issued, and the actual time of compensation or resettlement.

As explained by George Baisi, a butcher in Nyamasoga trading centre in the oil-rich Hoima District, compensation is usually insufficient. Pointing at his mud-roofed house that is to be demolished to pave way for a road, he stated, 'I am already a victim of the negative effects of oil

discovery; imagine, I spent approximately one million shillings to construct this house, but I was given 8,050 shillings as compensation for the house and part of my plot.⁵ The construction and upgrading of the 92 kilometre Hoima–Kaiso–Tonya road is intended to ease transport to the oil sites and the proposed oil refinery in Kabaale. In the case of the planned construction of the oil refinery, 14 villages (about 20 000 residents) live in suspense as to whether they will be resettled or compensated, as they wait for government to implement the Resettlement Action Plan.

Most of the land in the oil activity areas is held on a customary tenure basis. Very few people possess land titles and most of the buildings are of a non-permanent nature. The Land Act tasks each District Land Board to compile and maintain a list of rates of compensation payable in respect of crops and buildings of a non-permanent nature.⁶ The board is also supposed to conduct an annual review of compensation rates. These rates would be helpful, but unfortunately they are never compiled on time. The valuation is thus left to estimation by contractors, who are usually not conversant with grass-roots conditions.

The Land Acquisition Act

The Land Acquisition Act regulates the expropriation of unregistered land and land registered under the Registration of Titles Act Chapter 220 and contains relatively detailed provisions. Accordingly, acquisition may be by agreement between the government and the property owners, but because most people are unaware of this provision and have weak bargaining capacity, acquisition is normally by Minister's Declaration through statutory instruments. The government is required to compensate any person who suffers damage during the preliminary testing for suitability of the land, and any dispute arising must be referred by the Attorney General (AG) to the court for decision. However, it is ironic that without any prompting, the AG, a government legal representative, is expected to refer (challenge) a government decision to the court. Again, few people are aware of this process and lack the means to approach the AG for reference of their

complaints to the courts.

Land owners deserve ample notice. For instance, a Minister's Declaration must be served on the registered proprietor or occupier of the land. In practice, however, this rarely happens. A notice of intention to take possession of the land should be gazetted and exhibited near the land and all persons having an interest in the land should be notified to appear on a specified day to state their concerns. The day for such hearings is fifteen days' notice, and not later than thirty days after the publication of the notice. But since gazettes are not within easy reach and people may need to seek expert advice, this time allowance is insufficient. After an inquiry into claims and objections, the assessment officer makes an award.

In the case of a grievance, the judicial processes stipulated are unrealistic and alien to property owners. For example, a person aggrieved with the award may within sixty days appeal to the High Court. Whereas the appeal process is applauded, restricting the appeal to the High Court implies that most poor people do not know and cannot access and afford legal representation. In other disputes involving the temporary occupation of land, partial acquisition of buildings or manufacturing plants are referred by the AG to a Magistrates Court. Although these courts may be somewhat more easily accessible than the High Court, few people are aware of this provision.

The law prioritises expropriation; and the plight of the owners is secondary. When an appeal is pending and the property owner refuses to accept payment, or where it is impossible to make the payment, the AG can apply to the High Court, which may order payment to be made to the court. At this stage, the property owner is not contacted before the court makes any orders. Additionally, in case the property owner contests the possession of land, the appointed government officer may apply to a Magistrate Grade I, who can grant the possession without consulting the property owner.

In contravention of the Constitution, Section 7 of the Act allows possession of land after making the award. Possession may also be taken at any

time after the publication of the declaration and before valuation and compensation. Furthermore, whether or not compensation has taken place, it is an offence for a person to willfully obstruct any public officer in the acquisition exercise or to willfully destroy any equipment under use.

Petroleum (Exploration and Production) Act of 1985 and the new Bill

According to the Constitution, oil belongs to government; the property owner thus only enjoys surface rights. The holder of a licence is not to conduct any oil activities without the written consent of the lawful occupier, on any land which is within 200 metres of any inhabited, occupied house or building; within 50 metres of any land which has been cleared or ploughed or in good faith prepared for the growing of agricultural crops or on which agricultural crops are growing; and upon any land where crops have been reaped within the preceding year. However, the line minister can – without consulting the owner – authorise the holder of the licence to exercise all or any of his or her rights under the licence. This is a violation of the owner's right to own property.

Moreover, land owners are not to use the surface of the land in a manner that interferes with oil activities. For example, he or she cannot erect any structure without the written consent of the registered holder of the licence. The situation is not redeemed by the vague provision that licensees should exercise their rights reasonably so as not to affect the interests of the land owners.⁷

A land owner can demand that the licence compensates for damage or disturbance of surface rights, and any disputes arising shall be referred to arbitration. But a claim for such compensation must be made within four years from the date the claim accrued. This further complicates the already fragile compensation process, especially given that most grass-roots people may never get out of the complex and

murky waters of time limits and arbitration. The Petroleum (Exploration, Development and Production) Bill of 2011, which is now before Parliament, replicates the same pitfalls, save that disputes on acquisition of rights by the licensee are determined by an expert and compensation disagreements will be handled by the courts of law.

CONCLUSION

Although the Constitution clearly guarantees the right to own property, the existing legislation does not spell out the compensation and resettlement modalities. Worse still, most affected grass-roots land owners lack the means and capacity to use the available (though not comprehensive) procedural and remedial windows. This perpetuates the destruction of social relations, homelessness, landlessness and injustice.

ENDNOTES

- 1 Francis Tumusiime is a practising advocate of the High Court of Uganda and the Coordinator for Advocates for Natural Resources Governance and Development – a member of the Governance of Africa's Resources Research Network.
- 2 Uganda, Supreme Court, *Constitutional Appeal No 1 of 2004, between Phillip Karugaba and the Attorney General of Uganda*.
- 3 South Africa, Constitutional Court, *Per Froneman J, Bengwenyama Minerals (Pty) Ltd and 3 Others versus Minister for Mineral Resources and four others*. Case CCT 39/10 [2010] Zacc 26, paragraphs 71–73.
- 4 Uganda, The Land Act of 1998, Section 77, Chapter 227 (as amended).
- 5 Sekika E, 'Oil: Hoima cries foul over compensation', *The Observer*, 4 September 2012.
- 6 Uganda, The Land Act of 1998, Section 59, Chapter 227, Laws of Uganda.
- 7 Uganda, The Petroleum (Exploration and Production) Act of 1985, Section 39, Chapter 150.

The Governance of Africa's Resources Programme is funded by the Norwegian Ministry of Foreign Affairs. SAIIA gratefully acknowledges this support.

© SAIIA 2012 All rights reserved. Opinions expressed are the responsibility of the individual authors and not of SAIIA.