

Chapter Two

Land Law in Sudan - Ownership of Land

2.1 Background to the Land Law of the Sudan

Land, as a natural and national source of wealth, has always occupied a very important place in the law of the Sudan throughout the ages. At the very early stages and until now customary law as applied in the different localities in the Sudan, legislation, and Islamic Law and precedent have regulated its ownership, user, possession enjoyment and limitations on it (Mahdi, 1979).

2.1.1 Land Policy of the Condominium Government

On the reconquest of the Sudan, the Condominium Government, contrary to what was expected, did not declare itself the owner of all land in the Sudan by right of conquest. But the view was taken that all native rights in land, particularly individual ownership, were to be recognized and safeguarded in every possible way. The land policy as laid down was that until the contrary was proved by a settlement, the true ownership was vested in the Government in trust for the natives, and subject to all rights of user belonging to the natives whether in community or individually (Mahdi, 1979). And in carrying out the registration and settlement, it was provided by the Land Settlement and registration ordinance, 1925 that: “all waste, forest, and unoccupied land shall be deemed to be of the property of the Government until the contrary is proved”.

2.1.3 Unregistered Land

It is important to repeat that the policy of the Government in relation to unregistered land was clarified by section 16 (c) the Land settlement and Registration ordinance, which has already been mentioned. Such land, to repeat, was in the presumptive ownership of the Government. The presumption was usually rebutted by a person who could prove peaceable, public and uninterrupted possession before a settlement officer for a period of least 20 years. Such person might either acquire full ownership of the land in dispute or any other lesser right on it. (1925)

2.1.4 The Unregistered Land Act, 1970

Very small areas of lands all over the Sudan were covered by the system of land settlement and registration. Very vast areas remained either occupied by persons and unregistered or unoccupied and unregistered. It was laid down as a policy by Section 16(c) of the Land Settlement and Registration Ordinance, 1925, that all waste, forest and unoccupied land was deemed to be the property of the Government until the contrary was proved.

In order to ascertain who owns unregistered, occupied or unoccupied lands and to get some development projects off the ground, and to acquire lands occupied by squatters and speculators in defiance of local orders, the Government on 6 April 1970, promulgated the Unregistered Land Act. Section 4 of that Act lays down that all lands of any kind whatsoever, whether waste forest, occupied or unoccupied which is not registered before the commencement be the property of the Government and shall be deemed to have been registered as such as if the provisions of the Land Settlement and Registration have been duly complied with.(Mahdi, 1979)

2.1.5 Conclusion

Sudan Land Law is a combination of Islamic Law, customary Law, statutory and judge made law. After the promulgation of the Unregistered Land Act, 1970 some customary law principles almost reduced to nonexistence, e.g. hag el gusad as far as it relates to “unregistered” low riverbed land claimed by owners of highlands across the river. Since all unregistered land becomes government property it seems that a claim hag el gusad has been reduced to a claim of a right of cultivation, and if the proviso to Section 3 is invoked, the claimant may prove full ownership under the Land Settlement and Registration Ordinance, 1925, provisions.

2.2 Ownership of Land and Limitations on it

2.2.1 Definition of Land

There are a number of definitions in the Sudanese statutes, the most important and of general application of which is that in the Land Settlement and Registration Ordinance 1925 (section 2 of The Prescription and Limitation Ordinance, & section 4b of Pre-Emption Ordinance 1928). Section 3 reads as follows:

Land” includes benefits to arise out of land and buildings and things permanently fixed to land, also an undivided share in land and also any interest in land which requires or is capable of registration under the ordinance other than a charge but including the right to cultivate a determinate or determinable area of land although its situation may vary from year to year".

This is quite wide definition. In addition to the right of ownership it includes a right to cultivate, right of pasture, the right of occupation and cultivation known as the right of amara.

There are other customary rights less than the right of ownership which are also considered as land, e.g. hag el ard, hael asl, hag el miswag and hag el amara. Hag el ard, el miswag and el amara are usufructuary rights are capable of registration and which conveyance. It is clear that thing permanently fixed to the land is fixtures. For a thing to become a fixture it depends on the degree of annexation and purpose of annexation. (Cheshire and DAVIES, 1967)

2.2.2 Different forms of ownership of Land

Taking into consideration the definition give the word "land" and the different forms of ownership of land in the Sudan, it could be said that tribes families and village dwellers lands in consider their possession as their "own" Buildings and trees growing on that land belong to them in community or collectively. But legally speaking any land that was unregistered on the commencement of the Unregistered Land Act, 1970, has since then become Government property and is deemed to be registered in its name, Person who still remain in possession of such lands are no longer secure: and their ownership is

reduced to a mere license or “tenancy” at will which may be revoked at any time when the Government invokes sections of the Act, and evicts the occupant. However, the proviso to Section 3 of the Act, as invoked successfully, confirm the right of ownership of the occupant of the land. Tribal, communal, family and village “ownership” of land is tolerated in so far as it is not repugnant to the Unregistered Land Act, 1970. Registered private ownership of land along the Nile Valley and generally in the Northern Sudan Provinces and the urban areas in the Southern Region and Western Sudan recognized and respected. No person shall be of such property except in the manner provided for by law and upon payment of fair compensation. If the Government is in need of land for a public purpose it acquires it under the Land Acquisition Ordinance, 1930, and fair compensation is paid to the person whose land is expropriated.(Mahdi, 1979)

2.2.3 Limitations on the Ownership of land

In modern society, property, movable and immovable, its distribution rights flowing from it and limitations on it, occupies a central and decisive and Land ownership in the Sudan has played a dominant political, legal social role. In playing that role control over it governed by legislation custom and Islamic Law. Its absolute enjoyment operates within the limits of Law. Legal restrictions on the right of ownership seek to restrain the power to enjoy and the power to control it. Restraints on the enjoyment of land ownership are designed to the privileges which it confers in the enjoyment of things that life has to offer. In socialist, capitalist and developing countries, social justice sometimes dictates these restraints. (Mahdi, 1979)

An owner of land should not abuse his right so as to cause injury to another party. Moreover, the absolute rights of the owner of land are qualified and limited. His rights are subject to the rights which others have over his land, such as the right of way, the rights of tenants, lessees, licensees and mortgagees. There are restrictions in the interest of the Government, the public and the neighbors. During the 20th century the rights of the owners of land have been successively eroded by legislation. It has been said that the fundamental assumption of modern statutory law is that the landowner holds his land for the public good. (Frankfurter and Jennings, 1936)

2.2.4 Common Law Limitations on Ownership of Land

The general rule is that an owner of land must not exercise his rights in an excessive manner detrimental to his neighbor's property. If the neighbor suffers any injuries the landowner may be liable in tort for such injuries. He may also be liable for injuries caused to third parties by his acts or omissions in respect of things brought or artificially stored on his land, e.g. if water in a reservoir escapes. He may also be liable for nuisance, e.g. If he makes an unusual and excessive collection of manure which attracts flies and causes smell :(Bland v. Yates (1914) SJ 612), or if he is the owner of an upper floor in a building and he does acts which are detrimental to his neighbors or their property.

2.2.5 Customary Restrictions

There may be customary limitations on the ownership of land e.g. Cultivation, pasture and wood-cutting rights. The courts have upheld customary rights restricting the ownership of land such as the rights of miswag, amara, karu and ard.

2.2.6 Statutory Limitations

Restrictions on the ownership of land and its public control in the Sudan which has a vast physical expanse of land, must be founded on broad policy considerations which take it for granted that public interests are predominant. The land use and control laws exist to promote the common good rather than aiming at protecting private property. Statutory Limitations on the ownership of land in the Sudan are not found in one statute.(Mahdi, 1979)

2.3 Modes of Acquisition of ownership of Land in the Sudan

2.3.1 General

There is no statutory instrument in the Sudan enumerating these modes. They are in different statutes which are made whenever the legislature intends to regulate a certain field of land law by legislation.

Generally these modes are:

1. Possession and its effects, statutory and customary prescription and limitation
2. Pre-emption
3. The sale of land
4. Land settlement and registration
5. A gift, inheritance, wills dowries and khula.
6. The Unregistered Land Act, 1970 and the Land Acquisition Ordinance, 1930.

It must be said at the outset that there is no unregistered land in the Sudan now. Since the promulgation of the U.L.A. 1970 land in the presumptive ownership of the Sudan, Government under Section 16(c) of the Land Settlement and Registration Ordinance, 1925. Has under Section 4 of the U.L.A, 1970 become Government property and is registered in its name. No person shall acquire the ownership of such land by prescription unless the proviso to Section 3 applies. This proviso if invoked successfully may enable a person who has been in possession of Government land before the commencement of the U.L.A, 1970, for a long time to acquire its ownership or any other right over it by prescription after a land settlement is affected.

2.3.2 Possession and General Principles of the Law of Prescription in the Sudan

The statutory law relating to prescription and limitation in the Sudan owes its origin to and has been in by Islamic Law, Customary Law.

There are many local customary rights over and interests in land which are and enforced before less full ownership have been recognized courts e.g. Hag el gusad, hag el

miswag, the hag el amara, al. Hag el ard and el toria. Rights of cultivation, grazing, wood-cutting, pasture and customary rights and they are recognized and could be acquired by prescription.

Possession

Possession means an actual situation arising from the physical control of a person on land or a right over it as an owner of the land or the right over it. The principle of possession occupied a very important place in the Sudan land law. person may be in possession of land as its also be in possession o it as a agent, representative or receiver, however long to its ownership any over it by prescription he been in possession of the However, if such person has been in possession of the land for a long time, and His possession was adverse, as of right, peaceable, public and uninterrupted under Section 3 of the P.L.O., 1928 he may acquire the ownership of such land. For possession to be adverse the claimant must exercise overt acts in the land. If it is agricultural land he must demarcate it, clear it, plough it and cultivate it. If the land is building land, he must erect buildings on it. In pasture lands and forests, the necessary acts of grazing, woodcutting and collection of forest products must be exercised for the statutory period.

2.4 General Principles of Customary Prescriptive Possession

Custom is one of the major sources of Sudanese Land Law. The local and state courts uphold it if it is reasonable, universal, certain, and is compatible with public order, morality and law. The main difficulty facing the courts is the ascertainment of the customary law. No major effort has been made to collect and record customary law relating to land in the Sudan to make it available and accessible to the courts and the legislature for legal reform, codification and general guidance. However, the courts in their efforts to do justice, have ascertained and upheld many customs relating to land such as karu, amara, hag el gusad, hag el torya, hag el miswag, hag el asl, etc.(Mahdi, 1979)

2.4.1 General Principles of Hag el Gusad (customary prescriptive possession)

Title to land or any right to it may not only be claimed by statutory prescription, but may also be claimed by prescription. A customary principle on which a claim to land may be based is hag el gusad.

2.4.1.1 Definition of Hag el Gusad

Popularly hag el gusad means the right to land opposite and below high sagia land on the bank of the Nile in some parts of the Nile and Northern Provinces. Legally, it is a customary equitable presumption of non-universal application, for it is known and applied in some localities along the Nile banks. It is a rebuttable presumption, and the burden of proof on the claimant is not a light one.

2.4.1.2 General characteristics of Hag el Gusad:

1. Before the promulgation of the Unregistered Land Act, 1970, newly formed riverbed low seluka or gerf land, in dispute, was claimed by the owner of the high sagia land on the bank of the Nile if such land is opposite and below his high land. New unregistered land not corresponding with the boundaries of the registered highlander may not be claimed by hag el gusad, unless the claimant had been granted cultivation rights over it,

or has exercised over it, and in this case he bases his claim on prescription has the claimant failed to prove his prescriptive claim he may be allowed to cultivate the new extension pending new resettlement and re-registration of the whole riverbed in the area. After the commencement of the Unregistered Land Act, all new riverbed low seluka land which has never been registered in the name of a highlander low becomes Government Property and is registered in its name. It can only be claimed by the highlander on the strength of his past prescriptive possession. If the low land appears and he has never been in possession of it, it is Government Land. Because low riverbed (seluka and gerf) lands are scattered and of uneconomic value to the Government, the Government has exempted them from the Unregistered Land Act, 1970. Accordingly the Land Settlement and Registration ordinance, 1925 was applied. Hag el gusad claimants should appear before settlement and registration officers to prove their rights in accordance with the Land Settlement and Registration Ordinance, 1925, provisions. If a claimant proves title to or any right over land, it is entered in the land.

2. Hag el gusad rights extend from the boundaries of the registered high sagia land to the centre of the river: *ad medium filum aquae* (*aquae* means water, *filum* means an imaginary line or thread drawn along the middle of the river course). The center of the river is usually ascertained by the surveyors. It must be ascertained so as to determine the area that can be awarded to the hag el gusad claimant to cultivate or own permanently, i.e. Its width and length.

3. Hag el gusad rights run east and west, i.e. Across the river Nile and not downstream or upstream and up to the middle of the stream. The reason why hag el gusad extends only to the centre of the river stream is that the other half of the stream is usually claimed by the registered high-landers of the opposite bank of the Nile.

Even before the commencement of the Unregistered Land Act, 1970 the local Government authorities were very active asserting their powers of distribution over newly-formed low riverbed land. Such land was sometimes distributed among the poor, or as a reward or compensation to persons who lost their elsewhere. Such allotment might be temporary pending the re-appearance of the lost land or revocation of the

allotment. The disputes sometimes might be between the gusad claimants and such allottees.

When the high land is settled, the settlement is permanent as long as the registered owner possesses and enjoys the land. The future movements of the river, the washing away and accretions may not affect the ownership of the registered land.

If the ownership of the low seluka land is known, and if it disappears and then the owner will be entitled to possess it.

If the high land and the seluka below registered in the name of the same person and the seluka land disappears for many years, and then it because of the high land may claim it by virtue of hag el gusad and it had been registered in his name, it reappears below his high land. Nobody has exercised rights over it.

4. The onus of proving hag el gusad claims should be on the He should satisfy the court that the Government had not in the particular case exercised its rights of ownership. In the past the Government would then be left with the bare presumption of ownership of unregistered land. But now the Government is the owner of the land, and it would only be possible defeat its registered ownership by successfully invoking the proviso to Section of the Unregistered Land Act, 1970. The claimant should prove long adverse possession by him or his predecessors in title. The onus on him is a heavy one. A claim based on hag el gusad without more is bound to fail

5. It must be repeated that hag el gusad may mean the right to cultivate low riverbed land below the riparian sagia owners. Such a claim is not a claim ownership of land. If this claim is successful it deprives the Government of the right to allot cultivation rights to anyone but the right holders.

But the Government may not resist a claim where the claimant has been exercising his right of cultivation: it waives the right and leaves it to the court to decide which of the claimants is better entitled to the cultivation rights.

2.4.1.3 Ownership of Islands in the River

Where an island appears in the river its ownership follows the soil before the island arose into existence. If a person proves that he has had ownership or a right of cultivation of the soil before that new island came into existence, he has no prospect of a successful claim. Must prove the length of time he has been cultivating the soil before the islands appears if he is to succeed under the proviso to Section 3 of the Unregistered Land Act, 1970.

2.4.1.4 Defences against Hag el Gusad

Hag el gusad is an equitable presumption. A registered owner of high sagia and may claim the ownership of Government registered low riverbed land after 1970, if he invokes, successfully the proviso to Section 3 of the Unregistered Land Act, 1970. But a person claiming against a hag el gusad claimant must defeat the prima facie presumption of hag el gusad in favour of the gusad who has proved possession of the low riverbed seluka or gerf land. The defences may be as follows:

- (a) If a person other than the owner of the registered high land has been given the right to cultivate the low riverbed land below his high land by the local authorities, and he has been exercising that right, the claim to against the occupant of the low land is defeated.
- (b) A claim to riverbed land by hag el gusad is defeated if the principle of el not apply in the locality where the claim is made 2 Hag el gusad is a custom which has no universal application. It does not apply in Berber District. It was introduced in Merowe/Dongola District in 1941/42 help distribute fairly unregistered low riverbed seluka or gerf land applied as an administrative measure to, inter alia, ensure that where registered highlanders are in possession of unregistered low riverbed lands below and opposite their lands, such low lands are allotted to the highlanders.
- (c) Persons other than the riparian gusad owner may acquire possession of the low riverbed land by a prescriptive title.
- (d) The gusad claimant may have abandoned or surrendered the rights on behalf of himself predecessors in or surrender of gusad rights must be clear, and as regards adverse possession evidence of possession for at least 10 years is required.

2.4.2 The "Mirin" System

Mirin is a Northern Province local Arabic word which means an imaginary line dividing riparian lands. It is known in Berber District where hag el gusad is unknown.

Persons claiming ownership of low land may base their claims on mirin. It is founded on ancient ownership.

As a doctrine and a system of land division it was discussed in the leading case of *Heirs of Ahmed El Hussein and Others v. Heirs of Omer El Bihari and Others.* (1961) SLJR 149.). This case dealt with the proof of mirins lands, and the establishment of ancient ownership thereof. The system as a rule of division and ownership of land has been well recognized by the local and customary land law in Berber District from old times. The lands are still frequently referred to by the mirins which are given names.

Mr. Ryder in his Report on Land Customs in Berber Province in 1910 wrote about mirins and their recognition in customary law. He pointed out that if a mirin once existed it is never lost. If land or an island is divided up by mirins and it is then washed away or partly disappears, this does not affect the method of locating the mirin. It is still there in the eyes of the natives even if the greater part of it is under water. Mirin, when fixed, help to determine the situation of a plot of land so as to measure from a given base a certain width which con one holding and then continue and measure another width to become another holding and so on. The width of such measurements could easily be (mirin. So it is of recorded as there is always the fixed base to measure from little consequence whether the land is washed away. If it appears again, it can be measured in the same way where it had existed in the locality before. The maxim is therefore a "mirin is never lost." This means that when ancient ownership of a mirin has been proved, and the mirin can be ascertained by old maps or old documents, the plaintiffs must succeed in their claims.

If land with mirins over it had existed in the past and it disappeared the changes of the river, and after ten years or more it reappeared gradually. The old owners, as their holdings are defined within the mirin, will to have their lands on the strength of their ancient rights. If disappears the land again, the mirin and consequently the rights are

never lost, and remain to be seen to exercised by physical possession when the land reappears at any time.

2.4.2.1 Defence against the Mirin system

The ancient rights as fixed by old mirins are certainly subject to the operation of the prescription and Limitation ordinance, 1928. They are defeated by the establishment of prescriptive rights exercised over land, governed by the mirin tem, by another person. Such person may acquire title to land rights over “mirin land” by prescription when they satisfy the statutory requirements of Section 3 of the Prescription and Limitation ordinance, 1928.

2.4.2.2 Conclusion

Hag el gusad and the mirin systems are two modes by which title to or rights over land may be acquired provided that adverse possession has been proved. These two customary law principles are so settled and certain that their local codification is highly desirable.