

A LEGAL ANALYSIS OF

THE LEASE AGREEMENT BETWEEN THE GOVERNMENT
OF SIERRA LEONE AND THE TRIBAL AUTHORITIES OF
THE MALEN CHIEFDOM PUJEHUN DISTRICT, SOUTHERN
PROVINCE OF THE REPUBLIC OF SIERRA LEONE

AND

THE SUBLEASE AGREEMENT BETWEEN THE
GOVERNMENT OF SIERRA LEONE AND THE SOCFIN
AGRICULTURAL COMPANY SIERRA LEONE LIMITED.

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1. EXECUTIVE SUMMARY

The Government of Sierra Leone on the 5th of March 2011 signed a lease agreement with the Traditional Authorities of the Malen Chiefdom, Pujehun District, in the Southern province of the Republic of Sierra Leone for 16,457.54 acres of land for a large scale agricultural investment. This same portion of land was subleased to the SOCFIN Agricultural Company Sierra Leone Limited for the purpose of establishing large oil palm and rubber plantations in the area.

The implementation of the large scale foreign agro investment project has already during the first few months contributed to a notable increase of tensions and other signs of social disorder in the affected areas of Malen Chiefdom.

Welthungerhilfe Project SLE 1011 has been requested by local communities to provide legal advice in order to better understand the content and implications of the lease agreements for the local population.

The present document summarizes the results of an in depth review of the signed lease agreements against the existing legal framework in the country. Several inconsistencies have been identified, including:

1. Clause 2.2 of the lease agreement, not coincides with rule 3(c) of the Schedule to the Protectorate Land Ordinance (CAP 122 of the Laws of Sierra Leone 1960 as amended), where it is clearly expressed; that the purpose for which the land lease is made must be stated in the lease unequivocally without any incongruity,
2. Obviously, even if consent was ever obtained by the Lessor to the sub-lease, then it was not informed consent. Additionally from the face of the document there is not even indication of approval from the District Commissioner in writing attached thereto as provided for by law thus rendering the sub-lease voidable,
3. Though Section 9 Ordinance requires registration of the lease document thus making it a public document, there is neither a survey plan attached to the lease agreement nor is it clear to any one that it was made available to the Lessor before the signing of the agreement,
4. From the face of the document is clearly seen that neither the parent lease nor the sub-lease are registered documents as of date.

The Government of Sierra Leone is considered a “non native” according to the provisions of the Protectorate Land Ordinance, CAP 122 of the Laws of Sierra Leone 1960. It has the same status like any other foreign company requesting for an interest in land in the province. Contracting a lease agreement with the natives of Malen chiefdom to whom the government owes a fiduciary duty to seek their interest and further subleasing to the Scofin Agricultural Company clearly shows a conflict of interest and a breach of that duty. The government should instead play an umpire role between the Company and the native of Malen Chiefdom so as to seek the interest and welfare of its citizens.

The present analysis provides strong indications that due to legal inconsistencies the signed lease agreements are in effect voidable.

In order to ease tensions and to prevent existing tensions to further escalate, it is highly recommended to conduct a thorough review and amendment of both the lease and the sub-lease agreement under integration of independent (international) legal experts to support local communities in defining and expressing their expectations and concerns.

2. BACKGROUND ABOUT LAND LAWS IN SIERRA LEONE

Historic development

In Sierra Leone, there is a dual system of law in practice, which has its origin from the colonial period. On the one hand is the received English Law which is wholly and exclusively applied in the Western Area and the Bonthe Urban District and on the other hand is the Customary Law which predominantly applies in the provinces.

In the absence of any particular pre-existing legal system in each of these colonies capable of general application, the colonial power, Britain, imposed its own Metropolitan English Law over the existing Customary Laws in these colonies.

Thus we find English Law firmly established as the basic residual law in the former colony of Sierra Leone now known as the Western Area as well as in other former British colonies.

Customary law

The Customary Law is the law which applies predominantly to the ethnic tribal communities as their personal law derived essentially from their respective customs and traditions bearing directly on law. What is today described as customary other than the general law is described in Section 2 of the Local Court Act No. 20 of 1963 as:

“any rule, other than a rule of general law, having the force of law in any chieftom of the Provinces whereby rights and correlative duties have been acquired or imposed which is applicable in any particular case and conforms with natural justice and equity and not incompatible, either directly or indirectly, with any enactment applying to the Provinces and includes any amendments of customary law made in accordance with the provisions of any enactment”.

All land in the provinces is governed by Customary Law.

The underlining concept which governs this cardinal rule is that all land in the provinces is vested in the Chieftom Council or Tribal Authorities of which the Paramount Chief is the Head as trustees. This concept has its foundation to the declaration of the Protectorate in 1896 over the hinterland of Sierra Leone by the British Government when the native ownership of the

land by the tribes in the protectorate now known as the provinces was recognized. This view was maintained in Protectorate Land Ordinance of 1927 which was further extended to Ordinance no. 32 of 1933 which states:

“All lands in the protectorate is vested in the Tribal Authorities who hold such land for and on behalf to the Native Communities concerned”

Customary law as a system of law and justice in Sierra Leone today assumes a prominent place in the legal system of the country by reason of its overwhelming significance to about 85% of the population of the country, which regulates our native institutions of marriage, divorce, succession and most importantly the Land tenure system.

Additionally it stands as a personal law which determines the personal legal status of our native institutions such as chieftaincy, groups, individuals and property.

No doubt therefore that the present law regulating the provincial land use system as contained in Section 2 of the Protectorate (Provinces) Land Act CAP 122 of the Laws of Sierra Leone 1960, preserved as well the concept that land is vested in the Tribal Authorities who hold the land for and on behalf of the native communities.

Land tenure system at provincial level

The land tenure system at provincial level is differentiated Communal Land Tenure, Family Tenure and –as a relatively “modern” element: “Individual Tenure”.

There is in the first instance the COMMUNAL LAND TENURE by which the paramount interest in the land within a given area in the Chiefdom is held by and on behalf of the community as a whole. The paramount title to the land is here vested in the socio-political head of the community. The highest representative at traditional authority at Chiefdom level is the Paramount Chief who shares responsibility with other socio-political heads at the lower levels such as the Section Chief at Section level and Town or Village Chief at village or town level. These communal lands only include unapportioned or unappropriated portions of land in the community and also those lands preserved for the use of the community as a whole such as cemeteries, praying grounds, society bushes- all of which are subject to the direct control and management of the socio-political head.

The second system of tenure is the FAMILY TENURE. This is where the absolute or permanent interest in certain land within a particular Chiefdom is vested in various decent groups, each with a common ancestry and which constitute a family unit. This family unit is endowed with corporate legal responsibility which enables them to hold land as a group. The family as a group can enjoy the fullest cluster of rights which includes the right of enjoyment and disposal of the land for which it holds a permanent interest.

Responsibility for management and control of the family land is vested family head. Traditionally, the head of the family is usually the eldest member of the family. In modern times however the method of appointment of family head is by consensus normally after the funeral

of the predecessor. Age, education and wealth may sometimes influence the choice of a family head. Once chosen the family head takes charge of the family land and his position becomes similar to the socio-political head.

The third system of land tenure which perhaps one can say is as a result of modern development and thus is regarded as foreign to Customary Law is the INDIVIDUAL TENURE. This is where the ultimate or paramount interest in the land is vested in the individual.

This system is opposed to the Communal and Family Tenures. It is a modern development and thus cannot be ascribed to any particular group or tribe since it is now visible in all groups and tribes in the large Urban Provincial Towns and District headquarter towns. It must be noted that individual ownership of land is limited only to the natives who have the Customary Law as their personal law. Thus non-natives cannot have a freehold interest in land. Their interest in land is on a limited basis mostly in the form of a lease.

It is therefore important to state here that the two prominent systems of holding land in the provinces are the Communal and Family land holding systems. It is in recognition of these facts that the law regulating land use in Sierra Leone laid emphasis on the trusteeship of the Chiefdom Councils or Tribal Authorities. Thus the Chiefdom Councils or Tribal Authorities are not the owners of the land but custodians who hold for and on behalf of the true owners who are thus the respective communities and families.

3. ANALYSIS OF THE MAIN LEASE AGREEMENT BETWEEN THE GOVERNMENT OF SIERRA LEONE AND THE NATIVES OF MALEN CHIEFDOM

3.1. THE PREAMBLE

The Lease agreement between the Government of Sierra Leone represented by the Minister of Agriculture, Forestry and Food Security was signed on the 5th of March 2011 by the Paramount Chief on behalf of himself and the Chiefdom Council on the one part, as indicated in the preamble of the document, and a list of individuals from the Bahoin, Seinjeila, Kemoh, and Korwa sections of the Malen Chiefdom, Pujehun District, Southern Province of the Republic of Sierra Leone on the second part all as Lessor and Dr. Joseph Sam Sesay, Minister of Agriculture, Forestry and Food Security as Lessee.

In this preamble the identity of all the individuals from the various sections save for the Paramount Chief was not stated. Were they chiefdom elders or individual land owners or sub chiefs in the various sections? This was not stated thus making the identity of that party to the agreement uncertain.

The land as subject matter of the agreement is said to measure about *“16,248.54 acres as delineated in a Survey Plan numbered LOB 1098 dated 2nd March 2011 drawn and attached hereto and thereon verged RED or howsoever the same may be bounded known and defined or distinguished”*.ⁱ

There is neither such survey plan attached to the lease agreement nor is it clear to any one that it was made available the Lessor before the signing of the agreement. If ever a survey of the land was done before the signing of the agreement, when was it done and plan prepared?

Why was the plan for the land not made available to the Lessor and to the public since the lease is done by the Government of Sierra Leone which is of public interest? Section 9 Ordinance requires registration of the lease document thus making it a public document.

3.2. DURATION OF THE LEASE

Clause 1 of the agreement states that the in consideration for the rent sum of US\$5.00 per acre of land the Lessee is to have and hold the land for a period of 50 years commencing on the 1st day of March 2011 and expiring on the 28th day of February 2061 and also with an option to renew the said lease for a further term of 25 years.

The rent is to be paid on annual basis. Realizing that no stipulation is made as to the demarcation of the land which was delineated could it then be understood to mean the entire land mass including plantations, swamps, settlements and the vegetations?

Land according to English Common law includes the subsoil down to the center of the earth and the air space above. Hence the Latin maxim “ Cuius est colum, eius est usque ad caelum et ad inferos” meaning he who own land owns everything reaching up to the very heaven and down to the depth of the earth.

3.3. PAYMENT OF RENT

It is further stated in Clause 1 of the lease agreement that

“Rent for the first One (1) year term shall be paid in advance on or before the execution of these present (the receipt of which sum the Lessors hereby shall acknowledge and confirm) and the remaining rents for the unpaid term shall be payable every other one year (1) in advance with an option to renew the said rent after every seven (7) years, such review not to result in an increase of more than 17.5% of the rent immediately payable prior the review”.

It is clear in Section 5 of CAP 122 of the laws of Sierra Leone 1960 as amended that the rent shall be reviewed every seven (7) years but was the initial rent negotiated with the Lessor?

No information is presented about who represented the Lessor in the negotiation considering that the Lessee has greater bargaining strength.

3.4. PURPOSE OF THE LEASE

It is clear from Rule 3(c) of the Schedule to the Protectorate Land Ordinance (CAP 122 of the Laws of Sierra Leone 1960 as amended) that the purpose for which the land lease was made must be stated in the lease unequivocally without any incongruity as stated above!

However, clause 2.2 in the lease agreement states that the land was leased by the Government of Sierra Leone for the purpose of *“farming and agro-industrial development and any other purpose of Lessee may deem fit”*.

The underlined clause renders Clause 2.2 in the agreement elastic and thus uncertain as to the actual purpose of the lease. Farming and agro-industrial development may be conceived by the Lessor but “any other purpose of Lessee may deem fit” entrusts with the lessee greater power to use the land for the purpose not conceived by the Lessor and thus cannot form part of the agreement.

3.5. THE SCHEDULE

The schedule in the lease agreement points at a survey plan which should have been registered in the Ministry of Lands and Country planning and the Environment, but such plan is clearly lacking in the entire agreement. How were the coordinate figures of measurement arrived at?

3.6. ENDORSEMENT

Section 9 (a) of the Ordinanceⁱⁱ provides inter alia as follows:

“Every deed creating a tenancy of land shall be voidable by either party, unless it-

..it is executed in the presence of two witnesses by the Lessor before the District Commissioner of the District in which the land is situated; and is executed in the presence of two witnesses, by the lessee or his attorney or his agent before a Magistrate;”

It is clearly seen from the face of the Lease agreement that the lease was not executed as provided by law on the part of the Lessee even though the Lessor did satisfy the provisions of the law thus rendering the entire lease agreement voidable.

Section 9(b) further provides:

“...has endorsed upon it certificates of execution in their presence signed respectively by the District Commissioner and the magistrate before whom it is executed;”

From the face of the Lease document neither the District Commissioner nor the Magistrate did certify the document thus rendering it further voidable.

4. ANALYSIS OF THE SUB-LEASE AGREEMENT

4.1. PREAMBLE

This sub-lease like the parent lease between the Government of Sierra Leone and the Tribal Authorities of the Malen Chiefdom was signed on the 5th day of March 2011.

Section 9 the Ordinance inter alia states:

“ (c) provides that the lessee shall not sublet or assign his interest thereunder except with the consent of the Tribal Authority with the approval in writing of the District Commissioner, provided that such consent shall not be unreasonably withheld; and

(d) contains stipulations with regard to all the matters set out in rule 3 to the schedule of this Ordinance; and

(e) is registered within sixty days in the office of the Registrar General.”

It is clear that if consent was ever obtained by the Lessor to this sub-lease then it was not through informed consent as stated earlier on and that from the face of the document there is no indication of approval from the District Commissioner in writing attached thereto as provided for by law thus rendering the sub-lease voidable.

It is indicated in the preamble that

“the Lessor sought the consent of the Lessors to the Head Lease to sublet the premises demised thereunder....”

There is no indication as to when such consent was obtained even though blank spaces were provided for in the document to such effect.

From the face of the document is clearly seen that neither the parent lease nor the sub-lease is a registered document as of date.

4.2. KEY PROVISIONS

Clause 1 states inter alia:

“ To have and to hold the same unto the lessee for agro-industrial purposes together with the full rights of liberty for the lessee its servants and licensees with or without vehicles or on foot at all times and for all purposes to pass and repass to and from the demises land or part thereof...”

With no certainty as to the portions of land stated in the parent lease and even in the sub-lease it can be conceived that the native inhabitants shall, under the sub lease, be considered as licensees of the Lessee since the land mass/area described in the parent lease and in the sub-lease is vast and unclear with no survey plans to identify the settlements of the inhabitants of the land.

CLAUSE 1.1 states:

“the area of the Demised Land and the annual rent payable for the first seven years of this lease are set out in Schedule 1”

“Schedule 1” is not provided in the in the sub-lease agreement.

CLAUSE 2.2 empowers the Lessee to use the demised land

“ ...for farming and any other purpose of the Lessee may deem fit”.

Such elastic provision makes the purpose of the sub-lease unclear and uncertain and empowers the Lessee to do other activities on the land other than farming as it deems fit.

CLAUSE 2.7 gives right to the Lessee to erect structures on any part of the demised land. There is no stipulation as to the minimum quality requirements for the design and construction of these structures to ensure that the risk of industrial accidents in the future is minimized. There is need for such a clause to be contained in the sub-lease and to additionally provide the Chieftdom council with the professional body to verify both the design and construction.

5. CONCLUSIONS

5.1. LEGAL REPRESENTATION OF THE LESSOR

It is not clear whether the Tribal Authorities were afforded with legal representation to adequately guide them in the entire lease process. If the agreement was achieved without giving such a privilege to the Lessor, it is considered done in bad faith on the part of the Lessee considering the fact that the Lessee had greater bargaining power and authority over the Lessor.

Furthermore, it is obvious that whatever consent must have been given by the Lessor in this agreement was not an informed consent and thus could have been obtained in bad faith.

5.2. BENEFITS AND LOSSES ACRUED TO THE LESSOR UNDER THE AGREEMENT

The agreement does not specify the portion of land area such as upland or wet land but generally refers to all the land area that amounts to the number of acres mentioned in the schedule.

Thus taking away an unclearly specified land from the people could include areas of land that would not have been in the mind of the Lessor.

The lease does not mention any type of crop, plantation or settlements and the compensation that would be received by the Lessor should the Lessee in furtherance of the purpose of the lease tamper with any crop, plantation or settlements of the Lessor.

It is clear that land includes all that is on the land above and beneath but for the purpose of a lease agreement, specifications as to other attachments to land such as crops, plantations; settlements and compensations for them should form part of the covenants in the lease. Lack of these provisions as part of the covenant in the lease agreement implies compulsory taking of the property. This is thus a fragrant violation of the rights of the Lessor to such properties as provided for under Section 21 of the Constitution of Sierra Leone, Act No. 9 of 1991.

5.3. PURPOSE OF THE LEASE

Under the Ordinance the Government of Sierra Leone is considered a Non-Native and thus entitled to Leasehold interest in land only in the provinces same as any company that is registered in Sierra Leone.

What is unclear is the purpose of the Government of Sierra Leone leasing the demised land as described in the parent lease to the Tribal Authorities and further sub-leasing to the Socfin Agricultural Company Sierra Leone Limited and both transactions subject to the above mentioned inadequacies.

Both the Government of Sierra Leone and the Company are Non-Natives and have right to leasehold interest in land in the provinces. In order to seek the greater interest of the citizens of this country, the Government of Sierra Leone should have played the umpire role between the Socfin Agricultural Company Sierra Leone Limited and the Tribal Authorities of the Malen Chiefdom rather than entering into a lease and further sub-leasing to the company.

There is certainly a conflict of interest on the part of the Government of Sierra Leone in the transaction, given that most if not all of the Tribal Authorities are considered agents of Government in the provinces. If ever there were any negotiations, the Government of Sierra Leone had a greater weight of bargaining power.

The Socfin Agricultural Company Sierra Leone Limited is a registered company in Sierra Leone whose activities are regulated by the laws of Sierra Leone and monitored/supervised by the government of Sierra Leone using the appropriate government authorities. Engaging in a sub-lease agreement with the company amounts to a conflict of interest and also wildering greater bargaining power.

Thus the appropriate way out would be the Company leasing the demised land directly from the Tribal Authorities as provided for under the Ordinance. The Government on behalf of the citizens of Sierra Leone should be monitoring the activities/operations of the company so as to seek the best interest its citizens.

The results of the study demonstrate an urgent need for a review and amendments of both the lease and the sub-lease agreement so as to ease the tension and to prevent the tension generating a conflict that would likely escalate.

ⁱ "The schedule to this lease agreement"

ⁱⁱ Protectorate Land Ordinance (CAP 122 of the Laws of Sierra Leone 1960 as amended)