

**STUDY ON OPTIONS FOR PASTORALISTS TO SECURE THEIR
LIVELIHOODS**

**EXPERIENCES IN THE DEFENCE OF PASTORALIST RESOURCE RIGHTS
IN
TANZANIA: LESSONS AND PROSPECTS**

PART A

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[ABSTRACT: An Overview, first of the cases pursued by Pastoralists in the Tanzanian Courts. The purpose is to give the basis for legal options when litigation of protection of pastoral resource rights becomes necessary. Second the paper gives an overview of possible alternative remedies that may be pursued under Constitutional processes, and those that may be availed in International human rights forums.]

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1 THE COURTS AND PASTORALISTS

Since 1980's, pastoralists have not been sitting back where their rights have been under threat. In Hanang district, the pastoralist Barabaig took to court a Parastatal, NAFCO when it trespassed upon their lands. Similarly, in a variety of other cases the pastoralist Maasai communities have taken official and non-official trespassers to court. The following **Table 1** highlights such cases.¹ In all these cases, there has been a variety of reviews on the implication of each case. Suffice to point out that success has not been on the side of pastoralist. It seems, according to Chris Peter that, the court still view pastoralist in the most negative sense and technicalities are used to throw out substantive cases.² We give a brief review of two scenarios to put our views into context.

First, the case of the Barabaig illustrates how courts have handled the claim for land among pastoralists. How courts have viewed pastoral land rights and how the law has evolved with regard to that right. Of importance is also what are procedural hurdles that are encountered in proving the pastoral title.

Second, the case of the Mkomazi evictions shows how the law is used to justify evictions in conservation areas and how authorities fail to compensate pastoralist when wrongful eviction has been proved. Questions remain as what may be done in such a situation and what other remedies are available.

This part also gives an assessment of constitutional and international framework for the protection of livelihood. The struggle for collective rights seems to be at the beginning within the jurisprudence of the courts. In giving an analysis of the status of the present legal protection, pastoralists may strategize to take advantage of what is available.

¹ *Adopted the Table from Tenga, R.W. 'The right to food and security of pastoral resource rights in Tanzania' 2007 - Forthcoming in FAO/IIED publication on the Right to Food in EA.*

² *Peter, Chris Maina. "Human Rights of Indigenous Minorities in Tanzania and the Courts of Law," Raoul Wallenberg Institute of Human Rights and Humanitarian Law (Lund: University of Lund, 2007)*

TABLE 1: Some Core Pastoral Land Rights Cases in Tanzania				
No.	Case Reference	Community	Claim	Final Court Decision
	Mulbadaw Village Council & 67 Others vs. NAFCO (HC - Arusha - CV# 10/1981 and CA - CVA # 3/1986)	Barabaig Pastoralists in Hanang District	Claim Over extensive Pasture Lands appropriated by NAFCO, a Parastatal, as MULBADAW FARM, (about 10,000 acres) funded by CIDA, Canada	Pastoralists lost: (1) Village Council failed to show legal allocation of land from prior land authorities. (2) Barabaig Pastoralists failed to show the Court that they are natives of Tanzania! (Despite the public fact that Barabaig Pastoralists are found nowhere else on Earth, and in Court some had to get a translator!)
	Yoke Gwaku & 5 Others vs. Gawal Farms Ltd & NAFCO (HC – Arusha – CV#52/1988)	Barabaig Pastoralists in Hanang District	Claim Over extensive Pasture Lands appropriated by NAFCO, a Parastatal, as GAWAL FARM, (about 10,000 acres) funded by CIDA, Canada	The High Courts Awards a Nominal Victory: (1) Yes the Pastoralists have been illegally Dispossessed (2) But Representative Suit only covers those in Court and not the odd 780 others. (3) Claimants to be paid monetary compensations and not to be re-granted the land
	Ako Gembul & 100 Others vs.	Barabaig Pastoralists in	Claim Over extensive Pasture Lands	The High Court (per Nchalla, J.)

TABLE 1: Some Core Pastoral Land Rights Cases in Tanzania				
No.	Case Reference	Community	Claim	Final Court Decision
	Gidagamowd and Waret Farms Ltds & NAFCO (HC-Arusha - CV#12/1989)	Hanang District	appropriated by NAFCO, a Parastatal, as WARET and GIDAGAMOWD FARMS, (about 20,000 acres) funded by CIDA, Canada	dismisses the case: (1) That the Government has priority in Food Security and the acquisition of the Barabaig Land is proper, as national interest overrides all other interests.. (2) That the suit is bad in law as it should have been consolidated with the Yoke Gwaku Case. The litigants were at fault and maybe guilty of abuse of the process of Court.
	Lekengere Faru & Ors vs. AG & Ors (HC- Moshi - CV#33/94 & CV#33/95 and CA - CVA # 53/1998)	Maasai Pastoralists living in Mkomazi Game Reserve, North Eastern Tanzania	Claim against evictions from ancestral lands within the Game Reserve	The High Court per Munuo, J. finds that the Evictions were illegal, Orders that alternative land be sought and Claimants be Compensated. Court of Appeal per Nyalali, CJ, in a hastily written Judgment (1999) 'finds out' that the Maasai are not Natives of Mkomazi but 'recent' immigrants who only resided there under a

No.	Case Reference	Community	Claim	Final Court Decision
				licence. Orders paltry damages for only those who gave evidence in Court and also orders for alternative land to be sought. The last Order remains unimplemented to date.
	Ngotyaki, Oloruja & Others vs. Republic, (HC – Arusha - Criminal Appeal # 8/1991)	Maasai Pastoralists in Ngorongoro Conservation Area	Five Pastoralists appeal against conviction by Monduli District Court for allegedly breach of Anti - Cultivation Regulations within the Conservation Area, the conviction covers 9 people jailed for 3 months and 649 fined.	Convictions quashed by the High Court as they were based on (1) Repealed Law, and, (2) Section 9A of the Ordinance under which the accused were charged contained no punishment provisions

1.1 The case of Barbaig pastoralists in Hanang District.

The Barabaig cases, as shown in **Table 1** are founded on the legal principle that pastoralists have traditional and legally recognizable rights over grazing lands. The law, as then existing, did recognize native title over land in accordance with native custom and law (**S.2 of Land Ordinance 1923**). The law further provides the means under which customary law may be recognized and proved in a Court of Law (**S.11 Judicature and Application of Laws Act**).

The three cases (**Mulbadaw, Yoke Gwaku** and **Ako Gembul**), all held, at one stage, that the pastoralists had a customary title to their grazing lands. In the **Mulbadaw** case the High Court held that there was a native title but the Court of Appeal, on the basis of a flimsy technicality, held that the title was not proved as the claimants in Court did not prove that they were Barabaig natives! Furthermore the Village Council was disqualified as the custodian of the collective pastoral title as it is not a traditional entity.

In the following cases, that of **Yoke Gwaku** and **Ako Gembul**, the pastoral claimants tried to skirt around the procedural and technical hurdles that were pointed out in the Mulbadaw case. First, anthropological evidence was used to prove the existence of a native pastoral title in Hanang. A distinguished Australian Anthropologist, Dr. Charles Lane, testified in Court on the nature of Barabaig customary resource rights over grazing lands. Dr. Lane's testimony was based on his sociological study of Barabaig society. Second, the representative character of the claimants was achieved through the application of a representative suit as provided under the **Civil Procedure Code, 1966**.

In both aspects the Barabaig still lost as the Courts became highly ingenious in generating technical hurdles. In the case of **Yoke Gwaku** the court held that a customary pastoral title over the lands of Gawal area in Hanang District was proved. However, the Court held the representative application, although granted at the outset, did not hold water as the represented claimants failed to prove their losses in court. The court reasoned that orders for compensation may only be provided to individuals who gave evidence in court; and since only a few individuals gave evidence the court felt constrained to nullify the whole title over extensive lands to benefit a few pastoralists! Therefore although the trespass was proved the remedies could not be granted as prayed.

The claimants appealed, and several years later, the Court of Appeal was moved by an Advocate who claimed to have no instructions from the claimants to strike down the appeal. The goal has been shifted so much that now it has disappeared completely from the playground.

In the case of **Ako Gembul**, the same procedure was followed as in the case of **Yoke Gwaku**. The difference was that whilst in **Yoke Gwaku** the farm area claimed was Gawal Farm, in **Ako Gembul** the farm areas were Gidagamowd and Waret. The Judge in the case faulted the claimants as being frivolous, since this case should have been consolidated with **Yoke Gwaku**. He was further of the opinion that although a customary title was in existence it was lawfully extinguished. In the most vitriolic language the Judge dismissed the suit. As we stand to-day the status of its appeal is unknown.

From this scenario what do we learn? First, the court's negative attitude towards the existence of the pastoral title may be changed with refined and sophisticated proof of its existence. Furthermore today the Land Act and Village Land Act provide an avenue for the proof and recording of customary title hence enabling pastoral community to defend their resource rights. If the traditional title is informal pastoralist will have the same difficulties in terms of proving the title just as it happened in Hanang. This does not mean that proof is impossible; it only means the pastoralists must undergo a complex process in terms of proof and chances of success may be minimal. So lesson number one – formalize the pastoral title.

The Second lesson from the Barabaig cases is one regarding the procedural aspects of defending the collective or common resource rights of a pastoral community. This issue devolves on who is the lawful custodian of this kind of title. In the Barabaig case the Village Council was disqualified. Even today no body corporate or traditional entity is in existence that could be said to be the locus for customary land holding. In most cases the so-called representative has

been disqualified. So who shall speak for the commons or the collective remains a contested subject.

The present Land Acts provide a solution by putting in place a process for the formalization of the pastoral title. Yet serious questions remain to be resolved. For example, which entity should register as the custodian of the collectives' title? The New Grazing Land Bill seems to suggest a Pastoralist Association yet it is this kind of entity that was not successful in the former Range Development Strategy. So the challenge remains on the mechanics of defining this entity and the nature or bundle of rights that may be registered with the title. Several scenarios are possible ranging from the individual trustee to some forms of a collective body. So lesson number two seems to be - identify and legalise the holder of the pastoral title to land.

The third, lesson appears to be one of litigation strategy. The pastoralists succeeded in whatever they did in Court through extensive networking. Not only were the Pastoralists engaged but also other facilitators (from Individual Researchers, Lawyers, NGOs, and International Organizations). The knowledge base that is required has to be extensive since there are a variety of actors interested in pastoral lands for different objectives, some of which are in conflict with the communities' interests. It is possible to create appropriate synergies where a proper stakeholders' audit is done. The third lesson appears to be one of advocacy and strategy – there must be a working and dynamic network of like-minded stakeholders. It is not advisable to underplay this reality. A lot of interdisciplinary knowledge is required to prove land rights, water rights, hunting rights, rights to indigenous medicinal plants, heritage sites rights, organisational structures, etc. Advocacy and media strategy go a long way in shaping participants' resolve to go on with cases that may take very long to finish.

1.2 The case of the Maasai pastoralists in Mkomazi

The Mkomazi pastoralists different with the Hanang pastoralists are faced with an eviction problem justified as a conservation issue. The establishment of a Game reserve (now to be changed into a National Park) has led to one of the most unjustified evictions in Tanzania's history

The Mkomazi Game Reserve (MGR) is established in the north-east of Tanzania alongside the border with Kenya, south of the Tsavo National Park. It was established in 1952 and in the enabling Charter pastoralist rights were to be preserved. However by 1987 the Maasai Pastoralists started to face serious systemic mass expulsions from the Reserve. The pastoralists went to the High Court in Moshi where they lodged 2 cases challenging the eviction. The facts in the cases are as stated in **Box 1** below and subsequently.³

³ *Lekengere Faru Parutu Kamunyu and 16 Ors versus (1) Minister for Natural Resources, Tourism and Environment, (2) the Director, Wildlife Division, (3) Project Manager, Mkomazi Game Reserve and (4) The Attorney General (HC-Moshi) Civil Case No. 33 of 1994 . The other Mkomazi pastoralists' case which was similar to this one and also lodged in Court by Legal Aid Committee Advocates was*

Box 1: “Zoo in the Bush” at Mkomazi

Mkomazi Game Reserve is the focus of a struggle between government wildlife authorities supported by private conservation organisations, and the mainly Maasai and Ilparakuyu peoples who were evicted from the Reserve in 1988. The eviction of between 4,000-10,000 residents with 80,000 cattle was strongly enforced and no provision was made for their relocation. This caused severe disruption to the local economy as cattle died and many families were forced to leave the area. Those that remain have had to eke out a living from inadequate pastures in a narrow strip of land between the Reserve and nearby mountains. Some of the 60,000 people who live around the Reserve today feel they are entitled to access the land they regard as their own, even if that means having their livestock impounded and paying huge fines for ‘trespassing’ in the Reserve.

When appeals made to government failed a local community-based organisation. Ilaramataka Lorkonerei, took the matter to the courts (*Faru Kamunyu and 16 Others v. The Minister for Tourism, Natural Resources and Environment and 3 Others, Civil Case No. 33 of 1994* and *Kopera Kenya Kamunyu and 44 Others v. The Minister for Tourism, Natural Resources and Environment and 3 Others, Civil Case No. 33 of 1995 – later combined*). In the case heard at the High Court in Moshi, Tanzania, the Plaintiffs contended that the evictions failed to follow due process of law and were unconstitutional as they are in breach of customary rights to land. Despite international protest, attempts to bring a court injunction and the fact that legal rights to the Reserve were yet to be determined in the courts, the George Adamson Wildlife Preservation Trust (UK) and the Tony Fitzjohn/George Adamson African Wildlife Preservation Trust (USA) continued supporting the construction of a 17.5km² electric wire fenced rhinoceros sanctuary in the Reserve, referred to by one local Maasai leader as a “zoo in the bush”, and imported into the Reserve five Black rhinoceros from South Africa. This constitutes a slap in the face to local people and worked against a negotiated settlement of people’s claim to the Reserve. It also lifted the stakes of the conflicts and made a judgement in favour of local people all the more difficult to implement.

IWGIA, The Indigenous World 1997/98 p. 299

The Applicant pastoralists claimed to be native residents “for hundreds of years” of an area in north-east Tanzania known as “Alaililai lemwarzuni” in Maasai language and today styled by the law as Mkomazi Game Reserve. The area was made a game reserve under the **Fauna Conservation Ordinance**, Chapter 302 of the laws of Tanzania, in 1951. However its creation did not affect pre-existing and future customary land rights of the natives as these were expressly safeguarded by statutory and positive assurances by the government that these rights would not be disturbed without the consent of the resident pastoralists. Neither did the

styled: *Kopera Keiya Kamunyu & 44 Ors vs. The Minister for Natural Resources Tourism and the Environment & 3 Ors [HC-Moshi] Civil Case No. 33 of 1995*. Both cases were later consolidated.

legislative changes brought about by the **Wildlife Conservation Act, 1974** affect the safeguards. The Game Division itself in 1952, 1963, 1968 and 1971 made a list of pastoralists who were found in the Game Reserve and whose rights were safeguarded. The first government directive came out in 1987 to get all pastoralists out of the reserve. They however complained and got a brief extension. Nevertheless in 1988 by a directive from the Principal Secretary of MLUD, Mr. A. Mshangama, the Wildlife Division ordered all pastoralists out of the MGR.

The Applicants claimed in court that they were forcefully evicted from their ancestral lands, their homesteads were burnt down and livestock maimed or killed; and that their customary way of life has been broken down resulting into emigration of their members to Kenya and to urban areas. The Plaintiff filed in court particularized 12 areas on which they had suffered damages:

- i. *Their constitutional right to live and enjoy their respective lives has been infringed.*
- ii. *They have, without due process been denied their basic right to reside in their traditional and ancestral lands.*
- iii. *Unlawful eviction constitutes a serious infringement of the claimants' customary land rights of natives of Tanganyika as recognized by land laws of Tanzania.*
- iv. *Claimants find themselves in drought conditions, with their dwindling livestock lacking grazing and water and surrounding by settled villages.*
- v. *No plans to relocate the claimants were made.*
- vi. *Shortage of grazing for their livestock has attracted exorbitant fines of up to Tshs. 400,000/= for livestock straying into the MGR.*
- vii. *Frequent beating and general harassment by employees of MGR.*
- viii. *Loss by diseases and starvation of cattle, goats, sheep and donkeys estimated at 10 billion shillings.*
- ix. *Loss of access to customary holy places and sacred shrines.*
- x. *Loss of grazing lands has led to vicious deprivation of plaintiffs' employment, livelihood and ultimately, their right to life.*
- xi. *Evictions without compensation and alternative grazing land has reduced the maasai pastoralists into squatters surrounded by hostile agricultural communities.*
- xii. *Criminalization of claimants pastoral activities.*

The list is indicative of the corpus of rights that go along with the collective Title of the Maasai pastoralist. Extensive literature supported by extensive research work by Dr. Dan Brockington and Prof. Jim Igoe, show how the eviction was carried out and how it has succeeded.⁴

⁴ Dan Brockington, **Fortress Conservation: The Preservation of the Mkomazi Game Reserve, Tanzania.** (Oxford: James Currey Ltd, 2002); Jim Igoe and Dan Brockington, "Pastoral Land Tenure And Community Conservation: A Case Study from North-East Tanzania," **IIED Pastoral Land Tenure Series** (London), 11 (1999); Ibrahim H. Juma, "Extinction of Customary Land Rights in the Wildlife Conservation Areas of Tanzania: The Case of Mkomazi Game Reserve," **Africa: Zeitschrift der Gesellschaft fur afrikanisches Recht** 2 (2000)

The role of the courts has been most inconsistent. The case started in the High court where the Judge held that the pastoralists had been unlawfully evicted but instead of nullifying the eviction, the court confirmed it and ordered payment of paltry damage and grant of alternative land on a 'self help' basis. The claimants appealed to the Court of Appeal, there was hope that the top most court would clear the ambiguities in the High court's decision but instead the Court of Appeal came out with one of the most contradictory and legally vague decision.⁵

The Court of Appeal treated the whole matter in a rather novel fashion. The Court gave a list of "facts" or rather "circumstances" that were indisputable and hence cannot be contested. These included:

- (a) That it is undisputed by 1946 the Maasai, including Kwavi, were inhabitants of Northern Province to the West of Pangani/Ruvu River (by implication they did not reside in the Mkomazi Game Reserve area that is to the East of Pangani/Ruvu River) and that up to 1946 the inhabitants of the Mkomazi Game Reserve (MGR) area were the Pare and Shambaa.⁶
- (b) That it is undisputed according to a Scientific Report on the history of land use at MGR, published in 1967, the first Game Reserve was established in 1904, the Second in 1940 and the third in 1951. The Pastoralists only came within the Area in about 1948! In fact a Game Ranger, David Anstey, testified that before establishing the Reserves wide consultations were carried with local authorities (being Chiefs of Usangi, Ugweno, Same, Mbagaa, South Pare, and of Ndungu) no Maasai leader were involved in the consultations (The implication being that no Maasai was found there so there was no one to consult)⁷.
- (c) That it is undisputed Pastoralist have been the source of problem to Game Reserve Management so much that as early as 1952 the British administration ordered the Maasai to go back to Toloha, near Rum and to Masailand via Buiko.⁸
- (d) That it is undisputed human habitation in the reserve is confined to a small number of people that are ordinarily resident within the reserved. To satisfy the residence threshold a periodic census was undertaken in 1963, 1968, 1971 and 1982.
- (e) And it is undisputed that under the Wildlife Conservation Act 1974 (No. 12 of 1974) and GN # 265 and 275 of 1974 the MGR was split into two Uмба Reserve in Lushoto District and Mkomazi in Same District. But because of continued influx of pastoralists the Government by December 1987 decided to revoke all residence permits and required them to vacate by early 1988. Notice it was undisputed was communicated and the pastoralists did not move and consequently government forcefully evicted them.

⁵ Sifuni Ernest Mchome, **Evictions and the Rights of People in Conservation Areas in Tanzania** (Dar Es Salaam: Dar Es Salaam University Press, 2002);

⁶ Page 8 of the Certified Unreported Judgement.

⁷ P. 809, *ibid.*

⁸ p. 9, *ibid.*

From these undisputed “facts” the Court of Appeal proceeded with its decision:

1.2.1 Consideration of Procedural Issues by the Court of Appeal

i. The Issue of Representation in Court

The Court of Appeal stated the issue as follows:

“Whether it is correct at law for the 53 Pastoralists to sue not only on their own behalf, but also on the behalf of every member of the Maasai Community affected by the Eviction.”

The Pastoralists, through their Advocate Mr. Mchome, argued that since they sought a judgment *in rem* and not *in personam* an individual member of a community could sue both on his own behalf and on the behalf of other members of that community. This is so they argued because the “res’ (thing) that they took action to recover was land that was held or owned in common. The Court of Appeal disagreed. It observed that the Pastoralist argument was based on confusion. Whilst in a suit seeking judgment *in rem* i.e. “a judgment applicable to the whole world” an individual does not sue on behalf of the whole world, but sues for judgment which is effective against the whole world. Thus, where successful, the litigant obtains a judgment that is effective against the whole world but does not confer benefits upon the whole world. The Court stated that had the Pastoralists wanted to benefit members of the community at large they should have brought a class action under the law. The Court said that the situation is different when one wants to enforce a public legal right, such as a violation of an easement, e.g. a right of way, where any member of the public may sue to assert it not only on his own behalf, but on behalf of the general public.

First, the reasoning misreads the Pastoralists basic argument. The claim is that a Pastoral Right is a right in common. It is to a large extent co-extensive with a public legal right similar to an easement, e.g. a right of way. The Pastoralists right over pastureland, within certain priority rights, is a public right within a community of pastoralists. Where one member of that community asserts his “right to pasture” or his “right to livestock passage” or his “right to water or salt sources” he would do so “not only on his behalf” but on behalf of the community of Pastoralists. It is a technical flip-flop to distinguish conceptually the form of ownership with regard to the commons as substantively different from other public legal rights. The Court of Appeal strained itself to create a technical distinction without a real difference in order to deny the Pastoralists an obviously valid claim that where one co-owner asserts a right in the joint “property” against anyone besides the co-owners he would do so not only on his own behalf but on the behalf of all other co-owners.

Second, the same Courts have treated contradictorily the issue of representative suits with regard to pastoralists. In the **Mulbadaw Case** the Court rejected the Village Council as a representative of the community while the corporate form of the Barbaig in their native organisation could not exist under statute i.e. the **Village and Ujamaa Villages Act, 1975**. In the **Yoke Gwaku Case** Counsel went through a tortuous procedure of verifying hundreds of names whether they were actually part of the “numerous plaintiffs” that were interested in the proceedings, only to find at the end that the Court decided the procedure adopted was faulty despite the fact that it was the same Court that granted the representative capacity. So it is obviously a paradox that on the one hand the Courts find every technical excuse to reject a

representative suit procedure, but where it is avoided the same Courts insist that that is the proper procedure.

ii. Whether only Claimants who give evidence are the ones entitled to judgment

The second procedural point canvassed in the Court of Appeal was whether these Pastoralist Appellants, who did not give evidence at the trial in the High Court were not entitled to obtain judgment in their favour. The Court considered Order 3, and Order 17 R. 2 of the Civil Procedure Code, 1966 and held that the High Court misdirected itself in confining its decision to the determination of rights of only those claimants who personally gave evidence in the case. The Court was bound to look at the evidence produced by the Claimants and their legal Counsel to see whether the total evidence was supportive of their claims. Yet much as this may be a correct view of the law in the **Mulbadaw Case** the same Court of Appeal did not grant a similar liberal interpretation of the Courts duty in assessing evidence. In that case some of the Claimants were struck out by the Court for allegedly failure to have given evidence in the trial.

1.2.2 Consideration of Substantive Points by the Court of Appeal:

iii. Whether the Maasai community of which the Appellants are members, had an ancestral customary land title over the whole of the MGR.

“We now come to substantive points, and we begin by considering whether the Maasai community of which the appellants are members, had an ancestral customary land title over the whole of the Mkomazi Game Reserve. We have carefully considered the indisputable surrounding circumstances which gave rise to this case, and it is apparent that the Maasai community or tribe in question was not the first tribe to arrive in the geographical area which is the subject of this case. It is apparent that the Maasai were new arrivals in the area, preceded by other tribes, such as the Pare, Shambaa and even the Kamba. It would seem that the Maasai, as a nomadic tribe, began to reach the area in the second half of the 1940s and their presence was still scanty at the time the Mkomazi Game Reserve was established in 1951. That explains why they were not involved in the consultations which preceded the creation of the Game Reserve. That being the position; we are bound to hold that the Maasai Community in question did not have ancestral customary land title over the whole of the Mkomazi Game Reserve. We are aware that the learned trial Judge found that such title existed in a portion of the Game Reserve, that is, Uмба Game Reserve. The Respondents have not cross-appealed against the finding, but since that finding of the learned trial Judge is inconsistent with our overall finding, we have to invoke our revisional jurisdiction provided under Section 4(2) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 so as to set aside such finding which is inconsistent with ours. We do so accordingly, and find that no such title existed in the Uмба Game Reserve.”⁹

⁹ p. 16-17 of the Certified Unreported Judgment.

There are several areas of concern in which the Court makes technical assumptions clearly against the Claimants. The critical ones are as follows:

1.2.3 Indisputable Surrounding circumstances:

The Court observed that certain indisputable circumstances gave a factual conclusion that the Maasai were not the first to arrive in the area and they were preceded by the Pare, Shamba and even the Kamba. These “facts” also lead to the conclusion that the Maasai, only came into the area in the second half of 1940’s and that is why they were not consulted when the MGR was established in 1951.

From history and sociological evidence the Pare and Shambaa are ethnic groups that largely live on the mountain massifs on Pare and Usambara.¹⁰ The Historian Kimambo states “*The inhabitants of these Mountains (the Shambaa of Usambara, the Pare of Upare and the Chagga of Kilimanjaro) generally preferred to live on the High ground altitudes of 3,500 to 6,000 feet, far above the lowlands called nyika which they considered unsuitable for residence*”.¹¹ There is a historical claim that part of the reason why the Wapare and Wasambaa lived in mountains was to protect themselves against the Lords of the plains – The Maasai! The MGR is on the Plains of these Mountains it can hardly be argued that they had ancestral titles of use in these lands. It is not in evidence that there were counter-claims on the issue of ancestral lands from these “original” tribes. The sources from which the Court refer as indisputable are the very authorities that established the MGR and had reason to conceal the fact that the Maasai were resident in the area when they began their operation. No independent anthropological or historical evidence was sought by the Court. Henry Fosbrooke a Government Sociologist in the Colonial Era had Maps of explorers whom came to the area in the late 19th Century and sketched the presence of Maasai in the area. He notes that even most geographical sites in the area have Maasai names. How then can these people be said to have just moved in the area in the 1940s?

1.2.4 The assumption that an ancestral title may only be established by “first” peoples.

It is true that once a community establishes that it was the first in time to arrive over a given area a strong presumption would arise that it has an original prescriptive title. Yet the presumption must be proved and not merely assumed. The first people may have abandoned the land, or may have been conquered in ethnical wars, or just disappeared. The groups that follow and subsequently establish long usage would not be held ransom to the fact that there existed some people in the areas some time in the past.

What is required is proof of long use over time that is not contradicted by a superior title. The Court of Appeal assumed that a long user, other than the Maasai, existed and without further proof of any claim from such assumed user denied the ancestry of the Pastoralists title.

¹⁰ Kimambo, I.N. “Environmental Control and Hunger: In the Mountains and Plains of Nineteenth Century North Eastern Tanzania in Maddox et al **Custodians of the Land** 1995 (James Currey, London) pp. 71-95.

¹¹ Kimambo, *ibid.*, p. 71.

1.2.5 The assumption that the Maasai having not been consulted then they were not residents in the area.

In anthropological categorisation the Maasai society is referred to as acephalous. These are societies that lack centralised authority, administrative machinery and constituted judicial institutions – in short which lack government – and the political system is formed through mainly the lineage structure and age-set system.¹² The colonialists coming from hierarchical organisations, i.e. states, that operated through public functionaries did not know how to “engage” these stateless people. Colonial wisdom then dictated a philosophy of indirect rule whereby the colonised would be subdued through native henchmen who were leaders within the native system (the Indirect Rule strategy). The Maasai, as stateless people, did not have this recognisable hierarchy. No wonder that Germans were the first to seek control of the Maasai in 1907 by putting them into a **Reserve**, just like they did with wild animals.

A German Legal Historian Harold Sippel¹³ notes:

“In the case of pastoralists, e.g. the Maasai, a gigantic reserved area was established for the purpose of preventing the nomadic herdsmen from disturbing the rights of pasture of European and Boer farmers and from stealing white men’s cattle in Kilimanjaro region, as a colonial official for land affairs reported in his memories about his time spent in service in East Africa.¹⁴ The so-called Maasai Reservat (Maasai Reserve) created in 1907 in Arusha and Moshi district, had a size roughly of 1,500,000 acres and approximately 11,300 inhabitants. But even this vast areas was insufficient for feeding the enormous livestock of the Maasai Cattle – breeders. In spite of that fact the Maasai headmen were not allowed to leave their “protected area” together with their cattle and they were punished by confiscation of cattle or by corporal punishment if they dared to do so.”¹⁵

The Maasai Reserve was maintained by the British and it was the area that correlates with the Court of Appeal’s reference to Maasailand as a region West of River Pangani/Ruvu in North Eastern Tanzania. Thus despite the exigencies of nomadic Pastoralism that necessitated the Maasai to move onto Plains East of Pangani/Ruvu River, i.e. up to Mkomazi, it was official colonial policy that the area East of Ruvu River was outside the “designated Maasailand.” Hence all colonial campaigns were to “send” the Maasai to their homeland – the **Maasai Reservat**. The plains areas adjacent to the Pare Mountains were administratively demarcated to be under the non-acephalous tribes that had compliant headmen, styled “Chiefs”, and it was these henchmen of colonial rulers that were often so “consulted” in matters that affected areas under “their jurisdiction”. The Pare Chiefs that were “consulted” could care the less about what the

¹² Fortes and Evans – Pritchard **African Political Systems** (London: OUP 1940) and also Middleton and Tait (Eds) **Tribes Without Rulers** (Lond. Routledge & Kegan Paul, 1958) pp. 1-31.

¹³ Sippel, Harold “Aspects of Colonial Land Law in German East Africa” **Identity in Africa-Processes of Development and Change** (University of Bayreuth), pp. 3-38.

¹⁴ Methner, Wilhelm. **Unter drei Gouverneuren – 16 Jahre Dienst in deutschen Tropen, Breslau, 1938**, pp. 50-51.

¹⁵ Sippel, *ibid.*, pp. 32-33.

colonialists wanted to do on the marginal and dry steppes of Mkomazi. After all their actual homeland were the cool Mountains as observed by the Historian Kimambo. In fact to them to drive out the Maasai could as well have been taken to be good riddance! Obviously they would have complied to have wild animals on those plains and not the warlike Pastoralists as neighbours.

For the Court of Appeal to observe that the Maasai were not consulted and therefore it is “undisputed” that there were not in the area in 1947 is to ignore indisputable historical facts: First, that the Maasai are acephalous and there would be no chief to consult; and, second, they were by design relegated to an artificial human reserve, the Maasai Reserve, and any claim by them of an area outside that reserve was considered a nullity and interference on official policy. The Court of Appeal, unintentionally may be, has also turned a blind eye on undisputed historical facts and adopted those facts designed by the colonisers of a defenceless people.

The Court of Appeal went on to determine other issues such as (a) What is the Nature of the title, if any, which the Appellants had before they were evicted? (b) Whether the Appellants or any of them were unlawfully evicted from MGR. (c) The Reliefs to which the 27 Appellants/Plaintiffs are entitled to. On both scores the pastoralists got a bad judgment and reliefs remain nominal and evasive to this day.

When the Team visited Mkomazi pastoralists in August 2007 they related their predicament. Up to this day they have not been allocated alternative land. The Authorities have shown them some unsuitable land in Handeni. But an inspection of these areas, with government officials, revealed that the grass is totally unsuitable for livestock, no watering areas could be identified and the infrastructure for livestock keeping practically absent. The advocate for the pastoralists, Prof. Ibrahim Juma, now Chairperson of the Tanzania Law Reform Commission, gave the Team copies of correspondence with the authorities urging them to give alternative land to pastoralists as ordered by court. The challenge seems to be what these defenceless people can do in the face of a hostile municipal legal system. Are there any other remedies?

Thus, these cases show that not only has the post colonial state deliberately marginalised pastoralists by taking their traditional pasture land without providing compensation and alternative pasture land, but the courts in Tanzania have failed to defend the legal and the human rights of the pastoralists in the last half century. The courts have demonstrated lack of sympathy by readiness to invoke legal technicalities to defeat justice, and slavishly upholding authoritarian anti-pastoralist state policies and laws. The judgments of the High Court and the Court of Appeal in the cases cited above are cases on point. Pastoralists have lost the legal battles but not the struggle for their human rights. This they are determined to win regardless of the cost involved.¹⁶

¹⁶ Mama Dancan, Discussion during research, katesh (august, 2007)

2 IN DEFENCE OF PASTORALISM

People live on land and this is the basis of their basic right to life, right of establishment, right of movement and demonstration, right to work and other such rights that have something to do with land. Therefore the manner by which land is owned, used and disposed has become a major cause of marginalisation of peoples throughout the world. The causes of poverty in most Third World Countries have close relationship with the way land is owned, used and disposed. We understand at the same time that the core issue in globalisation process is the way capital is able to trace land based natural resources at source regardless of frontiers.

We are concerned in this dialogue with the interface between local and international legal systems with the legal rights for pastoral livelihoods in Africa generally and Tanzania in particular. This dialogue has hitherto positioned pastoralists as a indigent group because the occupation of raising and grazing cattle has been associated with underdevelopment and likened to primitive modes of production. Pastoralism is seen as successor to hunting and gathering.

In this part of our study we shall be concerned with the way both local and international law impacts upon pastoral livelihoods of peoples in Tanzania and how law could be used to construct a compact of constitutional and legal options for the defence of pastoral livelihoods.

2.1 Constitutional Protection of Pastoral Land Rights in Tanzania

The constitution of the United Republic of Tanzania was made in 1977 and is the supreme law of the land. All other laws derive their legality from the constitution. Article 64 (5) of the constitution states, *interalia*, that:

“... this constitution shall have the force of law in the whole of the United Republic, and in the event any other law conflicts with the provisions contained in this constitution, the constitution shall prevail and that other law, to the extent of the inconsistency with the constitution, shall be void”.

2.1.1 Bill of Rights

The constitution of Tanzania contains a bill of rights made up of 28 articles. The state has guaranteed through this bill that it will respect the rights promulgated therein without restrictions but has subjected this guarantee to claw back clauses contained in Article 30. The restrictions imposed upon human rights by the provisions of article 30 are by any stretch of interpretation too wide and unnecessary for democracy.

For instance Article 30(2) states:

“ It is hereby declared that the provisions contained in this part of this constitution which set out the basic human rights, freedoms and duties, do not invalidate any existing legislation or prohibit the enactment of any legislation or doing of any lawful act in accordance with such legislation for the purposes of-

(a)...

(b) *ensuring the defence, public safety, public order, public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property or and other interests for the purposes of enhancing the public benefit;*

Normally human rights jurisprudence allows minimum limitation of rights necessary for the operation of a democratic state. These limitations relate to public interest, the security and defence of the state. The above provision is too widely cast to include everything. The terms: “public safety, public morality and public health” are normally subsumed in the term “public interest”. The terms “public order and defence” are normally stated as “defence and security of the state”. It is however improper to include the terms “**rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property or and other interests for the purposes of enhancing the public benefit**” since these are unnecessary in the existence and operation of a democratic order. By introducing these claw back provisions, the state is deliberately refusing to guarantee the right to property and the right to life. As is apparent in this study, these are the provisions that have been used by the government to justify the taking of land from pastoralists through various policies and laws of the country with or without adequate compensation.

It is worth to take note that sub article (2) above saves all existing legislation and does not restrict the parliament from enacting of any legislation, nor does it invalidate any lawful executive action that takes away rights contained in the bill of rights. This sort of constitutional craftsmanship is untenable in law. Its trite rule of constitutional interpretation that the constitution does not create and bestow basic rights upon human beings. Human rights are inherent in all human beings the moment they are born. What constitutions do in enacting bills of right is to make the rights cognizable and ascertainable in law. If a constitution deliberately refuses to enact a basic right, this does not extinguish it or make it unenforceable. Courts will still have jurisdiction to recognize and enforce such right in accordance with other international instruments that have recognized and provided remedy when they are breached.

It is a settled principle of law, that every right when withheld must have a remedy, and every injury caused must be atoned by proper redress¹⁷ It follows that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights whether or not such rights have been recognised by the constitution or by law.¹⁸

2.1.2 Mandatory Guidelines for State Policies and Laws.

Part II of the constitution of the United Republic of Tanzania, 1977 provides fundamental objectives and directives of state policy and laws. The significance of the provisions in this part of the constitution is that it sets out mandatory guidelines to state policy that n organ or official of state is permitted to ignore or to detract from. The words used in Article 7(1) are as follows:

¹⁷ William Blackstone., **Commentaries on the Laws of England**, 23.

¹⁸ **Article 8, Universal Declaration of Human Rights**

“Notwithstanding the provisions of sub article (2), it shall be the duty and responsibility of the government, all its organs and all persons or authorities exercising executive, legislative or judicial functions to take cognizance of and apply the provisions of this part of this chapter.”

Sub article (2) is a claw back on the provisions of sub article (1) by taking away the jurisdiction of courts to enforce compliance with the provisions of sub article (1). Once again, like in Article 30, we see the insincerity of the constitutional makers. They give by one hand and take away by the other hand. In states where rules of good governance are respected, the public has the right to institute public interest litigation for enforcement of common benefits such as making the state authorities comply with fundamental objectives and directives of state policy.

The above misgivings of the provisions of Part II of the constitution notwithstanding, Article 8 enacts democracy and social justice as the fundamental principles of the state. (a) Sovereignty of the people, (b) social welfare, (c) government accountability to the people and (d) participation of the people in the Affairs of their government are stated clearly in this article as the *modus operandi* of governance. In this study we discovered that people at grassroots level were not given civic education to know how to elect leaders that can uphold their interests. Our discussions with community leaders and CSO officials in Katesh, Ngorongoro and Arusha¹⁹ revealed that pastoralists did not know that it was important to elect pastoralist leaders into elective decision making organs of state, they elected instead agriculturalists in order to relieve themselves of the hustle of attending endless meetings instead of taking care of their herds. When official policy and administrative decisions were made, these came as hailstorm upon pastoralists who were absent all the way, but involved in accordance with law²⁰.

The Constitution directs that state policy must aim at achieving social welfare. We did not find in our research concurrence between the agrarianisation of pastoral land in Hanang and the welfare of pastoralists living there. In fact figures given by the District authorities showed a radical change of demographic data, to wit, 82% agriculturalists, 5% pastoralists and the rest agro-pastoralists. In other areas like Mkomazi Game Reserve and Ngorongoro National Park, the need to increase conservation area was given more weight than the welfare of the pastoral

¹⁹ Per Lekei (Mkomazi pastoralists 14/08/07) , UCRT, Farm Africa (Katesh 16/08/07), Mweddu, Eretu

²⁰ In Katesh, officials in the District Council told us that pastoral community leaders had accepted that three of the wheat farms which were subject to court litigation be sold to liquidate debts, and two be divided one to pastoralists (Gawal) and the other (Warret) to agriculturalist. The so-called pastoralists and agriculturalist who were to benefit from the re-distribution of land were not those that had gone to court. Later when we spoke to community leaders they told us a different story. They said that the community leaders were not consulted. The Officials of the District council handpicked individuals from the villages, 17 in all and only 7 were pastoralist. They were hand picked just a day before the meeting and had no time to consult. The community leaders we spoke to expressed fears that this was done in order to allow part of the land to be allocated to some big fishes in the District Council. According to them they had to rise up in arms to prevent the parcelling of the farms.

communities. But more significant was the response we received from all grassroots leaders we interviewed regarding the involvement of the people in policy making. They all replied “no we were not involved or consulted”.

Article 9 (a) to (k) of the constitution of the United Republic of Tanzania, 1977 sets out the objectives of the state upon which state authorities can make sectoral policies. We seek to build a nation of equal and free individuals enjoying freedom, justice, fraternity and concord. Pastoral communities must be free and equal. They must enjoy freedom, justice, fraternity and concord like all others. The state through its policies must ensure respect of human rights, laws and must abolish injustice, intimidation, discrimination, corruption, oppression, favouritism and that national resources are used to eradicate poverty, ignorance and disease.

In view of the above mandatory guidelines to state policies and laws, Article 14 of the constitution guarantees for every person the right to life, and to protection of life, article 22(1) guarantees for everyone the right to work, article 24(1) guarantees for every person the right to own property and protection of such property and sub article 24(2) guarantees lawfully owned property from nationalisation, compulsory acquisition or taking by the government without adequate compensation.

2.1.3 Constitutional Remedies

It follows that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.²¹ Tanzania is signatory of and has ratified the International Covenant on Civil and Political Rights,²² under which she undertook to ensure that any person whose rights or freedoms as recognized under the Covenant are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.²³

The Covenant requires that the rights to such remedy be determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.²⁴ Tanzania also undertook to ensure that the competent authorities shall enforce such remedies when granted.²⁵ We have explained in the discussion above that Tanzania has not been sincere in carrying out this obligation as demonstrated in the claw back provisions of Article 30 of her constitution.

In common law as is in Tanzania, the normal method of seeking relief for breach of constitutional rights is by way of judicial review and constitutional petitions. Through constitutional petitions a party whose basic rights have been injured may petition to the High Court to have the offending

²¹ **Article 8, Universal Declaration of Human Rights**

²² UN General Assembly resolution 2200A (XXI) of 16 December 1966

²³ Article 2 (3) (a), UN General Assembly resolution 2200A (XXI) of 16 December 1966.

²⁴ Article 2 (3) (b), *Ibid.*

²⁵ Article 2 (3) (c), *Ibid.*

law or action declared unconstitutional and therefore null and void²⁶. Again through judicial review of legislative and administrative action, the High Court may be moved by an aggrieved party whose basic rights have been violated to provide prerogative remedies instead of having to go through a constitutional petition.

2.1.4 Constitutional Petitions.

Article 30(3) of the Constitution of the United Republic allows any person alleging infringement of his/her rights to institute proceedings for redress in the High Court. Therefore the *locus standi* [right to sue] in respect of violation of basic rights is given by the constitution. The problem is that the term “redress” used in the constitution is not defined. The International Covenant on Civil and Political Rights uses the phrase “effective remedy” in article 2(3)(a). This could have been a more appropriate terminology than the one used in the Tanzanian constitution. The procedure of instituting constitutional petition has been provided for in the **Basic Rights and Duties Enforcement Act [Cap 3 R.E. 2002]**.

Section 4 of this Act restates the contents of sub article 3 of article 30 of the constitution. It simply provides for the right of individuals to petition the High Court for redress. Section 13(1) of the Act, empowers the High Court, in making decisions in any suit, if it comes to the conclusion that the basic rights, freedoms and duties concerned have been unlawfully denied or that grounds exist for their protection by an order of the High Court, to make all such orders as shall be necessary and appropriate to secure the applicant the enjoyment of the basic rights, freedoms and duties conferred or imposed on him under the provisions of sections 12 to 29 of the Constitution. Therefore one may collaterally apply for constitutional remedies in an ordinary suit or application.

By using the words “*all such orders as shall be necessary and appropriate,*” the legislature may have intended that measures to secure the enjoyment of constitutional rights should not be confined to what is stated in subsection (2) of section 13 of the Act. Section 13(2) provides that:

Where an application alleges that any law made or action taken by the Government or other authority abolishes or abridges the basic rights, freedoms or duties conferred or imposed by sections 12 to 29 of the Constitution and the High Court is satisfied that the law or action concerned to the extent of the contravention is invalid or unconstitutional, then the High Court shall, instead of declaring the law or action to be invalid or unconstitutional, have the power and the discretion in an appropriate case to allow Parliament or other legislative authority, or the Government or other authority concerned, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it, and the law or action impugned shall until the

²⁶ See Peter Ng'omango v. Gerson M.K. Mwangwa and Attorney General, [1993] TLR 77, *Kukutia Ole Pumpun and another v. Attorney General and Another* [1993] TLR 159, and *Christopher Mtikila v Attorney General*, Misc. Civil Cause No.. 10 OF 2005 (Unreported).

correction is made or the expiry of the limit set by the High Court, whichever be the shorter, be deemed to be valid.

This provision is a restatement of sub article 5 of Article 30. It is a bad constitutional provision in so far as it authorised courts to “*allow Parliament or other legislative authority, or the Government or other authority concerned, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it.*” Courts should not interfere in legislative process by imposing conditions for undertaking legislative work.

Further, this provision states that: “*the law or action impugned shall until the correction is made or the expiry of the limit set by the High Court, whichever be the shorter, be deemed to be valid*”. This is a strange law that seeks to validate a nullity by way of constitutional declaration. It is common law that once a provision of law has been declared to be unconstitutional, it becomes null and void automatically. It can not by any stretch of imagination or grace be allowed to stand and remain a valid law.

Section 8 of the Act provides for, among other things, the Jurisdiction of the High Court to hear and determine applications made by persons seeking for protection of their basic rights.²⁷ It is assumed that remedies available in ordinary laws shall not be sought in a constitutional petition. Section 8(2) of the **Basic Rights and Duties Enforcement Act**. The section provides that :

8(2) The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious.

Courts in Tanzania have in appropriate cases struck down unconstitutional provisions of law from the statute books but have also in other cases given the parliament time to make necessary amendment of the law.²⁸ In some cases the court has ordered compensation as a remedy where land has been taken by the government. For example, in the case of *Attorney General v Lohay Akonaay and Joseph Lohay*²⁹ the Respondents petitioned against the Attorney-General in the High Court, under arts. 30(3) and 26(2) of the Constitution of the United Republic of Tanzania, for a declaration to the effect that the **Regulation of Land Tenure (Established Villages) Act, 1992, Act No 22 of 1992** is unconstitutional and consequently null and void. The Act had the effect of extinguishing customary rights in land, prohibiting the payment of compensation where rights have been extinguished, ousting the jurisdiction of the courts, terminating proceedings pending in the courts, and prohibiting the enforcement of any court decision or decree concerning matters in respect of which jurisdiction was ousted. This completely bad law was

²⁷ See Section 8 (1) (a)

²⁸ See *Peter Ng'omango v. Gerson M.K. Mwangwa and Attorney General*, [1993] TLR 77, *Kukutia Ole Pumbun and another v. Attorney General and Another* [1993] TLR 159, and *Christopher Mtikila v Attorney General*, Misc. Civil Cause No.. 10 OF 2005 (Unreported).

²⁹ [1995] TLR 80.

struck out and the Court of Appeal held that Customary or deemed rights in land are a real property protected by the Constitution and their deprivation without fair compensation is prohibited by the Constitution.

2.1.5 Lacunae in the Law

It is clear from the decided cases that neither the parliament, nor the courts have been focused and consistent in upholding human rights. The general legislative policy or approach has been to provide for and guarantee rights by one hand while taking them away by the other hand through claw back clauses. To date most of these claws back clauses have been repealed with the exception of those contained in Article 30 of the Constitution. The law has remained restrictive and overly hostile to rights than vice versa. One expected a better job by a parliament of an independent country compared to the colonial legislature.

2.1.6 Summary of Litigation Options:

We have shown the examples of the decided court cases that the courts in Tanzania have played hide and seek in adjudicating upon human rights, in one some cases standing boldly in defence of the rights of the individual while in others chickening out and presenting brazenly conservative judgments. An example of the former is seen in cases like **Peter Ng'omango v. Gerson M.K. Mwangwa and Attorney General**, [1993] TLR 77, **Kukutia Ole Pumbun and another v. Attorney General and Another** [1993] TLR 159, and **Christopher Mtikila v Attorney General, Misc. Civil Cause No.. 10 OF 2005 (Unreported)** while the latter example is clearly demonstrated by judgments of the courts in **Mulbadaw Village Council and Others Vs NAFCO and Others, Lekengere Faru Parutu Vs Minister for Wildlife and Tourism and others, Yoke Gwaku & Others Vs. NAFCO and Others**, and **Ako Gembul & Others Vs. NAFCO and Others**.

This practice is supplementary to the existing gaps in law that does not explicitly provide for specific remedies to be offered by the Court in instances of breaches of fundamental Rights. Declaration of unconstitutionality of law is a naked remedy that leaves the injured uncompensated. Further procedural technicalities seem to stand in the way of real justice. For instance over and above the technicalities invoked unnecessarily by the Courts, even within the domestic legal system, it is necessary for a claimant of violated right to exhaust other legal remedies before constitutional process can be invoked.³⁰

We have explained with the support of court cases that the government has not proved to be a respecter of respected these provisions of the constitution when dealing with the rights of pastoralists. These communities have been treated inhumanly, their rights have been violated without being given legal remedy and to date they remain fugitives in their own country. They are landless and homeless. Nobody wants to take responsibility for their plight, even when for

³⁰ Section 8(2) of the Basic Rights and Duties Enforcement Act

sometime high profile state authorities hailed from their midst³¹. Different approach has to be taken to change the pastoralists fortunes.

2.2 International Law Protection of Pastoral Rights

The international legal system has developed over time, especially after the Second World War specific provisions for the protection of marginalised peoples. These provisions have now been codified in two UN declarations, namely UN Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities³² and the UN Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly in September 2007 and specific provisions have been enacted into several different conventions of international law³³. These international legal provisions are however not capable of being realised by individuals or groups that do not constitute sovereign entities. *Locus standi* before international tribunals is available only to sovereign state entities.

2.2.1 The Banjul Charter

The indigenous people in Africa generally and Tanzania in particular have however the option of filing complaint before the African Commission of Human and People's Rights established under the African Charter of Human and People's Rights, 1981.

i. Mandate of the Commission

It may not be an exercise in belittling the commendable and thankless work that the Commission has so far done to Africa, but the truth is that the Commission is a toothless bulldog without any teeth to bite. The mandate of the Commission laid out in Article 45 creates a commission that in effect looks like a research and publicity institution for the human and people's rights³⁴. The mandate of the commission relating to protection of human and people's rights provided in Article 45 (2) falls short of providing for any powers to effect any measures against culprits or even to provide any remedy to victims of human rights violation.

The procedure provided for receiving communication from states lays less than mandatory provisions for compelling violating state to answer charges of human rights violation. In any case

³¹ The late Prime Minister Edward Sokoine, Ex-Prime Minister Frederick Sumaye and current Prime minister Edward Lowassa all hail from pastoralist communities. The Prime Ministerial portfolio is a senior executive position from which one would have expected radical shift of state policy in favour of pastoralism. This has not happened and may not happen.

³² UN Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities (1992) and the UN Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly in September 2007.

³³ Convention on Prevention and Punishment of the Crime of Genocide (article 1&2), International Covenant on Civil and Political Rights (ICCPR) International Convention on Economic and Social Rights (ICESR) (1966) and the ILO Convention No. 107 of 1997 and No. 169 of 1989.

³⁴ See. Article 45(1)

the method provided for is by way of bilateral diplomatic handling that exclude hearing of the victims of the violation.³⁵ Measures taken within the provisions of the Charter against any state that has violated human rights are confidential although the Chairman of the Commission has the mandate to publish his report after the Heads of State have deliberated upon them.³⁶

The Commission may consider communications from other sources other than states pursuant to the provisions Article 55. This has enabled non-governmental bodied working in human rights area to present communications that have exposed a lot of human rights abuses.³⁷ We do not consider the African Commission to be a viable option for championing the rights if indigenous people because the enforcement machinery is ineffective.

2.2.2 The African Court of Human and Peoples' Rights.

Nandi Azikiwe, the 1st Prime Minister of Nigeria first mooted the idea of an African Human Rights Court in his address to the International Commission of Jurists conference in Lagos.³⁸ Kemba Mbaye, a Senegalese lawyer raised it again during the preparations of the African Charter on Human and Peoples' Rights in 1981 but once again the idea fizzled out for lack of popular support from the powers that be.³⁹ The period between the adoption of the Banjul Charter in 1981 and 1990 was a period during which African states experiences widespread human rights abuses. The ineffectiveness of the African Commission laid credence to the demand for a full fledged Court. The African Heads of State adopted an Additional Protocol to the African Charter on Human and Peoples' Rights in 1998.⁴⁰ This protocol established an African Human Rights Court to complement the protective mandate of the African Commission on Human and Peoples' Rights.

i. Mandate of African Court of Human Rights.

According to Article 3(1) of the Additional Protocol, the court's mandate extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol establishing it and any other relevant Human Rights instruments ratified by the States concerned. The phrase "any other relevant Human Rights instruments ratified by the States concerned" is particularly interesting because only recently the United nations general Assembly has adopted a declaration on Indigenous people's Rights". While this may be seen as a non binding instrument, the court shall not be limited to consider it in administering justice in cases touching upon indigenous peoples' rights.

³⁵ See: Article 47 of the Banjul Charter

³⁶ Article 59 of the Banjul Charter.

³⁷ Chris Peter, "The Human Rights System" (2002) op. cit p. 18

³⁸ Chris Peter, "The Human Rights System", (2002) op. cit. p. 18

³⁹ Sifuni, E. Mchome, "An Overview of the Achievements, Problems and Prospects in Protecting, Promoting and Enforcing Human Rights in Africa" in Sifuni. E. Mchome (ed) **Taking Stock of Human Rights Situation in Africa**, op. cit. p.35

⁴⁰ Adopted at the 34th Ordinary Session of the Assembly of Heads of State and Government at Ouagadougou, Burkina Faso in June 1998

Further, in accordance with the provisions of Article 27 (1) of the Additional Protocol, the Court has mandate to hear complaints and avail remedy including payment of fair compensation or reparation. Under Sub article (2) of this article, the court can also prescribe provisional measures in cases of extreme gravity and urgency with a view to avoiding irreparable harm to persons.

ii. Access to the Court.

The usual practice in respect to access to international courts is that only subjects of international law have *locus standi*. In accordance with this position the protocol allows the African Commission, State Party which had lodged a complaint to the Commission, State Party against which the complaint has been lodged at the Commission, State Party whose citizen is a victim of human rights violation, African Intergovernmental Organizations and any State Party that has an interest in a case to be heard before the court.

Article 5 (3) of the Additional Protocol contains a progressive provision allowing Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of the Protocol. The provisions of article 34 (6) state that at the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.

These provisions make the African human Rights Court the most significant development in human rights struggles in Africa ever since the establishment of the African union. There is no doubt that states with bad human rights records will not make declarations under Article 34(6). However, as the saying goes “*res ipsa loquitur*” to wit “the thing speaks of itself”. States that will not make declarations under sub article six will have confirmed their resolve to be listed as the “human rights bad fellows of Africa”.

iii. The Hearing Process and Enforceability of Judgments.

Article 10 (2) of the Additional Protocol allows parties before the African Human Rights Court to be represented by legal counsel of their choice. Free legal representation may be provided where the interests of justice so require. Sub article (3) entitles any person, witness or representative of the parties, who appears before the Court to protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court. The Court is fully protected with guarantees for its independence and immunity under international diplomatic law.⁴¹

In accordance with the provisions of Article 27 (1) if the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation. Further sub article (2) empowers the

⁴¹ Article 17 (1) of the Additional Protocol

court to consider cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, to adopt such provisional measures as it deems necessary. The speed track of the court in terms of giving judgments after closure of hearing is ninety (90) days.⁴²

The Court is empowered to give final judgment decided by majority that is not subject to appeal.⁴³ Any further action after final judgment is by way of review⁴⁴ or interpretation.⁴⁵ Execution of judgment follows notification of the parties to the case of the judgment of the Court. The Protocol directs the Court to notify also the Member States of the OAU and the Commission.⁴⁶

The Court depends for the execution of its judgments on the Council of Ministers which is empowered to monitor their execution on behalf of the Assembly. ⁴⁷ The States Parties to the Additional Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution. There are no provisions of the treaty that give the Court or the Assembly of Head of States powers to compel a member state to respect the judgments of the court. Article 31 of the Additional Protocol directs the Court to submit to each regular session of the Assembly, a report on its work during the previous year. *The report shall specify, in particular, the cases in which a State has not complied with the Court's judgments.* In this sense the provisions on execution stand naked without any further guarantee. It is left to the good will of states that have signed and ratified the Additional Protocol to adhere to the doctrine of *pacta sunt servanda* by implementing the orders and remedies given by the Court.

2.2.3 East African Court of Justice

This study has also identified the East African Court of Justice, established by article 23 of the treaty of East African Community⁴⁸ as one of the for a that could provide the pastoralists in the region remedy for their legal claims. The researchers visited the headquarters of the Community at Arusha and met the Registrar of the Court Mr. John Ruhangisa. Researchers were particularly interested to know the current position of law in respect to the jurisdiction of the court.

The treaty provides under article 27 (2) that that the court shall have “such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end the Partner states shall conclude a protocol to operationalise the

⁴² Article 28(1) of the Additional Protocol

⁴³ Ibid sub article (2)

⁴⁴ Ibid sub article (3)

⁴⁵ Ibid sub article (4)

⁴⁶ Article 29(1) of the Additional Protocol

⁴⁷ Ibid sub article (2)

⁴⁸ Treaty for the Establishment of the East African Community, signed on 30th November 1999 and entered to force on 7th July 2000

extended jurisdiction". The registrar of the Court told the researchers that the partner states have so far not concluded a protocol to operationalise the extended jurisdiction that covers human rights matters. Any matter brought before the court at the moment falling under the extended jurisdiction of the court could come just as a test case since absence of a protocol to "operationalise" the extended jurisdiction does not necessarily mean that the court can not meet and hear any matter falling under that jurisdiction.

The treaty allows access to the East African Court of Justice by any person who is resident in a partner state aggrieved by the legality of an Act, regulation, directive, decision or action of a Partner States or an institution of the community on ground that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provision of the treaty. Included in the provisions of the treaty are Articles 3(3)(b) which lays down a membership qualification to the Community requiring adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice.

The treaty also provides article 6(d) as one of the Community's fundamental principles good governance, adherence to principle of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, recognition, promotion and protection of humans and peoples rights in accordance with the Banjul Charter. These provisions are also contained in the operational principles of the Community vide article 7(2) which states that Partner States undertake to abide by the principles of good governance, including adherence to the principle of democracy, the rule of law, social justice and maintenance of universally accepted standards of human rights.

We are of the opinion that absence of the operationalising protocol does not hinder the court of Justice of East Africa from entertaining pastoralist claims since the EAC treaty has adopted the Banjul Charter as its human rights instrument.⁴⁹

⁴⁹ See Article 6 (d) of the EAC Treaty.

3 WHITHER PASTORALISM?

This options study on legal remedies concludes with a hopeful note. The world is changing and pastoralists as part of the indigenous peoples of the world are gaining ground. The adoption of the UN declaration on the Rights of Indigenous peoples, 2007 is a milestone in a long struggle for recognition of indigenous people's rights. This study captures this moment and sets the trail of another movement towards actual realisation of the rights of pastoralists in Tanzania and in East Africa generally. Courts in Tanzania have failed the pastoralists. They have remained timorous and unable to creatively construe law to champion their rights as marginalised people leading marginalised livelihoods.

It is our contention that legal rights remain a barren field if their owners fall back in despair at every shooting of the gun by the enemy. The Mkomazi and Barabaig cases in Tanzania represents a historical repetition of disempowerment of our people first done by colonial administration and now by post colonial state. Sages have said that when history repeats itself, the second episode is a fictitious replay of the former. How could courts in an independent African state regurgitate colonial jurisprudence? Worse still how could this negative approach take place during the same time when the international human rights movement is making strides in terms of recognition and protection of indigenous people's rights?

For pastoralists in East Africa generally and Tanzania in particular, the struggle for their right to decent, prosperous and rewarding livelihoods has just began. They have a conservative local legal system to contend with, but this should not deter them in their struggle. We now have a blossoming international legal human rights regime which begins with the East African Court of Justice and the African Court of Human Rights. Man must explore the potentials of these two legal options before we can make any prejudgments on their efficacy.

While other policy, social and economic options are being pursued, it is clear that international legal regime for human rights protection offers hope and room to manoeuvre for pastoralists in Tanzania, in East Africa and Africa generally. Pastoralists may pursue litigation in international for a either individually where that is allowed or through NGOs.

4 REFERENCES

- Baldus, R.D., Kaggi D.T., and Ngoti, P.M., 2004, CBC: Where are we now - Where are we going?, Miombo - The Newsletter of the Wildlife Conservation Society of Tanzania, Arusha
- Blackstone., Commentaries on the Laws of England
- Brockington, D., 2002, Fortress Conservation: The Preservation of the Mkomazi Game Reserve, Tanzania, James Currey Ltd, Oxford
- Cotula, L., (ed), 2007 'Changes in "Customary" Land Tenure Systems in Africa'. London and Rome: International Institute for Environment and Development [IIED]
- De Merode Eleónore, and others (eds), UNESCO World Heritage Paper No. 13
- Fimbo, G.M., 2003. Land Law Reforms in Tanzania, A Lecture prepared to Commemorate the authors 60th Birthday Anniversary on the 8th day of August, 2003, Dar Es Salaam
- Forstater, M., (2002) "Bones for Sale: development, environment and food security in East Africa," Review of Political Economy
- Fortes and Pritchard, E., 1940, African Political Systems (London: OUP)
- Hando, J., 2004, Community Conservation Services: Experiences from Serengeti National Park in Linking Universal and Local Values: Managing a Sustainable Future for World Heritage
- Harold, S., "Aspects of Colonial Land Law in German East Africa" Identity in Africa-Processes of Development and Change (University of Bayreuth
- Hatfield., and Davies, J., 2006, "Global Review of the Economics of Pastoralism," World Initiative for Sustainable Pastoralism , Nairobi
- Igoe, J., and Brockington, D., 1999, Pastoral Land Tenure and Community Conservation: A Case Study from North-East Tanzania, IIED Pastoral Land Tenure Series, London
- Juma, I.H., 2000, Extinction of Customary Land Rights in the Wildlife Conservation Areas of Tanzania: The Case of Mkomazi Game Reserve, Africa: Zeitschrift der Gesellschaft für Afrikanisches Recht
- Kimambo, I.N., 1995, "Environmental Control and Hunger: In the Mountains and Plains of Nineteenth Century North Eastern Tanzania in Maddox et al Custodians of the Land, James Currey, London
- Kosyando Lembulung Ole, M., 2007, A Participation Report of the Pilot Project in Handeni District, Mkurabita and the Implementation Of The Village Land Act No. 5 Of 1999, September 18 - December 8, 2006, Arusha
- Larsson, P., 2006, The Challenging Tanzanian Land Law Reform: A study of the implementation of the Village Land Act. MSc diss., Swedish Royal Institute of Technology [KTH]
- Leland, F., 1963, Development of Range Resources in the Republic of Tanganyika, USAID, Dar Es Salaam

- Letai, J., 2007, *An Audit of the Rangelands Act and its Implications on Pastoral Livelihoods in Tanzania: A Report for Tanzania Pastoralists and Hunter-Gatherer Organization (TAPHGO)*, Arusha
- LHRC., 2003, *Protection of Wildlife & Human Rights on the Balance Sheet: A Case of Serengeti Killings. An Evaluation by the Legal & Human Rights Centre (Tanzania)*, Dar Es Salaam
- Llewellyn, K. and Hoebel, E.A., 1941, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*
- Maina, Chris P., 2002, "The Human Rights System"
- Maina, Chris P., 2007, "Human Rights of Indigenous Minorities in Tanzania and the Courts of Law," Raoul Wallenberg Institute of Human Rights and Humanitarian Law Lund: University of Lund
- Masara, Y.B., 2000, *The Conflict of Legislations and Collisions of Jurisdiction: An Impediment to the Realization of Community Based Conservation in Tanzania*, Consultancy Report of the AWF, Arusha(Unpublished)
- Mattee, A.Z., and Martin N.S., 2005, *Report on Policies and Laws that affect Pastoralism in Tanzania*, Consultancy Report on ERETO II, Ngorongoro Pastoralists Project, Phase 2., Dar Es Salaam, Royal Danish Embassy, DSM & URT, Ministry of Natural Resources
- Mattee, A.Z., and Martin N.S., 2006, *Ambivalence and Contradiction - A Review of the Policy Environment in Tanzania in relation to Pastoralism*, International Institute for Environment and Development [IIED], London
- Mchome, S.E., 2002, *Evictions and the Rights of People in Conservation Areas in Tanzania*, Dar Es Salaam University Press, Dar Es Salaam
- Methner, W., 1938, *Unter drei Gouverneuren – 16 Jahre Dienst in deutschen Tropen*, Breslau
- Middleton and Tait (Eds), 1958, *Tribes without Rulers*, Routledge & Kegan Paul, London
- Moore, S.F., 1978, *Law as Process*, Routledge & Kegan Paul, London
- Ndagala, D., 1982 "Operation Imparnati: the sedentarization of the pastoral Maasai in Tanzania Nomadic People
- Nelson, F., 2007, *Emergent or Illusory? Community Wildlife Management in Tanzania*, Pastoral Civil Society in Tanzania, International Institute for Environment and Development [IIED], Issue Paper No. 146, London
- Nelson, F., Sulle, E., and Ndoipo, P., 2006, *Wildlife Management Areas in Tanzania: A Status Report and Interim Evaluation*, Report Prepared for Tanzania Natural Resource Forum, Arusha
- Ojalammi, S., 2006, *Contested Lands: Land Disputes in Semi-Arid Parts of Northern Tanzania - Case Studies of the Loliondo and Sale Divisions in the Ngorongoro District*, PhD diss., Department of Geography, Faculty of Science, University of Helsinki.
- Ole Nasha, W., 2007, *Formalisation of Land in the Commons: the Future or the End of Pastoralism in Tanzania?*, MKURABITA Newsletter, Dar Es Salaam

- Parkipuny, M., 1979, Some Crucial Aspects of the Maasai Predicament, In Coulson, Andrew, and African Socialism in Practice: The Tanzanian Experience. 136. Nottingham: Spokesman
- PINGOs, HakiArdhi, LHRC, and HIMWA., 2007, Eviction and Resettlement of Pastoralists from Ihefu and Usangu-Mbarali District to Kilwa and Lindi Districts, Collaborative Report by PINGOs, HakiArdhi, LHRC and HIMWA, Arusha
- Pospisil, L., 1974, Anthropology of Law: A Comparative Theory, HRAF Press, New Haven
- Shivji, I.G. and Kapinga, W.B., 1998, Maasai Rights in Ngorongoro, Tanzania. Drylands Programme, IIED/Hakiardhi, London
- Shivji, I.G., 1994, A Legal Quagmire: Tanzania's Regulation of Land Tenure (Establishment of Villages) Act, 1992, Pastoral Land Tenure Series No. 5: International Institute for Environment and Development [IIED], London
- Shivji, I.G., 1994, Report of the Presidential Commission of Inquiry into Land Matters, Uppsala: Scandinavian Institute of African Studies, Tanzania
- Sjoholm, H. and Louno, S., 2002, Traditional Pastoral Communities Securing Green Pastures through Participatory Forest Management: The Case of Kiteto District, Tanzania, Proceedings of the 2nd International Workshop on Participatory Forestry in Africa, Rome: FAO
- Snyder, F.G., 1981, "Anthropology, Dispute Processes and Law: A Critical Introduction."
- Stolla, F., 2005, "Wildlife Management Areas - A Legal Analysis", TNRF Occasional Papers No. 5, Arusha
- Tenga, R.W., 2006, "Minority Rights in Tanzania", in Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives, (Eds) Binchy, Williams; Finnegan, Catherine, Clarus Press, Dublin
- Wily, L.A., 2003, Community-Based Land Tenure Management: Questions And Answers About The Tanzania's New Village Land Act, 1999, Issue Paper No. 120, IIED, London
- Yves. H., 2006, Tanzania Survey of Conservation Legislative Framework on Community Conserved Areas [CCAs], Evaluation by the IUCN Commission on Environmental, Economic and Social Policy [CEESP], IUCN. Inputs by Igoe, Jim; Lasgorceix, Antoine