HUMAN RIGHTS OF INDIGENOUS MINORITIES IN TANZANIA AND THE COURTS OF LAW

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There is a reluctance on the Courts' part to ameliorate the plight of the dispossessed by granting appropriate relief; at the same time, pressure for land is increasing by leaps and bounds. Infringing on customary land rights continues at fevered pitch. Professional hunters, mineral prospectors, commercial farmers, those who hunger for Canadian wheat, and foreign adventurers reminiscent of, and encouraged by the spirit of Christopher Columbus, Ferdinand Magellan, and Marco Polo are on the rampage. Pastoral land is fast disappearing, and why not, if parks, graveyards, school playgrounds could be, and have been expropriated? This land-grabbing mania is fueled by politicians and their lackeys who are in the business of lining their pockets. They find ready support from a civil service that is bereft of professional ethics and morality and which readily sells its conscience in return for the biblical 30 pieces of silver.


1.0 Introduction

The indigenous people have been a subject of ridicule by both the colonial and post-independence regimes in Tanzania. Instead of trying to understand and respect them and appreciate their ways of life, they have been characterised as backward, primitive and uncivilised. Their ways of life have and are seen as repugnant, unacceptable and not being in line with the current state of civilisation.

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This attitude towards the indigenous people partially explains the self-appointed mission of “civilising” them.2 Build schools for them, hospitals etc. But who said they have no education system of their own and medicines – sometimes more superior and of high quality to take care of the sick? Like the old story of the Camel and the Arab in the desert, the State has been slowly – but surely making serious inroads into the ways of life of various sections of indigenous people in the country. Step by step encroaching on their land, their watering areas and even farms. Areas used for their animals are being turned into Game Parks and Conservations Areas – through the law which has greatly disturbed their ways of life.

Like other sensible people in the current epoch, the indigenous people have opted for a peaceful method of pursuing their rights. They have gone to the courts of law to litigate their rights. Are the courts listening to them? This is the main pre-occupation of this paper. It examines the reaction of the courts in Tanzania to complaints by the indigenous groups about interference with their land and their rights over land in general. We concentrate mainly on the higher part of the judiciary – namely the High Court and the Court of Appeal. However, before doing that we provide a brief background to the indigenous people in the country. Who are they? Where are they? And what are their main concerns?

2.0 The World of Indigenous People in General

2.1 Indigenous People and Minorities

Indigenous people are sometimes grouped among minorities in a community. However, the very definition of minorities has been very elusive.3 At times, it is said that these are groups which in one way or the other find themselves disadvantaged because of their

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background, culture or traditions, religious beliefs and so on. It is also true that the question who is a minority and who is not is a fundamental question which has been a source of serious contention. This is basically because most regimes faced with minority related problems deny openly the existence of minorities within their borders. According to Sigler:

The very existence of minority groups is often denied by political leaders of nation-states. This refusal to acknowledge the presence of a minority group is an easy way to deny that group any claims of right.

He adds that while a definition cannot change this evasiveness of these regimes, but it can make evasion much more difficult. It has been note that this reluctance by States to address the question of definition of minorities is due to two main reasons. Firstly, to avoid the duty to deal with the rights of these groups and peoples; and secondly, ignorance and intolerance bordering racism and discrimination. It is therefore convenient for States to hold the rest of the international community at the level of definition. Thus not moving forward or backwards – but stagnant.

Another source of problems relating to definition of minorities is the diversity of groups which constitute minority. As it has been noted:

While a precise definition may serve to minimize controversy by drawing the bounds in a clear fashion, thus fitting the relevant rights to undeniable claimants, on the other hand, controversy may not be easily avoided in view of the range and extent of the diverse groups that exist across the globe distinguished by factors that are often

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4 It can however not be avoided because it helps to shed some light on the rights of minorities in general. This question is also addressed in O'BRIEN, Conor C., "What Rights Should Minorities Have? in WHITAKER, Ben (ed.), Minorities: A Question of Human Rights? Oxford and New York: Pergamon Press, 1984, p. 11.


6 Ibid.

7 Ketley argues that States have used the power of definition, historically and still today, to avoid their human rights obligations under international law. See KETLEY, Harriet, “Exclusion by Definition: Access to International Tribunals for the Enforcement of Collective Rights of Indigenous Peoples,” Volume 8 No. 4 International Journal on Minority and Group Rights, 2001, p. 331 at 332.

confused, complicated and contradictory. It thus makes it virtually impossible to list all the minorities that exist.\(^9\)

This problem of definition has not deterred the international community from attempting to come to terms with this problem bearing in mind that this happens to be one of the oldest concerns of International Law.\(^{10}\)

One early attempt to define who minorities are came from the Permanent Court of International Justice in 1930. In its Advisory Opinion delivered on 31\(^{st}\) July, 1930 on the *Greco-Bulgarian Communities Case*,\(^{11}\) the Court referred to minorities as:

> a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by their identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their own form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.\(^{12}\)

Since then there has been attempts to refine this definition. In 1954 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities described minorities as:

> Those non-dominant groups in a population which posses and wish to preserve ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population.\(^{13}\)


\(^{13}\) See UN Doc. E/2573 (1954), pp. 48-49.
Francesco Capotorti, the Special Rapporteur of this Sub-Commission in a very comprehensive study entitled *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, which was submitted in June, 1977 defines a minority group as:

>a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members posses ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.\(^{14}\)

In 1985, the Commission on Prevention of Discrimination and Protection of Minorities was to receive from its Sub-Commission a text which characterised minority as:

>A group of citizens of a State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with each other, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.\(^{15}\)

Of course States continued to discuss and propose changes in various aspects of this definition to suit their own specific interests.\(^{16}\) Later on in 1992 the United Nations Commission on Human Rights adopted a Declaration on the Rights of Persons Belonging to the National or Ethnic, Religious or Linguistic Minorities.\(^{17}\) Adopting this Declaration, the United Nations General Assembly picked up national or ethnic, religious and linguistic aspects to identify minorities.\(^{18}\)

Therefore, one has to examine the major criterion used to determine a minority group. At the moment there is a discussion on citizenship, being small numerically and having

\(^{14}\) See UN Doc. E.91.XIV.2. See also FAWCETT, James, *The International Protection of Minorities*, London: Minority Rights Group, 1979, p. 11.


\(^{16}\) Not very eager to come up with a generally acceptable definition by hiding behind the maxim *in jure omnis definitio periculoso est* i.e. in law, any definition is dangerous. See ANDRYSEK, Oldrich, *Report on the Definition of Minorities*, Utrecht: Netherlands Institute of Human Rights, 1989, p. 60.


distinct ethnic, religious, linguistic characteristics which differ from the rest of the population in a State.\(^{19}\)

Overtime, academics and other interested people have refined the definition of minorities from what exists at both international and domestic level. The main attributes of minorities are certain objective characteristics, self-identification, the number and long-term presence on the territory involved.\(^{20}\)

International instruments on human rights recognise the existence of this type of groups in various States and there have been attempts to provide protection for them. This is by ensuring, through the legal framework, that such groups are not discriminated against or disadvantaged in any way.

This spirit comes from the United Nations Charter itself. In Article 55 the Charter provides for universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. This is in line with the purposes of the United Nations as indicated in Article 1 of the Charter.

Directly touching on minorities is the International Covenant on Civil and Political Rights, 1966 which says:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.\(^{21}\)


One could also examine Article 22 of the African Charter on Human and Peoples' Rights which in relation to right to development provides in part:

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.22

One such common heritage of mankind being referred to here and which has been a centre of controversy in many States is land.

Minorities are of various types in different countries. They also suffer a variety of technical and legal disabilities and discrimination with very few opportunities open for them.23 These relate to employment,24 ownership of property, educational rights,25 curtailment of their religious26 and cultural rights and discrimination in general.27 Many of these rights may be at the level of the State policy and also at times at individual level. They thus need to be reduced into law or regulations in order to have effect. For purposes


of definition, one could say that minorities encompass a much wider group of persons and indigenous form part of that wider group.

2.2 Indigenous People and their Rights

Notwithstanding the proximity and the relationship between minorities and indigenous people, it is equally true that while an indigenous group may qualify as a minority but not all minorities are indigenous. For example, in the three East African countries of Kenya, Tanzania and Uganda the Asians are a minority group. They are an important economic force being a very powerful community in trade and commerce. However, these Asians are not indigenous. They came mainly from the Indian sub-continent during the colonial period to assist in the building of the Uganda Railway but stayed on and slowly spread all over the region.

Therefore, there is a need of concretely identifying who the indigenous people in a particular country are. A lot has been written on this theme. At times, the debate has been heated mainly because of the potential of the rights of the indigenous people. According to Alfredsson, at times indigenous peoples can legitimately demand for the right to internal self-determination. This potentiality makes many a State nervous and unease. They see their sovereignty, national unity and territorial integrity threatened. It is also this fear of the States which has influenced the "S" debate on whether the discussion is on people or peoples when it comes to minorities and indigenous. The States feel that any discussion of peoples is likely to encourage revolt among the minorities and


indigenous and demand for self-determination.\textsuperscript{31} Therefore, for them remaining with people only is less controversial as it individualises rights which are actually communal or collective in nature.\textsuperscript{32} To avoid this controversy is some circles there is a tendency of going to the term "populations" in lieu of either people or peoples. These include the ILO\textsuperscript{33} and the African Commission on Human and Peoples’ Rights.\textsuperscript{34}

The politics apart, efforts have gone on trying to find an acceptable definition of the term indigenous peoples. A comprehensive proposal came from the United Nations Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities Ambassador Jose R. Martinez Cobo. In an earlier Report the Special Rapporteur provided the following definition:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples,


in accordance with their own cultural patterns, social institutions and legal systems.\textsuperscript{35}

In addition, there are a number of factors are regarded as relevant for defining indigenous peoples and identifying their historical continuity. According to Rapporteur Martinez Cobo a historical continuity may consist of the continuation for an extended period reaching into the present, of one or more of the following factors: (1) Occupation of ancestral lands, or at least of part of them; (2) Common ancestry with the original occupants of these lands; (3) Culture in general, or in specific manifestations, (4) Language; (5) Residence in certain parts of the country, or in certain regions of the world; (6) Other relevant factors.

At the same time, self-identification as indigenous is also regarded as a fundamental element in this working definition by the Special Rapporteur. At individual level, an indigenous person is one who belongs to these indigenous peoples through self-identification as indigenous - group consciousness and is recognised and accepted by the group as one of its members. This is important as it reserves for these communities the right to decide who belongs to them, without external interference.

The proposals by the Sub-Commission was picked up and developed by the United Nations Working Group on Indigenous Populations established by the United Nations Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1982.\textsuperscript{36} This group, under the Chairpersonship of Erica-Irene Daes came up with four elements as guiding principles to identify indigenous peoples. These are:

1. The occupation and use of a specific territory;
2. The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;


(3). Self-identification, as well as recognition by other groups, as a distinct collectivity; and
(4). An experience of subjugation, marginalisation, dispossession, exclusion or discrimination.

However, it is emphasised that NOT all the four elements need to be present at the same time in a given situation.37

This approach based on guiding principles is the one used with some modifications by other institutions including the International Labour Organisation (ILO)38 and the International Bank for Reconstruction and Development (IBRD) – the World Bank.39

Be as it may, it is an undisputed truth that minorities and indigenous people going also with other titles such as tribal peoples or aboriginal peoples etc. are an important part of the world population today. According to some recent figures there are between 12,000 to 14,000 minority, indigenous and tribal groups in the world today. Their population is about 1.5 billion which is about a quarter of the world population.40 It will be naïve on the part of the world community to try to ignore such a large number of people.

37 These guiding principles are reproduced in AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS (ACHPR), Report of the African Commission’s Working Group of Experts on Indigenous Populations, op. cit. at p. 93.


It is gratifying to note that the United Nations is making efforts to alter its orientation in relation to indigenous people. In this vein, the UN General Assembly declared 1993 the *International Year for the World’s Indigenous People*. The aim of this positive gesture was partially to focus on some of the acute problems facing indigenous people in the areas of human rights, the environment, development, education and health. To complement this effort two years later, the General Assembly declared 1995 – 2004 the *International Decade of the World’s Indigenous People*. Also, the fact that 9th August is celebrated every year as the *International Day of the World’s Indigenous People* is meant to remind the world community that the question of indigenous people is important. To ice the cake, by awarding the Nobel Peace Prize to Rigobeta Menchu, a Quiche Indian indigenous rights advocate from Guatemala in 1992 the Nobel Prize Committee was sending an important message to the world community on the plight of the indigenous people all over the world.

### 3.0 Background: The Indigenous Peoples in Tanzania

In Tanzania there are various types of minorities. First, we have minorities who are minorities - numerically - but do not fit into the definition we have been examining above. These include the prosperous and powerful Asian community which we have referred to before. These are in minority in comparison with the rest of the population. The objective of the Decade was said to be promotion and protection of the rights of indigenous people and their empowerment to make choices which enable them to retain their cultural identity while participating in political, economic and social life, with full respect for their cultural values, language, traditions and forms of social organisation. See United Nations General Assembly Resolution 50/157 of 21st December, 1995. The 2nd International Decade was proclaimed by the General Assembly vide Resolution 59/174 of 20th December, 2004. On this see BURGER, Julian, “Indigenous Peoples and the United Nations,” in COHEN, Cynthia Price (ed.), *The Human Rights of Indigenous Peoples*, op. cit., p. 3 at p. 14.


They also have their distinct culture, religions and languages. However, they have considerable influence on the commerce, trade and the economy in general. The same could be said for the white minority in South Africa, Namibia and until recently in Zimbabwe too. They have been victims of persecution elsewhere in East Africa because of these positive attributes. However, they are not strictly speaking indigenous to the region and hence not the pre-occupation of this paper.

In this work our interest is in the indigenous minority ethnic groups in the country. These have been serious victims of State persecution because of their resistance to change and insistence on sticking to their cultural way of life. The Maasai for example, are said to be:

the classic case of an East African people who are strongly committed to their particular cultural tradition. They have combined an ostensible refusal to accept change with the appearance of an attitude of implicit superiority towards other peoples.

This attitude is reflected in the following words of a dying Maasai elder:

I have spoken and acted bravely all the time, and I feel good about it.
I hope that my children will be able to follow my footsteps.

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45 Interestingly even by 1990s they are the only group identified as ‘minorities’ in East and Central Africa by some reputable sources. See MINORITY RIGHTS GROUP, World Directory of Minorities, Essex: Longman Group UK Limited, 1990.


49 See SAITOTI, Tepilit ole and Carol Beckwith, Maasai, New York: Harry N. Abrams Inc., 1980, p. 1. On other reasons and persecution of minorities by different regimes see HEINZ, Wolfgang S.,
The government on the other hand sees it as its duty to "emancipate" these "backward" people by "developing" them.\textsuperscript{50} There are many groups of this nature. They include communities such as Hadzabe or Hadza who are basically hunters and gatherers living in Shinyanga, Arusha, Singida and Dodoma regions; \textsuperscript{51} the Ndorobo – hunters and gathers too and living in Arusha and Manyara Regions;\textsuperscript{52} and also the nomadic Maasai.\textsuperscript{53} Also in this category are groups such as the Barabaig, IRAQW, Mbulu etc. who stand between agriculture and pastoralism.\textsuperscript{54}


There are three reasons why these groups have been targeted for attack by the government. Firstly, it is the need to take over fertile land and make it readily available to foreign investors – and in some instances to facilitate of the so-called joint-ventures. A shining example is that of National Agricultural and Food Corporation (NAFCO) and the Canadians in Hanang District which was a subject of a court case to be discussed in this paper. Secondly, in an attempt to expand tourism, groups of pastoralists such as the Maasai are being removed from their traditional grazing areas. This is in the process of expanding the National Parks so that tourists can come and watch game at ease without being bothered and disturbed by "backward natives." Thirdly, is the reason being advanced by the government, that is, to integrate these "backward" communities into the mainstream way of life in the country for their own "development" by providing them with schools, hospitals, running water and other social amenities. Both in Tanzania and some of the neighbouring countries, programmes have been established to settle nomads through allocation of land for their animals. This makes it easy to control them.

The approach of the government of using excessive force needs to be re-examined. While this can bring temporary "victory" or “success” on the part of the State, it can hardly lead to a lasting solution. There is a need of a re-examination of the whole process so as to come with humane solutions which will take into account the sensibilities of these indigenous communities. These communities have a right to their ways of life, beliefs, their own language and culture. These deserve acceptance and respect. It is important to

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note that proper change can only come through dialogue, educational campaign and through conviction and not force.

4.0 Struggle for Land as a Strategic Resource and the Indigenous People

The struggles of the indigenous minorities in Tanzania and the State today centre on land and its use. This is not accidental. It is because land is an important resource in the world today. It is the main source of livelihood and survival. Therefore, whoever controls land logically controls the life of the others. This is because that person or persons control what guarantees survival of human beings. Due to the proximity of land to survival, it is frequently related to the right to life.

Again, due to the importance attached to land and its immense resources, many of the wars fought in the history of humankind and still being fought today centre on or are related to control over land and its resources. These resources include water, oil, gas, minerals and the soil itself on which crops are grown and houses and other forms of shelter are constructed for shelter.

Therefore, the struggle for land and the whole land movement focuses on two important issues namely, access to land and its resources; and control over this land and guarantee of the same.

5.0 Land and Rights over Land in Tanzania

In order to appreciate what is at issue between the indigenous people and the State over land, it is important to provide a brief explanation on land ownership and tenure in Tanzania. It is vital to note right from the outset that there is a fundamental difference between the practice and the law on land ownership in Tanzania today. In practice, land in Tanzania is seen as a commodity which can be sold and bought at the market. Therefore, it may not be surprising to find advertisements in the media of pieces of land being sold and people rushing to buy them. This practice is the desire of those who support the market economy and would like to have a freehold form of land tenure. This

57 Professor Thorvald Gran of the Department of Administration and Organisation Theory of the University of Bergen, Norway who has done considerable research in Tanzania in his comments on the draft of this paper has strongly challenged the characterisation of land in the country as a commodity and hence the adoption of the term resource in lieu thereof.
is understandable because this form of land ownership allows sections of the population to be able to live purely on land speculation – that is, buying and selling land: You buy cheap and sell dear!

However, in reality that is not what is provided for in both the law and policy on land in the country. For many years, the policy of the government of the United Republic of Tanzania over land has been shaped by the thinking of the first President of the United Republic the late Mwalimu Julius K. Nyerere. All his life, Mwalimu vehemently rejected commoditisation of land. For him, land was a gift of God. It could not therefore be sold and bought at the market place. To him, what could be sold was not the land itself BUT rather the “improvements” done on that land.

He articulated this philosophical thinking back in 1952 – nine years before independence. He said:

> When I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need. It is true, however, that this land is not mine, but the efforts made by me in clearing that land enable me to lay claim of ownership over the cleared piece of ground. But it is not really the land itself that belongs to me but only the cleared ground which will remain mine as long as I continue to work on it. By clearing that ground I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever then takes this piece of ground must pay me for adding value to it through clearing it by my own labour.58

This philosophy was endorsed 42 years later by the Court of Appeal of Tanzania which characterised it as "The Nyerere Doctrine of Land Value"59 in the case of *Attorney-General v. Lohay Akonaay and Another*.60

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59 One could trace this line of thinking some time back. Long before John Locke (1632-1704) it has been argued that: the right to private property arises because by labour a man extends, so to speak, his own personality into the objects produced. By expending his internal energy upon them he made them a part of himself. In general their utility depends upon the labour expended upon them, and thus Locke's labour theories of value in classical and socialist economies. See SABINE, George H., *A History of Political Theory*, London: George G. Harrap & Co. Ltd, 1964, pp. 527-528.

It was this philosophy which guided the Tanzanian nation on land matters for many years. It is a philosophy which did not treat land as a commodity but rather as an object of use to meet a human need.

Following this philosophy, all land in Tanzania was and still is considered as belonging to the public. So, what the individual gets is the right to use that land which essentially belongs to the public as a whole. Therefore, the user gets a title called right to occupancy i.e. the right to occupy and use that piece of land. Depending on the intended use of the land and its location, the right may be for a period of 99, 66 or 33 years. There used to be year to year occupancies which are rare now. It must be added here that the Land Ordinance, 1923 which governed land tenure until 1999 also recognised occupation of land under customary land tenure and characterised this as Deemed Right of Occupancy.

In this form of land tenure, proof of ownership was through use and occupation which gave the occupier (s) usufructuary rights. This type of land ownership was and is still of special interest in the country because the majority of the people living in the rural areas - and who form more that 80% of the population of Tanzania hold their land under this system.

The power over land is vested in the President of the United Republic and it is in whose name grants over land are given. Logically, the President has authority to re-posses land on behalf of the public. This is usually done for public good or in public interest. This may be for construction of roads, schools, hospitals etc. Where this happens, the legal occupier is not compensated for the land itself but rather for the “improvements” on that land – structures, houses, crops etc. In law these are referred to as unexhausted improvements.

61 Elaborating this in the case of Attorney-General v. Lohay Akonaay and Another the Court of Appeal of Tanzania explained: “Customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of Article 24 of the Constitution of the United Republic of Tanzania and their deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution.” See Court of Appeal of Tanzania at Arusha, Civil Appeal No. 31 of 1994. Reported in [1995] 2 LRC 399. See also COURT OF APPEAL OF TANZANIA, The History of Administration of Justice in Tanzania, Dar es Salaam: Mathews Bookstore & Stationers, 2004, p. 93.

This form of land tenure did not change with the coming of the new land laws – the Land Act, 1999⁶³ and the Village Land Act, 1999.⁶⁴ However, there are now intense pressure on the government from both the donors and international financial institutions such as the International Bank for Reconstruction and Development – the World Bank and the International Monetary Fund (IMF) to commoditise land itself and make it available as collateral for loans from commercial banks. This move is being resisted by a large section of the population given the current interest rates which at an average of 42% are still very high by all standards.

It is this type of land tenure under which the indigenous people in Tanzania are struggling for their rights over land.⁶⁵ The majority of indigenous people hold customary land titles under the deemed right of occupancy.

6.0 Judiciary as an Arena of Struggle: Pursuing Land Rights in the Courts of Law

Like many Tanzanians who do not have first hand experience with the operations of the courts of law in Tanzania, members of the indigenous minorities too believe strongly that the courts of law could be a way to justice for them. Experience so far indicates that their hopes – like the hopes of many others before them have been disappointed. They have not only wasted a lot of time in court corridors and resources but have also lost when eventually their cases are decided. This is indicated by the three cases discussed at length in this paper. In order to place these court matters in context, a brief background to the issue at hand will be given. This will not only show the absurdity of the behaviour of the courts of law in Tanzania and the higher judiciary in particular when it comes to protection of fundamental rights and freedoms of the people but also the strange

⁶³ Act No. 4 of 1999 (Cap 113 of the Revised Laws of Tanzania 2002).
behaviour of the government of the day in going about the rights of normal innocent citizens.

6.1 The Barabaig

The Barabaig or Datoga as they are sometimes referred to live across four regions.66 These are Arusha, Singida, Shinyanga and Dodoma. They are by and large pastoralists and therefore highly migratory.67

Professor Issa G. Shivji, who with Dr. Ringo W. Tenga, of the Faculty of Law has been involved with the issue of the Barabaig for many years,68 treats the problem facing the Barabaig at length in his work State Coercion and Freedom in Tanzania.69 The first collision between the Barabaig and the State was over the issue of settlement into Villages. The State was not happy with the nomadic way of life which the majority of the Barabaig were leading. It wanted them to lead a "modern" way of life in organised villages where they would be provided with schools, hospitals, and other social amenities. That would lead to "development." At the same time, the State suspected that it was this nomadic way of life which often led to fatal clashes between the Barabaig and other "step-nationalities" - to borrow Shivji's characterisation, in the region such as Wanyaturu.70 It is these two reasons which led to "Operation Barabaig."

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70 Most of these clashes arise out of raids among nomads for animals. On this see KHAZANOV, A.M., Nomads and the Outside World, Cambridge: Cambridge University Press, 1983, p. 222.
This operation is explained well in the case of *R. v. Bukunda Kilanga and Others.*\(^{71}\) According to evidence adduced before the court in this case, the ruling Party and its government had decided that the Barabaig should be settled into villages - and if necessary, it was to be done by force. All the coercive State apparatus were mobilised to assist in this exercise. These included the normal Police, the Criminal Investigation Department (C.I.D.) and the Field Force Unit (FFU). To coerce the Barabaig into the villagisation programme it was decided *inter alia*, that at least 20 head of cattle should be seized from each family. In addition, some members of the Barabaig community were locked in custody though they had committed no cognizable offence. All these actions were done in order to shock them and show them State power.\(^{72}\) Of course the cattle taken away as ransom was never returned but sold by the Party and government functionaries to "finance the settlement and the development of the Barabaig themselves."

### 6.1.1 National and International Capital against the Indigenous

The genesis of the problems between the Barabaig and the State in Tanzania is the decision of the government back in 1960 to decide to grow wheat in the now Hanang District of the Manyara Region (formerly part of the Arusha Region). Therefore, with the assistance of the Canadian Food Aid Programme the Ministry responsible for Agriculture in the government of the United Republic of Tanzania started the Basotu Wheat Complex aimed at reducing dependence on importation of the same. Wheat is important for bread making as well as for beer brewing. About ten thousand acres were put into wheat farming in this area.

In 1970 the government handed over the project to the National Agriculture and Food Corporation (NAFCO) which expanded the project. It now had several large scale wheat farms including Gawal, Gidagamowd, Sechet and Warret. These farms formed what was known as the Tanzania – Canada Wheat Programme (TCWP).

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\(^{71}\) High Court of Tanzania at Singida, High Court Sessional Case No. 168 of 1976 (Unreported). On appeal it is referred to as *Noya Gomusha and Others v. R.* [1980] TLR 19.

\(^{72}\) See the evidence of Samson Ntinda, the party Chairman in Singida who is quoted at length by Shivji in his work *State Coercion and Freedom in Tanzania*, op. cit., p. 84.
Incidentally, these farms encircled and or occupied over 120,000 hectares of pasture land, residential areas and holy shrines, graveyards, water and salt sources for Barabaig people and their animals. There were no efforts on the part of NAFCO to consult or talk to the Barabaig who occupied this land. NAFCO just purported to have acquired permission to establish their farms from the regional authorities. Therefore, it was just a question of forcefully removing the Barabaig who were “trespassing” on their newly acquired land. Supported by the ruling party and government functionaries, NAFCO unleashed the police and members of the Field Force Unit (FFU) on unsuspecting local people. What followed was brutality of grave nature. They began a systematic terrorization of the villagers - arresting them any time and subjecting them to serious beatings and other forms of torture. One of the victims of this barbarism explains the form of terrorisation under which they were living. We reproduce his statement at length in order to shed light on the state of things at that time in this part of the United Republic of Tanzania:

It was 19th February, 1985 around 1.00 p.m. I was returning from watering my cattle. A NAFCO Landrover from the direction of Katesh town pulled up beside me. Mwaigul, NAFCO's Assistant Manager, was seated in the front seat beside the driver. In the back, there were four armed Field Force Unit (FFU) soldiers and a plainclothesman. Mzee Duncan was also in the vehicle.

Mwaigul pointed me out. The soldiers threateningly ordered me to board the vehicle. I had no guts to ask questions ... At Waret, the vehicle was driven around the houses of NAFCO managers and white expatriates. More beer was served to the soldiers. The day was wet and chilly as it had rained heavily that day. It was late in the evening.

"Masikio" (ears!) called out one of the soldiers referring to me on account of my pierced ears. At gunpoint I was ordered to lie down in a ditch and roll in the mud. I began to shiver. Jonas, the Chairman, was called "Chairman of Wamang'ati" [a derogatory reference to Datoga people] He was also ordered to roll in the mud. Meanwhile women and children from the surrounding houses were watching us and NAFCO staff seemed to be amused and happy.73

73 This account is reproduced verbatim from SHIVJI, Issa G., State Coercion and Freedom in Tanzania, op. cit. at pp. 88-89.
It is this baseless brutality and harassment\textsuperscript{74} which led the Barabaig to go to court to seek for protection from this terrorism by a public corporation which had without shame stolen their land and wanted them to leave this area. One of the most protracted cases was referred to the court by Mulbadaw Village Council.

\textbf{6.1.2 The Case of National Agricultural and Food Corporation v. Mulbadaw Village Council and Others\textsuperscript{75}}

The facts of this case are as follows: In 1981 Mulbadaw Village Council and 67 villagers sued the National Agricultural and Food Corporation (NAFCO) for trespass on their land at the High Court of Tanzania, Arusha. This was in the case of Mulbadaw Village Council and 67 Others v. National Agricultural and Food Corporation.\textsuperscript{76} As indicated earlier, NAFCO with financial and technical support from the Canadian International Development Agency (CIDA) were involved in the development of wheat farms in Basotu in Hanang District which was then part of the Arusha Region but now in Manyara Region. They therefore used all means possible to acquire land for this purpose. These means included trespass or sheer force.

The High Court of Tanzania (D’Souza, Ag. J.) agreed with the arguments of the plaintiffs and granted damages for trespass and destruction of properties as prayed for. The Judge further made a declaration to the effect that the land belonged to the plaintiffs because they have been occupying the land under customary title and NAFCO were trespassers. Not dissatisfied with the ruling of the High Court NAFCO appealed to the highest court of the land - the Court of Appeal of Tanzania. The main arguments of the appellants were that the respondent had not established that they have been occupying the land in dispute under customary law or by grant under the Village and Ujamaa Villages Act of 1975.\textsuperscript{77}

Further that though the respondent village council duly registered could not show prove


\textsuperscript{75} [1985] TLR 88.

\textsuperscript{76} High Court of Tanzania at Arusha, Civil Case No. 10 of 1981 (Unreported).

\textsuperscript{77} Act No. 21 of 1975.
that the land was allocated to it by the District Development Council as stipulated and required by the said law of 1975 and that for individual villagers they failed at the High Court to prove as whether they were proper natives to have a bonafide claim of the land in dispute as required by law. The Court of Appeal was invited to determine the following matters in dispute.

(a). Whether to have a right over a land under customary title one has to prove that is a native within the ambit of the law;
(b). Whether land possessed by villages automatically vested in village councils after their establishment; and
(c). Whether NAFCO had trespassed by claiming and entering into the possession of the land in dispute.

In a highly technical but not convincing decision, the Court of Appeal reversed the decision of the High Court. In the view of the Court of Appeal the Plaintiffs/Respondents - Mulbadaw Village Council did not own the land in dispute or part of it because they did not produce any evidence to the effect of any allocation of the said land in dispute by the District Development Council as required by the Villages and Ujamaa Villages Act of 1975. So in effect the Village Council had trespassed by entering the land which did not belong to it within the meaning of the law. The fact that the Mulbadaw Village Council succeeded the previous unincorporated villages in administrative function over a specified areas confers no title of any type over such land on the Village Council. It was held further that the individual villagers had failed to prove that they were natives within the meaning of the law.

Before making a final decision on this case, the Court of Appeal, almost anticipating what to decide, issued an interim order to stay execution to the Plaintiffs. It was during the existence of this temporary order that NAFCO, assisted by Police, FFU and party and government functionaries in this area did the unbelievable. They began a systematic terrorisation of the villagers - arresting them any time and subjecting them to serious beatings and other forms of torture.78

78 The government was forced to form a judicial commission of inquiry to investigate the actions of these institutions. See GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA, Report of the Commission on Violations of Human Rights in NAFCO Wheat Farms of Hanang District (The Kisanga Commission), Dar es Salaam, 1993.
To add salt to injury, the government issued the Extinction of Customary Land Right Order, 1987\(^7\) through which land occupation in the areas occupied by the Barabaig under customary law was extinguished and thus making further pursuit of rights futile.

Thus, at the end of the day the land reverted back to the "trespasser" - NAFCO and its "shadow" partner - foreign capital from Canada.\(^8\) In their campaign for their land, the Barabaig wrote an open letter to the Canadian people explaining their plight and harassment by NAFCO which was working with Canadians.\(^8\)

That is what could happen to people who had heeded to the call by the same party and government to join villages in promotion of socialism and self-reliance. This is just because a foreign interest is waiting on the wings to grab these poor peasants' land. More or less similar line of reasoning has been taken by courts of law in all cases filled by the Barabaig in relation of their various lands taken away in the same fashion over the years.\(^8\)

### 6.2 The Mbulu

The Mbulu is an interesting group of people living in the Mbulu District in the new Manyara Region which was formerly part of the Arusha Region. They are closely linked

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\(^7\) Government Notice No. 88 of 13\(^{th}\) February, 1987. This Order was declared null and void by Chua, J. (as he then was) in Tito Saturo and 7 Others v. Matiya Seneya and Others, High Court of Tanzania at Arusha, Civil Appeal No. 27 of 1985 (Unreported). See PETER, Chris Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials*, Cologne: Rudiger Koppe Verlag, 1997, p. 218.


\(^8\) This letter is fully reproduced in LANE, Charles, "Turning Adversity to Advantage: How Barabaig Herders Have United to Protect their Lands and Advance their Interests, No. 1 *Indigenous Affairs*, January/February/March, 1997, p. 50 at p. 53.

\(^8\) See for instance the decisions in Case of Yoke Gwaku and 5 Others v. National Agricultural and Food Corporation (NAFCO) and Another, High Court of Tanzania at Arusha, Civil Case No. 52 of 1988; and Ako Gambul and 100 Others v. National Agricultural and Food Corporation and Waret Wheat Farm Ltd and Gidagamowd Wheat Farm Ltd, High Court of Tanzania at Arusha, Civil Case No. 12 of 1989 (Unreported). This and other cases relating to indigenous minorities are treated at length in MVUNGI, Sengondo E.A., "Legal Rights of Minorities and Indigenous Peoples in Tanzania," *Volumes 20-27 Eastern Africa Law Review*, December, 2000, p. 88.
to their neighbours – the Iraqw; Barabaig; Taturu; Maasai; Rangi; and Sandawe. While a number of them keep cattle, the majority of them are agriculturalists cultivating maize, beans, red and white sorghum, sweet potatoes and millet. Their ways of life and their land were highly affected by the policy of socialism and self-reliance of the then ruling Tanganyika African National Union (TANU) when it was inaugurated following the Arusha Declaration of February, 1967. This was particularly after the beginning of the implementation of the Ujamaa Villages programme which was part of the socialisation of the lives of the people of Tanzania.

6.2.1 Ujamaa Villages Programme and Individual Rights

The villagisation programme was the cornerstone of the policy Socialism and Self-reliance of ruling part in Tanzania. On 5th February, 1967 TANU) published the Arusha Declaration. This was the blueprint for socialist construction which established the

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83 Language experts argue that the majority of these groups are Afro-Asiatic and Cushitic in origin. See for instance THORNTON, Robert J., *Time and Culture Among the Iraqw of Tanzania*, New York: Academic Press, 1980.


course of development which Tanzania, as a country, was to follow i.e. socialist development.88

The Declaration was followed by another document specifically focussing on rural development prepared by the President of the Party entitled *Socialism and Rural Development*.89 This document which contained the philosophy of the party on rural development, like the Arusha Declaration itself, also placed man as the centre of development in a socialist society. Noting that the majority of Tanzanians live in the rural areas, it emphasized that for them to live a better life, it was necessary to live together in villages.90 As social and productions relations in the country were still essentially capitalist, for those behind *Ujamaa* policy these villages would become "islands of socialism in a hostile capitalist sea."91

It was generally hoped that the people, and particularly those in the rural areas would appreciate the efforts being undertaken by the party and its government and would voluntarily move into villages to live together.

During the early period of villagisation, both party and government leaders were optimistic that people would be understanding and that what was needed was a small dose of political education. Force was ruled out as a means of implementing the policy of socialism and rural development. President Nyerere for one was convinced that the whole exercise should be voluntary and nobody should be forced to live in a village.92

However, in the field things were not moving. According to McHenry:


Persuasion alone did not lead to the mass influx of people into villages that the party and government desired ... in the first couple of years only about 5 percent of the population moved into villages. Party and government leaders were getting impatient. It was at this point in time that things began to change and the leadership started contemplating the use of force to effect the villagisation programme. In a public meeting at Endabashi village in Mbulu the President broke the ice. He declared that it was now an ORDER for everyone in the rural areas to live in villages and all people have to move into villages in three years time - that is by the end of 1976. What followed was a wave of brutality. Overnight people were shifted from their homesteads to new “villages.” They left behind their farms, houses, crops, livestock and other properties. Millions in the rural areas were affected by this massive movement of people in rural Tanzania.

When the programme was eventually abandoned and people had regained their freedom, they did not only challenge the legitimacy and the legality of the programme – but also demanded compensation for the suffering they had undergone. One such case was that of Attorney-General v. Lohay Akonaay and Another discussed at length below.

6.2.2 The Case of Attorney-General v. Lohay Akonaay and Another

93 See McHENRY, Jr., Dean E., Tanzania’s Ujamaa Villages: The Implementation of a Rural Development Strategy, op. cit., p. 150.


96 Court of Appeal of Tanzania at Arusha, Civil Appeal No. 31 of 1994, Nyalali, C.J. Reported in [1995] 2 LRC 399.

97 Court of Appeal of Tanzania at Arusha, Civil Appeal No. 31 of 1994, Nyalali, C.J. Reported in [1995] 2 LRC 399.
It can be argued with conviction that in the first phase of independence in 1960s the new government might have genuinely wanted to have all the ethnic groups on board. The first aim of this government was to eradicate poverty, ignorance and diseases. It was therefore important to target those ethnic groups perceived to be “backward” and fast-track their “development” through building of new schools in their areas, hospitals and initiating development programmes.

With this mindset it was therefore just a question of time before the State clashed with the indigenous people who believed strongly in their culture and traditions. Patience on the part of the government was running out fast and soon persuasion turned into force. Therefore, during the villagisation programme of early 1970s indigenous people were not spared. They were shifted by force from their normal places of abode and relocated to Ujamaa Villages. When the Ujamaa Villages programme eventually came to an end they attempted to go back to their original homes and demanded to be compensation for the disturbance and hardship arising out of the programme. They went to the courts of law. Among the cases they instituted was that of Attorney-General v. Lohay Akonaay and Another.98

This case involved a father and son - Lohay Akonaay and Joseph Lohay. They had earlier on, in 1987, successfully instituted a suit in the court of Resident Magistrate at Arusha for recovery of a piece of land they held under customary law. An eviction order was issued and they were given possession of the piece of land in question. In 1992 the Parliament passed a new law, i.e. the Regulation of Land Tenure (Established Villages) Act, 199299 which came into force in December, 1992. This law, inter alia, declared the extinction of customary rights on land; prohibited payment of compensation for such extinction; ousted the jurisdiction of ordinary courts of law in all matters relating to the administration of the Act; terminated proceedings pending in normal courts of law;

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prohibited enforcement of any court decision or decree on all matters in respect of which jurisdiction was ousted; and established a tribunal with exclusive jurisdiction. The respondents were aggrieved by this new law and thus petitioned to the High Court under Article 30 (3) and Article 26 (2) of the Constitution of the United Republic of Tanzania, for declaration that the new law was unconstitutional and consequently null and void.

The High Court of Tanzania at Arusha, presided by Munuo, J. (as she then was) and ordered the entire new law to be struck off the statute book. The Attorney-General did not agree with this decision and appealed to the Court of Appeal of Tanzania.

The Court of Appeal in its decision first of all began by ascertaining the facts which were not in dispute between the parties. These were: during colonial period the respondents acquired a piece of land under customary law; between 1970 and 1977 there was a country-wide operation known as Operation Vijiji, through which majority of rural population scattered in various parts of the country were forcefully moved into villages, including the respondents. The effect of this operation was a wide-spread re-allocation of lands to villagers. The respondents were dissatisfied with the re-allocation exercise and that is why they instituted the aforementioned suit. In 1987 a subsidiary legislation was made by the government i.e. the Extinction of Customary Land Rights Order, 1987 which had the effect of extinguishing all customary rights in land in 92 villages listed in its schedule. The respondents’ village was also covered by this by-law.

The central issue was whether customary rights in land (deemed rights of occupancy) are constitutional rights recognized under the Constitution and ought to be protected as property.

The Court of Appeal held that: (1). the President holds public land on trust for the indigenous inhabitants of this country; and as a trustee, his power is limited in that he can not deal with public land in a manner in which he wishes or to the detriment of the beneficiaries of that land; and he cannot be the beneficiary of public land; (2). 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; (3). the provisions of the Act which oust the jurisdiction of the courts of law and those giving exclusive jurisdiction to the tribunal were unconstitutional for they offended the doctrine
of separation of powers enshrined in the Constitution; and (4). the trial judge was wrong in striking down the entire statute after finding only four Sections to be unconstitutional. In a stroke of a pen – the father and son lost the battle.  

6.3 The Maasai

The Maasai are among those ethnic groups which were caught up with the Berlin Conference of 1884-1885 when Africa was sub-divided into parts indiscriminately by Europeans among themselves. In this exercise, the Europeans never cared who lived where in the continent as they curved the boundaries. As a result, several ethnic groups found themselves into two or more “countries” in the process. Among them were the Luo who were and still are in Kenya, Uganda and Tanzania; the Makonde who are both in Tanzania and Mozambique etc. The Maasai were also caught up in this political trap. They found themselves in both Kenya and Tanzania.  

The Maasai are basically pastoralists and keep many heads of cattle, goats, sheep and donkeys. Like all pastoralists, they are constantly on the move looking for pasture and water for their animals. As they get squeezed out of their traditional grazing areas, the Maasai move to other areas and that explains their many clashes with farmers in places like Kilosa in Morogoro Region and Mbalali in Mbeya. One of the areas where the Maasai have been living grazing their cattle is Mkomazi Game Reserve from which they were now being

100 It should however be noted that people of this area have a history to pursuing their rights to the logical conclusion. During the colonial period for instance, the Meru presented their land case to the Trusteeship Commission of the United Nations in New York. See JAPHET, Kirilo and Earle E. Seaton, The Meru Land Case, Nairobi: East African Publishing House, 1967.


103 On the causes and repercussions of some of these clashes between pastoralists and farmers see MTWALE, Bernard Anthony, Conflicts Between Pastoralists and Farmers over Land Use: A Case Study of Kilosa District, A Dissertation Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Arts (Development Studies) of the University of Dar es Salaam, 2002.
told to vacate. As they get pushed around and removed from their grazing lands, the Maasai have sought relief from the courts of law. One such a move was in the case of *Lekengere Faru Parutu Kamunyu and 52 Others v. Minister for Tourism, Natural Resources and Environment and 3 Others*\(^{104}\) which is discussed at length below.

### 6.3.1 Promotion of Tourism and Investment Versus the Rights of the Indigenous Peoples

The background to the case of *Lekengere Faru Parutu Kamunyu and 52 Others v. Minister for Tourism, Natural Resources and Environment and 3 Others*\(^{105}\) is important for purposes of appreciating the forces at play which were not addressing the plight of the Tanzanians involved. A foreign investor had shown interest in established a rhinoceros farm within the Mkomazi Game Reserve which is shared by both Kilimanjaro and Tanga regions. It was argued that the main aim of this farm would be to maintain and if possible raise the number of rhinoceros in the country as they were endangered.

With the financial assistance from George Adamson Wildlife Preservation Trust of the United Kingdom and Tony Fitzjohn/George Adamson African Wildlife Preservation Trust of the United States of America, a 17.5 km\(^2\) electric wire fence rhinoceros sanctuary was to be put in place. This facility which a local people referred to as “Zoo in the Bush” was to be filled with black rhinoceros imported from the Republic of South Africa.\(^{106}\) For this project to succeed it was necessary to remove everybody from this areas. It is in the process of executing this project that the authorities decided to evict the plaintiffs from the land they have been using for years - allegedly to pave way for wildlife conservation.

The plaintiffs were aggrieved their traditional way of life was now being compromised in favour of the welfare of animals. In their view the proposed eviction exercise was unjustified for it interfered with their customary way of life and that in general the

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\(^{104}\) Court of Appeal of Tanzania at Arusha, Civil Appeal No. 53 of 1998

\(^{105}\) Ibid.

defendant had no right whatsoever to lay a claim on their land which they have been using for many years and the customary title was the evidence of their ownership.

6.3.2 The Case of Lekengere Faru Parutu Kamunyu and 52 Others v. Minister for Tourism, Natural Resources and Environment and 3 Others

The plaintiffs were residing in an area which was deemed to be a game reserve by the government. Despite the fact that the plaintiffs having occupied the said land for long period of time it was not theirs within the meaning of the law. The government took steps to put the land into its envisaged use of wildlife conservation which fact necessitated the eviction of the plaintiffs. The dispute arose due to the fact that the land had been historically occupied by the plaintiffs under customary title and the only way the government authority could dispossess the land from the plaintiffs was by way of Land Acquisition Act of 1967 something which was not done. Thus the plaintiff prayed to the court to be taken back to their land where they had been evicted and also to be compensated for the trespass and destruction of properties made by evicting authorities.

The High Court (Munuo, J. as she then was) reasoned and held that the plaintiffs should be offered alternative land for settlement which is sufficient for them to conduct their grazing activities and enable them to settle on self help basis. Being dissatisfied with the decision the plaintiffs moved to the Court of Appeal. The Court of Appeal was invited to determine the following issues.

(a). Whether appellants who did not give evidence at the trial in the High Court are not entitled to obtain judgment in their favour;

(b). Whether the plaintiffs had an ancestral customary land title over the whole area of Mkomazi game reserve (the disputed land);

(c). What title if any was conferred on the plaintiff before their eviction; and

(d). Whether the plaintiffs were forcefully evicted and what relief if any the plaintiffs were entitled.

The Court of Appeal held that:

The plaintiffs were new arrivals in the disputed area and were preceded by other tribes such as Pare, Sambaa and even the Kamba people among others. It seemed the plaintiffs being nomads by nature who move from one place to another arrived at the disputed land

107 Court of Appeal of Tanzania at Arusha, Civil Appeal No. 53 of 1998.
in the early 1950s and this partly explains why they were not involved in the consultation process between the authorities and natives which preceded the creation of game reserve. Thus the plaintiffs did not have ancestral customary land title as they claimed in the matter before the court.

In addition, the court held that since as a matter of law, land in Tanzania is a public property held by the President on that behalf so the title held by the plaintiffs was a revocable permit given by the Director of Game Reserves because like many other Tanzanians appellant were using the Mkomazi game reserve as beneficiaries of public land which they have a right to use but can be taken away for the general public good. It was further said that since the appellants were residing within the land then their eviction could have been done in a humane and dignified manner and bearing the fact that individual freedom is guaranteed under the Constitution then the eviction was forceful hence unlawful. Again the Court of Appeal retaliated the fact that only those appellants who went to court to present their case could be entitled for relief as deemed fit and just by the court. Additionally, the Court of Appeal awarded them compensation for destruction of their properties and alternative land for grazing their cattle.108 To some, this could be viewed as half victory as their rights were recognised and compensation ordered. There was also the order for allocation of alternative land. However, the fact remains that they never got their land back.

7.0 Conclusion: Doing Justice or Supporting the Status Quo?

It is true that at times sections of the judiciary in Tanzania have managed to come up with clear activism and have stood by the rights of the vulnerable and marginalised sections of the population including indigenous and minorities. Judges have made decisions strongly

supporting the rights of children against abuse\textsuperscript{109} and neglect\textsuperscript{110} and also on gender equality in issues like inheritance against the oppressive parts of customary law.\textsuperscript{111} However, the same spirit has not been exhibited in cases relating to indigenous peoples. This conclusion arises from three disenable tendencies. Firstly, the courts tend to openly side with the “development” thesis of the government and the need to “civilise” the indigenous groups so that they can move away from their “backwardness” and enter the mainstream programmes of the government and the country.\textsuperscript{112} Hence, one notices a lot of impatience in the courts when dealing with cases involving indigenous people. Therefore, by and large in majority of cases the indigenous groups have been the losers in court.

Secondly, even in situations where the rights of the indigenous groups are recognised and their claims accepted by the courts of law, both the High Court and the Court of Appeal of Tanzania have been very restrictive when it comes to making awards. It is therefore not surprising that they have strictly interpreted the whole concept of representative suit to include only “those who have sued” and actually those who have signed court documents\textsuperscript{113} and at times only those who have appeared in court and gave evidence to

\textsuperscript{109} See See the case of Athuman Ally Maumba \textit{v. The United Republic} (High Court of Tanzania at Dar es Salaam, Criminal Appeal No. 95 of 1989) in which Hon. Mr. Justice Kahwa Lugakingira handed out a stiff sentence to man who have been sexually abusing children describing him as a criminal pervert who engaged in a bizarre relay of sexual assaults upon indigent youngsters and who needed to be removed from civilised society so that children may get the chance to grow up in dignity and with a hope for a future. An appeal from this decision proved to be disastrous. The Court of Appeal of Tanzania enhanced the sentence. Hon. Mr. Justice Thomas Mihayo followed Lugakingira’s decision in the case of \textit{Nguza Vicking @ Babu Sea and 3 Others \textit{v. Republic}}, High Court of Tanzania at Dar es Salaam, Criminal Appeal No. 84 of 2004 which also involved abuse of children. This indicates a consensus by the courts of law in Tanzania when it comes to the protection of children as a vulnerable group.

\textsuperscript{110} In \textit{Chiku Lidah \textit{v. Adam Omari}}, High Court of Tanzania at Singida, (PC) Civil Appeal No. 34 of 1991 Mwalusanya, J. underlined the duty of the father to maintain his child as a basic right of the child.

\textsuperscript{111} See the decision of Saidi, J. in \textit{Ndewawiosia Ndeamto v. Immanuel s/o Malasi} [1968] H.C.D. No. 127 and Mwalusanya, J. in \textit{Bernado Ephrahim \textit{v. Holaria Pastory and Another}}, High Court of Tanzania at Mwanza (PC) Civil Appeal No. 70 of 1989. Reported in [1990] LRC (Const) 757. In these cases the High Court declares customary law which bars female members of clans from inheriting land as invalid.

\textsuperscript{112} Hon. Lady Justice Munuo in her \textit{ruling} in favour of the Government in \textit{Yoke Gwaku and 5 Others \textit{v. The National Agricultural and Food Corporation (NAFCO) and Another}}, High Court of Tanzania at Arusha, Civil Case No. 52 of 1988 asserted \textit{inter alia}, that the natural resources of the land have to be used for the development of the people particularly in the eradication of poverty, ignorance and disease.

\textsuperscript{113} This was the position taken by D'Souza, Ag. J. In \textit{Mulbadaw Village Council and 67 Others \textit{v. National Agricultural and Food Corporation}}, High Court of Tanzania at Arusha, Civil Case No. 10 of 1981.
back their claims.\textsuperscript{114} This excludes all other people in exactly the same situations as the litigants and who may have or who might be affected in the same manner by act or acts forming the basis of the suit. This type of judicial interpretation defeats the whole essence of public interest litigation by individualising claims of common or community nature.

Also, common loses to the community like those relating to the environment or common access to resources such as water are conveniently ignored as each and every complainant is forced to prove “specific and individual” loss, quantify it and that forms the basis of compensation. To add salt to injury, practice has shown that even when all these stiff conditions set by the courts of law are met by the complainants, still the compensation ordered is generally small, insignificant and at best symbolic. Coming after many years of litigation, this unreasonable compensation is meant to discourage other indigenous people and other citizens whose rights have been trampled upon by the State in Tanzania to give up pursuing their rights using the courts of law.

Interestingly, in all cases taken to court by or on behalf of indigenous people, the events giving rise to claims are preceded by excessive use of force, Assault, harassment, brutality, torture, cruel and other inhuman and degrading treatment and punishment by State institutions such as the police, security and the infamous field force unit. These actions of State agents normally lead to displacement, loss of livestock and other personal articles as well as break up and scattering of families. However, courts of law cleverly skirt around these serious violations of human rights and hardly address or even mention them. Mechanical and technical as they are in their approach to issues of rights, courts of law and in particular the higher judiciary\textsuperscript{115} take it that these cases are civil in nature and

\textsuperscript{114} See the judgement of the court written by Nyalali, C.J. (as he then was) in Lekengere Faru Paratu Kamunya and 52 Others v. Minister for Tourism, Natural Resources and Environment and 3 Others, Court of Appeal of Tanzania at Arusha, Civil Appeal No. 53 of 1998; and the judgement of Mrosso, J. (as he then was) in Yoke Gwaku and 5 Others v. The National Agricultural and Food Corporation (NAFCO) and Another, High Court of Tanzania at Arusha, Civil Case No. 52 of 1988.

\textsuperscript{115} According to lawyer Lobulu, the Court of Appeal of Tanzania in particular pre-occupies itself mainly with its own administrative and procedural rules – not in search for a reason to hear the substantive appeal so that justice is done but rather to find a device to get rid of the file. See LOBULU, Ben, “The Legal Profession in Tanzania – Lawyers & Judges: Protectors or Violators of Human Rights?” in ANKUMAH, Evelyn A. and Edward K. Kwakwa (eds.), The Legal Profession and the Protection of Human Rights in Africa, Accra and Maastricht, 1999, p. 31 at p. 40. This complaint is partially conceded by Hon. Mr. Justice Augustino Ramadhani of the Court of Appeal of Tanzania. See RAMADHANI, Augustino S.L., “Twenty Five Years of the Court of Appeal of Tanzania and the Establishment of the
not *criminal* and hence sticking to what is addressed to them! This is a strange behaviour as the highest judicial organ on land – the Court of Appeal of Tanzania has more than often reminded us that courts are courts of justice and not of the parties and hence can rise *suo moto* issues of public interest.\(^{116}\) It would be expected that courts would have noticed human rights violations without waiting to be moved by the injured parties in civil litigation.

In general, it can therefore be concluded that, unlike in other jurisdictions where the courts of law have turned to a viable arena of struggle with activist judges and magistrates leaning on the side of the poor and marginalised sections of the society this has not been the situation in Tanzania. This can be said with certainty in all cases involving indigenous minority groups. One cannot cite one case where their rights have been *fully* recognised and upheld by the courts of law. In the words of one of the advocates representing them:

> … the judiciary has not always proved to be useful tool in controlling administrative excesses. This is more so particularly where the judiciary is not as bold as it should be. In this case judges have at times tried to interpret the law in such a way as to justify the action of an administrative authority. The pastoralists case study of Mkomazi Game Reserve offers some of the living example on how courts may not necessarily be of assistance in cases of administrative injustices. In some cases in fact the courts have argued in support of the government violation of the laid down rules and procedures in handling matters affecting individual rights.\(^{117}\)

\(^{116}\) See for example the guidance given by His Lordship the Chief Justice of the United Republic of Tanzania Francis Nyalali in *Attorney-General v. Marwa Magori* (Court of Appeal of Tanzania at Mwanza, Criminal Appeal No. 95 of 1988) where he said: “Although it is true that neither of the parties had raised the issue of the constitutionality of the Deportation Ordinance, we are satisfied that the learned trial judge was correct in raising it *suo moto* for two reasons: Firstly, all courts of law in this country are duty bound to take judicial notice of all constitutional and legal matters. Secondly, the courts in this country are not courts of the parties but are courts of law and have thus inherent jurisdiction to raise and to consider matters which are necessary to a fair and just decision of a case, provided the parties are given reasonable opportunity to respond to the matters thus raised.” Interestingly the Court of Appeal itself does not adhere to its own guidance. Logically those below it follow suit.

And the future does not look bright either. However, as others have indicated, we should not lose hope. With the international community taking more and more interest in the rights of indigenous and minority groups in the country, those whose rights are violated by the State will boldly come out and challenge the violation. Their success in that endeavour will depend on a variety of factors including vigilant lawyers, rights-conscious judges and tolerance on the part of the State in Tanzania.