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OF LAND AND LEGITIMACY: A TALE OF TWO LAWSUITS

Kelly Askew, Faustin Maganga and Rie Odgaard

In many circles one hears the assertion that land is abundant in Tanzania. President Kikwete, Prime Minister Mizengo Pinda and other government officials repeatedly state that 44 million of Tanzania's total land area of 94.5 million hectares are arable, but only 23–24 per cent are being used (URT 2001; Kikwete 2011; Shamte 2011; Rwechungura 2011).[1] Yet in local communities, from the local press and among researchers one hears a very different story: that competition for land and violent land-related conflicts are becoming the order of the day throughout Tanzania.[2]

The number of conflicts appears to be increasing steadily in spite of the fact that recently enacted policies and laws[3] have the officially stated objectives of reducing land conflicts and protecting the land rights of Tanzanians, 80 per cent of whom depend on land for their livelihoods. Indeed, some of the new policies and

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[1]One should take these figures with a grain of salt, for even the official government website states a rather different figure: 20 per cent of land in the country is said to be arable, with only 5 per cent currently cultivated. See <http://www.tanzania.go.tz/landsf.html>, accessed 19 October 2012.

[2]'Alarm as Tanzania registers 5 land disputes daily', *The Citizen*, 29 February 2012; 'Land-related conflicts on the increase', *Daily News*, 21 August 2012; 'Land conflicts haunt independent Tanzania', *Daily News*, 2 December 2011; see also Mvula and Kawawa 2006; Baha and Chachage 2007; Maganga *et al.* 2007; Walsh 2007.

[3]Such as the National Land Policy of 1995; National Forest Policy of 1998; National Wildlife Policy of 1998; Land Act No. 4 of 1999; Village Land Act No. 5 of 1999; Land Disputes Courts Act of 2002; Land Registration Act of 2002; Environmental Management Act 2004; Land (Amendment) Act of 2004; and the Wildlife Conservation Act No. 9 of 2008.

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legislation may have exacerbated the situation and given rise to even more conflicts than before, some of a very serious nature.[4]

In this essay, we examine two lawsuits concerning land disputes in Kiteto District, Manyara Region, one of which can be viewed as a microcosm of the other. Both cases received final rulings in November 2011 from different authorities within the Tanzanian legal structure – the first being a localized dispute filed and decided at the district level; the other a case filed at the High Court of Tanzania and decided at the Court of Appeal (the highest court in the land). Both are conflicts between pastoralists and farmers.

The first case, *Rashidi Omari Kiboma vs Mkoa Kaipay and Ndatoya Tang'idi* (Application No. 6 of 2011), was decided on 8 November 2011 at the Simanjiro District Land and Housing Tribunal. It concerned 80 acres (32 hectares) in the Maasai village of Lesoit, contested by a farmer from the neighbouring village of Lengatei.[5] The plaintiff, Mr Kiboma, alleged that the disputed land had been his farm since 1986, obtained through the customary mechanism of his having cleared virgin land. The defendants refuted this, claiming that this was land set aside for pasture and clearly designated as such in the Village Land Use Plan they had approved via their Village Assembly in 1997. Mr Kiboma filed his lawsuit in January 2011 following an altercation that occurred earlier that month when he tried to plough the land with his tractor and was prevented from doing so. He filed his case at the Simanjiro District Land and Housing Tribunal, choosing to skip the local Lengatei Ward Tribunal. And because Kiteto District does not have its own tribunal, the case had to be filed in Simanjiro, a two-day journey from Lesoit.

The second case, *Tito Shumo and 49 Others vs Kiteto District Council* (Land Case No. 6 of 2007), was filed at the High Court of Tanzania (Land Division) at Dar es Salaam and ruled on at the Court of Appeal. It involved 250,000 hectares spread across nine villages of Kiteto District with high populations of Maasai residents. The 50 plaintiffs argued that the disputed territory was their property under customary law, claiming that they had occupied the area peacefully since 1980 along with some 16,950 others, having been granted it by their Maasai neighbours 'according to Maasai custom'. Mr Shumo and the 49 named others filed a representative suit on behalf of the 17,000 residents subjected to forcible eviction by the Kiteto District Council (KDC). They claimed widespread losses, including the demolition of homes, destruction of a school, torching of fields, widespread displacement, untold suffering, and loss of land and livelihoods. They claimed to be legitimate members of the villages named in the suit, and argued that the district overstepped its authority in evicting them. The defendant, KDC, responded by arguing that it had acted on behalf of the pastoralist villages that had tried unsuccessfully for years to remove the trespassers peacefully from land

[4]There have been a number of violent episodes over the past few years in Simanjiro, Morogoro, Loliondo, Kiteto, Kisarawe and Babati districts. See Lobulu 1998; Ojalammi 2006; Maganga and Sjaastad 2007; Nkwame 2011; Rwechungura 2011; and Maulidi 2012. In our own fieldwork in Babati District (2011), we toured investor farms where we were shown fields, tractors, storehouses and other property that had been torched not long before. One person we interviewed, a farm manager, was brutally murdered two weeks after we met him, presumably for being perceived as too closely aligned with the big investors.

[5]For more on Maasai communities, see Galaty 1982, 1993; Nurse and Waller 1993; Hodgson 2011.

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that had been collectively pooled to form a Community-Based Natural Resource Management Area (CBNRM) named Emboley Murtangos. It also argued that the council was wrongly sued since the rightful owners of the land were the villages, not the district, which was only fulfilling its responsibility as the enforcing authority in lawful village decisions.

Both cases demonstrate the intense competition for land occurring in Manyara and Arusha regions which, as the former 'Masai District' during colonial times, is the recognized homeland for several pastoralist (Maasai, Barabaig) and hunter-gather (Akie, Hadzabe) groups. As cultivators from overpopulated and increasingly infertile districts migrate in search of arable land, Kiteto has proved a great draw since the soil is very fertile. Yet, it is a semi-arid environment mainly suited for pastoralist and hunter-gather livelihoods. The two cases also illustrate the general situation for pastoralist groups in Tanzania, who are facing increased competition for access to pasture and arable land. Unfortunately, the land rights of indigenous minorities continue to be further undermined by some of the very recent policies and new legislation.[6]

Historically, pastoralists have lost out in East African court rooms. Hughes (2006) traces the history of Maasai land losses in Kenya, and their failed efforts to contest these in court, over the past century. She focuses in particular on the 'Masai Case of 1913' in the High Court of the Protectorate, in which Purko Maasai challenged the 1911 Agreement that caused them to be relocated from verdant pastures in the north to arid plains in the south, a case they lost on a technicality. Similarly, Lane and others have analysed the attempts by Barabaig herders in the 1980s to reclaim traditional land in Hanang District (Manyara Region) that they lost to Canadian-funded wheat farms (Lane 1994, 1996; Mwaikusa 1993; Tenga and Kakoti 1993; Fratkin and Wu 2010; Tenga 2011). They too lost on a technicality: they were unable to provide documentation certifying that they are 'native' (a colonial hold-over) Tanzanians – despite public knowledge that Barabaig people are not found anywhere else in the world.

More recently, a constitutional suit was filed in December 2010 in the High Court of Tanzania on behalf of Maasai pastoralists evicted in July 2009 from an area of 4,000 square kilometres encompassing 25 villages in Loliondo, Ngorongoro District. The land in question was granted by the government as a private concession to a hunting firm based in the United Arab Emirates (Mwaikusa 1993; Chachage 2003; Ojalammi 2006; Renton 2009; Nordlund 2011). The land was reassigned despite the existence of village land certificates for seven Maasai villages in the disputed area, and the government has demanded that the villages turn in their government-issued village certificates. The case remains mired in court.

Based on this dismal record, it is small wonder that Maasai and other indigenous communities avoid initiating lawsuits. And yet the two cases presented

[6]Well documented in Tenga 2008; Brown *et al.* 2009; and LHRC 2007. Specific policies and legislation that undermine indigenous minorities include the SPILL plan, the New Wildlife Act of 2008, the Grazing-Land and Animal Feed Resources Act of 2010, and some aspects of the Land Act of 1999 and Village Land Act of 1999. For further elaboration of this see Shivji 1999; Sundet 2005; Mattee and Shem 2006; Mattee 2007; Walsh 2007; Odgaard 2006, 2009; Tenga 1992, 2008, 2011; Peter 2007; and Maganga 2009.

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here may represent significant milestones since, unlike previous cases of land grabbing in Maasai areas, the pastoralists emerged victorious . . . if poorer.

Our analysis of these cases offers cause for both hope and concern. Even if the threats to Maasai land rights in Lesoit and Emboley Murtangos were circumvented, we contend that Tanzanian courts are being employed as a vehicle for 'legitimizing dispossession' (Tenga 1998). Wealthy elites who find their efforts to acquire the vast tracts of land they desire thwarted by protective mechanisms against precisely such behaviour (in the Land Act No. 4 of 1999 and Village Land Act No. 5 of 1999) are turning to the courts to get what they want. Having access to deeper pockets and being able to out-lawyer and out-manoeuvre via legal technicalities their poorer and often less-educated opponents enables elites (including the government itself) to avail themselves of the judicial system and acquire land through illegitimate means.

Yet Tanzanian courts also at times act independently of political influence and secure property rights for at least some of the dispossessed. Despite its overall record, the judicial system cannot be dismissed out of hand as exclusively 'pandering to State interests . . . [and being] in the business of making money' (Lobulu 1998). As will be shown, an unusual mix of conflicting pressures and key personalities in these two cases coalesced to produce unexpected outcomes in favour of the Maasai, whose land and legitimacy were on the line.

POLITICAL, SOCIAL AND LEGAL CONTEXT

An anti-pastoralist atmosphere pervades Tanzania. Discrimination against and ridicule of pastoralists and other indigenous minorities by the authorities and the press – not a new phenomenon in Tanzania (see for example Maganga *et al*. 2007 and Peter 2007) – is taking institutional form in legislation and judicial precedents that undermine and devalue the livelihoods, human rights and economic contributions of indigenous communities who are viewed as 'backward' by many in positions of power. Although pastoralism accounts for at least 14 per cent of the GDP (Tenga *et al.* 2008: 10),

> [t]he abolition of pastoralism seemed to have been on the agenda at the State level for a long time, practically from the eve of independence. These negative sentiments are not completely absent today as top leaders still give negative views on traditional pastoralism that puts into question their own literacy. (Tenga 2011: 19)

One of the worst cases of state-led oppression of pastoralists was the 2006 eviction of approximately 1,000 pastoralist households in the Ihefu Valley of southern Tanzania (Mbarali District; see PINGOs Forum *et al*. 2007; IWGIA 2008; Ole Ndaskoi 2009). In a modern-day 'Trail of Tears', these pastoralists were forced to march 500 miles with their cattle to Lindi, to areas that cannot support cattle, and fined all along the way for entering new districts with their herds. The evictions were rationalized via the claim that pastoralists were responsible for significant environmental degradation in the area that, in turn, caused a reduction in water resources supporting the national hydroelectric power stations (for a trenchant critique, see Walsh 2004, 2012). Many of these pastoralists had lived in the area as residents of officially recognized villages since the 1970s and thus

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could claim customary ownership under the Village Land Act No. 5 provision granting legal recognition of ownership to anyone who 'was in peaceable, open and uninterrupted occupation of village land under customary law for not less than twelve years' (URT 1999: 44).

Lately, the tone towards pastoralists has sharpened.[7] The following editorial illustrates the negative light in which pastoralists are seen as compared to farmers:

> While farmers maintain a permanent residence why should Tanzania's pastoralists stick to nomadism? As stakeholders in national development, these pastoralists should take part or be represented in the development agendas, but that process would be complicated if they keep on roaming around the country with livestock. . . . It is high time all rural communities in this country settled permanently. . . . The nation cannot successfully eliminate poverty, ignorance and preventable diseases if part of its people continues with an extremely out of date way of life. (*This Day,* 16 February 2009)

In pastoralist–farmer conflicts, government authorities typically side with cultivators and use the conflict, or 'conservation', as a reason for evicting pastoralist communities. Environmental preservation is also the official rationale for destocking campaigns that reduce pastoralist herds to levels insufficient for subsistence, typically with little to no compensation.

A number of organizations fighting for the rights of indigenous peoples in Tanzania have emerged, offering support when they take their grievances to court. However, as Peter notes:

> 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. (Peter 2007: 36)

The year 2011 thus marks a watershed year in which the courts ruled in favour of pastoralists' rights. The Emboley Murtangos case is doubly significant because the local government (KDC) sided with the pastoralist-dominated villages, turning the tables by carrying out an eviction campaign against the farmers. This outcome, however, was hard-won and exceedingly expensive for the coalition of organizations that backed the KDC in its case.

To accommodate the increase in conflicts and expedite their resolution, the Tanzanian government has reformed its legal institutions. The Land Disputes Courts Act of 2002 established authorities for adjudicating disputes at multiple levels: the village, ward, district and state levels. At the most local level is the Village Land Council, composed of 7 members – 3 of whom must be women – nominated by the Village Council and approved by the Village Assembly.

[7]For example, <www.IRINnews.org>, 19 May 2006; *Daily News*, 18 May 2006 and 17 June 2006.

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This body, however, lacks the authority to require disputants to appear before it and furthermore lacks power of enforcement; its function is primarily mediation. Like the Village Land Council, the Ward Tribunal (next level) lacks the power of enforcement. Only the District Land and Housing Tribunal (and superior instances) holds power of enforcement and hears appeals from the Ward Tribunals. The next level is the specialized Land Division of the High Court. The final authority is the Court of Appeal, which hears and makes final decisions on appeals from the High Court (Land Division) (Alden Wily 2003; Oxfam *et al.* 2005; Gastorn 2010).

Though new institutions have replaced previous ones in an attempt to rationalize jurisdictional authority, there is still some way to go before they become fully operational and efficient. Budget estimates for the Village Land Councils still have to be established and Ward Tribunals are functional only in some areas. Similarly, although there are 129 districts in Tanzania, only 39 District Land and Housing Tribunals have been established in the absence of adequate resources and qualified personnel.[8] This results in heavy caseloads and endless waiting for court rulings.

CASE 1: *RASHIDI OMARI KIBOMA VS. MKOA KAIPAY AND NDATUYA TANG'IDI*

One day in January 2011, village patrol warriors in the Parakuyo Maasai village of Lesoit were called to deal once again with a trespassing farmer.[9] The farmer, Rashidi Kiboma, from the neighbouring village of Lengatei, was atop his tractor, trying to plough land that the village had set aside as pasture for calves and young goats. He was well known to the patrol because they had had to remove him several times dating back to 2005, and had served him with injunctions instructing him to stop trespassing on village communal land. The disputed territory was not located on the edge of the village, near to the boundary with Lengatei, but rather in the middle of the village, since this facilitated easy access for grazing the young livestock. Thus trespass here did not occur via gradual encroachment, as is typical of many boundary disputes, but rather as a brazen act of what villagers called 'invasion' (*alituvamia*). Lesoit, established in 1992 after splitting off from Lengatei to form the only wholly Parakuyo Maasai village in Kiteto,[10] has a current population of around 1,800 residents (making it one of the less densely populated villages in the district).[11] Lengatei, by contrast, where 95 per cent

[8]Interview with Simanjiro District Land and Housing Tribunal chairman, M. Mahelele, Dar es Salaam, 9 October 2011.

[9]The authors spent a total of three months in this village over the period May 2010–July 2012, collecting numerous interviews (both structured and semi-structured) and living in the community for ethnographic data and insights. One author, K. Askew, also attended the hearing at the Simanjiro District Land and Housing Tribunal as an observer.

[10]More numerous in the district are the Kisongo Maasai. Lesoit is proud of being a Parakuyo Maasai enclave. For more on Parakuyo Maasai, see Beidelman 1962; Jennings 2005; Rigby 1985, 1992.

[11]The last census occurred in 2002 and a census is under way now (August 2012). The 2002 census data indicated a total population for Kiteto District of 149,099 residents distributed

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of villagers are farmers and 5 per cent pastoralists,[12] is suffering from a shortage of land.[13] Lesoit ratified its Land Use Plan (a requirement of the Village Land Act No. 5) in its Village Assembly meeting of 28 September 1997. The plan, much like a zoning ordinance, designated specific areas for residences, for pasture, for the protected natural spring, and for the community-managed forest.

The patrol tried to stop Mr Kiboma, but facing his sturdy tractor and stubborn defiance they had to abandon the effort and seek out the village leaders. Tanzanian villages all have two primary leaders: one elected by the Village Assembly and one appointed by the district government. The appointed position is that of the village executive officer (VEO), a salaried government position. It is typically held by an outsider from the village who has met minimal educational qualifications and is supposed to ensure connection to the central government. The elected position, that of the village chairman, is intended to ensure democratic representation and that one of the village's own, selected by popular vote, is in a position of authority. It is a highly respected, if unsalaried, post.

Lesoit's VEO, Tang'idi, and chairman, Kaipai, soon arrived on the scene and, after no amount of negotiation would persuade Mr Kiboma to depart, they sent for police from the nearest town of Kijungu. Mr Kiboma, intransigent and determined, entered into an altercation with the police that resulted in his being hauled off to the Kijungu station and booked for misconduct. A criminal case was filed against him for trespass, for which he was later punished with 90 days' probation.

Within weeks, the village received notification that Mr Kiboma had filed a civil lawsuit at the Simanjiro District Land and Housing Tribunal (Kiteto District being as yet without its own land tribunal), significantly suing Mr Kaipay and Mr Tang'idi as individuals, not in their respective capacities as village leaders. They set out on the two-day journey to Orkesumet, Simanjiro to collect their court summons from the tribunal. There they learned that Mr Kiboma had hired the services of a Mr Nyoki,[14] a 'bush lawyer'. He is not a qualified lawyer but had received limited paralegal training from an NGO in Dar es Salaam called the Legal and Human Rights Centre (LHRC). Following his training Mr Nyoki established his own 'Kiteto Paralegal and Human Rights Centre' in the Kiteto District capital of Kibaya, where, in addition to offering his services to aggrieved individuals, he served the mother NGO (LHRC) by reporting human rights abuses to them.

Lacking equivalent resources, Lesoit's leaders represented themselves throughout the proceedings, which carried on for most of the year, though they periodically sought advice from the Kiteto District Council's lawyer and from a Maasai lawyer based in Arusha. This entailed multiple trips to Simanjiro to file

among 58 villages, thus averaging 2,570 per village. Given the high rates of in-migration the district has experienced over the past decade, we anticipate that the average village population will now be well above 3,000.

[12]Interview with Lengatei Ward Tribunal chairman, S. Tetea, and secretary, J. Mgoma, Lengatei, 28 June 2012.

[13]2002 national census figures are Lesoit 1,567; Lengatei 3,778.

[14]A pseudonym.

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various required documents, submit their evidence, and attend the court hearing. Mr Kiboma did not attend the hearing himself but was represented by his son, a friend (both to serve as witnesses) and Mr Nyoki. The Lesoit delegation included Chairman Kaipai, VEO Tang'idi and one witness, a former VEO who had also once served as VEO for Lengatei.

The hearing offered a venue for the impressive theatrics of Mr Nyoki, who had clearly been influenced by American *Perry Mason* or *LA Law* television shows, and who employed with considerable success bullying verbal tactics of constant interruption, rapid-fire questioning, frequent objections and inverting, twisting and misquoting the arguments of the Lesoit officials. What ended up being the crux of his argument was the claim that Mr Kiboma was perfectly entitled to farm this land as it was still his under customary law, since Lesoit had not followed proper procedure in establishing itself as a village. The plaintiff argued that Lesoit was not a legitimate village.

This proved to be a fallacious argument as Lesoit can be found in all district lists of villages, is listed and included in the 2002 and now 2012 national censuses, has a government-administered primary school and secondary school, has a VEO who receives regular salary payments from the district, and has a government-issued Village Registration Certificate. Yet in support of his argument, Mr Nyoki submitted a letter on Prime Minister's office letterhead clearly composed in response to a complaint about the establishment of Lesoit that stated curtly that the matter required further investigation.

The first half of the hearing followed this format: presentation of applicant's case; cross-examination of applicant (in this case, his advocate) by the respondents; cross-examination of applicant by the tribunal; and, finally, cross-examination of witnesses for the applicant. The second half entailed the reverse. The applicant's case as presented by Mr. Nyoki returned again and again to the refrain of institutional illegitimacy: Lesoit was not a village (*kijiji*), nor even a sub-village (*kitongoji*), but a neighbourhood (*eneo*) within a sub-village. Accordingly, the two men sitting opposite him were not village leaders but ordinary citizens who had no authority to stop Mr. Kiboma from farming land that was legally his. The Lesoit delegation questioned the legitimacy of Mr Nyoki's presence at the hearing, saying they had not seen a 'Power of Attorney' form allowing him to represent Mr Kiboma. Nyoki immediately produced one on the spot with an apology for not having submitted it in advance.

A highlight of the proceeding was when the plaintiff's witnesses were called in for questioning. Brought in individually, they were asked about their relationships to Mr Kiboma and asked how long Kiboma's farm had been in the contested area. Both asserted that the farm had been in existence since 1986, established through the customary mechanism of clearing virgin bush. When asked if there were any other farms in the area, both replied in the affirmative. When asked to identify who exactly had farms in the area and where these farms were relative to the disputed area, neither was able to do so convincingly.

The hearing ended with the tribunal chairman declaring his intent to visit the contested site with the two assessors, stating that the evidence was insufficient to draw any conclusions. A site visit was scheduled for three weeks hence, with all expenses to be borne by the disputants (Tsh70,000 each, to cover fuel, one night's accommodation, per diem allowances for all three tribunal officials, plus a

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payment to the driver).[15] After two postponements, the site visit occurred in August 2011. In attendance were the tribunal officials: for the plaintiff, Mr Nyoki, Mr Kiboma and one fellow villager from Lengatei; and for the respondents, Chairman Kaipai, VEO Tang'idi and an impressive and intimidating group of over 70 fully adorned and armed village warriors. The plaintiffs were visibly nervous and when some warriors started hurling insults and challenges at them, clearly furious that their land rights were threatened, the tribunal chairman ordered the warriors to move off and observe from a distance.

What did the tribunal find? They found a wide stretch of pasture, just as indicated in the Village Land Use Plan, teeming with herds of grazing cattle. Absent was any evidence of cultivation. Facing almost certain defeat, the plaintiff's bush lawyer employed one last tactic to try and win the case. Mr Nyoki wrote his summary argument in English, a significant departure from the rest of the proceedings, which had taken place entirely in Swahili. Quoting from the Constitution, the Land Acquisition Act of 1967, the Local Government (Local Authorities) Act of 1982, and the Village Land Act No. 5 of 1999, Cap. 114, he argued:

> Therefore plaintiff owing to the evidence he has adduced before this Honourable court, it is quiet [*sic*] obvious and clear that he acquired ownership of his suit land Tenure system which is most cases the system applicable in rural areas . . . as far as the village land Act no 5 cap. 114 R.E. 2002 IS CONCERNED. An individual who has been in existence in a particular locality for 12 years or more becomes a true and lawful owner of the respective locality. . . .
>
> Applicant doesn't accept the falsely tendered before you [*sic*] Honor the said Lesoit village Registration Certificate, for the reason that the whole area is within Lengatei Village. . . .
>
> YOUR HONOUR: having so submitted, let us now deliberate on the issue as to whether the plaintiff deserve compensation as far as this matter is concerned. . . . Applicant has suffered irreparable losses to the extent that he did not cultivate in his farm last season amounting to loss of an average Tsh6,000,000/=[16] not forgetting that Applicant is entering in great expenses in running this case by way of transport, food, accommodation, etc.
>
> Honorable chairman of the Tribunal I finally and humbly beg to rest my submission, by emphasizing that the defense side has completely failed to prove their defense.
>
> Applicant finally surrender his fate unto the might [*sic*] wisdom of your honorable Tribunal.[17]

The tendering of plaintiff's final submission in English now required that the Lesoit respondents also had to submit their summary argument in English. Assistance in drafting the responding summary argument in English was provided by the District Council attorney who insisted on the legitimacy of their authority as village leaders, and that it was only in their capacities as recognized leaders that

[15]Roughly $50 each.

[16]Roughly $4,000 at the time.

[17]'In the District Land and Housing Tribunal for Simanjiro, at: Simanjiro, Land Application Case No. 6 of 2011: Rashidi Omari Kiboma (Applicant) vs Mkoa Kaipay/Ndatoya Tang'idi (Respondents), Final Submission, 19 August 2011', pp. 2–3.

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they stopped Mr Kiboma from cultivating since they were empowered to do so in the interests of the village. Moreover, they argued,

> Honorable chairman, The respondents still find the application has no merit as the evidence testified by prosecution side is different from the case filed. In his application, the applicant said the Suitland is at Lesoit village and respondents are residents of Lesoit village. At the hearing the applicant and his witnesses said the Suitland is at Lengatei Village. This is a great contradiction the Tribunal can not remain silent on it. Here the applicant seem [*sic*] not to be aware of where the Suitland is.
>
> Honorable chairman, At the hearing, the applicant raised a new matter that Lesoit is not a Village but is part of Lengatei Village. This Tribunal has no ground to play his new game and it was brought out of right time. The respondents tendered village Registration Certificate and a map showing its land use plan. Lesoit become a village since 1992 from Lengatei village. Lengatei kept silent since then watching Lesoit proceeding in all manner as all other villages usual act. Neither Lengatei Leaders nor its people can challenge the existence of Lesoit at this juncture, before this tribunal as well as in this case.[18]

Only in the Tribunal Chairman's final judgement is mention made of the site visit:

> From the above evidence I see no base for the applicant to sue the respondents in this manner. . . . After all I do not see any interest respondents have in their personal capacity to object the applicant from using a suit land. So . . . I consider that if the respondents evicted the applicant from suit land they did so as Village leaders.
>
> The respondents testified the suit land to be within a grazing land. When we visited a Suitland we found it was surrounded by a forest/uncultivated land. . .. In my view I can not allow the applicant go back [*sic*] to a Suitland for it will bring a dispute between him as a farmer and pastoralists. So status quo of the Suitland be maintained.[19]

Although the judgement allowed for the respondents to claim costs against the applicant, Lesoit's leaders have not opted to claim them. When asked why, they insisted that the important thing is that their land rights were preserved. To try and collect compensation for their expenses would require spending yet more money to file the claim back in Simanjiro, with no guarantee that Mr Kiboma would ever pay. 'We're just happy we secured our land.'[20]

CASE 2: *TITO SHUMO AND 49 OTHERS VS KITETO DISTRICT COUNCIL*

On 21 February 2007, a wealthy peasant farmer, Tito Shumo, filed a representative suit against the Kiteto District Council (KDC) along with 49 fellow applicants at the High Court (Land Division) at Dar es Salaam as Land Case No.

[18]'In the District Land and Housing Tribunal for Simanjiro, at: Simanjiro, Land Application Case No. 6 of 2011: Rashidi Omari Kiboma (Applicant) vs Mkoa Kaipay/Ndatuya Tang'id (Respondents), Respondents' Joint Final Submission, 5 September 2011', p. 4.

[19]'In the District Land and Housing Tribunal for Simanjiro, at: Simanjiro, Land Application Case No. 6 of 2011: Rashidi Omari Kiboma (Applicant) vs Mkoa Kaipay/Ndatuya Tang'idi (Respondents), Judgment', 8 November 2011, p. 6.

[20]Interview with authors, April 2012.

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6 of 2007, claiming damages and restitution of land. The farmers sought Declaratory Orders that would recognize their customary title to the land they were occupying and from which they had been evicted. They sought the same for a total of 17,000 people occupying an area spanning 250,000 hectares. They also sought compensation for damages and loss suffered through the destruction of their homes and other resources amounting to Tsh800,000,000 and general damages of Tsh200,000,000. They filed their case at the High Court since that authority holds jurisdiction over contested land valued at fifty million Tanzanian shillings or more. The applicants were given legal assistance by the Legal and Human Rights Center (LHRC), and KDC was represented by its Solicitors, and, later, at the Court of Appeal, by Excellent Law Chambers and Said El Maamry, Advocate (Tenga 2011). The applicants, just as in the Lesoit case, claimed customary ownership through clearing of virgin land and continuous occupation of at least 12 years. Yet by their own admission under deposition, the named applicants had moved to the area less than five years previous to the filing of the suit.

The case had its origins in the following events. Between 2002 and 2003, seven villages in the district decided to jointly establish a Community Based Natural Resource Management Area (CBNRM) covering roughly 3,200 square kilometres, of which 15 square kilometres are wetlands and salt licks, resources of crucial importance for livestock keeping that have been accessed by pastoralists from very early times and known by the name Emboley Murtangos.[21] Emboley Murtangos ('the place of salt' in Maa) constitutes a key feature and attraction along the corridor of seasonal wildlife migration from the Serengeti and Tsavo National Park (Kenya) to the Ruaha National Park. Colonial authorities had also disallowed cultivation of the area. However, deforestation – mainly caused by immigrants' farming activities as well as charcoal burning – and illegal hunting posed a danger to the sustainable management of the area and a threat to wildlife and livestock. It was for these reasons that the seven villages decided to pool their resources to create a CBNRM.[22]

The Kiteto District Commissioner supported the initiative and a process of joint land use management was established. The seven villages each contributed part of their village land. A formal request was submitted to the Ministry of Natural Resources and Tourism to establish a CBNRM programme after authorities at the district and regional levels granted their approval. The activities to be allowed in the conservation area would be livestock grazing, wildlife conservation and tourism (Porokwa *et al*. 2007: 23). This effort on the part of the villages to establish a conservation area was very much in line with policy developments in Tanzania in the late 1990s and early 2000s.

Upon establishing Emboley Murtangos, all residence within the CBNRM was banned. Individual occupiers – both agriculturalists and pastoralists – were asked to vacate. A large number of farmers, however, who had moved to the area from

[21]Interview with MP and Deputy Minister for Livestock and Fisheries Benedict Nangoro, 27 May 2010; also, Porokwa *et al*. 2007.

[22]The seven villages are: Namelock, Kimana, Ndirgish, Nhati, Emarti, Engusero Sidan and Loltepes.

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land-poor regions like Iringa, refused to move, so in 2006 the KDC initiated attempts to evict them forcibly. As indicated above, the farmers collectively sued the KDC in the Land Division of the High Court and a cease order was issued preventing further eviction efforts. In their suit, the applicants claimed customary rights acquired through: (a) clearance of virgin land; or (b) after paying dues to village or district authorities; or (c) being granted land by Maasai according to some undefined 'Maasai custom' (Tenga 2011).

The issues of how much land the claimants occupied, and how they got access to it, have been subject to much discussion and speculation, both in local communities and amongst village and district authorities. Local informants said that an oft-used strategy on the part of the immigrant farmers was to approach either local herders or village authorities and ask for a small piece of land, claiming that they were in need of a place to stay and a small plot to cultivate. There is a general feeling in many rural areas in Tanzania that people should not be denied a piece of land if they are in need of a place to stay. However, as nothing is *bure* ('free of charge') it is common practice that resources, favours or money change hands in such processes. It is likely that this happened in the affected villages.

However, according to both villagers and village government representatives in some cases, immigrants granted an initial small piece of land to build a temporary house would try to extend the areas they were assigned gradually through unobtrusive pushing of the boundaries. In other cases, they would approach other villages and repeat their request for land, thus obtaining a second or third parcel of land, thereby enlarging their holdings. Representatives for immigrant farmers argued that they had obtained letters from the village governments certifying their right to the land, for which they had paid facilitation fees.

As Kiteto is sparsely populated and as the land clearance often took place in isolated bush areas, it was very difficult to control how much land each migrant actually cleared. Local villagers told us that if they confronted the migrants and asked them not to clear the bush, they were often shown letters written by village authorities granting authorization to clear land. Some village leaders would, upon officially retiring from office, keep the official village stamp and illegally issue letters of allocation to people willing to pay an attractive sum.[23]

In other cases the ones clearing the land would claim to be only hired labourers paid to do the work of clearing by someone else not residing in the area. Wealthy immigrant farmers were reputed to have recruited poor people in their home areas as agricultural labourers and settled them on the land, requiring them to do the clearing and day-to-day cultivation work. Illegal immigrant settlements thus lined the main road in the Murtango reserve, featuring hundreds of families.[24] They erected flagpoles bearing the flag of the ruling party, Chama cha Mapinduzi; named their settlements; and tried in other ways to create the semblance of legitimacy, even taking requests to nearby villages that their settlements be

[23]Simanjiro District Land and Housing Tribunal Chairman M. Mahelele, interviews with authors, 10 May 2011 and 30 April 2012.

[24]Field observations, May 2010, February–March 2011, May 2011, May 2012.

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accepted as new sub-villages. But residents throughout the district held these to be squatter settlements.

According to both villagers and government representatives, there were also large-scale agricultural investors in the area, some from the political elite, and rumours that some of these were actually granted access to land by some district officials. A certain investor from Iringa Region was said to have cleared several thousand hectares of bush in one operation by simply spraying diesel fuel and setting the area on fire. Villagers claimed that if they tried to intervene and complain about such behavior they would be threatened with guns. These elites also imported agricultural labour from outside the district because the local Maasai and Akie have little experience of cultivation, and because the labourers could be used as allies when the farmers were confronted by local villagers.[25]

In January 2010, the High Court judge hearing the case issued her ruling in favour of the applicants and granted them the full one billion Tanzanian shillings requested in compensation and damages (roughly $75,000 at that time) plus 20 per cent interest. As Tenga observes,

> In Kiteto the seven villages that decided to form a community reserve . . . are all predominantly pastoralist villages. They carried out this task under a legislative regime that empowered Village Authorities to plan collectively for land use in their villages. The Land Acts, the Forest Acts, the Wildlife Management Act, and the Local Government (District Authorities) Act, notwithstanding their shortcomings, provided a legal framework where these villages could create Emboley Murtangos for the benefit of the pastoralist community. Not for purposes of pasture for livestock, a perception which all critiques tend to believe is the driving force of pastoralists, but for environmental conservation and wildlife management. The culprits this time, who saw themselves as victims, are the peasant cultivators, all non-pastoralists. The High Court reacted in the usual traditional manner of flaunting every claim related to pastoralists. The Judge did not even like the fact that when the Court visited Kiteto it was a large group of Maasai that accompanied the delegation. . . . The perfunctory [manner in which] she treated each claim from the Villages and how she expunged evidence admitted to prove that the Villages had made a democratic people-centred decision to create 'Emboley Murtangos' betrays the dismissive attitude traditional courts held of anything pastoralist. (Tenga 2011: 20)

The KDC promptly filed an appeal at the Court of Appeal of Tanzania and secured a new hearing in October 2011. The advocates for the KDC argued that the High Court Judge had erred in the following facts and application of law (for a more detailed discussion, see Tenga 2011):

- *Determining the matter as a representative suit and proceeding to grant orders that do not suit the legal requirements for a representative suit*. The KDC lawyers argued that the plaintiffs did not qualify to represent their colleagues as demanded by Order 1 Rule 8 of the Civil Procedure Act, Cap. 33 R.E. 2002. As noted by Tenga (2011), the law requires that in order for a suit to qualify as a 'representative suit' the numerous

[25]Information obtained during two consultancy assignments by Rie Odgaard in January and September 2009 (see Odgaard 2009 and Odgaard *et al*. 2009).

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applicants must have a common interest. Tito Shumo and his fellow complainants did not have the same interest in the dispute. The land they occupied was scattered over the several villages, they had acquired their holdings through different means and at different times, the properties allegedly demolished and their value were not the same for the applicants, nor were the differences evaluated or detailed in court documents, and as such remained unknown.

- *Failing to properly determine the question of unexhausted improvements allegedly done by the respondents herein as they were not legal owners of the suit premises*. The Counsel for KDC argued that since Tito Shumo and the other Respondents occupied different areas of land, grew different crops of differing quantities and values, the High Court should have recorded evidence to substantiate the claim for damages for the said unexhausted improvements. The Court of Appeal agreed with the Counsel for KDC that specific damages were not proved and it is trite law that where a complainant fails to specifically prove damage and loss the compensation cannot be granted. Thus the Tsh.800,000,000/= in compensation and Tsh.200,000,000/= in general damages granted by the High Court should be denied and disallowed as they were sheer guesswork with no indication of how the money would be distributed amongst the applicants.
- *Failing to properly determine the ownership of the land in dispute*. The Counsel for KDC submitted that the Claimants were trespassers in that no village authority had allocated the land in dispute to them. The vast majority of the migrants could, indeed, not claim having followed recognized procedure either of having lived there for 12 years or more after clearing the land, or of bringing their requests to the Village Land Committees and having them approved by Village Assembly. The Court of Appeal agreed with the Advocates of KDC in that the record from the High Court failed to show whether provisions of the Village Land Act regarding grant of customary land title to long-users of land were followed.
- *Failing to determine the residence of the Respondents*. The Advocates for the KDC argued in the Court of Appeal that the High Court wrongly held that Tito Shumo and his co-complainants were villagers within the meaning of the Village Land Act, Cap. 114. Section 2 of the Act defines a 'villager' as 'a person ordinarily resident in a village or who is recognized as such by the Village Council of the Village concerned'. The claimants themselves admitted to being constantly on the move, being evicted from one area and having to seek out another, thus never having 12 or more years of peaceful, open settlement.[26]

The three judges of the Court of Appeal were swayed by the arguments presented above and ruled in favour of the appellant, KDC, determining that ownership of the disputed land resided with the village authorities.[27] Thus nearly five years after filing the original suit, and after spending fortunes on attorney fees, on collecting affidavits and other documentary evidence, on ferrying officials and witnesses the 600 kilometres between Kibaya (Kiteto's district capital) and

[26]'In the Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 58 of 2010 between Kiteto District Council (Appellant) vs Tito Shumo & 49 Others (Respondents), Written Submission in Support of the Appeal', 23 September 2010.

[27]'In the Court of Appeal of Tanzania at Dar es Salaam (CORAM: Munuo, J. A.; Mbarouk, J. A.; and Oriyo, J. A., Civil Appeal No. 58 of 2010, Kiteto District Council (Appellant) vs Tito Shumo and 49 Others (Respondents), Judgement of the Court', 5 September and 10 November 2011.

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Dar es Salaam, on communication and multiple other extra expenses, the KDC and the pastoralist villages it represented won their case.

AFTERMATH AND IMPLICATIONS

After the Court of Appeal judgment was handed down, the evicted farmers attempted to stage a big demonstration on 1 December 2011, assembling about 200 tractors and blocking the Dar es Salaam–Dodoma Highway at Kibaigwa township.[28] The turmoil of the eviction even caused tension between the leaders of Dodoma and Manyara regions.

The 200 tractors indexed the presence of elite farmers, for tractors are uncommon in rural agriculture except among those with means. And yet, the vast majority of the Murtangos squatters are now people with nowhere to go. They left their home districts for lack of access to arable land or viable employment. Once more the poor and vulnerable have become victims, whereas, despite having lost the case, the rich farmers and elites supporting Tito Shumo and his fellow plaintiffs cannot be said to be losers. The final judgement made no allowance for compensation or damages to be paid to the KDC and villages. Nor was any punishment applied to those who intruded into an area officially set aside for conservation. Moreover, even though the KDC and villages won, they now have to pay for the new round of eviction, the levelling of the structures where the immigrants were staying, and regrading of boundaries demarcating the Emboley Murtangos reserve. One month after the judgement, all the pastoralist-dominated villages in Kiteto District – not just those immediately affected by the lawsuit – received letters from the District Executive Director with orders to collect within a two-week period millions of shillings from their villagers to pay the district for the extra militia it would have to hire in order to implement the evictions. Each village was assigned an amount deemed to be in accordance with their proximity to Murtangos. Thus the losers in this case are the poorest segments of the pastoralists as well as the immigrant farmers who bear the costs of restoring their rights and being evicted, respectively.

Finally, the fact that Shumo and his colleagues received legal assistance from the Legal and Human Rights Centre (LHRC) merits comment on the role of NGOs in supporting or undermining pastoral land rights (see Tenga 2011; Hodgson 2011; Igoe 2003; Hesse and Odhiambo 2002; DCI 2005). Founded and registered in 1995, the broad objective of LHRC is to create legal and human rights awareness and empowerment among the general public and, in particular, underprivileged sections of society, through legal and civic education, advocacy, research, follow-up of human rights abuses and provision of legal aid. LHRC has a long history in Kiteto District. In 2001 it provided training in the district on environmental policy and legislation. It has additionally trained paralegals (among them, Mr Nyoki) to provide legal *advice* (not representation) and monitor human rights violations. Finally, it has trained Village Land Committees on national land policy and legislation. It is but one of many NGOs in Tanzania

[28] *Nipashe*, 2 December 2011.

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concerned with land rights for indigenous populations.[29] Interviews with LHRC staff revealed that their involvement in the Murtangos case stemmed from reports by none other than Mr Nyoki that human rights abuses were taking place in the forcible eviction of farmers from their land by the KDC. And though LHRC in this instance supported farmers against pastoralists, it was also LHRC that defended the pastoralists evicted from Ihefu Valley in south-western Tanzania – who lost their livestock (and thus livelihoods) on the long march to Lindi Region in the far east of the country – in their criminal suit against the state.[30]

CONCLUSION

Previous studies have shown that local people in Tanzania are generally not in favour of using the court system to access their rights.[31] There is a general reluctance to involve 'outsiders' – state representatives, for example – in local conflicts. As evidenced in these two cases, it involves considerably higher costs, both in time and money, to seek redress through the courts rather than by resorting to local traditional or government authorities at the village or ward levels. There is, moreover, a common belief that people from outside will fail to identify solutions that will be considered legitimate by all the parties so that peace may be re-established. And, very importantly, there is also a fear of corruption and partiality when external government officials are involved (the High Court judge in the Murtangos case, for example).

However, these two cases allow some hope: at two different levels of the judiciary, the courts found in favour of pastoralists' claims to land and ruled against the claims made by invading farmers. Notably, in neither case was the lawsuit initiated by those whose land was being illegally grabbed, and who could lay persuasive claim to being indigenous to those areas. Together, these cases illustrate a pattern where courts are being misused to acquire institutional legitimacy for what amounts to theft of others' land. Consider it property laundering, if you will. When legitimate channels are closed, initiating a lawsuit against someone who has few means at their disposal to defend their rights can prove a roundabout way of securing legal imprimatur for a land grab. For if the defendants are outspent, out-lawyered, and out-lasted, the court may have no choice but to find in favour of the plaintiff, thus granting legally recognized claim to a land grabber. The poor typically cannot afford to press their claims in court and, if they cannot attend to make or defend their case, they almost always lose.

What all this illustrates is that triumph in the court system – so long denied pastoralists – has not brought with it material compensation for damages and losses, which pose real hardships for those affected. And though in winning its

[29]Other key NGO players are Oxfam, SNV (Netherlands Development Organization), Concern and Trocaire (both Irish NGOs); and KINNAPA (a Kiteto community-based organization), Pastoralists Indigenous NGOs (PINGOs Forum), Tanzania Pastoralist and Hunter-Gatherer Organization (TAPHGO), Community Research and Development Services (CORDS).

[30]Interviews with LHRC staff, 28 October 2011 and 8 June 2012.

[31]For example, Odgaard and Maganga 1994; Odgaard 2005.

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case Lesoit retained both its land and its legitimacy, every month brings with it new cases of invasion by farmers. Their neighbours to the south, to the east, and to the north have all run out of land and look with envy upon the sparsely populated terrain of Lesoit.

Lesoit was doubly affected by these two cases since its leaders not only had to ask their fellow villagers to assist with the costs of their frequent trips to Simanjiro to respond to Rashidi Kiboma's suit and to pay for half the costs of the tribunal's site visit, but they then had to return to villagers for another, even greater, collection of funds to support the Emboley Murtangos evictions (which are still stalled as of the writing of this essay). In a letter dated 12 December 2011 addressed to the Lesoit Village Chairman, the Kiteto District Executive Director wrote:

> Re: Permit to Collect Shs3,000,000/= to Further the Operation to Evict Invaders in the Emborley Murtangos Reserve
>
> 1.0 The Kiteto District Council is pleased to inform you that it won its appeal No. 58/2011 that it lodged in the Court of Appeal (DSM) to challenge the High Court (Land Division) decision recognizing invaders' ownership of land in the Emborley Murtangos reserve and requiring the Council to pay Tsh1,000,000,000/= in compensation.
> 2.0 Thus the Court of Appeal nullified the decision of the High Court and additionally ordered the invaders to vacate the Emborley Murtangos reserve land immediately.
> 3.0 In order to implement the eviction of the invaders from the reserve land the Council needs to receive 3,000,000/= [US$2,000] from your village.
> 4.0 The process for collecting these funds is:
> (d) Wealthy pastoralists to be charged Shs400,000/= [US$267]
> (e) Middle-tier pastoralists to be charged Shs100,000/= [US$67]
> (f) Low-tier pastoralists to be charged Shs50,000/= [US$33]
>
> Furthermore every contributor should be issued a receipt and ... deposits should be made every Friday with the completion of the collection to occur by 30 December 2011.[32]

There is no simple or once-and-for-all solution to the land problems in Tanzania, and the government faces many challenges in terms of fair and transparent implementation of the Land Acts and in combating corruption. But the state cannot be unilaterally cast as the oppressor of indigenous minorities, even if the long record outlined earlier in this essay would seem to support that assertion. For does not the Kiteto District Council also constitute 'the state'? And the Simanjiro Tribunal Chairman who diligently determined a just outcome in the Lesoit case? And the District Council attorney who drafted Lesoit's final submission in English? The situation on the ground is not reducible to rhetorical binaries such as 'state vs society' that permeate popular and scholarly literature. Rather, what these cases reveal so well is the fractured nature of the state that, like many institutions, is characterized by competing and contradictory tendencies: some furthering social good and others furthering personal gain.

[32]'Kumb.Na.HMW/KY/EL/E/09/35, 12/12/2011 from Jane K. Mutagurwa, District Executive Director, Kiteto, to Village Chairman, Lesoit Village'. Translated from Swahili by K. Askew.

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Legal reform in Tanzania, with the 1999 Land Acts and 2002 reform of the apparatus for dealing with land disputes, may have succeeded in placing limits on, even obstacles to, the ability of those with means to amass and hoard large tracts of land, but land grabbers have worked out an effective strategy for bypassing them. Still, persistent pursuit of indigenous rights within judicial settings has, after more than a century of consistent failure, finally begun to yield fruit. This can be attributed in part to mobilization of and by local and international NGOs, to increased education and networking in and by indigenous communities, and to the ideal enshrined in the Tanzanian constitution that all Tanzanians have a right to land and to a livelihood.

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ABSTRACT

Through a comparative analysis of two recent Tanzanian lawsuits concerning pastoralist–farmer disputes over land, this article argues that the judicial system is being employed as a vehicle for legitimizing dispossession. Wealthy elites who find their efforts to acquire vast tracts of land thwarted by protective mechanisms in the Land Act No. 4 of 1999 and Village Land Act No. 5 of 1999 are turning to the courts to get what they want. Having access to deeper pockets and being able to out-lawyer and out-manoeuvre their poorer and often less-educated opponents enables elites (including the government itself) to avail themselves of the judicial system and acquire land through illegitimate means. Yet our analysis also illustrates that Tanzanian courts at times act independently of political influence and secure property rights for at least some of the dispossessed. An unusual mix of conflicting pressures and key personalities in these two cases coalesced to produce unexpected outcomes in favour of the Maasai defendants, whose land and legitimacy were on the line. Winning, however, came at considerable cost.

RÉSUMÉ

À partir de l'analyse comparative de deux procès récents liés à des litiges fonciers entre pasteurs et agriculteurs en Tanzanie, cet article soutient que le système judiciaire est utilisé comme un moyen de légitimer la dépossession. Les riches élites qui voient leurs efforts d'acquérir de vastes étendues de terres contrecarrés par les mécanismes de protection prévus par la loi Land Act No. 4 de 1999 et la loi Village Land Act No. 5 de 1999 se tournent vers les tribunaux pour obtenir ce qu'ils veulent. Parce qu'elles ont à leur disposition plus de ressources, d'avocats et de combines que leurs adversaires plus pauvres et souvent moins instruits, les élites (y compris le gouvernement lui-même) peuvent se servir du système judiciaire pour acquérir des terres par des moyens illégitimes. Pourtant, notre analyse montre également qu'il arrive aux tribunaux tanzaniens d'agir indépendamment des influences politiques et de défendre les droits fonciers d'au moins une partie des dépossédés. Dans ces deux procès, un alliage inhabituel de pressions divergentes et de personnalités clés a œuvré, contre toute attente, en faveur des défendeurs maasaï dont les terres et la légitimité étaient en jeu. Cette victoire n'a cependant pas été sans prix.

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