

# Reforming Land Tenure In Tanzania: For Whose Benefit?

By William Olenasha

*Land to the ordinary African is equivalent to the market share to a Western Company. It also plays an important social function. The entire life of an average African revolves around land... Yet there is widespread lack of access to land due to bad governance practices. Land policy and land tenure practices in Africa have always pitted against the poor (Hansengule: 2000)*

## 1. Introduction

Major reforms in land tenure have been ongoing in Tanzania for the last fifteen years<sup>1</sup>. These reforms are unmatched by any previous reforms in land tenure in the history of the country. Ever since the British Colonial Administrators enacted the Land Tenure Ordinance of 1923, there has not been any significant reform in land law and policy until the ongoing reforms. The present reforms began with the appointment and works of the highly celebrated Presidential Commission of Inquiry into Land Matters (the Commission). The works of the Commission led to the formulation of the National Land Policy, 1995 (the Land Policy) which paved the way for the enactment of two major pieces of legislations-the Land and Village Land Acts, 1999(Acts No 4 and 5 respectively). The Land Act has been amended in 2004<sup>2</sup>. There have been other significant administrative developments relevant to land tenure such as the issue of the Land Bank and its administration by Tanzania Investment Centre (TIC).

The reasons for the ongoing reforms are many, depending on who is giving them. For the government, the subject reforms have been undertaken to, among others, resolve problems that existed in the old land regime and to eradicate poverty and foster development by ensuring maximum production utilising land resources<sup>3</sup>. These are connected with the sweeping forces of neo-liberal economic and political ideals that bank on privatisation, commercialisation, capital, commoditisation and modernisation of land and other natural resources.

This study aims at situating reforms in land within the broader context of the ongoing economic, political and social transformations currently taking place in the country. These are analysed with the broader objective of seeing, how and whether the interests of the poor are compromised or protected.

The study divides into different sections and subsections, which reinforce one another. The real focus of the study is the land tenure reforms, which have been taking place during the last fifteen years. That focus, is, however, prefaced, albeit very briefly, with a historical conspectus regarding land tenure. The works of the

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<sup>1</sup> This is not peculiar to Tanzania. The 1990's had witnessed an upsurge of land tenure reforms in Africa.

<sup>2</sup> By The Land (Amendment) Act, 2004

<sup>3</sup> The reasons for the said reforms are detailed in the Land Policy, 1995

Commission are dealt with at length, since, it is the only document that we know to have systematically collected and documented the grievances of the poor and made them public. Although the Land Policy disappointingly declined to take on board the recommendations of the Commission to a large extent, it is still an important document, since the new legislations in land are premised in its objectives and directions. The new land laws will also be dealt with, but much attention is paid to the Village Land Act, which deals with the land under the ownership of small producers, peasants and pastoralists. The amendments of the Land (Amendment) Act, 2004 is discussed at length, looking on the implications of permitting the sale of bare land and the promotion of the use of the land of the poor as collateral. Issues surrounding the introduction of the so-called Land Bank will also be explored. Recommendations are given towards the very end, the idea being that the chapter on reforms of land is not closed and debating land tenure matters should continue being the focus of land rights institutions.

## **2. Land Tenure Arrangements in Tanzania: A historical Overview**

The making and shaping of our land law regime is a product of colonialism, among other factors. It has its roots in the history of the different colonial masters that the country has been under. These are no other than the German and British colonial administrations. Nothing can be said about our present land tenure regime without a proper articulation of the history behind its formation.

### **2.1 The German Period**

The promulgation of the famous Imperial Decree of 26<sup>th</sup> November 1895 set in motion the philosophy of land ownership under German rule (presidential Commission Report, 1994). According to the subject piece of legislation, all lands whether occupied or not, were treated as crown lands. There was however an exception to this general rule in situations where private persons or communities could prove ownership. Private persons could prove ownership by documentary evidence while traditional communities could prove the same through use and occupation.

The crown therefore obtained radical title, merging property and sovereignty. Settler's ownership was recognised, that of traditional users was considered unowned and at best permissive.

Considering traditional lands as un-reflects with the prime objective of colonial empire, which was exploitative in orientation. Giving the sovereign unchecked powers over land meant that it could alienate land for exploitation at will without any legal hurdles<sup>4</sup>. In fact, merging sovereignty and property is a relic of the feudal era,

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<sup>4</sup> As a result of this policy lands amounting to 1,3 million hectares highlands and the coast were alienated to immigrants by German Colonial Administrators

where it was inconceivable to think of the feudal lord without land and subjects-the tenants.

As will be seen later, this philosophy re land continued largely unperturbed throughout British Colonialism and continues to regulate the practice and thinking regarding land tenure in 21<sup>st</sup> Century Tanzania.

## 2.2. The British Period

The British retained the basic principles of land tenure that were put into place by the Germans. There were however a few modifications, which were a result of Tanganyika being under the trusteeship of the League of Nations and Britain's own colonial production policy. The British also, unlike their German counterparts, managed to come up with a framework legislation regulating land tenure. The Land Tenure Ordinance (herein Land Ordinance) declared all lands to be public lands *"under the control and subject to the disposition of the Governor to be held and no title to the occupation and use of any such lands shall be valid without the consent of the Governor"* (Shivji, 1998)<sup>5</sup>. A proviso to the above section safeguarded rights in land that were legally acquired before the coming into force of the Land Ordinance. It is not clear whether customary titles were safeguarded by the said proviso, but it appears seem that the interest was to recognise and safeguard interests and titles to lands which were granted to immigrants and settlers during the German period.

The Land Ordinance in its preamble signalled a new philosophy re land tenure:

WHEREAS it is expedient that the existing customary rights of the natives of the Tanganyika Territory to use and enjoy the land of the Territory and the natural fruits thereof, in sufficient quantity to enable them, to provide for the sustenance of themselves their families and their prosperity should be assured and preserved:

AND WHEREAS it is expedient that existing native customs with regard to the use and occupation of land should as far as possible be preserved:

AND WHEREAS it is expedient that the rights and obligations of cultivators or other persons claiming to have on an interests in such lands should be defined bylaw

It is said in the above preamble that administrative decisions in relation to natural resources shall take into account native laws and customs and that they should safeguard the interest of present and future generations. These preambular declarations, which do not have the force of law, did not repeat themselves in the provisions of the Ordinance.

By the said ordinance, all lands were declared public lands. This notwithstanding, rights and interests in land that were acquired before the commencement of the ordinance were recognised. This will seem to refer to granted rights of occupancy that

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<sup>5</sup> Sections 2 and 3 of the Land Ordinance, 1923.

were issued during the German period and those acquired during the British period before the commencement of the ordinance. It is not certain whether customary rights to land that existed before the advent of colonialism were also saved by the said proviso.

A major change however, happened in 1928, when the Land Ordinance was amended to recognise customary law titles. The definition of the rights of occupancy was extended to include “the title of a native or a native community lawfully using or occupying land in accordance with the native law and custom”.

It has become a moot issue over time whether statutory recognition of customary law titles had in fact given it them the same status as granted rights of occupancy. Throughout history, every other judicial decision that has been given in this regard, has shown that the two do not enjoy the same status. The reason for this inequality has to do with the fact that owning land under the customary law arrangement does not make sense to formal property concepts of the West. This reality is expressed in no better terms by an opinion rendered by the British Foreign office in 1899:

*“ Sovereignty, if it can be said at all in regard to territory, is held by small chiefs, or elders, who practically savages, and who exercise a precarious role over tribes which have not as yet developed either an administrative or a legislative system, even the idea of tribal ownership in land is unknown. The occupation of ground in which a season’s crops have been sown, or where cattle are for the moment grazing, furnishes the nearest approach to private property; but in this case, the idea of ownership is probably connected with the crops and the cattle, then with the land temporarily occupied by them”*(in Tarayia, 2004).

Dispossession of lands were therefore motivated by the thought that Africans were savages, with no government, among other reasons (Tarayia, 2004, Hansengule, 2004, Odenda, 2004).

The controversy surrounding the nature and status of customary titles is not even clear in judicial pronouncements of the courts in independent Tanzania. It has been frustratingly difficult for customary landowners to prove their ownership in the presence of very unsympathetic courts. In *Yorke Gwaku and Give Others Vs National Agricultural and Food Corporation*<sup>6</sup> the court was even shamelessly struggling to decide on whether the Barbaigs are citizens of Tanzania. In the end, it had to take a ‘radical’ judicial notice to conclude that they are. It held that the villagers:

*“... are members of the Barbaig tribe who are acknowledge to be one of the African tribes in Tanzania, even though there was no evidence that they are citizens of Tanzania. I therefore take judicial notice, in the absence of evidence to the contrary, that they are also citizens of the United Republic and hence natives within the meaning of the term under the Land Ordinance”*

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<sup>6</sup> Civil Case No 52 of 1988 High Court (Arusha Registry)

In *Lekengere Faru Parutu Kamunyu Vs the Minister of Tourism and Natural Resources and 2 others*, customary law ownership to the land by the Maasai was refused, simply because they were not the first inhabitants of the place.

*“ We now come to substantive points, and we begin by considering whether the Maasai community of which the appellants are members, had an ancestral customary land title over the whole of Mkomazi Game Reserve. We have carefully considered the indisputable surrounding circumstances, which gave rise to this case, and it is apparent that the Maasai community or tribe in question was not the first tribe to arrive in the geographical area, which is the subject of this case. It is apparent that the Maasai were new arrivals in the areas, preceded by other tribes...”*

The effect of not respecting and recognising customary titles meant that the British could, and in fact, did alienate lands, making Africans, remain tenants of the crown, at will.

The effect of declaring land to be public lands does not have a sufficient explanation in law. In fact it would seem that it was just an administrative summersault to legitimatise dispossession of African lands. Because lands are public and further because customary titles to land do not enjoy the same status as granted rights of occupancy, it means that the British colonial estate could implement its economic objectives without impediments. Merging property and sovereignty in land, through the exercise of radical title, was the best way to exploit and plunder the natural resources of the Tanganyika colony.

As will be seen, the philosophy regarding land tenure did not change during the independence period and after.

### **2.3 Independence and After: 1961-1991**

The independence period had nothing to offer in land tenure arrangements. So whereas Tanganyika obtained political independence in 1961, it does not seem that the Majority of Tanganyikans obtained independence in respect of their land.

For matters related to land tenure, there were few changes; all the independent government did was a little replacement of words. Common among these, is the replacement of the word governor with President in the Land Ordinance. In fact the independence government never managed to have an elaborate policy in respect of land tenure<sup>7</sup>.

It is not clear why the independent government, with such energy and zeal for social, economic and political reforms, did not find logic to carry radical reforms in the regulation of this important resource. Perhaps, it is because, inheriting the colonial direction was good and practical for a government that wanted to control the

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<sup>7</sup> Only in areas of freehold tenure, semi-feudal tenure (known in some circles as Nyarubanja) and Lord-Tenant relationships –for detailed discussion on this refer to the Report of Presidential Commission of Inquiry, 12

economy and resources connected therewith. One can however reason against this argument because, if the government wanted to control this important resource, it could have easily nationalised it, as it did for other major factors of production.

The only major reform that can be said to have taken place during this period is the abolition of freeholds. The abolition of this system of land ownership was spearheaded by Nyerere's own philosophy of land tenure. In one of his writings Mwl. Nyerere observed that:

*“ The TANU government must go back to the traditional African custom of land holding. That is to say, a member of society will be entitled to a piece of land on condition that he uses it. Unconditional or ‘freehold’; ownership of land (which leads to speculation and parasitism) must be abolished (Quoted from Tanzania Vol I 1994: 17)*

That thinking laid the foundation for the adoption of government paper No. 2 of 1962-Proposals for the Tanganyika Government for Land Tenure Reform. The reforms dealt with two important issues, the conversion of freeholds existing hitherto to government leases and the abolition of the feudal systems of land ownership that were existing in different forms (famous among them being the Nyarubanja system), in the West Lake Region (Tanzania Vol, 1994: 17)

There has not been any other important policy direction in land to impact on land tenure. There have just been a few administrative arrangements in the management of land, but which, did not modify the existing tenurial arrangement.

### **3. Major Reforms in Land: The Appointment of the Presidential Commission of Inquiry**

#### **3.1 The Commission and its works**

Reforms in land law and policy of the 1990's and beyond started with the appointment of the Presidential Commission of Inquiry into Land Matters (popularly also known by the name of its famous Chairman-Issa Shivji). The Commission was appointed into in January 1991 and its mandate was detailed in the following terms of reference:

- To hear complains from the general public concerning land and plots in the rural areas and urban centres and to make recommendations for solutions thereto;
- To identify the basic causes of land disputes and to propose remedial measures for solving the same and recommend ways and means, including the establishment of machinery and procedures for settling land disputes;
- To analyse the functions, jurisdiction and organisation structures of institutions involved in land matters, its allocation and development, and in the settlement of land disputes with a view to identifying any deficiencies and problems of overlapping of powers and to recommend

clear demarcation of the jurisdiction on the existing organs; demarcation of the jurisdiction on the existing organs;

- To review matters of land policy/land laws currently in force concerning allocations of land and recommend changes thereto wherever necessary;
- To look into any other matters and issues connected with land which the Commission deems fit for investigation.

To carry out the enormous amount of tasks, the commission visited all regions in Mainland Tanzania and all districts, except two (Tanzania Vol 1, 1994:13):

The Commission's works have dealt with those issues at length and submitted voluminous reports of the evidence and the outcry of the local populace on the different problems in respect of land tenure, countrywide. The Commission had given a set of detailed recommendations to the president. For want of space we only mention some in passing, while expounding some, which we think, are immediately relevant to the objects of this study.

### **3.1.1 National Land Policy**

Tanzania has never had a national land policy prior to 1995. Lack of policy has meant that the nation did not have a clear roadmap to guide land tenure issues. The land tenure system was either influenced by broad statements of social and philosophical vision or left to work out itself pragmatically in the course of implementing broad social policy" (Report 136). Leaving discretion, vision and pragmatism to dictate land tenure arrangements led to acute problems in land tenure. It is because of this that the Commission opined that it was useful to have a land policy. The Presidential Commission made it explicit in its recommendations that:

*"We have no doubt in our minds that there is a great need in the country for a national land policy focussing on land tenure systems. We are fortified in this belief by the enormous amount of evidence we received on land problems which can be directly or indirectly traced to the lack of national policy"*(Tanzania Vol I, 1994: 136).

Then Commission then gave recommendations of what should be the principles of a land policy. Some of the recommended principles include:

- Land tenure systems should facilitate the generation, accumulation and investment of capital within the rural agrarian and pastoral sector.
- Villages should be self-governing units in which all adult members of the village fully participate in the administration of land matters through their village assemblies
- Use of land and pastoral communities for attaining food self-sufficiency and production of surpluses for domestic and export market is the principle basis of the land tenure system.
- Whereas national lands may be excised and merged in village lands, village lands subject to exceptions expressly provided in law, should not be excised and integrated in national lands.

- The land tenure system is based on multiple land regimes all existing side by side and none of which should be considered superior to the other and interests under all of them should enjoy equal security of tenure under the law.
- In all forms of land tenure regimes, security of tenure is depended on use and occupation.

### **3.1.2 Land Tenure Structure**

The commission also dealt at length with matters related to security of tenure. We will not go into details on all the recommendations, but we will just touch on a few.

#### **3.1.2 .1 Land to be a constitutional Category**

The Commission recommended that land becomes a constitutional category and specific chapter in the constitution be set aside for this factor. This chapter should include the fundamental principles of land tenure as well as putting in place the different organs mandated with issues of land tenure. Making land a constitutional category has some obvious advantages, over and above placing the same under ordinary law (Tanzania Vol I 1994: Chapter 15).

One, placing land under a constitutional arrangement will give it the legitimacy and profile it deserves (Shivji 1998: 46). Second, making land a constitutional category will protect it from the short-term political expediencies. Thirdly, placing matters related to land the Constitution will ensure public participating in any potential amendments, since “Constitutional changes usually attract greater attention and public debate” (Shivji: 1998:46). Fourthly, the Commission hoped that making land a constitutional category would link to the ongoing debates on a new constitutional order and democratisation. This would have placed matters of land tenure in the debate of democracy (Shivji 1998: 46)

#### **3.4.2 Declaration, Defining ad Vesting**

The Commission went on to propose changes of institutions that are mandated with the powers of holding lands in Trust and on behalf of all Tanzanians. In respect of this, the existing arrangement was such that all lands are public held in trust by the President for and behalf of all Tanzanians.

The Commission was of the opinion that vesting lands under the executive is dangerous, and, does not serve well democratic principles in land tenure. The Commission recommended that all lands be declared either National Lands or Village lands. It further went on to recommend that the National Land Commission (NLC) manage national lands. The actual day-to-day governance was proposed to be given to the Board of Land Commissioners (BLC).

In respect of village lands, the Commission recommended that they should be under the control and management of village assemblies. The idea was that village Assemblies are the most democratic avenues where important matters like land are discussed. Just by virtue of the fact that the assembly is made of all adult members of the respective village, then it safe to place decision-making powers regarding land to the majority. This is quite different from the previous arrangement where it is the Village Councils, composed of relatively few individuals, up to 25 people, who make many decisions on this important resource.

There are many other recommendations that were made by the Commission, but as, will be seen, only few of them were taken on board in the Land Policy and subsequent land legislation.

#### **4. The National Land Policy, 1995**

The Commission had suggested for the making of a compressive land policy. It went further to give detailed recommendations on what should be the fundamental tenets of the proposed policy. Following the completion and submission of the works of the Commission, the government came up with a land policy. While many people expected that the policy, would have incorporated recommendations emanating from massive evidence of the outcry in malpractices in land which were generated during the work of the Commission, to the dismay of many, the document retained in principle, all hitherto existing problematic areas in land tenure.

The reasons that necessitated the making of a land policy include:

- The increase of population
- The increase of livestock numbers
- More demand for agricultural land
- Growth and expansions of town necessitating demand for more land for settlements, industries and business
- Conflicts between farmers and pastoralists
- More demand of land for investment as a result of favourable investment policies
- Growth of land markets in and outside urban centres and the need for the government to benefit from transactions in land
- Recent decisions of the Court of Appeal which has given explicit legal recognition to customary law titles as a valid form of land occupancy
- Liberalisation of politics and the economy

The making of the policy was also done without sufficient participation of the people. This, with the utter disregard of the Commission's recommendations, is responsible for coming with a policy that does address the problems of land tenure in Tanzania. One wonders even whether the government read the

recommendations of the Commission. In fact, it is even known that the drafting of the policy was being undertaken parallel to the work of the Commission. The making of the policy, was undertaken by American Consultants<sup>8</sup>(as if Tanzania had no experts to draft their own National Land Policy). The theme that ran through the works of the Commission, was non participation of the citizens in important decisions pertaining to their land, the making of the national land policy ignore this important tenet of democracy. The Commission had observed that:

*“ The central focus of a large majority of complaints received by the Commission in rural areas was that the villagers concerned had not been involved or had not participated in the decision complained against. Hatukushirikishwa(“we were not involved”) was the constant cry”(Tanzania Vol I 1994: 94).*

Non participation in the making of the policy, had even taken place, when the then president elect, Mr William Benjamin Mkapa had made a solemn pledge that the policy would be open to public debate. In one of his post –elections interviews, the President made it explicit that:

*“ The land administration of these second phase government reached a decision to conclude a land policy. It has yet to be further enriched by substantial public discussion and then, parliamentary approval...(in Kapinga, 1996:4)*

The arrogance of the government in doing away with the right to participation is responsible for bringing a national policy that compromises the interests of poor people of this country. Below we try to expose the product of non-participation and total disregard of the efforts of the Commission of putting in place a democratic and pro-poor land tenure system.

#### **4.1 Land as a Constitutional Category**

The Government has taken on board the Commissions recommendation of making land a Constitutional category. Despite this, the long waited constitutional amendments to honour this important task are yet to take place, close to ten years, after the Policy became operational in 1995. Besides the nominal acceptance of the recommendation of the Commission, matters that are proposed to be entrenched in the Constitution are far less in weight, compared to those that were proposed by the Commission. The policy recommends the following to be entrenched in the Constitution:

- All lands in the country are public lands and have been entrusted to the President as a trustee on behalf of all Tanzanians.

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<sup>8</sup> “Step toe and Johnson were hired in February 1994 and Another American Consultancy Company, Tropical Research and Development, Inc (TR&D), is September (in Shivji, 1998: 71 fn 30)

- Land has value
- Rights on ownership and interests in land should not be extinguished without having recourse to the laws of the land.
- Real and fair Compensation will be given to an owner of land whose land is taken by the government.

While the matters that have been prioritised in the policy are important, we think there are issues that should have been included. Entrenching the concept that land has value can obviously be substituted by more important provisions like the ones related to the recognition of multiple land regimes and of occupancy being depended on use and occupation.

#### 4.2 Radical Title

As has been stated elsewhere in this study, our land tenure arrangement merges property and sovereignty, making the state the landlord and the citizens tenants at will. The Land Policy reiterates that the system of radical title, which has been inherited from the colonial estate, is fundamentally sound and thus accepted with a few modifications (Tanzania, 1995 Clause 4.1.0). This is however a blank statement as there is no justification for such finding (Shivji, 1996). The policy continues to vest lands under the trusteeship of the President and thus perpetuates the radical title. This does not however:

*Forcefully or otherwise stipulate that the president and his delegates also bear fiduciary duties towards the citizens of Tanzania as beneficiaries and for which they can be held legally accountable. Here, once again, is the repetition of the classical colonial and post-colonial mode of law making where the exercise of power by the state and its functionaries is legally entrenched while their duties and responsibilities (which means the right of citizens) are left to administrative and political goodwill (the legal equivalent is sometimes expressed in the phrase good faith (Shivji, 1996: Footnote 6 at P 5)*

The trust that was created in the radical title, which has not been changed by the policy, is not a legal trust but a political one. The Commission is clear on this when it observed that:

*“ We are aware that the use of term ‘trust’ was common during colonial era where land was vested in the state or some state-controlled (or in other places, for example, Kenya settler-controlled) organ. Colonial courts interpreted this trust to mean only a political and not a legal trust. Such interpretation was convenient to the colonial administration, which balked at the prospect of issues of massive land alienation in favour of foreign settlers and interests being dragged into the public glare through litigation (Report, 147).*

If the intention of the policy was to create a legal trust, then the president or his delegates should have been incorporated to be able to be held legally liable when they abuse their fiduciary relation (Shivji, 1996).

Related to the issue of radical title, is the power of the President to alienate lands for public interest. Public interest is not sufficiently defined save for the indication that public interest can mean development projects, which includes investment. This is

again a dangerous tenet that has been maintained by the reforms in land tenure. Under this arrangement, the president can revoke and acquire lands and dispose them as he deems fit, for whatever reasons, which in his/her opinion can fall under the so-called public interest. When land is acquired and disposed in respect of village lands for example, then consultation and consent of the village council is sought. The consent here is not absolute as, one, the consent of the Village council does not amount to that of the whole village. And, secondly, it is inconceivable for a village council to refuse a directive from the President (the radical land lord) or his delegates (as is the case with the District Councils). Vesting ultimate ownership and control of village lands to village assemblies, which was proposed by the Commission, was meant, among other things, at democratising decisions in land, by placing same under a body that is comprised of large corpus of village occupants.

The real reasons for throwing the Commissions recommendations on divesting the radical title have not been made explicit, but it can be inferred from various pronouncements of bureaucrats in government. In one these it was said:

*“The President as Head of State is responsible for the development of the country and the well being of the people, and land being an important element for development has to be controlled by the President. If land is vested in (the) Board of Land Commissioners and the Village Assemblies, then the government will be turned into a beggar for land when required for development. Instead of simply acquiring land for public purpose under the land Acquisition Act, the government will now be required to apply to the Board of Land Commissioners. In the villages, the government is an outsider and can only be given land of not more than three acres at a time for less than ten years. The government will not implement its policies in that way. The investment promotion policy will be impossible to implement when the government does not have a say in land matters. Land has to remain in the hands of the government –The Commission has not given enough reasons for the departure (Quoted in Shivji, 1998:81)*

The above way of thinking sums up the fear that the government has in undertaking major reforms in land. What it simply says is the fact that the government is afraid of democratising tenure, and is happy holding all powers in respect of management and control of power. The government, in this sense, still struggling to come to terms with the fact that, land has always remained the property of local the communities, it is only colonisation that has given its control to the state.

The fear is of course unjustified since the Board of Land Commissioners was proposed to be appointed by the President, and its unlikely that his appointees will let him down when he has a justified course for demanding land. As regards, to village lands, the President has not been robbed of his powers completely, he could still acquire lands, but this time the suggestion was that it should not be arbitrary.

Then too, the above statement is more important in shading lights on what is the real fear of the government in relinquishing powers on land. The fear lies in the fact that the government will not be accessing lands for foreign investment and bureaucrats loose opportunities of corruption in the giving away of the subject lands. The reasoning is of course flawed again given the fact, if foreign investment was a good thing, then villagers and other citizens, will be ready to welcome it to be exercised in

their lands. Perhaps, foreign investment, which is also centrally monitored, is tainted with imperfections. The reality is, people are worried to give their lands for the same. The Government has to use its administrative muscle to assure its availability. Professor Shivji, cannot be more clear on this when he writes:

*“ The policy rationalisation here and throughout the policy document is case in an uneasy blend of an inherited mode of authoritarian modernisation from the top, and the current orientation of liberalisation, marketisation and privatisation, all driven by the perceived need to promote foreign investment). The notion that the powers of the top bureaucracy should be circumscribed by having to go through consultations and applications to independent boards, or course still, grassroots Village Assemblies, is simply unacceptable in this developmentalist rhetoric (Shivji, 1998: 81*

### **4.3 Land Management and Administration**

Another important facet of the corpus of the national land policy is the retention of a centralised and bureaucratised management and administration of land. One of the most important findings of the Commission was that vesting power of administration and management to few bureaucrats and where indeed that power being known to have been abused is a cancer that should be done away with (Shivji, 1997). This important observation has blatantly been ignored by the same system that was using the discrepancy for the benefit of the few, who wield power. The land policy makes a few statements that are considered cardinal in retaining the hitherto existing status quo:

- (i) The Commissioner for Lands shall be the sole authority responsible for land administration
- (ii) The Commissioner will appoint officers who will have authority to administer land other than village land at the appropriate levels of government
- (iii) Village Councils shall administer village lands but will be required to report all decisions on land allocation to the village Assemblies
- (iv) The procedures and powers of the appointed officers will be defined by the Minister and shall include the execution of decisions made by village councils with respect to village land administration

A few things can be said about the above provisions, which have also found themselves into the new land laws. The vesting of powers of management and control of village land to Village Councils has signalled some degrees of decentralisation, but has by no means given meaningful devolution. The Commissioner for Lands, through Districts Councils, is still stretching his arms to the village lands. At best, the Village Council is the representative of the Commissioner at the village level. The Policy makes it categorical that the Commissioner can advise Village Councils and that latter should have regard to that advice (Land Policy, 1995: Clause 4.2.2)

The policy has belatedly vested the administration of the village lands to Village Council's that are supposed to report to Village Assemblies. The practice however in many villages is that Village Councils have a lot of decision making powers and in situation where many villages are illiterate and people making up the councils are

literate, they will normally use all means available, including coercion, to make sure that their decisions prevail. There has not been any cogent evidence to suggest that Village Assemblies, can, in fact, depart from decisions of the Village Councils. In fact, not many people are aware that the Village Assembly can overturn those decisions.

The reason that can be given for giving the village Councils control instead of vesting the same to the Assembly is because the council meets more regularly while the Assembly meets only thrice a year. Giving decision-making powers to the Assembly will delay decisions in land. The counter argument for this lies in the fact that transactions in land should not be done in a hurry and casual manner.

Then too, the Secretary and Chairman of the Village Assembly also happen to be same people who hold same positions in the village Council. They will thus use their position to make sure that their decisions are not contradicted. Besides the Village Executive Officer is a person with a lot of powers (like those of arrest) and weak villagers will be afraid to contradict his/her decisions. Village Councils are legal persons and are therefore in a stronger legal position compared to the assemblies, which do not have the legal capacity to own property.

#### **4.4 Use of land productively and sustainable development**

Productive use of land and sustainable development are not defined in the policy making us speculate as to what this means. There are forms of land use that are not considered productive and sustainable. It has become common discourse in land use paradigms to consider activities like pastoralism not to be productive and at best not sustainable. Some parties consider pastoralism to be an archaic way of doing business and destructive to the environment. The policy makes it imperative that one of the long-term objectives of the land policy is to prohibit nomadic pastoralism and shifting cultivation. A land policy with provisions of this nature that undermines livelihoods like pastoralism is counterproductive. The net effect of these mindsets is the fact in the location of land to different uses will favour activities that are considered productive and sustainable by policy makers. This way of thinking is flawed and has failed to find sense in the productivity and sustainability of pastoralism. It also fails to appreciate the fact that mobility (which the policy wants to prohibit) is the best way of utilising seasonably varying resources in fragile lands and climates. It is outright impossible to think of pastoralism without mobility and it does not therefore make sense for the policy to purport to protect the interest of pastoralism in a situation where it is not respected in the first place.

#### **4.5 The Value of Land**

It is one of the principles of the policy that an interest in land has value and shall be taken into account in any transaction in land. The policy does not define this but from the already existing jurisprudence, it would seem that, what is referred by value is the

use and occupation as derived from the right of occupancy concept. This means that land can only have value if and when it is developed. For this therefore, the policy does not introduce anything new. One of the conditions of the grant of the right of occupancy is that the occupier develops the same land and failure to do so will necessitate revocation of right of occupancy. This means that bare land has no value and cannot be disposed, as attempting to do so will invite revocation to the ownership to the potential seller, for failure to develop (Shivji, 1996, 2004). This is even clear from the provision of the policy, which says that ‘though land has value landholder can only transfer the right of occupancy’. This position remains history now, after the amendment to the Land Act (2004) where it is now permissible to sale bare land (See Discussion elsewhere in this study). The policy is therefore in respect of this in opposition to the amendments, since, whereas the policy allows only the transfer the right of occupancy (occupation and use) the amendments allow the transfer of the land (whether or not in occupation and or use). The state as the landlord will have its right to ground rent, but this does not translate into value or exchange value of that land.

The policy, as it would seem, and is evident, has not introduced anything new; it retains all facets of mal administration of land. Prof. Shivji sums up his discussion on the Policy in no unequivocal terms:

*... The Policy document is fundamentally a restatement of the existing land tenure system with all its problems, perspectives and approaches. It could even be described as a manifesto of the Ministry of Lands trying desperately to defend maladministration and abuse of power by rhetorical and hortatory statements of principles while reinforcing existing institutional hierarchies and management styles in its substantive provisions ....(Shivji, 1997, 17)*

## **5. The New land laws**

The passing of the policy paved the way for the enactment of two major pieces of legislations to regulate land tenure, the Land Act (No 4) and the Village Land Act (No. 5), both of 1999. Though the two pieces of legislations were enacted in 1999, they only came into force in May 2001. Originally the two legislations were drafted as one document, but because it was bulky, it had to be broken into two pieces of legislations (Willy, 2003:13). These pieces are still quite bulky despite being separated. They are a little bit peculiar when compared to other legislations we know, since they do not only give the substantive corpus of the law, but also go into details in respect of matters related to procedures. Matters of procedures are normally left to be the subject of different regulations. This bulkiness makes them frustratingly difficult to read. The Village Land Act has been translated into Kiswahili but this does not make it easily understandable to an ordinary reader

Both laws operate under the guidance of what are called the fundamental principles of the Land Policy. Some of these include:

- (a) to Recognise that all land in Tanzania is public land vested in the President as trustee on behalf of all citizens;
- (b) to ensure that existing rights in and recognised long standing occupation or use of land are clarified and secured by the law;
- (c) to facilitate an equitable distribution of and access to land by all citizens;
- (d) to regulate the amount of land that any one person or corporate body may occupy or use;
- (e) To ensure that land is used productively and that any such use complies with the principle of sustainable development
- (f) To take into account that an interest in land has value and that value is taken into consideration in any transaction affecting that interest;
- (g) To pay full, fair and prompt compensation to any person whose right of occupancy or recognised long standing occupation or customary under use of land is revoked or otherwise interfered with to their detriment by the state under this Act or is acquired under the Land Acquisition Act...
- (h) To provide for an efficient effective, economical and transparent system of land administration;
- (i) To enable all citizens to participate in decision making on matters connected with their occupation and use of land;
- (j) Regulate the operation of a market in land so as to ensure that rural and urban small holders and pastoralists are not disadvantaged;
- (k) To set out rules of land law accessibility and in a manner which can be readily understood by all citizens;
- (l) To establish an independent, expeditious and just system for the adjudication of land disputes which will hear and determine cases without delay;
- (m) To encourage the dissemination of information about land administration and land law as provided by this Act through programmes of public awareness using all forms of media.

We herein below try to summarise their salient features. Our focus will however, remain the Village Land Act, since this is where matters related to the tenure of small producers are transacted.

## **5.1 Categorisation of Land**

The Commission had proposed two categories of land-National lands and village lands. The new lands have divided the proposed national lands into what are called general lands and reserve lands. Village lands remain as proposed by the Commission.

Villages Lands are defined as lands declared to be village land under and in accordance with section 4 of the Land Act and include any transfer land to a village<sup>9</sup>.

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<sup>9</sup> Land Act, 1999, section 2

Reserve land is defined to include land reserved, designated or set aside under the provisions of the Forests Ordinance, National Parks Ordinance, Ngorongoro Conservation Ordinance, Wildlife Conservation, Act, The Marine Parks and Reserves Act, Town and Country planning ordinance, Highway Ordinance, Public Recreation and Grounds Ordinance, Land Acquisition Act, land parcel within a natural drainage system, land reserved for public utilities, declared to be hazardous land<sup>10</sup>. The administration of the activities taking place in reserve lands will be under the different authorities responsible for them, but the land remains under the control of the Commissioner for lands and he/she alone can grant right of occupancy in them.

The definition of General land is controversial. According to the Land Act <sup>11</sup>it means all public land, which is not, reserved land or village land **and it includes unoccupied or unused village land**. The village land Act defines the same to be just public land, which is not reserve or village land<sup>12</sup>. It does not include any village land whether occupied or un used. One wonders whether the difference between two acts in the definition of general land is accidental. If it is deliberate then it has serious implications in the administration of those unused or unoccupied lands. The following are some of the possible implications:

One, It is obvious that when there is conflict between provisions of the Land Act and those of other laws, those of the latter will prevail. Section 181 of the Land Act, is unambiguous when it states:

*On and after the commencement of this Act, notwithstanding any other written law to the contrary, this Act shall apply to all mainland Tanzania and any provisions of any other written law applicable to land which conflict or are inconsistent with any of the provisions of this Act shall to the extent of that conflict cease to be applicable to land or any matter connected with land in Mainland Tanzania.*

The obvious implication of that section is that indeed, if a dispute arises on the definition of general lands, when the matter goes to court, and depending on the judge deciding it, it is highly probable that the definition of general land in the Land Act will prevail.

Secondly, if general land includes unused or unoccupied village land, those lands will be under exclusive administration of the Commissioner for Land and the President can alienate it at will, without even having to exercise his powers of acquisition under the Land Acquisition Act, 1967. With the ongoing habit of the Government to embrace foreign investments, these lands would easily be alienated for investment. Village authorities will have no powers over those lands.

Third, it has enormous implications for lands belonging to pastoralists. Pastoralists' lands are normally considered un owned and unused. This is because of their system of transhumance, which rationally uses fragile and seasonably varying resources, by

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<sup>10</sup> Ibid, Section 6

<sup>11</sup> Ibid, Section 2

<sup>12</sup> Village Land Act, Section 2

leaving some areas fallow, while others are on use. The areas that are left unused and to that extent, unoccupied, can easily be categorised as general lands, which the president and his delegates can exercise administration powers on, including giving it out, for investment. Then too, the very fact that pastoralism does not leave permanent marks on the land, as is the case with other activities like farming makes it easy to conclude that their lands are not on use. Further, the government has made it explicit vide the land policy that it will prohibit transhumant pastoralism. This, and the general dislike of pastoralism as an economic system by the policy makers, makes this legal uncertainty an immanent threat to pastoralists' lands.

Fourth, many rural lands can be considered unused and unoccupied. In fact, very little rural land is used or occupied. Many villagers are small holders with the rest of their lands for future expansion. Labelling these general lands will be robbing them of their only security for survival. In fact, it makes the very categorisation of land a futile exercise, since it will not be possible to say which land is which.

Fifth, with the amendment of the Land Act in 2004 to make permissible the sale of bare land, categorising unused village land as general land, will make easy its alienability. The elites and the rich will rush in numbers to apply for granted rights of occupancy in these lands and later sell them or use them as collateral or equities. Since they are considered general land and with corruption being on the loose and rampant, it is extremely easy to get titles to these lands and dispose them of as one deems fit.

## **5.2 Transfer of different categories of land.**

Under the arrangements of the of the new land laws, it possible to transfer one category of land to the other. It is possible for example to transfer part of village land to general, and vice versa. The Commission had proposed that Village lands should not be transferred to national lands:

*Whereas national lands may be excised and merged in village lands, village lands subject to exceptions expressly provided in law, should not be excised and integrated in national lands.*

Giving the president the power to transfer one category of land into the other is one of the dangerous facets of the new land laws. The security of tenure of village lands is not guaranteed in an environment where the government is increasingly becoming the hawker of national lands in the interest of investments, privatisation and foreign capital.

## **5.3 Administration of lands**

General and Reserve (National Lands) will be under the Minister responsible for lands in policy formulation and is supervising the execution of functions of officers in

his Ministry<sup>13</sup>. Matters of Administration are, however, the exclusive province of the Commissioner for Lands. Section 10 (1) of the Land Act is clear on this:

*The Commissioner shall be the principal administrative and professional Officer of, and adviser to, the Government on all matters connected with the administration of land and shall be responsible to the Minister for the Administration of this Act and the matters contained in it.*

The law has therefore retained the old practice of extreme centralisation of administration of land. This despite the fact that the Commission had proposed complete devolution of power.

For village lands, matters of administration and management are given to village councils. According to the Village Land Act, village Councils will be responsible for the management of village lands and in doing so, they will be holding land as trustee on behalf of all villagers<sup>14</sup>. Just as the President is the trustee of all lands in the country, village councils are also trustees in their village lands. What the act has done is to place administration and management of village lands with a few people. The Commission had proposed that village lands be managed and governed by Village Assemblies. This proposal was given in a bid to democratise management and governance of this important resource.

In the administration of land, Village Councils will not be allowed to locate lands without the consent of Village Assemblies<sup>15</sup>. While this condition looks revolutionary, the practice in reality is that village Councils have enormous powers and it is very unlikely that any decision it passes will be contradicted by the Village Assemblies. This is compounded, among others, by the fact that, the Chairman and Secretary to the Village Council occupy the same positions in the General Assembly.

District Councils and Land Commissioner have enormous powers in the administration of village lands. The Commissioner for lands can give any advice (read order), either *suo moto*, or upon being asked, to the Village Council on matters related to the administration of land. When this advice is given, the Village Council must obey it, without fail<sup>16</sup>. The same thing applies to the District Council<sup>17</sup>. The powers of administration are therefore retained. At best Village Councils are an extension and servants of the central government bureaucracy in the management and administration of village lands.

#### **5.4 Customary Rights of Occupancy**

Customary law rights of land have now been given statutory recognition. The entire corpus of the village land Act is dedicated to the management and administration of customary titles. Under the new arrangement, customary law rights will be registered

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<sup>13</sup> Land Act, Section 8

<sup>14</sup> Village Land Act, section 8(1)

<sup>15</sup> Ibid, section 8(5)

<sup>16</sup> Ibid, Section 8(7)

<sup>17</sup> Ibid, Section 9(1)

in what are called Certificate of Customary Occupancy<sup>18</sup>. Customary rights can be given to any of the following persons and institutions:

- Individual, family units, associations, and primary cooperative societies that are ordinarily resident in the village.
- Non-village organisations such as Government departments, public corporations and panatelas, corporate institutions where the majority of shareholders are Tanzanians. These can be given Certificates of customary occupancy by the village Councils with the approval of the General Assemblies, but subject to the Approval of the Commissioner, who has to seek the guidance of the District Councils.

The titling of customary rights and interests in land, is a kin to what we know of the granted right of occupancy. In fact the only difference between the two is the fact that customary titles to land can be only be given in village lands while granted rights of occupancy can be given on all categories of lands. Registration, individualisation and registration of land (ITR) have advantages and disadvantages. It has a few advantages. One, it makes ownership *ex facie* easy to prove and hence can seem to increase security of tenure. Second, it makes it easy for land to be used in borrowing schemes. It has far more deadly disadvantages. One, making ownership easy to prove by titles also means it is easy to dispose it and hence security of tenure is compromised. Second, it encourages individualism and hence can easily lead to many conflicts in land use for people who have a tradition of sharing resources like pastoralists.

We await to see the implementation of titling of customary law ownership but from what is known from other jurisdictions like Kenya, that have tried, it, will lead to massive dispossession of land of the poor by elites and the rich.

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<sup>18</sup> Ibid Sections 22-29. These are known in Kiswahili as Hatimiliki za Ardhi Za kimila

## **5.5 Ownership of Village Lands by non-citizens.**

The law purports to prohibit ownership of customary lands by foreigners. They can however do it easily by registering institutions whose majority shareholders are citizens. With the level of corruption and dirty business practices, it is possible for companies of this nature to be formed simply for the purpose of getting customary titles to land. It is not unusual for people to register fake companies. So if it is possible to create fake companies, then there is no difficulty faking ownership of shares.

## **5.6 Dispute Settlement**

The land laws have introduced a new mechanism for the settlement of disputes. There are levels of bodies for settlement of land disputes. These are:

- Village Land Councils
- Ward tribunals
- District Land and Housing Tribunal
- The Land Division of the High Court
- Court of Appeal

The coming to fore of this novel way of dealing with disputes in land is a welcome development in a situation where ordinary courts had failed to address many disputes in land in the country. The advantage of these mechanisms and especially at the village and ward levels is the fact that dispute settlement institutions will employ traditional means and people sitting in them are people who are elected by the people themselves.

These dispute settlement mechanisms have been introduced in some places in the country; they are still missing in many parts. In those areas where the land tribunals have been put in place, elites and other powerful people have not shown any inclinations to respect them. In some places, corrupt individuals subvert these institutions by shifting the civil nature of land disputes so that the police and ordinary courts can have jurisdiction over them. In many villages of Kiteto for example, it has become the order of the day to hear cases of criminal trespass, even in situations where it is just the ownership of the land that is in dispute.

The efficacy and efficiency of these dispute settlement institutions are still to be tested over time. The challenge that lies ahead is to see to it that those institutions are put in place and villagers empowered to utilise them.

## **6. Amendments to the Land Act, 2004 and the Promotion of land as Collateral**

The amendments to the land acts, which were zealously being pursued by the Banking Sector (especially foreign), have finally been heeded to by the government. These amendments have signalled a revolution in the existing land tenure framework.

The intention of the subject amendments is to make it easy for borrowers to exercise their foreclosure rights without impediments. The amendments have the following broad objectives<sup>19</sup>:

- To give value to undeveloped bare land
- To allow land to be sold and bought just like any other commodity in the market
- To facilitate the use of land as collateral for borrowing in banks and other financial institutions.
- To facilitate and expedite the foreclosure of mortgaged lands owned by defaulting borrowers.

The government has however clouded the real intentions by political gimmicks, which purports to justify that the above amendments were effected for the interest of Tanzanians. The reason given by the Ministry of Lands and Human Settlements for the proposed amendments is to facilitate a market in land so that citizens can be free to sell land that they cannot develop to those with the requisite capacities (Kamata, 2003, Shviji 2003, 2004). Those without the capacity to develop land can then use the money acquired to invest in other areas that they have comparative advantage over.

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<sup>19</sup> For a more detailed discussion of these see Waraka Kwa Wabunge Wa Jamhuri Ya Muungano Wa Tanzania Kuhusu Mswada Wa Marekebisho Ya Sheria Ya Ardhi Namba 4 Ya 1999 submitted by HAKIARDHI. See also various discussions on the same in *Ardhi ni Uhai*, Toleo 1 of June 2004.

The subject amendments have introduced one major change to our Land Tenure system. This is in respect of bare land. According to the Amendments, it is now officially permissible to sell bare land. This is a hitherto unknown practice in the philosophy of land tenure in the country. The then existing arrangement in land markets did not allow the sale of bare land, because the value of land was thought to lie in the improvements made to it as opposed to the natural soil itself. The bare soil was rightly thought to be nobody's creation (only nature's or God, if you like) and hence nobody should be allowed to benefit from selling it (Shivji, 2004, AZIMIO LA UHAI 2004). The British Colonial tenure arrangement, which was adopted wholesale by the independence government, was close to this natural arrangement when it introduced the so-called rights of occupancy. This entailed that an applicant would be given land to occupy and own for a certain period, which is opposed to owning it against all other people. This concept has been well elaborated by Prof. Shivji when he writes:

*Right of occupancy was saleable but required approval of the Commissioner. In theory, no bare land under a right of occupancy could be sold because the Commissioner would not approve it. Any person who would attempt to sale bare land would immediately expose his/her default in terms of developments conditions and therefore make his land liable to be revoked. What was sold in a transfer of right of occupancy therefore was the development effected on land. This system to a large extent was preserved in the new Land law(Shivji, 1996)*

But what are the possible effects of this change to the welfare of small producers? These are seen in the broader context of the promotion of using land as collateral, which is also encouraged by the amendments in question. One of the most famous prejudices in the ongoing reforms in land is the concept of promoting land as collateral. When President Mkapa was elected to office in 1995, one of his promises was to undertake major reforms in land with the object of making land an asset. In a post election interview, he said the following, which would later set the agenda for reforms in land:

*“The last administration or the second phase government reached a decision to conclude land Policy...it essential aims at making the land user more committed to that land, so that it becomes an asset, in terms of investment opportunities. That is the first thing. It will recognise the land user's attitude, perhaps, not so much towards ownership, but towards land use. Make it more permanent more recognisable, more legal...so that it becomes an asset in terms of borrowing conditionalities. Also it makes it an asset in terms of the livestock industry. The other thing is of course to see how our land can be part of shareholding in industrial enterprises that are going to be established.” (In Kapinga 1996: 4)*

Promoting the use of land as collateral has been identified as one of the strategies in our National Programme for Economic Growth and Eradication of Poverty<sup>20</sup>. The idea seems to be borrowed from Hernando De Soto's book of *The Mystery of Capital*. In this famous book which now serving as our country's Economic Manifesto, De Soto asks: *Why Capitalism Triumphs in the West and Fails Everywhere Else*. For De Soto the answer is simple:

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<sup>20</sup> This strategy is a brainchild of the ongoing economic transformation programmes that are being controlled and monitored by the World Bank, the international Monetary Fund and Western Donors.

*“... the major stumbling block that keeps the rest of the world from benefiting from capitalism is its inability to produce Capital. Capital is the force that raises the productivity of labour and creates the wealth of nations. It is the lifeblood of the capitalist system, the foundation of progress, and the one thing that the poor countries of the world, cannot seem to produce for themselves, no matter how eagerly their people engage in all the other factors that characterise a capitalist economy”*(De Soto 2000:5)

A few things can be said about the above assertion.

One, the question is rhetorical and circular because: one, it assumes that capitalism is a good thing that must be pursued at any cost, by everybody, everywhere, and at all times. The vices of capitalism, in the form of exploitation of many by the few, among other reasons, make it an undesirable economic system that all right thinking people must struggle to eliminate. Second, for capitalism to thrive in the west, it must necessarily fail somewhere else. Capitalism, as an economic system thrives on inequalities and exploitation. For it to succeed in the West, it must bank on exploitation in other places. There is no way Capitalism can succeed all over the world, other wise it will be sowing seeds of its own demise. The answer to that question lies in turning it into the following statement: *The reason why capitalism triumphs in the West is because it ought (and is bound) to fail everywhere else.*

Two, Hernando De Soto’s question does not take into account the fact that western capitalism is characterised by grandiose internal inequalities, with astronomic economic differences between the rich and the poor.

Third, the question does not take into account the fact that the so called triumph of western capitalism is a result of many centuries of capital accumulation by exploiting material and human resources of other continents, most notably Africa, in the form of slave trade, and more than five centuries of intensive European colonialism and exploitation.

While these are obvious historical and economic facts, our government has embraced this ideology with biblical blindness. The Government has recently given a very expensive consultancy to Mr De Soto to up grade the slums in our urban centres so that they can be used as collateral in securing loans.

In connection with the above developments, the Government has recently established a Programme on Property and Business Formalisation<sup>21</sup>, which is administered by the Office of the President. The main objective of this programme is to<sup>22</sup>:

*“Facilitate the transformation of properties and business in the informal sector into formal, legally held and operated entities within the emerging and growing modern and formal economy in the country. It especially targets individuals and groups in the formal sector who for a variety of reasons are unable or unwilling to join the mainstream of the current setting of the country”.*

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<sup>21</sup> It is known in Swahili as Mpango wa Kurasimisha Rasilimali na Biashara za Wanyonge Tanzania (MKURABITA)

<sup>22</sup> This is according to an advert in the Daily News of Wednesday, January 26,2005, 17

The programme intends allegedly to empower the poor to capitalise their assets and hence alleviate poverty. Formalisation of property has, yes, the advantage of making it useful in securing loans, which are necessary for generating capital. This advantage can work when other factors of the equation are balanced. If one defaults in payments of loans, then that is the end of the advantage, as the mortgaged land will be foreclosed without mercy and irrevocably. So, in this regard, formalisation of property can also, and it did in many other countries lead to formalisation of dispossession and its concomitant destitution and marginalisation.

The logic continues! For land and other property to be used as collateral, it must be held 'legally', privatised, registered and titled. The presently ongoing reforms in land to privatise, title and register land, again, are the result of our government blindly echoing the school of thought of De Soto. For him, land and other property cannot secure loans in the form it is owned now; as for him they are extra legally owned:

*“ But consider whether it is possible for assets to be used productively if they do not belong to something or someone. Where do we confirm the existence of these assets and the transactions that transform them and raise their productivity if not in the context of a formal property system? Where do we record the relevant economic features of assets in not in the records and titles that formal property systems provide? Where are the codes of conduct that govern the use and transfer of assets if not in the framework of formal property systems? It is formal property that provides the process, the forms and the rules that fix assets in a condition that allows us to realise them as active capital” (De Soto, 2000: 44).*

The argument that is being posited by the above assertion is quiet simple to comprehend. For Assets to be used be productively, then they must be held and owned in a formal system that is, in records, in some easily identified form. If they not are held in the formal system, then for Mr De Soto and our government now to that extent, they cannot be said to be owned and cannot be called property for that matter. According to this logic therefore, land and other property that is owned and held under customary law, do not belong to anyone and such they are not property *strictu sensu*. As a result they cannot be used productively to generate further capital. This way of thinking is flawed of course. One because, using asset to secure loans is not the only way of using the same for creating capital. Somebody can use his land for farming and livestock rearing and when it is done efficiently, it can create more capital and will not put the owner under the risk of loosing it if and when defaulting payment of loans and interests.

The other argument posed in favour of “formalisation’ of property, is that it expedites and makes transactions easy. According to Mr De Soto:

*“Any asset whose economic and social aspects are not fixed is a formal property system is extremely hard to move in the market. How can the huge amounts of assets changing hands in a modern market economy be controlled if not through a formal property process? Without such a system, any trade of an asset, say a piece of real estate, requires an enormous effort just to determine the basics of the transactions: does the seller own the real estate and have the right to transfer it? Can he pledge it? Will the new owner be accepted as such by those who enforce property rights? What are the effective*

*means to exclude other claimants? In developing and former communist nations such questions are difficult to answer. For most goods, there is no place where the answers are reliably fixed. That is why the sale or lease of a house may involve lengthy and cumbersome procedures of approval involving all the neighbours. This is often the only way to verify that the owner truly owns the house and there are no other claims on it. It is also why the exchange of most assets outside the West is restricted to local circles of trading partners”(De Soto, 2000: 45)*

Again the above arguments can only be sound, if we assume that capitalism is a good thing. But, even if we were to assume that is good thing, we would have again to reason whether, many Tanzanians who are small producers and customary holders of land, have been prepared to enter into the so called formal property regimes and intricate transactions that are effected in them. For the larger part, what small producers need is the security of their lands and not necessary alien capital that is created from it. For these small producers, land is the only reliable asset they have for survival. For urbanite elites and business people, they have their salaries and savings and hence losing land will not make them destitute.

But also, the small producers cannot comprehend the extremely complex property systems and transaction that can take place in them. There are many examples in other jurisdictions, mostly Kenya, to ascertain that peasants lose their lands easily in formal property regimes.

Promoting land as collateral is done in the hope that banks and other financial institutions will be ready to lend to small producers. In other countries where these transactions have been tried, it has proven beyond doubt that these institutions will not necessarily accept the land of the poor as collateral. In Kenya, where this was tried, it has been observed that:

*“ financial institutions will hardly lend to the poor even if they have titles to their land. What self respecting bank manager would lend to a household without first checking that their incomes were sufficient to service the debt, before checking what collateral is being offered to service it?”(Odenda, 2003: 10)*

The reality of the matter is that banks and other borrowing institutions offer loans to persons and institutions that they believe can easily service the debt. Since, there are many elites and business people who have multiple means of serving debts, it is unlikely that small holders will get priority in these borrowing schemes. Who would give a loan to a villager in some remote corner of our Republic when they are well connected people in Dar es Salaam, who can easily service the debt by multiple means<sup>23</sup>. The reality pertaining now is that it is only people with good connections that can get loans from the banks. To get a bank loan you must either know somebody in the borrowing institutions or you must be ready to exercise corruption.

Policy makers also do not seem to grasp the obvious reality that many rural people do not have the requisite entrepreneurial skills to utilise loans to create more capital and

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<sup>23</sup> In any case parcels of land which may be offered by small producers as collateral may prove to be un saleable as they are normally family or clan land-this will be a disincentive for it to be accepted as collateral (Odenda, 2003).

be able to service the debts in time before their lands are foreclosed. To this extent, therefore, land mortgaging will only serve as an instrument of disinheritance of small producers (Odenda, 2003, Shivji, 2003, 2004).

Then too, many lands of the small producers are owned under commonage arrangements. Promoting land as collateral will necessarily invite individualisation. What is the fate of pastoralism and pastoralists when their lands are exposed to ITR regimes? There is a community that is happy to utilise resources communally, why will they want to heed to De Soto's or the government's plot of individual greed of private ownership of land.

Again, many small producers in Tanzania own only land of less than 5 acres. Big owners of land are bureaucrats and big businesses in town (Shivji, 2003). The question then is, which bank is ready to give loans to smallholders. In any case, what amounts of loan can some five acres of land fetch in a land market, given especially the fact that many of these lands are located in rural areas, which have poor infrastructure? If it cannot fetch a competitive price, the amount of loan that can be secured using it, is negligible. This will in turn not be enough to create more and meaningful capital. Because it cannot create more capital, there will not be any profits to service the debt. The net effect of this is we foresee a situation where borrowers will foreclose on any other mortgaged land for failure of creditors to honour loan agreements. In the long run therefore, the land collateral scheme is not poverty eradication scheme, but at best, a land dispossession plot, which will lead to further impoverishment.

What the amendments to the land act, 2004 propose is a radical shift from African land tenure jurisprudence. Land will now be taken as a pure commodity, devoid of its cultural and spiritual values. The most striking feature in this is the fact that, an important cultural value that lies at the root of the African personality is now being compromised in name of the market, development and modernisation. Professor Hansengule cannot be clearer on this:

*“ African Land does not reside in the hands of one particular individual. Land belongs to the community, while the individual can only enjoy rights of use. It is inconceivable to an African that an individual can exclude other members of the community from the use of that same piece of land when he/she is not using it, let alone to alienate it in the sense of selling the whole title to the land to a total stranger outside the grouping. Land ownership is interwoven with several cultural values so that its transfer also entails the transfer of the values, which is generally impermissible. Today, due to the advent of the Western economy and new values, people are beginning to sell traditional rights in land not so much because the traditional concept allows it but mainly due to the influences of the market. The market is forcing on Africans values that are totally alien in their cultures. The land market has never been an African concept” (Hansengule, 200: 309)*

The real threat of this craze of auctioning our lands and making it a commodity is that in the long run, a few rich and influential people will take all Lands in Tanzania, while the poor will be relegated to abject poverty and impoverishment. The late Mwl Nyerere, the first President of Tanzania, had prophesied this reality close to fifty years ago, when he said:

*“If people are given land to use as their property, then they have a right to sell it. It will not be difficult to predict who, in fifty years time, will be the landlords and who the tenants. In a country such as this, where, generally speaking the Africans are poor and the foreigners are rich, it quite possible that, within eighty or a hundred years, if the poor African were allowed to sell his land, all the land in Tanganyika would belong to wealthy immigrants, and the local people would be tenants. But even if there were no rich foreigners in this country, there would emerge rich and clever Tanganyikans. If we allow land to be sold like a robe, within a short period there would be only a few Africans possessing land in Tanganyika and all others would be tenants...” (Tanzania Vol I, 1994:114)*

## **7. Other developments**

### **7.1 The land Bank**

Another major development in the ongoing reforms in land is the establishment of an outfit called the Land Bank, which is administered by the Tanzanian Investment Centre (TIC). But what is the Land Bank? The name would suggest that it is a normal financial institution called bank that deals with the development of resources land by giving loans, among others. This is not what a land Bank is. A land Bank in the present context is a depository of records detailing lands that have been identified as suitable for investment purposes. The record of these lands is kept by TIC. According to the Director of investment in TIC, Mr Emmanuel Olenaiko,

*“Over 2.5 million hectares of land in Tanzania have been surveyed and found suitable for investment. This figure constitutes some 62.5% of over 4 million hectares managed under the Tanzania Investment centre (TIC). The remainder is categorised as land that is potential for investment where additional surveying or infrastructure is require (The citizen Thursday 10<sup>th</sup> September 2004)*

The practice is such that any investor who wants land for investment will simply go to TIC which will then direct and identify the requisite land and its locations, for the potential investor, who will then choose from a menu of more that 4 million hectares of prime lands that have been earmarked for this purpose.

In this case TIC will take to potential investor to the village whose land has been identified as suitable. TIC will then act as mediator between the investor and the villages in the procurement of that land. This is the ideal situation where our government brokers its citizen’s lands to investors. Investors wishing to apply for lands under the Land Bank scheme must meet some minimum requirements. These

include a minimum capital of US \$ 300,000 for foreign investors and US \$100,000 for local investors.

Some lands have already been given away under this scheme. Some beach hotel plots in Dar es Salaam have already been given to foreign investors. A derivative title has been given to Middle East Developer for the famous Kilimanjaro Hotel (The East African, July 19-25, 2004) Prime lands in Morogoro and Iringa have also been given away under the scheme, including the recently privatised Mufindi Paper Mills in Iringa (The Citizen, Thursday 30 September, 2004).

There are many gloomy mattes in respect of these lands, but a few things are obvious.

One, the procedure used to identify these lands leaves a lot to be desired. It would seem that TIC wrote to all Regional Commissioners asking them to inform District Councils in their jurisdictions, to identify the said lands in the shortest period possible.

According to a letter<sup>24</sup> written by TIC to the Regional Commissioner of Manyara Region Hon Anatoly Tarimo by TIC, the move to establish a Land Bank came from the President himself. The said letter details that the President after a meeting with different actors in the private sector where matters on how to promote private investment in the country were discussed, issued directives to all Government Ministries and Departments to work in their respective areas of competence to facilitate a good environment for investment and to be able to compete with other counties in this regard.

According to the same letter the President had earmarked 11 areas that were to be worked and reports on their progress to be given to him quarterly. The issue of Land Banks was among the 11 areas.

The respective District Executive Directors (DED's) later issued letters to all village Executive Officers in their Jurisdictions to call meetings as early possible to identify the said lands and report to him in less that 11 days. The letter was written to the VEO's on September 4<sup>th</sup> and they were required to cause a reply to him before 15<sup>th</sup> of the same month. Assuming that the letter reached the VEO three days after its issuance and the reply to reach the DED one day before the deadline, then at most, the Village Councils had 7 days to identify these lands. What this means in effect is the fact that there is no way that village Assemblies had the opportunity to participate in this important matter in respect of their lands. It is interesting to know whether the Village Councils can legally undertake such major decision without the consent and knowledge of the Village Assemblies. If it is not the case then legality of lands under the land bank scheme is highly contestable.

According to the same letter, the RC wanted:

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<sup>24</sup> Letter Ref No. TICC/B.10/17/5 of 7<sup>th</sup> August, 2002

*“ to be informed/notified of villages with good lands which villagers are ready to sublease to investors for a designate or those who are ready rent land for a certain period(in the same way as we rent a house) or those who are ready to contract farming for the production of food and commercial crops”<sup>25</sup>.*

A few things can be said about these developments.

First, the most critical issue here is whether Village Councils can in law identify lands to be sublet to foreigners without the consent of the village assemblies. Agreeing to identify land to the Bank scheme, implies consent to give it in for investment. This is a major decision on village lands that the government pressured village Councils to undertake without getting the approval of the village Assemblies. This is another clear trespass on the constitutional right to participation.

Second, the land bank scheme poses a few critical issues for the security of tenure of small producers. The method used to identify those lands has not been participatory. Villages were not given the opportunity to decide whether they want their lands to be under the subject scheme. At best they were forced to accept it under duress. They have not been told of the implications of identifying their lands for the scheme. Democratisation and participatory decision making in land management and administration, which underlie the fundamental recommendations of the Commission have been violated.

Third, identifying the best lands and giving them to investors, is a sinister move to give away lands to foreigners and few Tanzanians, at the expense of the majority of producers who would be left without productive land. The lands that have already been identified for the scheme, do not close the chapter, when these have been exhausted, then another process resurges to identify more land, and the process continues until the land of the poor has completely been given away to foreigners at throw away prices. This is what happened to places like Kenya, Zimbabwe where all good lands have been given to foreigners and the rich, leaving the poor landless and destitute.

Fourth, the rhetoric of the government that it will not allow foreigners to own land since they cannot have freeholds is just a political gimmick and entrenching it in law, is a mere ‘legalese posture’. What is the difference of giving a derivative title or right of occupancy to foreigner for 99 years, which is renewable for another and another term, and actually giving indefinite ownership? In any case giving a farmer land that would do intensive farming and thus destroy the soil for 99 years, is the same as giving him forever because, when he leaves (if he wills) that land will not be of any use.

Fifth, it has been argued time and again that the only way to develop our agricultural sector is to provide capital and loans to the actual tillers of the land-small producers. The government acknowledges this but is not doing anything to assist. The

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<sup>25</sup> Unofficial translation by the author

privatisations of Banks like the National Bank of Commerce, which would have served this purpose, is quiet a clear indication that the government is not serious in this endeavour.

## **7.2 Estate Agents Act**

Estate prices are on the rise in the county after the overhaul of the land tenure framework. Lands and especially in urban areas are a rare commodity. Until recently property markets have been regulated informally by estate agents who are not established and controlled by any law. The government has now decided to formalise the business of estate agents by hiring a firm of lawyers, the Law and Development Partnership of London to draft a bill to regulate the operations of land markets and the practice of estate agents in the country. Professor Patrick McAuslan, who drafted the 199 land legislations is leading this team (The East African, Jan 31-Feb 6, 2005: 23)<sup>26</sup>.

The effect of this other development in land tenure is hard to predict. However it is obvious that many of the present estate agents will be thrown out of business and the industry is going to be one for professionals in the same manner as are architects, valuers, lawyers and engineers. Some academic qualifications and amount of capital are going to be imposed by law for anybody who wants to register and operate as an estate agent. It will also hike property prices to be in pace with the stringent registration requirements and costs of operations on the part of the professional estate agents.

## **8. The Land Laws and other Legislations**

The reshaping of the country's land law and policy regime has not removed collisions with other legislations. The land laws are in direct clashes with laws and policies, which regulate wildlife, local governance, forestry, just to mention a few. I will expose some of these clashes.

### **8.1 The Village Land Act (VLA), Wildlife Conservation Act (WCA)<sup>27</sup> and Local Government (District Authorities) Act (LGA)<sup>28</sup>**

The WCA is in conflict with the VLA and LGA when it comes to the administration of village land. Village Councils upon being incorporated have given powers of management of village lands for and on behalf of villagers. According to the LGA<sup>29</sup> one of the functions of the Village Council is to 'initiate and undertake any tasks, venture or enterprise designed to ensure the welfare and well-being of the residents of village and participate by way of partnership or any other way, in economic

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<sup>26</sup> One is again baffled by the practice of the Government of using public money to hire foreign consultants to undertake tasks that can easily be executed by Tanzanian experts.

<sup>27</sup> Act No 12 of 1974

<sup>28</sup> Act No 7 of 1982

<sup>29</sup> Section 142(2)

enterprises with other Village Councils<sup>30</sup>. The VLA has placed village lands under the administration of Village Councils<sup>31</sup>. The WCA has on the other had placed powers of control and administration of wildlife under the Director of Wildlife. The Director has sweeping powers in issuing hunting licences. Game Controlled Areas (GCA's) is one category of protected areas where the Director has sweeping powers over. GCA's also happen at the same time to be village lands. The Director has powers to give hunting licences for wildlife in village lands. Hunters are not required to get the consent of Village Councils. This will outright be in contradiction with the powers that Village Councils have been given under the provisions of the WCA and LGA.

Very recently the Mininster for Tourism and Natural Resources (MNRT) has used powers conferred on her by the WCA<sup>32</sup> to promulgate the Wildlife Conservation (Tourist Hunting) Regulations of 2000<sup>33</sup>. These regulations have even extended the powers of the Director to areas that are not traditionally thought to belong to the province of wildlife management. These will further put to restrictions to Village Councils in utilising their village lands for the benefit of the villagers. According to these regulations:

No person shall conduct tourist hunting, game viewing, photographic safari, walking safari or any wildlife based tourist safari within a hunting block or within any wildlife protected area outside Ngorongoro Conservation Area, and National Parks, except by and in accordance with the written authority of the Director of Wildlife...<sup>34</sup>

The implication of the above provision is the fact that Village Councils in GCA's that also hosts hunting blocks cannot enter into economic ventures of investors using their lands without the consent of the Director of Wildlife<sup>35</sup>. This is another clear overlap between the LGA, VLA and WCA.

## **9: Recommendations**

Many recommendations have been given time and again on the reforms of our land tenure. The government has kept a deaf ear at many a times. This does not mean that the debate on land is closed. It is in this spirit that the following recommendations are given.

First, the government had acknowledged and accepted the Commission recommendation of making land a Constitutional Category. According to the Land Policy will be made A constitutional category and only a few areas will be entrenched. The entrenching on provisions on land in the Constitution has not been

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<sup>30</sup> Section 142 (3) is even more general as it gives the Village Councils the powers to do all such other acts that are deemed necessary in carrying out its functions.

<sup>31</sup> Section 8

<sup>32</sup> Section 84

<sup>33</sup> GN No 306/2000

<sup>34</sup> Section 16(5) of the Regulations

<sup>35</sup> For a through discussion of the legality of this provision see Rugemeleza N 2002 and Olenasha W 2003.

effected. While we think that the four issues proposed to be in the Constitution are important, we feel that there is a need to include others, which are equally important. The proposed inclusion in the Constitution has not yet been effected. It is now quite more close to ten years when this proposal was made. One wonders why the requisite constitutional amendment has not taken place. Further delay continues belittling this important resource and will delay attempts of potential constitutional litigations in incidences where people's constitutional rights to land are infringed.

Secondly, the retention of the radical title of the land tenure is a serious anomaly. For complete democracy to be effected, the radical title should be divested. While land rights activists might have broken heart by the blatant refusal of the government to take the Commission recommendation in this regard, it is still an important area of land rights activism.

Thirdly, the anomaly existing in the definition of general land should be addressed. In any case there is no logic in having General Land in Village land. This will be double categorisation and it will invite collision of jurisdictions. The question to ask is who is the person responsible for the administration of general land in village lands. There is therefore, an urgent need for this anomaly to be done away with.

Fourth, there is a need to remove overriding of legislations and collisions of jurisdictions existing in the areas of land laws and other laws like the those in the areas of Wildlife, local Governance, among others.

## **10. Conclusion**

The study has been undertaken with the objective of seeing how the ongoing reforms in land compromise the interests of small producers. What has eventually been the thread running through the document is the subject reforms are not for the benefit of small producers (the poor) it is serving the interests of foreigners and the rich.

The reforms in land tenure have marginalized and put the poor under the risk of losing their lands. There is a need to balance the need for using land for productivity and economic prosperity with that of securing the land rights of small producers.

The words to conclude the whole debate, is provided by professor Shivji:

*So long as the people live in fear of their lands being alienated and so long as they do not participate in decision-making process affecting their lives, there is not yet democracy (Shivji, 1998:110)*

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