Legal Tools

for Citizen Empowerment

A guide to the laws governing land and investment in Tanzania

Jumuiko la Maliasili Tanzania
Tanzania Natural Resource Forum

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ACKNOWLEDGEMENTS

Since 2006, Legal Tools for Citizen Empowerment has been working to strengthen local capacity to defend land rights, have greater control over decisions affecting land and get a better deal from incoming investment. Legal Tools is an initiative led by the International Institute of Environment and Development (IIED) and put into practice by many of their partners around the world. In Tanzania, the Tanzania Natural Resource Forum (TNRF) has been steering the process to develop legal tools in the country, to help strengthen land tenure security and identify fair and opportunistic investments. Mr. William Tate Olenasha conducted the legal analysis to inform this guide. He shared his findings and received feedback from civil society organizations at a validation workshop in March 2012. He is the lead author of this legal tool. This guide has also been reviewed by other legal experts to ensure accuracy.

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1 INTRODUCTION

Why this guide is needed

Tanzania is endowed with a wealth of natural resources. It is home to three of the largest lakes in Africa (Victoria, Nyasa and Tanganyika), numerous rivers, abundant wildlife, a range of minerals, and a vast and picturesque coastline, to mention but a few. But it remains one of the poorest countries in the world, ranking 148 out of 169 countries[1], with a per capita income of USD $362 in 2008 and with the majority of the population living below USD $1 per day[2]. Poor governance over natural resources has often resulted in an unequal distribution of wealth where few are truly benefiting from the resource treasure trove this country has to offer.

Recognizing the potential of natural resources, the government has recently prioritized promoting foreign direct investments (FDIs) and large-scale, commercial investments more generally, in pursuit of boosting economic growth. In recent years, the government has opened the door for investments in different natural resource sectors, most notably for food production, biofuel development, mining and tourism. Tanzanian nationals also play an important role in land acquisitions, including those led by foreign investors.

However, the danger of such a sudden interest in advancing Tanzanian development through natural resources relates to the context in which this is being done: the existing legal and policy environment does not offer robust enough safeguards for local and public interests, and leaves room for diverging interpretations. Also, there is a big gap between the statute books and what happens on the ground.

Lack of clarity in rules and procedures can have adverse consequences for prospective investors. Most importantly, the small-scale rural producers and the local communities whose livelihoods depend on land and natural resources are under threat. Tanzanian legislation does recognise important rights to rural people. But lack of awareness and capacity among those who stand to benefit from these rights means that progressive legislation has not always translated into real change on the ground. This guide aims to address this challenge. It discusses the most important laws that regulate land and investment in Tanzania, in order to make information available and to provide the basis for awareness-raising activities like radio programs and training sessions. Knowledge is power, and in Tanzania knowledge is critical to improve access, livelihood security and equality.

1 Figure according to the UNDP's human development of index
2 UNDP, 2010

Structure of the guide

This guide focuses on land and investment. The importance of land cannot be overemphasized: it is where all other resources are found, and as the entry point for access it is also the most insecure resource. Land laws are cumbersome and complex in Tanzania, and are thus often misunderstood or easily disregarded. The guide's 'Q&A' format aims to make information more easily digestible to a non-policy oriented audience. A series of procedural and legal questions was posed, and each question is answered according to the laws governing the relevant issue. As far as possible, the answers are written in simple and accessible language, in an effort to make this information accessible to a broad audience.

The questions focus on areas deemed especially important and relevant to local communities, with a particular focus on those that are commonly misunderstood. They also provide important opportunities for improving local people's livelihoods if citizens can effectively exercise their rights over such resources.

Relevant legislation: A comprehensive analysis of Tanzania's legislation is beyond the scope of this guide. Extractive industry developments are also outside scope. The guide mainly draws on the following laws:

- The Basic Rights and Duties Enforcement Act, 1995
- The Commission for Human Rights and Good Governance Act, 2001
- The Courts (Land Disputes Settlements) Act, 2002
- The Land Act, 1999(Act No. 4 of 1999)(herein the Land Act)
- The Land Use Planning Act, 2007(No. 6 of 2007) (herein, LUPA)
- The Land(Amendments) Act, 2004(No. 15 of 2004)
- The Local Government (District Authorities) Act, 1982
- The Tanzanian Investment Act, 1997
- The Treaty Establishing the East Africa Community, 1999)
- The Village Land Act, 1999 (Act No. 5 of 1999) (herein, the Village Land Act)
- The Ward Tribunal Act, 1985

2 LAND

What is land? (s. 2 Village Land Act)

"[Land] includes the surface of the earth and the earth below the surface and all substances other than minerals or petroleum forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to or under land and land covered by water;"(s. 2 Village Land Act)

According to the definition above, land includes the surface of the earth and surface below, but it does not include minerals and the petroleum found on the surface or under the surface. Basically, one is given the right to use and reside on the land, but that right does not extend to the mineral and petroleum resources that can be found on or in that land. Minerals and petroleum belong to the state, are regulated by different laws and can only be accessed and utilised with special permission of authorities appointed by law.

How many categories of land are there according to the land laws? (s. 3 Land Act)

For purposes of management, public land is divided into three categories: village land, general land and reserved land.

All land in Tanzania is public land that is vested in the President as a trustee on behalf of all Tanzanians (s. 3 of the Land Act). What this means is that in Tanzania nobody actually 'owns' land exclusively; instead, people only have a right to use or stay on the land, which is actually public property.

What is general land? (s. 2 Land Act; s.2 Village Land Act)

The meaning of general land is somewhat ambiguous because the Land Act and the Village Land Act provide different definitions of what general land constitutes:

- General land is defined as all public land that is not reserved land or village land, and includes unoccupied or unused village land (s.2 of the Land Act).
- According to the Village Land Act: general land is defined as, "all public land which is not reserved land or village land' (s. 2 Village Land Act).

The difference in definitions is that the Land Act includes "unused and unoccupied" areas in its definition of general land, while the Village Land Act does not. This can be confusing because in many villages, and especially with pastoralist communities, it is common to find land that might be considered unused and unoccupied, but that *is* actually being 'used' by surrounding communities (e.g. land that is used for seasonal grazing, firewood collection, spiritual use, etc.). This inconsistency can be a source of problems, as land considered to be village land under one law may be classified as general land under another one - although as of yet no specific instances of this problem have arisen.

What is reserved land? (s. 6 Land Act)

This is a category of land that that has been set aside for different purposes (s. 6 Land Act), including:

- Land for conservation areas and wildlife protected areas (e.g. Ngorongoro Conservation Area, national parts, game controlled areas, game reserves, wetland areas, wetlands reserves, forest reserves, etc.)
- Land declared hazardous
- Land for public utilities like roads and open spaces in urban areas

- Land for natural drainage systems

What is village land? (s. 22 Village Land Act)

- Land within the boundaries of a village that has been registered according to the main law establishing villages in Tanzania - the Local Government (District) Authorities Act, 1982.
- Land already set aside as Village Land according to the Land Tenure Act of 1965
- Land with boundaries that have been set aside according to any existing law or any administrative action that was in use before the enactment of the 1999 laws. These administrative actions could have happened under any existing law, either customary or foreign. In this category, the boundaries do not need to have been formally recognized or even to have appeared in a government gazette (the official government gazette containing government official communications). The implications of this are that the same area could be classified in a number of different categories, and no authority could even be aware of, let alone validate, all claims to the land.
- Land where boundaries have been agreed between a village council (effectively, the village government) and another relevant authority: another village council, the Commissioner of Lands, conservation authorities, city councils and district councils.
- Unreserved land that has, prior to the enactment of the Village Land Act, been used by villagers free of interruption. It does not matter whether the village was officially allocated that land. It could also be a land that pastoralists used to graze or where pastoralists of other villages have been using with special arrangement.

Can one category of land be transferred into another? (s. 4 Village Land Act)

Yes. The President can transfer any category of land into another category (e.g. village land to general Land, or general land to reserved land) for public interest (s. 4 Village Land Act). The definition of 'public interest' includes investment for *national interest*. This can make local rights vulnerable to a compulsory transfer that paves the way to commercial ventures. However, it is unclear exactly what the '*national interest*' is, as it is not defined in any laws governing land. This lack of clarity may open the door to abuse, but it may also enable villages to challenge the legality of compulsory transfers that claim to be for a public purpose.

What is the procedure for transferring village land to general land or reserved land? (s. 4-5 Village Land Act)

- If the President determines that a piece of village land should be transferred to general or reserved land, then he is required to direct the Minister of Land to initiate the transfer process. The Minister is required to publish, in the Government Gazette, the notice of the President's intended decision to transfer that land. She is also required to send that notice to the village council where that land is located. The notice must clearly state the location and the boundaries of the land that the President intends to transfer and the reasons behind his decision. Moreover, it must state the date of the intended transfer, which shall not be less than ninety days from the date of the notice.
- If the land proposed for transfer is occupied or was allocated to persons or group of persons, the village council is required to inform them by giving them a written notice.
- The community members that will be affected by any such transfer have the right to lodge their objections and views against such a proposal to the Commissioner for Lands and the village council. The Commissioner for Lands is required to incorporate those objections into his report to the Minister. The Minister must transmit that report to the President for consideration and action. People who stand to be affected can legally refuse the proposed transfer, but there is no legal barrier preventing higher authorities from proceeding with the transfer regardless.
- If the land proposed for transfer is less than 250 hectares the village council must submit its recommendations to the general village assembly, who may then refuse or accept the proposal based on this information and advice from the district council.
- If the land proposed for transfer is greater than 250 hectares, it is the Minister who has the power to approve or disapprove it, taking into account the recommendations of the village council, general

assembly, and district council. It is important to note that that the general assembly *cannot refuse a transfer that is more than 250 hectares*. The implications of this are that if you have money it is possible to bypass the village council (and by extension, the interests of local people) by buying land in bulk.

- The Commissioner for Lands or officials working under him are required to attend village council and village assembly meetings to discuss the decision of the President to transfer village lands to general or reserved land. This will enable them to answer villagers' questions and give reasons behind the President's decision. Moreover, a government agency or person to whom that part of land is proposed to be transferred, upon being invited by the village council or village assembly, may attend such meetings as well, and answer villagers' questions on how the land will be occupied and used (s.4(7)).
- The transfer of village land to general land or reserved land must be published in the Government Gazette and the transfer should be completed within 30 days after the publication of the notice.
- When land is transferred it ceases to be part of village land, and the Village Council relinquishes all control and management rights. These are transferred to the Commissioner of Lands.

Are villagers entitled to compensation when their land is transferred to general land? (s. 4 Village Land Act)

Yes. The Village Land Act makes it clear that *no transfer of village land to other categories of land can only take place if three conditions are fulfilled:* first, that the village council and the Commissioner for Lands agree on the amount of compensation and schedule of payment; second, in case of disagreement between the Commissioner and the village council the High Court has made a decision on the compensation amount; and third, when the village council and any authority in charge of general land or reserved land agree to exchange land until such land, to be exchanged, is identified and is ready to be transferred to the village council.

What type of compensation are villagers entitled to? (s. 4 and 9-11 Village Land Regulations)

The village council and the Commissioner of Lands should agree on the type of compensation that the affected persons shall receive. It could include any of the following:

- The market value of the land according to an assessment by a certified evaluation
- All unexhausted (unfinished or incomplete) improvements will be paid subject to an assessment by a qualified body (Regulation 9-11 of the Village Land Regulations).
- Disturbance allowance, accommodation allowance and loss of profit (Regulation.11 of the Regulations)
- If the land is unoccupied, compensation will only be given for the value of the land plus unexhausted improvements (see above)
- Provided alternative land in Reserved Land or General Land (s.4(8) of the Village Land Act)

The government normally pays compensation, but if the land is acquired for the benefit of an individual or company then the President can order that person or company to pay. If land is acquired for investment purposes, then the investor is the one who must pay compensation.

Can villages object to the compensation? (s. 10 Village Land Act)

Yes. The village council can object the method of compensation.

If the village council and Commissioner of Lands fail to agree on the method of payment, the matter will be taken to the High Court for determination. The High Court may give a temporary order while the methods of compensation are fully explored and discussed.

The President can take the land (by force if necessary) if the compensation issue remains unresolved (although this is subject to payment of compensation). Even though the villager may object the President's decision to transfer and the amount of compensation, the President is nevertheless empowered to go ahead and transfer the land, as he is the overall trustee on behalf of the public interest.

Certificate of Village Land (s. 8 Village Land Act)

The Commissioner of Lands is empowered to issue a certificate of village land to demarcated villages and those without any reported boundary conflicts. .

What is a certificate of Village Land? (s. 7 Village Land Act)

- It is a certificate given in the name of the President bestowing management rights and duties to the village council;
- It confirms the villages land and user rights under customary law
- It is the duty of the village council to keep custody of the certificate of Village Land.
- It delineates boundaries of the village and when the village is divided into several villages, it will contain alterations made by the Commissioner of Lands and its amended boundaries.
- The certificate, in predominantly pastoralist villages, affirms pastoral customary usage of land including de-pasturing of cattle.
- How is Village Land managed? (s. 7-8 Village Land Act)
- Village land is managed by the village council, which serves as the trustee. The trustee is not the owner of the land but the overseer of the interests of the beneficiaries, i.e., the villagers.
- The village council is responsible for ensuring village land is managed sustainably and that the environment and natural resources found thereon and therein are protected.
- The village council is supposed to consult and take into account the advice of public officials with powers extending to the village, such as the district council and the Commissioner of Lands.
- Establish a committee to advise it on proper management of village land. The advising committee, however, does not have decision-making powers over village land.
- The village council is not allowed to allocate village land to any person without the approval of the village assembly.
- The Commissioner of Lands may also give advice to the village council on the management of village land, and when this is done the village council is required to follow that advice.

Can the village councils be challenged over their management of Village Land? (s. 9 Village Land Act)

Yes:

- If village assembly members are not satisfied with the manner in which the village council is managing the village land in accordance with the law and as a trustee, 100 or more members can inform the relevant district council of their dissatisfaction in writing.
- The district council will then try to resolve the problem amicably.
- If this fails, the district council will inform the Commissioner of Lands of the problem and the lack of a resolution and ask him to give a directive to the village council, which the village council must comply with.
- Alternatively, the district council may ask the Commissioner of Lands to appoint an inquiry team to investigate the problem and make recommendations for resolution.
- The inquiry team may recommend that the village council be removed from the role of managing the village land.
- The inquiry team may recommend that the management of the village land be vested in the district council or the Commissioner of Lands until a permanent solution to the problem is found.
- Moreover, when the Commissioner or the inquiry team finds that the village land, contrary to the law,

took an action or omitted to take an action, the Commissioner must take that action so as to establish lawful management of the village land;

Can two or more villages manage their lands together? (s. 11 Village Land Act)

Yes. The Village Land Act makes it possible for two or more two villages to manage their land together by entering into what is called a "joint land use agreement". The procedure for this agreement is provided in the box 1.

Box 1: Procedure for making a joint land use agreement between villages (s. 11 Village Land Act)

1. The proposal can come from one of the villages or from the Commissioner of Lands.
2. The village council submits a proposal to the village assembly and asks the villagers to give their views on their land uses and the nature of the proposed agreement. If the proposal includes their land uses it will table the proposed joint land use agreement to the villagers voted upon by the relevant village councils.
3. If the proposal is rejected by one or more of the village councils, there must be a three-month gap before it is re-presented to the assembly(ies) that rejected it.
4. When the proposal is accepted, the respective village councils will each elect between three and five people to form a (joint management) committee, that will be charged with drafting the joint land management plan. Thereafter, the joint management team will present the draft plan to respective village assemblies for deliberation and vote.
5. The respective village assemblies can then give recommendations and amendments to the draft, which will be taken to the joint management committee for consideration.
6. The joint land management will not be implemented if all participating villages do not approve it.
7. The joint land management committee is to be guided and governed by the provisions of the Local Government (District) Authorities Act, 1982. This is the main law governing village committees.

What is the importance of joint land use agreements/arrangements? (s. 11 Village Land Act)

The importance of a joint land use arrangement depends on the type of land use taking place on village land, some land use activities demand that certain resources are shared; others do not. Pastoralists, for example, tend to work well with joint management agreements, as their reliance on mobility increases their tendency to share and use resources across individual village boundaries.

How is village land divided? (s. 12 Village Land Act)

The Village Land Act defines how village land can be divided into different categories according to use. This means that when undertaking land use planning, the village council should fit specific uses into these pre-fixed categories:

- *Communal village land*

Communal village land is a category available for all villagers, as well as others who may not be villagers but who have been given permission by the village assembly to use and occupy village land. This category of land is meant for communal, rather than individual use, occupation or ownership; it, therefore, cannot be given to individuals or groups, such as investors. This is the most secure category of village land (although under the current land system, any land can be transferred to another land type, which would then allow private owners to access).

The Village Land Act recognises that communal village land will also include areas that have habitually been set aside for communal or public use before the Act was put in place. Rural communities practiced land use planning even before villages - not in the form we know them today - were created. Respecting existing land use arrangements in these villages stand to reduce many of the conflicts associated with new land use

planning methods.

- *Land for individual use*

Land can be set aside for use by individuals, families or groups (an exact definition of 'group' is not given, but means something like a group or persons who have traditionally used land together: pastoralists for example are recognised as one such group). This category of land is easily recognisable as a large part of village land occupied and used by individuals or groups. The village council may decide to set aside or expand existing spaces for this kind of use. Unlike areas for communal use, land for individual use can be made available to outsiders by special arrangements e.g., leasing etc.

- *Land for future use*

Land "reserved" for future use refers to spaces that are not allocated for the use of villagers (individually or collectively) at present, but instead are set-aside for the future as needs arise. While this category of land is not available to villagers at present, it can be allocated to outsiders, including investors on a derivative title (a temporary title for land use for specific purpose and time or a leasing title with almost all the land rights that the holder has serve the title itself and shorter duration to the right as when that period expires the title reverts back to the holder). These outside occupiers are not given this land absolutely; instead, it is leased to them for a designate period of time. This land category is, therefore, the most prone to acquisition for outside interests.

How is communal land created? (s. 13 Village Land Act)

The Village Land Act outlines the procedure for allocating communal land in a village. Following the procedures for comprehensive land use planning is one approach to identifying communal land. However, communal village land can also be created by specific recommendations of the village council. In other words, land use planning for the whole village is not necessary for designating communal land: instead, it is enough to propose communal land to the village assembly, which then has the option to accept or reject the proposed communal land. The village assembly can also give recommendations on ways to improve the village council's proposal. If the proposed communal land is rejected by the village assembly, the village council must develop new recommendations.

What is a customary right of occupancy? (s. 2 Village Land Act)

Customary law applies specifically to different communities in Tanzania, as opposed to the land laws, which are statutory and universal, applying to all communities equally. For example, customary laws are for almost all ethnic groups in Tanzania and these are recognized by the country's law as long as they do not contradict other statutory laws and the country's constitution, especially equality of all genders.

A customary right of occupancy is "the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land under and in accordance with customary law." In other words, a recognisable group, tribe or community can be considered native to the land in question.

A customary right of occupancy is a title over land held by an African Tanzanian in an area or region where he/she resides. The customary title is grounded on a customary law of the ethnic group or a community of people in that area. Tanzania has more than 120 ethnic groups meaning in each ethnic group the customary law of that particular ethnic group applies and guides the management of the land in question.

What are the characteristics of a Customary Right of Occupancy? (s. 18 of the Village Land Act)

- It is equal to the statutory or granted right of occupancy;
- It has value;
- It can be held by an individual citizen of African descent or by a family of citizens of African descent;
- It is found in all categories of land village, reserved and general land. Customary right of occupancy is accepted on reserved land for a number of factors: non-extinguishment of such right when reserved or general lands are established, or creation of reserved lands with the purpose of encouraging human and wildlife co-existence (e.g. Ngorongoro Conservation Area, etc.).
- Customary right of occupancy has an indefinite time period i.e. perpetual. This is different from granted right of occupancy, which is given for a limited period of time, the maximum being 99 years.

- It is governed mainly by the customary law of the community where the land is situated, for issues or disputes arising between people who are living and occupying village land (although the Commissioner has the power to interfere as he sees fit). The Village Land Act also provides a general framework unto which customary land rights are held and protected through their recognition and equating them with granted rights of occupancy.
- It can be inherited and bequeathed by a will;
- It is accessible to both genders without any discrimination;
- It can be transferred or disposed off through sale, gift and such other related means;
- It can be acquired by the state for public interest subject to payment of prompt and fair compensation (see below).

Who is qualified to a get a Certificate of Customary Right of Occupancy (CCRO)? (s. 22 Village Land Act)

The Village Land Act (s. 22) outlines those eligible for acquiring a customary right of occupancy on village land. These categories can be divided into two groups: residents and non-residents of the village. The following residents have the right to obtain the customary right of occupancy:

- An individual person;
- A family unit;
- A group of persons recognised by customary law (as previously mentioned, the law does not define what a group means, but it is generally considered to be persons who have a tendency and who have habitually been using land together, such as pastoralists and recognised as such under customary law;
- Groups of persons who have formed and organised themselves into a primary cooperative, society, an association recognized by law, etc.;
- A divorcee or whose former spouse is a village resident; and
- Tanzanian citizens of African descent;

Non-residents who are Tanzania citizens can apply, either as individuals or as groups to obtain customary right of occupancy. Foreigners are not allowed to hold customary right of occupancy on village land. A non-village organisation where citizens are the majority shareholders can apply and get a certificate or a right of occupancy, and, if a minority shareholder, foreigners can be a part of that group, which is the one avenue that provides foreign access to CCROs.

How can I apply for a Customary Right of Occupancy? (s. 22 Village Land Act)

The Village Land Act has clearly outlined the procedure to apply for a customary right of occupancy:

- The applicant must complete all paperwork, which should be available at the village council's office.
- If it is an individual submitting the application, he/she must fill the relevant forms.
- If it is the family that is applying, then at least two representatives of the family must fill the application forms.
- Likewise, if it is a group of persons who have organised themselves formally into an association, SACCOs or primary Cooperative Society, then the forms must be signed by at least two authorised officers.
- If it is a group recognised under customary law, the forms must be signed by at least two recognised leaders of the group.
- For a group of persons who are non-residents, their application forms must be filled by at least five members of the village who are not related to the applicants.

- For all other categories, it is also possible for their representatives to sign on their behalf.
- The applicant(s) must also sign a declaration on ownership of any other lands in Tanzania.
- The village council may also prescribe any amount of fees to be paid by the applicants, and may demand any other relevant information to its satisfaction.
- If it is a non-village resident applicant, then the applicant must sign a declaration that they intend to begin construction on premises in the village within three months after they submit the application for a customary right of occupancy and it has been accepted. This declaration is intended to prevent land speculators hoarding huge tracts of land for speculative purposes without intention to develop.
- All of the applications must be submitted to the office of the village council. It is usually the Village Executive Officer (VEO) who keeps records in the village council office (although some other officer may be entrusted with this task).
- The village council can request any other information before it determines the outcome of the application.

How is an Application for a Customary Right of Occupancy Determined? (s. 23 Village Land Act)

- The village council is expected to review all applications within 90 days of receiving the application forms from the applicants.
- When considering a right of occupancy, the village council is required to take into account any prior rulings or decisions over that land. It will also consider advice provided by the Commissioner of Lands on an application by a Non-Village Organisation (NVO). The village council is required to treat all applicants equally, with particular attention paid to making sure that women are not marginalized in the land allocation process.
- When an application is from a NVO the village council will take into account the advice from the district council. Normally, a NVO that is well known in a community stands a strong chance of having its application accepted. The nature of the activities that the NVO proposes to use the land for will also be taken into account. In any case, the village council must make sure that the allocation of land to a NVO will not prejudice existing or future villagers' land rights.
- When village residents make applications, the village council must take into account the size of the land they already occupy. This is to ensure these villagers do not exceed he maximum land size that can be owned by an individual in that village (there is no universal regulation on an amount that a villager should hold; rather each village assembly is empowered to set its own size and amount through regulations). It will also have to consider the capacity of the applicant to acquire technology and skills to ensure that the additional land will be put to maximum productivity.
- Upon reviewing the application and considering the above factors the village council will then approve or reject the application. In case it rejects the application the village council must communicate to the applicant the reasons behind its decision.
- If the application is accepted the village council is required to send an offer in writing to successful applicant, along with conditions for which the customary right of occupancy will be given. The secretary and chairman of the village council must sign the offer. The successful applicant must then write back to the village council within 90 days either accepting or refusing the offer.
- The village council can attach conditions to customary rights of occupancy – for example payment of rent, premium or taxes – and, the successful candidate must comply with such conditions prior to getting the customary right of occupancy, where this is the case.
- The village council, when satisfied with payments made, will grant a customary right of occupancy within 90 days. This is done by issuing a Certificate of Customary Right of Occupancy (CCRO) (s. 23 of the Village Land Act), signed by the secretary and chairman of the village council and initialled by the grantee on each page, and also signed and sealed by the district land officer.

3 INVESTMENT

In 1986, Tanzania started a slow but steady journey of abandoning state-control of the commanding heights of the economy and instead embracing the free market economy. Private individuals and companies both domestic and foreign were allowed to invest in the country and serve as the main drivers of the nation's economy. The government retreated and assumed its role of regulating and monitoring investment activities.

The government passed different pieces of legislation geared at creating a conducive – and encouraging - environment for domestic and foreign investors. One of these laws is the Investment Act. The Investment Act sought, and seeks, to provide a one-stop centre for domestic and foreign investment. Most investments envisaged by the Investment Act are supposed to take place on land, and they require investors to lease or obtain some rights over the land. They also entail the removal and displacement of local people from their lands, payment of compensation, transferring land from village land to general land or the creation of derivative title in both general and village lands. It is from the foregoing reasons that we venture to unpack the Investment Act for broader understanding of the Act itself.

This section, therefore, presents the legal procedures by which land can be acquired for investment, and the entries that these procedures establish for villagers to have a voice. Where there are no clear legal procedures in place, existing practice is described.

Why does the government support investment and what are the relevant law-making institutions? (s. 4 Tanzanian Investment Act)

The government promotes investments because it can play an important role in the country's development and economic growth.

The Tanzania Investment Centre (TIC) was established by the Tanzanian Investment Act to serve as a 'one-stop centre' for the government charged with coordinating, facilitating, encouraging and promoting investments in Tanzania. It is specifically required to:

- Initiate and support measures that will enhance the investment climate in the country for both local and foreign investors;
- Collect, collate, analyze and distribute information about investment opportunities and sources of investment capital (i.e. potential buyers), and advise investors, upon request, on the availability, choice or suitability of partners in joint-venture projects;
- Identify investment sites, estates or land, and highlight the facilities available on these areas. This is to be done in consultation with other government institutions and agencies;
- Help investors obtain necessary permits, licenses, approvals, consents, authorizations, registrations and meet other legal requirements for setting-up and operating an investment including the coming into effect of investment certificates issued by the Centre;
- Provide, develop, construct, alter, adapt, maintain and administer investment sites, estates or land together with associated facilities of those sites, estates, or land, and subject to relevant law, the creation and management of export processing zones i.e. areas established by the government to stimulate production of goods geared for export. These areas enjoy special status and are exempt from many levies and duties charged on other goods not produced there;
- Provide and distribute up-to-date information on benefits and incentives available to investors

- Carry out and support local investment promotion activities to encourage and facilitate increased local investments, including entrepreneurial development programs.

How is an investor defined? (s. 3 Tanzanian Investment Act)

The Tanzania Investment Act distinguishes between foreign and local investors:

- A 'local investor' is:
    - An individual or 'natural' person (as opposed to a company which is also a recognised legal actor) who is a Tanzanian citizen;
    - A company incorporated under the laws of Tanzania with Tanzanian citizens as majority shareholders;
    - A partnership in which a Tanzanian national the controlling interest.
- A 'foreign investor' is defined as:
    - A person who is not a citizen of Tanzania;
    - A company incorporated under the laws of any country other than Tanzania in which more than fifty percent of the shares are held by persons who are not Tanzanian citizens;
    - A partnership in which a person who is not a Tanzanian citizen owns the controlling interest.

According to the Tanzania Investment Act the minimum capital requirement for foreign investors is US $300,000, and the minimum capital requirement for local investors is US $100,000. In other words, to qualify as an investor one has to prove that he/she has sufficient capital to finance the proposed investment.

Can local investors get land in Tanzania? (s. 15 Tanzanian Investment Act)

Yes, local investors are able to obtain land in Tanzania through the means available to any private citizen. They can obtain:

- The right of occupancy specifically geared for investment;
- A derivative right (i.e. a temporary land title use given to them by TIC with TIC obtaining it from the Commissioner for Lands, it generally fewer days less to the actual period stipulated in the land title, e.g. it the title given to TIC by the Commissioner is 99 years then TIC will issue a derivative right to 98 years and 364 days); and
- A sub-lease from private persons – as explained earlier in this document.

Can foreign investors get village land in Tanzania? (s. 17, 18, 22 Village Land Act)

Yes, but only for investment purposes. A foreign investor can only obtain village land indirectly. The Village Land Act makes it clear that only citizens of African descent can apply and get a customary right of occupancy in village land, which is equal in every respect to a granted right of occupancy. A village council can grant the certificate to any citizen or any group whose majority membership is made up of Tanzanian citizens.

Foreigners can, however, get a customary right of occupancy if they are a part of Non-Village Organization where majority shareholders are citizens. The Village Land Act defines a Non-Village Organization (NVO) as any group (corporate or otherwise) that is: legally allowed to operate in Tanzania and has a majority membership of Tanzanian citizens who do not come from the village in question.

While CCROs are *primarily* granted to citizens, foreigners can own village land, provided that they are not the majority shareholders in the approved corporate entity. In practice however, it is uncommon for foreign investors to acquire land, perhaps because they are unwilling to invest where they are unable to be majority shareholders

Can a foreign investor obtain land in general land? (s. 19 Village Land Act; s. 2 Land (Amendments) Act; s. 19 Land Act, s. 15 of the Investment Act)

Yes. General land is the easiest place for foreigners to get land for investments as majority shareholders.

This is partly due to the confusing and often conflicting definitions of general land discussed above. For example, land that is occupied or used by villagers but that isn't yet registered as village land is classified as general land by the Land Act.

The Investment Act and the Land Act make it clear that investors can be granted a right of occupancy for investment purposes. The Land (Amendments) Act of 2004 expands the avenues by which investors can obtain land for investment purposes:

1. By a getting right of occupancy for investment purposes under the Tanzania Investment Act;
2. By getting a derivative right for purposes of investment under the Tanzania Investment Act; and
3. By a partial transfer of interest in land for purposes of investment in joint ventures (in other words, by stating that you do not intend to be the sole investor on all of the land).

In all three cases, it is imperative that the land or interest acquired by a foreign investor be for investment purposes, and that the investment has been approved in accordance with the Investment Act of 1997.

What is the procedure for foreign investors to get land for investment purposes?

According to the Land Act, the Village Land Act and the Investment Act foreign investors seeking to acquire village land for investment purposes, have an option of petitioning the President to transfer the village land to general land. This kicks in the requirements of meetings between the Commissioner for Lands, investors, the village council, and village assembly. The village assembly consent is important and once consent is given the President through the Minister of Lands must issue a declaration of his intention to effect the transfer and once again a series of consultations have to take place with those that will be impacted by that decision. The declaration can be challenged in the court of law.

The investor, also, has an option to apply for the village land from the village council and village assembly to invest in the village as a NVO. The NVO must be an organization or company whose majority of its members are citizens conducting their businesses in the village. The application of land under this procedure will not result in any transfer of village land to general land.

The two main mechanisms available to foreign investors in obtaining land are: the TIC land bank scheme and an informal alternative procedure for identifying village land for investment. These are not clearly discussed in the land laws but the practice is described below.

What is a land bank? (s. 6 Tanzanian Investment Act)

The TIC Land Bank is a database of both government land and land held by other bodies but earmarked by TIC for investment purposes. Section 6 of the Tanzania Investment Act requires TIC to create and manage the land bank. In doing so it is required to collect, collate and analyse information related to estates and land, and to create and maintain an easy to access database.

Since 2004, TIC has been looking for lands, mostly in rural areas, whose owners are willing to sell to investors. Owners can be either individuals or village councils. TIC does not necessarily have titles to these lands; rather it calls on the general public and other institutions to bring to its attention areas that the landholders want them to be allocated to investors for investment purposes.

By 2005 TIC had only brought 2.5 million acres into its database[3], and only 50,000 acres have been allocated to investors through the land bank[4].

Can I get my land back if an investor fails to meet development conditions? (s.45 Land Act)

Yes. According to the Land Act (s. 45), if an investor (local or foreign) fails to meet the development conditions – the purpose for obtaining the land outlined in both the application and the certificate of rights of occupancy – the President can revoke the title.

For village land the village council has the power to revoke the title when the investor fails to honour the investment conditions stipulated in the title. For the village land that was transferred to the general land that land would simply revert to the President's (as a trustee of all land) and the Commissioner for Lands, who has the legal mandate over general land. This is because that land is no longer vested in the village council. The village council, however, may petition the President for it to be transferred to village land.

3 (www.tic.co.tz & USAID 2010)
4 (USAID, 2010)

What are certificates of incentives? (s. 17 Tanzanian Investment Act)

These are certificates that are given to successful investors from TIC after complying with all application procedures as stipulated in the Tanzanian Investment Act.

What do certificates of incentives offer? (s. 19-20 Tanzanian Investment Act)

Proponents of FDI argue that countries with sound investment climate and stability are the ones best suited and attractive to outside capital and investment. These investors shun investment risk countries as they pose danger to their investments. Most developing nations are perceived to be 'high-risk' investment destinations due poor records in adhering to the rule of law, corruption, weak governmental institutions, lack of an independent judiciary, and penchant to expropriate private property without fair and appropriate compensation; a powerful executive arm of the state dominating the parliament and the judiciary. To ameliorate the risks, these countries offer generous incentives like fiscal and legal stability, disavow nationalization, and accept a neutral and internationally credible investment dispute settlement body.

In the 1990s the World Bank categorized Tanzania, and most African nations, as high-risk countries. The Tanzania Investment Act sought to reduce such risks to foreign investors by offering a number of incentives. These incentives include:

- The recognition of private property and protection against political risks i.e. nationalization, creeping expropriation, fiscal stability,
- Reduced import tariff on project capital items (5% import duty for investments in priority sectors and 0% for investment in Lead Sectors);
- Favourable investment allowances and deductions i.e. capital allowance (100%) on industrial buildings, plant and machinery and on agricultural expenditure;
- Deferment of VAT payment on project capital goods i.e., machines, vehicles, as defined in the tariff book and relevant annexes of deferred VAT must be shown on monthly returns and thereafter extinguished unless it is discovered otherwise after audit;
- Imports Duty drawback on raw materials;
- Mining inputs, agriculture inputs, goods manufactured for exports, foodstuff and tourism attract zero-rate tax meaning there is no tariff that is charged on them;
- Straight line accelerated depreciation allowance on capital goods;
- Any investment that incurs loss is allowed to carry over that loss for a period of up to five years and deduct it against future profits;
- A reasonable corporate tax rate at 30% and below withholding tax on loan interest payments;
- The investor has unrestricted right to transfer outside the country 100% of foreign exchange earned profits and capital;
- The ease of obtaining other permits such as Residence/Work Permits, industrial licence, trading licence etc. through one-stop-shop operation of TIC; and
- The investor has an automatic right to obtain employment permits for of up to five foreign nationals for a project holding a certificate of incentives from TIC.

What is the procedure for obtaining a certificate of incentives from the TIC? (s. 17 Tanzanian Investment Act)

To obtain a certificate of incentives, an investor must submit an application to TIC with the following information:

- Name and address of the proposed business enterprise; its legal form; its banker (either the banking information or the financial backers if the investor has secured a loan); the name and address of each director or partner; and the name, address, nationality and holding of each shareholder;
- The qualifications, experience and other relevant particulars of the management;

- The nature of the proposed business activity and the proposed location for that activity;
- The proposed capital structure or amount of investment, and the projected growth over the next five years;
- How the investment will be financed, and evidence that sufficient capital is available;
- An undertaking that the project will be implemented as indicated in the project plan and expected returns.

Where an application is to rehabilitate and/or expand an existing enterprise, it must contain:

- The name of the existing enterprise, and its Articles of Association, Memorandum of Association or partnership agreement;
- The management team qualifications;
- A statement of audited accounts for the three previous years;
- The nature of the proposed rehabilitation or expansion;
- The capital structure and projected growth over the next five years;
- Financing required for the rehabilitation or expansion project, and evidence of availability of the financing.

The TIC Board examines applications for a certificate of incentives. If the potential investor is granted a certificate but wishes to expand his operations, he is required to submit a separate application with supporting documentation to the government authority with jurisdiction over the relevant sector and business. For example, applications to undertake activities in the hotel business are made to the Tourist Agents Licensing Authority under the Tourist Agents (Licensing) Act, 1969.

Is there a limit to the size of land and the duration of occupancy that a foreign investor can get? (s. 4 Land Act; s. 17 Village Land Act)

No and yes. Neither the Land Act or the Village Land imposes a limit on the amount or size of land that may be given to a foreign investor. The duration for a granted right of occupancy is limited to a maximum of 99 years; for a derivative title, the investor can get land for the duration of what remains from the original title.

Interestingly, the (non-binding) Guidelines for Sustainable Liquid Biofuels in Tanzania (2010) imposes limits to both the plot size and duration for which foreign investors can hold land for biofuels development. These investors can obtain a maximum holding of 25,000 hectares for an initial period of five years, renewable for up to a maximum duration of 20 years depending on the type of crop and other relevant information. This is because it is recognized that the area might be hoarded or not used for the stated purposes.

Despite slightly stronger restrictions on land use for biofuels, the guidelines are not legally binding or enforceable. Where the guidelines are in conflict with the land laws, it is the law that prevails. This is due to a well established principle of law that a policy or guideline, administrative circular, cannot override a law passed by parliamentThe guidelines do not come from the law, but rather from an administrative decision of the Minister of Energy and Minerals. The land laws do not establish a legal limit to the size of land that can be held for investment purposes, and do not limit the period of time an investment activity can be carried out except insofar as the land right is limited in duration.

Does a village need to have a land use plan before it can give land for investments?

No, the law does not require this. Under the Guidelines for Sustainable Liquid Biofuels in Tanzania (2010) however, there is a pre-condition that a land use plan be in place before a biofuels investment on village land can be made (MEM 2010:7). Here again, as the biofuels guidelines cover an area the law is silent on, it will be interesting to see whether this provision of the guidelines will be enforced in practice.

Are there any informal alternative procedures for identifying village land for investment?

Yes. Since the establishment of the land bank mechanism has not materialized an alternative procedure, mirroring the procedure discussed above in obtaining village land, has been developed for investors to get land for investments. This procedure normally follows these steps, which are a mixture of legal and informal

(or quasi-legal) practices:

- Prospective investors are connected to local brokers and make their intentions known on the quality, size of the land they want.
- The investor then approaches the District Council through the broker (usually the Land Officer) and states their intentions and the type and size of land desired.
- The District Council typically welcomes the investment opportunity and helps to identify village land that would be appropriate for the intended investment (general land is more easily accessible therefore this procedure is not used). In some cases the potential investors would have already identified the land of their choice with the help of brokers.
- When the District Council and investor have identified the village they want to invest in, the district will arrange for the investor to meet with the village residents to present the investment opportunity. They will normally consult with and seek the assistance of the village council before going to the village general assembly.
- If the village general assembly approves the request for land, the meeting will be documented in minutes, as evidence of the village having given its consent for its land to be used for investment purposes.
- The minutes of the village assembly will then be taken to either TIC or the Commissioner for Lands for transfer from village to general land procedures to begin.
- The transfer will take place subject to compensation paid to the villagers.

What ownership options are available to foreign investors after the land has been identified and transferred? (s. 31-34 Village Land Act)

In all cases, when village land has been transferred to general land, or where general land is otherwise available to an investor, there are three types of land rights arrangements the investor can hold:

1. A direct right of occupancy, under the administration of the Commissioner for Lands;
2. A 'derivative title' (managed by the TIC. A derivative title is a lease title with similar conditions as those attached to the certificate of occupancy save that its holder is a lessee and not a certificate of titleholder. The derivative title is a partial transfer of interest in land for purposes of investment in joint ventures, arranged by the Commissioner for Lands);
3. A partial transfer of interest in land for purposes of investment in joint ventures, arranged by the Commissioner for Land.

4 REDRESS MECHANISMS

Where do I go when I have a grievance?

It is a basic principle of law and justice that where there is a right there must a corresponding remedy when that right is violated. In practice, however, accessing and affecting the remedies provided by the law can be difficult. At the national level, remedies can be divided into those available through normal courts and those available through quasi-administrative bodies that have been entrusted with adjudicating certain rights. Remedies in normal courts can be further divided into civil and criminal law proceedings, and constitutional remedies.

The Land Act provides specific legal redress mechanisms but also mentions quasi-administrative remedies; for convenience this guide will group them as remedies in normal courts. Besides domestic mechanisms, there are sub-regional and regional, international human options, including the East African Court of Justice, the African Commission on Human and Peoples Rights, the African Court of Justice and a number of mechanisms under the UN Human Rights system.

Normal remedies (Domestic)

What is a 'normal' remedy?

Normal remedies are defined here in contrast with constitutional remedies. This includes options that are accessible in normal civil and criminal procedures, not those that are instituted through the constitutional procedure. In other words, they are subject to the wills and opinions of individual judges and courts, and are not directly dealt with in the Tanzanian Constitution.

What are the main domestic civil and criminal law procedures for addressing grievances through normal remedies?

Legal disputes are normally divided into two main categories: criminal and civil disputes. Criminal disputes deal with offences against legal prohibitions imposed by the Parliament on all people living in the United Republic of Tanzania. Violation of these legal prohibitions is an offence, which affects society, i.e. the entire country. This is called a criminal offence. The Republic, i.e. the government, is vested with powers to prosecute all people who commit such violations. When found guilty then the accused person can be convicted or forced to pay a fine or be visited by both. One underlying principle of all criminal prosecution is that the accused person is presumed innocent until he or she is proven guilty.

Civil disputes are disputes between private individuals over different engagements and interactions in their daily lives like business deals, marriage, employment, transportation, health, energy, natural resources management and so on.

Legal Procedures

For criminal matters, the first step is to report to the police who will then investigate the allegations. If there is sufficient evidence, the police will take the matter to court on behalf of the Republic of Tanzanian through the services of prosecutors. In a criminal trial, the complainant is normally the first witness of the prosecution. If the perpetrator is found to be guilty of the offense based on the evidence produced, he or she will be fined, sent to prison or both depending on the decision of the magistrate or judge.

For civil matters, those with a grievance can take their complaint to court by submitting a written document called a 'plaint stating the facts' and the nature of the complaint. If an investor, for example, has breached

conditions of a contract –by failing to pay fees to the village or using land for purposes other than what was agreed to in the contract – the complainant can take the investor to court for breach of contract. The accused will normally be required to answer the complaint with what is called a written statement of defense. The aggrieved party then has the option of replying to the written statement of defense if he chooses. The court will then hear the case by listening to the evidence from both parties. If the alleged wrongdoer is found guilty of the alleged wrong, the court will award damages (compensation) requested by the complainant and/or grant other remedies it deems appropriate.

Where do I go when I have a land related dispute at the village level? (s. 60-63 Village Land Act; s. 3 Courts (Land Disputes Settlements) Act)?

The Courts (Land Disputes Settlements) Act of 2002 governs land disputes in the country. It gives powers to the Village Land Council, (VLC), the Ward Tribunal, the District Land and Housing Tribunal, the High Court, and the Court of Appeal to settle such disputes. It also gives effect to the principles of land management enshrined in the Land Act and the Village Land Act.

The Courts (Land Disputes Settlements) Act directs that land disputes (not criminal cases) at the village level must be referred to the Village Land Council (VLC), a dispute resolution organ at the village level and the lowest level of dispute settlement available in the system.

The VLC is established through a nomination process. The Village Council i.e., the village governments presents seven names of adult villagers, three of whom must be women, to the Village Assembly (VA) for approval or disapproval. The Village Council will still have to nominate new names to replace any names rejected by VA. The VA must still approve or deny the new nominations.

Any person who meets the following criteria can be nominated to the VLC:

- Is a person of good standing, reputation and integrity;
- Has a good knowledge of customary law;
- Is not a member of the village council, to avoid conflicts of interest between the VLC and VC;
- Is not a Member of Parliament;
- Is a not magistrate working in the District where the VLC is to be established;
- Is over the age of 18;
- Is mentally fit;
- Has never been convicted of a criminal offence involving dishonesty or immorality; and
- Is a citizen of the United Republic of Tanzania.

VLC members are appointed to a three-year term, with the option of being reappointed using the same procedure.

The VLC quorum is four members, two of which must be women. The Chairperson/Convenor has a deciding vote in the case of a tie of votes.

What are the functions of the VLC? (s. 7 Courts (Land Disputes Settlements) Act)

To mediate both land disputes brought to it by individuals, groups or organisations; and between different groups with an interest in land under village management. Rather than the entire VLC sitting on all decisions, one or two VLC members can work with the parties to mediate a dispute, depending on the preference of the parties, and provided that the council members do not have any personal stake in the matter. The VLC normally conducts mediations and makes decision using the customary law applicable in the area (as long as it does not conflict with any other law).

The VLC is required to act in ways that are consistent with the principles of natural justice, i.e the right to be heard and to defend him/herself against the complainant as well as to be free from any influence or bias.

Do I *have* to refer my dispute to the VLC? (s. 61 Village Land Act)

The law can be confusing when it comes to this question. Section 61 of the Village Land Act states that "No person or non-village organisation shall be compelled or required to use the services of the Village Land Council for mediation in any dispute concerning village land", indicating that it is not mandatory. However, in practice there are often no other options, particularly when the value of the disputed land does not exceed 3 million shillings.

What is a Magistrate Court? (s. 4 Courts (Land Dispute Settlements) Act)

Magistrate Courts (the Primary Courts, District Courts and Resident Magistrate's Courts) are formal judicial bodies in the country established by the Magistrates Courts Act R.E. 2002. They are subordinate courts to the High Court and Court of Appeal. They have criminal and civil jurisdiction meaning they are empowered to hear and decide criminal and civil cases. These courts, however, do not have any powers on land cases in the country. Land disputes, therefore, should not be taken to these courts.

What is a Ward Tribunal? (s. 10 Courts (Land Dispute Settlements) Act)

After the VLC, the next level of land dispute settlement courts is the Ward Tribunal. The Ward Tribunal Act of 1985 established these tribunals. They have powers to hear complaints made directly to it by the complainants and appeals from people dissatisfied with the decisions of the VLC.

Who makes up a Ward Tribunal? (s.11 Courts (Land Dispute Settlements) Act)

The district council is empowered to establish Ward Tribunals in rural wards while urban authorities like the city, municipal and town council have powers to establish ward tribunals in urban wards:

- Ward Tribunals are made up of between three and eight people, at least three of which must be women
- The district council appoints the Tribunal Chairperson. Where there is no district council any other local government authority with appointment powers may appoint the Chairperson
- The Ward Tribunal Secretary is charged with keeping records of the Tribunal's proceedings
- Ward Tribunal members must have the following qualifications:
    - Not members of parliament;
    - Not members of the village council or Ward Development Committee;
    - Not civil servants;
    - Over the age of 18;
    - Mentally fit;
    - Persons not convicted of a criminal offence and offences arising out of immoral acts; and
    - Citizen of the United Republic of Tanzania.
- In any mediation session, the Tribunal must sit with three members, including at least one woman. The Tribunal members participating in a given session are selected by the Chairperson from the total pool of Tribunal members.
- For each session, the Chairperson also appoints a convener, who will have a deciding vote in the case of tie votes among the Tribunal (i.e. when an even number of members are present).

What are functions of the Ward Tribunal? (s. 13 Courts (Land Dispute Settlements) Act)

- Their primary function is to secure peace and harmony in their district by mediating conflicts and helping parties come to amicable solutions. Their approach is characterised by encouraging understanding and good relations, rather than the adversarial, 'winner takes all' approach in normal courts.
- To assist parties in mediation, the Tribunal is required to use the customary law of the area it serves

(providing it does not interfere with other legislation).

- The tribunal will also use the principles of natural justice in its mediation, especially where the customary principles of mediation lack such principles.

How can a complaint be taken to a Ward Tribunal? (s. 14 Courts (Land Dispute Settlements) Act)

The complainant is required to submit his/her complaint to the Secretary of the Tribunal. The complaint may be in writing or oral. For oral complaints, the Secretary is required to reduce it in writing and to give a copy to the complainant. Thereafter, Secretary must submit the complaint to the Chairperson, who will then select three members of the Tribunal to mediate the conflict, including assigning a convenor to preside over the proceedings.

Can I take any land dispute to the Tribunal? (s. 15 Courts (Land Dispute Settlements) Act)

No. Land disputes taken to the Ward Tribunal must be:

- Of a civil (not criminal) nature; and
- Regarding land or property of a value that does not exceed 3 million shillings. (This is called the "pecuniary jurisdiction" of the Ward Tribunal).

What powers does the Tribunal hold in relation to land disputes? (s. 16 Courts (Land Dispute Settlements) Act)

After hearing the parties or during the course of the trial, the Tribunal can:

- Order that the land or property in dispute be returned to its rightful owner;
- Order parties to comply with the agreement between themselves, where the dispute was caused by a lack of compliance of the agreement by any of the parties or both;
- Issue mandatory and prohibitive injunction i.e. compulsory and stoppage orders against any party(ies);
- Order any person in the dispute to perform certain duties, which the Tribunal finds necessary to resolve the conflict;
- Direct that the wrongdoer pay compensation to the victim in the dispute if it finds it just and appropriate to do so. The Tribunal may also specify the timeframes and/or instalments in which the payments should be made;
- Order the losing party to pay the costs of litigating the case by the winning party;
- Make such orders that the interest of justice requires in relation to the case.

Constitutional remedies (Domestic)

What are constitutional remedies?

Constitutional remedies relate to human rights violations, as determined and dealt with through the High Court.

What is the procedure of instituting constitutional petitions? (a. 12-29 Constitution of the United Republic of Tanzania)

- Alleged violations must be based on articles 12-29 of the Constitution of the United Republic of Tanzania Cap 2 2002 of laws of Tanzania, which sets out and guarantees the Tanzanian people and all people living in Tanzania the enjoyment of the fundamental rights and freedoms, such as: right to life, right to property, right to equality before, due process rights, freedom of assembly and association ECT.
- A complaint outlining the violation of any of these rights can be filed through a petition to any registered High Court in Tanzania. The petition must include the name and address of the applicant, the name

and address of the person against whom the application is brought, the reasons/grounds for the said application, the specific part of the constitution which is alleged to have been violated, the facts of the alleged violations and the nature of the redress and remedy that is being sought.

- A copy of the application/petition must be served to the person(s) against whom the application is brought.
- If the application is being brought against an officer of Government in their official capacity, a copy of the petition must be given to the Attorney General or his official representative.

What remedies/orders can the High Court provide? (s. 37-47 Courts (Land Disputes Settlements) Act; s. 13 Basic Rights and Duties Enforcement Act)

- The High Court can give orders necessary to stop or address proven violations, such as ordering the stoppage of acts of violation and/or ordering compensation for resulting injuries and losses.
- The High Court can also declare the violation of such rights or decisions and actions done by an individual, a company or the government to be illegal and in violation of the guaranteed basic rights and freedoms.
- If the alleged violations are a result of an Act of Parliament that contradicts the Constitution, the High Court will not declare a law to be unconstitutional, but it will give the Parliament time to amend the legislation. If the Parliament does not address the conflict with the constitution within a specified period, then the legislation will become null and void, and any actions based on it become illegal to the extent of their inconsistency with the Constitution.

Section 13(2) of the Basic Rights and Duties Enforcement Act (Cap 3 R.E 2002) is very specific on this:

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

What are some limitations of Constitutional Law Remedies?

- The fact that these remedies can only be entertained by the High Court limits the number of citizens who can seek remedies for violations of human rights. There are relatively few High Courts in the country and these are located only in urban areas.
- The procedure for accessing constitutional remedies is also extremely complex, and will most certainly require the services of a lawyer. Those who cannot afford or otherwise access a lawyer cannot therefore use this remedy.
- A panel of three judges is supposed to hear and decide a constitutional and basic human rights case. It is very difficult to synchronize the timetable of three judges as a result constitutional and basic human rights cases take a very long time.
- The fact that the High Court cannot declare an unjust law to be unconstitutional at the time of the judgment but to give time to the government to move parliament to amend such law is greatest weakness of the country's Constitution. This allows the unconstitutional law or provision to continue operating while violating the rights of other people.

Quasi-Judicial Remedies (Domestic)

What is the Commission for Human Rights and Good Governance (CHRAGG)? (a. 129 Constitution of the United Republic of Tanzania; s.5-6 Commission for Human Rights & Good Governance)

The CHRAGG is an autonomous government institution that is entrusted with the duty of protecting and promoting human rights and good governance in the country Article 129(1) of the Constitution of the United Republic of Tanzania establishes it, but the CHRAGG was only officially established in 2001, when the Commission for Human Rights and Good Governance Act was enacted.

What are the powers and functions of CHRAGG? (s. 6-8 Commission for Human Rights & Good Governance Act)

The main function of the CHRAGG is to investigate human rights violations and cases of unjust or inefficient administration. The CHRAGG can investigate these violations on its own volition, or after being asked to do so by an application from an aggrieved person or a representative of a victim of human rights violation.

A person acting in the interest of a group or class or persons can also seek the intervention of the CHRAGG on acts of human rights violations and maladministration. This means that victims who may be powerless to make complaints themselves can get the assistance of others, such as human rights minded organizations. One person can also represent a group of people even though he or she is not the victim.

The CHRAGG can offer the following remedies to aggrieved individuals or parties:

- Promote negotiation between parties;
- Report an abuse of rights and maladministration to the proper authorities;
- Make recommendations to authorities and other violators of rights (i.e. individuals or companies) to provide necessary remedy and/or redress.

What are some advantages of pursuing human rights violations through CHRAGG?

- It is easy to access the services of the CHRAGG as compared to an ordinary Court. Applications can even be done verbally.
- Appearance before the CHRAGG is not limited to individual persons, or legal representatives of the persons, who have suffered violations of human rights or good governance. Third parties can also appear on behalf of the victims.

What are some limitations of the CHRAGG?

- It cannot investigate the President of Tanzania or the President of Zanzibar despite the fact that heads of state are sometimes responsible for major decisions that interfere with human rights of the people and some of their acts are out of maladministration. For example, local communities can be deprived of their natural resources through acts that have the sanction of higher offices, including the President.
- It cannot entertain a matter that is before a court of law or other tribunal.
- It cannot adjudicate a matter that touches on the relations between the United Republic of Tanzania and other states or international organizations.
- It cannot overturn a presidential pardon for murder.
- It does not have a mechanism to enforce its decisions like courts of law. It can only give recommendations to other organs/institutions to enforce its decisions but it cannot force those other organs/institutions to abide by its recommendations.
- The impartiality of the CHRAGG depends on the individual perspective of the Commissioners who (along with Assistant Commissioners) are appointed by the President of Tanzania. Many Commissioners have previously been government employees and may thus be inclined to support the position of Government.

The East African Court of Justice (Regional Remedy)

What is the East African Court of Justice (EACJ)? (Art. 2 Treaty Establishing the East Africa Community)

The EACJ (the Court) is the judicial body of the East African Community.[5] The Court's origins date back to colonial times, with the 1909 establishment of the Court of Appeal of Eastern Africa, covering the then countries of Aden, Somalia, Kenya, Tanganyika, Uganda, Zanzibar and Seychelles (Nsekela, 2011). In later years, the Court changed to the Court of Appeal of East Africa serving the independent countries of Tanganyika, Zanzibar, Kenya and Uganda.

The Court ceased to exist when the first East Africa Community (EAC) collapsed in 1977. With the re-establishment of the EAC in 1997, the Court was also re-established by Treaty Establishing the EAC. The Court was officially inaugurated in 2001 and it serves the five member countries of the EAC.

What is the mandate of the East African Court of Justice? (a. 27-32 Treaty Establishing the East Africa Community)

The mandate of this Court are outlined in Articles 27-32 of the Treaty Establishing the East African Community (TEEAC) these include:

- Determining cases regarding the interpretation TEEAC;
- Determining human rights issues brought to the Court by citizens of member states (although this is subject to the Council of Ministers establishing a Protocol to mandate this jurisdiction);
- To hear grievances from the member states against one another or against the Community, and from the Community itself against member states, for failure to meet obligations under the TEEAC, or any other act, regulation or action;
- To hear disputes related to the East African Community employees;
- To arbitrate on matters related to conflicts between member states; and
- To hear appeals from member states' Supreme Courts (although again, this is subject to the formation of a protocol to that effect).

Who can appear before the East African Court of Justice? (Art. 37 of TEEAC)

A wide range of actors can take their grievances to the Court, though most are restricted to raising matters that have direct relevance to the TEEAC.

Some of the parties that can lodge various types of complaints to the Court are:

- Member states which may file cases against each other for failure to meet their obligations under the treaty, and for taking actions deemed contrary to the provisions of the Treaty.
- The Secretary General of the East African Community who can bring a member state to the Court for failure to meet its treaty obligations, and when it is in breach of the provisions of the Treaty.
- National courts which may refer matters to the Court for seeking the interpretation of the provisions of the Treaty.
- Legal bodies and citizens of the East African Community who can open suits to challenge the legality of any action or law of a Partner State which goes against the Treaty.

What are the limitations of East African Court of Justice?

The EACJ does not have its own machinery for enforcing judgments. Rather, it relies on the High Courts of member states to do so (Ruhangisa, 2001). In other words, when a judgment is given by the EACJ, the winner will have to go back to a High Court in her/his country and make an application for the home country court to enforce the judgment. The biggest problem with this is that it is up to national court of the 'defeated' country to implement the decision. The EACJ, however, does not have mandates over national laws and its recommendations can, therefore, be easily ignored.

5 The two other main bodies are the Council of Ministers and the General Assembly.

Some national courts suffer from political interference and are hesitant to enforce the decisions of the EACJ.

Another limitation of the EACJ is on the limited matters it can address. The Court does not yet have powers to determine human rights cases. Even though, in 2004 the Court was given the power to hear and determine human rights cases and appellate powers from the decision of supreme courts of member states. This decision is not yet operational as the necessary legal documents or protocol has not been passed. As a regional court of the region, the EACJ would be well placed to address human rights situations where national courts are unable or unwilling to do so. Granting the EACJ appellate jurisdiction would also create an opportunity for decisions of national courts to be challenged in a regional court.

The African Charter on Human and Peoples Rights (The African Charter)

In 1981, the heads of states of African nations met in Nairobi, Kenya and unanimously adopted the African Charter on Human and Peoples Rights ('the African Charter'). The African Charter enshrines individual and collective rights of people in a nation and accords them regional recognition and protection. It recognizes and upholds the principle of equality before the law, right to life, right to liberty and personal right to be heard, freedom of information, freedom of association and movement; right to assemble, right to participate in a government.

The African Charter also protects the right to property but the government can interfere with this out of public need or the general interest of the community out of the provisions of appropriate law. In the case of Tanzania this brings in the provisions of the Land Act R.E. 2002, the Land Acquisition Act R.E 2002, the Village Land Act R.E. 2002. The Charter also protects the right of the people to dispose of their wealth and natural resources and it can be exercised in their best interest and it cannot be taken away.

In case the government exercises its powers to take away the property of an individual it is required to pay appropriate compensation. The Tanzanian constitution calls for payment of fair compensation, and the African Charter requires compliance with applicable law. In other words, a violation of the constitutional requirement to pay compensation would breach the right to property provision of the African Charter.

The African Court of Justice and Human Rights

(Protocol on the Statute of the African Court of Justice and Human Rights)(Articles. 2 and 3,) and (the Statute of the African Court of Justice and Human Rights Articles 28, 29 and 30)

The Protocol on the Statute of the African Court of Justice and Human Rights replaced the African Court on Human and Peoples Rights and the Court of Justice of the African Union. In its place it established the African Court of Justice and Human Rights.

The African Court of Justice and Human Rights has powers to hear and decided cases and all legal disputes, which relate to:

a. The interpretation and application of the founding or constitutive Act i.e. the Act of the African Union that established it;

b. The interpretation, applicability and validity of other Treatises promulgated by the African Union and all subsidiary legal documents adopted by the Union or by the dissolved Organization of African Unity (OAU);

c. The interpretation of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol on Human and Peoples' Rights on the Rights of Women in African and such other legal instrument pertaining to human rights that is ratified by the States Parties concerned;

d. Questions of international law;

e. All acts, decision, regulations and directives of the organs of the Union;

f. All matters provided specifically in any other agreements concluded by the parties themselves or with the Union that confer jurisdiction to the Court;

g. Existence of any fact which when established constitutes a breach of an obligation owed to a State Party or to the Union; and,

h. The nature or extent of the reparation to be made for the breach of an international obligation.

The mandates of the Court are immense and touch on human rights of the people as the Court is empowered to hear and determine cases arising out of many human rights instruments including the African Charter. The Court has powers to therefore hear cases that pertain to land rights and investments.

Who can file a case before the African Court of Justice and Human Rights? (Articles 29 and 30)

There are two groups of people and institutions allowed to file and litigate cases before the African Court of Justice and Human Rights: These are two: entities eligible to submit cases to the Court and other entities allowed to submit cases before the Court: The first group comprises entities that can file cases to vindicate all matters that the Court has powers to determine:

- Countries that are members to the Protocol i.e. countries that have signed and ratified the Protocol thus agreeing to be under the jurisdiction of the African Court of Justice and Human Rights;
- The Assembly of the Heads of States of the Union of the African Unity, the Parliament and other organs of the Union authorized by the Assembly;
- A staff member of the Union on an appeal in a dispute guided by the terms and conditions laid down in the Staff Rules and Regulations of the Union.

The Second group encompasses of entities that are specifically to deal with violation of any right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa and other relevant human rights instrument that a country or countries in disputes have ratified. These entities include:

- State or countries that are members to the Protocol on the Statute of the African Court of Justice and Human Rights;
- The African Commission on Human and Peoples Rights;
- The African Committee of Experts on the Rights and Welfare of the Child;
- African Intergovernmental Organizations accredited to the Union or its organs;
- African National Human Rights Institutions; and
- Individuals or relevant Non-Governmental Organizations accredited to the African Union or its organs, subject to the provisions of Article 8 of the Protocol.

Individuals and Non-Governmental Organizations that are accredited to the African Union or any of its bodies have the right to file cases before the African Court. If a case involves the violation of human or peoples' rights then the case is supposed to be submitted by way of a written application to the Registrar of the African Court of Justice and Human Rights. The application must show clearly the right(s) that have been violated and indicate the specific articles:

- The African Charter on Human and Peoples' Rights;
- The Charter on the Rights and Welfare of the Child,
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women; and
- Or any other relevant human rights instrument that has been ratified by the country in question.

In hearing the case the Court has powers to issue provisional measures or temporary orders to preserve the rights of the parties. Thus, the Court has powers to order parties before it not to any act that may prejudice the rights of each other or of the other party until the Court hears and determines the dispute. Moreover, there is a right of representation with a party to the case entitled to nominate any qualified person to represent him or her before the Court.

Judgment and Decisions of the Court (Article 43)

The Court upon hearing the case is required to give its judgment within ninety days after completing the hearing. The Judgment must contain the reasons behind it. In its judgment the Court may order the payment of compensation if it finds that there was a violation of human or peoples rights or such an appropriate measure fit to remedy the violation. The Judgment of the Court is final.

Treaty Mechanisms at the United Nations level (International)

When domestic redress mechanisms cannot offer redress for violations of human rights, aggrieved persons can take their complaints to the international human rights system. This opportunity emanates from the fact that Tanzania has ratified a number of leading human rights instruments most notably, the International Covenant on Civil and Political Rights (ICCPR), 1966 and the International Covenant on Economic, Social and Cultural Rights (ICSECR), 1966

All treaties under the UN international human rights system, including ICCPR and ICSECR, have monitoring bodies. States are also required to undertake periodic reporting on how they have implemented rights provided in several human rights instruments, including ICCPR and ICSECR. Civil Society Organizations are allowed to present “shadow” reports (alternative reports/special reports) to challenge or contradict state reports. The ICCPR also has an additional Protocol which empowers States and individuals to submit complaints on human rights violations to the Human Rights Committee. This option is, however, not available to Tanzanians as the country has not ratified the relevant Optional Protocol.

The Human Rights Council

In 2006 the United Nations General Assembly (UNGA) established the Human Rights Council (the Council), which is an inter-governmental organ of the United Nations charged with strengthening and promotion of human rights in the world. The Council is made of 47 member states, which are elected by the UNGA. There different mechanisms employed by the Council in discharging its mandates. These include: the Universal Periodic Review (UPR), the Advisory Committee and the Complaint Procedure. The UPR is deployed by the Council to enable it to assess the human rights situations in all member states. The Advisory Committee serves to create and advance human rights knowledge within the Council through thorough interrogation of thematic human rights issues. The Complaint Procedure is a mechanism that enables individuals and organizations to submit complaints to the Council.

The Complaint Procedure

This is a procedure that was created by the Council on the 18th of June 2007 vide resolution 5/1 under the title of "Institution-Building of the United Nations Human Rights Council" Under this procedure individual or organizations that complain to have suffered or have knowledge of gross human rights violations have the right to submit their complaints known as "Communications". The communications are kept as confidential so as to enable the cooperation of the state concerned.

The Council is bound to accept any communication that is submitted to it if:

a. It is not politically motivated and is not inconsistent with the Charter of the United Nations, the Universal Declaration of Human Rights;

b. It is not manifestly politically motivated and its object is consistent with the Charter of the United Nations, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law;

c. Contains cogent description of the violations and the rights which are said to have been violated;

d. It is not in an abusive language; communications with abusive language may be considered if after the deletion of the abusive language other criteria for admission are met;

e. A person or group of persons, who contend to be human rights violations victims or other person or group of persons, including non-governmental organizations, acting in good faith and without being actuated with political reasons and have direct knowledge of the violations, are the ones who can submit a complaint to the Council;

f. The Complaint must be based on direct knowledge and not exclusively premised on mass media reports;

g. It is not a complaint that is already before the Council or another body of the United Nations or regional body;

h. The complaining person has exhausted domestic or national dispute settlement mechanisms unless he proves that their utilization will be hopeless or will take an unreasonably long time.

Thus when ones land rights are violated which amount to human rights then he or she is at liberty to submit a complaint before the Human Rights Council. A complaint must be submitted to:

Complaint Procedure Unit

Human Rights Council Branch

Office of the United Nations High Commissioner for Human Rights

United Nations Office at Geneva

CH-1211 Geneva 10, Switzerland

Fax: (41 22) 917 90 11

E-mail: CP@ohchr.org

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