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UNIVERSITY OF SUSSEX

THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
(LAW STUDIES)

***“SHAMBA NI LANGU”* (THE *SHAMBA* IS MINE):
A SOCIO-LEGAL STUDY OF WOMEN’S CLAIMS TO LAND
IN ARUSHA, TANZANIA**

HELEN ELIZABETH DANCER

AUGUST 2012

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

.....

Helen Elizabeth Dancer

*Dedicated to my parents
and to the women who shared their stories*

UNIVERSITY OF SUSSEX**HELEN ELIZABETH DANCER****THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
(LAW STUDIES)****“SHAMBA NI LANGU” (THE SHAMBA IS MINE):
A SOCIO-LEGAL STUDY OF WOMEN’S CLAIMS TO LAND
IN ARUSHA, TANZANIA****SUMMARY**

In the aftermath of a wave of land law reforms across Africa, this thesis seeks to re-orientate current debates on women’s land rights towards a focus on the law in action. Since the 1970s Tanzania has been at the forefront of African countries giving statutory recognition to women’s property rights and ‘equal rights’ to land. Equally, ‘customary law’ incorporating gender discriminatory social practices is recognised as a source of law in Tanzania’s plural legal system. Centring on disputes involving women litigants in Tanzania’s specialist system of land courts, this study considers the extent to which women are realising their interests in land through legal processes of dispute resolution.

The starting-point for the analysis is the legal claims to land which women bring and defend themselves against in practice. The study draws upon a year of ethnographic fieldwork, including courtroom observation, archival research and interviews conducted between January 2009 and January 2010, with particular focus on two districts of Arusha region. The thesis is structured to reflect the progression of women’s claims to land, from their social origins through processes of dispute resolution to judgment.

The thesis explores three central issues. Firstly, it considers the nature of women’s legal claims to land in family contexts, how and to what extent the issues raised are addressed by Tanzania’s contemporary statutory legal framework. Secondly, it examines how agency and power relations between actors engaged in the ‘semi-autonomous social field’ of land courts affect women’s access to justice and the progression of claims. Thirdly, it evaluates the process of doing justice and the way in which women’s claims are judged by land courts in practice. Particular attention is paid to how customary practices and judicial attitudes to female land-holding are evolving with contemporary Tanzanian discourses of justice and equal rights.

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It has been a privilege to work with Professor Marie-Bénédicte Dembour and Professor Ann Whitehead at the University of Sussex throughout my doctorate. I wish to thank them both for their constant dedication and intellectual insight and for many enjoyable supervisions. Their support and guidance throughout my research journey into legal anthropology has been inspirational.

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A substantial amount of archival and observational data was collected from five local ward tribunals, the District Land and Housing Tribunal (DLHT) and the High Court in Arusha and Dar es Salaam. I am grateful to the tribunal members and secretaries of each of the five ward tribunals I visited and to the chairpersons, judges, assessors and court administrative staff at the DLHT and High Court for granting me access and for so patiently assisting me in my archival, observational research and interviews over the months of fieldwork.

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In the early stages of my fieldwork, Professor Chris Maina Peter gave me most helpful advice and assisted me with COSTECH research approval and library access at the University of Dar es Salaam. My research also benefited from many discussions and interviews with advocates, elders, local leaders, village and ward officials, district council land officers and lawyers, magistrates, NGO activists and legal officers at HAKIARDHI, NOLA, TAMWA, TAWLA, TGNP, WLAC and WiLDAF, and many other Tanzanian men and women who became friends and so warmly welcomed and assisted me throughout the course of my fieldwork – *Asanteni sana*.

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Glossary of *Kiswahili* and vernacular words

<i>amani</i>	peace
<i>ardhi</i>	land
<i>arobaini</i>	mourning ceremony (held around forty days after death)
<i>askari</i>	guard/watchman
<i>aulo (Kimaasai)</i>	area of undivided paddock used for grazing
<i>baba</i>	father/mode of address for a man
<i>babu</i>	grandfather/mode of address for an old man
<i>balozi</i>	ten-cell leader/leader of ten houses
<i>baraza</i>	tribunal
<i>bibi</i>	grandmother/mode of address for an old or married woman
<i>boma</i>	(i) family homestead (ii) fort or administrative headquarters
<i>busara</i>	wisdom
<i>chai</i>	tea
<i>Chama cha Demokrasia na Maendeleo</i>	Party for Democracy and Development (CHADEMA)
<i>Chama Cha Mapinduzi</i>	Revolutionary Party (CCM)
<i>chipsi mayai</i>	omelette with chips
<i>daladala</i>	public minibus
<i>desturi</i>	customs/traditions
<i>diwani</i>	councillor
<i>eleza (ku-)/elezo/maelezo</i>	(verb) to explain/explanation/explanations
<i>elimu</i>	education
<i>enda (ku-/kw-)</i>	(verb) to go
<i>eneo</i>	area
<i>fariki (ku-)</i>	(verb) to die

All words are *Kiswahili* unless otherwise indicated. *Kiswahili* verbs are listed without their infinitive prefix *ku-*.

<i>faru</i>	A piece of rubber (historically a rhinoceros tail) used in beatings
<i>fedha</i>	money
<i>fundi/mafundi</i>	workman/workmen
<i>gawa (ku-)</i>	(verb) to divide/apportion
<i>haki</i>	justice/right
<i>haki sawa</i>	equal rights
<i>haki za binadamu</i>	human rights
<i>hekima</i>	wisdom/knowledge/judgment
<i>heshima</i>	respect/honour/modesty/dignity
<i>husa (ku-)/husiana</i>	(verb) to relate/be related
<i>Ilarusa (Kimaasai)</i>	the Arusha people
<i>ishi (ku-)</i>	(verb) to live
<i>jenga (ku-)</i>	(verb) to build
<i>jibu</i>	answer
<i>jua (ku-)</i>	(verb) to know
<i>kaa (ku-)</i>	(verb) to sit
<i>Kadhi</i>	judge of Islamic law
<i>kanga</i>	patterned fabric printed with a <i>Kiswahili</i> saying, worn by women
<i>karibu</i>	welcome
<i>kataa (ku-)</i>	(verb) to refuse
<i>kazi</i>	work
<i>kibanda/vibanda</i>	hut/huts
<i>kiburi</i>	arrogance
<i>Kichagga</i>	Chagga language
<i>kihamba (Kimeru/chagga)</i>	Chagga/Meru garden homestead
<i>kijana/vijana</i>	youth/youths
<i>kijiji/vijiji</i>	village/villages
<i>kikao/vikao</i>	meeting/meetings
<i>Kimaasai</i>	Maasai language
<i>Kimeru</i>	Meru language
<i>kitenge</i>	colourful patterned fabric worn by women

<i>kitongoji/vitongoji</i>	locality/localities within a village
<i>komboa (ku-)</i>	(verb) to redeem
<i>kondoo</i>	sheep
<i>korti</i>	court
<i>kuku</i>	chicken
<i>laigwenani (Kimaasai)</i>	spokesman/counsellor
<i>lalamika (ku-)</i>	(verb) to complain
<i>langu</i>	(possessive) mine
<i>leo</i>	today
<i>leta (ku-)</i>	(verb) to bring
<i>lima (ku-)</i>	(verb) to till/cultivate
<i>linda (ku-)</i>	(verb) to protect
<i>maandazi</i>	doughnuts
<i>maandishi</i>	writings
<i>madini</i>	minerals
<i>maendeleo</i>	development
<i>magereza</i>	jail
<i>mahakama</i>	court
<i>mahali</i>	place
<i>mahari</i>	bridewealth
<i>mali</i>	property
<i>mama</i>	mother/mode of address to a woman
<i>Mama Lishe</i>	woman with a small business selling cooked lunches
<i>marehemu</i>	deceased
<i>masale (Kimeru/chagga)</i>	dracaena/boundary plant
<i>matanga</i>	mourning ceremony
<i>matatizo</i>	problems
<i>mbuzi</i>	goat
<i>mchawi</i>	witch
<i>mdai/wadai</i>	claimant/claimants
<i>mdaiwa/wadaiwa</i>	defendant or respondent/defendants or respondents
<i>mgogoro</i>	dispute
<i>mila</i>	customs

<i>miliki (ku-)/mmiliki</i>	(verb) to own/possess / owner/possessor
<i>mjane</i>	widow
<i>mke/wake</i>	wife/wives
<i>mkwe/ukwe</i>	in-law/in-laws
<i>mlevi</i>	drunkard
<i>mlezi</i>	guardian
<i>mshili/washili wa ukoo</i>	clan headman/headmen
<i>mtendaje wa kata</i>	ward executive officer
<i>mtendaje wa kijiji</i>	village executive officer
<i>mti/miti</i>	tree/trees
<i>mtoto/watoto</i>	child/children
<i>mtoto mkubwa</i>	eldest son
<i>mtoto wa kike/wa kiume</i>	girl/daughter / boy/son
<i>mtu/watu</i>	person/people
<i>mume</i>	husband
<i>Mwalimu</i>	Teacher / President Nyerere's chosen mode of address
<i>mwenyekiti/wenyekiti</i>	chairperson/chairpersons
<i>mzee/wazee</i>	elder/elders
<i>mzee/wazee wa baraza</i>	tribunal elder/elders or DLHT assessors
<i>mzungu/wazungu</i>	white European/Europeans
<i>mtaa</i>	street
<i>ndugu</i>	brother/relative
<i>ng'ombe</i>	cow
<i>nguvu</i>	power/force
<i>nguvu za giza</i>	dark powers
<i>nunua (ku-)</i>	(verb) to buy
<i>nyumba/nyumbani</i>	house/home
<i>nyumba ndogo</i>	(colloquial) 'small house'/house of a second wife/concubine
<i>oa (ku-)/olewa</i>	(verb) to marry/be married
<i>omba (ku-)</i>	(verb) to ask/pray
<i>orkuma (Kimaasai)</i>	dark wooden club/traditional symbol of leadership
<i>pa (ku-)</i>	(verb) to give

<i>panda (ku-)</i>	(verb) to plant
<i>panga</i>	machete
<i>piga (ku-)</i>	(verb) to beat
<i>polisi</i>	police
<i>pombe</i>	local brew
<i>rehani</i>	pledge
<i>reja (ku-)</i>	(verb) to repay
<i>ruhusu (ku-)</i>	(verb) to allow
<i>rungu neusi</i>	dark wooden club/traditional symbol of leadership
<i>rushwa</i>	bribe
<i>saidia (ku-)</i>	(verb) to help
<i>sana</i>	(emphasis) very
<i>sauti</i>	shout/sound
<i>sehemu</i>	place/portion
<i>shinda (ku-)</i>	(verb) to win
<i>tetea (ku-)</i>	(verb) to defend
<i>uza (ku-)</i>	(verb) to sell
<i>weka (ku-)</i>	(verb) to place/put (meaning varies according to context)
<i>seng'enge</i>	barbed wire
<i>serikali</i>	government/official
<i>shamba</i>	farm/plot
<i>shanga</i>	beads
<i>shemeji</i>	brother/sister in-law
<i>Shirika la Uchumi la Wanawake Tanzania</i>	Economic Organisation of Women in Tanzania
<i>shuka</i>	blanket
<i>sukari</i>	sugar
<i>sumbua (ku-)</i>	(verb) to disturb
<i>swali</i>	question
<i>taarifa</i>	information
<i>taifa</i>	nation
<i>tunza (ku-)</i>	(verb) to care for
<i>uhuru</i>	freedom

<i>Ujamaa</i>	African Socialism
<i>ukoo</i>	clan
<i>Umoja wa Wanawake wa Tanzania</i>	Union of Tanzanian Women (UWT)
<i>urithi</i>	inheritance
<i>utu</i>	humanity
<i>Uzunguni</i>	European's place
<i>vurugu</i>	disturbance
<i>yatima</i>	orphan
<i>zalia (ku-)</i>	(verb) to be born
<i>zao/mazao</i>	crop/crops

Table of abbreviations and acronyms

ACHPR	African Charter on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
AICC	Arusha International Conference Centre
AIDS	Acquired Immune Deficiency Syndrome
ASAP	Asylum Support Appeals Project
AST	Asylum Support Tribunal
AWLAHURIC	Arusha Women's Legal Aid and Human Rights Centre
BACAS	Bureau for Agricultural Consultancy and Advisory Service
BCLR	Butterworths Constitutional Law Reports
CAB	Citizens Advice Bureau
CABI	Centre for Agricultural Bioscience International
Cap.	Chapter
CC	Constitutional Court
CHADEMA	<i>Chama cha Demokrasia na Maendeleo</i> (Party for Democracy and Development)
CCM	<i>Chama Cha Mapinduzi</i> (Revolutionary Party)
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
CLDO	Local Customary Law Declaration Order
CRC	United Nations Convention on the Rights of the Child
COSTECH	Tanzania Commission for Science and Technology
DFID	Department for International Development
Dig.	Digest
DLHT	District Land and Housing Tribunal
Est.	Established
FAO	United Nations Food and Agriculture Organisation
FIDA	Federation of Women Lawyers
FILMUP	Financial and Legal Management Upgrading Project
GCSE	General Certificate of Secondary Education
GLTF	Gender Land Task Force
GN	Government Notice

HAKIARDHI	Land Rights Research and Resources Institute
HCD	High Court Digest
HIV	Human Immunodeficiency Virus
HRBA	Human Rights-Based Approach
IAWJ	International Association of Women Judges
ICCPR	United Nations International Covenant on Civil and Political Rights
ICESCR	United Nations International Covenant on Economic, Social and Cultural Rights
IDLO	International Development Law Organisation
IFAD	International Fund for Agricultural Development
IIED	International Institute for Environment and Development
IMF	International Monetary Fund
JALA	Judicature and Application of Laws Act
KWIECO	Kilimanjaro Women Information Exchange and Consultancy Organization
LA	Land Act
LAA	Land Amendment Act
LDCA	Land Disputes Courts Act
LHRC	Legal and Human Rights Centre
LMA	Law of Marriage Act
LMR	Land Mortgage Regulations
LRC	Law Reports of the Commonwealth
LSRP	Legal Sector Reform Programme
LTG	Land Tenure Study Group
MP	Member of Parliament
MFSPA	Mortgage Financing Special Provisions Act
MTS	Medium Term Strategy
NALAF	National Land Forum
NGO	Non-Governmental Organisation
NLP	National Land Policy
NOCHU	National Organization for Children, Welfare and Human Relief
NOLA	National Organisation for Legal Assistance

NRI	Natural Resources Institute
ODI	Overseas Development Institute
PC	Primary Court
PINGOS FORUM	Pastoralists Indigenous Non-Governmental Organizations Forum
RE	2002 Revised Edition of the Laws of Tanzania
REPOA	Research on Poverty Alleviation
RL	Revised Laws of Tanzania Mainland
SA	South Africa
SPILL	Strategic Plan for Implementation of the Land Laws
SUWATA	<i>Shirika la Uchumi la Wanawake Tanzania</i> (Economic Organisation of Women in Tanzania)
TAHEA	Tanzania Home Economics Association
TAMISEMI	President's Office Regional Administration and Local Government
TAMWA	Tanzania Media Women's Association
TANU	Tanzanian African National Union
TAWLA	Tanzania Women Lawyers Association
TLR	Tanzania Law Reports
TLS	Tanganyika Law Society
TNGP	Tanzania Gender Networking Programme
Tsh	Tanzanian Shilling
UDASA	University of Dar es Salaam Academic Staff Assembly
UK	United Kingdom of Great Britain and Northern Ireland
UKBA	United Kingdom Border Agency
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN-HABITAT	United Nations Human Settlements Programme
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
URT	United Republic of Tanzania
USA	United States of America
UWT	<i>Umoja wa Wanawake wa Tanzania</i> (Union of Tanzanian Women)

VEO	Village Executive Officer
VLA	Village Land Act
WAT	Women Advancement Trust
WEO	Ward Executive Officer
WiLDAF	Women in Law and Development in Africa
WLAC	Women's Legal Aid Centre
WLSA	Women and Law in Southern Africa
WRDP	Women's Research and Documentation Project Association
WTA	Ward Tribunals Act

1. Introduction

1.0 A Mount Meru *shamba*

On the fertile lower slopes of Tanzania's second highest mountain, bounded by narrow mud pathways and bougainvillea hedgerows, there is a *shamba*. Over the years banana trees, maize, beans and vegetables have been cultivated on this small parcel of land by successive generations of a family. The *shamba* lies surrounded by others just like it in the tranquillity of an Arusha mountain village. Yet on closer inspection it is noticeable that many of the banana trees have been deliberately slashed. Nothing remains of a woman's house that once stood there. The *shamba*, it turns out, is the setting of an extraordinary legal battle in which a woman farmer claimed that her land was sold by her husband without her consent. There is a notice nailed to a tree - a temporary High Court injunction restraining the husband and his agents from damaging the *shamba* or doing anything to prejudice the woman's interest in it whilst the court proceedings are on-going.

The battle over this *shamba* is one of many in Arusha in an era of urbanisation and commoditisation of land. The journey of this woman to secure her interest in the *shamba* from village to High Court forms the subject of an extended case study in the penultimate chapter of this thesis. The thesis as a whole takes her and other women's experiences of making legal claims to land as the starting-point for a contemporary empirical study of the law in action in Tanzania's statutory court system.

The urban fringes of Arusha City lie an hour's walk down the mountain from this *shamba*. A major highway connects Arusha with Nairobi to the north and Moshi and Dar es Salaam to the Southeast, bisecting the city from the lower slopes of Mount Meru. The route has ensured Arusha's urban and rural development over many years. Today the city is the hub of the East African Community, the location of the United Nations (U.N.) Criminal Tribunal for Rwanda and the closest major urban centre to some of Tanzania's most significant mineral resources and national parks. Mount Meru's rich volcanic soil has also made the land extremely valuable for large and small-scale agriculture. The region attracts tourists and investors as well as migrant workers from other parts of Tanzania, East Africa and worldwide. Together these factors have generated a burgeoning market for land in Arusha. Unplanned peri-urban settlement

has crept up the mountain. A proliferation of urban slum areas gives a palpable sense of rapid urbanisation and pressure on land. The demand for land has provoked exponential increases in its commercial value and a great incentive to sell.

1.1 Context, overview and aims of the thesis

The rapid urbanisation and commoditisation of land in Arusha forms part of a bigger picture of social change, economic development and a ‘land rush’ across Africa – both causes and consequences of a wave of national land reforms that have taken place since the 1990s. As Manji and others discuss, the land reform agendas of African governments emerged both in response to grievances and conflicts over land within states and in the context of wider international pressures towards the liberalisation of African economies (Manji 2006: 31, Whitehead and Tsikata 2003). During this period the international neo-liberal economic policy agendas of Hernando de Soto (2000) and the World Bank became a major driving force behind African government policies for the marketisation and formalisation of land tenure. Such policies emphasised the benefits of privatisation and land titling for economic growth, individual tenure security and the realisation of capital (World Bank 1975, 1989, 2001, Deininger 2003).

There is now a vast body of academic, policy and activist literature reflecting on the implications of these developments for women’s land tenure security in Africa. Many of the debates have focused on rural land-holding and revolve around the relative merits of ‘customary’ systems versus statutory titling for securing women’s interests in land. Scholars within the fields of socio-legal studies and legal anthropology have for many years discussed the interaction of multiple norms, laws and modes of dispute settlement within African legal systems. There is now considerable interest in policy circles in the merits of ‘customary justice systems’, which are seen as more accessible fora than state courts for the majority of disputants. This has led to a recent convergence in these areas of scholarship (Harper 2011a, 2011b, Ubink and McInerney 2011, Tamanaha, Sage et. al. 2012). Yet, very little recent detailed empirical socio-legal research on African land dispute resolution fora exists to inform the debates. This thesis seeks to contribute both to the policy debates on women, land and law in Africa and to socio-legal scholarship on the law in action through an empirically grounded study of women’s legal claims to land in practice.

Tanzania,¹ as the location for this study, is widely considered to be amongst the most progressive states in Africa in its commitment to protecting women's interests in land. Since the 1970s Tanzania has been at the forefront of African countries that have enshrined women's property rights in statute. As Read writes, the Law of Marriage Act of 1971 (LMA) was 'a pioneering step of enacting the first measure in Commonwealth Africa ... to integrate the diverse personal laws of marriage and divorce' (Read 1972: 19). Equally, gender equality provisions in Tanzania's Land Act (LA) and Village Land Act (VLA) of 1999 (collectively known as 'the Land Acts')² were celebrated by many Tanzanian gender activists and women MPs as a significant achievement in successful outreach, lobbying and advocacy (Tsikata 2003, Mallya 2005). Crucially however, these gains for women's rights have always occurred alongside the continued statutory recognition of so-called 'customary law', aspects of which are regarded by many as discriminatory against women.

This thesis considers the extent to which women in the location of study are realising their interests in land through statutory processes of dispute resolution. The starting-point of the analysis is the legal claims to land which women make in Tanzania's specialist system of land courts established under the Land Acts. The study draws upon ethnographic fieldwork including courtroom observation, archival research and interviews conducted in two districts of Arusha region between April 2009 and January 2010. The thesis as a whole is structured to reflect the journeys of women litigants in Arusha and traces land disputes from their social origins through the land court system to judgment.

This introductory chapter contextualises the present study within the debates on women, land and human rights in Africa and outlines the methodological foundations of my research. 1.2 reviews the contemporary policy debates surrounding 'customary' and 'human rights-based' approaches to protecting women's interests in land. 1.3 discusses how literature from legal pluralism studies informs these debates in the context of securing women's interests in land through processes of dispute resolution. 1.4 reflects

¹ The United Republic of Tanzania (URT) comprises Tanzania mainland and Zanzibar; however the judicial system is not a Union matter under the 1977 Constitution (Cap. 2 R.E. 2002). In this thesis all references to the Tanzanian legal system and laws are to the system applying to Tanzania mainland.

² Land Act (Act No. 4 of 1999) Cap. 113 R.E. 2002, Village Land Act (Act No. 5 of 1999) Cap. 114 R.E. 2002. The Land Acts were brought into force on 1.5.01.

upon the major methodological approaches that have shaped the research design. The chapter concludes with an overview of the structure of the thesis.

1.2 Contemporary debates on women, land and human rights in Africa

In the centre of Arusha City lies the Arusha International Conference Centre (AICC) – home to the East African Community and U.N. Criminal Tribunal for Rwanda. In the main courtyard beyond the security gates stands a monument to Tanzania's first President, *Mwalimu* Julius Nyerere, inscribed with the words:

Africa knows no class. I doubt if there is a word in any African language which is equivalent to class or caste. If I protect Africa for anybody, it will be to protect it for Africa.

These words epitomise much of Nyerere's African Socialism (*Ujamaa*) and his resistance to the privatisation and commoditisation of land. In contrast to the privatisation agendas of international financial institutions and foreign governments Nyerere believed land to be a 'gift from God' that should not be expropriated to create class inequalities or to serve foreign interests at the expense of Africans (Nyerere 1958 – reprinted in Nyerere 1967, see also Kamata 2010). As Kijo-Bisimba and Peter write, as a communitarian and a religious man, he also believed in the equality of all human beings and in his writings, he emphasised the importance of equality between men and women for the development of the country (Kijo-Bisimba and Peter 2010).

The monument bearing Nyerere's words came to my attention when I attended the International Association of Women Judges (IAWJ) Africa Region conference held at the AICC during my fieldwork year. The theme of the conference was 'Access to Justice' and the importance of the occasion was marked by the presence of the President of Tanzania, Jakaya Mrisho Kikwete, and Tanzanian Chief Justice, Augustino Ramadani, as well as other senior members of the judiciary of Tanzania and beyond. Amongst other issues, several papers were presented on the topics of legal issues concerning women's property rights and violence against women. Throughout the papers and the plenary discussions which followed a recurrent theme was the need for stronger statutory provisions to address domestic violence and women's property rights. Gender discriminatory 'customary law', 'patriarchy', and 'culture and traditions' were frequently argued to be the biggest obstacles to securing women's property rights.

In a lively debate, I was particularly struck by the comment of one audience member: “*Why are we moaning about inheriting or marrying property when we can buy our own?*” The question highlights not only how far the meaning and use of land in Tanzania today has shifted from Nyerere’s vision, but also the socio-economic differences *between* women and their ability to acquire property. Despite Nyerere’s belief in a classless Africa and public ownership of land, social and economic inequalities increasingly separate individuals’ abilities to access and buy land in the age of newly liberalised African land markets. As Peters notes, increases in the market value of land and land conflicts have been both consequence and cause of growing social inequality to the benefit of local elites (Peters 2004).

Inequality operates through a number of structural levels – international, national, community and family, and these levels intersect with individual differences – age, religion, race, marital status, tribal identity, health, personal wealth and education – as well as gender. In a 1990s case study of land tenure and social change in Iringa region, Tanzania, Daley notes that wealth, age, marital status, education, knowledge and above all - confidence were all important factors mediating a woman’s ability to acquire and register land in that area (Daley 2008). What is noticeable both in the literature and in live debates on women and land more generally is that often insufficient attention is paid to socio-economic differences between ‘women’ as a social category, and the complexity of power relations that attach to various modes of land acquisition.

It is important to emphasise the diversity of ways in which land is used by families in Tanzania. Agriculture remains a major livelihood activity for the majority of Tanzanians living in rural areas. However, in rural areas on the fringes of urban centres such as Arusha, family-owned land is increasingly being utilised to build rental accommodation or small business premises to provide other income alongside small-scale farm production. In the unplanned areas of Arusha City land has become valuable first and foremost for housing and there is little space between the tightly packed houses for any farming. A recent study by Kweka and Fox (2011) conducted across several urban areas in Tanzania found that families engage in a range of agricultural and non-agricultural household enterprises for their livelihood and subsistence.

Despite the growing commoditisation of land, for many Tanzanians living in rural areas customary systems of land tenure have endured. This is associated with the continued importance of clanship and kinship, through which men's and women's claims to land are differentiated by gendered social ties that are closely connected to the life cycle. For example, amongst Tanzania's northern patrilineal peoples, whilst a man may expect to inherit a portion of land from his father, a woman's interests in inherited land are typically contingent on her status as a wife and relations with her husband's family. Her interests in, and claims over land and her family home change throughout her lifetime - as a daughter, wife, widow and mother. Both men and women can acquire land in other ways – such as through purchase, cultivation or debt default. However, limitations on resources mean that in practice many more men than women are able to do this.

As Whitehead and Tsikata observe, there is significant contestation between scholars as to the nature of such socially embedded, so-called 'customary' interests in land. Whilst some identify a hierarchy or 'bundle of rights', distinguishing secondary 'use' claims from primary 'control' claims to the land; others argue that tenure relations are 'negotiated, dynamic and fluid' (Whitehead and Tsikata 2003: 77). My contention throughout this thesis is that the rigidity or flexibility of customary systems can only be understood through empirical investigation. For debates on women's interests in land to be meaningful they must pay close attention to the factors that differentiate women's abilities to access, acquire and control land – hence to questions of agency and to social power relations that are linked with different modes of land acquisition.

The term 'customary' is widely used in academic and policy debates on land tenure and legal systems, but its actual meaning is contentious in a number of respects. Frequently in the policy literature 'customary' is used interchangeably with 'informal', 'traditional' or 'local' to describe systems and practices recognised by a particular community as having normative significance. The 'informal' or 'customary' is then often juxtaposed with 'formal' or 'statutory'. However, many scholars in the fields of law and anthropology contend that in so-called 'plural legal systems' (discussed further at 1.3) multiple legal orders coexist and intersect (Roberts 1979, Comaroff and Roberts 1981, Galanter 1981, Von Benda Beckmann 1984, Allot and Woodman 1985, Griffiths 1986, Santos 1987, Merry 1988, Woodman 1988, Vanderlinden 1989, Griffiths 1997, Von

Benda Beckmann 2002 amongst others). Moreover, in Tanzania and in some other African plural legal systems, both living social practices and codified versions of the customary are recognised by the state and applied by different courts in various ways in their decision-making. In these contexts, definitional dichotomies of the customary that are too rigid or based on state-centred conceptions of law are somewhat artificial.

‘The re-turn to the customary’

One of the most detailed discussions of gendered power relations and African land reform to date is Whitehead and Tsikata’s widely cited 2003 article, which reviews the contemporary policy debates on women and land tenure. The authors highlight an emerging consensus then taking place amongst policy institutions, and some academics and lawyers in favour of a ‘re-turn to the customary’. The theoretical underpinnings to this convergence were ‘evolutionary’ theories of land tenure, most notably Platteau’s ‘evolutionary’ theory, which became prominent in the 1980s. In summary, Platteau’s theory contends that demand for the state to initiate a formal system of individualised property rights comes ‘from below’ in response to commercialisation of agriculture, population pressure on land and conflicts between land users. It is argued that these state measures serve to reduce the number of land conflicts, promote tenure security and generate a range of economic benefits (Platteau 1996, Whitehead and Tsikata 2003: 71).

A further main influence was growing evidence of the adverse impact of privatisation and titling policies on many women’s interests in land in Africa, most notably in Kenya. As Mackenzie (1993), Lastarria-Cornhiel (1997) Yngstrom (2002) and others have observed, in areas of land shortage in particular, where land is privatised and then registered in the name of a male head of household this has in many cases diminished women’s pre-existing claims to matrimonial or inherited family land. African feminist lawyers, who had worked extensively for reforms to improve women’s access and rights to land, were the most significant voices against this re-evaluation of the customary.

As Whitehead and Tsikata (2003) discuss, proponents of a ‘re-turn to the customary’ were pointing to the resilience of customary land tenure and the advantages of a system that recognises multiple claims to land, and which is also flexible, socially embedded and locally understood. They noted a diversity of standpoints lying behind this renewed support for customary systems. For example, the Land Policy Division of the World

Bank, which had begun to favour ‘evolutionary’ approaches to privatisation and formalisation, sees customary tenure systems as providing a useful framework from which incremental titling can be achieved from the ground up (World Bank 2001). By contrast Toulmin and Quan’s ‘human-centred’ approach identifies the inherent advantages for the poor of customary systems of land tenure that are cost-effective and relatively secure. They argue in favour of reformed customary systems developed by African people themselves to suit particular local circumstances (Toulmin and Quan 2000). Those advocating democratisation and greater community level participation support a strengthening of local-level institutions and their incorporation into statutory systems (Shivji 1998, Palmer 2000, Alden Wily 2000 – see also 2006).

Whitehead and Tsikata point out that these policy debates give relatively little consideration as to how social power relations might affect women’s interests in land if customary systems are strengthened. Arguing from a gender perspective, their central contention is that policy makers must consider how to ensure that women’s claims to land will not be undermined as a consequence of the strengthening of local institutions which are socially embedded in local and gendered power relations. Debate is still on-going as to the relative merits of preserving customary practices and institutions versus their abolition or reform through statute. The complexity of the issue, as Whitehead and Tsikata highlight, lies in the fact that the strength of women’s claims to land often lies precisely in their social embeddedness. In customary land tenure systems both women and men often successfully base their claims to land on gendered kinship relations. These same social ties are the power relations that underpin existing gender inequalities.

‘Human rights-based approaches’ (HRBA)

Proponents of statute-driven land tenure reform at one stage divided into two distinct camps – neo-liberal economists on the one hand, and human rights advocates on the other, each approaching issues of development, empowerment and poverty reduction from quite different normative standpoints. However, these divergent standpoints have increasingly converged through the adoption of what have become known as ‘rights-based approaches’ to development. The origins and growth of these approaches may be traced to the discourse of international development agencies in the early 1990s and the World Social Development Summit at Copenhagen in 1995 (Cornwall and Nyamu-

Musembi 2004, Ikdahl, Hellum et al 2005), as well as to the work of the economist Amartya Sen (Sen 1999, Nussbaum 2003: 59, Banda 2005: 273).

Cornwall and Nyamu-Musembi observe that although the phrases ‘human rights approaches’ or ‘rights-based approaches’ to development have been widely adopted, there is no one sense in which they are used or understood. They tend to be viewed either ‘legalistically’ as standards for designing or assessing interventions; or as norms ‘underpinning the entire development enterprise’. They may be used as a means of addressing issues of duty-holders’ accountability, or to enable people to empower themselves towards the realisation of their social and economic rights (Cornwall and Nyamu-Musembi 2004: 1431). Gauri and Gloppen (2012) identify four institutional mechanisms which they observe as using human rights-based approaches (HRBA): global compliance, policy and programming, rights talk, and legal mobilisation.

The mechanisms Gauri and Gloppen identify are particularly seen in the work of international human rights organisations concerned with realising women’s interests in land. The U.N. Human Settlements Programme (UN-HABITAT), the U.N. Entity for Gender Equality and the Empowerment of Women (UN Women) and the U.N. Development Programme (UNDP) are all publicly committed to using HRBA as a conceptual and practical framework for development policy. In the case of UN Women HRBA is also a tool for promoting states’ compliance with the UN Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW).

One international development institution that has stopped short of wedding itself with HRBA is the World Bank. In a 2004 speech the World Bank’s General Counsel, Roberto Dañino welcomed the growing recognition of human rights as central to the World Bank’s development work, within the confines of its remit as a financial agency (Dañino 2005). In practice the Bank appears to place more emphasis on ‘gender mainstreaming’ than human rights in its approach to policy-making on land issues (Giovarelli, Katz et. al. 2005, World Bank 2009). In its most recent 2012 World Development Report, which takes Gender Equality and Development as its theme, the authors observe the interdependent nature of various social and legal institutions, markets, households and the transformative power of actors in creating economic opportunities and enabling women’s greater agency generally (World Bank 2012).

HRBA is now widely appealed to by advocates of statutory solutions to securing women's interests in land at the regional and national level. The phrase 'rights-based approach' is publicly used by the regional African women and law organisations – Women in Law and Development in Africa (WiLDAF), Federation of Women Lawyers (FIDA) and Women and Law in Southern Africa (WLSA) to define their strategic frameworks for legal and development programming. Tripp observes that the majority of African women activists and scholars have adopted a rights-based approach in their campaigns (Tripp 2004). Opinions expressed by a number of African women judges at the 2009 IAWJ conference in Arusha suggest that there remains strong support amongst African feminist lawyers for legislative and rights-based approaches to strengthening women's property rights against discriminatory customary practices. In Tanzania, rights-based approaches are evident in the work of legal NGOs - notably the Legal and Human Rights Centre (LHRC), Women's Legal Aid Centre (WLAC), Tanzania Women Lawyers Association (TAWLA) and the National Organisation for Legal Assistance (NOLA), whether in policy debates, strategic litigation, or in encouraging social change at a community level.

Foreign funding of African human rights NGOs has undoubtedly contributed to the sometimes jargon-like use of the phrase 'HRBA'. This in turn reignites the 'culture versus rights' debate polarising universal rules and local cultural norms. Such critics ignore the fact that human rights are also heavily contested within Western contexts (see for example Dembour 2006). In seeking to move beyond this polarisation a number of scholars writing in African contexts adopt a more nuanced position on human rights within African cultural norms (An-Na'im and Hammond 2002, Butegwa 2002, Nyamu-Musembi 2002). For example, writing on women's property rights in Kenya Nyamu-Musembi argues that the local level is not 'a repository of unchanging patriarchal values'; positive openings exist within a community's value system which are complementary to human rights agendas. Hence, local practices should be seen as pathways to the promotion of human rights and gender equality. Alternatively, as Cowan, Dembour and Wilson argue, it is possible to see the tension between universalism and cultural relativism as 'part of the continuous process of negotiating ever-changing and interrelated global and local norms' (2001: 6).

Whilst An-Na'im and others see human rights ultimately as something positive, they nevertheless view the concept of human rights as something which was at least originally external to African societies. Ultimately this concession to the notion of human rights as 'external' offers limited resistance to the imperialist charge and – from the perspective of women – limited moral resistance against those who claim the cultural authenticity of discriminatory norms against 'foreign' ideas of rights. Even if 'universal' ideas of human rights are translated into local terms – the process of 'vernacularisation' of rights, as Merry conceptualises it – this does not ultimately transform the concept of rights itself at the local level. Rather, as Merry contends, rights become 'ornamented by local cultural signs and symbols and tailored to local institutions' (Merry 2006: 216).

My contention is that when human rights are translated into policy discourse (HRBA) something is lost in the power of human rights as a moral discourse. Arguably, it is when the individual evokes a moral concept of rights that they offer the strongest normative resistance against discriminatory or oppressive laws or social practices. What is needed is for policy makers and activists to approach the concept of rights from a different starting-point. Santos' proposal for a 'counter-hegemonic' understanding of human rights, offers one such starting-point (Santos 2007, 2009). Santos (2009) imagines human rights as 'a struggle against unjust human suffering, conceived in its broadest sense ... encompass[ing] nature as an integral part of humanity'. Writing on the possibility offered by progressive theologies to 'help to recover the "human" of human rights' Santos argues, '...if God were a human rights activist, He or She would definitely be pursuing a counter-hegemonic conception of human rights and a practice fully coherent with it' (Santos 2009: 29). In the context of women's interests in land, a counter-hegemonic conception of rights urges us to pay attention to women's experiences and the way women themselves frame their claims.

Reforming customary land tenure practices through statute

In the last decade the policy debates on land tenure explored in Whitehead and Tsikata's article have continued to evolve. Legislators and policy-makers are revisiting customary practices and institutions to explore ways in which they may be used to implement land law reforms whilst protecting women's interests in land. In the new

wave of African land reform most states have continued to recognise customary land tenure in statute, although to varying degrees. Alden Wily's 2012 survey of African land tenure reforms notes that customary land tenure receives most positive statutory recognition in Angola, Benin, Botswana, Burkina Faso, Ghana, Madagascar, Mozambique, South Africa, South Sudan, Tanzania and Uganda (Alden Wily 2012). Amongst these countries Tanzania's Land Acts stand out for their strong recognition of customary land tenure practices *and* gender equality. The intention appears to be to preserve customary practices at the local level whilst mediating against any gender discriminatory aspects through a statutory clause enshrining men and women's equal rights to land.

Tied in with the current policy focus on customary systems and their role in local land administration, there is now renewed scholarly and policy interest in dispute resolution through 'customary justice systems' – or 'traditional authorities', which recognises their importance in African societies. Past the hum of policy debates and land law reforms however, a fundamental question remains to be answered: what is happening in practice?

Within the past thirty years there have been relatively few published detailed empirical studies by lawyers and anthropologists of how African 'customary justice systems' and state courts that have regard to customary practices actually work in practice (Comaroff and Roberts 1981, Moore 1986, Rwezaura and Wanitzek 1988, Woodman 1988, Griffiths 1997, the WLSA series 1999-2000, Ubink 2008). The various methodological approaches taken in these case studies are discussed at 1.4. In the context of the new wave of land law reforms across Africa, empirical legal studies are particularly important for understanding the impact of statutory reforms in the context of land administration and legal processes of dispute resolution. Ultimately it is only by conducting context-specific studies of the law in action that it is possible to gain insight into whether people are able to effectively access justice through the new statutory systems, and how courts of different levels negotiate and interpret laws and other norms in practice.

This thesis considers the law in practice in the context of women's claims to land in Arusha. A key question is the extent to which Tanzania's new Land Acts and the pre-

existing LMA provide an effective statutory framework for addressing the claims to land that women are making in practice. Chapters 2 and 3 explore customary land tenure practices within the location of study and the kinds of legal claims to land that are being made by women in Arusha. A study of the process of women's legal claims to land raises two further overarching themes of inquiry. Firstly, where do women go to make claims and resolve disputes over land and how do claims progress through various dispute resolution fora? Secondly, what are the normative frameworks operating within these fora and how do actors engaged in processes of disputing invoke, contest and apply various laws and other norms in practice?

1.3 Normative pluralism in African legal systems

Scholarship from legal pluralism studies may be employed to address these processual and substantive questions. A detailed discussion of the concept of 'legal pluralism' is beyond the scope of this thesis. However, it is important to note that leading scholars in the field of legal pluralism studies, notably Moore (2001) and Griffiths (2005) have questioned the meaning and use of the concept at a time when the notion is fast spreading beyond the disciplines of socio-legal studies and anthropology (Tamanaha 2008). In a detailed discussion of what he describes as 'the troubled concept of legal pluralism' Tamanaha observes that Griffiths, who has for many years provided the most authoritative answer to the question 'What is legal pluralism?' has reassessed his original definition. In his seminal 1986 article Griffiths offers a descriptive theory to counter the ideology of 'legal centralism', or state-centred conceptions of law:

A descriptive theory of legal pluralism deals with the fact that within any given field, law of various provenance may be operative. It is when in a social field more than one source of 'law', more than one 'legal order', is observable' (1986: 38).

In a later article Griffiths revises his previous position:

In the intervening years, further reflection on the concept of law has led me to the conclusion that the word 'law' could better be abandoned altogether for purposes of theory formation in sociology of law It also follows from the above considerations that the expression "legal pluralism" can and should be reconceptualized as "normative pluralism" or "pluralism in social control". (Griffiths 2005: 63-64 – cited in Tamanaha 2008).

Moving beyond these definitional dilemmas, the concept of ‘legal pluralism’ or ‘normative pluralism’ has nonetheless proved fruitful for illuminating fields beyond the state where women make claims, and the interaction of these fields with state systems. For example, Manji observes an ‘exit from the state’ by women in African contexts where, it is argued, the attitude of the state towards women has been ‘at best ambivalent and at worst physically and symbolically coercive’. Drawing on MacKinnon’s theory that ‘[s]ubstantively, the way the male point of view frames an experience is the way it is framed by state policy’ (MacKinnon 1983: 653), Manji argues that ‘legal centralism reflects male experiences of law as predominantly public, state law’. By contrast legal pluralism affords an articulation of a ‘feminine view of the (legal) world’ where legal centralist paradigms have proved inadequate (Manji 1999).

Dispute resolution beyond state legal systems

Most lawyers practising in common law legal systems, including Tanzania, find that their professional training is focused largely on state law and adversarial legal processes. Relatively little emphasis is placed on other modes of dispute resolution beyond the courtroom or lawyer’s office or to understanding the wider social dynamics of disputing. Viewed through a juristic lens, state law and courts lie at the centre of a legal world in which litigants submit to a judicially controlled process of dispute resolution. Yet, from the perspective of many litigants, courts are situated at the edge of the social world – often seen as unattractive, remote or feared fora of last resort. In the Tanzanian context and elsewhere, it is very common in the case of a dispute over land that by the time it has reached the stage of court intervention, conflict and negotiation between the parties and other third parties will already have taken place in a number of other fora.

Between 1997 and 2001 WLSA conducted an extended programme of research on administration of justice and delivery constraints in seven Southern African countries. The programme findings included that ‘justice delivery’ is not confined to the courtroom, but also occurs through a number of ‘justice delivery systems’ - family and clan, local institutions such as chiefs, police, legal aid offices, social welfare offices, churches and district administrators (WLSA Botswana 1999; WLSA Lesotho 2000; WLSA Malawi 1999; WLSA Mozambique 2000; WLSA Swaziland 2000; WLSA

Zambia 2000; WLSA Zimbabwe 2000). A number of studies since then have drawn further attention to the role of non-statutory justice systems and social factors affecting women's access to statutory fora (Stevens 2000, Nyamu-Musembi 2002, 2003, Wojkowska 2006, Magoke-Mhoja 2008, Henrysson and Joireman 2009). 'Legal pluralism' is often used in this context to describe a concept of the 'legal' which is not confined to statutory systems; and/or the varying ways in which norms and laws prevail in different fora. This may have an important bearing on disputants' choice of fora and how disputes are handled and ultimately determined.

The importance for women of justice delivery outside the court system was highlighted again in a 2010 Global Barometer Survey carried out across a number of African countries. The survey found that women are more likely to contact a community leader than a government official when they have a grievance (UN Women 2011: 66). However for some women this may not necessarily be down to choice. In her widely cited article, von Benda Beckmann (1981) applies the concept of 'forum shopping' from private international law to the local level in order to describe the behaviour of disputants who choose between fora, basing their choice on their hopes for the eventual outcome (1981: 117). This implies that an individual who 'forum shops' exercises a degree of choice in engaging a particular forum. However, as Whitehead and Tsikata argue, processes of allocation in dispute resolution are themselves socially embedded (Whitehead and Tsikata 2003: 97). Hence, individuals with limited agency to choose between fora tend to follow conventional social pathways whilst those in positions of power within their family and community can also influence or drive the direction of the dispute.

Very little empirical research in African contexts has been conducted on how actors within statutory fora impact upon women's agency and influence the progression and outcome of a dispute. Whilst studies of 'customary justice systems' focus on the role of community leaders, family members and increasingly - paralegals, little attention is given to the role of lawyers, legal NGOs and professional members of the judiciary and their impact on access to justice – particularly on women's access to justice. Taking a processual approach to studying disputes, chapter 4 of this thesis analyses the part played by social, political and legal actors from the origins of the dispute in its social context and as claims progress through the court system. This offers a more complete,

litigant-oriented and socio-legal analysis of the law in action. Particular attention is paid to agency, knowledge and power relations between actors engaged in legal processes and their role in framing, mediating, contesting and transforming claims. This adopts a broadly Foucauldian perspective on power relations (Foucault 1980) to examine issues of women's access to justice, but also draws upon more recent work by feminist scholars (Yngvesson 1993, Hirsch 1998, Manji 2000) who pay attention to how women as disputants actively engage in processes of negotiation and resistance.

Justice and judging in Tanzania's plural legal system

The process of doing justice and judgment represents the culmination of the statutory legal process. Normative pluralism is embedded within Tanzania's statutory legal framework, which judges are required to apply in practice. Six sources of law are officially recognised: the 1977 Constitution, which includes the Bill of Rights,³ statute,⁴ case law from the High Court and Court of Appeal, which is binding on the lower courts, Received laws,⁵ 'customary' and Islamic law,⁶ and international law (Nyanduga and Manning 2006). The potential for contestation between these various sources of law is clearly illustrated in the area of women's interests in land. Tanzania is one of the most progressive African countries in its statutory commitment to gender equality. It is a signatory to major international and regional human rights treaties⁷ and the Tanzanian Bill of Rights enshrines a right to equality.⁸ In the context of women's land rights, The Land Acts explicitly provide that men and women have equal rights to acquire, hold, use and deal with land.⁹

³ The Bill of Rights was inserted into the Constitution in 1984 under the Constitution (Fifth) (Amendment) Act (Act No. 15 of 1984).

⁴ including all legislation (or Ordinances) which were enacted by the pre-independence colonial administration as Orders in Council (by virtue of the Laws Revision Act (Act No. 7 of 1994) Cap. 4 R.E. 2002.

⁵ including Common Law, the Doctrine of Equity and Statutes of General Application of England, applicable before 22nd July 1920 (by virtue of the Judicature and Application of Laws Act (JALA) Cap. 358 R.E. 2002 (JALA), s.2(3).

⁶ JALA s.11. The Interpretation of Laws Act (Act No. 4 of 1996) Cap. 1 R.E. 2002 provides the Tanzanian statutory definition of 'customary law' (discussed below).

⁷ UN International Covenant on Civil and Political Rights of 1966 (ICCPR), UN International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR), CEDAW, UN Convention on the Rights of the Child of 1989 (CRC), African (Banjul) Charter on Human and Peoples' Rights of 1981 (ACHPR) and 2003 Women's Protocol thereto (the Maputo Protocol).

⁸ The equality clause (Article 13) was amended with effect from July 2000 to include the provision expressly prohibiting gender discrimination.

⁹ LA and VLA s.3(2) (see Appendix D).

These strong equal rights provisions are however, subject to other somewhat less egalitarian laws and norms elsewhere. Article 30(2)(f) of the Bill of Rights – known as the ‘clawback clause’ is much criticised by human rights scholars and activists because it makes the human rights provisions in the Constitution subject to existing laws and promotion of the national interest generally. The Land Acts did not alter the general statutory recognition of ‘customary law’ (discussed below) and land courts are required to apply it in practice.¹⁰ However, the legislation provides an important caveat that any rules of customary law denying women lawful access to ownership, occupation or use of land be held as void.¹¹ This establishes a hierarchy of norms for courts to follow hinging on a legal centralist model in which statute trumps ‘customary law’ that is deemed to be discriminatory. However, since land courts are also required to apply ‘customary law’ this provision requires selectivity and normative assessment by land courts in their interpretation of whatever they perceive to be ‘customary law’ and its ‘discriminatory’ features in order to accommodate statutory provisions for gender equality. There are obvious challenges for interpretation where social organisation and land tenure systems are rooted in patrilineal principles.

A complicating issue for legal practice is the heavily contested nature of customary law itself. One contemporary definition proposed by Woodman (2011) is:

A normative order observed by a population, having been formed by regular social behaviour and the development of an accompanying sense of obligation.

Alternatively, the Tanzanian statutory definition is:

Any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any African Community in Tanzania and accepted by such community in general as having the force of law, including any declaration or modification of customary law made or deemed to have been made under section 12 of the Judicature and Application of Laws Act, and references to “native law” or to “native law and custom” shall be similarly construed.¹²

¹⁰ LA s.180(1)(a), Land Disputes Courts Act (Act No. 2 of 2002) Cap. 216 R.E. 2002 (LDCA) s.50.

¹¹ VLA s.20(2) (see Appendix D).

¹² Interpretation of Laws Act s.4.

Woodman's definition conceptualises customary law as a normative order that originates from social behaviour rather than being imposed by the state. In contrast the Tanzanian statutory definition of customary law encompasses both 'living' (Ehrlich 1936) and codified versions of customary law that local district councils declare to be the customary law applying in their area.

The way law itself is conceptualised has consequences for the approaches governments adopt in attempting to create, implement or seek to change it. Attempting to define some uncoded customary practices as 'law' and others as customs and traditions (*mila na desturi*) is itself problematic because the concept of 'law' remains so contested within legal theory. This is particularly the case whenever theoretical definitions of law are applied cross-culturally. Within anthropology Bohannan argues 'law' to be a (European) 'folk' concept, the meaning of which cannot be translated across jural systems that operate in a fundamentally different way (Bohannan 1957). Chanock contends that the codification of 'customary law' by colonial governments stemmed from a conscious decision to 'stabilise' and bring it under the control of the state rather than the people where it could be 'modified and controlled only to a limited extent' (1985: 47). Mamdani (1996), most notably, asserts that it formed part of a process of 'decentralised despotism' by colonial governments and local native authorities. Some scholars therefore argue that because of its close associations with colonialism 'customary law' is an illusory concept (Read 1972, Chanock 1985).

Tanzania's codified 'customary law' was the product of a project by the German anthropologist, Hans Cory undertaken during the period of British colonial rule. Twining notes that Cory collected individual statements on marital and inheritance matters from male elders of more than twenty patrilineal Bantu groups which were then unified and consolidated as draft rules of 'customary law'. In 1963 these drafts were amended and ratified by many District Councils and enacted as the Local Customary Law Declaration Orders (CLDOs)¹³ providing standardised rules regulating customary issues of marriage, divorce, guardianship, inheritance and other matters (Twining 1964: 36-38). The research process behind the CLDOs, which involved male colonial officers collecting statements from male elders, resulted in a highly patriarchal codified version

¹³Local Customary Law (Declaration) Order (G.N. 279 of 1963), Local Customary Law (Declaration) (No. 4) Order (G.N. 436 of 1963), Cap. 358 R.E. 2002.

of customary law, which is today widely considered to be discriminatory against women.

As Snyder (1981), Moore (1986) and Woodman and Obilade (1995) argue, the process of codification amounts to a process of transformation, which as Moore puts it – involves a major reinterpretation of guideline norms into mandatory substantive rules. Significantly, she notes that ‘the basis on which ... groups made discretionary exceptions and modifications is lost in the ‘translation’ from primary group to court, to say nothing of the difference between fact-finding and fact-knowing as the basis of discussion and decision’ (Moore 1986: 170). The contentious provenance of Tanzania’s codified customary law and its gender discriminatory aspects have led to repeated calls from activist lawyers for their repeal. However, to date they remain in force and applicable in many patrilineal areas of Tanzania where districts have adopted them as local law.

By contrast, there is much greater scholarly support for recognition of uncoded or living versions of customary law that are more responsive to social change and contemporary notions of rights. Perhaps the most prominent Tanzanian advocate for the judicial recognition of living customary law is Professor Issa Shivji, Chair of the Presidential Commission of Inquiry into Land Matters which preceded the Land Acts (the Shivji Commission). As the Commission commented following its period of extensive field research: ‘in many parts of the country ... the various customary laws are not frozen, but living social organs which respond to social change’ (URT 1994: 252). Shivji’s positive view of living customary law and its potential to contribute to the development of common (land) law in statutory processes of dispute resolution is discussed further in chapter 3.

The Tanzanian statutory definition of customary law, which recognises two kinds of customary law – codified and uncoded – has practical significance for courts in deciding which form of customary law to use, and how to find and interpret it. The process of judging and doing justice is the subject of chapter 5 of this thesis. In the context of women’s claims to land, questions are raised as to the form of customary law that adjudicators consider in practice and how they mediate between gender discriminatory customary law and equality provisions under the Land Acts. It is widely

contended within legal scholarship that law and legal institutions are patriarchal (Conley and O'Barr 2005: 60). In addition to considering how courts use and interpret customary law, this study also examines the extent to which legal processes and approaches to doing justice in the particular location of study appear patriarchal and gendered, and the implications of this for women's legal claims to land.

1.4 Methodological approaches and research design

I began this research project from the perspective of a practising lawyer with a belief that human rights could serve as a legal tool to challenge inequality and realise women's interests in land. Postcolonial feminist critiques of human rights, notably Mohanty (1988) and Kapur (2002, 2006) however, caused me to reflect on some of the pitfalls of human rights-based scholarship and activism and its tendency to generate or reinforce a 'victimisation rhetoric' (Kapur 2002) about women. The 'dark side' of human rights - as Kapur describes it - continues to receive little attention in mainstream human rights scholarship and advocacy. Yet as Kapur argues, such scholarship and advocacy requires 'understanding and learning from the postcolonial engagement with rights that are informed by the legacies of the colonial encounter' (Kapur 2006: 685). These postcolonial critiques were a major factor in my decision to foreground the empirical and women's experiences of making claims to land in my Tanzanian case study, rather than taking HRBA as the starting point.

In order to avoid the pitfalls of using HRBA, I turned instead to feminist methodological approaches. As Harding has observed, the distinctive power of 'feminist-inspired' research lies in the researcher using women's experiences to generate her research questions, designing research for women, and placing herself in the same critical plane as the overt subject matter (Harding 1988). Yet, as Spivak warns, elite construction of the subaltern¹⁴ woman's consciousness or subject brings its own 'epistemic violence'. Welcoming 'information retrieval in these silenced areas', she nevertheless urges scholars to learn to '*speak to* (rather than listen to or speak for) the historically muted subject of the subaltern woman' by '*systematically* "unlearn[ing]" female privilege' (Spivak 1998: 295). In an interview with Shaikh, Spivak clarifies this

¹⁴ The term 'subaltern', originating from the work of Antonio Gramsci and developed by the 'Subaltern Studies' group of intellectuals and Spivak herself, is used to describe an 'effect' rather than a defined category of subordinated social groups not forming part of a (colonial) elite (Landry and MacLean 1996: 203).

phrase as ‘learning to learn from below’, seeing one’s privilege as instrumental more than anything else. She warns however, that this is a formula that is ‘very easy to agree with and *extremely* difficult to practice’ (Shaikh 2007: 183).

Inspired and informed by these postcolonial and feminist scholars, I resolved to conduct a rich, detailed and empirically-based study of women’s claims within a broader socio-legal inquiry into the law in action. In the context of the new wave of African land law reforms, such empirical legal studies are particularly important for understanding the impact of statutory reforms on women’s interests in land, how women are engaging with new statutory fora for land dispute resolution, and how law is used and applied by courts in practice. Whilst a focus on disputes, which leaves out ‘trouble-less cases’ can give only a partial picture of how laws and other norms are understood and used within a society (Holleman 1973), context-specific studies of the law in action have intrinsic value for other reasons. Disputes amplify power relations between actors and a study of disputes reveals how power relations may be mediated by laws, norms and legal processes. Empirical research of disputes in statutory fora can provide important insights into the opportunities and obstacles that statutory law and legal processes offer women making claims to land beyond family and community-based fora.

Studying the law in action

Within the past thirty years very few detailed empirical studies by lawyers have been published on how African ‘customary justice systems’ and local African courts actually work in practice. Such studies include Rwezaura and Wanitzek (1988), Woodman (1988), Wanitzek (1990-91, 2002), Griffiths (1997), the WLSA series (1999-2000), Manji (2000) and Ubink (2008). Further ethnographic studies of legal processes by anthropologists include Comaroff and Roberts (1981), Moore’s historical ethnography of Chagga customary law on Kilimanjaro (1986), Rosen (1989, 1995), Caplan (1995), Hirsch (1998) and Stiles (2009). The latter four studies all focus on law in Islamic contexts.

There is considerable diversity of approach between the case studies by lawyers. Rwezaura and Wanitzek analyse the application by courts of a particular statute - Tanzania’s LMA - in a large volume of court cases across four different regions of the country. Woodman’s study examines how state courts ‘create’ customary norms in two

countries – Ghana and Nigeria. Griffiths and Ubink take ethnographic approaches to data collection. Ubink's Ghanaian case study examines contemporary interpretations of customary law and the power of traditional authorities in both land management and dispute resolution. The WLSA series, Griffiths, Wanitzek and Manji all take women's claims as their focus. WLSA's research is activist-oriented and examines issues of access to justice and justice delivery in a range of local fora. Griffiths uses life history narratives to explore the gendered nature of women's access to resources and family law in Botswana. Wanitzek (building on Hirsch's socio-linguistic approach in her Kenyan study) analyses how legal language is used to express power and reinforce gender bias in the context of marital cases in Tanzania. Manji uses individual case studies from Kagera region, Tanzania to illuminate women's experiences of struggles over land and to propose a theoretical framework for conceptualising the interaction of women and property.

My own study of women's claims to land took a processual (Gulliver 1963, Collier 1975, Moore 1978, Comaroff and Roberts 1981) and multi-sited ethnographic approach to fieldwork in order to explore the dynamics of disputing and 'the interlocking of multiple social-political sites and locations' (Gupta and Ferguson 1997: 37). The research design applies Moore's methodological concept of the 'semi-autonomous social field' – one which 'can generate rules and customs and symbols internally, but ... is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded' (Moore 1973: 720). The field of study was therefore not confined to the walls of the courtroom. Throughout my fieldwork I took a 'grounded' theoretical approach to my research questions and generated new ones in a continuous process of data collection, reflection and review (Glaser and Strauss 1967, Corbin and Strauss 1990, Bentzon, Hellum et al 1998). Appendix 1 of this thesis offers a detailed account of my most significant research design choices and the ethical and practical challenges that arose during fieldwork.

Field sites

The fieldwork for this study was conducted in Tanzania between January 2009 and January 2010, of which over nine months were spent in Arusha itself. The geographical context of the study is two districts within Arusha region - Arusha Municipality (now

Arusha City) and the peri-urban/rural agricultural district of Arumeru¹⁵ surrounding it. The 2002 census records these two districts as having the highest population density in the region.¹⁶ Data collection centred on legal dispute resolution fora within the two districts. The Land Acts established a five-tier system of land courts (Village Land Council – Ward Tribunal - District Land and Housing Tribunal (DLHT) – High Court Land Division - Court of Appeal) which now holds exclusive jurisdiction to determine land disputes.¹⁷ With the exception of the Court of Appeal, which is located in Dar es Salaam, all other levels of court operate within the two districts of this study.

Arusha region's first DLHT opened in Arusha Municipality in January 2005. As at January 2010 there were two DLHTs - the second being based in Karatu - covering Arusha region's six districts. Whilst ward tribunals had already been established under the Ward Tribunals Act of 1985 (WTA),¹⁸ in 2009 not every ward in Arusha Municipality and Arumeru had a functioning ward tribunal and some villages did not have village land councils. At the other end of the court hierarchy a shortage of High Court Land Division judges in Tanzania had resulted in a large backlog of appeals, meaning that very few judgments in land cases involving women claimants had been promulgated in the High Court or the Court of Appeal above it.

I considered it necessary to study disputes in more than one level of court in order to explore the progression, mediation and judging of claims as they become shaped and transformed by family, community and legal professional actors at various stages of dispute resolution. It was apparent from initial scoping research that the majority of legal claims involving women in the two districts were handled at the levels of Ward Tribunal and DLHT. Consequently the institutional focus of my fieldwork became (although was not limited to) these two levels of land court.

A substantial amount of archival and observational data was collected over a period of nine months at the DLHT in Arusha Municipality, as well as in five ward tribunals

¹⁵ In 2007 Arumeru District was administratively divided into two district councils – Arusha Rural and Meru. The two district councils continue to share a single District Commissioner.

¹⁶ The 2002 population census records the populations of Arusha Municipality and Arumeru as 281,608 and 514,651 respectively. The two districts cover just 0.3% and 8% respectively of the area within Arusha region but accommodate 21.9% and 40% of the population (National Bureau of Statistics 2004). The region's other four districts - Karatu, Ngorongoro, Monduli and Longido are by contrast more sparsely populated and predominantly pastoralist areas.

¹⁷ LA s.167 and VLA s.60-62.

¹⁸ (Act No. 7 of 1985) Cap. 206 R.E. 2002

covering urban, peri-urban and rural areas within the two districts. I spent an average of 2 months visiting each ward tribunal. In addition I observed legal aid clinic sessions at a local NGO – the Legal and Human Rights Centre (LHRC) and conducted semi-structured and unstructured interviews with a wide range of people – litigants their family members and elders, as well as legal, executive and political actors engaged in legal claims and land administration. I also kept a detailed ethnographic field diary.

1.5 Structure of the thesis

This thesis is structured to reflect the progression of women's claims to land from their social origins through processes of dispute resolution to judgment. Chapter 2 locates women's claims to land in their historical and social context. Drawing upon a range of fieldwork data it surveys the common themes and issues that arise in women's legal claims to land in Arusha and introduces the locations and people whose claims are discussed in later chapters. Chapter 3 offers a technical overview of the statutory landscape for making legal claims to land provided in the Land Acts and LMA. The chapter considers the extent to which this framework is effectively designed to address the kinds of claims that are made by women in the location studied.

Chapters 4, 5 and 6 take a processual approach to studying the law in action. Chapter 4 examines the progression of women's claims from their social origins through various dispute resolution fora. The analysis centres on agency, knowledge and power relations between actors as they negotiate and contest claims in these various fora. Chapter 5 focuses on adjudicators and their approach to doing justice and judging claims. This encompasses an analysis of procedural justice and how laws and other norms are interpreted and applied in practice. Chapter 6 draws together the themes of previous chapters in an extended case study which explores gendered subjectivity, law, power and discourse through textual analysis of a dispute. The chapter reflects upon how multiple actors engaged in the dispute shape, contest and ultimately transform the woman's legal claim from home and village to High Court.

2. Social origins of women's claims to land:

Family and land tenure in Arusha

2.0 Introduction

This chapter situates women's legal claims to land in their social context. Arusha region has been the location of intense struggles over land since pre-colonial times. These struggles, which continued throughout the colonial period and following Tanzania's political independence, have shaped both the rural and urban landscape and social tenure relations that underpin many contemporary claims to land. The chapter begins with an overview of the historical development of land tenure in Arusha and follows with a descriptive portrayal of the locations within Arusha Municipality and Arumeru where I conducted fieldwork in land tribunals. The way in which land is acquired in Tanzania is then discussed, as this has significant implications for the degree of autonomy and control that an occupier has over its use and disposition. In the context of land held according to local patrilineal land tenure practices this creates gendered and intergenerational social relations over the land. The next section shows how these gendered social relations form the basis of many women's claims to land in Arusha today. The final part of the chapter introduces key issues concerning women's claims to land that arose during my fieldwork, as well as the women whose claims are discussed in subsequent chapters.

2.1 Arusha: people, land and livelihoods

Struggles over the land

The rural district of Arumeru is the heartland of the Arusha and Meru peoples. Spear provides the most detailed account of the history of Arusha and Meru farmers on Mount Meru up until 1961 and their relations with the pastoralist Maasai and Chagga of nearby Kilimanjaro (Spear 1993, 1997). A detailed history of the Arusha and Meru and their relationship with the land is beyond the scope of this thesis. A brief overview will however, contextualise the present struggles over land.

Spear traces the history of farming on Mount Meru back to the seventeenth century when *Kichagga* speaking Meru from Kilimanjaro established new farming settlements

on the south-eastern slopes of the mountain. The Arusha (or *Ilarusa* as they are also known) were originally inhabitants of the semi-arid plains of Arusha Chini (Lower Arusha) and traded with the Maasai and Swahili caravans on their route to Kenya. The conquest of the south-eastern Maasai plains by the Kisongo Maasai led some Arusha to relocate to the south-western slopes of Mount Meru in the 1830s. However, the Kisongo Maasai and Arusha maintained close relations through the *Kimaasai* language, age-set ceremonies, intermarriage and cooperation in pasturing animals and agricultural production.

According to Spear, in the mid-nineteenth century as both Meru and Arusha populations increased and cleared forest areas on the mountain slopes for cultivation they eventually came into contact and conflict with each other before joining together in raids of people and cattle on Kilimanjaro. By the 1890s the Arusha had grown to dominate the mountain through more intensive farming practices, displacing Kisongo pastoralists and by assimilating many Meru, Chagga and Maasai into Meru clans. The intimately connected history of the Kisongo Maasai and the Arusha and their shared language helps to explain why Arusha farmers are today also often known as Maasai – or ‘town Maasai’.

German colonial rule (1885-1916) was a period of bloody conquest and resistance (Spear 1997: 61-74). In Arusha, much of the land around the lower slopes of the mountain was alienated in favour of European settlers. Land used by Arusha and Meru farmers was restricted to a band between the lowland settler farms below 4,300 feet and the designated forest reserve above 5,300 feet on the upper slopes of the mountain. This contributed to an intensification in the farming practices of the indigenous farmers, who replaced fields of maize and beans with permanent cash crops of coffee and bananas, sent some of their cattle to the plains and stall-fed those that remained. The practice of keeping cattle, sheep and goats in stalls – or ‘zero-grazing’ on the mountain continues to this day.

As a consequence of German defeat in the First World War, in 1918 Tanganyika passed to the British under a League of Nations Mandate and later as a Trust Territory until the country’s political independence in 1961. Tanganyikan lands that were alienated under German rule were sold, mostly to the British, some to Asians, with only a fraction of

one percent being bought by Africans (URT 1994: 10). In Arusha, as population density rose in the 1940s and 1950s some Meru moved off the mountain to settle to the east and west on the plains where they kept large cattle herds. Pressure on land from indigenous population increases and British colonial aspirations to develop European settler production led to the establishment of the Arusha-Moshi Lands Commission in 1946 to resolve the growing crisis. This resulted in further alienation of Meru land when it was proposed that Meru people be relocated from the north-eastern slopes of the mountain to land acquired for them in less fertile semi-arid lowlands (Spear 1997: 210-225).

Meru protest and resistance to the forced evictions in 1951 was reported to be non-violent. Their struggles culminated in the Meru land case before the U.N. Trusteeship Council and General Assembly in 1952. However, despite two tabled resolutions condemning British actions, in the face of British statements that they would refuse to withdraw, the removals were accepted at the U.N. as a *fait accompli* (Spear 1997: 229). The post-war period also saw expropriation of Arusha land with rapid expansion of the town and relocation of the main road connecting Arusha with Moshi at Kilimanjaro and the Kenyan border at Namanga (Spear 1997: 201).

Following independence in 1961 President Nyerere's government pursued a series of national rural development policies aimed at fighting 'poverty, disease and ignorance'. Significant budgetary resources were put into the agricultural sector to improve and transform agricultural production. However, ultimately the country's economic growth was too low to achieve these aims (Kamuzora 2010: 94). Nyerere's policy of *Ujamaa* (African Socialism) announced in the 1967 Arusha Declaration led to the nationalisation of former alienated lands into the hands of governmental and parastatal bodies. The later policy of '*Operation Vijiji*' ('villagisation') between 1974 and 1976 saw millions of rural peasants relocated to *Ujamaa* villages throughout Tanzania. As Shivji writes, this caused widespread confusion and alienation of land in its disregard of customary land tenure (Shivji 1998: 12).

As elsewhere in colonial Tanganyika, Arusha town was developed to serve the interests of the colonisers, and racial divisions that were created then have translated into racial and class divisions in urban land occupancy today. The roads and the *boma*

headquarters of the German administration, which still stands in the centre of Arusha, were built by African forced labour. The town was designed to serve the colonial power as a centre for commerce and administration. While European town dwellers were given security of tenure through leases of up to 99 years in well-planned low-density housing areas, transient African inhabitants ‘squatted’ or held short term licences, which could be revoked easily by administrative officers (URT 1994: 65). The Asian community lived in medium-density housing in the commercial area of town (Lugalla 1995: 14, cited in Hughes and Wickeri 2011: 802).

During the British colonial period laws such as the Labour Utilization Ordinance of 1947¹⁹ were passed to serve colonial interests and restrict indigenous rural-urban migration. Such laws were abolished after political independence leading to a period of increased rural-urban migration and very rapid growth of squatter areas (Lugalla 1995: 8, 11, 27, cited in Hughes and Wickeri 2011: 802-3). Various policies were introduced to meet the growing demand for urban housing. These included the establishment of the National Housing Corporation and later projects intended to facilitate construction and lending (Mahanga 2000: 95, cited in Hughes and Wickeri 2011: 803-80). Later attempts to instigate new building projects in place of slums and to encourage town dwellers to build new houses were largely unsuccessful (Lugalla 1995: 52, cited in Hughes and Wickeri 2011: 804).

The legacy of colonial alienation of the Meru and Arusha from the land and subsequent post-independence land policies sowed the seeds for many contemporary land disputes in the region and left sharp racial and socio-economic divisions in the allocation of land that have endured to the present day. In more recent years some parts of large settler farms surrounding Arusha Municipality have been sold to make way for new planned residential areas with more mixed populations. Meanwhile as demand for land continues to rise, old conflicts flare up over farms that were historically owned by settlers and were later moved into government hands. During my fieldwork year there were clashes between some 300 Meru villagers and police on the site of a government owned 500-acre farm near the Arumeru market town of Tengeru. Following rumours

¹⁹ R.L. Cap. 243.

that it had been sold to a public official, villagers claimed the farm to be Meru ancestral land and invaded it, slashing the banana trees to stake their claim.²⁰

Contemporary Arusha

It is estimated that in the last ten years alone the population of urban Arusha has nearly doubled.²¹ In July 2010 - six months after I completed fieldwork - Arusha Municipality was officially declared a city. Approximately 95,000 kilometres squared of land was administratively annexed from western Arumeru with some 27,947 Arumeru residents becoming citizens of the new Arusha City.²² For clarity and consistency, in this thesis the former district name of Arusha Municipality is used when referring to the administrative boundaries that were in existence during my period of fieldwork. This section contextualises the claims discussed in subsequent chapters through a descriptive portrait of Arusha's urban centre and the five wards I visited to conduct my Ward Tribunal study. Four of the wards were located in Arumeru and one in Arusha Municipality. To protect the identity of some informants and third parties I refer to these wards as 'Upper Arusha', 'Arusha Plains', 'Meru Rural', 'Meru Town' and 'Arusha Urban'.

Today, the leafy area known as *Uzunguni* ('Europeans' place'), situated close to the centre of the municipality, is characterised by European-style housing, restaurants, tourist hotels and surfaced roads lined with jacaranda and flame trees. The area is largely inhabited by foreign nationals and wealthy Tanzanians, many of whom work in Arusha's most lucrative employment sectors – the nearby U.N. Criminal Tribunal for Rwanda and East African Community, Tanzanite mining, commercial agriculture, tourism and safari companies. The buildings are guarded by *askaris* (watchmen) – often Maasai who migrate to the town from other parts of the region for work. Many local women are employed as maids and housegirls. This is also the location of the High Court and the Regional Commissioners' Building which houses Arusha's DLHT.

²⁰ '300 villagers in Arusha clash with armed police' The Guardian (Tanzania) 8.6.09 p.3.

²¹ Fieldwork interview with Arusha Municipality Land Registration Officer 7.10.09. Arusha's regional population growth in the inter-censal period 1988-2002 was 73% - the fourth highest regional growth rate in Tanzania (National Bureau of Statistics 2006: 4).

²² 'Arusha elevated to city status.' The Arusha Times 31.7.10 – Report of an interview with the Executive Director of Arusha Rural District.

In marked contrast, the western half of the centre - home for much of Arusha's Asian population - is dominated by civic apartment blocks, offices, shops, fabric sellers, cafes, small bars and guesthouses, the main marketplace and bustling streets where many men and women make their livelihoods in countless small businesses. The streets are alive with the enterprises of *mafundi* (tradesmen and women). Maasai and Arusha women sit making their handmade *shanga* beaded jewellery to sell to passers-by. There is a whirr of tailors' sewing machines, alongside shoe repairers, key cutters and mobile phone credit sellers. *Mama Lishe* women serve up hot lunches of rice, beans, chicken and beef to local workers while street food sellers at the bus stand cater for travellers with *chipsi mayai* (omelette with chips) *maandazi* (doughnuts), chapattis and sweet *chai* (tea). Women roast maize on small charcoal stoves or sell bananas, mangoes, avocados, green vegetables and other produce from buckets.

To the south-west of the municipality in the shadow of an imposing maize flour factory lies 'Arusha Urban' ward. Rapid urbanisation since the 1980s has seen what were once village areas become an integral part of the municipality: a maze of unplanned housing and unsurfaced roads where the local population make their living in service industries or small businesses, selling home-grown produce in the market, or working as employees in garages or local factories. The majority of the population living in urban Arusha are not Arusha or Meru and have migrated to Arusha from all over Tanzania. Lack of urban planning in these areas has caused a large number of land disputes concerning boundaries and roads blocked by people building new houses, as well as landlord and tenant disputes in rented properties. This ward generated a high number of appeals to the DLHT.

'Upper Arusha' ward is situated to the north of the Arusha-Moshi road on the periphery of the municipality. The southern peri-urban part of the ward near the main road has a mixed population of Tanzanians and a small number of *wazungu* (Europeans). Walking up the bumpy unsurfaced road from the main highway there is a concentration of cement-built houses, small businesses and shops, a bar and local primary school. As the road stretches uphill onto the lower slopes of Mount Meru the scene becomes rural. Bananas, maize, beans, fruit and vegetables are grown on family *shambas* and houses are constructed of either mud or cement bricks. Cattle for milk production and goats are kept near to the house in a *kibanda* (hut) and fed on chopped up banana stems and other

vegetation from the *shamba*. There is the occasional small wooden *kibanda* where local women sell just a few neat piles of locally grown fruit and vegetables, a butcher's *kibanda*, a church. Further uphill the noise of the local shops and bars disappears to the sounds of cockerels and mountain streams flowing alongside the lush *shambas* and hedged mud pathways. This is Arusha heartland, where the first language of many inhabitants is *Kimaasai*.

Despite its location on the periphery of Arusha town this ward has not been subject to urban planning. The area is mostly unsurveyed, informal settlement and family *shambas*. Demand for land in the ward is high. Population increases over successive generations have reduced the size of fertile agricultural plots that families rely on for their livelihood and subsistence. The high cost of coffee production coupled with its declining value on the international market has led many families to reduce coffee farming in favour of vegetables with yields three times a year. Increasingly people are building brick or cement houses on their *shambas* to meet population rises or to provide an additional source of income from renting. The demand for land has created a market for it and now constitutes a great incentive for villagers to sell land that has been passed down through families for generations. This has given rise to a high number of land disputes in the ward, particularly where sellers have failed to obtain consent from family members and the village authority. A large number of appeals to the DLHT were from Upper Arusha Ward Tribunal.

In contrast 'Arusha Plains' ward to the west of the municipality comprises a mix of commercial settler farms and smaller Arusha family plots. Again, the commoditisation of land and expansion of the urban periphery has encouraged many local people to sell plots to migrant workers from other parts of Tanzania and beyond. European settler occupancy of land close to the municipality in colonial times has remained substantially unchanged with large commercial coffee estates of several hundred acres extending south and north of the main road towards Kisongo, each managed by the descendants of European settlers. Parts of the coffee estates are now being sold under separate titles for multiple concept land use.

Beyond the irrigated coffee estates heading in the direction of Arusha's small airport the landscape becomes wilder. Undulating hills and plains like dustbowls in the dry season

rapidly transform into grassland in the rainy season when rains flow through channels produced by soil erosion, enabling local farmers to grow maize, beans, sweet potatoes, peas and groundnuts on rain-fed family *shambas*. In contrast to the small half or quarter acre *shambas* in Upper Arusha ward, family *shambas* on Arusha Plains' less fertile low-lying plains are typically 1 or 2 acres. In addition to growing crops, families 'zero-graze' their livestock on maize, bean husks and grass cut from road boundaries. Many of the inhabitants in this area are Arusha people and *Kimaasai* is widely spoken. Cattle and goats are traded amongst Maasai and Arusha men at the livestock market in Kisongo.

Urban expansion and the commercial value of land in this area has also encouraged selling. One Arusha woman living in the ward told me that she was preparing to sell one of her inherited two acres and to use the sale proceeds to build small brick houses for rental to 'high class' people working in the town. In 2010 more than 50% of the land in the ward had been registered, including settler farms and most of the village land that has subsequently become annexed to the new city.²³ Land in the ward's other villages is mostly unregistered. It is from these unregistered areas, where land is held under customary rights of occupancy that the majority of disputes heard in Arusha Plains Ward Tribunal originate.

Taking a *daladala* (public minibus) east from the municipality along the main Arusha-Moshi road towards Kilimanjaro the landscape gradually becomes rural and the passing scene is one of farms large and small, growing bananas, coffee, sunflowers, maize, sugar cane and rice. Women dressed in *kanga* and *kitenge* board the *daladala* with plastic buckets full of produce, and bundles of live chickens. The women are heading to do business in one of the Meru market towns situated on the main road to Kilimanjaro, where they will trade seasonal fruit and vegetables, ground coffee, rice, beans, maize flour, chickens and fabrics, alongside men selling second-hand clothing and general household goods.

The rapidly developing 'Meru Town' ward lies to the east of the municipality along the Arusha-Moshi highway. Besides the market, it is also a frequent stopping point for business people on the way to Moshi as well as tourists visiting Mount Meru's Arusha

²³ Interview with Arusha Rural District Land Officer 4.1.10.

National Park. Some employees in the Tanzanite mines of Merarani in the adjacent Manyara region commute to work each week from their homes in the ward. People from many parts of Tanzania and a small number of *wazungu* live here, although the indigenous population is Meru. Local officials I spoke to anticipated that many land disputes would arise with implementation of the local planning strategy and land registration in the hitherto unplanned ward.

A number of large irrigated commercial farms adjacent to the highway around the ward were European settler farms during colonialism. Now they are leased by the government to foreign investors or wealthy Tanzanians and produce coffee and roses mainly for export. Meru Town's larger farms, including the rice paddies are a source of seasonal employment for locals. There are also smaller family *shambas* in the ward although the soil here is not as fertile as on the mountain slopes. During my fieldwork year low rainfall caused crops such as maize on many small rain-fed *shambas* to fail. On one occasion when I attended the Ward Tribunal at Meru Town the day's hearings had been cancelled to enable government emergency supplies of maize to be distributed to local people from the ward office during the drought.

To the east of Meru Town is 'Meru Rural' ward. Most of the inhabitants of this ward are Meru and rely on farming for their livelihood. *Kimeru* is widely spoken. Farms in the ward are typically one acre or so inherited family *shambas* growing coffee, bananas, beans, maize, sunflowers, fruit and vegetables. Families also keep a small number of cows, goats and chickens. Coffee farming in the ward remains an important source of income but has significantly declined in favour of vegetable production since the 1980s due to local religious conflicts and population displacements, along with rising coffee production costs and fall in market values.

Typically, family coffee *shambas* generating cash crops are managed by men. Women also cultivate other crops such as maize and beans on their allocated portions of family land. Coffee producers sell their crop to coffee cooperative unions by the kilo for onward commercial sale. As the history of struggles over land by the Meru clearly illustrates, family *shambas* on Mount Meru lie at the very heart of Meru identity. Disputes over land within families are said to be common, particularly between brothers fighting over unequal shares of inherited *shambas*. However, cash and food crop

production in the area is generally well managed and social attitudes towards female ownership of inherited land tend to be heavily patriarchal. This may explain why there were very few claims to land in Meru Rural Ward Tribunal involving women.

2.2 The '*shamba*'

The *Kiswahili* word *shamba* defies any satisfactory English translation. Its literal meaning is a farm or plot of cultivated ground (of any size) and therefore encompasses both commercial farms and small family plots. The Standard Swahili-English Dictionary (Johnson 1939) suggests that the origin of the word may lie in the French word *champ* (field) and the cultivation of cloves on Zanzibar from the late eighteenth century onwards. In the family context use of the word *shamba* holds a meaning which intimately connects people with the land, to ancestors and to future generations.

In her historical study of the Chagga of Kilimanjaro Moore distinguishes *shamba* from the *Kichagga* (and *Kimeru*) word *kihamba*. A *kihamba* is a homestead consisting of a banana garden surrounding the family home that could be occupied permanently by a man and his male lineal descendants, failing which, his brothers or other male agnates. The family lived on the land while ancestors were buried in a part of the *kihamba* bounded by *masale* (dracaena plants) (Moore 1986: 80-85). Spear writes that for the Meru the *kihamba* has similarly been a place of upbringing and veneration of ancestors. Whilst the youngest son would usually inherit his father's *kihamba* other sons cleared adjacent land to establish new plots, to be inherited by their own sons in turn (Spear 1997: 26).

Moore notes that unlike *kihamba*, *shamba* plots hitherto were not permanently held but lowland areas annually allocated, nominally by the chief and used to grow annual crops of maize, beans and millet (Moore 1986: 115-117). During the British colonial period increasingly *shamba* lands were converted into *kihamba* as households moved down the mountain (Griffiths 1930, cited in Moore 1986: 117). Nowadays Meru and Chagga use both the vernacular word *kihamba* and the *Kiswahili* word *shamba* to refer to inherited family (and clan) land. With no remaining vacant land to clear on Kilimanjaro or Mount Meru, with each generation existing family *shambas* are being divided into smaller and smaller plots.

Early Arusha mountain farmers also cleared land for cultivation on the slopes of Mount Meru with the youngest sons inheriting land from their father. Spear notes however, that whereas for the Meru the main form of social organisation was the clan and lineage, Arusha local social organisation centred on age-sets with age-mates pioneering new lands on Mount Meru together after they had retired from being warriors (Spear 1997: 50). Over time aspects of Arusha and Meru social practices have merged, for example the adoption of Arusha systems of age-sets by Meru (Moore and Puritt 1977: 125), and Meru agricultural practices by Arusha. Today both Arusha and Meru use the *Kiswahili* word *shamba* to refer to cultivated inherited family farm plots.

For both Meru and Arusha, livestock remain of socio-economic significance and many families living in rural areas keep at least some livestock – whether cows, goats or sheep in a stall on the *shamba*. Livestock are generally controlled and exchanged by men. They may be slaughtered on ceremonial occasions, used for bridewealth (*mahari*), customary pledges/mortgages (*rehani*) and fines as well as kept to produce milk, meat and manure.

2.3 Owning, acquiring, using land

[Land is] God's gift, given to all His creation without any discrimination ... When I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need. It is true, however, that this land is not mine, but the efforts made by me clearing the land enable me to lay claims of ownership over the cleared piece of ground ... Whoever then takes this piece of ground must pay me for adding value to it through clearing it by my own labour.

- Extract from Nyerere's 1948 pamphlet '*Mali ya Taifa*'²⁴

The concept of 'owning' the land itself is one which is not recognised in Tanzanian law today. It was introduced under German colonial rule when some 1,300,000 acres (1%) of Tanganyikan lands were alienated in favour of settlers through 'Conveyances of Ownership'²⁵ and later converted into freeholds by the British.²⁶ In 1923 the other 99%

²⁴ (National Property) Reprinted in Nyerere (1967: 53-58).

²⁵ Imperial Decree regarding Creation, Acquisition and Conveyance of Crown Lands and regarding the Acquisition and Conveyance of Lands in general in German East Africa, promulgated 26.11.1895, s.6.

²⁶ Land Registry Ordinance (No. 15 of 1923) R.L. Cap. 116 s.7(1).

of occupied and unoccupied lands of mainland Tanganyika were declared to be ‘public land’ vested under the control of the Governor for the use and common benefit of ‘the natives’²⁷ (URT 1994: 9-11). Executive power over land was retained after independence when the radical title became vested in the President as trustee. At Tanzania’s independence in 1963, and consistent with Nyerere’s conviction that land was public, not private property ‘*to be sold like a robe*’ (Nyerere 1967: 55) the remaining 1% of settler freehold tenures were eventually extinguished and made part of public land.²⁸ For a detailed history of land tenure reform in Tanzania see James (1971), James and Fimbo (1973), Lyall (1973), Fimbo (1974, 1993), URT (1994), Shivji (1998).

The 1923 Land Ordinance also introduced the concept of the ‘granted right of occupancy’²⁹ – the right to use and occupy land, which is still recognised in Tanzanian land law today. In 1928 the Ordinance was amended to recognise customary or ‘deemed’ rights of occupancy being ‘the title of a native or a native community lawfully using or occupying land in accordance with native law and custom’. In contrast to the contractual basis of the granted right of occupancy, as Shivji notes, the relation between customary occupier and the state was an administrative one and much less secure (Shivji 2002: 196). According to the Shivji Commission the nature of deemed rights was interpreted with ‘considerable flexibility’ by the colonial administrators and provided customary rights-holders with virtually no legal security against land alienation in practice (URT 1994: 12).

The Shivji Commission observed that the right of occupancy system was first developed in Northern Nigeria and is said to have been based upon what were thought to be fundamental principles of African customary tenure, most notably that land is held to be used and the occupier of land retains control over it so long as it is used. However, it differs from customary systems in vesting the radical title in an outside (state) entity rather than tribe, clan or family, and unlike customary tenure, a granted right of occupancy is for a definite period (URT 1994: 13).

²⁷ Land Ordinance (No. 3 of 1923) R.L. Cap. 113 s.2 and 3.

²⁸ Freehold Titles (Conversion) and Government Leases Act (Act No. 24 of 1963) Cap. 393 R.E. 2002 (repealed under the Government Leaseholds (Conversion to Rights of Occupancy) Act (Act No. 44 of 1969) Cap. 367 R.E. 2002 s.10).

²⁹ s.6.

The Land Acts have retained the principles of public ownership of land and the legal concept of the ‘right of occupancy’ – including customary rights of occupancy, as the only recognised type of land tenure. Accordingly, the right of occupancy is the closest that any individual or corporate body today can come to ‘owning’ land in a legal sense. This is subject always to ultimate control and ownership being vested in the radical title of the President as trustee on behalf of the citizens – a highly centralised locus of power through which land may be acquired or transferred ‘in the public interest’. Under the Land Acts what is ‘owned’ and can be ‘sold’ by the individual or corporate body is not the land itself, but ‘an interest in or over land’.³⁰

Customary practices of acquisition and disposition

Land in Tanzania may be acquired in three ways: by cultivation, purchasing or inheritance (Fimbo 2007: 145). As Fimbo notes, subject to any specific legislative exclusion, today customary land tenure is applicable to African settlements in both rural and urban areas of Tanzania (Fimbo 2007: 152). The Land Acts categorise public land into three types: ‘general land’- all public land which is not reserved or village land; ‘village land’- land within the jurisdiction of the village, which may be either communal, vacant, or land used or occupied by an individual or family under customary law; and ‘reserved land’- including forests, national parks and land reserved for public utilities. Under VLA³¹ customary rights of occupancy apply to general land, village land, reserved land, planning areas as well as urban and peri-urban areas (Fimbo 2007: 156).

The mode of acquisition of a piece of land has very significant implications for the extent to which an occupier or user of the land has autonomy over its disposition. Although much discussion in this thesis concerns uncoded customary practices, the codified Rules of Inheritance contained in CLDO No. 4³² offer a useful starting-point for illuminating the distinction that is often made between three types of land held under customary principles of land tenure - self-acquired, family and clan land.

‘Self-acquired land’ is land acquired by an individual through his or her own efforts, whether by clearing land, planting permanent crops or making other permanent

³⁰ Land Amendment Act (Act No. 2 of 2004) (LAA) s.2.

³¹ VLA s.14.

³² G.N. 436 of 1963 Second Schedule.

improvements to the land. The practice of staking a claim to land through cultivation has a long history and is often evoked in disputes over land held under customary tenure today. Generally speaking, the individual has absolute control over its disposition and his or her children have exclusive rights of inheritance. According to CLDO No. 4 'If the deceased left sons, or sons and daughters these will inherit all his property exclusively.'³³ However, unlike the position under the Indian Succession Act of 1865³⁴ (discussed in chapter 3), which makes no distinction between the entitlements of male and female heirs, CLDO No. 4 provides that self-acquired land must be distributed in three 'degrees' (or grades of heirs) with preference given to sons in the first and second degrees, whilst daughters inherit between 1/20 and 1/10 of the property in the third degree.³⁵

In practice an individual has much greater discretion in the allocation of land than the Rules suggest. Magoke-Mhoja observes that at one stage the rationale for giving the eldest son the largest share was tied to his obligations to care for younger siblings (2008: 135). The ability to return to the family home under the care of a brother is particularly important for women who leave their natal home upon marriage, but subsequently return in the event of relationship breakdown or widowhood. As Magoke-Mhoja notes however, whilst this system may have worked well in the past, socio-economic changes mean that today this principle is much less observed in practice.

'Family' and 'clan' land is distinguished in terms of scale of family interests. Hence family land is land which is passed between the generations of a large family, whereas 'clan land' may be defined as land - whether privately or communally owned, or held on family tenure, 'within the jurisdiction of a clan' – namely a group of individuals who are related by virtue of a common ancestor (See James and Fimbo 1973: 427). Rules of succession under CLDO No. 4 are the same for both. In Arusha's local patrilineal systems of landholding, including Arusha, Meru and Chagga, family and clan land is customarily heritable by male agnates, with a man's sons being the first order of heirs. Wives gain access to the land by virtue of their marriage into the man's family. Under

³³ Rule 26.

³⁴ (Act X of 1865) made applicable in Tanganyika under British colonial rule by the Indian Acts (Application) Ordinance of 1920 R.L. Cap. 2.

³⁵ Rules 19-30. The eldest son of the most senior wife inherits 1/3 in the first degree; other sons of all wives inherit between 1/10 and 1/15 of the property in the second degree.

VLA a woman's interest in her husband's customarily inherited land is classified as a 'usufructuary' or 'derivative' right.

Dispositions of family and clan land typically require the consent of male family members and approval by family or clan elders. Issues of disposition are therefore discussed at *boma*³⁶ (family) meetings, which may include senior members of the family or clan, such as the *mshili wa ukoo* (a Meru clan leader or headman)³⁷ or *laigwenani* (an Arusha 'counsellor')³⁸. Family members have the right to refuse sale or to buy the land themselves. Spouses also have a right to refuse to consent to a disposition under statute.³⁹ Village councils are statutorily obliged to disallow an assignment of land which would defeat a woman's right to occupy under a customary right of occupancy, derivative right or as a successor in title; or where there would be insufficient land remaining to provide for the family's livelihood.⁴⁰ The importance of maintaining a family connection with the land and a strong social group means that there is also a strong social presumption against sale unless the need is urgent, such as to pay hospital bills or school fees. As one Meru *mshili wa ukoo* explained:

*Washili yo kazi yao yeeiringa nrema, kaam ali kwa kumba nrema kuchikooya wandu nndi. Wanyanyakaa. (It is the washili's responsibility to protect the land, and if you just allow the selling of land you will lose your people. They will be scattered.)*⁴¹

Despite the well established social and legal obligation to obtain consent, land is often sold without the consent of family, clan or village authorities, with serious social consequences for families who are left landless and homeless as a result.

³⁶ The term *boma* has two meanings – a family homestead, or a fort or administrative headquarters.

³⁷ The *mshili wa ukoo* is elected by clan members. Puritt writes that qualities sought in an *mshili* are an ability to speak well at meetings, be wise and just and considered a 'reasonable man' (Moore and Puritt 1977: 112). Clan leaders will often carry with them a symbol of their authority. An *mshili wa ukoo* I met kept with him a small pocket diary with '*mshili wa ukoo*' and his clan area stamped on the cover. This served as an identity card, which was recognised by clan members and public authorities such as the police.

³⁸ Gulliver translates this *Kimaasai* word as 'spokesman' or 'counsellor', chosen by elder lineage members for their intelligence, initiative, knowledge of people, lineage affairs and custom, diplomacy and persuasiveness (Gulliver 1963: 50, 101-109). The traditional symbol of authority of an Arusha *laigwenani* is the '*rungu neusi*' (*orkuma* in *Kimaasai*) – a dark wooden club that *laigwenani* often carry with them to tribunals when acting as witnesses.

³⁹ LMA s.59, LA s.85, s.114 (as amended by LAA) and s.161 (see Appendix D).

⁴⁰ VLA s.30(4)(b) and (c) (see Appendix D).

⁴¹ Interview with *mshili wa ukoo* 12.1.10. Translation from *Kimeru* by Charles Livingstone.

Disposition by way of a pledge (*rehani*), or ‘customary mortgage’ is often preferred over sale as a means of raising capital in cows or money – perhaps for bridewealth or funeral expenses whilst retaining land within the family. Mortgage provisions in the Land Act (discussed in chapter 3) do not override customary practices of *rehani*.⁴² Customarily, under the terms of a *rehani* pledgees are not entitled to plant permanent crops, as this is tantamount to ownership, although they may harvest crops on the land (James 1971: 346). The right of a pledgee to take possession of the land depends on the terms of the pledge itself; for example, in default of payment of the debt, when the date of redemption has passed, or from the date of the mortgage where the debt is to be discharged through harvesting of crops by the pledgee (James and Fimbo 1973: 415-424). The terms of a *rehani* are generally witnessed and recorded by family or clan elders. However, difficulties can arise if there is a dispute as to the terms of the agreement many years later if the witnesses or minutes of the *rehani* agreement are no longer available.

Individualisation of land tenure - registration and titling

One of the most significant developments in land tenure law under the Land Acts is the promotion of the individualisation of titles. Administrative procedure for registration of a right of occupancy is determined by the type of land in question. The granted right of occupancy to general or reserved land is legalised through the issuing of a ‘certificate of occupancy’ by the Commissioner for Lands.⁴³ VLA vests authority in village councils to allocate and grant customary rights of occupancy as well as to issue certificates of customary rights of occupancy of village land. The certificates must be approved both by the chairman and secretary of the village council and the District Land Officer.⁴⁴ The Act provides that the village may require the payment of a premium on the grant of a right of occupancy to a non-village organisation or persons not ordinarily resident in the village.⁴⁵ However, many village governments in Arusha in 2010 were openly charging a 10% fee for all dispositions of land handled by the village. One consequence of this appears to have been to discourage villagers from going through the village authorities to seek the necessary consent for a disposition of land.

⁴² LA s.115(1) and (4) (as amended by LAA) (see Appendix D).

⁴³ LA s.29(1).

⁴⁴ VLA Part B.

⁴⁵ VLA s.26.

Before village councils are able to grant customary rights of occupancy and issue certificates they must have been issued with a certificate of village land demarcating the boundaries of the village and conferring upon the village council its functions of management of the village land.⁴⁶ The village must also have established a registry.⁴⁷ According to District Council Land Officers I interviewed, by early 2010 approximately 50% of all land within the area of Arusha Rural District Council had been surveyed and titled under the Land Act. As for village land, whilst the boundaries of all but two of Arusha Rural District Council's 76 villages had been confirmed only four villages had land registries and therefore most villages had not been given their village certificates.⁴⁸ In Meru District aside from a township urban planning process, none of Meru District's 66 villages had functioning land registries and few villages had been issued with a village certificate.⁴⁹ In short, systems for registration of customary rights of occupancy under the Land Acts in most of Arumeru had yet to be implemented.

In 2009 in Arusha Municipality, where all the land is classified as 'general land', I was informed that approximately 15% of the land had been registered under granted rights of occupancy.⁵⁰ This included much of the centre and the planned housing areas of Njiro and Kijenge on the site of a former large sisal estate towards the outskirts of the municipality. The cost of obtaining a certificate of right of occupancy is significant, typically comprising an application fee of 5000 Tanzanian Shillings (Tsh), plan preparation fee of 6000 Tsh, land rent payable to the government assessed at fixed rates according to the size and use of the land and its location, a registration fee of 20% of land rent, and survey costs of 600,000 Tsh upwards.⁵¹ Given that annual per capita GDP in 2010 was 770,000 Tsh (URT 2011: 38) these costs are out of reach of the vast majority of Tanzanians.

Concerning titling of matrimonial property the Land Registration Officer of Arusha Municipality commented that although the Land Act provides for registration of property in the names of both spouses, very few certificates are issued in joint names in practice. Land Officers in Arusha commented to me that often women – including

⁴⁶ VLA s.7.

⁴⁷ VLA s.21.

⁴⁸ Interview with Arusha Rural District Council Land Officer 4.1.10.

⁴⁹ Interview with Meru District Council Land Officer 5.1.10.

⁵⁰ Interview with Arusha Municipality Land Registration Officer 7.10.99.

⁵¹ In 2010 the official Tsh-£ exchange rate was 2159 Tsh to £1.

women who know their rights – do not seek for their names to be included on the title for reasons of tradition. Similar findings have been made elsewhere (Hughes and Wickeri 2011: 848-849). The application form does not require the applicant to state whether the land in question is matrimonial property, and, as discussed in chapter 3, the statutory procedural safeguards are not always adequate to protect a spouse's interest in practice. The Land Registration Officer for Arusha Municipality suggested one solution might be to require all applications to be accompanied by a letter from a local community leader such as a *mwenyekiti wa mtaa* (street chairman) confirming the marital status of the applicant.

Despite the political drive towards formalisation and titling, implementation of administrative land law reforms in Tanzania has been slow and uneven. Pedersen attributes this to underfunding of the Strategic Plan for Implementation of the Land Laws (SPILL) and a lack of coherence in land administration structures (Pedersen 2012). Whilst land titling has yet to take effect in many places and is out of financial reach of most Tanzanians, the majority of citizens in Arusha continue to hold unregistered interests in land.

2.4 Life cycles, relationships and women's claims to land

This section draws together observations from a range of my own fieldwork data and other sources to highlight some of the frequently occurring issues that are raised in women's legal claims to land in Arusha. It is important to state that legal claims to land involving women litigants raise a variety of issues in practice, not all of which relate to family life or are inherently gendered. This is particularly the case for disputes from urban and peri-urban areas where landlord and tenant and boundary disputes are a common issue in claims brought by both men and women. Occasional claims are brought by women against village authorities for taking land without compensation. It is the case however, that the majority of claims involving women that I encountered during my research arose from family disputes. Chapter 3 considers the protection of women's land and property rights afforded by statute. What is evident from claims to land held under customary tenure is that such claims are socially embedded. Claims that concern land held under customary tenure tend to be closely linked to significant life events such as marriage, separation and divorce, or death of a husband or father.

Marriages and their breakdown

According to Arusha, Meru and Chagga customary practices, it is often when a son marries that he is allocated a portion of his father's land, thereby retaining land within the family for the next generation. This is typically carried out by the father in the presence of his brothers, wife, sons, neighbours and family elders as witnesses. Depending on the size of the land, the son's wife is then allocated a part of this land to cultivate, with the remaining land being reserved for the husband and future allocations (for example to subsequent wives in the case of polygamous marriages). Polygamous and 'potentially polygamous' marriages (i.e. monogamous marriages that may become polygamous in the future) are recognised in Tanzanian law.⁵² In polygamous marriages often the first (or senior) wife will receive a larger portion of land from her husband than the junior wives. This unequal division of land can lead to conflict between wives or between wives and the sons of other co-wives at a later stage, especially if land is scarce. This issue is explored in greater detail in chapter 4 through a discussion of 'Elizabeth's claim.

The local patrilineal rationale that land remains within the family if allocated to a son, but would be 'lost' to a daughter 'because she will be married' (and thereby entitled to use her husband's land), is embedded in Tanzanian language and marriage traditions and reinforced by virilocal practices of residence near the husband's kin. Through language and social marriage practices a woman is constructed as a passive actor in the marital transaction between families. The *Kiswahili* verb *kuoa* (to marry) is always used in its passive form *olewa* in relation to women, but in the active form *oa* in relation to men. This reflects the idea that a woman is married to her husband and his family - and hence his land. Practices of the woman's family receiving bridewealth from the man's family,⁵³ and parties to 'send off' the woman before the marriage ceremony itself, reinforce this linguistic distinction between men and women as parties to a marriage.

⁵² LMA s.10. Only polygynous marriages are permitted within the legal definition of polygamy.

⁵³ For a discussion of bridewealth and conceptions of 'women as property' see papers by Hirschon, Strathern and Whitehead in Hirschon ed. (1984: ch. 1, 9 and 10). In her paper on patrilineal marriage traditions in the New Guinea Highlands, Strathern argues that the women and things exchanged between male transactors are akin to 'inalienable gifts', constituting 'wealth' (rather than 'property' in a materialist sense, which inaccurately constructs women as objects without personhood).

Local patrilineal principles underpinned by male control of family land can have a significant impact on women's agency over dispositions within marriage. In a discussion of women, kinship and property Whitehead contends that generally kinship and family systems, as well as economic systems of production and exchange, serve to construct women as less able than men to act as subjects (Whitehead 1984: 180). She specifically identifies the language and exchanges associated with marriage as one such significant construction. In Tanzania, gendered inequalities embedded within patrilineal practices of land tenure become re-entrenched through the statutory principle of separate ownership of property between spouses.⁵⁴ As discussed above, both customary practices and statutory provisions require family consent to be sought before a disposition of family land. However, patrilineality and the gendered linguistic construction of a woman as *olewa* both serve to diminish a woman's power to object to dispositions in practice. This contention is illustrated in chapter 6 which explores the claims of a woman – 'Naserian' against sale of a family *shamba* without her consent.

Gendered inequalities in the ownership of land within marriage become critical in circumstances of marriage breakdown. In contexts where codified customary practices of land tenure are recognised, this may leave a woman without land. For example, according to the CLDO Rules on the Law of Persons,⁵⁵ when a couple divorce, both the house and land which has been acquired by joint efforts is retained by the husband (after the harvest). The wife retains kitchen equipment, and the cattle, food and cash crops are divided between the spouses.⁵⁶ The concept of joint marital property is also not recognised in Islamic law. Writing on Islamic law in the Tanzanian context, Makaramba notes that Muslim women whose marriages were contracted according to Islamic rites keep their dower upon divorce and often receive a parting gift of deferred dower for 'good behaviour' during the marriage (Makaramba 2010: 281).

The statutory property rights of all women upon divorce were strengthened by LMA and subsequent case law (discussed in chapter 3). It remains the case however, that many women either do not seek divorce, or do not receive – or seek - a share of the matrimonial home in practice. In their socio-legal study of family law in Tanzania in the late 1980s Rwezaura and Wanitzek found that claims to matrimonial assets were not

⁵⁴ LMA s.58 (discussed further in chapter 3).

⁵⁵ G.N. 279 of 1963 First Schedule.

⁵⁶ Rule 94.

often seen in practice in petitions for divorce, especially amongst peasant women. The authors suggest that women petitioners who do not make such claims may be unaware of their legal rights or reluctant to diminish the assets of their children (Rwezaura and Wanitzek 1988: 16). There is a dearth of socio-legal research to confirm the extent to which this position may have changed in recent years.

In the event of marriage breakdown, unless a wife has access to other property of her own the most practical solution will usually be for her to return to her natal home with just her personal property. If a woman's father is deceased and his property has already been distributed amongst male heirs, she may have to rely on other male family members for a place to stay or access to family land. For this reason there is a gradually growing practice of fathers allocating a small portion of land to daughters in case their marriages should fail. This is a sensitive issue because it challenges the heart of gendered power relations and behaviour within marriage. One Arusha *laigwenani* explained to me:

If a father wanted to give land to his daughter in the past that would have been interfered with but now it can happen. Now we say 'haki sawa' (equal rights). You were not allowed to before because a woman would get land when she was married. The problem is that ... it can make a woman more arrogant (kiburi) because she has the land where she came from and where she is now. The woman can misbehave. She becomes arrogant. If you hit her she knows she can go back to her father's land and build there ... Women had respect (heshima)⁵⁷ for their husbands, but right now they don't have any.⁵⁸

Further issues concerning women's access to land arise in the context of the breakdown of polygamous marriages and other kinds of non-monogamous relationships. One important legal issue for a co-wife (although not an issue that arose in my own fieldwork) is her inability to become a party to divorce proceedings between her husband and another co-wife.⁵⁹ As Rwezaura observes, this effectively gives the divorcing co-wife a superior interest in the matrimonial property when a court allocates assets upon divorce (Rwezaura 1994-1995: 530-532).

⁵⁷ In the context of Muslim coastal Kenya Hirsch observes the critical social importance attached to Swahili women demonstrating *heshima* (translated as respect, honour and modesty) and that men secure their own claims to *heshima* through the *heshima* of the women in their households (Hirsch 1998: 48-49).

⁵⁸ Interview on 28.10.09 – contemporaneous translation from *Kiswahili* noted in English.

⁵⁹ *Maryam Mbaraka Saleh v. Abood Saleh Abood* Court of Appeal of Tanzania Civil Appeal No. 1 of 1992 (Unreported), cited in Rwezaura (1994-1995: 530).

Islamic marriages and marriages contracted according to customary practices are presumed polygamous or potentially polygamous unless the contrary is proved.⁶⁰ Polygamy is not legally recognised for Christian marriages.⁶¹ Notwithstanding the legal restrictions on polygamous marriage within the subsistence of a monogamous marriage the law does not prohibit parties from converting their marriage into a polygamous one (except in the case of Christian marriages).⁶² LMA also provides for a rebuttable presumption of marriage in the case of a man and woman who have lived together for a minimum of two years ‘in such circumstances as to have acquired the reputation of being husband and wife’.⁶³ The main rationale behind the legal presumption of marriage was to give women cohabitants and their children greater legal protection in the event of relationship breakdown (Rwezaura 1998: 191).

A significant consequence of these provisions is that many relationships have an uncertain legal and social status which is open to challenge. This in turn has consequences for claims to property entitlements. For example, although Christianity prohibits polygamy, this may effectively happen in practice either where parties separate but do not divorce and then ‘remarry’ customarily, or where parties remain as a couple but the husband has a ‘*nyumba ndogo*’ (small house) as it is colloquially known, i.e. a relationship with another woman as his ‘concubine’. Such relationships are not always conducted in secret and some couples in these circumstances may be regarded by their family or local community as married. In other cases the second ‘wife’ may not be aware of the husband’s first relationship and, as Rwezaura observes: ‘parties remain ignorant of their actual legal status under state law for a long time – until one day a marital dispute or the death of one of the parties (especially the husband) throws a dark shadow on the validity of their marriage’ (Rwezaura 1998: 196).

During my fieldwork I observed cases where, believing that she was married to her ‘husband’, a woman had placed reliance on her marital status, for example by contributing cash to the purchase of property which was then registered in the husband’s sole name. If a relationship ends a woman may encounter difficulties in proving her interest in the property if her ‘husband’ disputes the marital status of their relationship

⁶⁰ LMA s.10(2)(a).

⁶¹ LMA s.11(5).

⁶² LMA s.11(1) and 15(4).

⁶³ LMA s.160(1).

and she is unable to prove her financial contributions. Moreover, as Rwezaura comments: ‘lack of documentary evidence often provides an incentive to the parties to dispute the existence of the marriage’ (1998: 204).

Inheritance

As described above, much of a father’s land will effectively be inherited by his children *inter vivos*. Claims to the deceased’s unallocated estate may be customarily made at a mourning ceremony (*matanga*) that takes place in the days or weeks after his death, when a guardian/administrator is appointed. In accordance with Arusha customary practice a guardian (*mlezi*) – often a brother of the deceased, is appointed at the *arobaini* (ceremony held around forty days after the death) to assume the deceased’s responsibility in taking care of the family. A guardian administrator is then in a position to apply for letters from the ordinary courts if it is necessary to do so in order to administer the estate. For Meru, often the eldest son of the deceased (if he has come of age) is appointed by family elders. Occasionally a widow will be appointed as administrator (or co-administrator) of her deceased husband’s estate.

In practice, administrators often have some discretion in the way that the deceased’s estate is distributed. According to one Meru *mshili wa ukoo*, in the event that there remains unallocated land after a husband’s death, his widow, together with the eldest son, may be given the authority over future divisions of the remaining land amongst her children. One Arusha *laigwenani* explained that depending on the circumstances an estate could be divided between the wives, or inherited by the last born son. The rationale for allocating a husband’s remaining land to the last born son is similar to the rationale for giving the largest share of a man’s estate to his eldest son under CLDO No. 4 (discussed above). With land comes responsibility. Here the social expectation, which is also codified under CLDO No. 4,⁶⁴ is that the children who inherit will care for their widowed mother. As the Shivji Commission observed, among the Chagga and Arusha, widows are entitled to use the homes of their husbands for the rest of their lives acting as custodians of the share of inheritance of their sons. When the sons take over their property, the widows become dependents of their sons and retain their matrimonial property rights for the remainder of their lives (URT 1994: 252-253).

⁶⁴ Rule 27 (discussed below).

Historically Meru, Arusha and Chagga daughters have enjoyed limited entitlements to inherit land through customary practices. Similarly Rule 20 of CLDO No. 4 provides:

Women can inherit except for clan land which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership.

Judicial activism in the higher courts both before and after the Bill of Rights of 1984 has sought to challenge this discriminatory provision, producing precedent which recognises the equal rights of females to inherit and dispose of clan land. In 1968 Mr Justice Saidi allowed an appeal by a daughter to inherit Chagga clan land, stating: *'it is quite clear that this traditional custom [that clan land should not be inherited by females] has outlived its usefulness'*.⁶⁵ After the coming into force of the Bill of Rights, in 1988 Mr Justice Mwalusanya held that Haya customary law, specifically Rule 20 of CLDO No. 4 was discriminatory and inconsistent with Article 13(4) of the Constitution.⁶⁶

Living customary practices of inheritance vary and unlike the CLDO Rules, they are responsive to social change. Since fathers often divide up much of their estate or declare their wishes during their lifetime they have discretion to allocate land to their daughters directly. In my conversations with Arusha elders I was told of daughters now being left portions of their father's land by will, whilst one Meru *mshili wa ukoo* I interviewed told me that he had personally supervised daughters being allocated portions of their father's land, especially in circumstances where daughters were taking care of their mothers.⁶⁷ This latter point reflects a way in which the moral basis for giving land to the last born son is applied as a basis for giving land to a daughter. As two ward tribunal members explain:⁶⁸

When we educate our daughters they are the ones who remember their homes and come to take care of their parents in old age, more than sons.

⁶⁵ *Ndewawiosia d/o Ndeamtzo v. Imanuel s/o Malasi* High Court of Tanzania at Moshi (PC) Civ. App. D/80/66; [1968] HCD 127, reprinted in James and Fimbo (1973: 204-209).

⁶⁶ *Ephrahim v Pastory & Another* High Court of Tanzania at Mwanza (PC) Civil Appeal No. 70 of 1989, [1990] LRC (Const.) 757. In another Haya inheritance case *Magdalena Zacharia v Daniel Zacharia* High Court of Tanzania at Mwanza (PC) Civil Appeal No. 23 of 1989 (Unreported) Mwalusanya again upheld a woman's right to inherit clan land and dispose of it without discrimination on the basis of her gender; both cases reprinted in Kijo-Bisimba and Peter (2005: 387-409).

⁶⁷ Interview with *mshili wa ukoo* 12.1.10.

⁶⁸ Contemporaneous translation from *Kiswahili* noted in English.

People have come to realise the importance of developing their daughters.

- female member

Those who have educated their daughters, when the daughters have got better jobs they have come to redeem their parents' farm if there has been a rehani.

- male member

The practice of giving land to daughters is not new and has been observed elsewhere. In a study of the Hehe and Sangu in southern Tanzania, Odgaard found that historically both sons and daughters had inherited land. More recently socio-economic change had meant that women were increasingly being given land by their fathers to enable them to take responsibility for their natal families (Odgaard 1999).

During my fieldwork I met several older women who had been allocated portions of land by their fathers many years previously. In some cases the women had been given the land because their father had no sons. It is also generally accepted that a father may allocate land to a daughter if she remains unmarried. However, in one case an Arusha woman had been allocated a portion of land alongside her brothers, which she wished to pass on to her own children. This is an example of an Arusha and Chagga practice noted by the Shivji Commission of bequests made to daughters that are conditional on the land later being passed to their sons, who in turn bear the name of the benefactor grandfather (URT 1994: 251). The practice therefore effectively re-establishes the original patrilineal connection with the land by fictive kinship. Significantly, the legal claims to land brought by these women were claims against male family members who had in various ways challenged their ownership of the land as daughters.

Gender discrimination against inheritance of family and clan land by widows has enduring legal and social force. A widow has little control over dispositions or a right to inherit family or clan land under Rule 27 of CLDO No. 4:

The widow has no share of the inheritance if the deceased left relatives of his own clan; her share is to be cared for by her children just as she cared for them.⁶⁹

⁶⁹ In *Scholastica Benedict v Martin Benedict* Court of Appeal at Mwanza Civil Appeal No.26 of 1988, [1993] TLR 1 the Court of Appeal applied this rule and refused the widow's claims to inherit and reside

In the 2005 constitutional case of *Elizabeth Stephen and Salome Charles v. The Attorney General*, the High Court, though agreeing that ‘*the impugned paragraphs [of CLDO No.4] are discriminatory in more ways than one*’, declined to declare unconstitutional and strike out these provisions discriminating against widows for violating constitutional and international rights guarantees.⁷⁰ This decision is discussed further in chapter 5.

Unless she has her own land, a widow’s access to land after the death of her husband will often be based on her family’s moral responsibility to care for her. This makes her access to land contingent on her relations with her children and the guardian appointed to take care of the family and land. James and Fimbo note that historically: ‘*A widow’s well-being is provided for in the practice of levirate (sometimes called wife inheritance) ... [by] a deceased’s brother or next of kin ... But a widow may in the alternative, if she chooses not to remarry in the family, acquire occupational rights in the deceased’s property by virtue of her children’s rights therein*’⁷¹ (1973: 188-9). Although the practice of levirate continues in Tanzania, it appears that increasingly in Arusha the deceased’s brother’s role is limited to one of guardianship.

Some women’s claims are the result of a guardian abusing this position of trust within the family and chasing a widow from her land. One Arusha Rural District Land Officer remarked to me that there is no mechanism in place under the Land Registration Act⁷² which prevents an administrator from registering the deceased’s property in his own name. However, it may be difficult for negatively affected parties who may be ignorant of the law to understand the nature of the administrator’s power as trustee. This is not a new problem. Gulliver observes: ‘Almost all Arusha have a fund of stories concerning the alleged chicanery of guardians and, cautiously executed, there is indeed little to prevent it’ (Gulliver 1964: 220). ‘Furaha’’s claim against a family guardian, discussed in chapter 4 provides one vivid illustration of this kind of abuse of position in practice.

in her husband’s house on the basis that she should be supported by her children in the house they had inherited.

⁷⁰ High Court of Tanzania at Dar es Salaam Misc. Civil Cause 82 of 2005 (Unreported). Electronic copy held by author.

⁷¹ These practices are codified in Rules 62-66 of the CLDO on the Law of Persons.

⁷² (Ordinance No. 36 of 1953) Cap. 334 R.E. 2002 s.334.

2.5 Conclusion

This chapter has provided an overview of issues arising in women's claims to land in Arusha. From this it can be deduced that the majority of legal claims to land brought by women result from life changes, whether following relationship breakdown or the death of a husband or father. This in turn illustrates the gendered and intergenerational nature of many women's claims and the fact that land tenure for both men and women is founded on social relations. Power relations between a woman and other members of her family shift throughout her lifetime and are closely linked to a woman's security of tenure over her home and/or land. During the period of my fieldwork, in wards such as Upper Arusha and Arusha Urban, where population density was high and land was mostly unsurveyed, ward tribunals were kept busy with claims to land brought by both men and women.

Three significant overarching features of women's legal claims are apparent from this study. Firstly, in circumstances of tenure insecurity and pressure on land generally, changes in a woman's gendered status within the family – whether as a widow, daughter of a late father, or separated wife, act as a catalyst for claims to land. Secondly, claims to land by men against women often represent challenges to a woman's existing ownership or occupation of land. A noticeable feature of these claims is that they are often brought against women who have inherited land from their father. In contrast, claims to land brought by women tend to constitute a defensive response against the act of a male relative who may have sold or mortgaged land without consent or chased a woman away. It is uncommon for women to bring claims against men in land courts for land that they have never used or occupied. This appears to be the case particularly in well managed cash-cropping areas, such as Meru Rural ward, where social attitudes towards female ownership of inherited land are generally heavily patriarchal.

Thirdly, there is a close relationship between socio-economic status and women's legal claims to land. When I began my fieldwork I had hypothesised that most women's legal claims in land courts would be brought by women who knew their rights and were reasonably economically secure. From my first day of courtroom observation in the DLHT I quickly realised that the situation is in fact quite the reverse. Law is an instrument that may be used proactively or reactively. Law tends to be used proactively

by those who have the knowledge and funds to secure their rights. Hence richer women who have the means to acquire land through purchase may also secure their rights proactively through land registration. In contrast, poorer women who lack resources to acquire land for themselves commonly only have access to land through their husband. Since most women's legal claims in land courts appear to be made in response to land being alienated from them, the claim represents a defensive use of law where other social methods of handling the dispute have failed. This raises issues of agency and power relations linked to a woman's socio-economic position and knowledge of the law. Overwhelmingly women's legal claims to land in land courts represent a reactive use of the law by women as a weapon of last resort when family or clan land has been alienated from them.

3. Women's claims to land in legal contexts:

Tanzania's statutory framework

3.0 Introduction

In Tanzanian legal contexts land, marriage and inheritance issues tend to be treated as distinct categories – both in the formulation of statute and in the shaping of the court system. Yet, in circumstances where claims to land are gendered and intergenerational these three issues become inseparable. This chapter extends the discussion of local customary practices in chapter 2 to evaluate statutory provisions in Tanzanian land, marriage and inheritance law concerning the family and gender equality. It also discusses the specialist land court system established under the Land Acts and its position in relation to the executive branch of government and the ordinary courts, which hear matrimonial and succession claims. The chapter provides a legal and political contextualisation of the current statutory framework, which underpins my empirical analysis of women's claims to land in chapters 4 and 5. The three chapters together present a socio-legal study of how women claimants negotiate this statutory framework and how their claims are handled and judged by land courts in practice.

3.1 Background to the Land Acts of 1999

The Land Act and Village Land Act of 1999 marked the first comprehensive statutory reform on land matters in mainland Tanzania since the country's independence. The Acts were also an important legal landmark for gender equality, enshrining the right of every woman to 'acquire, hold, use and deal with land ... to the same extent and subject to the same restriction ... as the right of any man'.⁷³ This was not the first time that Tanzania had led the way in advancing women's property rights in the region. In the 1960s although a Kenyan Commission had made recommendations for marriage law reform in its 1968 Report on the Law of Marriage and Divorce, it was in Tanzania that the Report's proposals were first translated into legislation. Read observes that Tanzania's Law of Marriage Act (LMA) of 1971 was the first of its kind in Commonwealth Africa (Read 1972: 19). Its recognition of married women's equal

⁷³ LA and VLA s.3(2) (see Appendix D).

rights to ‘acquire, hold and dispose of property’⁷⁴ was progressive and this provision of the LMA is clearly echoed in the Land Acts.

The picture concerning Tanzania’s inheritance and succession laws is rather different. Despite long-running and widespread calls for statutory change, including a 1995 Law Reform Commission Report on Succession, there has been no equivalent reform in this area. The Indian Succession Act of 1865 came into operation in Tanzania in 1920 during the British colonial period and codifies English common law on succession.⁷⁵ It was and still is applicable to Christians and persons of European origin in Tanzania. However, the Judicature and Application of Laws Act of 1961 (JALA) creates a statutory rebuttable presumption that customary law shall be applied in the case of African Christians. The estates of Muslims may be administered according to Islamic law and/or local customary practices.⁷⁶ Against this backdrop, the government’s National Land Policy (NLP) preceding the Land Acts did not set out to fully resolve the tension inherent in Tanzania’s plural legal system between the recognition of gender equality and customary marriage and inheritance practices that discriminate against women’s interests in land.

Both LMA and the Land Acts were precipitated by significant social, economic and political change and crises in the legal system itself. The LMA was enacted in the first decade of Tanzania’s political independence not long after the court system itself had been radically changed under the Magistrates Courts Act of 1963 (discussed in part two of this chapter). Part of the legal agenda for reform in the immediate aftermath of the colonial period had been the ending of the discriminatory dual court system for Europeans and Africans and the establishment of a new unified court system. Similarly, as Rwezaura notes, the LMA was enacted in an attempt to alleviate problems with conflict of laws and to remove discrimination and double standards in the administration of family law. One object of the LMA was therefore to integrate the plurality of customary, Islamic and English common law relating to private law

⁷⁴ LMA s.56 (see Appendix D).

⁷⁵ Made applicable to Tanzania (Mainland) by the Indian Acts (Application) Ordinance of 1920 R.L. Cap. 2.

⁷⁶ JALA s.11(1).

matters.⁷⁷ A second was a reformist aim to enhance the legal position of married women and children (Rwezaura 1994-95). This second aim was carried on the wave of African Socialist ideology from the country's then ruling party – the Tanzanian African National Union (TANU), and in particular, activism from its women's wing – *Umoja wa Wanawake wa Tanzania* (Union of Tanzanian Women (UWT)) (Read 1972: 20, Rakstad, Kaiser et. al. 2000: 91).

Over twenty years later the political climate had radically shifted in response to global neo-liberal economic agendas notwithstanding the continuity of a socialist ruling party in government – now *Chama Cha Mapinduzi* (CCM – the Revolutionary Party). Tsikata writes that the decades leading up to the Land Acts had also been characterised by increasing marketisation and pressure on land, land conflicts and general dissatisfaction with land administration bureaucracies (Tsikata 2003: 151). These contrasting domestic and international pressures for land reform were reflected in the distinct approaches of the Presidential Commission of Inquiry on Land Matters chaired by Professor Issa Shivji of the University of Dar es Salaam (the Shivji Commission) and the Tanzanian government to addressing the issues.

In 1991 the Shivji Commission was appointed to conduct research which would inform the drafting of a new national land policy and legislation on land matters. In the introduction to its Report the Commission sets out the rationale behind its 'rather unusual method of work' - reversing the usual top-down process of consultation and beginning instead with members of the public (URT 1994: 2). During the period of its research the Commission visited all but two districts of the country to listen to the voices of ordinary villagers (Shivji 1998: vii). Its central recommendation was that a new national land policy should be 'based on the direct participation of land users and the community as a whole in the management and administration of land' (URT 1994: 141). The Tanzanian government however, chose not to follow this core tenet and a number of other conclusions of the Report in formulating its own NLP (URT 1995) and later hired a British legal consultant, Professor Patrick McAuslan to draft legislation based on its NLP.

⁷⁷ JALA was amended such that 'the rules of customary law and rules of Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act' (JALA s.11(4)).

Scholarly debates on the overall legal methodology behind the Land Acts and the provisions relating to gender became somewhat polarised. There was considerable disagreement between Shivji and McAuslan on the most appropriate methodology, which is echoed in the titles of their respective books on the subject. Shivji has argued that a ‘technocratic’ approach to law reform ‘without the people’ is ‘*Not yet democracy*’ (Shivji and Kapinga 1997, Shivji 1998: 106-110). McAuslan favoured detailed legal drafting to establish clear checks and balances and some procedural and substantive legislative provisions on women’s rights to land thereby ‘*Bringing the law back in*’ (McAuslan 2003: 245-74, 2010) (see also Manji 2006: 89-95 and McAuslan’s comments thereon - McAuslan 2010: 120-122).

Gender equality and inheritance issues account for just 9 of the 350 pages in Volume 1 of the Shivji Commission’s Report. The Commission justified this largely on the basis that gender issues were considered to be outside its main terms of reference. The Report’s lack of attention to gender was criticised by feminist activists and scholars in the debates on the Land Bills which followed (notably Tibaijuka in the Land Tenure Study Group (LTG) 1995: 41 and Manji 1998; see also Shivji’s comments on the critiques: Shivji 1998: 83-92). In the context of women’s interests in land the Shivji Commission favoured a middle-ground ‘evolutionary’ option over ‘hard law’, ‘soft law’ or ‘customary’ options, which were considered either unworkable or too slow in their extremes. This approach recommended that laws concerning Islamic and customary inheritance practices that were gender discriminatory would remain unchanged but that other laws such as the Bill of Rights, land tenure and property law should be addressed in the hope that they would have an impact on inheritance laws (URT 1994: 256-7).

The government’s position on women’s interests in land in its NLP was conservative:

In order to enhance and guarantee women’s access to land and security of tenure, women will be entitled to acquire land in their own right not only through purchase but also through allocation. However inheritance of clan or family land will continue to be governed by custom and tradition.

Ownership of land between husband and wife shall not be subject to legislation. (URT 1995: para 4.2.6)

As a result of meetings between various interest groups in 1997 two civil society coalitions were formed, which took distinct approaches to lobbying on the Land Bills. One was the National Land Forum (NALAF),⁷⁸ which made a series of recommendations largely supporting the Shivji Commission and focusing particularly on the rights of pastoralists, decentralisation and the radical title. On the issue of women's interests in land NALAF drew attention to the discriminatory provisions in the Bills and called for new procedures to allow for female participation and equal representation on bodies concerned with land issues. As Maoulidi notes, NALAF's approach to gender issues was contextualised in 'larger questions of the democratisation, liberalisation and marketisation of the economy' (Maoulidi undated: 30, citing Shivji 1998: 86-87). Following a consultative workshop on the Land Bills in March 1997, a second coalition of women's civil society groups formed the Gender Land Task Force (GLTF)⁷⁹ to specifically address issues of gender equality in the Bills.

In summary, GLTF's main demands were for statutory recognition of spousal co-occupancy through the contribution of labour to the development of land, voiding of sale of such land by a spouse without the other's consent, statutory provisions on land relations, equality of representation on land administration bodies, and separation of clan and family land with only the former being governed by customary law (GLTF 1998, Tsikata 2003: 171). In 1998 NALAF and GLTF joined together to form the Land Coalition, but tensions arose within it particularly concerning their lobbying positions on gender issues. The development of the respective positions of NALAF and GLTF and tensions within the Land Coalition have been extensively discussed elsewhere (Manji 1998, TGNP 2000, Benschop 2002, Tsikata 2003, Maoulidi undated, Mallya 2005, Manji 2006: 101-105).

⁷⁸ NALAF included the Land Rights Research and Resources Institute (HAKIARDHI), University of Dar es Salaam Academic Staff Assembly (UDASA), Sahiba Sisters' Foundation, Pastoralists Indigenous Non-Governmental Organizations (PINGOS) FORUM, Women's Research and Documentation Project Association (WRDP), *Ilaramatak Lorkonerei*, *Inyuat-e-Maa*, *Kipoc-Barbaig*, *Aigwanak* Trust, LHRC, TAWLA, Tanzania Media Women's Association (TAMWA), Tanzania Gender Networking Programme (TGNP) (Tsikata 2003, Mallya 2005).

⁷⁹ GLTF members included TAWLA, TAMWA, TGNP, WLAC, Tanzania Home Economics Association (TAHEA), *Shirika la Uchumi la Wanawake Tanzania* (Economic Organisation of Women in Tanzania) (SUWATA), National Organization for Children, Welfare and Human Relief (NOCHU) and Women Advancement Trust (WAT) (Tsikata 2003, Mallya 2005).

A second study, published in 1999 was commissioned by the Ministry of Community Development, Women's Affairs and Children and led by the founding member of TAWLA, Magdalena Rwebangira to look specifically into gender and land issues in five regions of Tanzania experiencing pressure on land (Kilimanjaro, Kagera, Arusha, Mbeya and Lindi). Whilst agreeing with the Shivji Commission's conclusions on customary law and representation of women in local structures, the study found that women were enthusiastic about titling and statutory courts that could hand down binding decisions. It also maintained that women were demanding full land rights and that education and sensitisation on women's land rights was essential (Rwebangira, Temu et. al. 1999; see also Tsikata 2003: 171-173, McAuslan 2010: 121).

A number of substantial changes were made to the draft Land Bills as a result of two workshops held during the initial drafting period, in March and October 1996 and in response to wider debates and civil society lobbying during the two years that followed. Important for women was a considerable strengthening of key provisions concerning spouses' interests in land (discussed below). Significantly, the Land Acts did not alter the general statutory recognition of customary law in Tanzania's plural legal system,⁸⁰ save to hold as void any rules of customary law that deny women lawful access to ownership, occupation or use of land.⁸¹ This effectively instituted a statutory equality 'trump' over gender discriminatory customary practices of land tenure. However, as Tsikata notes, this was considered unsatisfactory by TGNP and LHRC because it placed the onus on individuals to challenge provisions that they felt to be discriminatory (Tsikata 2003: 174).

As to whether such legal rights would make any difference for women's interests in land was a matter of much debate at the time the Acts were passed. The inclusion of gender equality provisions in the Land Acts was celebrated by civil society members of GLTF⁸² and Tanzanian women MPs as a significant achievement in successful lobbying, advocacy and outreach by Tanzanian gender activist organisations (Tsikata 2003, Mallya 2005). In contrast, Shivji himself contended that they were proclamations with 'some educational value' but having 'little meaning in the hard provisions of law'

⁸⁰ JALA s.11.

⁸¹ VLA s.20(2) (see Appendix D).

⁸² most notably TAWLA and WAT.

(Shivji 1999). Others such as TGNP saw both ‘achievements and gaps’ in the new legislation (TGNP 2000, discussed by Tsikata 2003: 173). Whilst the inclusion of a new presumption of spousal co-ownership⁸³ was a significant development, other key sections⁸⁴ protecting women’s property rights in essence reinforce similar provisions in LMA.⁸⁵

3.2 Statutory frameworks for the protection of women’s interests in land

The Land Acts and LMA

The most emblematic provision on gender equality and land in the Land Acts is the common section 3(2) which enshrines the right of ‘*every woman*’ to ‘acquire, hold, use and deal with land ... to the same extent and subject to the same restriction ... as the right of any man’. This is similar to, but extends the equal rights provision in section 56 of LMA: ‘A *married woman* shall have the same right as has a man to acquire, hold and dispose of property, whether moveable or immovable ...’ (italics are my emphasis). Hence, in contrast to LMA, the Land Acts do not contain any marital status qualification for women in the overarching equal rights provision. Similarly there is no discrimination concerning a woman’s marital status in respect of her right as a village citizen to apply for a customary right of occupancy in village land under VLA.⁸⁶

Other key provisions protecting women’s property rights under the LMA and the Land Acts are largely concerned with the interests of women as spouses. Generally, there is a presumption of separate ownership of property between spouses,⁸⁷ and a rebuttable presumption that property acquired during the subsistence of a marriage is owned solely or jointly according to whether it was acquired in sole or joint names.⁸⁸ However, in relation to land this position has now been modified by LA which has strengthened married women’s land rights by creating a presumption - rebuttable by provision to the contrary in a certificate of occupancy (or customary occupancy as the case may be), that land acquired by a spouse for the co-occupation and use of both (or all) spouses is held

⁸³ LA s.161 (see Appendix D).

⁸⁴ LA and VLA s.3(2), LA s.85 and s.114 (as amended) (see Appendix D).

⁸⁵ LMA s.56 and s.59 (see Appendix D).

⁸⁶ VLA s.22(1) (see Appendix D).

⁸⁷ LMA s.58; gifts between spouses are also subject to the rebuttable presumption that the gifted property belongs absolutely to the donee (LMA s.61) (see Appendix D).

⁸⁸ LMA s.60 (see Appendix D).

by the spouses as occupiers in common.⁸⁹ Further, where land is held in the name of one spouse, the other spouse is deemed to have acquired an interest in the land by virtue of contributing their labour to the ‘productivity, upkeep and improvement’ of the land. The presumption of co-occupancy is perhaps the most radical step in the protection of women’s interests in land under the Land Acts. As Tripp (2004) notes, Tanzania and South Africa led the way as the first two African countries to adopt spousal co-occupancy clauses in their legislation.

The Land Acts also strengthened a spouse’s right against alienation of the family home or land by the other spouse without their consent. The requirement of family consent to a disposition of land held on family tenure is a long established customary practice (James and Fimbo 1973: 244) although historically there was little focus on the right of a wife to refuse consent to a disposition. Documented cases from the 1950s and 1960s focused on ‘clan control’ (James and Fimbo 1973: 427-447). The authority of a spouse to refuse consent to a disposition was given statutory force under LMA⁹⁰ and reinforced by LA.⁹¹ VLA also provides that a village council shall disallow an assignment which would operate to defeat a woman’s right to occupy land.⁹² Both LMA and LA contain a number of provisions which protect a spouse’s interest in the ‘matrimonial home’ defined as:

[T]he building or part of a building in which the husband and wife ordinarily reside together and includes –

- a. where a building and its curtilage are occupied for residential purposes only, that curtilage and any outbuildings thereon; and
- b. where a building is on or occupied in conjunction with agricultural land [or pastoral land], any land allocated by the husband or the wife, as the case may be, to his or her spouse for her or his exclusive use.⁹³

Importantly for women, this definition also protects a wife’s interest in family land that she has been given to cultivate by virtue of her marriage to her husband. LMA prohibits

⁸⁹ LA s.161(1) and (2).

⁹⁰ LMA s.59.

⁹¹ LA s.85, s.114 (as amended), s.161(3)(b).

⁹² VLA s.30(4)(b) and (c) (see Appendix D).

⁹³ LMA s.2(1). The definition was repeated in LAA s.112 (with the addition of ‘pastoral land’).

the sale, gift, lease or mortgage of an estate or interest in a matrimonial home by a spouse during the subsistence of a marriage without the other spouse's consent.⁹⁴ If a spouse's interest is alienated in this way then LMA protects their right to continue to reside in the matrimonial home until dissolution of the marriage, decree of separation or order for maintenance. This is subject to the person acquiring the estate or interest satisfying the court that they had 'no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it.'⁹⁵ A spouse can protect their interest in a matrimonial home against a *bona fide* purchaser or lender by registering a caveat,⁹⁶ although in practice this appears to be uncommon in cases that reach the stage of litigation.⁹⁷

The question must be raised as to how realistic it is for a spouse who lacks legal literacy or agency within the family to be able to take the proactive step to register a caveat in her interest. LA went further in protecting a spouse's interest against a *bona fide* purchaser or mortgagee providing:

... where the aforesaid spouse undertaking the disposition deliberately misleads the lender or, as the case may be, the assignee or transferee as to the answers to the inquiries made [regarding spousal consent pursuant to the requirements in s.59 LMA] ... the disposition shall be *voidable* at the option of the spouse or spouses who have not consented to the disposition.⁹⁸

VLA similarly provides that an assignment that *inter alia* defeats a woman's right to occupy land 'shall be void'.⁹⁹ These provisions offer potentially powerful legal remedies for a wife who has not consented to a disposition, because it vests control in

⁹⁴ LMA s.59(1). In *Leons Challamila v Mayalla Edward Masunga* High Court of Tanzania at Dar es Salaam, Civil Appeal No. 150 of 1999 (Unreported) Manento J. (as he then was) held that '*no spouse can dispose of the matrimonial property jointly acquired during the marriage without the consent of the other spouse*'; quoted in Mashamba (2008: 55).

⁹⁵ LMA s.59(2).

⁹⁶ Land Registration Act (Ordinance No. 36 of 1953) Cap. 334 R.E. 2002, s.78(1).

⁹⁷ In *Hadija Mwere v Ally Mbaga* High Court of Tanzania at Mwanza, Civil Appeal No. 40 of 1995 (Unreported) Lugakingira J. (as he then was) stated: '*[A] prudent spouse would seek to protect (her) interest (in a matrimonial home) by actually causing a caveat to be registered ... In accordance with the provisions of s.33(1) of (the) Land Registration Ordinance, Cap. 334, the owner of any estate holds the same free from all estates and interests ... other than encumbrances (such as a caveat duly) registered ...*' Reasoning followed by Kalegeya J. (as he then was) in *NBC Limited v M/S Konje Multi Traders Co. Ltd and 2 Others* High Court of Tanzania at Dar es Salaam (Commercial Division), Commercial Case No. 284 of 2002 (Unreported) - both cases quoted in Mashamba (2008: 55-56). For further discussion on protection of a spouse's interest through a caveat see Mwaisondola (2007: 303-309).

⁹⁸ LA s.161(3) (italics are my emphasis).

⁹⁹ VLA s.30(6) (by reference to the criteria in VLA s.30(4)(b) and (c) (see Appendix D).

the hands of the non-consenting spouse rather than the wider family. However, as my empirical research findings indicate, in practice the potential impact of these sections has not been realised in some legal claims made by women where dispositions have taken place without their consent.

There have been further legislative attempts to address the issue of safeguarding a spouse's interest in the matrimonial home since the Land Acts were passed. LA as it was originally passed by Parliament provided that a mortgage of a matrimonial home (including a customary mortgage) would only be valid if the document creating the mortgage was signed (or there was other evidence of assent) by the borrower and spouse living in that home.¹⁰⁰ In practice this was not a very effective safeguard in many cases since a signature could easily be forged or obtained on a false premise or under pressure. The protection of a spouse's position against mortgaging without consent was subsequently revised by the Land (Amendment) Act of 2004 which placed the responsibility on the mortgagee 'to take reasonable steps to ascertain whether the applicant for a mortgage has a spouse or spouses'.¹⁰¹ The 'reasonable steps' to be taken were elaborated upon in the Land (Mortgage) Regulations of 2005 (LMR),¹⁰² which also specified how a mortgagee should satisfy him or herself that the asset of a spouse was informed and genuine.¹⁰³ The 'reasonable steps' were subsequently revised again by the Mortgage Financing (Special Provisions) Act of 2008 (MFSPA).¹⁰⁴ This places a burden on both mortgagor and mortgagee. Under MFSPA in the first instance it is the responsibility of the mortgagor to disclose his or her marital status. The mortgagee's responsibility to take 'reasonable steps' to verify the applicant's marital status is deemed discharged if a mortgagor provides confirmation by way of a written and witnessed document or affidavit.¹⁰⁵

¹⁰⁰ LA s.112(3). LA Part X (Mortgages) was repealed and replaced under LAA s.6.

¹⁰¹ LA s.114(2) (as replaced by LAA).

¹⁰² G.N. No. 43 of 2005 para. 4. These steps included a discretionary duty on a mortgagee who was doubtful about a mortgagor's declared marital status to require production of an affidavit by the applicant mortgagor.

¹⁰³ G.N. No. 43 of 2005 paras. 5 and 6. The mortgagee's duty is deemed complied with if he or she advises the applicant in writing that he or she should ensure his or her spouse receives independent advice on the terms and conditions of the mortgage, and the spouse provides a signed and witnessed document confirming they have received such independent advice and have understood and assented to the terms of the mortgage. In the case of a customary mortgage, the mortgagee's duty is to explain the terms and conditions of the mortgage to the spouse directly and in the presence of an independent person.

¹⁰⁴ Act No. 17 of 2008.

¹⁰⁵ s.114(2) as amended by MFSPA s.8.

Arguably, whilst compliance with the legislation serves to protect the interests of the mortgagee, none of the statutory requirements provide sufficient safeguards for spouses in practice. Once the required documents concerning marital status and spousal consent have been provided there is little incentive for a suspicious mortgagee to investigate the marital status of the mortgagor any further or to ensure that consent has genuinely been obtained. A statutory requirement for further third party evidence, such as a statement from the local *mwenyekiti wa mtaa* confirming the marital status of the applicant and whether spousal consent has been obtained, could offer greater protection for spouses. The potential consequence of failing to ensure that spousal consent has been obtained is much graver for the mortgagor than the mortgagee, because MFSPA makes it a criminal offence for the mortgagor to provide false information on marital status.¹⁰⁶ As Hughes and Wickeri write, some Tanzanian women's NGOs have expressed concern at the potential risk of eviction for spouses of husbands convicted under this section, where a couple is unable to meet loan repayments or a fine imposed by the criminal courts (Hughes and Wickeri 2011: 828).

In contrast to the provisions against unilateral sale or mortgage of the matrimonial home, there is little statutory protection for the many women in Tanzania who experience domestic violence or forced eviction by a husband or other relative. LMA protects a deserted spouse from being evicted from the matrimonial home by or at the instance of the other.¹⁰⁷ The Act also provides for the making of a non-molestation injunction as between spouses during or after matrimonial proceedings.¹⁰⁸ It further imposes a positive duty on a husband to maintain his wife (or wives) by providing accommodation, clothing and food¹⁰⁹ and prohibits corporal punishment of a spouse.¹¹⁰ There is no criminal sanction for breach of these provisions under the LMA, although the Act does give the ordinary courts jurisdiction to make orders for spousal maintenance both during and after a marriage.¹¹¹

¹⁰⁶ s.114(4) as amended by MFSPA s.8.

¹⁰⁷ LMA s.59(3) (see Appendix D).

¹⁰⁸ LMA s.139 (see Appendix D).

¹⁰⁹ LMA s.63(a). Ss.(b) also imposes a duty on a wife to provide for her husband if he is incapacitated from working and she has the means to do so (see Appendix D).

¹¹⁰ LMA s.66 (see Appendix D).

¹¹¹ LMA s.115.

Significantly however, the legislation does not enable a woman who is abused or denied access to the matrimonial home or land, or has been forced to leave or chased away during a subsisting marriage to seek an injunction enabling her to return safely to the matrimonial property. As Mashamba (2008) notes, this lacuna was observed by the High Court in *Paulo Abdullah v Mohamed Bin Abdullah*:

*The whole of the Law of Marriage Act seems to assume that the husband and wife will be sharing a matrimonial home; there is no specific provision, which provides for an order for injunction against one of the spouses in respect of the occupation of the matrimonial home.*¹¹²

This is in contrast to the position in England for example, where in circumstances of domestic abuse family courts regularly exercise their power under the Family Law Act of 1996 to grant a spouse or other ‘associated person’ a non-molestation order and/or an occupation order enforcing their entitlement to remain in occupation of the home, potentially to the exclusion of the respondent.¹¹³ In Tanzania however, save for claims for spousal maintenance and voiding of dispositions without consent, neither the land courts nor the ordinary courts have jurisdiction to hear claims to land and other matrimonial property brought between spouses outside the context of matrimonial proceedings. Consequently wives who are abused and/or denied access to land but who - for a variety of reasons - do not seek a legal separation or divorce, find themselves without any potential legal remedies. Similarly there is lack of such legal protection against other relatives who may abuse or force a woman to leave her home or land.

As discussed in chapter 2, in practice this means that the only option for many wives in this situation is to return to live with their parents or another relative. However, this step carries serious implications for a wife’s property interests. Unless the couple reconciles and the wife returns to her husband, the usual consequence is that she will be deemed to have lost her interest in the matrimonial home. Adopting a law similar to the English Family Law Act could theoretically offer an emergency legal remedy to address this issue. However, in social contexts where patrilineal customary practices of marriage and land tenure endure it is questionable whether such legislation would have

¹¹² High Court of Tanzania at Dar es Salaam, Civil Appeal No. 150 of 1999 (Unreported) quoted in Mashamba (2008: 56).

¹¹³ Family Law Act of 1996 Part IV (as amended). An ‘associated person’ includes current or former spouses, civil partners, cohabitants, engaged couples, parents of a child, relatives – widely defined, parties to the same family proceedings, and persons who have shared a household.

much impact in practice. For example, LMA gives married women the legal entitlement to claim a share of the matrimonial assets upon divorce. However, the limited impact of LMA amongst some groups of women (discussed in chapter 2) demonstrates that the existence of a legal remedy does not necessarily mean that it will be effectively used in practice - particularly where people are not aware of their statutory rights or where discriminatory customary practices prevail.

In circumstances where a legal separation or divorce is sought, ordinary courts have jurisdiction to order a division of assets acquired by the joint efforts of the spouses during the marriage. The statutory inclination towards equality of division is subject to 'the custom of the community to which the parties belong', the extent of the parties' contributions towards acquisition, any debts owing which were contracted for their joint benefit, and the needs of infant children of the marriage.¹¹⁴ For courts adjudicating claims to property in matrimonial proceedings the most controversial legal issue has been the question of spousal contributions entitling wives to a share of the property. As Rwezaura and Wanitzek discuss, the approach of the courts to this issue has not been uniform, with higher courts much more likely than the lower courts to apply fully the provisions of LMA (1988: 17).

There has been further inconsistency between the Court of Appeal and High Court in the interpretation of 'contributions'. The Court of Appeal in the seminal 1983 case of *Bi Hawa Mohamed v. Ally Sefu*¹¹⁵ held that a wife's domestic services were a 'contribution' within the meaning of section 114 LMA. As Rwebangira notes however, the courts below this have tended to require litigants to prove their 'tangible' contribution, with particular weight being given to economic contributions that wives in many cases may be unable to show or substantiate with documentary evidence

¹¹⁴ LMA s.114 (see Appendix D). Courts also have power to divide assets upon cessation of cohabitation based on the presumption of marriage in s.160 (*Letisia Buguma v Thadeo Magoma and Another* High Court of Tanzania at Mwanza, Civil Appeal No. 8 of 1989 (Unreported) Mwalusanya J - judgment reproduced in Kijo-Bisimba and Peter (2005: 410-417); *Joseph Sindo v Pasaka Mkondola* High Court Civil Appeal No. 132 of 1991 (Unreported) – discussed in Rwezaura (1994-1995: 529-30).

¹¹⁵ Court of Appeal of Tanzania at Dar es Salaam Civil Appeal No. 9 of 1983, [1983] TLR 32. Prior to *Bi Hawa Mohamed* the more conservative approach of the High Court to the meaning of 'contribution' had been restricted to economic contributions (*Zawadi Abdallah v Ibrahim Iddi* High Court of Tanzania at Dar es Salaam Civil Appeal No. 10 of 1980, [1981] TLR 311). See Mtengeti-Migiro (1990) for a more detailed discussion of these two cases.

(Rwebangira 1996: 16).¹¹⁶ It should be noted that much of the research on implementation of the LMA and cases in the lower courts is now of some age and it would be useful to conduct new empirical studies on matrimonial proceedings in primary and district courts to evaluate recent developments in the law in practice.¹¹⁷

The Law Reform Commission of Tanzania has noted the need for reform of section 114 to clarify the position on ‘contributions’ and take into account social change and developments in human rights law. Its 1994 Report on the Law of Marriage Act proposes removing ‘the custom of the community’ as a factor in the exercise of judicial discretion and recognising the duties of a housewife ‘as contribution enough to entitle her to a share of the family assets when the marriage breaks down’ (Law Reform Commission of Tanzania 1994: 12). These recommendations, if adopted, would do much to bring statute in line with the most gender progressive case law and strengthen women’s legal position to a share of matrimonial property upon divorce. However, such recommendations have yet to receive legislative consideration.

Women and inheritance law

Notwithstanding significant legislative change in the areas of marriage and land tenure law, there have been no equivalent reforms in Tanzania’s statutory laws of succession. The Indian Succession Act of 1865 came into operation in Tanzania in 1920 during the British colonial period. It is applicable to Tanzanian Christians subject to the ‘manner of life’ test in JALA section 11(1). This creates a presumption that customary law shall apply unless it is apparent from the deceased’s manner of life that another law should apply. The Shivji Commission notes that in practice the Indian Succession Act is rarely applied to the estates of African Christians (URT 1994: 250).¹¹⁸ This is also said to be

¹¹⁶ *Mikidadi v. Mwanaisha Hashim* (PC) Matrimonial Civil Appeal No. 8 of 1980 (Wife in employment - equal division), *Bahari Binti Rajabu v. Juma Abdallah* High Court of Tanzania (PC) Matrimonial Civil Appeal No. 8 of 1984 (Unreported) (No financial contribution from wife – Primary Court order for equal division reversed on appeal), *Hamida Abdul v. Ramadhani Mwakaje* High Court of Tanzania at Dar es Salaam (PC) Civil Appeal No. 12 of 1988 (Unreported) (Domestic services as main contribution does not entitle a wife to an equal share of the assets), *Zakia Haji v. Hamisi* High Court of Tanzania at Dar es Salaam Matrimonial Civil Appeal No. 84 of 1983 (Unreported) (Appeal dismissed for absence of proof of ‘tangible’ contribution). See Rwebangira (1996: 16-21) for a detailed discussion of these and other cases.

¹¹⁷ One more recent empirical study by Magoke-Mhoja (2008), based largely on in-depth interviews, offers a useful insight into the experiences of child wives and widows in Shinyanga, Morogoro and Mara regions of Tanzania in divorce and inheritance cases.

¹¹⁸ Contrast *Re Innocent Mbilinyi* [1971] HCD No. 283 in which the High Court applied statutory law having found that the deceased, an urban Christian woman, had abandoned a customary way of life.

the case for the Hindu Wills Act of 1870,¹¹⁹ which is in principle applicable to the Tanzanian Hindu Community (Law Reform Commission of Tanzania 1995: 24).

The inheritance position of Muslims may be determined by local customary practices and/or Islamic law. This is subject to the deceased having made a 'written or oral declaration' that Islamic succession law should apply.¹²⁰ In a 2011 study on religion and women's land rights in Tanzania, legal activist interviewees commented from their own experience that Muslim leaders do not always follow Islamic law in their handling of inheritance disputes (Killian 2011: 42). This mixing of Islamic and customary practices of inheritance is reflected in statute. As Makaramba observes, the Probate and Administration of Estates Act provides that the estate of a deceased Muslim may be administered either 'wholly or in part' according to Islamic law. This recognises the reality that customary practices may also apply in the distribution of the estate of a deceased Muslim, effectively subsuming Islamic law into customary law (Makaramba 2010: 288-289).

In its 1995 Report on Tanzanian Law of Succession, the Law Reform Commission of Tanzania gave consideration to the ways in which current customary and Islamic inheritance law discriminates against widows and daughters in practice. In particular, the Commission noted the contrast between the statutory protection in LMA of a wife's property interests over jointly acquired marital property upon divorce, and the lack of such equivalent protection in practice for a widow in estates matters (Law Reform Commission of Tanzania 1995: 7). The Commission's overarching recommendation was for a uniform law of succession, which recognises but moderates tribal, customary and religious differences according to principles of justice and equity (1995: 62-70). With respect to women's property rights the Commission proposed a law consistent with Tanzania's human rights commitments and LMA, which recognises women's rights to inherit property, including the immovable property of a spouse for life in trust for their children.

¹¹⁹ (Act XXI of 1870) imported to Tanzania (Mainland) through the Indian Acts (Application) Ordinance of 1920.

¹²⁰ Probate and Administration of Estates Act Cap 352 R.E. 2002 s.88(1)(a) incorporating the Administration (Small Estates) (Amendment) Ordinance R.L. Cap. 30 s.19(1)(a).

Many of the Commission's proposals have been echoed by gender activist Tanzanian NGOs, advocates and scholars, who have also pressed for change through constitutional test case litigation¹²¹ and an NGO-proposed new Succession Bill (reproduced in Ezer 2006: 652-662). However, despite the fact that Tanzania has been at the forefront of gender progressive legal reform on marriage and land tenure law in Africa, as Ezer notes, it lags behind other countries (including African countries such as Ghana and Zambia) in reforming its succession law to promote gender equality (Ezer 2006: 643). As such, the Law Reform Commission's proposals, and other recommendations for legal protection of women's property interests against 'property grabbing' after the death of a husband or father have yet to receive legislative attention in Tanzania.

Legislation which gives effect to equal rights enshrines a state's commitment to gender equality. However, as many matrimonial cases in the Tanzanian lower courts demonstrate, legislative change is not in itself sufficient to bring about changes in society or the law in practice. Despite the fact that under LMA women are entitled to a share of matrimonial assets by virtue of their contribution to acquisition, social and legal research has shown that in many divorce cases it is customary practices and a restrictive interpretation of the legal meaning of 'contribution' that has often prevailed. To understand why this is the case, it is necessary to go beyond the face of the legislation and examine legal processes as being part of a semi-autonomous social field. It is this approach, rather than proposals for legislative change, which forms the focus of my analysis of women's claims to land in this thesis.

3.3 Statutory land dispute resolution: a fusion of executive and judicial powers

A specialist land court system

The Land Acts¹²² and Land Disputes Courts Act of 2002 (LDCA) introduced Tanzania's contemporary specialist land court system - a five-tier hierarchy comprising Village Land Council, Ward Tribunal, District Land and Housing Tribunal (DLHT), High Court Land Division and Court of Appeal. Just as land tenure systems had been considered in urgent need of reform, equally the state of land dispute resolution had

¹²¹ *Elizabeth Stephen & Salome Charles v. The Attorney General* (High Court of Tanzania at Dar es Salaam Misc. Civil Cause 82 of 2005 (Unreported) (discussed further in chapter 5).

¹²² LA s.167 and VLA s.60-62.

been a key area of concern for the Tanzanian government prior to the Land Acts. The need for a new system for hearing land disputes was identified by the government in its terms of reference for the Shivji Commission. These expressly included the task of recommending machinery and procedures for settling land disputes as well as ‘identifying any deficiencies and problems of overlapping of powers [in the settlement of land disputes] and to recommend clear demarcation of the jurisdiction of the existing organs’ (URT 1994: 1).

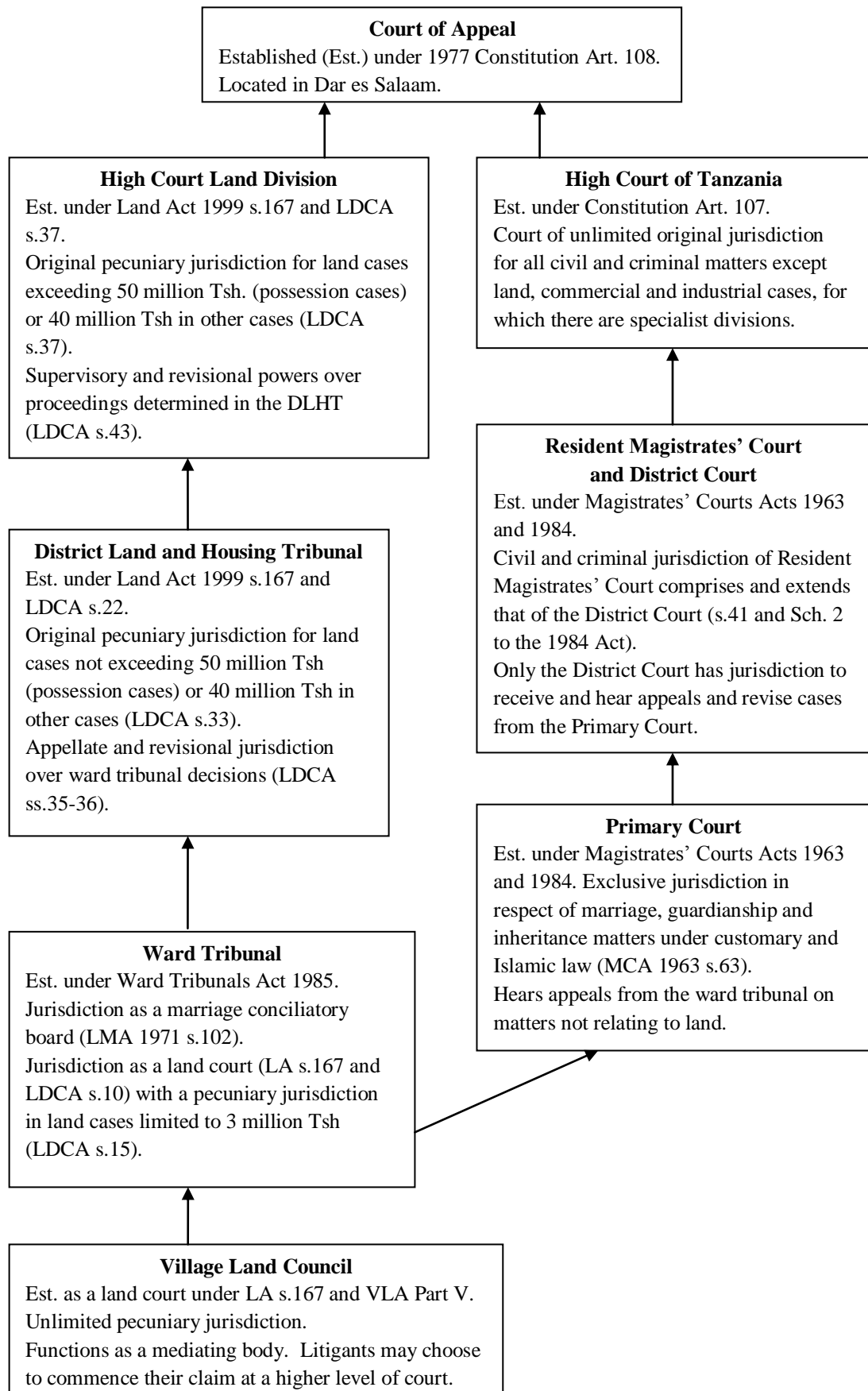
The ‘new’ mechanism that was ultimately established under the Land Acts created a separate court system with exclusive jurisdiction for the determination of land disputes alongside – and to a certain extent overlapping with – the ordinary court system (*Figure I*).¹²³ However, with the exception of the Village Land Council, it will be contended that there is little about the institutions themselves which is actually new. Save for the Village Land Council and Court of Appeal the original jurisdiction of each land court is now determined by the pecuniary value of the land in question. Yet in the case of the Ward Tribunal, in Arusha the limits of its pecuniary jurisdiction are not always observed in practice.

Sharp increases in the market value of land in Arusha has meant that many small family *shambas* are today worth considerably more than the 3 million Tsh limit of the Ward Tribunal’s jurisdiction. Despite this, ward tribunals during my period of fieldwork routinely heard cases concerning unregistered family plots that were generally acknowledged to be worth more than this. Since such plots had not been officially valued, ward tribunals appeared to take a broad practical view that small family *shambas* – whatever their market value – fell within their jurisdiction whereas larger *shambas* did not.

My second contention is that the task of resolving problems in the overlapping of powers in the system has also not been fully realised in practice. This section examines the distinctive approach to land dispute resolution fora that has been taken by successive colonial and post-colonial administrations in Tanzania, and the strong fusion of executive and judicial powers that has endured from the German colonial period to the present day.

¹²³ LA s.167 and LDCA s.3-4.

Figure 1 – Statutory framework for property disputes in Tanzania



Drawing upon historical analyses and local government studies, it is contended that the fusion of executive and judicial branches of government at the most local level of court has had - and will continue to have - significant implications for the power dynamics of land dispute resolution in Tanzania. In subsequent chapters this contention is illustrated through fieldwork examples which highlight the significance of executive control at the local level for women's access to justice in land cases today.

Political and jurisdictional developments in statutory dispute resolution

Moore has observed that developments in dispute resolution systems in Tanzania have been closely connected to its changing political structure (Moore 1986: 148). Reflecting on these aids firstly, an understanding of why the current separate ordinary and land court systems have been adopted and the enduring executive influence over judicial organs at the local level. Secondly, it is relevant for contextualising the significance of customary practices as a source of law, the position and background of actors adjudicating or mediating land disputes, their values and sense of justice. In chapters 4 and 5 of this thesis I discuss this second set of issues in the context of my own empirical research findings.

The fusion of powers between executive and judiciary began under the period of German colonial rule (1884-1916) and continued under the British¹²⁴ with the establishment of a dual discriminatory legal system – one for foreigners, another for ‘natives’. German law was applied to cases concerning the European population, while the indigenous population had their disputes heard by local leaders who also exercised executive functions and were accountable to colonial executive authority (Bierwagen and Peter 1989). Cases in the native courts were decided in accordance with local law (i.e. local customary practices), having regard to the ‘legal practice of the natives insofar as this is not – from the point of view of civilised nations – contrary to healthy common sense and good morals.’¹²⁵

Over time, the strong fusion of powers in the native courts system became watered down and gradually the chief's judicial functions were replaced by magistrates assisted

¹²⁴ Courts Ordinance (No. 6 of 1920) R.L. Cap. 3 and Native Courts Ordinance (No. 5 of 1929) R.L. Cap. 73.

¹²⁵ German Foreign Office Decree of 15.1.1907 in the translation given by Moffett (quoted in Bierwagen and Peter 1989: 397).

by assessors – a practice that continues today. The Native Courts Ordinance was repealed¹²⁶ and native courts were renamed ‘local courts’ with appeal lying to a local court of appeal and the Central Court of Appeal, presided over by a judge of the High Court.¹²⁷ This marked the first step towards a unified court system (Bierwagen and Peter 1989), although significantly, in the case of land matters, proceedings affecting the title to or any interest in land registered under the Land Registration Ordinance were excluded from the jurisdiction of the local courts¹²⁸ (Cotran 1970). This reinforced the dualist system of land tenure (discussed in chapter 2) by channelling land matters through two separate processes of dispute resolution.

Tanganyika became independent from Britain in 1961.¹²⁹ This, as Bierwagen and Peter note, led to three important steps in the unification of the court system through the ending of the system of appeals to the Crown,¹³⁰ the fusion of executive and judicial powers of local administrators,¹³¹ and the dual court system that had been based on racial discrimination¹³² (Bierwagen and Peter 1989: 400). However, despite Tanzania’s new drive for independence and national unity spearheaded by President Julius Nyerere, as Cotran notes, in common with other East African countries, the court system in the process of unification retained much of its English common law heritage.¹³³

The Magistrates Courts Act of 1963 introduced the present unified court system comprising Primary, District and High Court, which was subsequently retained by the Magistrates Courts Act of 1984.¹³⁴ Whilst the system continues to this day, its jurisdiction over civil land disputes was removed by the Land Acts. Primary courts continue to have exclusive jurisdiction in respect of marriage, guardianship and inheritance matters under customary law and magistrates sit with lay assessors. As Moore notes, this restored a practice which had prevailed throughout the colonial period

¹²⁶ Local Courts Ordinance (No. 14 of 1951) R.L. Cap. 299.

¹²⁷ The Central Court of Appeal was abolished before independence and its functions exercised by High Court judges sitting with assessors.

¹²⁸ Local Courts Ordinance 1951 s.13.

¹²⁹ Tanganyika (Constitution) Order in Council of 1961.

¹³⁰ See Cole and Denison (1964: 90) for further discussion.

¹³¹ Local Courts (Minister for Justice and Regional Local Courts Officers) Act (Act No. 16 of 1962) (Cotran 1970).

¹³² Magistrates Courts Act (Act No. 55 of 1963) R.L. Cap. 537.

¹³³ See Cotran’s discussion on ‘Anglicising’ of the East African court systems at independence (Cotran 1969).

¹³⁴ (Act No. 2 of 1984) Cap. 11 R.E. 2002.

where chiefs had been assisted by elders or assessors in their decision-making (Moore 1986: 172).

A further later key development in the reform of matrimonial dispute resolution was the creation under LMA of the present system of marriage conciliatory boards, with a central objective of reconciling parties experiencing matrimonial difficulties (Figure 1).¹³⁵ LMA makes it a statutory requirement that all parties seeking a decree for legal separation or divorce in the ordinary courts must have referred their matrimonial difficulty to a board (whether a religious board or their local ward tribunal), which has certified that it has failed to reconcile the parties.¹³⁶ The socially embedded nature of marriage conciliatory boards and the implications for women seeking to make legal claims to land will be discussed further in chapter 4.

In many fertile parts of the country by the 1960s land had become increasingly scarce and a better framework was needed for resolving customary land disputes. One specific piece of legislation¹³⁷ was passed in 1963 to deal administratively with disputes on land that had been alienated to settlers and foreign holders without consultation with ‘native authorities’ (URT 1994: 101). Further legislation providing for the establishment of customary land tribunals was passed in 1968, initially to deal with disputes in Kagera region.¹³⁸ In places where these tribunals operated, they exercised concurrent jurisdiction over land cases with the primary courts. Cases were heard by a panel of five paid members (including one lawyer) appointed by the ruling TANU party and the Minister for Land and Settlement (Moore 1986: 167). Appeal was to the Minister for Land and Settlement, although courts were sometimes asked to enforce judgments (James and Fimbo 1973: 189).

The creation of customary land tribunals in the late 1960s re-established once again the link between executive and judiciary in land cases, even at a time when the new unified ordinary court system had separated judicial from executive powers. In 1992 the

¹³⁵ LMA s.101-2.

¹³⁶ LMA s.101.

¹³⁷ Land (Settlement of Disputes) Act (Act No. 25 of 1963) R.L. Cap. 524. This set up machinery for intervention under the Minister and a number of orders were made concerning lands in Tanga and Lushoto (URT 1994: 102).

¹³⁸ Nyarubanja Tenure (Enfranchisement) Act (Act No. 1 of 1965); subsequently repealed by the Customary Leaseholds (Enfranchisement) Act (Act No. 47 of 1968) Cap. 377 R.E. 2002, which extended the scope and geographical coverage of the Act beyond Kagera to Pare, Moshi and Tukuyu regions (URT 1994: 102).

system of customary land tribunals was extended to other parts of Tanzania to deal with land disputes which had arisen as a consequence of *Operation Vijiji* and more generally.¹³⁹ The current DLHT established under the Land Acts has effectively replaced the customary land tribunal with similarly constituted personnel of legally qualified chairperson and lay assessors accountable to the same department of government, although not political appointees.¹⁴⁰

A year after the establishment of customary land tribunals, in 1969 a parallel system of arbitration tribunals was created to deal with civil and matrimonial matters, which were to blur the boundaries between judiciary and executive once more.¹⁴¹ These were to be the precursor to the current system of ward tribunals. As Moore notes, these were informal courts run by local party laymen whose purpose was to dispose of family and other small-scale disputes through reconciliation before they had reached the primary court stage (Moore 1986). Arbitration tribunals consisted of five lay persons appointed by the TANU Branch Committee having jurisdiction over the ward. Moore has noted that proceedings were informal, and that despite lack of an official power to impose any fine or punishment, in practice the tribunals ‘rather freely interpreted their powers and [did] not always restrain themselves as officially directed’ (Moore 1986: 164). No law or procedure was specified as to how to bring about amicable settlement between the parties. This remains the case for present day ward tribunals, which operate with little statutory or regulatory frameworks on procedure and rules of evidence.

Today’s ward tribunals were brought in under the Ward Tribunals Act of 1985 (WTA) against a backdrop of renewal in local government in 1984. The period since independence had seen a gradual erosion of local government as politics became increasingly centralised under the TANU socialist government. District councils were abolished in 1969, followed by urban local authorities in 1972 on the recommendation of the American consultancy firm, McKinsey and Co. Regional and district

¹³⁹ Customary Land Tribunals and Customary Land Appeals Tribunals were deemed to have been established under sections 8 and 13 of the 1968 Act pursuant to sections 6 and 9 of the Regulation of Land Tenure (Established Villages) Act (Act No. 22 of 1992) Cap. 267 R.E. 2002. S.3 of the 1992 Act also extinguished the customary rights of occupancy of persons who had previously used or occupied land in villages as a result of *Operation Vijiji*.

¹⁴⁰ The Customary Land Tribunal and Customary Land Appeals Tribunal were disestablished under LDCA s.53 (a) and (c).

¹⁴¹ Magistrates Courts (Amendment) Act (Act No. 18 of 1969) adding s.15A to the parent Act; Arbitration Tribunals Regulations (G.N. 219 of 1969).

development committees were substituted in their place, the stated aim being greater efficiency and distribution of resources (Liviga 1992: 213). However the project failed and in the face of economic decline and pressure from the World Bank and International Monetary Fund (IMF), local government was reintroduced through a package of new legislation.¹⁴² The new local government system was officially explained as aiming at enhancing popular participation in development efforts (Meshack 1987: 6, quoted in Lawi 2003), and it is therefore politically significant that ward tribunals were brought in under the auspices of local government rather than the judicial system at this time.

Msekwa (1977) notes that the Presidential Commission, which recommended the establishment of ward tribunals, envisaged that they would be 'reconciliatory, flexible, informal, and sensitive to local culture in their functioning' (quoted in Lawi 2003). These aims are reflected in WTA,¹⁴³ which explicitly sets out their social as well as judicial functions:

The primary function of each Tribunal shall be to secure peace and harmony in the area for which it is established by mediating and endeavouring to obtain just and amicable settlement of disputes.

As Mswekwa and Farmer note, the ward tribunals represent a modification of the customary courts that existed during the period of colonial rule, tasked with 'controlling ordinary social strife at the local community level for the purpose of keeping peace and tranquillity by the cheapest possible means' (Msekwa 1977: iii, Farmer 1974: xi - quoted in Lawi 2003). This emphasis on pacification and reconciliation goes beyond positivist approaches to justice conventionally employed in English common law dispute resolution and is significant in explaining the way in which land cases are being decided by ward tribunals today.

The location of ward tribunals within the framework of local government also has consequences for the extent to which other arms of local government influence dispute settlement. Lawi, in his study of ward tribunals in Babati district suggests that the ward as an administrative unit presents some degree of conformity to the modern ideal of

¹⁴² Local Government (District Authorities) Act (Act No. 7 of 1982) Cap. 287 R.E. 2002, Local Government (Urban Authorities) Act (Act No. 8 of 1982) Cap. 288 R.E. 2002, Local Government Finances Act (Act No. 9 of 1982) Cap. 290 R.E. 2002, Local Government Service Act (Act No. 10 of 1982), Local Government Negotiating Machinery Act (Act No. 11 of 1982). See also Liviga (1992).

¹⁴³ s.8(1).

separation of powers in governance: between ward tribunals operating as judicial organs of the ward committees¹⁴⁴ which, together with village governments, exercise legislative functions under the direction of district councils. However, my contention is that the Land Acts have muddled separation of powers in the adjudication of land disputes at the ward level. Prior to the Land Acts it was the primary court, rather than local government, that exercised supervisory jurisdiction over the ward tribunals. Today, this supervisory jurisdiction has not been fully transferred to the DLHT, although it has the power to revise the proceedings of a ward tribunal in addition to powers conferred upon it in exercise of its appellate jurisdiction.¹⁴⁵

Under the present system, there is significant executive control of the Ward Tribunal embodied in the position of the Ward Executive Officer. In an executive capacity the WEO acts as Secretary to the Ward Development Committee, which appoints the members of the Ward Tribunal. The WEO also acts as a mediator in disputes involving local people both before legal action and in order to implement ward tribunal judgments. The role extends to the maintenance of security in the ward as well as enforcement of ward by-laws, and includes powers of arrest and detention. Further, the WEO supervises Village Executive Officers (VEO) and *Mtaa* Executive Officers and coordinates development projects in the ward as well as election processes.¹⁴⁶ The VEO has a similar role at the village level.¹⁴⁷ The range of powers of the WEO means that he or she has the potential to become a pivotal actor – for good or ill - in the handling of land cases in the Ward Tribunal. As my empirical research illustrates, where an individual WEO abuses their position of power, they can exert considerable undue influence on the process of justice in the Ward Tribunal.

The Shivji Commission and dispute resolution under the Land Acts

Customary land tribunals had come under heavy criticism, and Shivji argued strongly that they lacked legitimacy in the eyes of the public and undermined the constitutional principle of separation of powers (Shivji 1998: 65). The Shivji Commission noted the

¹⁴⁴ WTA s.24(3).

¹⁴⁵ LDCA ss. 35-36.

¹⁴⁶ The functions of the WEO are prescribed by the Local Government (District Authorities) Act s.30A and Local Government (Urban Authorities) Act s.15A (inserted by the Local Government Laws (Miscellaneous Amendments) Act (Act No. 13 of 2006) s.4 and s.16.

¹⁴⁷ See Grawert (2009: 364) for further discussion of the roles of local government officers in Tanzania.

heavy involvement of the executive – from village to Ministry – in land dispute settlement and considerable confusion caused by overlapping jurisdiction and long delays in the resolution of disputes (URT 1994: 102-5). The Commission was clear that a specialist system of land courts was needed to deal with the specialised nature of land matters, but that any dispute settlement machinery should not be located in the executive branch. The fusion of executive and judicial authorities handling land disputes had been shown to be a recipe for arbitrariness, confusion and corruption. It was argued that decentralisation and popular participation was needed to enhance the authority and legitimacy of the courts (URT 1994: 197-202).

The Shivji Commission's proposals were based on fundamental principles of popular participation, separation of powers and physical proximity to the people. The proposed system comprised a hierarchy of an elders' tribunal (*baraza la wazee*) at village level, a Circuit Land Court, which would travel to hear disputes *in situ*, and a High Court Land Division - all located in the judicial branch of government. Elders were to have a stronger input in decision-making than had previously been the case in the use of court assessors in the Tanzanian legal system. Their role at every level of court was aimed at allowing for fuller community participation in the process of land dispute resolution and to expose professional personnel to the 'values of justice and fairness of the community' (Shivji 2002: 206). In this way, the Commission hoped that a body of Tanzanian common (land) law could develop which would be sensitive to the community's sense of justice and fairness. The Commission's proposals reflected a conscious attempt to move away from, what Shivji describes as 'the Western positivist bias for professional dispensers of justice' (Shivji 2002: 205).

In fact, little of the spirit of the Shivji Commission's proposals in respect of dispute settlement was taken forward in the Land Acts. In the early drafts of the Land Bills, the only change to the ordinary court system was provision for village mediation. The final outcome was the creation of a specialist land tribunal system, but one which did not fully embrace the principles of separation of powers and popular participation that the Commission had espoused. As Coldham notes it was 'surely optimistic to expect the Government to reverse a 30-year old policy of interventionism and to 'restore' powers of land administration to panels of elders; but also, more controversially, that the new system reflected a continued commitment to settle land disputes by means of quasi-

judicial bodies' (Coldham 1995: 234). Shivji is highly critical of what he describes as a 'bias for Western positivism and legal justice, and resurrection of the colonial divisions between received law and customary law' in the Land Acts. As Shivji puts it, the Act: 'adopts the terminology of the Commission's report in setting up the dispute settlement machinery, while stripping it of all its principles and perspectives on justice, community participation and development of a more legitimate Tanzanian common law' (Shivji 2002: 207).

By contrast, McAuslan in his 'more law' approach argued that the Shivji Commission's proposals were either naive or based on 'path dependency' - driven by long-standing Tanzanian (colonial) legal traditions. McAuslan's main criticism centred on drafting style: '... with a few broad strokes of the legal pen giving vast powers to legally unqualified people and relying on their innate common-sense and sense of justice to get things done – just like Operation *Vijiji* in fact' (McAuslan 2003: 253). Preferring the South African approach to drafting new land law reforms, McAuslan maintains that more detail in legislation will 'facilitate radical action rather than hinder it' and that legal rules and checks and balances are needed to replace 'reliance on administrative and political action based on goodwill and common sense' (McAuslan 2003: 254). McAuslan's critical approach to 'goodwill and common sense', and Shivji's concern to promote 'the community's' values of 'justice and fairness' both point to approaches to justice taken in local courts which are beyond the realm of professional legal training. In chapter 5 I analyse how these socially embedded understandings of justice work in practice in the way claims are handled and judged by land tribunals and their implications for decision-making concerning women's claims to land.

3.4 Contemporary land court personnel

Ultimately, neither the Shivji Commission's nor McAuslan's approaches to separation of powers and checks and balances were adopted for the local level of land court. Both village and ward tribunals remain accountable to local district councils under the President's Office Regional Administration and Local Government (TAMISEMI). This therefore continues the historical fusion of judiciary with executive at the local levels of land dispute resolution. Each of the five ward tribunals I visited was convened within the small ward office, thereby physically situating it in the same building as the office

of the ward executive officer and other executive officials. Ward tribunal members are nominated by their villages and appointed by the ward committee.¹⁴⁸ In the five ward tribunals I visited it was common for the members to have held previous political roles, such as *balози* (ten-cell leader)¹⁴⁹ or village council member. Some had worked as primary court assessors. Some female members had been secretaries for UWT. CCM affiliation was common and arguably continues a degree of the politicisation that existed in arbitration tribunals in the past.

Whilst district councils are responsible for supervising, training and remunerating ward tribunal members as well as providing funding for the tribunals themselves, in practice none of the ward tribunals or their members received funding or remuneration from their local district council, and members had received quite limited training for their role. The tribunals typically sat once or twice a week, depending on the workload of the tribunal and availability of members. Lack of remuneration was a common complaint from members of all the ward tribunals I visited, which they felt was made worse by the statutory disqualification of civil servants from ward tribunal membership.¹⁵⁰ Whilst this restriction serves to preserve separation of executive and judicial powers in the office of the ward tribunal member, some members considered that this unfairly penalised them from seeking employment in the public sector when they were not being paid for their tribunal work.

In contrast to regulations which provide for fixed court fees in the DLHT¹⁵¹ there are no equivalent national regulations for ward tribunals to charge fees in relation to proceedings under the Land Acts. As such, it was common practice for ward tribunals to set their own fees to charge litigants. In 2009 5,000 Tsh appeared to be a standard figure for file opening. One woman I met listed to me the total costs she had incurred in her Ward Tribunal claim: a 5,000 Tsh file opening fee, 35,000 Tsh for 7 witness summonses, 70,000 Tsh for the site visits and 20,000 Tsh for copies of the file to take to the DLHT. Other claimants quoted similar figures for their own cases. Site visits were usually the single highest cost in Ward Tribunal proceedings. In one case I observed

¹⁴⁸ WTA s.4(1)(a).

¹⁴⁹ The role of the *balози* is discussed in chapter 4.

¹⁵⁰ WTA s.5(1)(c).

¹⁵¹ Land Disputes Courts (District Land and Housing Tribunal) Regulations (G.N. No. 174 of 2003) (DLHT Regulations) para. 3(1) and First Schedule.

both parties were required to pay 110,000 Tsh each for the site visit. In addition to the fees that tribunals set for the conduct of a case some tribunals imposed fines on parties who failed to attend (typically 20-50,000 Tsh) or showed disrespect to the tribunal during proceedings (60,000 Tsh). At one tribunal which normally heard cases on a Saturday, litigants would be charged an additional fee if they wanted their case to be heard on a weekday.

The ethics of ward tribunals charging fees in this way is not a straightforward issue. Given the lack of local government funding, members can only meet their administration costs and pay themselves by charging the litigants who appear before them. In their 2009 study of customary dispute resolution processes in Kisii, Kenya Henrysson and Joireman similarly found that litigants in land tribunals were expected to pay unofficial transport costs and lunch for officials because salaries were insufficient. Whatever the justification for charging these fees the high costs of bringing a claim represents a significant hurdle for claimants who lack access to funds. Moreover, the fees are considerably higher than the fixed fees set by regulations in the DLHT. For example, in 2009 the statutory fee to issue an application for execution in the DLHT was 2,500 Tsh. It is therefore somewhat ironic that ward tribunals, which are intended to be accessible to local people, are financially speaking the least accessible level of dispute settlement in the land tribunal system.

The DLHT is also an underfunded institution. However, unlike ward tribunal members DLHT chairpersons are salaried law graduates, appointed by the Ministry of Lands and Human Settlements Development – the department responsible for this particular level of the tribunal hierarchy. They are assisted by remunerated lay assessors, with a role similar to assessors in the primary court. As Moore has noted, the presence of elders in the contemporary legal system echoes the pre-colonial role of headmen (*washili*) in local dispute settlement (Moore 1986: 148). In the context of the DLHT - and appeal hearings in the High Court Land Division that originate from the ward¹⁵² - their place alongside legally qualified chairpersons and judiciary appears intended to underscore the place of local customary practices and community conceptions of justice in Tanzania's plural legal system. In practice the majority of Arusha's DLHT assessors whom I met were not originally from Arusha and had held former careers as army

¹⁵² LDCA s.39.

officers, business people, union and public sector workers. They explained to me that their knowledge of local customary practices (as the Regulations require them to have)¹⁵³ came from living amongst the local Arusha population for many years.

The establishment of a specialist High Court Land Division reflects the significance of land issues and volume of land disputes in Tanzania. The High Court (and Court of Appeal above it) is located exclusively in the judicial branch of government; however, since its creation under the Land Acts the High Court Land Division has suffered from a severe shortage of judges and underfunding from the Ministry of Constitutional Affairs and Justice. During my fieldwork year there were just four High Court Land Division judges for the whole of Tanzania. Based in Dar es Salaam, the four judges travel to regional sub-registries throughout the country to hear cases. This means that judges are not locally resident in most of the areas they visit and they spend very limited time in each place. A judge would visit Arusha two or three times a year for approximately a two-week period, funding permitting. This has significant implications for how professionally qualified judges seek to understand and apply local customary practices, in contrast to the approach of tribunals operating at the village and ward level, which are staffed by local elders from the communities they serve. I explore these differences further in chapter 5.

A matter upon which NALAF and GLTF were agreed was the importance of female representation in land dispute resolution. There is today a significant female presence in the Tanzanian judiciary, including the Court of Appeal and High Court,¹⁵⁴ although gender equality at all levels of court has yet to be achieved. During my fieldwork year the personnel of Arusha's DLHT comprised one male and one female chairperson, and two out of the six assessors were women. Statute requires that ward tribunals must comprise not less than four or more than eight members, of whom three shall be women.¹⁵⁵ VLA also stipulates that three out of seven village land council members must be women.¹⁵⁶ In the wards I visited however, none of the tribunals were attended by all the appointed members and none had more than two active female members. It

¹⁵³ DLHT Regulations para. 33(1)(a).

¹⁵⁴ As at April 2012, 26 out of 68 High Court judges and 4 out of 15 Court of Appeal judges in Tanzania were women (Source: www.judiciary.go.tz – accessed July 2012).

¹⁵⁵ LDCA s.11 and WTA s.4.

¹⁵⁶ VLA s.60(2).

was quite common for ward tribunals to proceed to hear cases without a proper quorum of half the total members, rendering their decisions liable to being held void on appeal. Some female members expressed to me that the unpaid two days a week commitment was particularly onerous as they had small businesses, dependent relatives and other household responsibilities to attend to.

Despite these problems, the call for greater participation by women at all levels of the court system is actively being addressed in Tanzania and female presence amongst the judiciary compares favourably with many other countries. My impression from observing ward and DLHT proceedings in Arusha was that women tribunal members were respected by their male tribunal colleagues and were active participants in the adjudication process. Two female members I met held the position of chairperson on their village land council and ward tribunal respectively. It is difficult to make a social-scientific assessment of the impact of greater female representation on substantive decision-making in land matters or on women's access to justice. However, from my informal conversations with female ward tribunal members and litigants at the ward level, it appeared that the presence of female members made some women litigants feel more comfortable in approaching these local levels of tribunal for assistance.

3.5 Conclusion

The Land Acts of 1999 were an important landmark in the progressive realisation of women's property rights in Tanzanian law. However, my contention is that they also represent a missed opportunity for a more fundamental reconfiguration of the way in which gender and land tenure relations are constructed through statute. In chapters 2 and 3 I have focused on the gendered and intergenerational aspects of customary practices and statutory laws on land tenure, matrimonial property and inheritance in order to highlight the inseparability of these three areas of law in family contexts. Yet, with the passing of the Land Acts these three areas of law have not been consolidated and are now glaringly inconsistent on issues of gender equality. There have been gender progressive developments concerning spousal land rights under LMA and the Land Acts. However, laws of succession remain unchanged and most cases are determined according to 'customary law'. This means that customary practices of land tenure which discriminate against female inheritance remain recognised in estates

matters heard in the ordinary courts, whilst land courts have jurisdiction to ‘trump’ discriminatory customary practices to give effect to women’s equal rights to land in disputes heard under the Land Acts.

The creation of a separate system of land courts was an important priority for both the Tanzanian government and the Shivji Commission to remedy a number of deficiencies in the administration of justice in land cases. However, this has also served to amplify the fragmented statutory approach to land in family contexts. Since matters concerning the division of matrimonial property and succession remain under the jurisdiction of the ordinary courts, the notion that land courts have exclusive jurisdiction in land disputes is something of a misnomer. As my fieldwork findings illustrate in the chapters to follow, this is shown to be a recipe for confusion and delay where claims to land between spouses are made to a court that lacks the relevant jurisdiction. It also highlights a substantial legal lacuna in statutory protection of a wife and her interests in land within a subsisting marriage.

Lastly, the concentration of power over land ownership and dispute resolution in the hands of the executive by successive administrations in Tanzania has proved to be a highly effective way of retaining political power and social control over land matters and a recipe for corruption. This executive power has been retained and to some degree strengthened at the local level of village and ward tribunal under the current land court system and the concentration of power in the position of the WEO in particular. As will be discussed, this location of the ward tribunal within local government carries significant implications for the power dynamics of local land disputes. Where such power is abused, it also raises challenges for access to justice if executive and judicial spheres become further enmeshed with social power relations in the family and community.

4. Making legal claims to land:

Agency and power relations in legal processes

4.0 Introduction

Understanding why women's legal claims to land succeed or fail in practice requires an approach to the study of law which goes beyond its statutory framework. This chapter takes two women's experiences of making legal claims to land in Arusha as the starting point for an analysis of the significance of power relations and agency¹⁵⁷ within legal processes of land dispute resolution. The analysis is informed by the work of Yngvesson (1993), Hirsch (1998) and Manji (2000). For these scholars, disputes are not only structured by rules, ideologies and power relations, but may also be contested and reconfigured by actors engaged in active processes of negotiation and resistance. Accordingly, understanding processes of disputing requires observation of structures and individual agency, as well as a broadly Foucauldian approach to studying power relations.

The chapter extends the institutional analysis of ward tribunals within local government in chapter 3 to consider how other local actors engaged in disputing processes interact with the tribunal and shape the course of disputes. The women's claims progress from the Ward Tribunal into other fora beyond the local community, including district and NGO offices and higher levels of court. The chapter considers how the introduction of professionals into the dispute reconfigures power relations between existing social actors. Drawing upon recent policy-oriented literature on access to justice and legal aid, it then reflects upon ways in which the women's experiences of making legal claims may usefully inform contemporary policy debates on legal services provision and women's access to justice.

4.1 Two women's experiences

The two women's stories which follow are in many ways characteristic of the types of claims to land made by women in rural and peri-urban areas of Arumeru District. In

¹⁵⁷ I use Ortner's conceptualisation of 'agency' in the context of questions of power: 'agency is that which is made or denied, expanded or contracted, in the exercise of power ... the (sense of) authority to act, or lack of authority and lack of empowerment ... that dimension of power that is located in the actor's subjective sense of authorization, control, effectiveness in the world' (Ortner 1997: 146).

each case the woman's claim was made in response to being forcibly ousted from her land by a male relative. Both claims were made by women whose land problems began at a stage in their lives when they had very limited power within their own families. In each case the woman brought her claim against a male family member – the first against a guardian in-law, the second against a husband. The cases offer individual personal insights into how power struggles over land in family contexts escalate and shape the dynamics of a dispute and their outcome in statutory legal fora. They also demonstrate strategies that women in relatively weak positions of power adopt in attempting to secure the return of their land.

In the first of the two cases we hear the voice of 'Furaha',¹⁵⁸ an Arusha widow in her late forties giving evidence in her local ward tribunal. She brought her claim against her *shemeji* (brother-in-law) 'Godluck' - her late husband's older brother - who had been appointed as guardian of the family after her husband's death. The second case is that of 'Elizabeth', a Meru woman in her fifties who shared with me the story of her claim to land against her husband 'Anaeli' in a fieldwork interview.

Barbed wire

Furaha had been in the fortunate position of having acquired two *shambas* during her lifetime. Both *shambas* were located in the same Arusha village on the peri-urban lower slopes of Mount Meru. Furaha had no brothers and had been given the first *shamba* by her father when she was still a young woman. The second *shamba* had been apportioned to Furaha and her husband as family land by her husband's family when they married. Furaha and her husband had used the two plots to cultivate bananas, maize, beans and vegetables. Furaha said that her problems with Godluck began after the deaths of her father and husband.

In her evidence to the Ward Tribunal Furaha described how Godluck had forced her away from her late husband's *shamba*. Godluck subsequently sold that *shamba* without her consent and several houses were built on it by the purchasers. At the time of the Ward Tribunal proceedings Furaha was living in a mud house on the *shamba* that she had inherited from her father. Furaha recounted how Godluck had fenced off her house

¹⁵⁸ Names have been changed in the interests of protecting the identities of informants and third parties.

from the rest of the plot and built a second house right next to it for his son. This left her with no remaining land to cultivate.

The Ward Tribunal where Furaha made her claim was some fifteen minutes walk from her home in the village. On the day she gave her evidence Furaha sat alone in the middle of the front bench directly facing the four tribunal members hearing the case. There were two male and two female members in attendance that day, in addition to the tribunal secretary, who sat behind a large table taking a careful note of the proceedings. Furaha's manner was calm and measured as she gave her evidence, pausing after each sentence for the tribunal secretary to finish writing down what she had just said. At first she spoke in her vernacular language of *Kimaasai* before being prompted to speak in *Kiswahili*. She was allowed to speak with very little interruption from the members. When Furaha had finished giving her evidence the secretary motioned to her to come forward and add her thumbprint to his notes. Furaha, like many other litigants and witnesses and every third woman and every fifth man in Tanzania was illiterate.¹⁵⁹ This is a translated extract from her evidence as recorded by the tribunal secretary:¹⁶⁰

I am claiming my shamba which I was given by my father. This shamba, after my father died and my husband died, my brother-in-law whom we made a guardian came to sell it.¹⁶¹ He left a small portion, where my house was and then he built in the same shamba.¹⁶² He brought wire and fenced that area. He built a timber house outside my place. He obstructed me from the toilet area. He brought thorns and put them there. That was one shamba. The second shamba was my husband's.¹⁶³ In that shamba there was a time when we lacked money to farm it because we used to farm it using a tractor. He said this shamba cannot be left in this state I'll go and farm it.¹⁶⁴ We had not agreed but he used force to go and farm it. After farming, the crops were ready for harvesting. I fell ill the second year and I wasn't able to farm. Then I was well, the shamba produced

¹⁵⁹ Literacy is defined as the percentage of persons aged 15 or over who can read and write. The 2007 Tanzanian Household Budget Survey reports a national literacy rate of 72.5% (80% men, 66.1% women) (REPOA 2009). This is higher than average within Africa: 63.4% (72.6% men, 54.5% women) 2005-2008 (Source: UNESCO Institute for Statistics <http://stats.uis.unesco.org> (accessed July 2012)).

¹⁶⁰ Translated from *Kiswahili* by Miriam Matinda. See Appendix E for the original *Kiswahili* version of Furaha's evidence.

¹⁶¹ Here it appears that Furaha is stating that the *shamba* that she inherited from her father was sold. In fact it was her husband's family *shamba* that was sold.

¹⁶² Here Furaha is referring to the *shamba* that she inherited from her father where she was living at the time of her Ward Tribunal claim.

¹⁶³ This is the *shamba* that was sold.

¹⁶⁴ This occurred sometime after the death of Furaha's husband.

crops, I went and told him that I now wanted to farm my shamba. He told me I won't give it to you. ... So he continued to be the one using that shamba. ...

The day before yesterday he asked me why did you bring a summons against me? Do you claim anything here? I will just kill you and no one is going to claim anything from me. He found my son ... he wanted to beat the child. I asked him why he hit him. He turned on me and told me I want you, he pulled me against the barbed wire fence it cut me and then he kicked me. He pushed me to the ground, held my neck and picked up a machete turned it and hit me with it. After people cried out he let me go, I got up and went to the police station. I was given officers to come with me and bring him and when we arrived we found him with the mwenyekiti wa kitongoji [local village leader] ... The mwenyekiti said we had come to talk but since you [officers] have come you will have to go. He was taken to the station. ... Before he went into custody he said I know the thief who stole from me and who caused me to fight with this woman. ... He pointed at my son. ... They arrested him, both were kept in custody. The mwenyekiti said that since he is a student and they are relatives we ask that this matter does not go to court [word not clear] they will go to talk about it at home. ...

The meeting was held, they talked and found that the child was not a thief. ... The elders said [to me] that your claim should proceed by summons.

In questions from the tribunal members Furaha was asked whether she had gone anywhere else before making her complaint to the tribunal. She replied:

I started at home with the clan elders. It was unsuccessful. I brought it to the village office. It was unsuccessful. We took it again to the police station. It was sent back to go to TAWLA ... The clan elders asked, they said we will go and finish it at home. The meeting was held. That man [Godluck] disturbed it and refused.

Furaha had also complained to her local *balozi* and *mwenyekiti wa kitongoji* (local community leaders - see 4.2 below) but all attempts to resolve the dispute had failed. Eventually the *mwenyekiti wa kitongoji* wrote to the WEO. It was he who finally directed that the matter should go to the Ward Tribunal.

Godluck did not attend any of the hearings, and the tribunal members therefore decided to hear the case in his absence. Furaha was a woman without a husband or father to protect her. Few of Furaha's family members attended to support her in the

proceedings. However, on the day that the tribunal conducted a site visit to her *shamba*, both her local *mwenyekiti wa kitongoji* and *baloji* were present and confirmed her claim to the land. The Ward Tribunal gave judgment in Furaha's favour:

The first *shamba*: '*... ni mali ya Mama [Furaha] aliyepewa na baba yake.* (It's the property of Mama Furaha who was given it by her father.)

The second *shamba*: '*... ni mali ya Mama [Furaha] pamoja na watoto wake shamba hili ni urithi kutoka kwa ... (marehemu) mume wanahaki ya kuridishiwa mara moja.*' (It's the property of Mama Furaha together with her children this is the inheritance from the ... (deceased) husband they have the right to be given it back at once.)

A blanket

Like Furaha, Elizabeth's experience of making a legal claim was beset with violence and intimidation from members of her own family. When I met her she had already pursued a claim against her husband, Anaeli through the Ward Tribunal and DLHT without success. After her case had failed in the land courts she went through the process of marriage conciliation and petitioned for divorce in the District Court.

Elizabeth was the second of her husband's three co-wives, married in accordance with Meru customary practice. The land dispute concerned a family coffee *shamba* in a rural Meru village, which she claimed had been given to her by her husband Anaeli when she was married. She described to me how the eldest son of her senior co-wife - 'Michael', who was also the local WEO, was now occupying the coffee *shamba*. It was not disputed that Anaeli - by this time an old man - had allocated a portion of the coffee *shamba* to the eldest of Elizabeth's sons - 'Samwel', who had built a house on it. Anaeli had also given each of his three wives *shamba* plots for growing maize.

Elizabeth described years of marital problems and domestic violence:¹⁶⁵

The big problems were when he [Anaeli] started beating me until I lost, well, my teeth. There was this time he began ... this day I went back to my [parents'] place. I stayed for two years. When I returned I found that he had chased away my sons but it wasn't him. He is telling his son [Michael] from the other [wife]. [Michael] called them [my sons] to his

¹⁶⁵ Translated from *Kiswahili* by Miriam Matinda and Helen Dancer. Extracts from the original *Kiswahili* interview recording were transcribed by Cecilia Kimani. See Appendix E for the original *Kiswahili* version.

place, yes, he called them to his place, he told them every day at six in the morning come. He beat those children; he beat them until they left. Then he beat those children with a faru.¹⁶⁶ Every day at six in the morning he beat the children with that faru. For example, this one [Samwel] has his house and now he [Michael] has destroyed the house that he [Samwel] built in those two acres and chased them away.

She also stated that her husband had sold their cows and goats without her consent and killed her chickens. Anaëli had sent church leaders and family elders to her parents' home to bring about reconciliation, but on each occasion that she returned to her husband there were further problems. On one occasion Elizabeth found herself arrested on the basis of a complaint made by Michael to the local police. She was later released without charge and sent letters of complaint to the District Commissioner and the District Police Officer about the arrest but the problems continued. Over the years she had sought help within the family, as well as from village and district officers, the police and the local social welfare office but with no long-term resolution.

The Ward Tribunal rejected Elizabeth's claim to the coffee *shamba* - apart from the small portion given to her own son, Samwel - and further rejected all her claims of harassment. Elizabeth recalled that after the Ward Tribunal's decision Michael, together with his own brothers invaded Elizabeth's remaining maize *shamba* and planted *masale* (dracaena - boundary plants), thereby staking their claim to the land. She went on to describe the part that she believed Michael had played in the family conflict and her land claim:

Now, this Michael is the elder son of the household, his father [Anaëli] told him this: "I am giving you my blanket¹⁶⁷ as you are the elder son". Then he [Michael] said now I am the elder son no one can complain. He disturbed me until I went to complain to the tribunal, and when he went no one listened to me. And that child, the thing is he was walking around with his father's blanket and saying "I am the elder son, now I'm the ward executive officer, now what are you going to do?"

Occupying twin positions of authority – as WEO and the elder son - Michael held seemingly unfettered power over the dispute in both the Ward Tribunal and at home. Elizabeth had no way of knowing or proving the extent to which the Ward Tribunal's

¹⁶⁶ A piece of rubber used in beatings. The word '*faru*' refers to the rhinoceros tail that was once used to beat slaves and prisoners.

¹⁶⁷ A symbol of leadership within the family.

decision had been influenced by Michael as WEO. However, his role in the family conflict more generally was noted by the marriage conciliatory board that was later convened in a different ward tribunal.

On appeal the DLHT set aside the Ward Tribunal's judgment but declined to give a substantive judgment of its own. This was on the basis that it lacked jurisdiction to decide questions of ownership of matrimonial property within a subsisting marriage. With no apparent legal remedy to gain access to the land, homeless and landless, Elizabeth decided to petition for divorce. There were further attempts by family elders to reconcile the couple before Elizabeth's claim finally progressed to the marriage conciliatory board. Elizabeth went on to explain what she wanted to happen in the divorce case:

Me the thing that I want to happen is for him to give me my right. All those [years] I have lived in his house for all those years; he [should] give me my right. If a person stays with a person as a worker won't they get a salary?

I asked Elizabeth to clarify how she wanted the court to divide the land:

I want him to give me my right for all those years that I lived at his place. Now, when a person keeps involving you in cases instead of helping you. I want the costs for this case, and for caring for his children. The court can help me to ask that man [Anaeli] to help me, all those years that I lived at his place and cared for the children, and where is his land? They [the court] can ask him: Those children of this woman do you know what they eat? What do they wear? I want to have a share of that land. Now those three women [wives], doesn't each of them have their own [land]? Now the one that's mine [i.e. the land], where will it go? Isn't it mine and my children's? My children where will they go? I want my right, for all those years that I have lived at his place.

Elizabeth very clearly based her claim to a share of her husband's inherited family land on her contribution to the marriage as a wife who had brought up her husband's children. References to 'his place' and 'his children' in her account emphasise the patrilineal dimension of her claim, where both her own children and the land that she had cultivated would have been regarded as ultimately belonging to her husband's lineage. Elizabeth's case also demonstrates the intergenerational nature of a dispute over family land. Hers is a good example of how some land disputes arise between

younger family members with vested interests, who may influence - or even cause - the dispute but do not become parties to the legal claim themselves. At the Ward Tribunal, both Elizabeth and Anaëli as the legal parties appeared relatively powerless actors in their own dispute, which intensified through the actions of Michael and his brothers physically staking their claims to the land through conflict, destruction and cultivation outside the legal forum. The more unusual and extreme feature of Elizabeth's case was that one of the third party actors also held a pivotal executive role as the local WEO, with supervisory power over the proceedings in the Ward Tribunal.

Both Furaha and Elizabeth's stories reveal the high stakes faced by many women who make legal claims to land. For both women, acts of intimidation and violence had been ongoing but things escalated after they made their legal claims. In Furaha's case it was after she issued her legal claim that the worst acts of intimidation and violence occurred. Elizabeth was ousted from her remaining maize *shamba*. As these and other women's stories told in this thesis convey, violence, harassment, threats, malicious arrest, cursing and constructing barriers are all tactics used to intimidate and discourage women claimants – and those who support them - from pursuing their case in court. Despite these risks, land courts have no jurisdiction to make non-molestation orders to protect those who make claims to land.

4.2 The Ward Tribunal as a 'semi-autonomous social field'

Furaha and Elizabeth's experiences offer important insights into how women making legal claims must negotiate their position with Ward Tribunal actors effectively operating in a 'semi-autonomous social field' (Moore 1973: 720). In Elizabeth's case this is exemplified in the concentration of executive, legal and familial authority in the hands of Michael as WEO and head of the family. This concentration of power served to thwart Elizabeth's attempts to secure her land through her local Ward Tribunal. For Furaha however, the actions of elders, local political leaders and tribunal members made it possible for her to successfully make and win her land claim despite the violence and intimidation she had suffered from her family guardian.

Peacemakers and gatekeepers

Both women's cases show that where claims occur between relatives considerable attempt is made to resolve the dispute within the family or community before proceeding to court. In this way elders and community leaders effectively act as social gatekeepers to statutory fora. Both claims follow similar trajectories – commencing with family elders before progressing to village officers, the police, district officials and NGOs. This reflects conventional social pathways of dispute resolution and social norms which favour peaceful processes of mediation and reconciliation. Going straight to court without the consent of certain key family members is strongly discouraged, as a number of scholars writing on African dispute settlement have noted elsewhere (Bohannan 1957, Gulliver 1963: 220-21, Lowy 1978, Griffiths 1997, Hirsch 1998:93, the WLSA series 1999-2000, Nyamu 2000, Nyamu-Musembi 2002, 2003, Tsanga 2007:448-9, Magoke-Mhoja 2008, Henrysson and Joireman 2009).

Gaining the support of key family and community actors as mediators or witnesses in a dispute often involves considerable expense. One woman claimant recounted to me all the expenses she had incurred in bringing her claim to a family *shamba*. The costs began when she had to cook food for everyone who attended an initial meeting at her home – some 35,000 Tsh. At the village she paid the VEO money as a 'thank you' for the Village Land Council meeting. She also gave the witnesses 60,000 Tsh as a thank you for their assistance in the proceedings. This was in addition to the substantial costs incurred in Ward Tribunal fees (discussed in chapter 3). Whilst some of these costs appear discretionary, others have the appearance of a bribe. From the perspective of the woman claimant she had found them all to be necessary for pursuing her claim. Henrysson and Joireman describe a similar 'monetisation' of elders in their study of women's property rights in Kisii, Kenya (2009). The practice reflects not only the asymmetric power relations between the claimant, family elders and local officials, but also the importance of such actors for pursuing and winning a legal claim. Such costs represent a significant obstacle to justice for the poorest litigants.

Moore observes that the *balози*'s role in dispute resolution varies between mediation, spectating and 'arrogating decision-making powers to himself' (Moore 1986: 165). The *balози* is the most local of political positions – an office which dates back to the mid-

1960s when it was instituted by the ruling party – TANU ‘as a source of continuous political vigilance’ following an attempted coup in 1964 (Moore 1986: 372). Each group of ten houses elects a *balози* as leader of the ‘ten-cell’, with a range of administrative and dispute resolution duties. At this very local level the *balози* is able to acquire a detailed knowledge of the people living within the ten-cell and is a natural first port of call for many disputants. That a local political figure is called upon to mediate in quite sensitive family issues blurs any divide between ‘public’ and ‘private’, ‘political’ and ‘personal’ in the context of family and land matters. Arguably, this has helped to maintain a level of party political social control within the local community.

The *balози* reports to the *mwenyekiti wa kitongoji* (chairperson of a locality within a village) or *mwenyekiti wa mtaa* (the urban equivalent - literally a ‘street chairperson’). He or she is elected by the citizens living within their *kitongoji/mtaa* and is expected to know every person by name and appearance. One *mwenyekiti wa kitongoji* I came to know took me on walks around his *kitongoji* during the course of my fieldwork. On the walks we exchanged personal greetings with every person we encountered walking past or working on the land. He told me that he personally knew everyone and the boundaries of every plot within his *kitongoji*. In the context of a small rural *kitongoji*, this did not seem unlikely since the *mwenyekiti wa kitongoji* – like the *balози* is often called upon to be present at family dispute resolution and is generally made aware of dispositions of land within their area.

The *mwenyekiti wa kitongoji* may also take on a more active role in the resolution of land disputes even after a claim has been issued in the Ward Tribunal. The social importance of resolving disputes ‘at home’ (*nyumbani*) permeates the forum of the Ward Tribunal giving rise to dynamic negotiations between litigants, family elders, local political leaders and tribunal members on the direction of the dispute. This can result in a collective favouring of disputes being sent home for settlement. As one Arusha *laigwenani* (see chapter 2) explained to me, if there is a fight involving a person in his clan and the case is taken to court, his work is to convince people to take the case out of the court to find a solution at home. In terms of power relations, one consequence of sending cases back home from the tribunal is to fortify the power of elders such as the *laigwenani* or *mshili wa ukoo* as authority figures within family kinship structures.

The power of family and political actors and norms that favour sending cases back home from the court is strengthened and encouraged by statute. It is within the jurisdiction of the Ward Tribunal to ‘adjourn any proceedings relating to a dispute in which it is exercising jurisdiction if it thinks that by so doing a just and amicable settlement of the dispute may be reached’.¹⁶⁸ The fact that statute positively encourages ward tribunals to send cases back home in this way directly challenges legal centralist models of law as an autonomous field from the social. Rather, as Griffiths contends in her study of Kwena family disputes in Botswana, claims are pursued ‘in interconnected social and legal worlds’ (Griffiths 1997: 32, 2001).

Sometimes a *mwenyekiti wa kitongoji* will attend a tribunal hearing as the local leader of the parties to a dispute and the matter will be sent away or adjourned for him or her to go and reconcile the parties. In one case that I observed, the Ward Tribunal members explained to me that they had given permission for the matter to be solved at home for “*utu*” (humanity) because when the law is followed “*ikaumiza*” (it might hurt). The woman claimant, whose farm had been trespassed upon by local herders grazing their cattle, had taken her claim to the tribunal after the respondents had failed to meet with the *mwenyekiti wa kitongoji* to resolve it. Following service of witness summonses a clan elder went to the Ward Tribunal and asked for the case to go back home. The elder brought one of the respondents to the woman’s home with a kilogram of sugar (seeking forgiveness) and 20,000 Tsh by way of compensation, but another respondent did not attend. The *mwenyekiti wa kitongoji* asked for the case to go back home but the tribunal refused this request until the remaining respondent had been brought before them. On the next occasion the *mwenyekiti wa kitongoji* brought the remaining respondent and asked for the case to be returned home. Negotiating her position to keep the matter in court, the woman claimant asked that her file remain open at the tribunal stating “*Siwaamini*” (I don’t trust them). The tribunal granted this request, gave a deadline for payment of compensation and the matter was adjourned once again, the *mwenyekiti wa kitongoji* being instructed to “*Endelea weka amani*” (Go and make peace). Eventually the dispute was settled away from the tribunal to the woman’s satisfaction and the parties later returned to confirm that the matter had concluded.

¹⁶⁸ LDCA s.13(4).

In that case it appeared that by publicly delegating their mediatory role to the *mwenyekiti wa kitongoji*, the Ward Tribunal strengthened his authority to bring about reconciliation. The tribunal members continued to flex their own authority by maintaining supervisory control over the process in two ways. Firstly, they refused the matter to be dealt with at home without the respondents attending the tribunal; secondly, they kept a watch on the progress of dispute resolution through adjournments. The woman claimant appeared to have more confidence that she would secure compensation through the Ward Tribunal having tried and failed with the assistance of the *mwenyekiti wa kitongoji* previously, and was therefore reluctant for the case to be sent back home unchecked. Everyone else it seemed wanted to settle the dispute back home.

The case illustrates how the outcome of dispute resolution ‘at home’ may be influenced by the Ward Tribunal acting as an accountability mechanism in the process. Here, maintaining a degree of statutory supervision served to mediate the balance of power between social and political actors in a dispute that was sent home for settlement. Nader and other scholars (Singer 1979, Merry 1982, Abel 1982, Auerbach 1983, Hofrichter 1987) in their critiques of ADR, point to the way ‘harmony ideology’ is used coercively by more powerful actors in processes of ‘pacification’ (Nader 1993: 4). However, as Davidheiser argues, ‘mediation and conflict resolution processes can also be employed against social stratification [if problems of power and inequality are taken into account]’ (Davidheiser 2006: 294).

When a claim is made to the Ward Tribunal the complexity of social relations between family, executive, political and legal actors may serve to modify or reinforce pre-existing power relations between litigants, depending on how the tribunal handles the dispute. In a case where violence or intimidation by a powerful actor is a feature there is a real risk that sending a case back home will serve to disempower an individual who has sought justice in a statutory forum. More generally, I would contend that the very uncertainty surrounding the power dynamics of disputing means that tribunals should be most reluctant to favour returning a case home solely at the request of authority figures occupying more powerful positions within a family or community. This course of action is likely to reinforce rather than redress social power inequalities and therefore be to the detriment of litigants with the least power in the wider social context of the dispute.

4.3 ADR, legal aid and ‘capacity-building’

Securing help from individuals and institutions, such as district officials and NGOs who are not embedded in the local community may represent an opportunity for claimants to renegotiate the social dynamics and normative framework of a dispute. However, both district officials and NGO legal officers I interviewed commented that in many cases, by the time people come to see them the dispute has reached a stage where it may already be too late for them to effectively intervene.

In Arusha’s district councils both district lawyers and land officers receive a steady stream of people seeking help despite the fact that they now have no official role in resolving individual land disputes unless a district council is itself a party. One district land officer explained to me that nowadays they attempt to informally assist people who seek their help, particularly women:

*We do a kind of arbitration. We talk to both sides and explain and try to solve the problem. ... Women come here when it’s too late, after they’ve done all the procedures and formalities of inheritance and probate. They have decided that the deceased’s brother will supervise the properties of the late deceased. They don’t supervise - they go further and take or sell it. They come when it’s already in the name of another person or sold. They are not much aware of their rights from the beginning. ... In that situation the only thing we can do is advise the person to go to court. Anything else and you may be wasting their time. ... On average two women a week come to see us.*¹⁶⁹

Reconciliation has been an important part of the service of Tanzanian legal NGOs¹⁷⁰ since their legal aid clinics were established in the late 1980s and early 1990s. As Kuenyehia writes, conciliatory approaches have enabled NGO legal aid clinics to gain social ‘acceptability’ with their clients (Kuenyehia 1990). In the reconciliation appointments I observed at LHRC’s Arusha clinic, legal officers would listen to the parties’ accounts, controlling the dynamics of the discussion before putting forward their own opinion on what should be done. In cases where the reconciliation was successful the legal officer would draft a memorandum of understanding which all the parties would then sign. In the sessions that I observed the parties usually presented as

¹⁶⁹ Interview with Arusha Rural District Land Officer 6.1.10.

¹⁷⁰ These include Tanganyika Law Society (TLS), the Legal Aid Committee of the University of Dar es Salaam, WLAC, LHRC, TAWLA, TAMWA and NOLA.

very respectful towards the (generally young) legal officer, even if the disputants were significantly older and occupied a high social status within their own family and community. This may be indicative of a reconfiguration of power relations within the confines of the legal aid clinic as a trained lawyer – with all the status that accompanies his or her position – takes control over the dynamics of the dispute.

The legal officer's position and his or her ability to shape the dynamics and outcome of the reconciliation carries the same potential for coercive 'harmony ideology' as reconciliation by family elders and community leaders 'at home'. However, legal officers as trained lawyers bring an alternative normative perspective to the dispute, which may result in a different outcome by comparison with a dispute which is mediated 'at home' on the basis of customary practices or religious norms. In her ethnographic study of legal aid clinic reconciliations in Dar es Salaam, Bourdon (2009) observes that NGO lawyers not only invoke legal rights in reconciliations, but are prepared to go beyond the bounds of law blending legal, religious and customary notions of rights in order to arrive at what they consider to be a just conclusion. In the case of child support claims for example, this approach will often tend to favour women, since NGO lawyers seek to arrive at an amount of maintenance on the basis of what they feel the father can and will pay, rather than simply what the law specifies (Bourdon 2009: 284-285). Bourdon therefore contends that 'dispute resolution within the NGOs has potentially transformative effects as NGO lawyers translate their notions of rights and gendered justice through their legal manoeuvres' (2009: 234).

As well as reconciliation, LHRC and TAWLA's legal aid clinics in Arusha prepare their clients for court by offering free legal advice and document-drafting services (after payment of a nominal file opening fee). According to legal officers at these clinics most of their clients in land disputes seek legal advice at the DLHT stage of a claim. Generally therefore, save for higher value land claims which commence at the level of DLHT, this is after the claim has been substantively determined in the Ward Tribunal and the judgment has been appealed or requires execution. This is perhaps unsurprising given the social pathways to justice in family claims described above, and because advocates are themselves prohibited from appearing or acting for a party in the Ward

Tribunal.¹⁷¹ In Furaha's case although she won her legal claim and Godluck did not appeal, in order to physically reclaim her land she had to apply to the DLHT in town for execution of the Ward Tribunal's judgment. After the time limit for an appeal had passed, the Ward Tribunal members advised Furaha to go to an NGO in town for assistance in pursuing her claim in the DLHT.¹⁷² Elizabeth sought advice from a legal NGO after her claim had failed in the Ward Tribunal. The NGO drafted grounds of appeal to the DLHT, but her appeal was unsuccessful.

Due to limited financial resources and a shortage of legal officers who are qualified to practise as advocates, legal aid NGOs do not usually represent their clients in court, save in the most exceptional cases. During the period 2007-2009 just 14 of LHRC Arusha's 7604 clients were represented by an advocate. 4 of these were land cases.¹⁷³ For the vast majority, 'capacity-building' (a phrase adopted by legal aid NGOs from development discourse) takes the form of document drafting and a 'client coaching' appointment in the legal aid clinic prior to a hearing date. The aim of client coaching is to equip people with the skills and knowledge to represent themselves in court. To supplement the advice that clients are given in their coaching appointment LHRC also produces 'self-help kit' booklets which give a basic practical guide to the law on various topics including giving evidence in court.

For many people, the central urban location and presence of professional lawyers at the DLHT and higher courts is an intimidating prospect. Knowing where to go for legal help often depends on the knowledge of family members or local leaders and their willingness to assist. In my observation of legal aid clinic sessions, it was not unusual for women clients to be accompanied by a male family member or community leader, who would remain throughout their conference with the legal officer. Clients may find it reassuring or helpful to have someone else present to assist them with their claim and provide moral support. However, power dynamics between legal officer, client and those who accompany them to the clinic can have a significant impact on the client coaching process itself. In the case of female clients this may also reinforce social

¹⁷¹ LDCA s.18(1).

¹⁷² Furaha issued her application to the DLHT and was waiting for a hearing date when I left Tanzania at the end of my fieldwork.

¹⁷³ LHRC Arusha Operational Plan Report 2007-2009.

norms that a guardian or eldest son should be present to represent her interests and/or speak on her behalf.

During my observations of these sessions I noted that sometimes if a client was nervous or unused to speaking about her case much of the discussion would take place between the legal officer and the male family member who had accompanied her to the clinic. This occurred in Elizabeth's client coaching session where much of the interaction happened between the legal officer and her brother whom she had brought with her. This was also a challenge that I experienced in conducting my own interviews where male family members were present (see appendix A for further discussion of this issue). In this scenario there is a risk that if the third party has a vested interest in the outcome of the case - for example a relative with their own interest in the land - he becomes privy to advice and discussions that he could use to his own advantage.

I would argue that it is vital that both lawyers and researchers are sensitive to any potential vested interests and the pre-existing social power dynamics which are brought into a conference or interview, since these may serve to undermine a woman's ownership of her legal claim. If a lawyer (or researcher) takes the initiative for ensuring that an interview is conducted without third parties present they create a confidential space away from the vested interests of a person's entourage and an opportunity for that person to engage directly in the discussion and thereby take greater ownership of their case (or story). However, the very nature of power inequalities, social expectations and cultural differences (whether stemming from differences in nationality, class, age, race, gender, religion or tribe) means that this is something which is often much easier to say than to do in practice.

4.4 Litigants in person and representation in the DLHT and High Court

As a barrister in England and a researcher at the DLHT and High Court in Arusha, I have often been struck by the way in which court dress serves to overtly differentiate actors in legal proceedings. Symbolically court dress confers authority on the legal establishment and aligns lawyers with judges and the state, rather than with the clients they represent. This visual contrast between lawyers and laypersons is immediately apparent in the higher levels of Tanzanian court. On most weekday mornings, the corridor outside the DLHT's two hearing rooms in Arusha's Regional Commissioner's

building is crowded with advocates, litigants and their witnesses. Advocates' black suits, white shirts, waistcoats and ties or white collar bands are a sharp contrast to the red *shuka* (blanket) often worn by male elders, and brightly coloured *kanga* and *kitenge* fabrics worn by many women. In Arusha's High Court, located in a leafy part of *Uzunguni*, the cramped corridor outside the judges' chambers presents a similarly distinctive social picture.

As Furaha's and Elizabeth's cases illustrate, in the Ward Tribunal power relations and case outcomes are substantially affected by family, community and executive actors. Legal representation there is prohibited.¹⁷⁴ The situation in the DLHT and higher courts is very different. Legal professionals, technical legal procedures, *Kiswahili* and English predominate in the functioning of the court. Accordingly, in these higher levels of court, legal actors, their status, professional knowledge and language serves to contest pre-existing social power relations between disputants and reconfigures the power dynamics of the dispute. Applying Bourdieu's theory of practice (1977), the institutional standing of the advocate and his or her ability to speak legal language represents discursive power in the presentation of a claim. This has obvious consequences either for enhancing access to justice, or alternatively, amplifying social power inequalities where legal aid is unavailable for the poorest litigants.

The right to legal representation, often recognised as a key feature of effective access to justice, is incorporated in the right to a fair hearing under Article 13(6)(a) of the Tanzanian Constitution. This right has been held to include publicly funded representation for poor citizens prosecuted for serious or complex criminal matters.¹⁷⁵ However, in practice legal aid is only provided by the state in capital criminal cases (Peter 1997: 338). There is no state-sponsored legal aid for civil matters. There is reported to be a national shortage of advocates in Tanzania¹⁷⁶ and *pro bono* or NGO-funded legal representation in land courts is extremely limited. Under these

¹⁷⁴ LDCA s.18

¹⁷⁵ *Khasim Hamisi Manywele v Republic* High Court of Tanzania at Dodoma, Criminal Appeal No. 39 of 1990 (Unreported) (reproduced in Peter 1997: 348-370).

¹⁷⁶ As at December 2011 there were approximately 2,315 advocates in Tanzania [including deceased and retired advocates] with most being based in urban areas. The number of advocates has increased significantly in the last two years. 603 of this total number were registered in 2011 alone. Source: '*CJ: Advocates are too few*' The Citizen (Tanzania) 15.12.11. This recent increase is the result of efforts to reduce the administrative backlog of Law graduates who had been waiting for years to take the Bar examination, and the establishment of the new Law School of Tanzania.

circumstances client coaching and drafting legal documents for self-representation is currently the only practical way for (mostly foreign-funded) legal NGOs to assist a large number of poorer litigants to access justice in the higher courts. Some advocates also offer a similar preparatory service for clients who may be unable to afford the full cost of representation in court. For the majority of the poorest litigants however, the cost of representation by an advocate is prohibitively expensive. Courage, determination and the support of family members or local leaders invariably proved necessary for them to pursue their claim unrepresented through the slow and uncertain court process.

A 'representation premium'?

Many litigants I met during the course of my fieldwork were fearful of the court process and wanted an advocate to represent them in these higher courts. Although there is a clear demand for representation in the higher courts from many litigants, there is a dearth of quantitative empirical research on the impact of legal representation in the Tanzanian court system. Courts do not collect their own statistical data on this issue and court records and filing systems are not organised in a way that makes this type of research easy to conduct. The role and value of legal representation as compared with legal help outside of court has come under close scrutiny in recent policy debates on legal aid as governments in a number of countries (particularly the U.K., U.S.A. and Australia) have sought to reduce their publicly funded legal aid budgets. Findings of research on litigants in person and legal representation conducted in these countries are context-specific. However, they may usefully inform debates on legal aid provision elsewhere. This section surveys the recent policy-oriented literature and my own empirical research findings to reflect on the importance of legal representation for women's access to justice in Tanzania.

In a recent literature review of litigants in person conducted on behalf of the U.K. Ministry of Justice, Williams notes a general consensus across the majority of studies that lack of representation has an adverse impact on case outcomes, with lawyers obtaining significantly better results than unrepresented litigants (known as a 'representation premium') across a range of case types (Genn and Genn 1989, Seron, Frankel et. al. 2001, Hannaford-Agor and Mott 2003, Law Council of Australia 2004, Genn and Gray 2005, Moorhead and Sefton 2005, Genn, Lever et. al. 2006, Lederman

and Hrungr 2006, Citizens Advice 2009, Engler 2010, Sandefur 2011 – all cited in Williams 2011).

As Williams notes, studies that argue the existence of a representation premium often explain it in terms of the skills and expertise that lawyers bring to a case (Williams 2011: 6). More specifically however, a recent study by Sandefur (2011), cited by Williams concluded that whilst representation has a powerful impact on case outcomes the difference in ‘win rates’ between lawyers and expert non-lawyers is much smaller. Sandefur’s suggestion is that procedural familiarity is key; therefore representation by lay experts may be as effective as lawyers in influencing case outcomes. This conclusion also reflects findings in Genn and Genn’s 1989 landmark U.K. study (see Williams 2011: 7).

The general consensus on a ‘representation premium’ is questioned by Adler (2008) in his research on the effect of representation on case outcomes in five different types of tribunal in the U.K.¹⁷⁷ Adler acknowledges that complex cases benefit from representation, that those who were represented said that they valued this for a variety of reasons, and that a significant minority of those unrepresented said that they would have preferred to be represented. However, his overall finding from the tribunals studied was that good pre-hearing advice was just as likely to achieve a favourable outcome as representation in the tribunal itself. He suggests that this is due to the manner in which the tribunals studied perform their functions, adopting an inquisitorial as opposed to an adversarial approach - whether or not the parties are legally represented (Adler 2008: 25). This principle contention raises some important questions concerning judicial approaches to doing justice - an issue explored further in chapter 5 of this thesis.

A subsequent 2009 study by the British legal charity - Citizens Advice questions the degree to which the benefits of representation can be compensated in other ways. The study considers the impact of legal representation and pre-hearing legal help by a legal charity - the Asylum Support Appeals Project (ASAP) on appellants’ success rates in

¹⁷⁷ Criminal Injury Compensation Appeals Panels, Employment Tribunals, Social Security Appeals Tribunals, Special Educational Needs and Disability Tribunals (England), and Additional Support Needs Tribunals (Scotland). Data collection comprised telephone interviews with 869 applicants/appellants at four tribunals and observation of 64 tribunal hearings (Adler 2008: 2).

asylum welfare support appeals to the Asylum Support Tribunal (AST).¹⁷⁸ In common with many litigants in Tanzanian land courts, the majority of asylum support claimants in the AST are socially and economically vulnerable and as foreign nationals many face language barriers in making claims. 79% of appellants in oral appeal hearings participated through an interpreter appointed by the AST.

The study found that the effect of representation on the success rate of the U.K. Border Agency (UKBA) as Respondent was relatively minor (appeals were dismissed in 51.8% of cases in which it did not appear, and 57.4% of cases in which it did). The consequence of legal representation on the success rates of appellants however, was markedly different. Whereas 71.3% of appellants who were represented at the hearing¹⁷⁹ had their appeals allowed or remitted for a fresh decision, just 38.6% of those who had received no legal advice or representation were successful - a 32.7% 'representation premium'. In the 50 cases where both sides were represented, the appellant success rate was 70%. This increased only slightly to 72.3% when appellants alone were represented, but fell significantly to 33.3% when only the UKBA was represented at the hearing.

Significantly, appellants who had received a brief session of pre-hearing specialist legal advice from ASAP on the morning of the hearing but were not represented were no more successful than appellants who had had no legal advice or representation (34.8%).¹⁸⁰ The findings suggest that even in tribunals which do not adopt as formal or adversarial an approach as some other types of court, for litigants faced with cultural and language barriers, legal representation at oral hearings makes a substantial difference to their prospects of success and limited pre-hearing legal advice is not an equally effective substitute.

¹⁷⁸ Findings were based on an examination of the AST reasons statement in all 616 appeals lodged between October 2008 and March 2009 that proceeded to hearing or decision on the papers. Of this total number 477 were oral appeals and 139 were paper appeals. In oral appeals appellants were represented in 24% of cases and UKBA as Respondent in 41% of cases. Appellants may opt to decide to have their appeal decided on the papers only. Of the 139 paper-only appeals 42.5% were allowed. The study does not indicate the percentage of paper-only appellants who had received legal advice in preparing their appeal.

¹⁷⁹ In all but two cases the legal representative was from ASAP.

¹⁸⁰ The report author states that 'in deciding which appeals it will provide representation at the hearing, the ASAP does exercise a *degree* of selection, on merit. But there is no reason to believe that this limited degree of selection accounts for all – or even much – of the substantial representation premium ...' (Citizens Advice 2009: 11).

The findings of these various studies are not directly comparable with the Tanzanian context where the legal issues, litigants' backgrounds, language use and legal culture are often very different. However, the general conclusions of the studies on the reasons for existence of a 'representation premium' serve as a useful point of departure for an analysis of how advocates may transform or entrench pre-existing social power relations between disputants when claims are reconfigured in the higher levels of court. The following sections consider two important issues I identified during the course of my fieldwork upon which lawyers' skills and expertise and procedural familiarity with tribunal functioning can affect agency and power relations – legal language and literacy, and technicalities and delay.

Legal language and literacy

In Tanzania literacy rates vary widely between generations and between urban and rural locations, but are lowest amongst older women.¹⁸¹ In my ward tribunal study high levels of illiteracy were observable in Upper Arusha and Arusha Plains ward tribunals where many litigants and witnesses thumb-printed the secretary's note of their evidence. In contrast, at Arusha Urban, Meru Town and Meru Rural tribunals litigants more often used a signature. Whereas most litigants in Adler's study would have spoken the language of the court as their first language, in Tanzania vernacular languages are widespread and the national language of *Kiswahili* is not universally spoken or understood. English is the official language of the Tanzanian higher courts, but it is generally only spoken well by Tanzanians who have received a Form IV education.¹⁸²

Mertz argues that legal language is 'a crucial crossroads where social power and language interact' (Mertz 1994: 441, see also Wanitzek 2002: 6). In the context of Tanzania's land courts there is considerable awkwardness in the use of multiple languages throughout the system and an evident tension between the exigency to use English in a Commonwealth 'common law' legal system and the reality of the

¹⁸¹ The last Tanzanian population census in 2002 reported overall literacy rates of 72.5% (80% men, 66.1% women). Literacy rates amongst persons aged over 65 were 27.8% (42.9% men, 13.8% women). This compared with 78.4% amongst 15-24 year olds (80.9% men, 76.2% women). There were also significant variations in literacy rates across the 5 districts within Arusha region. The regional average was 67% (70% men, 63% women). The highest was Arusha municipality: 91% (92% men, 89% women) followed by Arumeru: 72% (75% men, 70% women) and Karatu: 64% (66% men, 61% women). These contrasted sharply with the predominantly Maasai pastoralist districts of Monduli: 39% (45% men, 34% women) and Ngorongoro: 27% (34% men, 21% women) (National Bureau of Statistics 2004).

¹⁸² Equivalent to GCSE in England and Wales.

languages spoken by the population at large. That tension is clearly seen through the hierarchy of the legal system and reveals much about where a particular level of court is culturally situated and the actors that dominate it.

In the Village Land Council and Ward Tribunal, where tribunal members are lay adjudicators and representation by advocates is prohibited, social power associated with literacy and language use does not generally represent a significant barrier to justice. There are no application forms for claimants to complete, and the secretary will generally write out a person's claim if they are unable to do it themselves. Both Furaha and Elizabeth spoke their vernacular languages as their first language, a broken *Kiswahili* and no English. Although *Kiswahili* is the official language of the Ward Tribunal and litigants and witnesses are encouraged to speak it wherever possible, in rural areas tribunal members generally speak the vernacular language of the communities they serve and there is considerable mixing of *Kiswahili* and vernacular languages in courtroom discourse and general conversation. If evidence is given in a vernacular language the tribunal secretary will simultaneously translate it into *Kiswahili* for the purpose of the court record.

In the DLHT, where advocates are permitted to appear, both *Kiswahili* and English are recognised as official languages; however, English is specified as the language of the court record.¹⁸³ In practice, where one or more parties in a case are unrepresented, legal actors continuously negotiate the language divide between *Kiswahili* and English. Litigants in person can conduct the entirety of their case in *Kiswahili* including their written pleadings. In contrast advocates and NGOs will generally draft their clients' documents in English and some represented parties will see much of their case presented to the tribunal in English. Lawyers then advise their mystified clients about what took place after the hearing. Ironically, this effectively excludes a non-English speaking represented litigant from full participation in their case. This creates what Wanitzek describes as an 'asymmetrical discourse between court officials and parties' (Wanitzek 2002: 7).

Whatever the spoken language used in court, both the court record and judgments in the DLHT are written in English. This presents practical challenges both for DLHT

¹⁸³ LDCA s.32.

chairpersons, who must simultaneously translate evidence into English, and for litigants, who upon reading the court record will find their own words interpreted into another language they may not understand. The practice represents a change from the Customary Land Appeals Tribunal where, as High Court Land Division Judge Hon. Ngwala told me, judgments had previously been written in *Kiswahili*. In terms of access to justice this appears to be a backward step. As some ward tribunal members also commented to me, this was unhelpful for them as non-English speakers seeking to understand why a judgment they had given had been upheld or set aside on appeal.

In the High Court and Court of Appeal the dominant language of the legal establishment is English. Advocates and judges speak English, although this is usually their second language after *Kiswahili*. I observed High Court judges to be flexible in using *Kiswahili* in cases involving litigants in person, but there was an overriding expectation that English would be spoken whenever possible. Some advocates struggle to speak good English and the quality of English in pleadings drafted by lawyers varies considerably.

There is a lack of qualified interpreters in Tanzania's higher courts. In wards where vernacular languages are widely spoken tribunal members from those wards are able to converse with litigants directly in the local language. However, when the DLHT and High Court is faced with a non-*Kiswahili* speaker anyone present in court and conversant in the vernacular language may be asked to interpret. This is also the practice in the ordinary court system where, as Principal District Magistrate Mwakajinga notes, courts place great reliance on the trustworthiness of assistant registrars or lay persons to act as translators, not to mislead the court or serve their own interests (Mwakajinga 2002: 234). In a court system that is chronically short of funds lay translation may be the only practical solution, but it is an unreliable method for ensuring that translation is done as accurately and impartially as possible. As such there is a pressing need for independent, qualified vernacular interpreters at these levels of court, not just to translate evidence, but to ensure that litigants are able to follow courtroom discourse that is conducted in English between lawyers and adjudicators.

Socio-linguistic research on courtroom discourse can offer some insights into how the language of legal representatives can affect case outcomes. Whilst some litigants in person in Arusha's land courts presented as quite knowledgeable and confident and

appeared to be able to articulate their claims quite clearly, many struggled under pressure to forward their case by failing to provide evidence or arguments addressing the legal issues. In their 1980s sociolinguistic study of courtroom discourse Conley and O'Barr observe that legal discourse tends to be 'rule-oriented'. Claims presented in this way are based on specific rules, duties and obligations; events are presented sequentially, cause and effect and responsible agents are identified, and evidence addresses directly the specific legal rule in question (Conley and O'Barr 2005: 67). By contrast, 'relational accounts', which are more common amongst laypersons, particularly women, tend to be based on general rules of social conduct, personal status and social position; they are often non-sequential and rich in life details that the law usually deems irrelevant (2005: 68).

Furaha's evidence is an example of a relational account. A rule-oriented version might have begun with an explanation of the basis upon which she claimed the *shambas* according to customary practices of land acquisition. She might then have elaborated on the processes and people involved in allocating the land, supporting her account with oral evidence or written documentation such as family meeting minutes from other witnesses to the acquisition. Taking events in chronological order she might then have identified the specific incidents when she was denied access to the land and how it was sold by Godluck without her consent.

In contrast to adjudicators in the higher courts, ward tribunal members as laypersons are not legally trained to prefer evidence presented in a rule-oriented way. However, in fora where adjudicators are legally qualified - and therefore trained in rule-oriented approaches to presentation and problem-solving - the court has to work much harder to effectively reconstruct the relational account within the rule-oriented legal framework it is used to working within. A busy court may not have the time or patience to do this. It follows that a litigant who cannot construct or express their claim in this way is at a natural disadvantage. This is particularly the case where the party they face is represented by an articulate and methodical advocate. Issues of evidence gathering, judicial approaches to doing justice and linguistic differences in litigants' speech are explored in greater detail in chapters 5 and 6.

Technicalities and delay

There is a widely held belief amongst Tanzanian legal professionals that the court system is flexible in accommodating litigants who cannot read or write, are unaware of their legal rights or unable to speak the official language of the court. As one Arusha DLHT chairperson comments in this judgment on an appeal from the ward:

I've perused the records from this file and observed that, it is true that the appellant had initiated his appeal by way of a letter. I can admit that this style is not strange on our District Land and Housing Tribunals where our major clients are ordinary people, mostly illiterate and generally (laymen) who are "wakulima toka vijijini" [village farmers/peasants] and who most of them have no capacity even to hire an advocate. These people are strangers to the legal procedures, format and language of the court. That is why our legislation is a bit humble towards them. Our tribunals are not strictly driven by legal technicalities and format, our concern is the "CONTENTS"¹⁸⁴ of the document filled and the determination of the suit to the "MERITS"...

In my observations and archival research in the DLHT I noted several examples of cases similar to this where the court had appeared to make allowance in favour of litigants in person who had, for example, filed an appeal out of time or otherwise than in accordance with the correct legal procedure. Courts are often cautious of dismissing cases where the social consequences may be serious and a party has failed to attend without explanation. Moreover, where a preliminary objection is made on a point of law, or other legal issues arise, the DLHT and High Court will often adjourn a case and permit parties to file written submissions on legal arguments.

When Elizabeth came to petition for divorce in the District Court her husband raised a preliminary objection that the parties had never been lawfully married. Neither of the parties was represented and the matter was adjourned for both parties to file written submissions on the objection. Although Elizabeth was not represented in court the legal aid clinic which she attended prepared a written submission on her behalf in response to her husband's. I was later informed that her husband's preliminary objection was rejected and the divorce petition was allowed to proceed. This was just one of a number of cases I encountered where litigants in person had been able to overcome a technical

¹⁸⁴ Capitalisation in the original.

legal point through use of a written submission drafted by an NGO legal officer. What was so striking about Elizabeth's case was her determination in pursuing her claim through a significant number of family, community, executive and legal dispute resolution fora without giving up. By the time she was faced with the preliminary objection in the District Court, she had already unsuccessfully pursued her claim through two levels of land court and a marriage conciliatory board. Other claimants in a similar position may well have given up.

Despite the fact that courts do make allowances for litigants in person, arguably advocates and adjudicators do not take a robust enough approach to ensuring that cases are also progressed efficiently without undue delay and avoiding taking unnecessary and irrelevant technical points. Advocates, with their knowledge of the law, often favour legal technicalities as an efficient way of disposing of a case without substantive determination. Adjournments are frequently requested by advocates and savvy litigants in order to make technical legal arguments. This may well be justified – and ultimately shorten the case - particularly in situations where repeated claims are made between the same parties on issues that have already been finally determined elsewhere (*res judicata*) or claims brought outside the statutory limitation period. Advocates also often seek adjournments for professional reasons, for example that the advocate is representing another client in the High Court at the same time.¹⁸⁵ Where both parties are represented but an advocate is absent, there is a culture amongst the small community of Arusha's advocates of 'holding the brief' of the other advocate and requesting an adjournment on their behalf. This contrasts with the position in England for example, where if the regularly instructed lawyer is unavailable the case will be passed to a colleague to ensure that the client is fully represented in their absence. The Tanzanian practice must be understood against the backdrop of a shortage of advocates in Tanzania, with many advocates operating as sole practitioners. However, seen from the perspective of the litigant, it is the advocate who is responsible for delaying their case.

One extreme example of technicalities and delay I noted was a DLHT claim brought by a sibling group against the administrator of their deceased mother's estate. Both sides

¹⁸⁵ The DLHT Regulations stipulate '... the Tribunal shall not believe any other evidence as a proof for [a party's advocate] being in the superior courts other than by producing summons to the advocate and cause list from such courts' (para. 13(3)).

were represented by advocates and the evidence did not commence until some 20 months after the claim was issued. In the intervening period there were over 40 adjournments with preliminary objections made and subsequently abandoned, and numerous letters on file from advocates asking for adjournments due to professional commitments, weddings and sickness. Ultimately, it is within the power of the chairperson hearing the case to manage it in order to avoid undue delay.¹⁸⁶ However, in practice courts often adopt a fairly lenient approach to requests for adjournments. Twaib, writing on the Tanzanian legal profession found in a random survey of adjournments in two of Dar es Salaam's Resident Magistrates' Courts (date not specified) that both advocates and magistrates were responsible for a large number of court delays (Twaib 2001: 64-72). As well as delaying justice for individual litigants, this contributes to the systemic backlog of cases in the higher courts.

Adjournments are regularly granted to litigants and advocates who then pursue technicalities devoid of any real legal merit. In these cases adjournments often appear to be sought precisely to invite delay, perhaps in the hope that the other side will be forced to concede the case or simply give up. It is widely recognised that in the Tanzanian legal system as a whole courts are often complicit in delaying cases upon payment of a bribe (*rushwa*). Litigants and lawyers I met in Arusha had many stories of litigants, lawyers, adjudicators and administrators in various levels of court, known or suspected to be involved in bribing activities. This included instances where court files had gone 'missing' and had subsequently been 'found' upon payment of a bribe. 'Corruption'¹⁸⁷ is officially acknowledged to be an entrenched feature of Tanzanian society and the justice system.¹⁸⁸ In the case of court staff and adjudicators - particularly magistrates - this is in part a symptom of the low salaries they receive. From the perspective of litigants, corruption in the court system represents a kind of institutional power that they must either buy into or resist in order to successfully make

¹⁸⁶ DLHT Regulations provide: 'Where a party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal, the Tribunal may require the party to proceed himself and if he refuses without good cause to lead the evidence to establish his case, the Tribunal may make an order that the application be dismissed or make such other orders as may be appropriate' (para. 13(2)).

¹⁸⁷ 'Corruption' is a criminal offence in Tanzania under the Prevention and Combating of Corruption Act (Act No. 11 of 2007).

¹⁸⁸ The Warioba Report on Corruption (URT 1996a) concluded that corruption had become endemic in Tanzanian society. A Transparency International Report (2009) positioned the Tanzanian judiciary at 4th on the list of the most corrupt public institutions in East Africa.

a claim. Both of these approaches require agency – whether deriving from social position, knowledge and expertise or simply money to buy influence. In this light, it is clear why so many poor litigants have little faith in the court system to deliver justice and equally, why in the higher levels of court so many express a wish to be represented by an advocate.

Paralegals and the power of attorney

Given the limited availability of legal aid for representation in Tanzania one potential solution for litigants in person who cannot afford an advocate lies in representation by paralegals – laypersons trained to advise and assist parties in legal disputes, whether by providing basic legal advice, legal literacy training, mediation services or assistance in preparing for court. Elsewhere in Africa, most notably South Africa and Sierra Leone, paralegals have become an integral part of national systems of access to justice. In the case of Sierra Leone, it is reported that community-based paralegals trained by the NGO - Timap for Justice have proved popular with communities in their approach to dispute resolution based on principles of reconciliation (Open Society Justice Initiative 2010, Harper 2011a: 64-66).

Paralegals have been on the policy agenda in Tanzania for a number of years. In 1996 the High-Level Task Force Report on the Tanzanian Legal Sector ('the Bomani Report') drew attention to limitations in access to justice and legal services for the majority of Tanzanian citizens and a legal system undermined by corruption and delay (URT 1996b). The Tanzanian government adopted the Report and subsequently established the Legal Sector Reform Programme (LSRP) Medium Term Strategy (MTS) with its aspiration and vision of 'Timely Justice for All' to implement the Report's recommendations. It included provision for Civil Society Organisations/NGOs to be brought within the implementation framework and supported in providing legal aid, training paralegals and delivering legal literacy programmes. Despite some achievements, the 2008 Review of the LRSP noted that: 'the dearth of resources sapped the implementation of MTS in the early phase' (Ministry of Justice and Constitutional Affairs 2008: 3) and found there had been limited progress in improving access to justice for the poor and disadvantaged (Ministry of Justice and Constitutional Affairs 2008: 83).

Tanzanian legal NGOs (notably WLAC and LHRC) have been engaged in nationwide programmes to establish independent paralegal units in local communities; however, paralegal services have yet to reach most communities. There is one small paralegal unit in Arusha Urban – Arusha Women’s Legal Aid and Human Rights Centre (AWLAHURIC) – initiated by WLAC. In its 2007 annual report ‘Access to Justice through Paralegal Work’ WLAC notes that despite achievements of paralegal workers their role continues to receive limited recognition both in the court system and society generally (WLAC 2007). Recent research by Diehl with paralegals in Morogoro region similarly concludes that the influence of paralegals against major problems within the justice sector is low and requires links with more powerful organisations and lawyers (Diehl 2009).

In terms of assisting parties in court, one of the biggest challenges paralegals have faced is a lack of support from the legal establishment itself. Twaib notes that the Tanganyika Law Society (TLS) initially opposed the introduction of paralegals out of concern to maintain professional standards (Twaib 2001: 144). Legislation which enables paralegals (and other persons) to act for parties in courts above primary courts under a power of attorney has been on the statute book since 1966.¹⁸⁹ However, this right has been interpreted differently by the Court of Appeal and the High Court. In the 1980 Court of Appeal case of *Naiman Moiro v Nailejiet K.J. Zablon Nyalali C.J.* said *obiter* ‘I am not aware of any provision of law permitting the conduct of a case by a person holding the power of attorney where the party concerned is also present in court’.¹⁹⁰ This appeared to limit representation by power of attorney to circumstances where the litigant was physically absent from the court. Subsequently however, the activist judge Justice Mwalusanya in the unreported 1988 High Court case of *National Bank of Commerce v Vitalis Ayemba* held that since the law must be taken to intend what is

¹⁸⁹ Civil Procedure Code Act No. 49 of 1966, Order 3. Rule 1 provides: ‘Any appearance by a party to a suit may be made or done by a party in person or by his recognised agent or by an advocate, duly appointed to act on his behalf’. Rule 2 provides *inter alia* ‘The recognised agents of parties by whom such appearances, applications and acts may be made or done are (a) persons holding powers of attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties’ (see Peter 1997: 340).

¹⁹⁰ [1980] TLR 274.

reasonable there was '*no basis for treating them* [i.e. a lawyer and a recognised agent holding power of attorney] *differently because they perform the same role*'.¹⁹¹

As Peter argues, the decision in *National Bank of Commerce* suggests that at High Court level a recognised agent holding power of attorney may appear for a party who is also present in court. As he further observes however, this is an unpopular view amongst many advocates who '*jealously guard their profession and would do anything in their power to maintain a monopoly over it*' (Peter 1997: 341). Despite the potential for trained specialist paralegals to play an important role in facilitating access to justice for the poor, their impact on representation in Tanzania has been very limited. During the course of my fieldwork I did not become aware of any instances of paralegals acting under a power of attorney in Arusha's land courts.

4.5 Conclusion

The act of making a legal claim may be understood as a moment of agency and - in the case of women like Furaha and Elizabeth - resistance against violence and the alienation of land. However, as these women's stories show, the progression of women's claims often depends on the support of other pivotal actors. In Arusha's local communities it is family elders and local leaders such as the *balozi* and *mwenyekiti wa kitongoji* who women will often turn to in the first instance to resolve a dispute over land. This reflects the socially embedded nature of pathways to justice. It also highlights the importance of legal awareness programmes for these key actors as well as women themselves, in order that they may facilitate women's access to justice by using their existing social status to open pathways. In this way, as Koda argues, men become 'allies in feminist struggles' (Koda 2000).

The social and political power of these pivotal actors permeates the legal sphere of the Ward Tribunal, where legal and executive personnel may become part of the social power dynamics of a dispute. Power relations between these actors are manifested in different ways as the dispute progresses. In some cases – such as Furaha's – these power relations can actively assist women who seek justice in local courts. Without her local community leaders Furaha's claim would have lacked sufficient supporting

¹⁹¹ High Court of Tanzania at Mwanza, Civil Case No. 37 of 1988 (Unreported) – reprinted in Peter (1997: 374-376).

evidence. For others – such as Elizabeth – a concentration of power in the hands of an adversary can serve to thwart a woman's claim. These local power dynamics are founded on personal relations between institutional actors involved in a particular dispute. This suggests that agendas for improving access to justice in local courts need to start from the basis of addressing the impact of local power relations on legal processes of disputing.

In terms of structure, one way to reduce the concentration of executive power over ward tribunals would be to locate all levels of land court in the judicial branch of government – a proposal that was advocated by the Shivji Commission (URT 1994: 198). Secondly, in terms of process, the social and legal culture of reconciliation and mediation, which can result in sending cases back home for settlement, needs to take into account the potentially disempowering consequences wherever social power inequalities exist between the actors involved. Thirdly, the lack of funding for ward tribunals has resulted in tribunal members charging disputants high fees to hear their claims. This increases the risk of members being susceptible to accepting bribes from those who can afford it. The obvious solution to this problem is to regulate tribunal fees and remunerate members for their work. However, it was claimed by district council officials I interviewed that the district councils lacked funds to do this.

At the higher levels of court social power relations may shift according to litigants' abilities to negotiate a very different institutional framework. As fora which are socially disembedded from litigants' local communities, this may represent an opportunity for securing justice – particularly where local actors have obstructed claims. However, where litigants lack the skills, knowledge, language or procedural familiarity, these courts appear quite inaccessible. In terms of power relations, legal professionals (both lawyers and adjudicators) possess these skills and knowledge. Their institutional standing means that collectively they rule the roost in these higher levels of court. They therefore have the capacity to reconfigure the power dynamics of disputing between parties within the court forum. This can be transformative for those litigants who have very limited power within their own social sphere. Hence, the act of engaging the services of an advocate is another moment of agency in the progression of a dispute. In practice however, the cost of hiring an advocate and the limited availability of *pro bono*

representation means that often social power inequalities become amplified, because representation is generally only available to those who can afford to pay for it.

Legal NGOs have taken a number of steps to try to make these higher courts more accessible to litigants in person. NGO legal officers will also often try to avoid disputes going to court by offering reconciliation services at their legal aid clinics. This is another effective way in which lawyers can use their social standing and legal expertise to affect the social power dynamics, normative framework and outcome of a dispute. Where disputes do progress to the higher courts, adjudicators will often adopt a flexible approach to the use of the official language of the court and make allowances for litigants' lack of technical legal knowledge. Adjourning a case to deal with points of law by way of written submission gives litigants in person the chance to present their legal arguments in writing and have them drafted by someone with legal knowledge. In practice however, the quality of these documents varies considerably and litigants may not fully understand their contents.

In order to overcome the problems of a shortage of advocates and funds for legal representation, NGOs provide client coaching appointments to enable litigants in person to represent themselves. This can be effective for those litigants who have the confidence, language skills and general knowledge to be able to express themselves in a way that persuades the court. However, it cannot be claimed that a client coaching appointment is an effective substitute for legal representation for litigants who do not already possess many of these skills. Hence, for as long as the practice of higher courts is structured to reflect the language, skills and expertise of legal professionals, there will remain a pressing need for representation under legal aid schemes and independent interpreters to ensure that all litigants are able to fully understand and effectively participate in the court process.

5. Doing justice in women's claims:

Haki and 'equal rights'

5.0 Introduction

This chapter explores the process of justice and decision-making by land tribunals in practice. The Tanzanian notion of justice – or '*haki*' has evolved as a powerful social discourse that is closely associated with freedom and rights – both of the nation and the individual. In order to contextualise legal approaches to doing justice in women's claims, the chapter begins with an overview of the origins of this contemporary idea of justice. In the Tanzanian legal context, normative ideas of justice also include notions of reconciliation and 'natural justice'. These concepts are reinforced through constitutional and statutory frameworks, which further inform adjudicators' approaches to evidence-gathering and judging claims. Using a sample of eleven cases from the Ward Tribunal and DLHT collected during my fieldwork, the chapter explores how adjudicators operating within these complex normative and procedural frameworks are determining women's claims to land in practice.

Summaries of each of the eleven cases are set out as case reports in Appendix F of this thesis. The sample is small and is not purported to be necessarily a representative reflection of the way women's legal claims to land are judged more generally. Nevertheless, important themes and practices are clearly evident in the judgments. In the context of wider fieldwork data and other case analyses in the thesis, the judgments offer insights into the normative and procedural underpinnings of legal decision-making in women's claims. It is argued that, whilst it appears that social practices and judicial attitudes to female land-holding are evolving with current rights discourse, the judgments reveal a disconnect between these developments and an implicit male bias in the gathering and assessment of evidence. It is therefore contended that the tension between local patrilineal customary practices and the principle of equal rights (*haki sawa*) has yet to be fully resolved in the context of women's legal claims to land.

5.1 *Haki* and 'natural justice'

The power of the contemporary Tanzanian discourse of *haki* finds its roots both in the nation's history as an African state that was politically transformed under President

Nyerere, and in the more recent decades of grassroots and civil society campaigning on rights issues. As a moral discourse, it was powerfully expressed in Nyerere's '*Uhuru na Maendeleo*' (Freedom and Development) (Nyerere 1973):

*... For what do we mean when we talk of freedom? First, there is national freedom; that is, the ability of the citizens of Tanzania to determine their own future, and to govern themselves without interference from non-Tanzanians. Second, there is freedom from hunger, disease, and poverty. And third, there is personal freedom for the individual; that is, **his right to live in dignity and equality with all others**,¹⁹² his right to freedom of speech, freedom to participate in the making of all decisions which affect his life, and freedom from arbitrary arrest because he happens to annoy someone in authority – and so on. All these things are aspects of freedom, and the citizens of Tanzania cannot be said to be truly free until all of them are assured. ...*

In Tanzania today, *haki* is a widespread political and popular discourse. For example, it has been incorporated into the names of several civil society rights organisations – *Haki-Ardhi*, *Haki-Elimu*, *Haki-Kazi* and *Haki-Madini* – campaigning on land, education, workers' and mineral rights respectively. *Kiswahili* sayings, such as '*Haki zetu leo*' (Our rights today) are seen printed on women's *kangas*. In 2001 '*Haki*' was the title of the hit song by 'Bongo Flava' (Tanzanian Hip-Hop) artist – Joseph Mbilinyi ('Sugu'), who, in the 2010 elections, was elected to the Tanzanian Parliament as an MP with the leading opposition party CHADEMA (*Chama cha Demokrasia na Maendeleo*).

According to Geertz and Hirsch the socio-linguistic origins of *haki* lie in the Arabic term *haqq*, which in Muslim ideology has three closely related meanings. The first corresponds to 'reality, truth, actuality, fact, God'; the second to 'right, duty, claim, obligation'; and the third to 'fair, valid, proper' (Geertz 1983: 188, Hirsch 1998: 85). In the Tanzanian legal context, the *Kiswahili* term '*haki*' has its own usage independent of Islamic law; for example: '*haki za binadamu*' (human rights); '*haki sawa*' (equal rights); '*nataka haki zangu*' (I want my rights); '*ana haki*' (he/she has a/the right); '*naomba haki itendeke*' (I ask that justice be done). Part of the socio-linguistic significance of *haki* in the Tanzanian legal context has been its capacity to cut across differences between local vernacular jural norms (discussed below), thereby integrating

¹⁹² '*yaani haki yake ya kuishi, akiheshimika sawa na wengine wote*' (Original *Kiswahili* version of Nyerere's speech - bold type is my emphasis).

Tanzanian and *Kiswahili* notions of ‘rights’ and ‘justice’ throughout the country’s statutory legal system.

African and English concepts of ‘natural justice’

An important legacy of Tanzania’s social and political history is the complexity of normative frameworks for doing justice in its plural legal system. In addition to *haki*, there are local African norms of reconciliation, which reflect the social values and approaches to dispute resolution of local communities. As the first anthropologist to study disputes in an African colonial court, Gluckman argued that the approach to dispute settlement of Barotse judges, rooted in the social context of cooperation between kinsmen, amounted to an African notion of ‘natural justice’: ‘It is in this process of achieving reconciliation, while abiding by the law, that I believe we can see most clearly the doctrine of natural justice present in Africa’ (Gluckman 1992: 28, 1955).

Historically legal anthropologists have disagreed over the extent to which the concept of ‘justice’ is universal or capable of translation across cultures. Later African studies of disputing processes by Bohannan (1957) and Gulliver (1963) questioned the existence of concepts of ‘justice’ in jural systems that operated in a fundamentally different way from European legal systems. For example, in the case of the Arusha, Gulliver noted that principles of right behaviour guided the making of claims and dispute settlement in local Arusha conclaves and moots in the late 1950s; however there was no word in the vernacular language that could be translated as ‘justice’ and no such concept existed in Arusha ideology (Gulliver 1963: 241-242). Despite disagreement over the appropriate use of terminology and cross-cultural comparison, a common observation made across all these studies of African dispute resolution – and others – has been the importance of the restoration of peace through reconciliation. Whilst Bohannan and Gulliver did not express it as a concept of ‘justice’, they each observed the significance of reconciliation in Tiv and Arusha dispute resolution respectively.

In his study amongst the Arusha, Gulliver noted that reconciliation was most important in disputes between related persons who had an interest in maintaining or restoring a relationship (Gulliver 1963: 240). In a later ethnography of the Meru, Puritt also wrote that the primary function of Meru traditional ‘courts’ was ‘to restore social order by

reconciling the disputants and not simply by punishing individuals' (Moore and Puritt 1977: 115). In Arusha and Meru society today the task of effecting reconciliation outside the statutory court system still falls to the *laigwenani* and *mshili wa ukoo*. These elders also play an important role in witnessing land allocations and administration of estates. As such, they are poised to play a crucial role both as gatekeepers to statutory fora, in circumstances where they have been unable to bring about reconciliation, and as witnesses in court proceedings.

There is also the English legal concept of 'natural justice' imported through the introduction of the English common law system during the colonial period. In contrast to local African norms of reconciliation, the English concept of 'natural justice' developed from seventeenth and eighteenth century state-centred Enlightenment theories of the social contract and natural rights. Rawls' modern theory of 'justice as fairness' is also based on liberal assumptions of what a rational person would consider just, independent of any vested interests (Rawls 1972). In the context of English law, the notion of 'natural justice' is largely a procedural concept grounded in the principles of due process and the rule of law. Both English and Tanzanian law recognise the central maxims of natural justice as *nemo judex in causa sua potest* ('no one shall be a judge in their own cause' – the rule against bias), *audi alteram partem* ('hear the other side') and *nullum arbitrium sine rationibus* ('no decision without reasons').¹⁹³ In Tanzania this legal concept of natural justice is enshrined in the Constitution, which also requires courts to focus on doing 'substantial justice', rather than being bound by technicalities that defeat justice.¹⁹⁴

5.2 Normative and procedural approaches to doing justice in land courts

Throughout the colonial period, dualism in the Tanzanian court system meant that African and English approaches to doing justice remained relatively distinct. Cotran observes that the British or general courts operated according to English legal principles, and the British administration interfered little with African courts (Cotran 1969: 131). As discussed at 3.3, the unification of the Tanzanian court system was a gradual process which began during the British colonial period and was consolidated

¹⁹³ Article 13(6)(a). See Peter (1997:426-480) and Kijo-Bisimba and Peter (2005:432-467) for an overview of the interpretation of these natural justice principles by the Tanzanian higher courts.

¹⁹⁴ Article 107A(2)(e).

after political independence through the Magistrates Courts Act of 1963. This Act introduced the Primary, District and High Court structure of the present ordinary court system, with lay ‘assessors’ sitting alongside magistrates to inform the process of justice.

The ‘assessor’ system was first introduced during the colonial period, when chiefs presiding over local African courts were assisted by local elders. Moore suggests that the presence of assessors in Tanzanian court hearings from the mid-1920s onwards appeared to stem from colonial and postcolonial administrators’ concerns to ‘inhibit the arbitrariness or corruption of the court holder’ and keep the court ‘impartial and harmonious with local conceptions of justice’ (Moore 1986: 172). In the current land court system established under the Land Acts assessors sit alongside the legally qualified chairpersons in the DLHT, and judges in the High Court Land Division in the case of appeals originating from the ward. This could be seen as a ‘hybrid’ court structure for a plural legal system, designed with the intention of balancing professional English legal approaches to justice with local community notions of justice.

In its recommendations on the structure of the new land court system the Shivji Commission had advocated a prominent role for elders’ participation in the proposed Circuit Land Court that was more akin to the role of a jury than the assessor system. The Commission argued that this would allow fuller participation of the community in the process of adjudication, ‘exposing the professional personnel ... to the values of justice and fairness of the community’ (Shivji 2002: 206, URT 1994: 202). However, the design of the present land court system under the Land Acts from the DLHT upwards was weighted more towards professional English common law justice than the Shivji Commission’s model. For example, in the DLHT:

In reaching decisions the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion.¹⁹⁵

The assessors at Arusha DLHT produce written opinions in English, which are generally two or three pages long. It is not uncommon for two assessors hearing a case to reach different opinions on the merits of a claim, or for DLHT chairpersons to differ

¹⁹⁵ LDCA s.24.

from the opinions of the assessors. One chairperson explained to me that the assessors and chairperson do not discuss the case with each other prior to writing their opinions and judgment on it, except in the event that they need to cross-check their notes of the proceedings. The assessors write their opinions first. The chairperson then writes the judgment after reviewing the file and the opinions of the assessors. In the High Court Land Division a judge is simply required to sit with two assessors to hear appeals from the DLHT that originate from the ward.¹⁹⁶ The judge is not bound by the opinions of the assessors and there is no requirement to give reasons to depart from the assessors' opinions.

By contrast with the higher courts, the Village Land Council and Ward Tribunal are staffed entirely by local elders with no professional legal qualifications. Consequently, their normative approach to doing justice is less legally technical than that of the higher courts. One Ward Tribunal chairperson explained to me that she was afraid when she was appointed chairperson because she did not know the laws:

Even now I don't know the laws but depending on the case before you, you have to use your wisdom (busara) and also rely on the evidence provided by witnesses. Sometimes the case would involve going to inspect an area. If someone has cooked the evidence that's where the truth will be revealed because when we go to that area we use the elders who have been living there for a long time as they must be aware of such land and how it was acquired and how the dispute arose. It will come as a surprise to the person who provides false witnesses when we speak to the elders.

I then asked her what she meant by 'using her wisdom'. She replied:

*If an ordinary person was presented with such facts or evidence how would an ordinary person come to a decision?*¹⁹⁷

Unlike legally qualified adjudicators in the DLHT and higher courts, Ward Tribunal members take on their role without formal legal training. As the chairwoman's explanation suggests, lack of legal training means that members may adopt an approach to their role which relies substantially on their own 'wisdom' acquired through life experience as elders or in other respected official positions within a local community.

¹⁹⁶ LDCA s.39(1).

¹⁹⁷ Contemporaneous translation of a conversation in *Kiswahili* noted in English.

The notion of using ‘wisdom’ also arose in a focus group discussion I conducted with DLHT assessors. Indeed, in *Kiswahili* the roles of Ward Tribunal member and DLHT assessor have the same term – *mzee wa baraza* (literally ‘tribunal elder’) – a social position that is synonymous with wisdom and commands respect. For some, wisdom has a spiritual dimension. At one Ward Tribunal I attended prayers were said by the tribunal members together before beginning each day’s work. The chairperson there explained to me that they did this for God to give them wisdom (using the *Kiswahili* word *hekima*¹⁹⁸ rather than *busara*) whilst they were judging. He added that ‘dark forces’ (*nguvu za giza*) exist, so they prayed to God that those forces would not control their minds and cause them to make a bad decision.

In practice I observed that Ward Tribunal members also work closely with the Ward Tribunal Secretary in formulating their judgments. Secretaries are often more highly educated than other Ward Tribunal members, since WTA requires that a Secretary must be ‘sufficiently literate and educated and capable of satisfactorily discharging the duties of Secretary’.¹⁹⁹ In my observation of deliberations, secretaries would generally take the lead in reading out or summarising the evidence recorded in the proceedings to the tribunal members, who would each have an opportunity to give their opinion on the case. Where members disagreed on the final outcome usually a single opinion was produced which reflected the majority view. In my archival research I occasionally noted judgments where separate opinions of each member were set out in the judgment, with the final decision reflecting the opinion of the majority.

Although WTA stipulates: ‘A Secretary of the Tribunal shall attend all sittings of the Tribunal and record all its proceedings but shall not participate in decision making’,²⁰⁰ in my observation generally secretaries were influential and active players in the deliberation process, even if they did not necessarily ‘vote’ on the final outcome. Some secretaries wrote judgments summarising the evidence and decision in the case in the absence of members, who would then approve them with little or no amendment. The personal opinion of a secretary may therefore be highly influential in the outcome of a case.

¹⁹⁸ *Kiswahili* word of Arabic origin which loosely translates as ‘wisdom’, ‘knowledge’ or ‘judgement’.

¹⁹⁹ WTA s.5(2).

²⁰⁰ WTA s.5(3).

Statutory procedural frameworks for doing justice

These variations in approaches to doing justice at different levels of court are reinforced by statutory frameworks for procedural justice. This has served to preserve some normative differences in judicial approaches, with reconciliation most evident in the lower levels of land court, whilst at the higher levels of court a more legalistic approach to justice prevails. There is little statutory regulation of procedural justice in the Village Land Council and Ward Tribunal, save a broad emphasis on mediation, reconciliation and observance of ‘natural justice’ principles.²⁰¹ Both WTA and LDCA provide that the primary function of each Ward Tribunal is ‘to secure peace and harmony in the area for which it is established’ by mediating the parties to a dispute.²⁰² WTA further provides:

... the Tribunal shall in all proceedings seek to do justice to the parties and to reach a decision which will secure the peaceful and amicable resolution of the dispute, reconciliation of the parties and the furtherance of the social and economic interests of the village or ward as a whole in which the dispute originates.²⁰³

Complementary to this provision LDCA provides:

The Tribunal shall, in performing its function of mediation, have regard to –

- (a) Any customary principles of mediation;
- (b) Natural justice in so far as any customary principles of mediation do not apply;
- (c) Any principles and practices of mediation in which members have received any training.²⁰⁴

VLA sets out a similarly worded tripartite framework for mediating disputes in the Village Land Council.²⁰⁵

These statutory provisions strongly reinforce African norms of dispute resolution described above, and conceptualise justice as a process of peaceful reconciliation. In

²⁰¹ WTA s.16(2) incorporates the first two principles of natural justice outlined above.

²⁰² WTA s.8(1) and LDCA s.13(1).

²⁰³ WTA s.16(1).

²⁰⁴ LDCA s.13(3).

²⁰⁵ VLA s.61(4).

practice however, after an initial exploration of the possibility of mediation, I observed that quite often Arusha's ward tribunals would proceed to hear cases under their compulsive jurisdiction.²⁰⁶ It was less common for mediation in land cases to take place within the tribunals. Some cases were sent back home for settlement. Once the Ward Tribunal's compulsive jurisdiction is invoked there are no specific regulations as to rules of evidence or procedure for hearings,²⁰⁷ meaning that doing justice relies substantially on the discretion of members of the individual tribunal. WTA provides:

- (1) The Tribunal shall not be bound by any rules of evidence or procedure applicable to any court.
- (2) The Tribunal shall, subject to the provisions of this Act, regulate its own procedure.
- (3) In the exercise of its functions under this Act the Tribunal shall have power to hear statements of witnesses produced by parties to a complaint, and to examine any relevant document produced by any party.²⁰⁸

The statutory priority of reconciliation which is vested in the Village Land Council and Ward Tribunal is absent from provisions regulating procedure in the DLHT and the High Court Land Division. These courts are subject to constitutionally enshrined principles of natural justice, and are additionally required to follow common law civil procedure. Chipeta notes that the history of Tanzanian civil procedure law finds its roots in English civil procedure.²⁰⁹ Both the DLHT and High Court are bound by the provisions of the Evidence Act of 1967²¹⁰ and Tanzania's Civil Procedure Code, which provides a comprehensive framework for the conduct of civil litigation.²¹¹ However, as with the Ward Tribunal LDCA affords the DLHT and High Court Land Division wide discretion in practice in the regulation of procedure and evidence:

²⁰⁶ WTA s.8(2) and LDCA s.13(4).

²⁰⁷ Save that the Customary Law (Limitation of Proceedings) Rules 1964 apply to proceedings in the Ward Tribunal in the exercise of its compulsive jurisdiction (LDCA s.52(1)).

²⁰⁸ WTA s.15.

²⁰⁹ Historically this was both directly through the Reception Clause in the Tanganyika Order in Council 1920, and circuitously via the Indian Code of Civil Procedure (Act No. 5 of 1908), which was applied in Tanzania via the Indian Acts (Application) Ordinance of 1920 until the coming into force of the Tanzanian Civil Procedure Code on 1.1.67 (Chipeta 2002: xxiv).

²¹⁰ (Act No. 6 of 1967) Cap. 6 R.E. 2002.

²¹¹ LDCA s.51. The Law of Limitation Act (Act No. 10 of 1971) Cap. 89 R.E. 2002 also applies to proceedings in the DLHT and High Court (LDCA s.52(2)).

- (a) Subject to regulations made under section 49 may accept such evidence as is pertinent and such proof as appears to be worthy of belief, according to the value thereof and notwithstanding any other law relating to the adduction and reception of evidence;
- (b) Shall not be required to comply or conform with the provisions of any rule of practice or procedure otherwise generally applicable in proceedings in the appellate or revisional court, but may apply any such rule where it considers the application thereof would be advantageous to the exercise of such jurisdiction ...²¹²

Specific procedures for DLHT hearings are contained in both LDCA and the DLHT Regulations of 2003. These include hearing cases in the absence of a party and/or their advocate,²¹³ and some very brief provisions on the conduct of hearings themselves.²¹⁴

So far as procedural justice is concerned then, statute affords land courts – particularly the lower levels of land court – quite broad discretion as to the conduct of hearings, admission and evaluation of evidence. These broad procedural frameworks exist within overarching normative frameworks of reconciliation and common law approaches to justice. For cases heard in the Ward Tribunal, such broad discretion makes it difficult for litigants to successfully challenge a tribunal’s approach to procedural justice on appeal, except in cases where it can be shown that the principles of natural justice enshrined in the Constitution and WTA have not been followed.

5.3 Gathering evidence

In practice, evidence-gathering at the substantive hearing stage in both the Ward Tribunal and DLHT is typically of three kinds: witness testimony, documentary evidence and a site visit. This section explores the principles that appear to underlie and inform the courts’ approaches to these various kinds of evidence-gathering and the implications this may have for women’s claims to land.

Witness testimony

Both the Ward Tribunal and DLHT attach significant importance to the oral evidence of witnesses, particularly in cases involving unregistered land where there is no

²¹² LDCA s.51(1).

²¹³ DLHT Regulations paras. 11 and 13.

²¹⁴ DLHT Regulations paras. 12 and 14.

documentary evidence of title. This appears to stem from the fact that customary practices of allocation and disposition of land usually involve a number of family members and neighbours as witnesses. As one Ward Tribunal member put it: '*Because we are dealing with land issues and things which are seen, an oral claim for the claimant is not enough. There must be another witness.*'²¹⁵ The choice of witnesses is a matter for the parties; although in land disputes involving family or neighbours parties would typically rely on the evidence of family and clan elders as key witnesses at the tribunal hearing itself. In some cases I observed that Ward Tribunal members would also call further witnesses to the tribunal of their own motion where it appeared that having heard the evidence of both parties' witnesses, material issues remained unresolved.

In the Ward Tribunal there are no statutory rules concerning how evidence must be heard - beyond the constitutionally enshrined natural justice principle of *audi alteram partem*. Generally ward tribunals allow parties to give their own oral narrative account, largely uninterrupted, and call witnesses to give evidence and be asked questions by all parties and tribunal members. However sometimes ward tribunals use their discretion to impose restrictions on oral testimony and cross-examination. In one case where a female claimant had written a simple one sentence letter in support of her claim, I observed the Ward Tribunal members proceed to hear a full narrative from the respondent, but refuse to allow the claimant to expand on her written claim in oral evidence. Instead they told her that what she had written in her letter was her claim and that what she wanted to say could be said through her witnesses.

At another Ward Tribunal, in one case members restricted questions in cross-examination by each of the parties to two questions per witness, in what appeared to be an attempt to focus the parties' questioning on the issues to be determined. At a third tribunal, in a full day of oral evidence neither party was invited to ask questions after each witness had given evidence, with only the tribunal members asking clarifying questions. However, during the respondent's case the claimant asserted his right to cross-examine the respondent's witnesses: '*nafikiri ninahaki*' ('I think I have the right'), to the dismay of the respondent, who, it appeared had not been aware that he had also had a right to cross-examine the claimant's witnesses.

²¹⁵ Contemporaneous translation from *Kiswahili* noted in English.

Complaints about the fairness of procedures for hearing evidence are a common ground of appeal to the DLHT. However, due to the wide procedural discretion afforded to ward tribunals the DLHT will consider whether the complaining party's case was heard fairly in quite general terms. In a focus group discussion²¹⁶ I explored DLHT assessors' approaches to questioning and evaluating witness evidence. One assessor explained:

Assessor 1 (female): *If a case comes from the Ward Tribunal and one side complains that they were not given time to be listened to and the other side says he or she was given time then we look at the evidence to see were there witnesses on the other side or not? If there were we decide that the other side is stating wrong. If it is true that he or she wasn't given time to be listened to then the tribunal has a big opportunity to say that this kind of case must be re-heard at the Ward Tribunal.*

During my observations at the DLHT hearings I noted that each party was routinely given the right to give oral evidence, call witnesses, cross-examine and be cross-examined. Where parties were represented, advocates would tend to take their client and witnesses through their evidence-in-chief by asking a series of questions, rather than leaving the witnesses to give unrestricted narrative accounts. Many litigants in person struggled to frame or ask many questions of witnesses. One chairperson's approach in this situation would be to hold up a piece of paper with a large question mark on it and tell the person to 'liza swali!' (ask a question!). Two assessors described their own methods for questioning witnesses and assessing the credibility of their evidence:

Assessor 2 (male): *If there are two witnesses on each side and we hear the witness of A, we weigh what they have said and compare what they have said with what A says in submission. That's where we have to be careful. A might say something but [their] witness might not talk about it. In cross-examination they might stammer and not be sure. That's where we have doubt and might give the benefit to the other side. Some witnesses are trained in what to say. Sometimes we try to ask tricky questions to confuse them and sometimes they enter into the trap.*

Assessor 3 (male): *When you are cross-examining any of the witnesses you look directly at their eyes and ask questions. If they are telling the truth they'll look directly at you and won't tremble, but if she's giving false information at times she'll tremble and avoid your face.*

²¹⁶ The focus group discussion was conducted and noted in English.

Since courts often attach significance to confident and corroborated oral testimony there are evident risks of injustice for litigants in person who struggle to ask questions and establish their case through adversarial legal processes. This may be made worse where adjudicators do not take the time to explore witness testimony through their own questions, intimidate witnesses (whether intentionally or inadvertently) or actively restrict parties from giving evidence or asking questions. This compounds the challenges already faced by litigants who may be afraid or ignorant of court procedures, from articulating their case or asking important, relevant questions. Consequently, there is a real possibility that a party's oral evidence may be left incomplete or lacking in aspects that adjudicators consider important for proving a case, such as corroboration of particular facts by witnesses.

Women who are unused to speaking for themselves and making claims in fora dominated by male elders or professionals are at an obvious disadvantage in this respect. Male domination in ward tribunals was most noticeable at the rural ward tribunals of Meru Rural and Arusha Plains. The hearing room at Meru Rural was arranged with benches lining three of the four walls of the room. Tribunal members sat behind a desk on the fourth side of the room and parties and witnesses were required to stand in the centre of the room facing towards the tribunal members. On any hearing day the benches would be filled with around twenty or so men – whether parties, witnesses or general observers. It was rare to see another woman inside the tribunal apart from the sole woman tribunal member and myself, and land claims brought by women were also uncommon. During the two months that I spent at Meru Rural, there were no women claimants in land cases and only one female witness appeared before the tribunal – a mother in a land dispute between brothers.

At Arusha Plains Ward Tribunal there were more cases involving women litigants and witnesses. At this tribunal parties and witnesses were also required to stand in the centre of the much smaller hearing room to give their evidence. The gendered divide between male and female court users was most noticeable outside the building. Women claimants would often sit some distance away with their heads covered waiting for their cases to be called, whilst male parties and witnesses tended to wait much closer to the tribunal building. Both my male and female research assistants at Arusha Plains (who were themselves Arusha and Maasai) commented to me that the women claimants and

witnesses we observed often struggled in the way they gave evidence and asked questions.

Documentation

Documents such as minutes of clan meetings, land registration documents or sale contracts are often produced in land tribunals either on the initiative of a party or at the request of the tribunal. In disputes concerning unregistered land, minutes of clan meetings are considered particularly significant, since they may be the only written record of allocation of a piece of land. One DLHT assessor explained:

Assessor 2 (male): We normally insist or ask them: was there any clan meeting to say that things should be done like this? We look at clan meeting minutes taking that into consideration. Clan meetings are very important in helping us to decide especially when the claimant and respondent are blood brothers.

One potential problem for women claimants is that clan meeting minutes, sale contracts and land registration documents are typically produced through processes which have a strong male gender bias. Clan meetings are attended and discussions dominated by male elders. Buying, selling and titling of land have traditionally been regarded as male activities. One Arusha District Land Officer explained to me that in his experience, registration of customary rights of occupancy in the name of a woman was very rare in a patrilineal society where families wanted the name to be maintained with the land. He had found registration in joint names of spouses more common for granted rights of occupancy, but it was not unusual for an educated woman to attend his offices and for traditional reasons be prepared to leave the decision on title up to her husband.

Despite this implicit male gender bias, occasionally women do produce evidence of title in support of their claims. In one such case at the DLHT a woman successfully claimed against a village council that had taken several acres of her land for road-building without paying her compensation. The woman proved that her land had been encroached upon by producing village meeting minutes and a certificate of ownership and registration of title. The significance attached to documentation may equally however, create particular difficulties for women claimants in the context of personal relationships where money, land and personal property transactions are conducted on the basis of trust.

Litigants sometimes attempt to rely upon forged documents or poor quality photocopies of documents produced in evidence by a person other than the maker of the document. Advocates are alert to this practice and are invariably quick to object to such documents being admitted as evidence in the DLHT and High Court. However, in practice a DLHT chairperson will often admit such a document onto the court record ‘for identification purposes’ only. Unbound by formal rules of procedure on evidence, ward tribunals have discretion to admit or refuse such evidence as they think appropriate. Authenticity or evidential weight to be attached to documents will then be considered in the final assessment of all the evidence.

Tribunals are alert to the issue of forgeries; however, documents of questionable authenticity are sometimes given evidential weight by tribunals. In one DLHT case concerning breach of a sale agreement, the claimant’s case relied substantially on a photocopy of clan meeting minutes tendered by the claimant together with a copy of the sale agreement itself. The case was heard *ex parte* and the documentary evidence was therefore left unchallenged. No one from the clan meeting gave evidence at the hearing to confirm the authenticity of the minutes. When I later examined the minutes and sale agreement there appeared to be several inconsistencies in the signatures and thumbprints of persons whose names appeared in both documents. Despite initially admitting the clan meeting minutes ‘for identification purposes only’ the chairperson gave conclusive weight to the minutes as evidence of clan consent to the sale in the judgment.

In the execution proceedings which followed the tribunal ordered forceful eviction of the respondent and demolition of the houses on the land. After the judgment had been executed it subsequently transpired that the land was occupied by a woman who had been oblivious to the fact that the respondent – who was in fact the family guardian – had sold her land. The sale had taken place without her knowledge or consent. Indeed, the woman’s name appeared on neither the meeting minutes nor the sale agreement. The meeting minutes stated that the woman had been occupying the land and therefore the respondent had been ordered by the clan to build another house for her on an alternative plot. Despite this, an order for demolition of the houses was made.

Site visits

Ward tribunals routinely conduct site visits to the disputed land. Such visits are often essential in rural and unplanned urban areas where land is unregistered and so claimed boundaries to the land must be verified by those who witnessed allocations and dispositions in the past. A site visit typically begins with tribunal members identifying the names of occupiers of neighbouring plots and any physical markers defining the boundaries to the land. The site is then paced out by the tribunal members, usually accompanied by the local *balozi* or *mwenyekiti wa kitongoji* and any permanent crops and buildings are noted. I observed the dynamics of a Ward Tribunal site visit to be quite informal, with tribunal members discussing the case with local leaders and elders who were present at the scene. The local *mwenyekiti wa kitongoji* or *balozi* would play a collaborative role in the fact-finding process. On some visits I attended, these discussions were recorded as evidence in the record of the proceedings. In other cases such discussions would be informal and left off the tribunal record.

The following extract from my field diary describes one Ward Tribunal site visit I attended and illustrates the roles played by the various actors present at the scene. The *mwenyekiti wa kitongoji* in this case was a familiar face at the Ward Tribunal, in this and other cases involving parties living within his *kitongoji*:

It's a hot day for a site visit. The secretary tells me that the tribunal members are going there because they want to find out the size and boundaries of the land. The tribunal charters a daladala and the tribunal members, parties and others interested in the case all pile in. The land in question is in the next village. On the way to the site we stop at a local bar for everyone to get sodas. The daladala then winds its way over rough and dusty ground to the site. It's at the foot of one of the small hills that characterise the landscape in this area. The land is dry with little vegetation save for some thorn trees. Further up the hill and just on the other side of the boundary of the plot are some mud houses partially obscured by trees - a flat roofed house and a round house. Passersby on foot and on bicycles stop to look at the scene. At one point I count around 18 people at the site and I ask the secretary who they all are. Apart from the parties and witnesses from their family, I am told there is the mwenyekiti wa kitongoji and the rest are neighbours and villagers who have taken an interest.

The plot is large and as the tribunal chairperson, secretary and mwenyekiti wa kitongoji begin to pace it out one of the witnesses – a family elder - tries to interfere. The Ward Tribunal chairperson tells him to keep quiet - the law is dealing with this now. Stop trying to interfere with this mama.

It's the heat of the day and whilst waiting for the chairperson, secretary and mwenyekiti wa kitongoji to return from their pacing out of the land everyone else struggles to get a bit of shade sitting and chatting under the thorn trees. Eventually they return and the neighbours present are asked to confirm whether the boundaries identified are correct. Before we leave the mwenyekiti wa kitongoji and chairperson address everyone about the importance of maintaining peace while the proceedings in the tribunal are ongoing.

The DLHT also conducts site visits to the disputed land if it is considered necessary in order to determine factual issues in a case. Unlike Ward Tribunal site visits however, when the DLHT goes on location it will be to a community and amongst local people whom the tribunal members are unlikely to know. This raises challenges in terms of knowing which neighbours, elders or other witnesses attending the scene would be able to assist rather than mislead the tribunal. One assessor explained to me that in order to overcome this problem when they go on a site visit they ask three or four neighbours 'Who here is prepared to tell us the truth?' The tribunal members then talk privately with those who are willing, in order to find out about the land, who bought it and from whom. I observed this to be the case on a site visit to an urban plot in an unplanned area of Arusha Municipality:

At 10 a.m. we set off in a land cruiser on our site visit. The driver and DLHT chairperson sit in the front. I sit in the seats behind them with one assessor and the clerk – equipped with tape measure for measuring the plot. In the back of the land cruiser sit the parties directly involved in today's cases.

The property that we visit is situated in an unplanned area of Arusha Municipality, along unsurfaced side roads. We stand outside the property amongst the small crowd of people that have gathered there. The chairperson makes introductions and asks me, the clerk and assessor to do the same. I notice two men in particular - the appellant and respondent in the case. We are invited in to look at the property and the assessor draws a sketch map, which will later be placed on the record as an official drawing of the property. The houses in this road are of rough

brick and cement construction with corrugated iron roofs, just a few metres in length and width and tightly packed. The plots are not much bigger than the houses that they stand on. There is a small yard on one side of the house where there are a few sugar cane plants growing, buckets of water and a small charcoal stove that is lit, with beans in an ungo basket ready for cooking.

At the front of the house quite a crowd is gathering and the chairperson and assessor sit on a stone step opposite the property in question to decide who is going to give witness evidence. The chairperson selects them quickly. Then one by one the witnesses are taken through to the small yard to give their evidence out of earshot. The tribunal clerk takes an oath from the first witness. There are just the five of us present. The first witness is a balozi, who says that he has held that position from 1982 to date. He speaks in a very low voice which is barely audible over the rustling of sugar cane and cockerel crowing nearby. We are all standing except for the chairperson who is sat on the step taking notes. A second witness gives evidence.

I count up the number of people who have gathered outside the property – about 22 including nine women. None of them are asked to give evidence, although the appellant seems to want a woman seated nearby in a green kanga to be asked questions. The chairperson and assessor are reluctant but ask her a couple of questions in front of everyone, which they do not make notes on. They do not consider that the personal information the appellant seems to want the tribunal to ask her about is relevant to the issues in the case. Then we all get into the land cruiser to leave. The appellant starts to get angry shouting through the driver's window across to the respondent on the other side. We leave.

As both field diary extracts illustrate, whilst there are differences in approach to site visits of the ward tribunals and DLHT, in each case the *balozi* or *mwenyekiti wa kitongoji* is often present in their capacity as a local leader claiming knowledge of the dispute. In some cases, such as Furaha's case explored in chapter 4, the evidence of local leaders present at the site visit may prove determinative in a tribunal's assessment of a claim.

It is readily apparent that all three types of evidence – oral testimony, documentation, and information gathering at site visits – are produced substantially through male dominated social processes and by male authority figures within a family and community. In the case of inherited family land, family elders and local leaders are

pivotal actors in the production of evidence for proving allocation of land. Litigants who lack documentation in support of their claims must find allies amongst these elders and local leaders as witnesses. For women, this means that any gender barriers to recognition of their interests in land must be overcome with these key actors, if they are to gain their support as witnesses.

5.4 Negotiating customary law and equal rights

The land disputes explored in this thesis clearly demonstrate the social significance of local patrilineal customary practices in the context of inheritance and marriage. Under Tanzania's legal centralist model of normative pluralism, the Land Acts require land courts to apply customary law,²¹⁷ with the caveat that any rules of customary law denying women lawful access to ownership, occupation or use of land be held as void.²¹⁸ This section analyses how land courts are negotiating customary law and equal rights in judging women's claims to land in practice.

LA specifies that, in addition to the Constitution and relevant statute, all courts determining land disputes are required to apply the 'customary laws of Tanzania' and the substance of the common law and doctrines of equity from other Commonwealth countries which appear relevant to the circumstances of Tanzania.²¹⁹ The obligation to apply customary law is reiterated in LDCA:

- (1) In exercise of its Customary Law jurisdiction, a Ward Tribunal shall apply the Customary Law prevailing within its local jurisdiction ...
- (2) In the exercise of their respective jurisdictions, the High Court and the District Land and Housing Tribunals shall not refuse to recognize any rule of Customary Law on the grounds that it has not been established by evidence but may accept any statement thereof which appears to it to be worthy of belief which is contained in the record of proceedings or from any other source which appears to be credible or may take judicial notice thereof.²²⁰

These statutes taken together give land courts wide discretion both as to the sources of customary law they may use in decision-making, and their interpretation of the

²¹⁷ LA s.180(1), LDCA s.50.

²¹⁸ VLA s.20(2).

²¹⁹ LA s.180(1).

²²⁰ LDCA s.50.

substantive content of customary law itself. Such discretion is subject to observing constitutional principles, statutory requirements in the Land Acts and the fundamental principles of the Land Policy. So far as women's claims to land are concerned, the Land Acts have effectively set the courts an agenda to interpret customary law purposively in a way which is progressive in recognising women's equal land rights.

LA also sets the courts a clear objective to develop a body of Tanzanian common law on land matters:

... it shall be the duty of all courts in interpreting and applying this Act and all other laws relating to land in Tanzania to use their best endeavours to create a common law of Tanzania applicable in equal measure to all land and to this end the courts shall apply a purposive interpretation to this Act and shall at all times be guided by the fundamental principles of land policy set out in section 3.²²¹

To date, this is an objective yet to be realised at the level of High Court Land Division and Court of Appeal, where few judgments interpreting the Land Acts have been produced since the establishment of the land court system. Those that have been produced are not systematically disseminated or reported. As at January 2010 the Tanganyika Law Reports – described by Peter as ‘a good example of poor and almost useless law reporting if not digesting’ (Peter and Kijo-Bisimba 2007: 253) was up-to-date to the 1999 volume, which predates the coming into force of the Land Acts in May 2001. As at 2012 the Law Reports had been brought up to date to the 2006 volume, although I am told that many Tanzanian advocates do not have ready access to the more recent volumes. During my fieldwork year, lawyers and DLHT chairpersons seeking to make use of case law were relying either on decisions which predated the Land Acts or unreported Tanzanian decisions that they had been able to obtain through professional networks. As a consequence of the problems with law reporting and the case backlog in the High Court Land Division, a body of reported higher court precedent on the Land Acts has yet to develop.

Cases from the Court of Appeal and High Court pre-dating the Land Acts demonstrate the higher courts' approach to interpreting and giving effect to customary law in land and inheritance matters. In a series of cases noted by Peter, the Court of Appeal

²²¹ LA s.180(3).

adopted a conservative approach, which recognises customary law, including gender discriminatory customary law, in its decision-making. In a 1984 case the Court of Appeal held: '*The customary laws of this country have the same status in our courts as any other law, subject to the Constitution and to any statutory law that may provide to the contrary*'.²²² In an analysis of decisions on customary land tenure predating the Land Acts, Fimbo observes that the Court of Appeal has relied heavily on printed texts (Cory and Hartnoll 1945 (Haya law),²²³ Anderson 1955 (Islamic law),²²⁴ Cory 1955 (Nyamwezi law),²²⁵ James and Fimbo 1973 (Customary land law)²²⁶) 'as if they were legislation' in finding various aspects of customary law (Fimbo 2007). Save for James and Fimbo, these texts were written by Europeans during the colonial period and reflect the authors' understandings of customary and Islamic law at that time. This approach to finding and interpreting customary law presents an interesting contrast with the South African Constitutional Court,²²⁷ which sees living customary law as intrinsically adaptable and capable of evolving under the new constitutional legal order.

The High Court's approach to negotiating customary law and equality provisions in the Constitution has been mixed. As discussed at 2.4 of this thesis, in the leading 1989 case of *Ephrahim v Pastory and Another*, the activist judge Mwalusanya declared Rule 20 of CLDO No. 4 on Inheritance to be discriminatory and inconsistent with Article 13(4) of the Constitution. However, more recently the High Court has refused to strike out other discriminatory provisions of the CLDOs on constitutional grounds. In the 2005 test case of *Elizabeth Stephen and Salome Charles*²²⁸ initiated by a group of Tanzanian activist lawyers, two widows of customary marriages had each been denied by their

²²² *Maagwi Kimito v Gibeno Werema* Court of Appeal of Tanzania, Civil Appeal No. 20 of 1984 (Unreported). See also *Rukuba Nteme v Bi. Jalia Hassan and Another* Court of Appeal of Tanzania, Civil Case No. 19 of 1986 (Unreported); *Haji Athumani Issa v Rweutama Mituta* Court of Appeal of Tanzania, Civil Application No. 9 of 1988 (Unreported) - all cited in Peter (1997: 382-383).

²²³ *Boniface Muhigi v Philemon Muhigi* [1967] HCD No. 231; *Deocras Lutabana v Deus Kashaga* Court of Appeal of Tanzania at Mwanza, Civil Appeal No. 1 of 1981, [1981] TLR 122.

²²⁴ *Matei Kijuu v Omari Salehe* [1961] Dig. 206.

²²⁵ *Shija Kadasa v Mahuyi Kadasa* [1961] Dig. 208.

²²⁶ *Maagwi Kimito v Gibeno Werema* Court of Appeal of Tanzania, Civil Appeal No. 20 of 1984, [1985] TLR 132; *Deocras Lutabana v Deus Kashaga*.

²²⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744, 1996 (10) BCLR 1253; *Shilubana and Others v Nwamitwa and Other* 2009 (2) SA 66 (CC); *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 10. For a discussion of the South African Constitutional Court's recognition of living customary law see Himonga (2011).

²²⁸ *Elizabeth Stephen & Salome Charles v The Attorney General* High Court of Tanzania at Dar es Salaam Misc. Civil Cause 82 of 2005 (Unreported). Electronic copy held by author.

husbands' relatives the right to inherit their husbands' properties according to customary law. The High Court declined to declare or strike out as unconstitutional discriminatory paragraphs of CLDO No. 4 on Rules of Inheritance. Its reasoning is significant in illuminating the High Court's approach to customary law and gender equality:

After agreeing that the impugned paragraphs are discriminatory in more ways than one we have thought whether it will be in the best interest to give the orders prayed for. In reaching our decision, we are guided by a number of factors. We are aware that what the Order did was to declare and recognize some of the customs of the people which were there for many years before. These customs evolve and change with time, a process that does not end, nor can it be ended.

In some matrilineal societies today, uncles are running away from schooling their sister's children in favour of the children's biological fathers. In the Wasukuma tribe fifteen years ago the daughter of your aunt was called aunt number two. Now, she is called a cousin like in other tribes. There are tribes where at one time, cousins could marry, a custom now dead and buried. The wave of inter-marriages between tribes and races has dealt a serious blow to some and in fact, many, of our customs. A good number of these are dead and others are dying.

What we are saying is this. It is impossible to effect customary change by judicial pronouncements. A legal decision must be able to take immediate effect, unless overturned by a higher court. For customs and customary law, it would be dangerous and may create chaos if courts were to make judicial pronouncements on their Constitutionality. This will be opening the Pandora's box, with all seemingly discriminative customs from our 120 tribes plus following the same path.

The legislature saw this danger and in its wisdom, came up with section 12 of the Judicature and Application of Laws Act [cap. 358 R.E. 2002] ... [judgment cites the section, which provides a formal mechanism for the declaration and modification of customary law by District Councils.]

We are of the considered opinion that the provisions of the foregoing section would provide the best avenue to remedy the situation now complained of. The advantage of this avenue is that it will start from the

*grass roots where any custom is felt and a decision will be acceptable and implementable by the majority.*²²⁹

The judgment recognises that customary practices are living and evolving and sees the task of changing the codified CLDOs as a matter for local councils, rather than the judiciary. This appears to assume that the mechanism under JALA is effective for harmonising the codified CLDO Rules with social change. In recent years the Law Reform Commission of Tanzania has been engaged in a process of reviewing the CLDOs. The Commission has noted that in practice none of the district councils of Tanzania have used the provisions in JALA to conduct periodic studies of customary laws within their respective areas (Law Reform Commission of Tanzania undated). This suggests that there is a lack of momentum from ‘the grassroots majority’ to change the CLDOs. It is therefore arguable that the current system under JALA serves to reinforce the status quo, since it does nothing to address social power relations that militate against amending local laws to promote gender equality. It also calls into question the extent to which the CLDOs and other texts on customary law are reliable source materials for ascertaining contemporary customary practices in the higher courts.

Fimbo (2007) notes that, by contrast with the higher courts, the primary courts make little use of texts and tend to rely on assessors in establishing the content of customary law. In my own fieldwork I found little evidence to suggest that land courts in Arusha referred to texts or the CLDOs in their interpretation of customary practices either. Instead, Ward Tribunal members and DLHT chairpersons and assessors relied on their own knowledge of unwritten living customary practices as members of the local community. I explored the issue of giving effect to ‘customary law’ and principles of gender equality in various conversations and interviews with adjudicators during the course of my fieldwork. What follows are some of the most notable opinions which were expressed to me on the subject:²³⁰

High Court Judge (female): *I don’t consider complexity of laws is a real issue. If you unpack customary law per se it is not there. There is living*

²²⁹ The claimants appealed. In December 2010 The Court of Appeal struck out the appeal as incompetent for being accompanied by a defective drawn order which was wrongly dated (‘*Court of Appeal rejects widows’ appeal*’ – Daily News (Tanzania) 28.12.10).

²³⁰ Conversations with the High Court judge and DLHT members were in English. The comments of Ward Tribunal members are a contemporaneous English translation from *Kiswahili* unless otherwise stated.

customary law or day to day practice under the name of customary law. [On using the CLDOs in her judgments]: There are a lot of things that influence decision-makers, including customs. In our decisions currently we don't really depend on Customary Law Declaration Orders. I don't know if I have ever used them. I have reversed decisions that are discriminatory. When considering the justice of the case in most cases I refer to cases decided in the locality and what I think is the justice of the case.

DLHT chairperson (female): *Customary law is used in the distribution of land but if customary law is repugnant to natural justice we don't follow it. We resort to normal laws. Women did not have access to land but as time went on that slowly started to change. A lot of people now are raising that women have a right to own land. Sometimes we'll uphold tradition if it's not repugnant to natural justice. After taking the evidence, the assessors will tell you what the custom says. If you depart from it you have to say why, for example because it is departing from the law. If you don't have any case law then you use commonsense.*

DLHT assessor (male): *We consider customary law. Some tribes like Maasai are really strict on customary law and regulations which are recognised by the government and judiciary system of Tanzania. Two brothers might be quarrelling over a piece of land. According to tradition who is supposed to inherit? The last born boy inherits the house and surrounding land. That also helps us to reach an assessment.*

Ward Tribunal secretary (male): *You can find it [i.e. customary law] in the village... [Customary law] is not a written thing. People in rural areas that is their stand... Customary law, tradition, custom – it's the same... These customary laws have no chance in this world. I hate that law because according to the Constitution everyone has rights to possess the land. Women are our mothers. Without them we couldn't be here... In our judgment [refers to a case in which the Ward Tribunal upheld a woman's right to land] we quoted words from the Law of Marriage Act.²³¹*

Ward Tribunal member (female) (from the same tribunal as the secretary above): *When reflecting on her own personal experience she expressed to me with great anger that customary law 'oppresses' (kugandamiza) women.*

Ward Tribunal member (male): *What we mostly do first is reconcile or mediate the parties. At the end there will still be love. If that fails that's when we'll use the laws.*

²³¹ Conversation in English.

Ward Tribunal member (female): *Using traditions and customs might not always be right and since the tribunal is there to bring people to settle disputes it might not be doing justice to some parties if it uses traditions and customs always. Now there are rights of women to land. Right now women have got equal rights to land as men but if you have such a case before you of a woman claiming rights to land if you use such traditions and customs you will deny some rights.*

Ward Tribunal secretary (male) [on his understanding of ‘customary law’]: *The rules or laws that are laid down by our ancestors on how land will be distributed for that clan – maybe from father to son. Before the customary law did not give any right to women to own land but now the laws require a woman to be given such right and even favour women’s rights to land... The customary law about women being able to inherit land has itself changed. Even though that’s the reality now there are still some elders who are old fashioned and don’t want to adapt so there are still some disputes.*

Ward Tribunal member (female): *It’s the land laws that have brought about the change because there are still some to date who have a patrilineal mode of life who claim women can’t own land. Now it’s the law which binds them.*

Ward Tribunal member (female): *We rely on customary law but when we reach a point and find it’s difficult to rely on it we use land law... Mostly if it’s discriminatory to the claimant we’ll use the land laws.*

The most striking feature of these opinions is the consensus of approach across different levels of court to customary law and equal rights in practice. Expressing views which perhaps have more in common with the South African Constitutional Court than the Tanzanian higher courts in general, they indicate a willingness to reinterpret or disregard customary practices that are perceived as gender discriminatory. One Village Land Council chairwoman explained to me that attitudes to patrilineal inheritance practices were changing in Arusha: *‘Serikali imepitisha haki sawa ... Haki sawa kwa jinsia zote ... Watoto wa kiume na wa kike haki sawa’* (The government has passed equal rights [law] ... Everyone has equal rights ... Sons and daughters have equal rights).

This equality and ‘equal rights’ (*haki sawa*) discourse appears in many judgments concerning female inheritance of land. There are several examples in Appendix F of this thesis. For example, in case 1 the Ward Tribunal refers to gender equality

principles in the Land Acts in upholding a daughter's claim to inherit her father's *shamba* and redeem the *rehani* on it:

All the members of the tribunal have unanimously decided that in accordance with the Land Laws of 1999-2001 the wife and husband have equal RIGHTS (HAKI sawa)²³² to own (kumiliki) land ...

In case 2, both the Ward Tribunal and DLHT on appeal applied statutory equality provisions as the basis of their reasoning for restoring land to daughters that had been alienated from them by other members of the family:

Considering that these are orphans without their father. Also considering that they are girls who are now recognized by the laws and the Nation in general as the same as boys. The tribunal disclaim all the statements by [the respondent's] children that girls do not have inheritance. (Ward Tribunal judgment)²³³

... the appellant and his allies who want to grab the land from [the respondents] are still overwhelmed by old age concept when to many societies. It was believed that a woman has no right to inherit a land, But to date things have changed, even our laws have been changed to consider the women's rights of ownership over land is equally the same as that of the men, Vide The Land Act 1999 No 4, on s.3(2). (DLHT judgment)

There are further examples of equality and rights discourse in cases 3 and 4 where the women claimants also made successful claims concerning inherited land. At first glance, these judgments appear quite transformative in restoring land to women which other family members had tried to deny them. However, in all four of these cases, the women had the support of key family or community leaders in bringing their legal claims. In cases 1 and 2, land had been given to daughters because the deceased father had no sons. This was also the situation in Furaha's claim, discussed in chapter 4, and is a recognised customary practice within Arusha's local patrilineal tribes. In cases 3 and 4 the family elders had supported parental discretion in allocating land to daughters as well as sons. Therefore in fact, whilst these equality statements may indeed reflect the tribunals' normative standpoint, the judgments as a whole reaffirm the decisions of

²³² Capitalisation is the tribunal's own.

²³³ See Appendix F for the original *Kiswahili* version.

important social actors involved in the dispute. Seen in this light, the judgments do not really challenge the existing social status quo, but rather uphold it.

Further support for this contention is to be found in the way tribunals approach claims between spouses concerning inherited family land. In these cases discourses of equal rights are much less evident. One explanation for this may be that in local patrilineal systems wives and daughters are seen as having different kinds of interests in inherited land, and wider family members must customarily be consulted on dispositions. The role of family elders and women's agency in objecting to dispositions of inherited family land is explored in detail in the extended case study in chapter 6. A comparison of cases 7 and 8 in Appendix F neatly illustrates the distinction that is often made between inherited and self-acquired land and the implications this may have for women's agency. Both cases were decided by the same DLHT chairperson. The wife in case 7 was unsuccessful in her claim, which concerned a plot of inherited family land. By contrast, the wife in case 8 was successful in both the Ward Tribunal and DLHT, where the land in question had been purchased during the marriage.

In case 7 an inherited family *shamba* was mortgaged without the wife's consent. The husband was unable to repay the mortgage and the wife sought an injunction to declare the mortgage void and to prevent the *shamba* being forfeited to the mortgagee. Under LA the wife had an interest in the *shamba* as a co-occupant who had contributed her labour to the 'productivity, upkeep and improvement' of the land. She was therefore statutorily entitled to object to the mortgaging of the *shamba* and – in the event that it was proved that her husband had deliberately misled the mortgagee that she had consented – have the disposition declared void.²³⁴ However, the chairperson found that the inherited family *shamba* in question was not 'purely a matrimonial property' and did not apply this statutory provision in the wife's favour. Instead the assessors and the chairperson were persuaded by the efforts made by the family elders to settle the matter. The chairperson considered that the mortgagee had acted in good faith and was entitled to be repaid his money through an order for sale:

... it is my humble belief that [the mortgagee] gave that money to [the husband] on good faith and belief that [the husband] had the blessing of

²³⁴ LA s.161.

his family, as he came with somebody ... who was identified as a son of [the husband] ...

The chairperson also:

... positively not[ed] efforts made by clan elders meeting of both sides which resolved that in order to keep peace and harmony among the parties and two bomas (i.e. families) it is prudent and for the interest of justice that [the mortgagee] be given his money.

In case 8, where land had been purchased by the claimant's husband during the course of their marriage, the DLHT took a different approach to the sale without consent. The chairperson and one of the assessors found in the wife's favour, concluding that the land was 'matrimonial property' which the wife had been using for over 10 years: '*... any move to dispose of the same then consent of [the wife] be sought first*'.

The DLHT file for case 7 indicated that the wife intended to appeal to the High Court Land Division. Whether or not the DLHT chairperson's decision was correct in law, the two cases clearly demonstrate the distinction that is made in reality between inherited and purchased land that is acquired by a married couple. The cases illustrate the difference in wider family members' interests in land acquired in these two different ways, and the implications of this for a wife's agency to object to dispositions in practice. This conceptual distinction at a social level may permeate the legal sphere of judicial decision-making.

5.5 Using wisdom and commonsense

The notion that judges can and do in practice make their decisions purely on legal grounds has been heavily contested by feminist legal scholars. Reflecting on her own experience of judging, Baroness Hale, the U.K.'s only female Supreme Court judge points out:

[T]he business of judging, especially in the hard cases, often involves a choice between different conclusions, any of which it may be possible to reach by respectable legal reasoning. The choice made is likely to be motivated at a far deeper level by the judge's own approach to the law, to the problem under discussion and to ideas of what makes a just result. ... an important part of feminist jurisprudence has been to explode the myth of the disinterested, disengaged, and distant judge. (Hale 2008: 319-320, cited in Hunter 2010: 31).

The Ward Tribunal chairwoman's explanation earlier in this chapter, of her approach to adjudication based on using wisdom and local elders, provides one example of how social norms influence the decision-making processes of individual adjudicators. In a patriarchal society, where land is allocated according to patrilineal principles, this is highly significant for women's legal claims to land.

As discussed at 5.3 I found many examples in my fieldwork of cases where women had successfully made claims to inherited family land. However, these claims were successful because women had the support of key family elders or community leaders, who provided evidence in support of their claims in the tribunal. Where land is unregistered, which is often the case in rural and unplanned urban areas, in order to prove an interest in inherited land women must rely on the oral evidence of family members who witnessed the allocation and/or their minutes of family meetings. In cases 1-4 in Appendix F each of the women's claims relied on this kind of evidence; and each were successful to the extent that they were supported by elders' evidence. Equally, case 6, which concerned a female orphan's claim to land, was unsuccessful for lack of this kind of evidence in support. The importance of elders' evidence also extends to spousal disputes concerning dispositions of inherited land. For example, in case 7 the DLHT placed weight on the evidence of elders in reaching its final decision.

In contrast with these cases, an interesting feature of case 5 is that the Ward Tribunal did not fully uphold the woman's claim to her *shamba* despite acknowledging the evidence from family elders that she had been given the *shamba* by her father. The judgment states that discussions had taken place between family elders and the tribunal members in the latter stage of the legal dispute. The content of these discussions is not disclosed in the Ward Tribunal's judgment. However, the judgment indicates that after meeting with family elders the decision was made by the tribunal to divide the land between the parties – who were patrilateral cousins – 'to bring peace in the *boma*' (*kuleta amani katika boma*) as they were relatives. It therefore appears that family elders nonetheless played an important part in the final outcome.

Claims between spouses raise different evidential issues which can often introduce wider scope for individual judicial discretion. Claims to land in the context of divorce

and separation fall to be determined in matrimonial proceedings under the jurisdiction of the ordinary courts. In land tribunals, claims between spouses often concern disputes over dispositions without spousal consent, and contribution claims where the relationship does not have a clearly recognised legal status. This second kind of claim can turn on evidential issues concerning the status of the relationship, whether the land is considered 'matrimonial property' and whether contributions can be proved. Where family elders and local leaders are not witnesses to these matters, tribunals and litigants must look to other kinds of evidence to verify claims.

2.4 of this thesis discussed the ambiguous social and legal status of certain kinds of polygamous relationships, including second marriages by Christian husbands, and 'concubinage'. Claims between couples in this kind of relationship often concern disputed financial contributions to property that has been purchased in the name of one party (usually the man). Women in this situation do not have the same statutory interest in the man's land as a legal spouse. Consequently, the status of the parties' relationship often becomes a material issue in the legal claim. These relationships cannot be proved by a marriage certificate; so litigants must rely on other kinds of evidence to prove the nature of their relationship and financial contributions. This may be extremely difficult where a relationship has been conducted in secret or where financial contributions to the property have been made in cash.

Cases 10 and 11 both concern financial contributions made by women towards properties that had been purchased in a relationship of 'concubinage'. The women had no documentary proof that they had made the financial contributions. In both cases the men disputed the women's claimed contributions. The nature of the parties' relationships was also a contested issue. In case 10 the chairperson dismissed the woman's claim for lack of evidence: whereas the man had provided a sale agreement in support of his claim, the woman could provide no documentary or other proof of her cash contribution.

In case 11 another chairperson took a different approach to assessing the evidence. The man had claimed that the woman was his tenant and owed him unpaid rent. The woman claimed that the parties were in a relationship and she had financially contributed to the purchase and development of the disputed plot. Neither party produced documentary

evidence in support of their claims. The man called the seller of the property, his uncle and a workman as witnesses in support of his claim. The woman called her son, whom she claimed to be the son of the claimant, and another workman as witnesses. She also produced a photograph of the parties together. Although there was no documentary proof of the woman's financial contribution, the chairperson concluded from the evidence as a whole that the woman was a 'concubine' and went on to infer that she had contributed to the development of the land.

The different outcomes in these two cases illustrate the scope for judicial discretion in evaluating evidence where it is difficult for parties to prove the status of their relationship and financial contributions. There is an implicit gendered dimension to the approaches adjudicators take to assessing the evidence in these kinds of claims, where the woman's cash contributions are given on the basis of trust and land is very often registered in the sole name of the man. Feminist legal theorists have stressed the importance of 'asking the woman question' (Bartlett 1990); 'noticing the gender implications of apparently neutral rules and practices', and paying attention to the individuals before the court and the reality of their lived experiences (Hunter 2010: 35). In the present context, this calls for adjudicators to pay close attention to the gender dimensions of land acquisition within relationships.

5.6 Conclusion

The sample of cases discussed in this chapter illustrate that there is considerable overlap in the three normative approaches to justice in Tanzania's plural legal system at different levels of land court. All levels of court are bound by the English and Tanzanian common law principles of natural justice and are flexible in the procedures they adopt in adjudicating individual claims. Whilst legal technicality is more evident in the DLHT and High Court Land Division than in the Ward Tribunal, ward tribunals also use statutory provisions in judging claims (for example cases 1 and 4). Ward tribunals place more emphasis on reconciliation and peace (*amani*) than the higher courts; yet the importance of restoring peace can also be influential in the outcome of claims in the DLHT (for example case 7).

The *Kiswahili* concepts of *haki* (justice) and *haki sawa* (equal rights) are widely used in both social and legal contexts. As the sample of cases and quotations from adjudicators

(and elders elsewhere in this thesis) illustrates, the discourse of *haki sawa* appears to be making an impact in social and legal contexts concerning women's claims to land. The case studies illustrate that paternal discretion to give land to daughters is not necessarily new and is not necessarily based on the principle of gender equality. What is new however is that members of ward tribunals and the DLHT in Arusha view the equality provisions in the Land Acts as a basis for departing from customary practices where they deem it necessary, in order to safeguard women's interests in land. This appears to reflect a legal centralist approach to normative pluralism in Tanzania's legal system.

In practice however, normative pluralism in this context is not quite so straightforward. Since most legal disputes turn on their facts rather than points of law, cutting across these various normative approaches to justice is the crucial question of how evidence is obtained and weighed in practice: what, or rather, whose evidence counts? The discussion of evidence-gathering by tribunals at 5.2 demonstrated the pivotal role of family elders and local leaders as witnesses in the tribunal and on site visits, as well as in the production of documentation such as family meeting minutes and sale contracts. Where land is unregistered, litigants in cases concerning inherited land in particular must find allies in these key actors if they are to be successful in their legal claim. As discussed in chapter 4, as well as acting as witnesses, these actors are also gatekeepers to legal processes. This may help to explain why many claims to inherited land by women that reach the stage of a legal claim are ultimately successful. It is not that tribunals are radically challenging patrilineal processes of land allocation. In effect, social processes determine which women's claims will be supported through the legal process, and tribunals endorse these social decisions.

In the context of claims between parties in relationships that are not legally recognised, different evidential issues are raised. Yet, the way adjudicators assess these claims is also implicitly gendered. This is because gender dynamics often underpin processes of making sales contracts and registering land titles in a man's sole name; and women typically do not ask for receipts from their partners for their financial contributions because their relationship is based on trust. If adjudicators attach greater weight to documentation than to other kinds of more circumstantial evidence, they adopt an approach to assessing evidence which effectively tends to favour male claimants.

These gendered biases in evidence-gathering and assessment in inheritance and spousal disputes illustrate the patriarchal nature of law in the context of women's claims to land. This is underscored by the male dominated environment of some tribunals and the social challenges facing some women who are very unused to speaking for themselves in male dominated fora. The legislative pen has enshrined women's equal rights to land in statute, and adjudicators in Arusha's land tribunals appear ready and willing to reinterpret customary practices to give effect to women's land rights. However, if tribunals are to do justice to women's claims to land in practice, adjudicators must be alert to the gendered evidential challenges that women face in proving their claims. Whilst there are problems for adjudicators in basing their judgments on testimony which may have little or no corroboration, at present it appears that tribunals are also at times too quick to reach a decision based on quite scanty documentary evidence. Whether adjudicators use 'wisdom' or 'commonsense', I would contend that for substantial justice to be done in women's claims to land it is necessary for tribunals to 'ask the woman question' as an integral part of the process of gathering and assessing evidence.

6. ‘*Shamba ni langu*’ (the *shamba* is mine): A case study of gender, power and law in action

6.0 Introduction

This chapter returns to the *shamba* on the slopes of Mount Meru where this thesis began, to develop further the major themes discussed in chapters 2 - 5 through a single extended case study.²³⁵ The case study is both typical and exceptional as an example of women’s claims to land in Arusha. The substantive issue - that family land was sold by a husband without his wife’s consent - is a common cause of land disputes between spouses in Arusha. The case is also exceptional - as an example of a claim that was pursued from Ward Tribunal to High Court. Although relatively few claims by women villagers make it as far as the High Court, analysing the process of the dispute from family and community through the hierarchy of the courts offers important insight into the way in which women’s claims to land are constructed, progressed, transformed, and adjudicated upon.

Chapter 4 of this thesis explored issues of agency and power dynamics in legal disputing processes, whilst chapter 5 considered procedural and substantive aspects of doing justice through an analysis of a number of judgments. This chapter goes further, bringing together these issues with an analysis of how actors construct and pursue their legal claims through courtroom discourse. Taking a transcript of court proceedings as a primary data source, the analysis pays particular attention to gendered subjectivity and the role of customary practices in the construction and contestation of legal claims. The analysis is supported by further data collected on visits to the *shamba* in question as well as interviews with a number of actors involved in the dispute.

The analysis is particularly informed by Hirsch’s (1998) methodological approach to studying gendered discourses of disputing in Kenyan *Kadhi* courts. This in turn applies Butler’s (1993) theory that gendered subjectivity is constructed through performance by subjects engaged in social life. Hirsch’s socio-linguistic study focuses on ‘how power operates discursively to constitute categories of persons, often using gendered terms, and how people positioned through local and global discourses enact and (sometimes)

²³⁵ In order to preserve the anonymity of individuals, pseudonyms are used throughout and some changes have been brought to the exact circumstances and identifying features of the dispute.

contest their construction as gendered subjects’ (Hirsch 1998: 18-19). This present legal study of the law in action re-orientates Hirsch’s socio-linguistic approach to consider how gendered subjectivity is used to substantively make legal claims to land and in turn constructs gendered power relations between those who lay claims to the land. Further, I consider how discursive construction of gendered relations to land impacts upon the adjudication of claims by tribunals.

6.1 Origins of the dispute and the framing of claims

The *shamba* in dispute is quite a typical Arusha family *shamba*, approximately one acre in size, in a rural village on the slopes of Mount Meru. Over time, claims to the *shamba* have been visibly staked through the cultivation of crops and other marks made by people on the land. The boundaries of the *shamba* are demarcated partly by hedgerows and partly by grass, and the plot has been divided by a narrow mud pathway. On it grow mature banana trees – permanent crops planted by previous generations, as well as young maize, beans and some young non-native trees, which were planted by the buyer of the land after he thought the seller – ‘Paulo’, had won the case. There is a notice nailed to a tree on the land – a temporary High Court injunction granted in favour of the claimant – ‘Naserian’ – entitling her to use the land to cultivate non-permanent crops, at least for the time being. Naserian is the wife of Paulo. Their family, like many other families in this rural village, rely on the land, both to produce crops as a source of household income and as a place to raise their children and keep livestock.

The dispute began in 2005 when the *shamba* was sold without Naserian’s consent. Her claim to the *shamba* stemmed from her marriage into the *boma* to Paulo in 1999. According to Arusha tradition, generally a son can expect to be allocated a portion of his father’s land upon marriage. In this case the land in question had been Paulo’s father’s and his father’s before him. When Paulo’s father – ‘Babu’ passed away, his brother ‘Leleyo’ was appointed as guardian for the family. This left the *shamba* in the hands of Naserian’s mother-in-law – ‘Bibi’ by virtue of her own marriage into the *boma*. For Naserian’s marriage the *shamba* had been pledged to another family member in exchange for cows to use as her bridewealth. Whilst the *shamba* had remained pledged under *rehani* the pledgee himself had been cultivating it.

Naserian wanted to be shown the *shamba* that she would be tilling and went to see Bibi. One source told me that shortly before the legal dispute began, the pledgee as a family member had given permission at a *boma* meeting to allow Naserian to build a house on the land and make a living by cultivating the *shamba*. However, no evidence to this effect explicitly appears anywhere in the transcript of proceedings. According to the evidence of Bibi and clan elders in the Ward Tribunal, Naserian was shown the *shamba* and a portion of the *shamba* was divided for Naserian by clan elders in the presence of the pledgee. Naserian was told that she would need to work to repay the *rehani* on the *shamba* herself.

Time passed and Naserian got word that the *shamba* was being sold. In her evidence to the Ward Tribunal Naserian describes how she was told by her husband, Paulo and others that the *shamba* would be sold despite her refusal. Naserian went to see Leleyo as her family guardian. He in turn contacted his fellow family elders and a *boma* meeting was held to look into the matter. Meanwhile, according to the *boma* chairman, Paulo took a kilo of sugar to the chairman's house to ask for permission to sell the *shamba*. The chairman refused and his decision was confirmed at the *boma* meeting. However, as it would later transpire, the *shamba* had already been sold.

Suspensions that the *shamba* had been sold were aroused when Leleyo heard that cows had been taken to the pledgee in order to redeem the land. The pledgee rejected the cows. New trees planted on the land were further evidence of a change of ownership. Clan elders claimed that at a subsequent *boma* meeting Paulo eventually admitted to having sold the *shamba*. On the advice of the local *diwani* (councillor) Naserian took her claim to the Ward Tribunal. However, when the Ward Tribunal heard the matter, Paulo denied any knowledge of the *shamba* or that he had sold it. Instead, Bibi as Paulo's only witness claimed that she had sold it in order to enable her to rebuild Naserian's and her own house which had recently fallen down in the rains. Crucially, her evidence was supported at the Ward Tribunal's site visit by the local Village Chairman who told the Tribunal that he had given his consent to the transaction proceeding. Ultimately it was his evidence that the Ward Tribunal relied upon in its judgment that at the moment of sale the land had still belonged to Bibi.

Although Naserian as *mdai* (claimant) and Paulo as *mdaiwa* (respondent) were the legal parties to the proceedings in the Ward Tribunal and beyond, the act of selling the *shamba* opened up no less than six competing claims to it. Of these six claims it is notable that Paulo, who ordinarily would have inherited land from his father and allegedly sold the *shamba*, was the only one who did not seek to stake a claim to it in the Ward Tribunal. Besides the parties to the case, Bibi effectively made a historic claim to the land as the purported seller; clan elders made claims as guardians of the land for past, present and future generations; the pledgee claimed a debt of cows in exchange for his interest in the land; and the buyer staked his claim physically by planting trees on the land.

The claims of the pledgee and the buyer were only indirectly heard through the voices of other actors in the Ward Tribunal proceedings. Despite their interest in the land they were not joined as parties and there is nothing in the transcripts to indicate that this issue was considered by the Tribunal. The elder who divided the land and Bibi each describe how the buyer made his interest in the *shamba* known – by planting trees on the land. The pledgee's voice was heard indirectly through the guardian - Leleyo, the family elder who divided the land, Bibi and the Village Chairman. Each of them told of the pledgee's refusal to receive cows to redeem the *shamba*.

The ways in which these various actors discursively construct the *shamba* reveals much about why disputes arise when family land is sold to an 'outsider' without family consent. On one construction the *shamba* forms part of family and clan identity, connecting and sustaining past, present and future generations as a home, a place for growing food, rearing livestock and raising children. Marriage and death are therefore the key events at which claims to land are traditionally observed. Although family land may nominally be held by an individual, wider family members retain an interest in it. This is illustrated in the present case by the expectation that claims to the *shamba* should be raised at the *arobaini* (mourning ceremony) held after Babu's death, the responsibility of clan elders to divide and allocate the *shamba* to Naserian, and the requirement for clan elders to consent to any sale. Alternatively, the *shamba* is constructed as an owned economic asset which can be sold to anyone for the personal financial gain of the individual in possession of it.

These two constructions of the *shamba*, as a resource which also symbolises family and clan identity, and as a private economic asset, are not however completely dichotomous. The case illustrates how on both constructions land is regarded as currency which can be exchanged for cash, animals and, through bridewealth – women and children. However, whereas sale of family land to someone outside the family constitutes permanent alienation of the land which will usually be met with great disapproval by family elders, pledging land through *rehani* for a reason such as bridewealth, is commonplace and does not sever the family from the land. Moreover, *rehani* pledges are frequently made to a pledgee within the wider family. *Rehani* constructs a relationship whereby return of the animals or cash to the pledgee serves to repay the debt and redeem the land.

6.2 The dispute in the Ward Tribunal

Evidence given in a Ward Tribunal is written down simultaneously by the tribunal secretary. As such, a secretary's transcript of ward tribunal proceedings constitutes the official record of the trial tribunal and is relied upon by higher levels of court as constituting an accurate account of what was said.²³⁶ It should be noted that for the purpose of an academic case study, it cannot be claimed that the official transcript of the proceedings constitutes a complete or wholly verbatim transcription of the evidence presented to the Ward Tribunal. With this caveat in mind, the Ward Tribunal transcript in this case is nonetheless extremely rich in cultural and linguistic detail and reveals much about subject positionings and power dynamics between actors and how they seek to contest competing claims and persuade the tribunal.

As is often the case in court proceedings, the evidence as a whole contains many contradictions and inconsistencies, both within the evidence of a witness and between witnesses. In contrast to an English court's approach to resolving inconsistencies by focussing on chronology and details of events; timescales, dates and the sequence of events are rarely identified in this case. Much of the individual narratives move non-sequentially between events that occur several years apart, with no indication as to how much time has passed in-between. Some important issues appear to be left unresolved.

²³⁶ A translated version of the Ward Tribunal transcript discussed in this chapter is contained in a separate annexe, which is available from the author upon request – translation by Miriam Matinda and Helen Dancer.

An appeal tribunal unfamiliar with the land and people in question would need to spend a great deal of time carefully considering the various conflicting accounts to make an assessment of the evidence and legal merits of the different claims.

The claimant - Naserian

Naserian founds her claim to the *shamba* not by recourse to her statutory rights, but by reference to local customary practices concerning the allocation of land to a woman upon marriage. As such, her claim is rooted in her own construction of her gender identity, as a young wife married into the *boma* who is responsible for tilling her husband's family land as part of her marital role. Naserian establishes the basis of her claim in her first sentence:

Naserian: I say that the *shamba* is mine because when I came to that *boma* I asked Bibi when I met her where is the *shamba* that I will be tilling; she told me there was one. ... (*Mimi ninasema shamba ni langu kwa kuwa nimekuja katika boma hilo nikamwambia Bibi niliyemkuta likowapi shamba nitakalo lima akaniambia lipo.*)

Naserian narrates the process of asking to see her portion of land as a new wife in the *boma* and being shown it in the traditional way by Bibi and the clan elders. She further links herself to the *shamba* by reference to her responsibility for redeeming the *rehani* that was pledged for her bridewealth. As is clear from her final sentence (below), she contests the possibility that the *shamba* was still with Bibi on the basis that Bibi did not make a claim to it at the *arobaini* held after Babu's death:

Because if she [Bibi] had stood up in the *boma* meeting and said that the *shamba* is her property I would not have troubled myself with that *shamba* (*Maana ingekuwa ameamka kwenye kikao cha boma na akasema shamba ni mali yake nisingeangaika na hilo shamba*).

The language used by Naserian conveys her sense of responsibility for cultivating the *shamba* rather than a right to own it. This is illustrated by Naserian's question to Bibi: '... where is the *shamba* that I will be tilling ...' (... *liko wapi shamba nitakalo lima* ...).

Although the *shamba* is referred to in various places as 'mine', 'the child's', 'Bibi's', or 'ours' these possessives appear to reflect a sense of shared responsibility for the *shamba* as land that is held by, for and between successive generations. It may be 'mine' to use for the time being, but ultimately the *shamba* is commonly regarded as being an object

of the family, which is passed from one generation to the next, never to be owned, bought or sold by a single individual acting unilaterally. This is encapsulated in the following question from the Tribunal members and the guardian, Leleyo's response:

Question: Is this *shamba* your *boma*'s or was it bought? Answer: It's ours
(*Swali: Je shamba hili ni la boma lenu au imenunuliwa? Jibu: ni yetu*).

In Naserian's narrative this sense of responsibility for the *shamba* and the importance that she attaches to it for maintaining family life is reflected in her repeated refusal to agree to the sale:

Naserian: I told him this *shamba* will absolutely not be sold ...
(*Nikamwambia halitauzwa kabisa shamba hili ...*); and her determination to redeem the *shamba* despite being twice prevented from doing so by other actors: 'I still haven't given up' (*bado sijakata tama*).

Naserian's language, which conveys determination and responsibility, is qualified by a sense of limited agency over the fate of the *shamba*, which is 'to be sold' by other actors in greater positions of authority, despite her legal right to refuse sale. In the following extract note the repeated use of the passive construction by Naserian when narrating decisions concerning the future of the *shamba* and her housing arrangements (passive constructions emboldened for emphasis):

Naserian: He [the chairman] told me the *shamba* will **be sold** and you will **be built** a house and **bought** a *shamba*. I told him this *shamba* will absolutely not **be sold** for me to **be built** a house. Because the *boma* had sat it **was decided** they would give support for me to **be built** a house.
(*Akaniambia shamba litauzwa na utajengewa nyumba na utanunuliwa shamba. Nikamwambia halitauzwa kabisa shamba hili nijengewe nyumba. Maana boma imekaa ikaamuliwa wapasue nguzo kuchanga nijengewe nyumba.*)

Various actors discursively construct Naserian as an actor who has limited agency, despite her legal rights. There is a commonly understood expectation that the older generation (including Bibi) have a responsibility to look after wives as 'children' (*watoto*) brought into the *boma*. The limits of Naserian's agency over her own property as a wife are most graphically illustrated when Paulo becomes involved in a fight and he uses Naserian's animals, which she had bought to redeem the *shamba*, as compensation to pay for his wrongdoing. In relation to the *shamba*, Naserian is told by the

chairman²³⁷ that if she refuses the sale the consequences are that she will be left without a husband – a role that as a woman she is told by the chairman she can never fulfil:

Naserian [quoting the chairman]: ... will you be the husband if your husband is sent to jail? (... *utakuwa mume ikiwa mume wako atapelekwa magereza?*)

There are many other examples in the transcript of discourse which reinforces the authority of male elders over family life and land. These include appointment of the deceased's brother as family guardian after Babu's death; questioning why Naserian did not make a request for assistance to redeem the *shamba* at the *arobaini*; refusal of the pledgee to accept cows to redeem the *shamba* from anyone other than an elder; responsibility of the *boma* to build Naserian a house or offer her a place to stay; expectations that clan elders and brothers-in-law will be consulted or take responsibility for helping to rebuild the houses; Paulo taking a kilogram of sugar to the chairman of the *boma* to seek permission to sell the *shamba*, and so on.

Without her own documentary evidence that the land was given to her or sold, Naserian was wholly reliant on the support and oral evidence of clan elders and the minutes of their meetings to corroborate her account. This illustrates that whilst in local patrilineal systems of land tenure, women can generally expect to have access to their husband's family land; in circumstances of a dispute women may find themselves on shaky ground when it comes to actually proving their claim, and are reliant on good social relations with male elders of the family to try to substantiate it.

In this case three clan elders gave evidence in support of Naserian in the Ward Tribunal – Leleyo, the chairman of the *boma*, and the elder who divided the land. *Boma* meeting minutes were referred to as proof that the *boma* did not consent to a sale. However, the credibility of the elders' evidence was directly challenged in several places by both Paulo and the Tribunal members. For example, it was noted that the minutes which were produced included names of elders who were not present at the meeting. The chairman was unable to say how many cows were given in exchange for pledging the *shamba*, and there were contradictions between the elders concerning whether the *shamba* was pledged before or after Babu died.

²³⁷ It is unclear from the transcript whether the chairman she refers to here is the chairman of her *boma* or the Village Chairman.

Questions from the tribunal members by reference to local customary practices also served to highlight apparent weaknesses in Naserian's claim. For example Naserian admitted that she never tilled the *shamba*, and Paulo's elder brother was not present at the time of the allocation, thereby casting doubts on whether the land was ever given to her. Naserian did not raise the issue of redemption at the *arobaini* meeting - the traditional place to stake a claim. When asked, she admitted that she had no documentary evidence to support her claim.

The respondent - Paulo

Whereas Naserian founds her claim on her gendered responsibilities and positioning as a wife married into the *boma*, in contrast the basis of Paulo's case as respondent is denial. This runs throughout his answers to questions from his wife. Paulo's evidence consists of a single sentence in which he places responsibility for sale of the *shamba* on his mother, Bibi; however, he does not substantiate this further through a narrative of his own:

I Paulo I don't know I feel sad because I have been brought here and I haven't sold the land, the one who sold it is Bibi (my mother) ... (*Mimi Paulo sijui nasikitika kwajili nimeletwa hapa na mimi sijauza shamba aliyauza shamba ni Bibi (mama yangu) ...*)

The contrasting ways in which the parties construct and present their claims illustrates the distinction between 'relational' and 'rule-oriented' accounts.²³⁸ Naserian's account may be characterised as 'relational' - focusing on social relations, positions and expectations. Naserian asks very few questions of other actors to forward her claim and her questions of both Paulo and Bibi are event-based rather than rule-based. Paulo's evidence is more 'rule-oriented' and challenges the apparent weaknesses in others' claims by reference to certain principles.²³⁹ Paulo's rule-based approach is evident in

²³⁸ For further discussion of 'relational' and 'rule-oriented' accounts see Conley and O'Barr (2005: 67-68) and 4.4 of this thesis. Gender differences in male and female courtroom discourse have been noted elsewhere. For example, Hirsch observes a distinction between women's storytelling narratives and men's authoritative 'meta-narratives' in Kenyan *Khadi* courts, the latter of which enable men to place themselves on the same terms as the *Khadi* hearing the case (Hirsch 1998: 165-179).

²³⁹ The extent to which these contrasting approaches to persuading a court may be considered intrinsically gendered is questioned by Conley and O'Barr. They argue that although studies reveal a gendered distribution of the two kinds of accounts, gender influences this indirectly. They suggest that the ability to produce rule-oriented accounts is a skill which tends to be acquired by those who have exposure to cultures of business and law, which are largely male-dominated spheres (Conley and O'Barr 2005: 73).

his questioning style. In the following extracts he cross-examines Naserian and the elder who divided the *shamba* on principles of *rehani*:

Paulo's question [to Naserian]: When you say you went to be apportioned a *shamba* is it possible for a *shamba* which is pledged to be divided? (Swali: *Unaposema umekwenda kugawiwa shamba je shamba lililoko katika rehani inawezekana likagawiwa?*)

Naserian: Yes it was divided by my Father-in-law (Jibu: *ndio limegawiwa na Baba mkwe*)

...

Paulo's question [to the elder who divided the land]: When you say you went to divide the *shamba* can a pledged *shamba* be divided? (Swali: *unaposema umekwenda kugawa shamba je shamba liliko rehani linagawanywa?*)

Elder: Yes, because if you can redeem it you can go on and redeem it. (Jibu: *Ndio maana ukiweza kulikomboa ukomoe.*)

The Tribunal members question Paulo's defence in two ways. Firstly, they question him on his attitude to his wife's authority to refuse sale of family land – her statutory right. Secondly, they challenge the possibility that he would not be given a *shamba* as a son in the *boma* – his customary expectation:

Question: As your wife has she the power to protect all of your property? (Swali: *Je anaweza kuwa mke wako anauwezo wa kulinda mali zako zote?*)

Answer: Yes (Jibu: *ndio*)

Question: Do you deny what she has said as your wife? (Swali: *Je unaweza kukataa neno ambalo amekueleza na wakati ni mke wako?*)

Answer: I deny it because I don't know that *shamba*. (Jibu: *Nilimkataa maana sijui shamba hilo.*)

Question: We have been told you are three, so which number child are you? (Swali: *Tumeelezwa kuwa mpo watatu je wewe ni mtoto wangapi?*)

Answer: Third (Jibu: *Watatu*)

Question: How can you say you don't have a *shamba*? (Swali: *Unawezaje kusema wewe hauna shamba?*)

Answer: I have two *shamba* plots, but I can't enter in an area where I am not welcomed. (Jibu: *Mimi nina shamba vipande viwili, bali siwezi kuingilia katika eneo ambalo sijakaribishwa.*)

Question: Are you tilling those *shambas*? (Swali: *Je unalima hizo shamba?*)

Answer: Yes. (Jibu: *Ndio.*)

Ultimately however, these potential weaknesses in his evidence are not determinative in the Ward Tribunal's judgment.

Bibi

Paulo's defence relies heavily on his mother, who makes an admission in her brief evidence that she was the one who sold the *shamba*. However, she does not claim that the *shamba* was 'her's' at the time it was sold. In her replies to the tribunal members' questions she admits that the *shamba* had been allocated to Naserian, but she nevertheless justifies the decision to sell the *shamba* on the basis of necessity – the *shamba* was all her husband left to her and no one helped her to repair the houses that fell down in the rains. At the site visit she further justified the sale because she had been unsuccessful in asking the pledgee to increase the *rehani* on the *shamba*. She then asked 'the government' (meaning the Village Chairman) for agreement to the sale of the *shamba* and he accepted.

In a similar way to Naserian, the overarching tenor of Bibi's account is one of taking responsibility for the protection of 'her children' under circumstances of limited agency; thereby minimising any liability that might have arisen from her sale of the land. In short her defence as a non-party to the proceedings is that there was nothing else she could have done in the circumstances and she acted in the best interests of herself and the future generations of her husband. However, it is noticeable from the transcript that the lack of compliance with the legal procedures for sale,²⁴⁰ and Naserian's right to object to the sale as a 'derivative right holder' were issues apparently left unexplored in evidence. As to why Bibi and the Village Chairman allowed the sale to proceed without

²⁴⁰ VLA s.30, LA s.161(3)(b).

involving Naserian or any other *boma* elders is an important issue which is left unresolved.

Role of local leaders in the dispute – the Village Chairman

The Village Chairman is the final actor, who was present when the Ward Tribunal conducted a site visit to the *shamba*. His influence is notable in the Ward Tribunal's judgment. The transcript records that he saw it as part of his role to address the problem of the collapsed houses by telling Bibi's sons and Naserian to join efforts with the *boma* to rebuild them. On his evidence he accepted a letter signed by Bibi and her sons and daughter (but not Naserian) seeking permission from 'the government' to transfer the *shamba* so that Bibi could secure her housing situation. He supports Bibi's account that she sold it and unsuccessfully attempted to redeem it with cows afterwards. He claims no son objected but he did not involve Naserian or the wider family. In fact he maintains that he had tried to get the chairman of the clan and the pledgee arrested for building a house on the *shamba*. He is critical of the elders' and pledgee's involvement in the dispute:

Village Chairman: So the ones who are causing this disturbance are the pledgee and those elders of the clan without looking at the fate of the widow ... (*Hivyo wanaoendesha vurugu hii ni mwekewa rehani na wale wazee wa ukoo bila kuangalia hatima ya mama mjane ...*)

The judgment of the tribunal members relies heavily on his account, discrediting the clan elders and finding that Naserian was never given the *shamba* - despite Bibi acknowledging this in her own evidence.

Ward Tribunal judgment

In their judgment the tribunal members found that Bibi had been left the *shamba* by her deceased husband and that she had pledged it for bridewealth and later sold it on the advice of the Village Chairman in order to rebuild the houses that had fallen down in the rains. No reference is made in the judgment to the evidence from various witnesses - including the clan elders and Bibi herself - that the *shamba* had been divided for Naserian. Instead, the tribunal members concluded that Naserian had not tilled or been given the *shamba* by Bibi. The Ward Tribunal ruled that the *mmiliki* (owner/possessor) of the *shamba* was Bibi, not the claimant or the respondent. They also found that the

pledgee (who had not given evidence before the tribunal himself) had tricked Bibi and refused to accept the cows to redeem the *shamba* because he had wanted to take it for himself. They found that Leleyo had been of no help to Bibi but that ‘the government’ (meaning the village government) had ‘stood firm to defend the right of the widow Bibi’ (*Serikali ilisimama imara kutetea haki ya bibi huyu mjane ...*) to get the help in order to rebuild the damaged houses.

The tribunal members were of the opinion that the true respondent should have been Bibi, not Paulo; however they did not join her as a party to the proceedings. This would later prove to be an issue of crucial importance upon appeal. Their final determination was that the respondent Paulo had ‘won’ the case (*mdaiwa katika shauri hili [Paulo] ameshinda*). The Ward Tribunal further stated that the cows and goats should be returned to the pledgee through the village government. When the matter was first brought to the Ward Tribunal a stop order was issued, which prevented anyone from building or doing anything else permanent to the land. At some point a house was built on the land. At the site visit the Village Chairman claimed that this house was built by the pledgee with the clan elders. Although it is not stated in the tribunal proceedings, I was told that this house had been built by clan elders for Naserian. The tribunal ruled that the house should be removed immediately and that those who had trespassed on the *shamba* by building the house should be dealt with by the village government and Ward Executive Officer under their powers. This house was later destroyed.

The tribunal members’ opinion on the role and powers of clan elders gives some insight into their perspective on the case generally:

The tribunal also suggests that when a husband dies and leaves his wife as owner/possessor of all the property it’s the wife’s and children’s not the clan elders’ because many of them now don’t follow ethical procedures which they were given they put income first. What will become of the orphans and widows? (*Baraza pia linapendekeza kuwa mume anapokuwa amefariki akamwacha mke mmiliki wa mali yote ni mke na watoto na sio wazee wa ukoo kwani wengi wao sasa hawafuati taratibu za maadili walizopewa wanatanguliza mapato. Je yatima na wajane watafanywaje?*)

The Ward Tribunal judgment appears to rest almost entirely on the account given by the Village Chairman at the site visit. The tribunal members are critical of the clan elders

and their perceived failure to act to protect Bibi and Naserian, whose houses had fallen down – further echoing the stated opinion of the Village Chairman. No reference is made to any of the evidence which supported Naserian’s case. There is no evaluation of the competing witness accounts or the weight to be accorded to minutes of *boma* meetings. The tribunal does not consider Naserian’s customary interests in the land and her statutory rights under the Land Acts to object to the sale.

6.3 The dispute escalates

The local *mwenyekiti wa kitongoji* had become involved in the case and gave Naserian shelter and support. Three months after the Ward Tribunal’s judgment she appealed to the DLHT. Whilst the appeal process was ongoing the dispute took on a parallel political dimension when the *mwenyekiti wa kitongoji* himself was arrested, threatened and cursed by some people who were close to him. The *mwenyekiti wa kitongoji* believed that his arrest and the threats and curses were engineered in an attempt to intimidate and stop him from helping Naserian and discouraging anyone else from helping her.

During my interviews I was told that there had been growing discontent amongst many of the villagers about the Village Chairman’s conduct in a number of village matters. Eventually, a village meeting was convened by all the *wenyeiki wa vitongoji* of the village, attended by several hundred villagers and the local councillor. The Village Chairman was impeached on a number of grounds including unlawful sale of family land, and a new chairman was elected in his place.

These political matters were not raised before the DLHT. Nine months later the DLHT produced its decision. The chairperson hearing the case noted that as it was brought outside the 45 day time limit the appeal was technically time barred,²⁴¹ but nevertheless gave judgment on the merits of the appeal – perhaps an example of the flexible approach of Tanzanian courts to technicalities where there are litigants in person. The grounds of appeal stated that the Ward Tribunal did not evaluate the evidence of the guardian and clan elders or the minutes of the clan meeting. However, the chairperson noted that the minutes showed that Bibi was not in attendance at the meeting and that by

²⁴¹ LDCA s.20(1).

that time the land had already been sold. The chairperson described the land as ‘leased’ (rather than pledged) in order to pay bridewealth.

Upholding the decision of the Ward Tribunal and dismissing the appeal the chairperson found that the land had still been the property of Bibi when it was sold. The finding was based on Naserian’s own replies to questions – that she had not tilled the land herself. However, the chairperson did not consider in the judgment the legal question of whether procedures for sale under the Land Acts had been complied with. In particular, VLA offers legal protection against sale for ‘derivative’ right-holders, including successors in title.²⁴²

Some five months later Paulo made an application for execution requesting:

The judgment debtor [Naserian] be evicted from the suit land.

A permanent injunction order be issued to restrain the judgment debtor or her agents, servants or heirs from interfering with the decree holder [Paulo] in his peaceful enjoyment of the suit land.

Having lost her original application and subsequent appeal Naserian sought legal advice for the first time. Unable to afford an advocate she eventually obtained legal help from a legal aid clinic. By this time her legal options for appeal had become extremely limited. She was too late to lodge an appeal against the substantive appeal judgment of the DLHT and was faced with eviction from the *shamba*. However the decision of the Ward Tribunal that Bibi – not Paulo, was the owner of the *shamba* left open the possibility of a technical legal defence to the application for execution: Paulo did not have the *locus standi*²⁴³ to make the application because the Ward Tribunal had determined that the land did not belong to him.

There is a brief note in English on the DLHT record of the submissions made by the parties at the execution hearing, which would have been conducted in *Kiswahili*:

Applicant: I pray this tribunal to make an order so that I can be given that land and the judgment debtor be evicted as I won at the ward tribunal and to this tribunal.

²⁴² VLA s.30(4)(b).

²⁴³ i.e. the right of a party to appear and be heard before a court.

Respondent: I will reply on my written submission. I pray the tribunal to consider the same.

The central argument in the written submission for the Respondent, which was produced in English reads as follows:

... the suit land was declared by both the trial tribunal and the appellate tribunal to be the lawful property of the alleged decree holder's mother after analyzing the evidence tendered and in that respect the alleged decree holder has no *locus standi* to make this application for execution for the land which is not his.

However the argument failed to persuade the DLHT and an injunctive order was made to permanently restrain Naserian from entering the *shamba*:

... I have perused the judgment at the ward tribunal and found that, the judgment pronounced the decree holder as the winner of that suit land, I quote: '*... katika shauri hili [Paulo] ameshinda*' end of quotation. This decision was also confirmed by the District Land and Housing Tribunal, I believe the judgment debtor has failed to show cause why execution against the suit land should not be carried out.

In the execution ruling it appears that the DLHT missed a key issue: whilst the Ward Tribunal had declared Paulo 'the winner' it also made a clear finding that Bibi was the owner of the *shamba* and should have been the respondent to the proceedings, not Paulo. This was to form the basis of a further appeal to the High Court Land Division.

The legal issue of *locus standi* was Naserian's only remaining legal route to regaining use of the *shamba* after failing to appeal in time against the first DLHT judgment, which was itself an appeal out of time. The legal technicality argument represented a significant departure from the substantive moral basis of her original claim against sale of the land - that the *shamba* was hers by virtue of her marriage into the *boma*. Her original moral claim was also supportable by her legal right to refuse sale of family land; even though she was not aware of her legal rights at that stage. Pursuing claims through courts and tribunals often involves a reconstruction of moral claims in a way which will persuade a court to give a legal ruling in a party's favour. Having failed to appeal within statutory time limits, Naserian's moral claim was transformed into technical appeal points in order to access the higher levels of court. The language of her

claim was in turn reconstructed, from the moral claim - *shamba ni langu* to the technical Latin legal argument - *locus standi*.

6.4 Appeal to the High Court Land Division

Three weeks after lodging her High Court appeal against the execution ruling, the house on the *shamba* was destroyed, crops were uprooted and trees planted. With the assistance of the legal aid clinic Naserian issued an urgent application for a temporary High Court injunction to restrain Paulo and the buyer from disturbing her occupation of the land. In a subsequent counter-affidavit Paulo stated that after the execution ruling in the DLHT court brokers had been appointed and performed their duty. In the affidavit written in English accompanying Naserian's application, the substantive moral basis of her original claim re-emerged:

... the applicant depends on the suit land for day-to-day need. The suit land has been used by the applicant for raising her kids and paying for school fees.

.... the applicant has no any other farm/land which she can use for cultivation so as to enable her to feed her children.

Naserian represented herself and Paulo was absent at the hearing of the application for an injunction. The hearing would have been conducted in *Kiswahili* though the note of the applicant's submissions on the court file is in English:

I pray for interim order to stop him from doing anything whatsoever regarding the suit land.

On the basis of the applicant's submissions and affidavit in support the High Court granted a temporary injunction:

... restraining the respondent, his agents, workmen or whosoever from damaging, alienating or rather doing any other act whatsoever regarding the suit land that may prejudice the interest of the applicant herein until determination of the application inter partes.

The injunction was nailed to a tree on the *shamba* and Naserian returned to cultivate vegetables on the land. The temporary injunction did not allow her to plant permanent crops or build a house. Over the course of the next year and a half the case was listed and adjourned several times due to the absence of one or other party or the judiciary. A

few months after the temporary injunction was granted the *mwenyekiti wa kitongoji* was arrested again for allegedly threatening to harm the buyer with a machete. While he was remanded in custody the banana trees in the *shamba* were slashed. The prosecution failed. I was told that as at July 2012 the case had yet to be finally determined by the High Court Land Division.

6.5 Reflections on the case study

Whilst lawyers and legislators focus on rights and statutory law, it is crucial to recognise that gendered subjectivity within customary practices of land tenure remains integral to both men's and women's claims to land and to the way in which ward tribunals approach their task of determining interests in land. In this case, Naserian framed her claim to inherited family land by reference to customary practices of marriage and land tenure. Similarly, the customary basis of men's claims to land is highlighted in the questions that the Ward Tribunal members asked Paulo as a successor to his father's land. References to customary practices permeate the evidence of all actors in the Ward Tribunal. Examples include: pledging land through *rehani* for bridewealth; the process of dividing and allocating land to wives married into the *boma*; cultivation and making permanent improvements to the land as a basis for establishing a claim; the practice of appointing a guardian upon the death of a father; making claims to land at an *arobaini*; the *boma* meeting as the venue for decision-making over family land; *boma* elders having responsibility for dividing and supervising the allocation of family land, and so on.

These various practices underpinned Naserian's attempts to secure her interests in the *shamba* with the assistance of her guardian and other elders. In their courtroom discourse Naserian and her witnesses constructed Naserian's moral claim in accordance with her gendered subjectivity as a wife married into the *boma*. This discursive construction served both to establish and to limit Naserian's agency as a member of her husband's family, with only limited capacity to directly challenge what was happening to the land. These family power dynamics and capacity to act in the family context were reproduced in the Ward Tribunal. With no documentation to support her claim to the land, Naserian was reliant on the oral testimony and meeting minutes of her husband's family elders.

There are many possible reasons why Naserian's claim failed in the lower tribunals. There was a lack of clarity in the way her claim was presented – both in her own evidence, and in the evidence of other witnesses. Both parties' claims contained evidential weaknesses and inconsistencies, but some important factual issues concerning Naserian's use of the land and the terms of the *rehani* were left unresolved. Naserian did not make much use of questions to clarify or challenge evidence. She had little documentary evidence to support her claim. In contrast, Paulo was rule-oriented in his approach to giving evidence and made much greater use of questions to challenge the apparent weaknesses in Naserian's case. His evidence was supported by the Village Chairman – a powerful local leader, whose account prevailed in the evidence that informed the Ward Tribunal's judgment. The evidence of the family elders who supported Naserian's claim was largely discredited by that of the Village Chairman, who declared himself responsible for the decision to allow sale of the land. It appears that the Village Chairman's impeachment from office was not brought to the attention of the DLHT; yet this fact would have had significant bearing on his credibility as a witness who had become involved in the sale of the land.

There was a lack of attention to legal issues in both the Ward Tribunal's and DLHT's judgments and it appears that there was no explicit attention drawn to Naserian's statutory rights. Both levels of tribunal appeared to focus more on factual than legal issues – particularly whether or not Naserian had tilled the land. According to Naserian's own evidence, she had not. However, the fact that this was a family *shamba* which had been pledged meant that identifying the person who had been tilling the land was insufficient to establish the identity of all persons with an interest in the *shamba*. For example, Bibi gave evidence that the *shamba* had been divided for Naserian, and Naserian gave evidence of her own efforts to redeem the *rehani* on the *shamba*. Although Paulo repeatedly raised questions concerning the nature and implications of the *rehani* in his own cross-examination of witnesses, these issues were not fully addressed in the judgments. LA leaves the law in respect of so-called 'customary mortgages' wide open for interpretation.²⁴⁴ In this case a number of issues about the *rehani* were left unresolved, such as the implications of Naserian being given responsibility to redeem the *rehani* on the divided land herself. Even when Bibi was

²⁴⁴ LA s.115(1) (as amended by LAA).

declared to be the owner of the *shamba*, the tribunals did not address the consequence of claims to land between generations or the protection of derivative rights under VLA.

The Ward Tribunal transcript is not an easy document to read and an appeal tribunal that had not heard the evidence and did not know the people and land in question would have needed to spend a good deal of time carefully analysing the transcript in order to give full consideration to the points raised by Naserian on appeal. Naserian's appeal to the DLHT was out of time and neither of the parties had legal representation. It was not until Naserian had lost her appeal to the DLHT that she sought help from a legal aid clinic. By that stage the time limit for appeal had passed and it was already too late for her to challenge the substantive findings made by the Ward Tribunal and DLHT. Arguably, if Naserian had had greater awareness of her legal rights and court procedures at an earlier stage she would have been in a position to pursue the legal arguments that fortified her moral claims to the land with much greater effectiveness – all the more so if she had been legally represented in court. Instead by the time she had obtained legal advice there was only a narrow legal point available to her to pursue. This was eventually successful at the first stage of the High Court process, where for the first time she obtained a favourable ruling which enabled her to return to the land under a temporary injunction.

As at July 2012 the High Court Land Division had yet to reach a final determination of the case. Whatever the final outcome in the High Court, it seems unlikely that the dispute will ultimately be resolved through the legal system, and that some other form of social dispute resolution will be needed. Losing her appeal in the High Court would leave Naserian and her children landless. Winning her appeal against the execution ruling would be unlikely to resolve matters, since the original Ward Tribunal and DLHT judgments in favour of Paulo would still stand. However, having failed to join Bibi, the pledgee and the buyer as parties to the proceedings, these judgments would be incapable of enforcement by them. It therefore remains to be seen how a legal resolution to the dispute in this set of proceedings would provide a social resolution for all those who claim an interest in the land – whether they were legal parties or not.

6.6 Conclusion

The social and legal issues concerning sale of family land that are raised in this case reflect a significant period of social change in Arusha. With the rapid expansion of the town in the last 10-15 years and the coming into force of the Land Acts, land is now increasingly seen as an economic asset and sale of family land without a family's consent has become a significant social problem. In contemporary Arusha, where pressure on land is intensifying and more and more family land is being sold, the Land Acts offer legislative protection against sale for those who have unregistered interests in land, most notably women. Yet as this case illustrates, although statute protects many women's interests in land and women are making legal claims, women's land rights are not always recognised or protected by village authorities and land tribunals in practice. This extended case study has sought to offer an illustrative explanation as to why this may happen.

On a number of levels the courts and tribunals hearing this case were left with a very confused and incomplete picture of the social reality when they adjudicated Naserian's claim. This reflects the challenges faced by women and men in effectively presenting their claims to legal fora and in overcoming barriers to justice that are the consequence of social and political power relations that interface the court system. It also demonstrates weaknesses in the process of adjudication where important legal and factual issues are not brought to the court's attention or are not given sufficient consideration. It is typical for legal processes to seek to confine the task of adjudication to the issues that are considered relevant by the court. Hence, many events surrounding court processes are either not brought to the attention of courts, or are ignored as irrelevant to the court's substantive task. Yet, as the history of this and other cases show, dispute resolution in courts is often accompanied by social and political incidents away from the court. Such events are extremely relevant to litigants and witnesses engaged in processes of disputing. In themselves they represent obstacles to justice.

Maintaining or defending a claim in court requires resilience and the support of people capable of influencing the outcome – whether as witnesses, allies or intermediaries. In this case despite the uprooting and slashing of crops, the destruction of Naserian's home, intimidation and cursing of allies, and delays in the legal proceedings, Naserian

continued to pursue her claim through the courts. Delay – particularly in the High Court Land Division – compounds these social challenges surrounding access to justice. This has the potential to cause a party to give up on their claim altogether, or perhaps seek alternative methods for resolving the dispute – whether through elders, local leaders or by other means of self-help. In this case, a major factor in Naserian's ability to continue to pursue her claim was the support she received from her local *mwenyekiti wa kitongoji* and family elders, who played a major role as witnesses, providing moral and social support and by escorting her to court.

Ultimately, there is no one factor which can explain why Naserian was so unsuccessful in her legal claim in the Ward Tribunal and DLHT. Whilst the influence of the Village Chairman appeared to be pivotal in the Ward Tribunal, timely and good legal representation at the DLHT stage could have made a significant difference to the substantive outcome. Naserian wanted an advocate to represent her but was unable to afford one. Her struggles for justice provide a vivid illustration of the need for change in the process of adjudicating legal claims and good quality legal representation for all.

7. Conclusion

Mimi naomba mtoto wa kike hana urithi kwani baba yangu alishanipa ... naomba haki itendeke. (I ask why a daughter cannot inherit, because my father gave me [that land] ... I ask that justice be done.)

- Concluding words from a woman litigant's statement to a ward tribunal, Arusha 2009.

I began this research project from the perspective of a practising lawyer, with a belief that human rights could serve as a legal tool to challenge inequality and realise women's interests in land. However, influenced by feminist and postcolonial critiques of human rights I chose not to pursue a human rights-based approach to data collection and analysis; instead taking women's experiences of law and legal processes as the starting-point for a socio-legal enquiry into the law in action. During my fieldwork I was soon to re-encounter the language of rights in social and legal contexts of women's claims to land. Reflecting on the ways in which people engage with law and ideas of rights in practice, I have returned to my original belief in their value for individual empowerment. However, in light of the lessons learned from women's experiences of engaging with the Tanzanian legal system - and my own experiences as a family lawyer in England - my perspective on how women can and could realise their interests in land using law and human rights has shifted considerably.

Using international or state-driven human rights law as a starting-point for 'rights-based approaches' to legal empowerment involves adopting a framework of rights-speak that is legalistic, technical and ultimately delimited by state interests. Within this framework, although rights may become 'vernacularised', at the local level they nonetheless retain a hegemonic essence. Though legalistic vernacularised rights represent a legal tool, their origins as state instruments mean that they lack the 'humanity' and felt sense of justice that flow most naturally from counter-hegemonic people-driven notions of rights – as Santos proposes. It is this latter notion of rights that in Tanzania appears to resonate in the discourse of *haki* and *haki sawa*. Although the gender equality provisions in the Land Acts have been brought into public consciousness through a discourse of '*haki sawa*', this discourse was not created by the legislation, but rather strengthened by it. It is this discourse which in turn carries the power to bring a deeper moral sense of justice into legal decision-making, just as the woman litigant invites the court to do in her statement quoted above. My contention is

therefore that rights talk can be most powerful in social and legal spheres when it is born from a counter-hegemonic desire for freedom and justice, rather than created by legal instruments. In Tanzania rights, freedom and justice are encapsulated in the national discourse of *haki*. Arguably, it is when rights are part of such an everyday moral discourse that they hold the greatest potential to gradually change social attitudes and legal processes of decision-making: there is power in the discourse of rights itself.

The nature of women's interests in land

Whilst policy-makers, activists and lawyers in Tanzania have been much focused on statutory equal rights provisions to realise women's interests in land, it is crucial to recognise that particularly in the case of inherited family land – both men and women frequently frame their claims by reference to customary practices of inheritance, marriage and land tenure. Hence in practice both men's and women's claims to land in these contexts are in their essence gendered and intergenerational. Chapter 2 of this thesis discussed the social backdrop of women's claims to land in Arusha. The enduring force of local patrilineal principles of land tenure in Arusha means that in the case of 'family land' which has passed through the hands of successive generations, the circumstances in which women inherit tend to be more restrictive than in the case of 'self-acquired land' that is acquired either by purchase or cultivation free of prior lineal interests. Equally, patrilineal ties to land tend to be looser in recently developed urban and peri-urban parts of Arusha where much land is purchased or otherwise acquired for the first time by a nuclear family.

Amongst Arusha's local patrilineal tribes the most common rationale for male inheritance of family land appears to be founded on a cultural and socio-linguistic distinction that a daughter will 'be married' away from her natal family (whereas a son 'marries'). Hence it is often said that a daughter does not need a piece of land of her own, as she will have access to her husband's land. Land given to a daughter is often seen as a loss to her natal family when she is 'sent off' to join her husband's family and take his name. Despite this there is nothing new in women in Arusha being given portions of inherited 'family land' by their fathers. However, in the disputes I encountered during my fieldwork the circumstances in which women had been given inherited family land were quite specific. These included situations where a father had

no sons, daughters remained unmarried, or a conditional bequest had been made to a daughter who would in turn pass the land to her son. Such practices appeared to be largely accepted by the family elders involved in the disputes as operating within a wider framework of patrilineal customary practices and the legitimate exercise of a father's discretion to allocate family land. As such, whilst atypical they did not represent a significant challenge to gendered customary practices of tenure relations, but rather, were examples of how such practices had been adapted to particular sets of circumstances. In these cases disputes within the family often arose when a male family member seized control of the land or sought to contest the basis of a woman's interest in land by commencing litigation.

There is now widespread social debate on whether fathers should give land to their daughters on the basis of gender equality. During my fieldwork year I met a number of parents who indicated that they were willing and wished to give land to both their sons and daughters – particularly in circumstances where daughters would have caring responsibilities for their parents. Studies in other regions of Tanzania have also reported that attitudes on this issue are changing favourably towards female inheritance (BACAS 1999 (Kigoma), Koda 2000 (Kilimanjaro), Ashimogo et al 2003 (Morogoro) – all cited in Isinika and Mutabazi 2010: 135) However, based on my observations and conversations with inhabitants of Arusha it remains the case that patrilineal principles of succession still underpin the dominant viewpoint on land tenure amongst both men and women.

Despite this enduring gender-based distinction concerning inheritance of family land there is also an awareness of the risk for women of not having their own land in the event of marriage breakdown. Accordingly, some parents choose to give a small portion of land to their daughters as a kind of insurance. The rationale for doing so is different from dividing land on an ideological basis of equality. It represents a solution to the problem that in terms of social practice in the event of marriage breakdown a woman must leave her husband's land and return to her parents. Hence, giving daughters a small portion of land may be seen as an attempt by parents to mitigate the social consequences of this. This is a sensitive issue because it goes to the heart of challenging power inequalities within marriage and facilitating female agency by making a woman less economically dependent on her husband. She is therefore more

able to leave a marriage, for example in circumstances of domestic abuse, by returning to her own land. Indeed, just the possibility of this may affect the way that she is treated by her husband during the marriage.

It is often at a time of critical life events, such as after the death of a husband or father, or relationship breakdown, that women may find themselves in a particularly vulnerable social and economic position within the family. Power relations between a woman and other members of her family shift throughout her lifetime as her gendered status within the family changes – whether as a widow, daughter of a late father, or separated wife. These shifts in power relations are closely connected with a woman's tenure security over her home and land. Vulnerability due to a woman's position within the family may be increased by other social factors such as illiteracy, low income, poor health, lack of awareness of legal rights or of a husband's financial dealings, domestic abuse, local political power dynamics, social ostracism, violence, threats or harassment. My findings indicate that tenure insecurity linked to social vulnerability can often provide the catalyst for land to be taken or sold without a woman's knowledge or consent, or for an old dispute over land to flare up and tenure relations renegotiated. It follows that when family disputes over land occur, power relations within the family are critical to the protection of women's interests in the land, which are often dependent on kinship relations rather than a legal title.

Claims to land by men against women often represent challenges to a woman's existing ownership or occupation of land. A noticeable feature of these claims is that I found they were often brought against women who had inherited land from their father. In contrast, claims to land brought by women tended to constitute a defensive response against the act of a male relative who had sold or mortgaged land without consent or chased the woman away. Law is an instrument that may be used proactively or reactively. My findings suggest that legal claims to land by women in land courts represent a reactive use of the law as a weapon of last resort. This is in contrast to women in a stronger social and economic position who have the knowledge and funds to be able to proactively secure their interests in land from the outset - for example through legal titling, registering a caveat, by becoming an administrator of their deceased husband's estate, or by using favourable social relations to ensure their

interests are protected. Women in these situations tend not to be seen in land courts fighting for land through protracted litigation processes.

The Land Acts offer seemingly good statutory protection for women's interests in land, including untitled and 'customary' interests. However, in order to assess their effectiveness in practice it is essential to consider the operation of law and legal processes in their social context – as part of a 'semi-autonomous social field' (Moore 1973). As the cases drawn from my fieldwork clearly illustrate, whilst women's equal rights to land are enshrined in law and women are using statutory dispute resolution fora to defend their interests in land, the process of litigation through land courts raises many challenges and uncertainties for women in practice.

Designing laws for women

The Land Acts of 1999 were an important landmark in the progressive realisation of women's property rights in Tanzanian law. In chapter 3 I argued that they also represent a missed opportunity for a more fundamental reconfiguration of the way in which gender and land tenure relations are constructed in statute. Instead of focusing on the lived realities of Tanzanian families and the inseparability of marriage, succession and land tenure for the majority of ordinary men and women, the central political agenda behind the Land Acts was the creation of land markets and formalisation of property interests. Hence, both substantive law and legal institutions under the Land Acts were designed first and foremost to meet this neo-liberal economic agenda.

From the perspective of women's interests in land, there were progressive developments concerning spousal land rights both under LMA and the Land Acts, and formal gender equality is a central pillar of the National Land Policy. GLTF saw the presumption of spousal co-occupancy and the power to void a disposition without spousal consent as provisions which significantly strengthened women's land rights. Yet, the latter provisions remain inadequate for protecting women's interests in land. The implementation of land registration programmes in Tanzania is in its early stages and much land remains unregistered. The process of surveying and registering land is expensive and out of reach of the majority of Tanzanians. Many men and women are unaware of their legal rights, resistant or reluctant to the idea of registering land in the joint names of spouses. Whilst the Land Acts provide a set of rules for buyers and

mortgagees to follow which will protect their interests, in practice it is easy for an individual to provide buyers and mortgagees with the documentation they require without their spouse's consent. Where unregistered interests in land are concerned, statutory safeguards need to require more than a signature or affidavit if women's interests are to be meaningfully protected. This may call for greater involvement of key community actors in the legal process of dispositions.

Concerning female inheritance of land the passing of the Land Acts has seen land, family and succession laws in Tanzania become more fragmented and inconsistent than ever. Whilst the Land Acts include a statutory equality 'trump' over discriminatory practices in land disputes, codified discriminatory customary laws of succession were left unchanged by the Land Acts, and uncoded discriminatory customary practices also remain recognised in Tanzania's plural legal system. Such discriminatory laws and practices are still applied in estates matters heard in the ordinary courts.

The creation of a separate system of land courts was an important priority for both the Tanzanian government and the Shivji Commission to remedy a number of deficiencies in the administration of justice in land cases. However, this has also served to amplify the fragmented statutory approach to land in family contexts. Where land disputes between spouses are concerned there is confusion amongst many litigants in identifying the appropriate legal fora to make a claim. In reality there is a substantial legal lacuna in statutory protection of a wife and her interests in land within a subsisting marriage, as Elizabeth's case in chapter 4 highlights. Whilst land courts can issue injunctions against unauthorised sale or mortgage of land by a spouse, they have no jurisdiction to make orders regulating the occupation of family land between spouses within marriage, or to make injunctive orders to protect an individual against domestic violence.

NGO activists, women judges and lawyers in Tanzania have been campaigning for laws to protect women against domestic violence, including property grabbing. A number of cases from my fieldwork graphically illustrate that the act of issuing a legal claim can often be met with violence and property dispossession against a woman claimant and those who help her. If land courts had a more comprehensive set of legal tools at their disposal to deal with the range of social issues, including violence, that arise in family land disputes, this would go some way to protecting women and strengthening women's

agency throughout the litigation process. However, such legal measures would need to be supported by effective police action and social awareness.

Access to justice and social power relations

It is often claimed that women favour local level dispute resolution over the fora of legally qualified lawyers and judges. However, my discussions with women claimants in Arusha suggest that attitudes to this issue are quite mixed. Situated in the local communities they serve, village land councils and ward tribunals are undoubtedly best placed to handle claims from litigants who only speak their local vernacular language. Their knowledge of local people also holds advantages for grasping the history and factual complexities of a dispute and ensuring that a litigant's actual family members and local political leaders are the ones called to give evidence before the tribunal. They are also generally quicker at resolving disputes and work with family elders and community leaders to reach a peaceful settlement.

The higher the level of court the more removed the court is from a local community. This may raise practical challenges in terms of taking time away from employment and caring responsibilities and journeying to courts by foot or on public transport. It also carries significant disadvantages for those who are illiterate and/or converse mainly in their vernacular language. The more removed from the community the less likely tribunal members are to know - or think they know - the people and history of a dispute. This means that although it may be harder for a more distanced tribunal to establish the factual basis of the dispute and have confidence in the reliability of particular witnesses, the tribunal itself is less likely to prejudge the litigants and witnesses and the merits of the claim.

Whether a person favours one form of dispute resolution or level of court over another may greatly depend on whether personal circumstances and relationships place them at an advantage or disadvantage in the minds of the legal actors involved in the dispute. As fora which are socially disembedded from litigants' local communities, at the higher levels of court social power relations can shift according to litigants' abilities to negotiate a very different institutional framework. This may represent a new opportunity for securing justice – particularly where local actors have obstructed claims. This was an important issue for one woman I came to know who had been harassed and

branded *mchawi mlevi* (a drunkard witch) by her neighbours. She had no confidence that 'the village' would give her a fair hearing and believed that 'someone will pay someone'. Instead she wanted her claim to be resolved by a lawyer or a court in town.

Chapter 4 of this thesis analysed the making of legal claims to land as an on-going process of agency, resistance, negotiation and contestation of social power relations. Furaha and Elizabeth's experiences demonstrated that the act of making a legal claim is in itself a moment of agency and resistance against violence and the alienation of land. However, the progression of women's claims into statutory legal fora often depends on the support of male family and community leaders giving their blessing to a claim proceeding to court and providing support as witnesses. In some cases women have found it necessary to pay or provide food for witnesses to gain their support in proceedings.

It is easy to make assumptions and generalisations about male patriarchal attitudes to female land-holding; however, during the course of my fieldwork I met several male family elders and local political leaders who, through their actions, demonstrated a commitment to helping women litigants to realise their claims to land. As An-Na'im and Hammond argue, whilst 'predisposed to act in culturally sanctioned ways, [people] are to varying degrees agents of change in the transformation of their own culture' (2002: 13). Much depends on the individual sensibilities of those in positions of local power.

The social and political power of these pivotal actors permeates the legal sphere of the Ward Tribunal, which is located in the executive rather than the judicial branch of government. As a locus of enmeshed local power structures ward tribunals and their previous institutional incarnations have long been criticised as politicised institutions that are vulnerable to corruption or the perception of corruption. From the perspective of women's claims the location of the ward tribunal in local government *and* local community brings additional challenges of negotiating male-dominated power dynamics between social, political, executive and legal actors at the interface of family, community and the tribunal itself. The presence of women as members of the ward tribunal may help to bridge a gendered social divide between female litigants and those

judging claims, but it does not prevent dealings between tribunal members and other actors which can impact upon the outcome of a dispute behind the scenes.

At an institutional level, facilitating access to justice in village land councils and ward tribunals would require no less than a structural dismantling of the fusion of executive and judicial power in local government, proper funding of tribunals and their members and regulation of tribunal fees to address the challenges of corruption. From the perspective of women's access to justice in particular, access to justice agendas must also address the impact of male-dominated social power relations in legal processes. This calls for legal literacy programmes that work with women and those in existing positions of authority, and reflect not just on the mechanics of law and legal processes but on their social implications from gender perspectives. Nyamu-Musembi has called for open-mindedness in looking for positive openings in a community's value system and collaboration with community members committed to social change as a basis for realising women's property rights (2002: 126). This approach to legal literacy is not unrealistic where local leaders are willing actors in processes of social transformation.

Twenty years have passed since activism on access to justice and legal literacy programmes began in Tanzania. To date mass sensitisation on the implications of the Land Acts in the region has been carried out principally by the local district councils in association with LHRC. Their programmes have included training sessions for local village and clan leaders and selected villagers on land rights and legal procedures, as well as seminars at village assemblies open to all villagers. TAWLA's Arusha office also conducts periodic seminars for women and children on particular topics. In order to reach the widest possible local audience LHRC broadcasts ad hoc local radio programmes on a range of civic, legal and human rights issues and maintains a profile at public events in the region, for example International Women's Day and HIV/AIDS awareness days. However, reaching women directly through mass media remains a challenge in rural areas due to lack of electricity, male control of communications such as the radio in male-headed households and unequal division of labour which may give some women less time to listen to the radio (TGNP 2007: 50-51).

Whilst more still needs to be done to educate ordinary men and women on their legal rights local NGOs and district councils lack resources to be able to carry out sustained,

direct mass sensitisation work. As a consequence strategies for educating the wider public on their rights have tended to be indirect or at public meetings, which women may be less likely to attend. Much of the legal literacy education in Arusha has targeted local leaders and officials, who are mostly men, charged with responsibility for implementation of law and procedure under the Land Acts. This reflects a wider picture across Africa. A review of 20 African countries in 1996 showed that due to limited state initiatives NGOs were focussing their training efforts on certain people within communities whom it was intended would disseminate legal information to local people (Tsanga 2007: 437). One challenge with indirect approaches to knowledge dissemination is that they effectively hand power through knowledge acquisition to those who have responsibility for recognising an individual's rights and advising them on where to go for legal advice and access to justice beyond the family. This is urgent work if laws are to be applied in practice, but it remains unclear to what extent this knowledge is being transferred to the wider population, particularly women.

Legal education programmes need to be sensitive to social power relations both in the way that they are publicised and in ensuring that it is not only the most powerful members of a community who participate and gain knowledge. In terms of their aims and substantive content women's access to justice initiatives require an approach to engaging with law and legal processes which directly addresses the social challenges that women face. Such initiatives must move beyond the technicality of law and information provision to providing environments for women to speak out about their experiences – both in women-only environments and in discussions with men. It is difficult to achieve this through one-off seminars or piecemeal project work. TGNP in Dar es Salaam runs weekly seminars which give ordinary men and women a unique open forum to engage in debate on a variety of social issues. These seminars are invariably well attended and women and men alike are encouraged by the organisers to *sauti!* – speak out and make their voices heard. It is hard to overestimate the significance of this for women who are precluded from speaking in social contexts elsewhere and must then face a male-dominated legal tribunal to present their claims to land in person.

Law's patriarchy and the transformatory potential of haki sawa

The male-dominated environment of some ward tribunals and social power structures that interact with legal processes illustrate the patriarchal dimensions of legal institutions at the local level. The cases explored in this thesis have illustrated the importance of *hekima* (wisdom/judgment) and *amani* (peace) as normative discourses that reflect conciliatory approaches to doing justice by both land tribunals and family elders and local leaders. Accordingly, both ward tribunals and the DLHT pay close attention to family processes of dispute resolution which are governed by mainly male elders and community leaders. This is illustrated in the importance attached to the oral evidence of family elders and documentation such as *boma* meeting minutes, as well as the practice of 'sending cases back home' via a *mwenyekiti wa kitongoji* to '*endelea weka amani*' (go and make peace). Such norms and processes are discretionary and inherently conservative in that their practice serves to preserve (male-dominated) social power relations. However, they can also positively serve women by recognising and upholding their interests within these social power structures.

These male-dominated structural features of legal processes are reinforced by the patriarchal nature of 'customary law', which land tribunals are required to apply in Tanzania's plural legal system. My fieldwork findings show that in contrast to the textual approach of the higher courts in general (discussed in chapter 5) ward tribunals and the DLHT in Arusha do not tend to refer to codified versions of customary law in their decision making. In practice tribunal members engage with their own contemporary understandings of customary practices concerning marriage, land acquisition and use. As discussed in chapter 1, some practitioners and academics term this a 'living law' approach, which has the effect of imbuing social practices with the normativity of 'law'. One consequence of this is that by its uncoded nature interpretations of 'living law' are seen to exist in the minds of those local authority figures who claim to know it. If courts recognise this in their approaches to finding law and judging claims this renders legal processes intrinsically patriarchal and enables male elders to assert legal authority over the knowledge and application of customary practices. It is therefore important for law reformers to reflect on the implications of advocating for the concept of 'living law', since this may serve to reinforce male dominated social power relations in the adjudication of disputes.

The statutory equality ‘trump’ in the Land Acts represents a legal centralist challenge to the application of customary laws that are perceived to be gender discriminatory. Interestingly, despite all that may be said about the patriarchal nature of the legal system, my fieldwork observations suggest that in the context of inheritance-related land disputes adjudicators in Arusha’s land tribunals appeared to be ready and willing to discount or reinterpret customary practices to give effect to women’s land rights. Their general approach is not so much based on legal technicality as on the normative force of a discourse of *haki sawa* (equal rights). The Land Acts provide an illustration of how broad discourses of gender equality and human rights have been ‘reformulated and legalised’ (Wilson 2007) through their use in the construction of statute. Statute itself has then become used as a basis for constructing rights discourse. Hence, the discursive object of *haki sawa* has gained normative force as a ‘tool’ which is being used in social and legal processes of decision-making.

In contrast to the conservative power of *amani* therefore, *haki sawa* as a discourse offers transformative possibilities to challenge male-dominated social power relations and customary practices in land tribunals. However, as discussed in chapters 4 and 5 in practice the transformative possibilities of *haki sawa* are generally not actively tested in the context of female inheritance claims. This appears to be in part due to the atypical circumstances that give rise to many women’s claims to inherited land – such as land given to daughters by a father with no sons. I did not see claims to inherited land brought by women which lacked the evidential support of at least some influential family elders or local political leaders. The most likely explanation for this is that legal claims are generally only brought and sustained after attempts to resolve the matter at home have failed and family elders have given their blessing to the woman’s claim proceeding to statutory legal fora. It would appear that women who lack support from key members of their own family or a respected local *balozi* or *mwenyekiti wa kitongoji* are unlikely to be in an evidential or social position to make or sustain their claim.

In the context of disputes between spouses and unmarried couples, my fieldwork findings suggest that the discourse of *haki sawa* has had limited impact on patriarchal attitudes to female control of inherited family land as opposed to self-acquired land. In practice, the fieldwork cases demonstrate that land acquired in these different ways is treated differently by both families and courts. The distinction is significant in terms of

social attitudes to the legal requirement for a wife's participation in dispositions concerning 'matrimonial property'. In some cases women reported being denied the right to be heard or excluded altogether from participation in meetings concerning family land. Even when women expressed their views indirectly, for example via a family guardian, their agency in stopping a disposition effectively was contingent on their relations with other men in the family, as the case study in chapter 6 illustrates. Land courts appeared to be more willing to void dispositions of self-acquired land than inherited family land where spousal consent had not been obtained, notwithstanding that a wife's interest in both types of land is protected under the Land Acts.

Where there are issues of law and fact to be determined, although statements about gender equality regularly feature in tribunal judgments, the decision to uphold a woman's claim tends to be made on some other substantive basis. Hence, *haki sawa* in judicial decision-making is generally used in a hortatory way to give extra normative force to a decision that has been made in favour of a woman litigant on other more specific statutory or evidential grounds. Arguably therefore, perhaps the greatest value of the equality 'trump' in the Land Acts lies in its capacity to influence social attitudes and the evolution of customary practices which are more favourable to women, rather than as a transformatory legal tool in litigation.

'Unlearning privilege' - the role of lawyers and judges in the process of justice

Across many societies lawyers and judges are popularly perceived on the one hand, as honourable members of an elite profession and on the other, as greedy or out of touch with the sense of justice of ordinary people whom courts are intended to serve. Undoubtedly there is much truth in the suggestion that some lawyers enter their profession motivated by status and riches. Some relish the prospect of the rigorous intellectual challenge of law and the art of legal argument. For some would-be lawyers it is about 'justice'. The professionalisation of a person as a lawyer or a judge is a process of 'conversion' to law: a gradual process of intellectual transformation in which the lawyer becomes trained eventually to view the social world through legal rules, and the legal concept of justice as one which is separable from a felt sense of justice or *haki* that is bonded with social relationships. Having successfully completed this process of social dislocation, and wearing their professional court attire, lawyers and judges alike

are equipped with the rule-oriented mindset to enable them to judge claims against a set of criteria which the architects of law deem relevant. Opportunities for technical arguments are seized upon like legal cherries – especially if it involves an adjournment or striking out a claim. In adversarial legal processes truth-finding is considered secondary to the objective of proving and winning a client's case. Little wonder that courts the world over are such feared and alien environments for most ordinary people.

In Tanzania, the shortage of advocates and funds for legal representation mean that the majority of litigants represent themselves. Yet the practice of the DLHT and higher courts is structured to reflect the language, skills and expertise of legal professionals. As discussed in chapter 4, legal NGOs have taken a number of steps to try to make these higher courts more accessible to litigants in person – through document drafting, client coaching and the preparation of written submissions of legal arguments. NGO legal officers will also try to avoid disputes going to court by offering reconciliation services at their legal aid clinics. However, none of these measures are a complete substitute for legal representation in court; particularly where litigants are illiterate and do not fluently speak the official language of the court.

These challenges in legal representation raise a number of questions: Who are courts for, what is the value of lawyers and how should courts operate? If the purpose of courts is to do justice for the litigants who appear before them, then the values, language and processes of the court should reflect this. Tanzanian law academics such as Rwezaura (1993) and Shivji have long been advocating for the national language of *Kiswahili* to become the language of the law. The Shivji Commission argued that *Kiswahili* should be spoken at all levels of land court, even if statutes were to remain in English (URT 1994: 199). The Commission's recommendations on language have not been implemented. However, I would argue that realisation of access to justice in the interests of the population as a whole will only be substantively achieved through the adoption of *Kiswahili* as the official language throughout the Tanzanian court system. Although there is the argument that English is the official language of government and business in Tanzania as well as the common language of Commonwealth legal systems, arguably it is more important that a litigant is able to read the judgment in their own case and have their evidence recorded on the court record in the same language that it

was spoken in; than for judgments to be produced in English for the purpose of Commonwealth law reporting.

In Tanzania, lawyers are prohibited from practising in ward tribunals and primary courts. Their institutional and social standing means that they are powerful players in the higher levels of court. Many litigants I met wanted but could not afford the services of a lawyer. Competent lawyers have the skills, procedural knowledge and confidence to present claims in court that many litigants lack. It follows that legal professionals have the potential to redress social power inequalities within the court forum. This can be transformative for those litigants who have very limited power within their own social sphere. However, in practice often social power inequalities become amplified, because representation is usually only available to those who can afford to pay for it. In a legal system where there is little *pro bono* representation, it must be asked whether it is fair to allow social power inequalities to become amplified by parties who can afford to engage the services of an advocate, without actively promoting other kinds of legal support in court – such as paralegal assistance.

Adjudicators in the DLHT and High Court are mindful of power imbalances in representation and will often adopt a flexible approach to litigants in person. However, from my observation of all levels of land court I would argue that more needs to be done by those adjudicating claims to ensure that litigants and witnesses are given the space and support to articulate their claims in a language that they feel confident in, or through an interpreter who is able to accurately and impartially interpret. Since many litigants are unaware of their legal rights this may call for adjudicators to become quite interventionist in enabling people to make and frame their claims. Research on access to justice and judging in the UK (Adler 2008) suggests that an inquisitorial approach to gathering evidence is preferable to an adversarial one if power imbalances in legal representation are to be minimised.

As discussed in chapter 5, in the case of women's claims to land adjudicators also need to be mindful of the social challenges that many women face in producing evidence that is generally considered persuasive for establishing a claim, and the gendered nature of document production concerning interests in land. In the case of unregistered land and claims between unmarried couples, if adjudicators attach most weight to the witness

evidence and documentation of family elders and legal titles than to other kinds of more circumstantial evidence, they effectively adopt a male gendered approach to adjudication, which in many cases will tend to favour male claimants or male-dominated power dynamics within a family. My contention therefore is that for substantial justice to be done in women's claims to land it is necessary for tribunals to actively consider gender issues and dynamics as an integral part of the process of gathering evidence and adjudicating claims.

The Land Acts have strengthened and renewed a discourse of equal rights in the context of women's interests in land, and offer women a legal tool which may be used proactively to secure rights, or to defend women's interests in land through litigation. In the context of the law in action lawyers and judges have a key role to play in the realisation of women's interests in land. Yet their role also risks undermining women's claims if they fail to adopt a litigant-centred and gender sensitive approach to the process of justice. I argue that this requires judges and lawyers to not only utilise the skills of their profession, but – applying Spivak's (1998) phrase – be prepared to systematically 'unlearn their privilege' and actively engage with the values and felt sense of *haki* of ordinary people, ensuring that women's voices and experiences are heard and understood. In this way the role of lawyers and judges may be conceptualised as one of facilitator of access to justice, rather than simply an advocate or adjudicator. In the spirit of Santos (2007), the pursuit of justice and rights through court processes may then become a counter-hegemonic project of social emancipation.

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Appendix A

Research design and ethical issues

This discussion focuses on my most significant research design choices and some of the practical and ethical research challenges that I faced as an ‘*mzungu*’ (white European) living and conducting ethnographic research in an African society. In the interests of transparency and critical review I give particular attention to the challenges and benefits that were inherent in the cross-cultural dimension of my research.

Research design

Before commencing research in Arusha I spent an initial two months in Dar es Salaam undertaking an intensive *Kiswahili* language course and discussing my research design and possible fieldwork locations within Tanzania in conversations with Professor Chris Maina Peter at the Law School of the University of Dar es Salaam and legal officers at LHRC and other Tanzanian legal and feminist activist NGOs²⁴⁵ based in the city. Through these conversations five regions of Tanzania emerged as potential locations for conducting my fieldwork – all fertile agricultural areas where particular concerns had been identified over women’s interests in land in the context of patrilineal land tenure systems. These were Kagera, Arusha and Kilimanjaro in the north, and Mbeya and Iringa in the south. Pressure on land in all three northern regions had resulted in a high number of land disputes reaching the courts.

In order to decide on a single location for my fieldwork I conducted scoping visits to four of the regions identified, spending approximately one week in each location. I decided not to visit Kagera – located in the far northwest corner of Tanzania - due to the distance involved in scoping the various fieldwork locations across the country. In each location I visited the local legal NGO (NOLA in Mbeya and Iringa, KWIECO in Moshi (Kilimanjaro) and LHRC in Arusha) to ascertain some of the regional issues concerning women and land and to discuss practical questions of access in order to conduct my research. I also visited local primary courts and the DLHT to gain a sense of the nature and volume of legal claims concerning land that were being brought by women. From these initial scoping visits Kilimanjaro and Arusha emerged as the two most viable places to conduct my research in terms of practical access and high volume

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of legal claims. The socio-economic complexity of Arusha, challenges of rapid urbanisation, and the legacies of colonial and investor demand for Arusha's land and other natural resources, were all significant factors in my final choice of Arusha as the location for an ethnographic study of women's legal claims to land in contemporary Africa.

The multi-sited nature of my research meant that in order to undertake a study of sufficient depth within the timeframe, it was necessary for me to prioritise the type and levels of courts and tribunals in which to conduct my research. Although the Land Acts introduced a specialist system of land dispute resolution, claims to land in the context of divorce and administration of estates lie within the jurisdiction of the ordinary courts. One important consideration was the extent to which I should study land issues raised within the ordinary court system as well as land tribunals.

It became apparent to me during the early stages of my research in the DLHT and LHRC that there was some degree of overlap between the ordinary courts and land tribunal system in some of the legal claims involving women. I found several cases where male and female claimants had initially litigated inheritance or matrimonial claims through the hierarchy of ordinary courts and subsequently re-litigated their claims in a different incarnation in the land tribunals – or vice versa. However, the high volume and range of issues in land claims concerning women that were handled by Arusha's DLHT alone was such that I decided to focus my study on two levels of tribunal within the land court system rather than attempt to cover the ordinary court system as well.

I had official permission by way of a research permit and letters from local government to conduct the research. However, in order to establish good relations with Ward Tribunal members from the outset I arranged for local contacts to accompany me to the tribunals as an introducer – whether a district officer, local community leader, friend, elder or research assistant. Thereafter I generally attended Ward Tribunal sessions with a research assistant (discussed further below). Establishing rapport, becoming a familiar face and gaining an understanding of what we were observing meant that I and my research assistants found that our work in the ward tribunals was quite painstaking, and required great patience and concentration. At each Ward Tribunal we visited we

collected data in the form of observation, court records and interviews with tribunal members and litigants on just two or three cases involving women litigants per tribunal. However, the depth and richness of the material we collected proved to be some of the most valuable data for interpretation from my fieldwork.

As a result of the research design decisions I made, a weekly research pattern emerged. For most of my nine months of fieldwork in Arusha I lived in one of the wards I studied in order to participate in and observe daily life in a local community, and kept a detailed field diary. In a typical week I divided my time spent observing and conducting archival research in legal fora between three different locations. Most ward tribunals sat for two days per week. In any given week I spent on average two days at the Ward Tribunal, one or two days at the DLHT and one or two days at LHRC's legal aid clinic, with the remaining time spent conducting interviews with litigants, family and clan elders, local leaders, lawyers, adjudicators and local government executives.

Practical and ethical issues

Courtroom observation

Observation is time-consuming and not always favoured over other methods of data collection such as interviews. Nevertheless, I considered it essential for gaining an understanding of power dynamics and interactions between social and legal actors involved in the process of dispute resolution, the practical realities of access to justice, courtroom discourse 'off the record' and the functioning of the legal system itself. However, one issue that I found troubling - familiar to many a legal ethnographer observing courts and tribunals - was my own positioning and impact as a researcher present in the courtroom. This was a particular challenge for conducting research in the lower courts and tribunals in local communities unused to the presence of 'outsiders', including advocates.

I experienced this challenge on my first scoping visit to a primary court in Mbeya region. Turning up at the court by myself I did not know how I might be perceived or received as an obvious outsider, but people were friendly and curious and I got into conversation with a member of the public outside the court. Within a short period of time all three magistrates had come outside to meet me. They were more welcoming

that I could ever have imagined – indeed, no court or tribunal I visited in Tanzania refused me access to conduct my research there. I soon found myself accompanying one of the magistrates into the courtroom and to my surprise was invited to sit next to the court clerk immediately below the judicial bench. The eyes of a packed courtroom of people stared back at me. I felt enormously conspicuous and conscious that my positioning alongside court personnel was inappropriate for its potential to generate public concern and wonder as to why I was there. It seemed to align me with the bench.

Having experienced this reception and effect of my presence and positioning in a courtroom early on, at each new tribunal I visited I was careful to request from the outset a position in the least conspicuous place in the tribunal from where I could observe and take notes. Some tribunals announced to members of the public my status as a researcher. I always used a notebook rather than a laptop to take notes at court and dressed in a smart-casual way to avoid creating too official an appearance. I will never know the extent to which my presence as an observer may have impacted upon the proceedings on any given day. However, spending nine months at the DLHT and up to two months at each Ward Tribunal enabled me to collect a very substantial amount of data from different fora for comparison, including historic and contemporary data from occasions when I was not present. I also became a familiar face with tribunal members, advocates and litigants, and over time I had many informal conversations with a range of court users and personnel in the hours and days spent hanging about the tribunals. These spontaneous and informal conversations added to the insights I was able to gain from other sources of data and contributed to the gradual process of theorising and evaluation that I engaged in throughout the period of my fieldwork.

Archival research

Much of the development of my research design in the early stages of my fieldwork in Arusha grew from research in the archives of Arusha's DLHT. I spent the first three days working with raw data from court registers to identify the volume of cases involving women claimants and their geographical origin within the region. One immediate problem I faced was that no gender disaggregated data was available so it was necessary for me to go manually through the registers identifying the gender of litigants for each case. This task required the assistance of an obliging member of

tribunal personnel since there were many local vernacular names which I did not recognise. From my initial tabulation of data on appeals I established a scattering of cases across numerous different wards. However, three wards in Arusha Municipality, Arumeru and Monduli Districts had generated a higher than average number of appeals. I took them as my starting-point and asked to look at the case files for the appeals from these wards.

A second practical problem then arose. One symptom of underfunding in Tanzania's legal system is the very inadequate file storage system in Arusha's DLHT. Whilst live case files were relatively easy for administrative staff to access I was unable to view a number of the older files I had requested that had been bundled and stacked away. Over the course of the nine months however, I made detailed notes on over fifty separate cases involving women litigants from ward, DLHT and High Court archives and some LHRC case files, giving a substantial sample of detailed court data from which to generate theory and findings. I requested most of these case files after observing the cases in the tribunal. Hence, my choice of case files was largely driven by what I had observed rather than by pre-determined criteria – other than the gender of litigants. This also meant that I had observation data to enrich the archival data.

A third challenge in following the progression of cases was the length of the court process. Whilst it was possible to observe and collect archival data for several Ward Tribunal cases from file opening to judgment, cases in the DLHT and High Court by contrast took considerably longer - sometimes years - to conclude. This meant it was impossible to observe many DLHT cases from start to finish during my nine months in Arusha. I was able to collect judgments from 22 of the cases and was reliant on archival data to track appeals from ward to DLHT and from DLHT to High Court.

Interviewing litigants

I considered interviews with women litigants extremely important for bringing women's voices and experiences of accessing justice into my research. The value of personal narratives and life histories has been emphasised by a number of scholars of legal ethnography. In her ethnographic study of the Kwena of Botswana Griffiths found life histories an important tool for understanding the context in which people pursue claims,

or desist from doing so (Griffiths 1997, 2002). As Caplan writes, personal narratives, including life histories, ‘... provide a vital entry point in interaction between the individual and society’ (Caplan 1997: 14). They may also, as Hirsch suggests, ‘offer possibilities for women to make observations about their lives that they might not articulate in everyday contexts’ (Hirsch 1998: 61). Yet conducting interviews, including life histories, proved to be the most sensitive and difficult aspect of my data collection.

Critiques of feminist ethnographic research as a whole have drawn attention to its inherent ethical tensions rooted in power inequalities and the risk of objectification, manipulation and betrayal of informants whose private lives are made public by the researcher (Patai 1991, Stacey 1991). Such risks may be mitigated by ensuring informed consent and developing respectful relations based on reciprocity, although arguably they can never be entirely overcome. In the context of my research on access to justice I was faced with conflicting priorities. On the one hand, on several occasions I was asked to help or support someone who had given their time to contribute to my research project. On the other hand I wanted to remain as ‘neutral’ as possible in order to be able to speak to various parties to a dispute and achieve a balance of perspectives. I had to try to resolve such dilemmas whilst becoming part of a community, engaging in everyday interactions with informants and developing friendships. I found conducting interviews in such circumstances an ethically and socially complex business, bound up in a web of social relations. I in turn became the subject of my informants’ questions and decisions.

These complexities of ethics and bias have been discussed by other scholars conducting legal ethnographic research. Coutin, for example, reflecting on her own commitments and biases in undertaking research and voluntary work with legal services programmes in community organisations, argues that ‘to view fieldwork as merely or even primarily research can underestimate the complexity and embeddedness of social interaction and overestimate the power of ethnographers’ (Coutin 2002: 109). Moreover: ‘because social interaction is multifaceted, fieldwork unavoidably creates competing obligations of one sort or another’ (Coutin 2002: 119; see also Coutin and Hirsch 1998). I resolved that the most ethical approach where I was in a position to offer some modest practical assistance to a woman who asked for my help was to do so, whether directly, or in the

case of legal advice, by referring her to the LHRC. In such circumstances I prioritised feminist-inspired research ethics over maintaining the position of a passive bystander for the sake of a more 'neutral' approach to data collection. I considered that this was necessary for conducting my research in the most ethical way possible, but also for gaining a meaningful understanding of women's experiences of accessing justice.

My ethical choices in these cases shaped my research findings to the extent that it gave me access to particular insights whilst excluding others. It was through such cases that I acquired an appreciation of the nature of the women's struggles for access to justice that I could not have learned from a single interview. Female bias in these cases was, I would argue, not only justified given my research aims, but also balanced with male perspectives in my data collection as a whole. I also undertook interviews with male family members, elders, community leaders and male litigants in other cases and obtained male witness testimony from observation and archival research. The majority of Ward Tribunal members and lawyers I met were also male.

Due to the sensitive nature of family land disputes I wanted to prevent any adverse social consequences for informants as a result of participation in my research. This meant that the process of arranging and conducting interviews had to be done discretely, which was not straightforward in the case of litigants I met at tribunals. In the case of LHRC clients this was somewhat easier as legal officers assisted with introductions and arranging the interview appointments. However, interviews via the LHRC carried two major disadvantages. Firstly, I considered that ethically I would not be able to interview other parties to the dispute because of the conflict of interest this would generate. Secondly, it became evident that, despite what they had been advised, some informants had hopes that I would be in a position to assist them with their case either by representing them myself or by paying for an advocate to represent them in court. This was a particular issue during my fieldwork period because, faced with very limited funding for legal representation, the approach of Tanzanian legal NGOs was invariably one of coaching clients to appear in person. However, several litigants I spoke to told me they were afraid of representing themselves and wanted an advocate. In a couple of cases I found myself in the uncomfortable situation of disappointing hopeful informants.

I also wanted to interview litigants who were pursuing their cases without the benefit of any legal advice. Meeting litigants in person was difficult at the DLHT, where the long corridor outside the hearing rooms in the Regional Commissioners' Building – whilst a good place to chat with advocates I came to know – was not conducive to striking up conversations with people I did not know. In contrast, ward tribunals proved to be more natural places to meet litigants, local leaders and elders who were involved in the court process, in their own communities. Sometimes opportune moments arose when I could ask someone if they would be willing to participate in my research. Alternatively, simply sitting in the vicinity of the Ward Tribunal on my own or with my research assistant I found that over time people would approach us themselves and we would then discuss with them whether they would be prepared to talk to us about their case.

One particular difficulty I encountered when interviewing some women litigants was in ensuring that others whom they had brought to the interview did not speak for them or inhibit what they might say. Some of the women I interviewed were accompanied by a man such as a family elder, guardian or a son. Anxious to make my interviewees feel as comfortable as possible - and concerned not to transgress social norms or cause any cultural offence - I gave the women the choice as to whether others remained for the interview, and often they chose for them to stay. However, one disadvantage of this was that sometimes the accompanying man would answer questions posed to the woman for her and I would have to make it clear that the woman should answer the questions.

In my observations of legal aid clinic conferences I noted that sometimes female clients would be accompanied by men to the clinic and the same situation would occur with substantial conversations taking place between the legal officer and the accompanying man while the woman remained silent. I discussed my observations and own difficulties in conducting interviews with a legal officer at the clinic. We were in agreement that lawyers and researchers should be alert to the impact of allowing others to sit in on interviews and if necessary take their own judgment on whether a third party should be present in the conference or interview. From my experiences of conducting and observing others' interviews with women litigants I would urge both lawyers and researchers to ensure that they create the necessary space to allow a woman to speak in

her own cause and take such measures as may be necessary to ensure that what she says is not potentially affected by any vested interests of her entourage.

Translation

As Birbili notes, collecting data in one language and presenting the findings in another involves taking translation-related decisions that have a direct impact on validity (Birbili 2000). This was a significant issue in my fieldwork, which involved collecting data in four different languages – English, *Kiswahili*, *Kimeru* and *Kimaasai*. My *Kiswahili* language training enabled me to converse with many informants directly. However, I decided to engage research assistants to translate in-depth interviews and help bridge cultural gaps between interviewees and myself. Translation of questions and answers was done simultaneously and I wrote verbatim notes in English paying attention to any particularly significant *Kiswahili* words and phrases. If informants consented I also recorded interviews on a voice recorder for future reference. However, several informants preferred me not to use the voice recorder.

The challenge of simultaneous translation was not simply my own. Ward Tribunal secretaries and DLHT chairpersons routinely simultaneously translate witness testimony from the vernacular to *Kiswahili* or from *Kiswahili* to English in order to record proceedings in the official language of the tribunal. This has a direct impact on the accuracy of the ‘verbatim’ recording of witness testimony on the court record – a factor I had to take into account when analysing court records as textual discourse. Proceedings in the land courts were not officially tape recorded. Therefore, for the purpose of my research project I asked my research assistants to make their notes of tribunal observations in *Kiswahili*. We would then go through the notes together at the end of the day’s work to produce an English translation to supplement the handwritten tribunal record of proceedings.

In ward tribunals located in Meru and Arusha areas I found it necessary for my research assistants to be able to speak English, *Kiswahili* and the local vernacular language since tribunal members and witnesses would often mix *Kiswahili* and their vernacular language to such a degree that a Tanzanian who did not speak the local language sometimes could not understand what was being said. Over the period of nine months in Arusha I had to engage four research assistants to be able to adequately address the

translation-related challenges of my research. My research assistants were all law graduates and therefore interested in and sensitive to legal processes as well as fluent in English and *Kiswahili*. Three of my research assistants also spoke the vernacular language of their respective tribes. A significant proportion of the court documentation I collected was in sometimes quite broken *Kiswahili*. My research assistants translated court documents into English, which I then reviewed and edited.

Being *mzungu*

This account has endeavoured to highlight some of the very real challenges I faced in conducting cross-cultural research in multiple legal and social contexts and with a diverse range of informants. My experience as a lone foreign researcher was at times, and especially in the early stages, overwhelming, puzzling and full of the unexpected. Being regularly labelled '*mzungu*' by strangers and friends grew extremely wearing, but I learned to accept it as a kind of exoticism of the white person who looked so out of place walking around a Tanzanian mountain village or travelling in a *daladala*. At the same time, I was regularly struck and humbled by the warm welcome of '*karibu sana*' ('you are very welcome') that I was greeted with throughout Tanzania.

I made a conscious choice to distance myself from – though not abandon entirely – my cultural comfort zone of Arusha's ex-pat community, and live instead with Tanzanian families. Choosing cultural unfamiliarity and conducting multi-sited research proved exhausting and left me initially with a feeling of isolation between worlds. My field diary became my most important daily resource for reflection on my research, my own subjectivity and emotions and for unravelling the sensitive ethical dilemmas I faced. It was in these early stages of unfamiliarity and cultural isolation that I was able to notice and question most vividly the everyday. This, I came to appreciate as one of the most valuable features of cross-cultural ethnography.

Reflecting on my own experiences I believe that the researcher can never conduct their project entirely detached from their own normative commitments, subjective positioning, social and cultural background, knowledge, emotions and preconceptions. Reflexivity serves as a tool for analysis but it cannot change the researcher's own position in the world. Yet, the naivety and emotional discomfort I experienced, together with my overt status as an outsider carried the advantages of freedom to question

normality and a heightened sense of my own subjectivity. My own background served as a point of comparison and contrast, providing me with openings for exploration that might have remained closed by familiarity to a researcher in their own society. For this reason I would welcome cross-cultural research of my own society and legal institutions. I would argue further, that projects conducted collaboratively by insiders and cross-cultural researchers provide an interesting model for socio-legal and feminist research founded on ethics and reciprocity, with the potential to yield particularly rich findings and original thought.

Appendix B

Table of legislation

Constitutional legislation

Constitution of the United Republic of Tanzania 1977 Cap. 2 R.E. 2002

Constitution (Fifth Amendment) Act (Act No. 15 of 1984)

Tanganyika (Constitution) Order in Council 1961

Primary legislation

Administration (Small Estates) (Amendment) Ordinance R.L. Cap. 30

Civil Procedure Code (Act No. 49 of 1966) Cap. 33 R.E. 2002

Courts Ordinance (No. 6 of 1920) R.L. Cap. 3

Customary Leaseholds (Enfranchisement) Act (Act No. 47 of 1968) Cap. 377 R.E. 2002

Evidence Act (Act No. 6 of 1967) Cap. 6 R.E. 2002

Freehold Titles (Conversion) and Government Leases Act (Act No. 24 of 1963) Cap. 393 R.E. 2002

Government Leaseholds (Conversion to Rights of Occupancy) Act (Act No. 44 of 1969) Cap. 367 R.E. 2002

Indian Acts (Application) Ordinance of 1920 R.L. Cap. 2

Interpretation of Laws Act (Act No. 4 of 1996) Cap. 1 R.E. 2002

Judicature and Application of Laws Act (Ordinance No. 7 of 1920) R.L. Cap. 2, (Ordinance No. 1 of 1961) R.L. Cap. 453, Cap. 358 R.E. 2002

Labour Utilization Ordinance of 1947 R.L. Cap. 243

Land Act (Act No. 4 of 1999) Cap. 113 R.E. 2002.

Land (Amendment) Act (Act No. 2 of 2004)

Land Disputes Courts Act (Act No. 2 of 2002) Cap. 216 R.E. 2002

Land Ordinance (No. 3 of 1923) R.L. Cap. 113

Land Registration Act (Ordinance No. 36 of 1953) Cap. 334 R.E. 2002

Land Registry Ordinance (No. 15 of 1923) R.L. Cap. 116

Land (Settlement of Disputes) Act (Act No. 25 of 1963) R.L. Cap. 524

Law of Limitation Act (Act No. 10 of 1971) Cap. 89 R.E. 2002

Law of Marriage Act (Act No. 5 of 1971) Cap. 29 R.E. 2002

Laws Revision Act (Act No. 7 of 1994) Cap. 4 R.E. 2002

Local Courts Ordinance (No. 14 of 1951) R.L. Cap. 299

Local Courts (Minister for Justice and Regional Local Courts Officers) Act (Act No. 16 of 1962)

Local Government (District Authorities) Act (Act No. 7 of 1982) Cap. 287 R.E. 2002

Local Government Finances Act (Act No. 9 of 1982) Cap. 290 R.E. 2002

Local Government Laws (Miscellaneous Amendments) Act (Act No. 13 of 2006)

Local Government Negotiating Machinery Act (Act No. 11 of 1982)

Local Government Service Act (Act No. 10 of 1982)

Local Government (Urban Authorities) Act (Act No. 8 of 1982) Cap. 288 R.E. 2002

Magistrates' Courts Act (Act No. 55 of 1963) R.L. Cap. 537

Magistrates' Courts Act (Act No. 2 of 1984) Cap. 11 R.E. 2002

Magistrates' Courts (Amendment) Act (Act No. 18 of 1969)

Mortgage Financing (Special Provisions) Act (Act No. 17 of 2008)

Native Courts Ordinance (No. 5 of 1929) R.L. Cap. 73

Nyarubanja Tenure (Enfranchisement) Act (Act No. 1 of 1965)

Prevention and Combating of Corruption Act (Act No. 11 of 2007)

Probate and Administration of Estates Act (Act No. 9 of 1963) R.L. Cap. 445, (Act No. 55 of 1963) R.L. Cap. 29, (Act No. 33 of 1964) R.L. Cap. 30, (Act No. 9 of 1965) R.L. Cap. 326, Cap. 352 R.E. 2002

Regulation of Land Tenure (Established Villages) Act (Act No. 22 of 1992) Cap. 267 R.E. 2002

Village Land Act (Act No. 5 of 1999) Cap. 114 R.E. 2002

Ward Tribunals Act (Act No. 7 of 1985) Cap. 206 R.E. 2002

Secondary legislation

Arbitration Tribunals Regulations (G.N. 219 of 1969)

Customary Law (Limitation of Proceedings) Rules (G.N. 311 of 1964)

German Foreign Office Decree of 15.1.1907

Imperial Decree regarding Creation, Acquisition and Conveyance of Crown Lands and regarding the Acquisition and Conveyance of Lands in general in German East Africa, promulgated 26.11.1895

Land Disputes Courts (District Land and Housing Tribunal) Regulations (G.N. No. 174 of 2003)

Land (Mortgage) Regulations (G.N. No. 43 of 2005)

Local Customary Law (Declaration) Order (G.N. 279 of 1963), Cap. 358 R.E. 2002

Local Customary Law (Declaration) (No. 4) Order (G.N. 436 of 1963), Cap. 358 R.E. 2002

Regional and International instruments

African Charter on Human and Peoples' Rights 1981 (the Banjul Charter)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (the Maputo Protocol)

United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979

United Nations Convention on the Rights of the Child 1989

United Nations International Covenant on Civil and Political Rights 1966

United Nations International Covenant on Economic, Social and Cultural Rights 1966

Indian legislation

Code of Civil Procedure (Act No. 5 of 1908)

Hindu Wills Act (Act XXI of 1870)

Indian Succession Act (Act X of 1865)

English legislation

Family Law Act 1996 chapter 27

Appendix C

Table of cases

Tanzanian cases

Bahari Binti Rajabu v Juma Abdallah High Court of Tanzania (PC) Matrimonial Civil Appeal No. 8 of 1984 (Unreported)

Bi Hawa Mohamed v Ally Sefu Court of Appeal of Tanzania at Dar es Salaam Civil Appeal No. 9 of 1983, [1983] TLR 32

Boniface Muhigi v Philemon Muhigi [1967] HCD 231

Deocras Lutabana v Deus Kashaga Court of Appeal of Tanzania at Mwanza, Civil Appeal No. 1 of 1981, [1981] TLR 122

Elizabeth Stephen and Salome Charles v The Attorney General High Court of Tanzania at Dar es Salaam Misc. Civil Cause 82 of 2005 (Unreported)

Ephrahim v Pastory & Another High Court of Tanzania at Mwanza (PC) Civil Appeal No. 70 of 1989, [1990] LRC (Const.) 757

Hadija Mwere v Ally Mbaga High Court of Tanzania at Mwanza Civil Appeal No. 40 of 1995 (Unreported)

Haji Athumani Issa v Rweutama Mituta Court of Appeal of Tanzania Civil Application No. 9 of 1988 (Unreported)

Hamida Abdul v Ramadhani Mwakaje High Court of Tanzania at Dar es Salaam (PC) Civil Appeal No. 12 of 1988 (Unreported)

Joseph Sindo v Pasaka Mkondola High Court of Tanzania Civil Appeal No. 132 of 1991 (Unreported)

Khasim Hamisi Manywele v Republic High Court of Tanzania at Dodoma Criminal Appeal No. 39 of 1990 (Unreported)

Leons Challamila v Mayalla Edward Masunga High Court of Tanzania at Dar es Salaam Civil Appeal No. 150 of 1999 (Unreported)

Letisia Buguma v Thadeo Magoma and Another High Court of Tanzania at Mwanza Civil Appeal No. 8 of 1989 (Unreported)

Maagwi Kimito v Gibeno Werema Court of Appeal of Tanzania Civil Appeal No. 20 of 1984, [1985] TLR 132

Magdalena Zacharia v Daniel Zacharia High Court of Tanzania at Mwanza (PC) Civil Appeal No. 23 of 1989 (Unreported)

Maryam Mbaraka Saleh v Abood Saleh Abood Court of Appeal of Tanzania Civil Appeal No. 1 of 1992 (Unreported)

Matei Kijuu v Omari Salehe [1961] Dig. 206

Mikidadi v Mwanaisha Hashim High Court of Tanzania (PC) Matrimonial Civil Appeal No. 8 of 1980 (Unreported)

Naiman Moiro v Nailejiet K.J. Zablon Court of Appeal of Tanzania [1980] TLR 274

National Bank of Commerce v Vitalis Ayemba High Court of Tanzania at Mwanza Civil Case No. 37 of 1988 (Unreported)

NBC Limited v M/S Konje Multi Traders Co. Ltd and 2 Others High Court of Tanzania at Dar es Salaam (Commercial Division) Commercial Case No. 284 of 2002 (Unreported)

Ndewawiosia d/o Ndeamtzo v Imanuel s/o Malasi High Court of Tanzania at Moshi (PC) Civil Appeal D/80/66, [1968] HCD 127

Paulo Abdullah v Mohamed Bin Abdullah High Court of Tanzania at Dar es Salaam Civil Appeal No. 150 of 1999 (Unreported)

Re Innocent Mbilinyi [1971] HCD 283

Rukuba Nteme v Bi. Jalia Hassan and Another Court of Appeal of Tanzania Civil Case No. 19 of 1986 (Unreported)

Scholastica Benedict v Martin Benedict Court of Appeal of Tanzania at Mwanza Civil Appeal No. 26 of 1988, [1993] TLR 1

Shija Kadasa v Mahuyi Kadasa [1961] Dig. 208

Zakia Haji v Hamisi High Court of Tanzania at Dar es Salaam Matrimonial Civil Appeal No. 84 of 1983 (Unreported)

Zawadi Abdallah v Ibrahim Iddi High Court of Tanzania at Dar es Salaam Civil Appeal No. 10 of 1980, [1981] TLR 311

South African cases

Bhe v Magistrate Khayelitsha 2005 (1) SA 580 (CC), 2005 (1) BCLR 10

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744, 1996 (10) BCLR 1253

Shilubana and Others v Nwamitwa and Other 2009 (2) SA 66 (CC)

Appendix D

Key provisions from the Land Acts and Law of Marriage Act

Land Act (Act No. 4 of 1999)

Section 3

(2) The right of every woman to acquire, hold, use and deal with land shall to the same extent and subject to the same restriction be treated as the right of any man, is hereby declared to be law.

Section 85

If a lease is entered into by (a) two or more lessors as cooccupiers; or (b) two or more lessees as cooccupiers, and the lease is terminable by notice, the notice must be given by and to all the cooccupiers, unless all the parties to the lease have agreed otherwise, expressly or by implication.

Section 114 (formerly s.112 - as amended by LAA and MFSPA)

(1) A mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid only if -

(a) any document or form used in applying for such a mortgage homes is signed by, or there is evidence from the document that it has been assented to by the mortgagor and the spouses or spouses of the mortgagor living in that matrimonial home; or

(b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses living in that matrimonial home.

[(2) For the purpose of subsection (3), it shall be the responsibility of a mortgagee to take reasonable steps to ascertain whether the applicant for a mortgage has a spouse or spouses.]

Repealed by MFSPA and replaced as follows:

(2) For the purposes of subsection (1), it shall be the responsibility of the mortgagor to disclose that he has a spouse or not and upon such disclosure the mortgagee shall be under the responsibility to take reasonable steps to verify whether the applicant for a mortgage has or does not have a spouse.

(3) A mortgagee shall be deemed to have discharged the responsibility for ascertaining the marital status of the applicant and any spouse identified by the

applicant if, by an affidavit or written and witnessed document, the applicant declares that there were spouse (*sic*) or any other third party holding interest in the mortgaged land.

(4) An applicant commits an offence who, by an affidavit or a written and witnessed document, knowingly gives false information to the mortgagee in relation to existence of a spouse or any other third party and, upon conviction shall be liable to a fine of not less than one half of the value of the loan money or to imprisonment for a term of not less than twelve months.

Section 115 (as amended by LAA)

(1) The creation and operation of customary mortgages of land shall, subject to the provisions of this section, continue to be in accordance with the customary law applicable to the land in respect of which the customary mortgage is created.

...

(4) In any case concerning a customary mortgage, the Village Land Council determining the case shall, where it appears to the Village Land Council that - (a) there is a lacuna in the customary law applying to that mortgage; and (b) no other system of customary law makes adequate or any provision for the matter in respect of which there is a lacuna, be guided by the relevant provisions of this Part of this Act.

Section 161

(1) Where a spouse obtains land under a right of occupancy for the co-occupation, and use of both spouses or where there is more than one wife, all spouses, there shall be a presumption that, unless a provision in the certificate of occupancy or certificate of customary occupancy clearly states that one spouse is taking the right of occupancy in his or her name only or that the spouses are taking the land as occupiers in common, the spouses will hold the land as occupiers in common and, unless the presumption is rebutted in the manner stated in this subsection, the Registrar shall register the spouses as joint occupiers accordingly.

(2) Where land held for a right of occupancy is held in the name of one spouse only but the other spouse or spouses contribute by their labour to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an occupancy in common of that land with the spouse in whose name the certificate of occupancy or customary certificate of occupancy has been registered.

(3) Where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then-

(a) where that disposition is a mortgage, the lender shall be under a duty to make inquiries of (*sic*) the borrower has or as the case may be, have consented to that mortgage accordance with the provisions of section 59 of the Law of Marriage Act, 1971-

(b) where that disposition assignment or a transfer of land, the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to whether the spouse or spouses have consented to that assignment or transfer in accordance with section 59 of the Law of Marriage Act, 1971 and where the aforesaid spouse undertaking the disposition deliberately misleads the lender or, as the case may be, the assignee or transferee as to the answers to the inquiries made in accordance with Paragraphs (a) and (b), the disposition shall be voidable at the option of the spouse or spouses who have not consented to the disposition.

Village Land Act (Act No. 5 of 1999)

Section 20

(2) Any rule of customary law and any decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally, shall have regard to the customs, traditions, and practices of the community concerned to the extent that they are in accordance with the provisions of sections 9 and 9A of the Judicature and Application of Laws Ordinance and of any other written law and subject to the foregoing provisions of this subsection, that rule of customary law or any such decision in respect of land held under customary tenure shall be void and inoperative and shall not be given effect to by any village council or village assembly or any person or body of persons exercising any authority over village land or in respect of any court or other body, to the extent to which it denies women, children or Persons with disability lawful access to ownership, occupation or use of any such land.

Section 22

(1) A person, a family unit, a group of persons recognised as such under customary law or who have formed themselves together as an association, a primary co-operative society or as any other body recognised by any law which permits that body to be formed, who is or are villagers, or if a married person who has been divorced from, or has left for not less than two years, his or her spouse, was, prior to the marriage, a villager, and all of whom are citizens, may apply to the village council of that village for a customary right of occupancy.

Section 30

(4) The village council shall disallow an assignment which-

...

(b) would operate or would be likely to operate to defeat the right of any woman to occupy land under a customary, right of occupancy, a derivative right or as a successor in title to the assignor;

(c) would result in the assignor occupying an amount of land insufficient to provide for his livelihood or where he has a family or other dependants, for their livelihood;

...

(6) An assignment that infringes the criteria set out in subsection (4) or that is made notwithstanding the service of a notice to disallow on one or both parties to the assignment shall be void.

Law of Marriage Act (Act No. 5 of 1971)**Section 2**

(1) ...

“Matrimonial home” means the building or part of a building in which the husband and wife ordinarily reside together and includes –

(a) where a building and its curtilage are occupied for residential purposes only, that curtilage and any outbuildings thereon; and

(b) where a building is on or occupied in conjunction with agricultural land [or pastoral land],²⁴⁶ any land allocated by the husband or the wife, as the case may be, to his or her spouse for her or his exclusive use.

Section 56

A married woman shall have the same right as has a man to acquire, hold and dispose of property, whether movable or immovable, and the same right to contract, the same right to sue and the same liability to be sued in contract or in tort or otherwise.

²⁴⁶ The definition was repeated in LAA s.112 (with the addition of ‘pastoral land’).

Section 58

Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property.

Section 59

(1) Where any estate or interest in the matrimonial home is owned by the husband or by the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

(2) Where any person alienates his or her estate or interest in the matrimonial home in contravention of subsection (1), the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until-

(a) the marriage is dissolved; or

(b) the court on a decree for separation or an order for maintenance otherwise orders,

unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it.

(3) Where any estate or interest in the matrimonial home is owned by the husband or by the wife and that husband or wife, deserts his or her spouse, the deserted spouse shall not be liable to be evicted from the matrimonial home by or at the instance of the husband or the wife, as the case may be, or any person claiming through or under him or her, except-

(a) on the sale of the estate or interest by the court in execution of a decree against the husband or wife, as the case may be; or

(b) by a trustee in bankruptcy of the husband or wife, as the case may be.

(4) Nothing in this section shall be construed as affecting any of the provisions of the Rent Restriction Act, 1962, conferring upon a party to a marriage the right of continuing to reside in any premises of which her or his spouse or former spouse is or was a tenant.

Section 60

Where during the subsistence of a marriage, any property is acquired-

- (a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;
- (b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.

Section 61

Where, during the subsistence of a marriage, either spouse gives any property to the other, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the donee.

Section 63

Except where the parties are separated by agreement or by decree of the court and subject to any subsisting order of the court -

- (a) it shall be the duty of every husband to maintain his wife or wives and to provide them with such accommodation, clothing and food as may be reasonable having regard to his means and station in life;
- (b) it shall be the duty of every wife who has the means to do so, to provide in similar manner for her husband if he is incapacitated, wholly or partially, from earning a livelihood by reason (*sic*) of mental or physical injury or ill-health.

Section 66

For the avoidance of doubt, it is hereby declared that, notwithstanding any custom to the contrary, no person has any right to inflict corporal punishment on his or her spouse

Section 114

(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1), the court shall have regard-

- (a) to the custom of the community to which the parties belong;
- (b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
- (c) to any debts owing by either party which were contracted for their joint benefit; and

(d) to the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

Section 139

The court shall have power during the pendency of any matrimonial proceedings or on or after the grant of a decree of annulment, separation or divorce, to order any person to refrain from forcing his or her company on his or her spouse or former spouse and from other acts of molestation.

Appendix E

Original *Kiswahili* texts with translation for chapter 4

*Barbed wire*²⁴⁷

Original <i>Kiswahili</i> transcript	English translation
<p>Mimi nadai shamba langu nililopewa na baba yangu. Hili shamba baada ya baba yangu kufariki na mume wangu kufariki shemeji yangu tuliye mfanya kama mlezi akaja kuuza. Akabakiza sehemu kidogo, akabakisha ile nyumba yangu akaja akajenga katika shamba tu. Akaleta waya akazungusha pale. Akajenga nyumba ya mbao pale nje kwangu. Akanizuia hata mahali pa choo. Akaleta michongoma akaniwekea. Hilo ni shamba moja. Shamba la pili ni la mume wangu. Lile shamba kuna wakati tumekosa fedha za kulima kwani tulikuwa tunalima kwa trekta. Akasema hili shamba halina hali mimi nitakwenda kulilima. Ikawa hatuja kubaliana naye akafanya nguvu akaenda kulilima. Baada ya kulima mazao ikaiva akatoa. Nikaugua mwaka wa pili ikawa sijaweza kulima. Nikapona, shamba likatolewa mazao, nikamwendea nikamweleza nataka kulima sasa shamba langu. Akaniambia sikupi. ... Basi akaendelea kuwa yeye, ndiye</p>	<p>I am claiming my shamba which I was given by my father. This shamba, after my father died and my husband died, my brother-in-law whom we made a guardian came to sell it. He left a small portion, where my house was and then he built in the same shamba. He brought wire and fenced that area. He built a timber house outside my place. He obstructed me from the toilet area. He brought thorns and put them there. That was one shamba. The second shamba was my husband's. In that shamba there was a time when we lacked money to farm it because we used to farm it using a tractor. He said this shamba cannot be left in this state I'll go and farm it. We had not agreed but he used force to go and farm it. After farming, the crops were ready for harvesting. I fell ill the second year and I wasn't able to farm. Then I was well, the shamba produced crops, I went and told him that I now wanted to farm my shamba. He told me I won't give it to you. ... So he continued to be the one using that</p>

²⁴⁷ Translated by Miriam Matinda

<p>anatumia hilo shamba hivyo</p> <p>...</p> <p>Juzi sasa akaniambia kwani umeenda kuniletea samosi?</p> <p>Kuna kitu unachodai hapa? Nitakuwa basi na hakuna mtu atakayenidai mimi.</p> <p>Akamkuta kijana wangu ...</p> <p>akata kampiga mtoto. Nikamuuliza kwa nini umpige. Akanirukia nilikuwa nakutaka wewe, akanifuta katika sengenge ikanikata na akanipiga teke.</p> <p>Akaniangusha chini,</p> <p>akanishika shingo akainua panga akageuza akanipiga nayo.</p> <p>Baada ya watu kulia akaniachia, nika amka nikaenda polisi kituoni. Nikapewa maaskari wa kuja kuchukua tukaja tukamkuta yupo na mwenyekiti wa kitongoji. ...</p> <p>Mwenyekiti akasema tulikuwa tumekuja tuongeelee lakini kwa sababu mmekuja itabidi tuende. Akapelekwa kituoni ...</p> <p>Akawekwa ndani kabla hajawekwa ndani akasema ninamjua mwizi aliyeniibia na aliyesababisha nikatoa ngomvi na huyu mama ... Akamuonyesha kijana wangu. ...</p> <p>Akashikwa akawekwa ndani, wote wawili, kile. Mwenyekiti akasema kwa sababu huyu ni mwanafunzi na ni ndugu moja tunaomba haya maneno yasiende mahakama wasipelekwe [word not clear] nyumbani tutaenda kuongelea ...</p>	<p>shamba.</p> <p>...</p> <p>The day before yesterday he asked me why did you bring a summons against me? Do you claim anything here? I will just kill you and no one is going to claim anything from me. He found my son ... he wanted to beat the child. I asked him why he hit him. He turned on me and told me I want you, he pulled me against the barbed wire fence it cut me and then he kicked me. He pushed me to the ground, held my neck and picked up a machete turned it and hit me with it.</p> <p>After people cried out he let me go, I got up and went to the police station. I was given officers to come with me and bring him and when we arrived we found him with the mwenyekiti wa kitongoji. ... The mwenyekiti said we had come to talk but since you [officers] have come you will have to go. He was taken to the station. ... Before he went into custody he said I know the thief who stole from me and who caused me to fight with this woman. ... He pointed at my son. ... They arrested him, both were kept in custody. The mwenyekiti said that since he is a student and they are relatives we ask that this matter does not go to court [word not clear] they will go to talk about it at home. ...</p>
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<p>Kikao kikakaa, wakaongea, akakutwa yule mtoto sio mwizi ...</p> <p>Na wazee wakasema ile shauri lako la madai ya samosi siendelee.</p> <p>...</p> <p>Nilianza nyumbani kwanza na wazee wa ukoo. Ikashindikana. Nikaleta katika ofisi ya kijiji. Ikashindikana. Tukapalekana tena paka polisi. Likarudishwa likaingia pale TAWLA ... Wazee wa ukoo wakaomba, wakasema tutaenda kumaliza nyumbani. Kikao ikaitishwa. Yule baba akavuruga akakataa.</p> <p>...</p>	<p>The meeting was held, they talked and found that the child was not a thief. ...</p> <p>The elders said [to me] that your claim should proceed by summons.</p> <p>...</p> <p>I started at home with the clan elders. It was unsuccessful. I brought it to the village office. It was unsuccessful. We took it again to the police station. It was sent back to go to TAWLA ... The clan elders asked, they said we will go and finish it at home. The meeting was held. That man disturbed it and refused.</p> <p>...</p>
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*A blanket*²⁴⁸

Original Kiswahili transcript	English translation
<p>Kulikuwa na matatizo matatizo akaanza kunipigapiga mpaka kuanzia akanitoa, nini, meno. Saa hiyo alianza [word not clear] siku hiyo nilienda kwetu. Nikakaa miaka mbili. Niliporudi nikakuta amefukuza vijana wangu lakini si yeye. Alikuwa akiambia huyo kijana chake cha huyo mama mwingine. Anawaita huko kwake, ehe, ndiye aliwaita huko kwake, akawaambia kila siku saa kumi na mbili njoo. Akapiga wale watoto; akapiga wale</p>	<p>The big problems were when he [Anaeli] started beating me until I lost, well, my teeth. There was this time he began [word not clear] this day I went back to my [parents'] place. I stayed for two years. When I returned I found that he had chased away my sons but it wasn't him. He is telling his son [Michael] from the other woman [wife]. He [Michael] called them [my sons] to his place, yes, he called them to his place, he told them every day at six in the morning come. He beat those children;</p>

²⁴⁸ Translated by Miriam Matinda and Helen Dancer. Extracts from the original *Kiswahili* interview recording were transcribed by Cecilia Kimani.

<p>watoto mpaka wakaenda. Halafu anapiga wale watoto na faru. Kila siku saa kumi na mbili watoto wanalalia hiyo fori.</p> <p>Kama huyu,</p> <p>ana nyumba yake na sasa amevuruga hiyo nyumba imejengwa kwa hizo ekari mbili na kumfukuza.</p> <p>...</p> <p>Sasa, huyo Michael ndiye alikuwa mtoto mkubwa kwa nyumba, baba akamwambia hivi: “Nimekupa na ile blanketi yangu mwe mtoto mkubwa”. Halafu akasema kwa vile amekuwa mtoto mkubwa hakuna kulalamika. Akanisumbua nikaenda kulalamika huko kwenye baraza, na yeye anaenda hakuna mtu akanisikia. Na huyo mtoto, kitu anatembea nacho ni ile blanketi ya babake na kusema</p> <p>“Mimi ndiye mkubwa, sasa mimi ni mtendaje wa kata, sasa mtanifanyia nini?”</p> <p>...</p> <p>Mimi kile kitu ninataka kifanyike anipe haki yangu. Ile yote nimekaa kwa nyumba yake kwa miaka hiyo yote; anipe haki yangu.</p> <p>Mtu akikaa kwa mtu hata mfanyikazi hakuna hata mshahara?</p>	<p>he beat them until they left. Then he beat those children with a <i>faru</i>.²⁴⁹ Every day at six in the morning he beat the children with that <i>faru</i>. For example, this one [Samwel] has his house and now he [Michael] has destroyed the house that he [Samwel] built in those two acres and chased them away.</p> <p>...</p> <p>Now, this Michael is the elder son of the household, his father told him this: “I am giving you my blanket as you are the elder son”. Then he said now I am the elder son no one can complain. He disturbed me until I went to complain to the tribunal, and when he went no one listened to me. And that child, the thing is he was walking around with his father’s blanket and saying “I am the elder son, now I’m the ward executive officer, now what are you going to do?”</p> <p>...</p> <p>Me the thing that I want to happen is for him to give me my right. All those [years] I have lived in his house for all those years; he [should] give me my right. If a person stays with a person as a worker won’t they get a salary?</p> <p><i>Elizabeth is then asked to clarify how she wants the court to divide the land.</i></p>
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²⁴⁹ A piece of rubber used in beatings. The word *faru* refers to the rhinoceros tail that was once used to beat slaves and prisoners

<p>Nataka anipe haki yangu kwa miaka hiyo yote nimeishi huko kwake. Sasa, mtu saa yote anakupiga kesi si anatakiwa kukusaidia. Hiyo kesi ninatumia pesa, na watoto wake nimemtunzia. Korti inisaidie kuuliza mzee anisaidie, miaka hiyo yote nimekaa kwake na kumtunzia watoto, na ardhi yake iko wapi? Wamuulize: Hawa watoto wa huyo mama unajua wanakula nini? Wanavaa nini? Ninataka nipasuliwe ile ardhi. Sasa hao wanawake watatu, si kila mtu ana yake? Sasa hiyo ya kwangu, itaenda wapi? Si hiyo ni yangu na watoto wangu? Watoto wangu wataenda wapi? Mimi ninataka haki yangu, miaka hiyo yote nimekaa kwake.</p>	<p>I want him to give me my right for all those years that I lived at his place. Now, when a person keeps involving you in cases instead of helping you. I want the costs for this case, and for caring for his children. The court can help me to ask that man [my husband] to help me, all those years that I lived at his place and cared for the children, and where is his land? They [the court] can ask him: Those children of this woman do you know what they eat? What do they wear? I want to have a share of that land. Now those three women [wives], doesn't each of them have their own [land]? Now the one that's mine [i.e. the land], where will it go? Isn't it mine and my children's? My children where will they go? I want my right, for all those years that I have lived at his place.</p>
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Appendix F

Case Reports for chapter 5

1. *Rehani*

Ward Tribunal application

The claimant was an Arusha widow and the only child of her father. During his lifetime the claimant's father had two adjacent *shambas* in a rural Arusha area – the 'northern *shamba*' and the 'southern *shamba*'. The widow claimed both plots on the basis that the southern *shamba* had been under *rehani* for 10,000 Tsh²⁵⁰ and the northern *shamba* under *rehani* for a sheep and a bull. At the time of the proceedings the respondent, who was the claimant's paternal aunt by marriage, was using the southern *shamba*, and the respondent's son, the northern *shamba*. After the claimant's father died the claimant tried to redeem the *rehani* by offering 10,000 Tsh to her aunt but the aunt had refused.

In relation to the northern *shamba* the aunt claimed that this had been bought through her contribution of a sheep and a bull to slaughter at the funeral. She disputed the claim that this farm was also under *rehani*. Elders from the claimant's paternal family gave evidence that the southern *shamba* was under *rehani* but the northern *shamba* had been sold for a sheep and a bull. The husband of the respondent, who was the claimant's paternal uncle and guardian, also gave evidence. Two documents were produced during the proceedings. One was the minutes of a boma meeting at which the guardian confirmed that the southern *shamba* was under *rehani* for 10,000 Tsh to his wife and was the claimant's inheritance from her father. The second was a statement purportedly written during the funeral recording that the guardian was to take care of the deceased's estate on behalf of the claimant. The *mwenyekiti wa kitongoji* was present at the site visit.

The tribunal members noted the witness evidence of *boma* elders who had confirmed that the northern *shamba* was sold for a sheep and a bull, but the southern *shamba* had been under *rehani* for 10,000 Tsh and should therefore be redeemed by the claimant. The judgment concludes:

All the members of the tribunal have unanimously decided that in accordance with the Land Laws of 1999-2001 the wife and husband have

²⁵⁰ Equivalent to approximately £5 at 2010 exchange rate.

equal RIGHTS (HAKI sawa)²⁵¹ to own (kumiliki) land. [The claimant] has been ordered to give/pay [the respondent] Tsh 10,000 at once in front of the tribunal members. As from today [date] the southern shamba shall be held by her (amekabidhiwa) and the second northern shamba shall remain with (litabakia) the family of the respondent _____ after being proved that she bought it for one sheep and a bull.²⁵²

2. *Aulo*²⁵³

DLHT appeal

The claimant was an Arusha woman in her sixties at the time of the legal claim. Her father passed away leaving only daughters, no sons. The claimant, her sisters and their widowed mother lived on the family land in a peri-urban Arusha village under the care of a family guardian. Sometime later the claimant's mother passed away and she and her sisters left the area as married women to live with their husbands. The guardian died and another family guardian was appointed to take over his role. The second guardian and his children invaded the land and built houses on it. When the claimant and her sisters had problems with their husbands they tried to return to their land. They brought claims to the family elders and later to the Ward Tribunal against the guardian.

Clan elders gave evidence at the Ward Tribunal of their efforts to attempt to ensure the daughters were given back the land. The Ward Tribunal upheld the daughters' claim:

In his generation the late babu was blessed with daughters/girls only. He had no sons. All his daughters were married. Therefore, there was no child who remained at home, except the wife who later died. ...

Considering that these are orphans without their father. Also considering that they are girls who are now recognised by the laws and the Nation in general as the same as boys. The tribunal disclaim all the statements by [the respondent's] children that girls do not have inheritance.

The Ward Tribunal ruled that the part of the *aulo* land which had not been built on be allocated to the daughters, but that the areas with houses remained; '...if the children [i.e. the daughters] continue to claim they have the right to claim [those areas].'

²⁵¹ Capitalisation is the Tribunal's own.

²⁵² All extracts of Ward Tribunal judgments are translations from the original *Kiswahili*.

²⁵³ Gulliver discusses the significance of *aulo* to the Arusha - an undivided grazing area inherited and shared by the sons of a deceased father, and its potential to generate bickering and disputes (1963: 79-80).

The guardian appealed to the DLHT. Both parties were litigants in person and the matter was dealt with on written submissions. One assessor (male) commented on the *'outdated assumption that female children had no right to inherit land which formerly belonged to their parents.'* The other assessor (female) concluded: *'Because the late [father] had no male children, the appellant took an opportunity of scolding the female children by the intention of grabbing their land just because they cannot inherit the land the system which is now time barred'.* Citing the equality clause in LA the DLHT chairperson upheld the Ward Tribunal's decision:

... the appellant and his allies who want to grab the land from [the respondents] are still overwhelmed by old age concept when to many societies. It was believed that a woman has no right to inherit a land, But to date things have changed, even our laws have been changed to consider the women's rights of ownership over land is equally the same as that of the men, Vide The Land Act 1999 No 4, on s.3(2).

3. Roadblock

DLHT appeal

In a Muslim family living in a peri-urban Arusha village all the sons and daughters were given portions of their late parents' *shamba* during their lifetime. The maternal uncle of the litigant brother and sister gave evidence that he had witnessed the allocation of the land and that all but the claimant daughter of the deceased had sold their lands. In her evidence to the Ward Tribunal the claimant daughter said that she kept the plot to develop and build a house on it, but that her brother (the respondent) had invaded her *shamba*. She tried to solve the matter by recourse to the *balози*, village office and police. Practical action by family elders and the VEO also failed to end the dispute. Eventually she took the matter to the Ward Tribunal. There her maternal uncle gave evidence of the attempts that were made to restore the land to her. The Village Chairman, *balози* and neighbours also supported her claim. Minutes of family meetings were produced. The Ward Tribunal found that the respondent had chased her and later sent relatives with machetes who blocked the road which gave access to her land.

The Ward Tribunal concluded: *'Anahaki ya kutumia kama watoto wengine walipopewa haki zao'* (She has the right to use [the land] like any other child who had been given

their rights). The respondent brother did not participate in the Ward Tribunal proceedings but appealed its decision.

In the DLHT neither party had legal representation. The brother failed to attend on a number of occasions and his daughter appeared on his behalf under a power of attorney. One assessor (male) noted the brother's non-attendance at the Ward Tribunal, the fact that all the deceased's children were given land before his death, the brother's actions in blocking the road and the brother's failure to attend the site visit. The brother had not given any convincing reasons to support his appeal. The other assessor (female) concluded that the appellant brother had used delaying tactics throughout the legal proceedings. The chairperson concluded:

In the event it is clear that, the intention of the appellant is to unjustly take the respondent's piece of land by force under the umbrella that, the land in dispute is under administrator of the deceased's Estate and not the lawful property of the respondent.

The land was declared the property of the daughter and the appeal dismissed with costs.

4. A will

Ward Tribunal application

A Meru widow wrote a will in which she bequeathed to her daughters, grandson and great grandchildren land in a lowland Meru village that she and her husband had cleared and cultivated together. Her husband's nephew, who was the administrator of her late husband's estate, objected on the basis that the farms were for the coming generation and should only go to her unmarried daughter and male grandchild. The clan took the case to the Village Land Council for dispute resolution but the matter was moved to the Ward Tribunal after the Village Land Council failed to resolve it. The Ward Tribunal was persuaded by the evidence of the clan elders who had blessed the will and gave evidence in support of the widow.

It is clear without argument that the defendant had no reason to refuse to attend the meeting which the applicant had called, because by doing so the defendant raised hatred and caused a communication breakdown between them ... The daughter of the applicant was right when she took her mother to stay with her and nurse her because there was nobody to take care of her ... the woman did not have care when she was sick as the

defendant and his wife did not visit this woman or bring her food or any help...

The applicant showed strength of character and cleverness in wanting to produce her will in writing rather than orally in front of the elders of the clan, because the law on wills states that a written will is better than words ... The government and lawyers insist or advise Tanzanians to write wills early or when they are alive to prevent disputes of estate ...

[Quoting LMA section 56] For important reasons which carry legal weight, it is evident that the outdated male system is reaching the end ... this tribunal in front of the [elders of the clan] has seen to it that this woman has every right to give her child that piece of land in dispute without any argument because she is the one who has taken care of her in all situations.

5. *Amani*

DLHT appeal

The woman in this case was the respondent in a claim brought by her patrilineal male cousin. At the time of the claim she was an old woman. She was the only daughter in an Arusha family of six siblings living in a rural Arusha village on the slopes of Mount Meru. During their youth all of her brothers were given land. In a fieldwork interview conducted in *Kimaasai* she described being given a plot of land by her father to cultivate for herself. He told her that when she got married and had a son, she should name him after her father and that he would inherit the land from her.²⁵⁴ She commented to me that at that time according to the Arusha tradition it was not usual for a girl to be given land – she was just lucky because her father loved her very much. Over the next fifty years she married, had children and continued to cultivate the land. She planted maize and beans at first and later, permanent crops of coffee and bananas. Some years later she gave the land to her son. After her husband passed away she and her son decided to build a couple of rooms for rental on the land to gain some additional income. Her cousin (the claimant) complained to the Village Chairman and the matter eventually came before the Ward Tribunal.

²⁵⁴ This is an example of an Arusha practice noted by the Shivji Commission whereby fathers make conditional bequests of family land to daughters whose sons in turn bear the name of their grandfather (URT 1994: 251).

In his evidence to the Ward Tribunal the claimant cousin stated that after his father died the respondent's father (his paternal uncle) became *mmiliki* (the 'owner/possessor') of the land and chased his mother and family away. When they returned in their twenties, the claimant and his brothers were 'given' (*pewa*) some of the land by their maternal uncles, but the respondent's *shamba* remained with her. Around thirty years ago the claimant's father passed away and the claimant continued to cultivate the land thereafter. Many years later her husband also passed away. A dispute arose after the respondent saw building work being carried out on the land. Stating that he believed the land had been sold he began his legal claim in the Ward Tribunal.

After hearing evidence from several witnesses the tribunal concluded that the respondent had indeed been given the land by her father, adding '*hakuna mtu ambaye angeweza kumkataza kwani alikuwa na nguvu*' (no one could forbid him from doing so because he had the power). They noted that her father had 'given' her (*alimpa*) the land although 'it related to' (*inahusiana*) the claimant's father. Notwithstanding their finding that the respondent's father had given her the land, after hearing the evidence and meeting on a separate occasion with family elders, the tribunal decided to divide the land between the parties 'to bring peace in the *boma*' (*kuleta amani katika boma*) as they were relatives. The Tribunal's decision meant that the respondent and her son would effectively lose half the land that she had been cultivating for some fifty years.

The respondent appealed to the DLHT. The Ward Tribunal's judgment had not considered the legal position that the twelve year limitation period²⁵⁵ for a suit to recover land had expired many years previously. I am told that the respondent was successful in her appeal to the DLHT on the basis of limitation.

6. A grave

DLHT application

The claim was brought by a maternal aunt as next friend of a female orphan, against the orphan's guardian, the Village Chairman, *balози* and purchasers of the land in question. None of the parties were legally represented. It was claimed that the child, along with her maternal aunt and uncles, had inherited a portion of her maternal grandfather's plot

²⁵⁵ Law of Limitation Act (Act No. 10 of 1971) Cap 89 R.E. 2002, s.3 and Schedule Part I no.22. See also Customary Law (Limitation of Proceedings) Rules 1963 (G.N. No. 311 of 1964), s.2 and Schedule.

of land in an urban part of Arusha. The family was Arusha, although it was claimed by the maternal aunt that sons and daughters of the orphan's maternal grandfather had inherited portions of his land. The child's mother had already died by the time the land was allocated, and she had been buried on the land. It was claimed that the plot had been allocated to the orphan as the child of her late mother. It was further claimed that the land had been entrusted to the care of her maternal uncle – her guardian, until she attained her majority. The respondent uncle later sold the land without her consent, claiming that it was his to sell.

In the DLHT the guardian, Village Chairman, *balози* and family elders all gave evidence for the respondents confirming that they had given their authority to the sale proceeding. The case for the claimant orphan relied on the evidence of her maternal aunt, a town planner, another *balози* who was present at the allocation of the land and the local district councillor. It was said that the guardian uncle had made an oral promise before the councillor to give the orphan an alternative piece of land by way of compensation.

The claim was dismissed. The two assessors (male and female) and DLHT chairperson preferred the evidence of the respondent's witnesses – the family elders and *balози*, finding that the land had been allocated by the grandfather only to his own wife and son. It was found that there was no documentary evidence and insufficient testimony to prove the orphan's claim that she had inherited the land, or that she had been promised alternative land after it was sold. The chairperson found that the claim had not been proved on the balance of probabilities.

7. Boma meeting

DLHT application

A wife made a claim against her husband and mortgagee for pledging a family *shamba* inherited from his father as security for 15 million Tsh without her consent. She sought a declaration that the *shamba* was the children's property, that the disposition was null and void, and a permanent injunction against the respondents from interfering with her occupation of the land. Both parties were litigants in person. In evidence it was not disputed that the wife had not agreed to the mortgage and that a young man, who was

identified to the mortgagee as being the husband's son, had been present with the husband when he signed the mortgage agreement.

Problems arose after the husband lost the money he had received from the mortgagee in a con trick. When the husband failed to repay the money the mortgagee asked for the elders of both families to meet. The *boma* meeting agreed that the mortgagee should be repaid without interest within six months, failing which the *shamba* would be forfeited. The wife stated in evidence that she had been present at the *boma* meeting but had not been given the chance to speak. The *balози* gave evidence that he had refused to sign an agreement without the whole family consenting to the transaction. Elders from both *bomas* gave evidence to the tribunal and a marriage certificate, children's birth certificates, mortgage contract and *boma* minutes were tendered in evidence.

The assessors noted the problem that an agreement had been signed and that the family had nowhere else to go. One male assessor favoured a solution that involved the case returning to the clan and reverting to the DLHT with a progress report within a fixed period, failing which the agreement would have to be abided with. The other female assessor noted that the wife had '*tried her best to prohibit the land from being sold to [the mortgagee]*' and that it was a 'backdoor' transaction, but nevertheless thought that the mortgagee's prayers should be granted with costs.

The chairperson noted the evidence of elders and *boma* meeting minutes but did not make reference to the wife's or *balози*'s evidence and concluded:

... it is my humble belief that [the mortgagee] gave that money to [the husband] on good faith and belief that [the husband] had the blessing of his family, as he came with somebody ... who was identified as a son of [the husband] ...

The chairperson also 'positively not[ed] efforts made by clan elders meeting of both sides which resolved that in order to keep peace and harmony among the parties and two bomas it is prudent and for the interest of justice that [the mortgagee] be given his money.

Finally, the chairperson concluded that since the *shamba* was inherited from the husband's father it could not be said to be '*purely a matrimonial property*'. The chairperson ordered a sale of part of the *shamba* to enable the mortgagee to be repaid. The wife subsequently appealed to the High Court Land Division.

8. Collusion

DLHT appeal

A wife brought a claim in the Ward Tribunal against a friend of her husband for disturbing her use of land. The land in question was located in a rural Meru village and had been purchased by the claimant's husband and cultivated by the couple during the subsistence of the marriage. Neighbours and village leaders had given evidence at the Ward Tribunal that the land had been acquired by matrimonial efforts and that the wife had used it for more than 10 years. In a linked case between the purchaser and the husband the Ward Tribunal had found that the land had been sold by the husband to the purchaser without the wife's consent. In the claim between the wife and the purchaser, the Ward Tribunal also found in favour of the wife that the land was matrimonial property.

The purchaser appealed to the DLHT and was represented by an advocate. The respondent wife was in person. The appeal was dealt with on written submissions. Although the purchaser produced sale agreements, purportedly endorsed by the village council to support his claim, these were disregarded by the DLHT chairperson in favour of the oral evidence of village leaders which the Ward Tribunal had relied upon in its judgment.

The DLHT assessors differed in their opinions. The male assessor was persuaded by the purchaser's advocate's submissions and the documentary evidence supplied by the appellant purchaser in support of his appeal:

I am of the opinion that the submission made by the appellant's counsel are more stronger to what the respondent has said. The respondent's reasons are mere allegations instead of giving material supporting evidence.

The female assessor concluded:

Her husband has not refuted [that the respondent was married to the appellant's close friend] and he did not appear before the tribunal to refute that the suit land was a matrimonial property. He colluded with the applicant, he told lies and later apologised to the ward tribunal simply because he wanted to force her to move out merely for the reason she has no child... [The ward tribunal] came to a fair and right judgement.

The DLHT chairperson observed:

... all the neighbours, witnesses and the village government authorities/leader who testified before the trial tribunal seemed to know and recognise the respondent to be the wife of ____, who had decided fraudulently to sell the suit land.

The chairperson concluded that the purchaser had failed to establish that the suit land was his property; the wife had used it for more than 10 years and it was therefore matrimonial property - *'any move to dispose of the same then consent of [the wife] be sought first'*.

9. Compensation

DLHT appeal

The woman in this case was the respondent in both the Ward Tribunal and DLHT appeal. The claim was brought by her husband to whom she had been married traditionally. He was the father of her children. The husband claimed that she had mortgaged and sold their matrimonial property without his consent. The woman stated that although the parties had been married traditionally, unbeknown to her, her husband had already legally married another wife, whom he eventually returned to. It was not disputed that the husband had purchased the land. Having been abandoned by her husband, in the years that passed the respondent built a house on the land with money from her relatives and a loan from an NGO. She provided the Ward Tribunal with documentary evidence of the NGO loan. She stated that she had sold part of the land to repay the loan in order to safeguard the house that was pledged as security.

In the DLHT neither of the parties was legally represented, and the case was dealt with on written submissions. The husband's claim was founded on the basis that the property in question was 'matrimonial' and he denied that he had had another wife or that the parties had ever separated. The respondent argued that having been abandoned by her husband she became entitled to the land as her sole property by virtue of section 114 LMA.

The DLHT assessors (both female) found in favour of the woman. One assessor described the land as *'compensation for not being able to marry her legally'* – a 'gift'

for ‘*his mistress and her offspring*’ which was no longer a matrimonial home because he had abandoned her and she had had to develop the land on her own with the help of a donation. The other assessor stated:

It is my view that she was right to mortgage/sell the suit land because there was no other way out of solving the tabled problems for the interest of her three abandoned children.

Upholding the original decision of the Ward Tribunal in the woman’s favour, the DLHT chairperson concluded:

... since the suit land was bought by the appellant in cooperation with the respondent and since the appellant has returned to his legal wife ... and stayed there for 6 years then there is no doubt that the suit land ought to have been the property of the respondent together with her ... children.

10. Sale agreement

DLHT application

A woman brought a claim against a man she had known for 10 years and regarded as her husband though they were never legally married. Neither party was legally represented in the proceedings. The application concerned a sum of 800,000 Tsh that the woman claimed she had given to the man to enable him to ‘build a house for their babies’ – the two children of the parties – on a plot of land that he had purchased previously. The man had subsequently moved into the newly built house with another woman whom he claimed to be his wife. The claimant wanted an order for sale with the proceeds divided between the parties and their children. The man stated that he had purchased the plot with a male friend, who gave evidence to that effect at the hearing. He also produced a sale agreement in support. The woman called her landlord and a neighbour to confirm that she had been living in rented accommodation and the respondent had been visiting her there for a few days once every 2-3 months. Her witnesses regarded the parties as husband and wife. The respondent called his brother as a witness who confirmed that she was a girlfriend.

Both the male and female DLHT assessors were of the opinion that the parties were not officially married and that the house was therefore not matrimonial. The application lacked evidence (by way of a marriage certificate) and there was no documentary proof

that the claimant had contributed the 800,000 Tsh. However, the female assessor expressed some sympathy for the woman's position: *'the tribunal has to find legal actions so as [she] can be compensated'*. The DLHT chairperson found a relationship of 'concubinage' but added:

... this court is not a proper forum to adjudicate matters relating to their marital affairs, whether they were legally married or not is not a matter that interests to this tribunal. The interested part to this tribunal is to determine if at all the applicant contributed Tsh 800,000 to the building of the disputed house.

The chairperson concluded that it was difficult to prove the woman had donated the 800,000 Tsh. Her application was dismissed with costs.

11. Selling 'bites'

DLHT application

A man brought a DLHT claim for unpaid rent and an eviction order against the woman respondent. The man was represented by an advocate and the woman was a litigant in person. The parties had previously litigated in civil proceedings in the Primary, District and High Courts on the issue of monies that the woman alleged she had given to the man for buying the plot in question. The Primary Court had decided in the woman's favour, but that decision was subsequently quashed by the District Court and an appeal to the High Court was never substantively determined. The woman had claimed that she had begun a relationship with the man many years previously. He had impregnated and abandoned her. Years later she introduced her son to him and they resumed a relationship. She claimed that she gave him 2.5 million Tsh in the presence of her children to buy a plot. He did so and said that he would build a house. She later moved in and bought materials for the house at his request. She was introduced to a woman whom she later discovered to be his girlfriend/wife. When the girlfriend/wife tried to evict her she lodged her claim in the Primary Court.

After the case had progressed to the High Court the man filed a case in the DLHT claiming that the respondent was his tenant. He claimed that he had known her in the past but did not remember having a child with her. Years later they met again and she told him she was looking for a house. He rented his house to her but did not reduce the

agreement into writing as they knew each other. She paid one instalment of rent. He tried to recover further rent from her by involving the *mwenyekiti wa kitongoji* and his wife. He called the seller of the property, his uncle and a workman as witnesses in support of his claim. The woman called her son and another workman as witnesses.

There was only one assessor's opinion in this case. She found that the woman was a second wife and that she was a co-owner of the property as a '*nyumba ndogo*'. There was no document to support the man's claim that she was his tenant. Although the woman produced no document supporting her claim that she had contributed the money, this was a relationship of trust and they had a child together. The woman's claim was supported by her son and photographs which gave the appearance that they were a couple.

The DLHT chairperson also inclined to the assertion that the woman had contributed to the upkeep of the house. This was on the basis of circumstantial evidence that a woman selling 'bites' (snacks) in the market could not afford to lease a five-roomed house and provide for her children's schooling and basic needs. There was no tenancy agreement and the claimant's wife had not been aware of the house at first. Although there was no documentary proof of the woman's financial contribution, the chairperson concluded that she was a co-owner by virtue of her contribution to the building of the suit land as his 'concubine'. The judgment made no reference to the District Court's conclusion that there was no evidence to support the woman's claim that she had made a financial contribution. The man subsequently appealed to the High Court Land Division.