COMPETENCE AND INDEPENDENCE OF LAND TRIBUNALS IN ADMINISTRATION OF JUSTICE

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Abstract

The Land Law Reforms of 1999 came with separate machinery for resolution of land disputes which became operational on the 1st day of October, 2003. This machinery divorced the subordinates' courts from resolving land disputes and was replaced by land tribunals. The latter includes the Village Land Councils, the Ward Tribunals and the District Land and Housing Tribunals. The competence of the tribunals is questionable. Although the tribunals have to administer justice based on the Constitution and statutes, members of the first two organs are lay persons. Not only they are lacking legal knowledge but also the law does not register literacy as a necessary qualification for tribunal membership. Independence of the tribunals is also in issue. Executive authorities have exclusive powers on their formation and operation. This article discusses the above issues and observes that tribunal membership lack the necessary knowledge and skills to administer justice. It further observes that the members lack both security of tenure and remuneration. As a solution to the above mischiefs, the article recommends for abolition of land tribunals so that land disputes are resolved under the existing judicial system. Consequently, the existing judicial system should be empowered and facilitated to administer justice timely and efficiently.

Key words: Tribunals, Competence, Independence

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1.0 Introduction

The Land Act[2] and the Village Land Act[3] establish and vest exclusive jurisdiction to resolve land disputes in specified courts and tribunals. These courts and tribunals are the Court of Appeal, the High Court, the District Land and Housing Tribunals (DLHTs), the Ward Tribunals and the Village Land Councils. The present land disputes settlement machinery reflects the spirit of the National Land Policy of 1995. The machinery also partly accommodates the recommendations of the presidential commission of inquiry into land matters of 1992. The old system had so many deficiencies of which the current one is aimed to curb. These included backlog of cases, multiple institutions for disputes resolution[4], case delay and lack of hierarchical arrangement.[5] The present machinery became operative since 2003. It has been in place for more than 15 years. It is high time now to have its adequacy and efficiency tested.

It is against the foregoing backdrop, that this article examines the competence and independence of the tribunals in the administration of justice. In so doing, the article considers the fact that the tribunals (save for DLHTs) are manned by non-lawyers; their operation is monitored and controlled by both, central and local government authorities; and the fact that they are detached from the judiciary. The discussion is epitomized by general recommendations and the conclusion.

2 Cap. 113 R.E. 2002
3 Cap 114 R.E. 2002
4 The National Land Policy of 1995 para 4.2.25 at page 20
5 *Ibid*

2. 0 The Meaning of Land and Land Disputes

2.1 The Meaning of Land

There are different perceptions for lawyers and laymen on reference to the term land. The latter might consider land to mean any piece of ground, physical substance or any soil whatsoever. But for lawyers, land means more than that, for example in Tanzania 'land' includes the surface of the earth and the earth below the surface and all substances other than minerals and petroleum, forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to land.[6] Hence, the principle, *Quic quid Plantur Solosolo Cedit,* which means that whatever is attached to the soil, becomes part of it. At common law, land includes structures such as buildings and any other things attached to the soil, whether above or below the surface.[7]

Land transfer at common law includes not only physical soil but also all buildings permanently attached to soil. It can be construed further that mines and minerals below the surface of the earth go with the ownership of soil above them. Obviously, this is not in line with Tanzania's position in which case minerals and petroleum are not part of the land. Even the term 'ownership' of land is alien to Tanzania land laws. Land is acquired in our country for occupation and use.[8] It is the public in Tanzania which owns the land and the same has been vested in the President as trustee.[9] The concept of land ownership of which in some jurisdictions gives the owner the right to use (and abuse) land[10] is not

6 S. 2 Land Act Cap. 113 R.E. 2002
7 Commonwealth V.N.S.W (1923) 33 C.L.R. 1
8 S. 19 LA
9 S. 4 (1) LA
10 Roger J. S., Property Law (4th Edition) Longman, London, 2003 P. 6

applicable in our country. Not only that land is not owned in the real sense of ownership but also its occupation and use is subjected to some express and implied conditions[11] breach of which can attract fines, actions in court, or even revocation of the right of occupancy.[12]

2.2 The Meaning of a Land Dispute

A land dispute is a case arising from a conflict centred on clashing interests over the land upon which a land court or tribunal has jurisdiction. There is however a debate on the differences between a commercial and a contractual case on one hand and a land dispute on the other hand. The High Court has so far registered different opinions on the matter.

While the first school of thought provides that a mortgage transaction is a commercial dispute[13], the second school of thought vests concurrent jurisdiction in the commercial and land courts where the matter involves both commercial and land elements.[14] The third school of thought on the other hand dismisses the jurisdiction of the land courts on the basis of contractual relations.[15] This school of thought stands on the fact that since the cause of action is founded on a contractual relationship of a bank and a customer, land courts lack jurisdiction to deal with contractual disputes. The fourth and last school of thought maintains that the loan being in a form of a mortgage the claim is land related[16].

Generally, in deciding on the nature of dispute under discussion, the decisive controlling aspect is a landed matter. It can be said therefore that a land dispute includes; conflicts over occupation of land in its strict sense as defined in section 2 of both the Land Act and the Village Land Act. Disputes over leases, mortgage and security as covered under part IX and X are squarely within the domain of land disputes. The definition also should inevitably be extended to cover conflicts over easements and analogous rights which are created under part XI of the Land Act.

3.0 The Land Disputes Resolution Machinery

3.1 The Old Land Court System

Earlier, during colonialism, there was a dual court system consisting of Native Courts and Subordinate Courts. At that time the land disputes were resolved by courts under formal and informal systems of administration of justice. The latter included council of elders, office of chiefs and customary tribunals.

After independence, there was no specialised system for land disputes resolution. As a result, conflicts pertaining to land matters were part of civil disputes resolved by normal courts of law. The latter included the courts established under the Magistrates Courts Act[17], the High Court and the Court of Appeal of Tanzania. Jurisdiction of the courts depended on, whether or not the land is registered, [18] the law applicable[19], geographical location of the disputed land, and the pecuniary value of the subject matter.

11 S. 34 LA, Also, G.N 77 of 2001
12 Part VI sub-part 4 LA
13 For example the case of *Britania Biscuits Ltd vs NBC Ltd et al Land case No. 4 of 2011 HC Land Division at DSM (unreported)*
14 For example the case of *Michael Mwailupe vs CRDB Bank Ltd, Land Case No. 7 of 2003 HC of Tanzania at DSM (unreported)*
15 For example the case *of Epimark S. Mbwani vs CRDB Bank Ltd and another, Land Division at DSM, Land Appeal No. 6 of 2010 (unreported)*
16 For example the case of *Anatoly J. Mushi vs Joachim Mwingira land case no.239 of 2004 HC of Tanzania at DSM (unreported)*
17 Cap. 11 R.E 2002
18 The primary court had no jurisdiction to try a matter where the land the sub\ject of dispute is registered
19 The primary Court had jurisdiction where the applicable law is either Islamic or Customary law

3.2 A Need for Special Machinery to Resolve Land Disputes

Many complaints and discontents were levelled against the old systems of land dispute resolution. The first glaring weakness was multiplicity of authorities for land dispute resolution with overlapping powers.[20] These included both courts of law and administrative authorities. Again, as per the NyarubanjaTenure (Enfranchisement) Act,[21] and the Customary Leasehold (Enfrachisement) Act[22], the land tribunals enjoyed jurisdiction to entertain land disputes. The old system was so inefficient that it resulted to backlog of cases. Multiplication of bodies responsible for land disputes resolution caused jurisdiction overlapping which resulted into confusion and in some cases procedural uncertainties. Involvement of government authorities in resolving land disputes made the situation worse for in some cases, those authorities were parties to the conflicts.

In 1991 the government formed the Presidential Commission of Inquiry into Land Matters[23] popularly known as the "Shivji Commission". In its report the Commission proposed separate machinery for adjudication of land disputes. The proposed institutional structure had a setup from Baraza la Wazee la Ardhi (BWA), The circuit land courts (CLC) and the Land Division of the High Court. Deficiency of the old land dispute resolution machinery is also noticeable in the National Land Policy (NLP) which provides on the problem in the following terms:

> *Efficiency in land Administration in the country has declined and now land has become a source of frequent disputes. There is no formal hierarchical arrangement among these different institutions involved in dispute settlement most of the disputes result from multiple allocating institutions, poor records keeping, lack of or failure to follow laid down procedures in both allocations, revocations and acquisitions.[24].*

The policy recalls further that:

> *Since the ministry of lands is involved in the land delivery system and might be involved in one way or another in these disputes, it would be improper for the ministry to deal with dispute settlement. The courts would be ideal for the job, but due to their work-load, most of the courts are loaded with other disputes and very little time is given to land disputes. Disputes remain in courts unsettled for more than 20 years.*

Because of increasing problems and challenges associated with the old system of land disputes resolution, it became imperative to have the new system in place.

3.3 The Present Land Courts System

Both the Shivji Commission and the NLP preferred separate machinery for resolution of land disputes. The system was to divorce government authorities from adjudicative roles. The new machinery was also to cure overlapping of jurisdiction and get rid of confusion and uncertainty among the dispute

20 A Report on the Review of the Legal Framework on Land Dispute Settlement in Tanzania: The Law Reform Commission 0f Tanzania. At page 7

21 No. 1 0f 1965

22 No. 1 of 1968

23 It started to work in June, 1991, produced its report volume I in January, 1992 and volume II in January, 1993

24 NLP para 4.2.2.5

settlement organs.

It was the policy statement of the NLP to have in place well-established land dispute resolution machinery.[25] According to the policy, the existing quasi-judicial bodies were to be retained and strengthened. These were to start from *Mabaraza ya Wazee ya Ardhi* to quasi-judicial bodies at the district, regional and national levels with appeals to the High Court.[26]

The above policy statements were substantially accommodated under the Land Law Reform of the late 1990s and early 2000s. Accordingly, sections 167 and 62 of the Land Act[27] and the Village Land Act[28] respectively establish the land court system which consists of the Village Land Councils, the Ward Tribunals, the District Land and Housing Tribunal, the High Court Land Division and the Court of Appeal of Tanzania. The same institutional structure is recognized and covered under section 3 of the Land Disputes Courts Act[29]. The new system became operational from 2003 and has been active for fifteen years now.

4.0 The Land Tribunals

4.1 The Village Land Council

This is a land tribunal at the village level. It is composed of seven members out of whom three are women. Members are nominated by the village council and are approved by the Village Assembly[30]. Some persons are excluded from being council members. Those excluded are non-citizens and non-village residents, members of National Assembly, the convicts[31], persons under eighteen years of age, mentally unfit persons and a magistrate having jurisdiction in the district where the council has to function.

It should however be noted that there is a conflict of law on the composition of the Village Land Council. While section 5 of the Land (Courts Disputes Settlements) Act[32] provides:

The village land council shall consist of seven members of whom three shall be women.

The Village Land Act provides that:

> *S.60(2).....that council shall consist of not less than five no more than seven persons of which not less than two shall be women....*

Qualification for membership includes a person of standing reputation with integrity and possessing knowledge of customary land law. While the pecuniary powers of the council are unlimited, its territorial jurisdiction is within the village. The functions of the council are provided under section 7 of the Courts (Land Dispute Settlements)[33]. These includes: receiving complaints from parties in respect of land and mediating between them and assist parties to arrive at a mutually acceptable settlement of their disputes. Any person aggrieved by the decision of the tribunal has to refer the matter to the court having jurisdiction to entertain the same.

4.2 The Ward Tribunals

For every ward in Tanzania the Ward Tribunal is established.[34] The same tribunal is designated as a court under the

25 NLP para 2.2.6
26 *Ibid*
27 Cap. 113 R.E. 2002
28 Cap. 114 R.E. 2002
29 Cap. 216 R.E 2002
30 S. 5 of Cap. 216 R.E 2002
31 Convicted of a criminal offence involving dishonesty or moral turpitude
32 Cap. 216 R.E 2002
33 Cap 216 R.E 2002
34 S.3 of the ward tribunal Act Cap 206 R.E 2002

Land Disputes Courts Act.[35] The Ward Tribunal is composed of not less than four and not more than eight members of whom three should be women.[36] Neither the Land Disputes Courts Act nor the Ward Tribunal Act provides for the qualifications for the members of the tribunal. However, some people are excluded from being nominated as members. The excluded persons are Members of the National Assembly, members of the Village Council and Ward Committee. The Ward Tribunal Act also excludes legally qualified persons and judicial employees, civil servants, mentally unfit persons, non-citizens, persons under eighteen years and those who have seriously been convicted of a criminal offence involving moral turpitude. Ward tribunal Members hold office for a term of three years and are eligible for re-election.

The ward tribunal has a secretary who should be sufficiently literate, educated and capable of satisfactorily discharging his duties. The secretary appointment is permanent staff in the service of the local government authority within which the tribunal is situated.

The primary function of the tribunal is mediation and reconciliation. In all cases, the tribunal must attempt to reach settlement of the dispute amicably. Upon failure of mediation the tribunal has to exercise its compulsive jurisdiction.

The territorial jurisdiction of the tribunal is within the ward upon which it is established. In so far as pecuniary jurisdiction is concerned, the tribunal has powers where the value of the subject matter does not exceed three millions Tanzanian shillings. The tribunal is empowered to enquire into and determine disputes arising under the Land Act and the Village Land Act. After determination of the case, enforcement of the orders of the tribunal is done by the District Land and Housing Tribunal (DLHT). An appeal from the ward tribunal is directed to the DLHT within forty five days from the date of the decision or order against which the appeal is brought.

4.3 The District Land and Housing Tribunal (DLHT)

These tribunals are established by the responsible Minister exercising the powers under the Land and Village Land Acts.[37] By exercising such powers, the Minister may establish the DLHT in each district, region or zone as the case may be. The DLHT is composed of a chairperson and is duly constituted when sitting with two assessors. The chairperson is appointed by the Minister amongst legally qualified persons. The tribunal chairpersons just like assessors have three years tenure but they are eligible for re-appointment.

The pecuniary limit of DLHT in proceedings for the recovery of possession of immovable property is three hundred millions Tanzania shillings. Where the subject matter is capable of being estimated at a money value the pecuniary limit is two hundred millions Tanzania shillings.

The subject matter of jurisdiction includes all proceedings under the Land Act, Village Land Act, the Customary Leaseholds (Enfranchisement) Act,[38] the Rent Restriction Act[39] and the Regulation of Land Tenure (Established

35 S.10 Cap 216 of R.E 2002
36 S. 11 cap 216 of R.E 2002
37 SS 167 and 62 respectively, see also s.22 of the Land Disputes Courts Act
38 Cap 377 R.E 2002
39 Cap 339 R.E 2002

Villages) Act.[40] According to section 33 (1) (b) of the Land Disputes Courts Act, the tribunal's jurisdiction is extended in all such other proceedings relating to land under any written law in respect of which jurisdiction is conferred upon it. The DLHT has original, appellate and revisionary powers.[41]

5.0 Literature Review on Adequacy and Efficacy of Land Tribunals

Efficacy and adequacy of the present machinery for resolution of land disputes in general, and land tribunals in particular has been covered by different authors. The Law Reform Commission of Tanzania in its Report on the Review of the Legal Framework on Land Dispute settlement[42] (LRC Report), observed that establishment of the present land court system is incompatible with our constitutional set up and violates the doctrine of separation of powers[43]. The same observation is made by Kironde[44] who maintains that the current institutional structure is against the doctrine of separation of powers and has accountability challenges. Kironde made further findings that the problem of case delay is still alive and is featuring the present land disputes resolution machinery. Olenasha[45] on the other side faults the tribunals on their geographical coverage. According to him the tribunals were only established in some parts of the country therefore many areas are still missing their services. Gaston[46] on his side made a comparative observation between the tribunals and the normal courts of law. As per his findings there are discrepancies in terms of services, remuneration and tenure. The study and findings by the authors above is general. They cover establishment, nature and operation of the land dispute resolution machinery. This article is specifically addressing competence and independence of land tribunals in administration of justice.

6.0 Competence and Independence of the Tribunals

6.1.0 Competence of the Tribunals

Both the village land councils and the ward tribunals have to transact their business as provided under the Land Act, the Village Land Act, the Constitution and some other laws. The tribunals must be guided by the written laws and some other settled binding legal principles. In the course of administering justice inevitably members have to read and have a clear understanding of the said land laws. Similarly, they need to engage into statutory interpretation. The latter therefore makes it necessary for them to have knowledge for legal methods, statutory interpretation and their application. Unfortunately, this is not the case and the contrary is the fact.

Looking at the Village Land Council and the Ward Tribunal composition, all of their members have no legal knowledge. Members of the tribunals are ignorant of the legal rules and principles which are relevant in matters that come before them. This is deliberately made for expediency and flexibility purposes. Indeed to be a legally qualified person is a disqualification for membership into those organs.[47] This is a serious mischief

40 Cap 267 R.E 2002
41 SS. 33-36 of cap 216 R.E 2002
42 Produced in May 2014
43 LRC Report at pp 6, 35 and 53
44 Kironde, J. M. Improving Land Sector Governance in Africa: The Case of Tanzania, Paper prepared for the "Workshop on Land Governance in support of the MDGs: Responding to new challenges" Washington DC March 9-10 2009
45 Olenasha, W. Reforming Land Tenure in Tanzania: For Whose Benefit? At www.hakiardhi.org/WILLIAM%20SUBMISSION.pdf, pg 21(accessed on 6.6.2019)
46 Gaston, K. "The Dynamics and Continuity in Land Dispute Mechanisms in Mainland Tanzania: The Jurisdictional Debate" (2009) pp. 583-584
47 S (1) d of cap 206 R.E. 2002

in the formation and operation of the tribunals. The two organs are presided over by lay persons[48], where some of them may even be utterly illiterate. It is practically impossible for these members to have a correct interpretation of the law and its application without having some basics of law and its associated principles. It should further be noted that most of these laws are in English language. This presents another problem of language barrier which is a significant obstacle in the administration of justice. Although the secretary of the tribunal must possess reading and writing skills, it is not necessary that he has to be good in English. After all, the secretary is not a member of the tribunal therefore he/she does not participate in decision making.

Another problem is arising from the fact that interpretation of statutes is backed up by judicial principles made out of precedents. Most of these principles are compiled in the law reports which are written in English. The law reports are not only that are written in the language foreign to the members; but also they are not accessed by them. A research made by the Institute of Judicial Administration Lushoto (IJA) which was conducted in Tabora[49] and Mwanza [50] revealed that tribunals are not supplied with the necessary law materials. Again, authorities tasked to have the members trained have been off duty [51] on the matter.[52] Section 185 of the Land Act and section 66 of the Village Land Act impose a duty to the Minister to cause the two laws to be translated in Kiswahili. This obligation has either been neglected or hardly ever done. The research conducted by IJA showed that there are hardly translated versions of relevant laws which have ever been issued to the members of the village land councils in Mwanza and Tabora. Nevertheless, there is no legal obligation on the part of the Minister to have the Ward Tribunals Act and the Land Disputes Settlement Act translated in Kiswahili.

There are cases where the tribunals have been acting without jurisdiction. This is clearly reflected in the following cases entertained by the ward tribunals in Missenyi District in Kagera Region.

The first instance is from Kashenye Ward tribunal in the case *of WEO vs Hosea Ntula Criminal Case No. 2/2005.* Out of its jurisdiction, the tribunal entertained a sexual offence case in which the accused had a love affair with a school girl one Namala Begashe and made her pregnant. The tribunal sentenced the convict to ten years imprisonment.

The second instance arises from the *Nsunga Ward tribunal* in the case of *John Machume vs Gasper Zacharia Criminal Case No, 3/2005*. While the tribunals have no power to deal with witchcraft cases, the *Nsunga Ward tribunal* entertained a witchcraft dispute on 10th April 2005. The accused was sentenced to six months imprisonment.

The third instance is from *Minziro Ward Tribunal* which without jurisdiction, the ward tribunal tried a serious offence of breaking and entering in the case against *Stephen Paul, cited as civil case no. 21 of 2005.*

The fourth instance is from *Buyango Ward Tribunal* in the case of *Gustodes*

48 See also Edson J.M, The Role of Tribunals in the Administration of Justice: A Case Study of Njombe District, (2000), Dissertation Submitted in partial fulfillment of the requirements for the Award of Degree of Bachelor of Laws at the Faculty of Law, University of Dar es Salaam.

49 A report on capacity building to Primary Courts Magistrates on supervisory powers over administration of justice held at Tabora, 8-12 October 2018

50 Was done in March, 2019

51 LRC Report pp53-54

52 S.26 of Cap 206 R.E 2002

Rugafunya vs Jackson Michael which entertained a land criminal case without jurisdiction. This is contrary to section 4(2) of Cap 216 R.E 2002.

Another serious problem is confusion between civil and criminal wrongs by the tribunals. This was noted all over Bukoba and Misenye districts. Some of the cases include the following: *Kanyigo Ward Tribunal* in the case of *Vincent Aporinali vs Gosbert Rwegoshora, Civil Case No. 1 of 2005* entertained a dispute concerning the contract for a house construction as a criminal case involving allegation of theft. The accused was sentenced to one year imprisonment. In *Criminal Appeal No. 15 of 2003* from *Bwanjai Ward Tribunal*, the primary court magistrate ordered the retrial of the case because the tribunal had tried the land dispute as a criminal case instead of being a civil matter.

In another land dispute between *Fredrick Stanslaus vs Method Stanslaus Criminal Case No. 2 of 2005; the Buyango Tribunal* tried it as a criminal case while it was a civil one. The primary court at Bukoba town considered the issue and ordered retrial of the case. In the case of *Gasper vs Zacharia criminal Case No 8 of 2005*, *the Nsunga Ward Tribunal* tried a defamation matter as a criminal case and sentenced the accused to imprisonment. Likewise, In *R vs Creophas Kajungu,* Kyaka Ward Tribunal entertained a trespass dispute as a criminal case.

Furthermore, although it is mandatory for tribunals to employ mediation mechanisms to obtain amicable settlement of disputes before resorting to compulsive jurisdiction, most tribunals ignore the procedure and instead, they only jump to a compulsive jurisdiction without attempting mediation.

In the absence of legal knowledge by the tribunal members, lack of law materials coupled with absence of the necessary training; the competence of land tribunal's members to administer justice is in issue.

The same fate is affecting assessors of DLHT. The latter are lacking legal knowledge and training and are not supplied with legal materials.

6.2 Tribunal Independence

Independence of judiciary (tribunals) refers to the freedom of the institutions responsible to administer justice. It is when a decision maker delivers justice fairly and impartially without fear or favour and without being subjected to any pressure regardless of the angle upon which it is generated. There are four main elements of independence of judiciary which also can be used to analyse independence of tribunals. These are security of tenure and remuneration, immunity of tribunal officers and, their separation from other offices and responsibilities.

6.2.1 Security of Tenure

Members of the village land councils and ward tribunals, assessors and the chairpersons of the DLHT are appointed for three years tenure. The Village Council is responsible to appoint members of the Village Land Council, while the Ward Development Committee is vested with powers to appoint members of the ward tribunals. The chairpersons and assessors of the DLHT are appointed by the Minister responsible for land. The first two organs cannot be detached from

political affiliation[53] which may have direct influence on the composition of the tribunals. While the majority of the Village Council members are *vitongoji* chairpersons, the majority for the WDC are village chairpersons who come into office under political parties' umbrella. It is not uncommon to have land conflicts which feature political tussles.[54] Political clashes have caused some tribunals to be dissolved, while others became inactive for substantial period of time.[55]

Since the chairperson for the DLHT is appointed by the Minister, he is accountable to the executive. The Ministry responsible for Land has supervisory and disciplinary powers on the chairpersons[56]. As a result, the executive has unchecked enormous powers over the tribunals[57]. It has exclusive authority not only over chairperson's appointments and renewal of their tenure but also on the general operation and transaction of business by the tribunals. Under the current tribunal institutional structure; the Minister responsible for land, the registrar and local government authorities have unchecked administrative[58], supervisory and ultimate control over the tribunals[59]. The tenure for the tribunal's members and chairpersons is not secured. They survive in offices at the mercy of the executive. Re-appointment into offices and re-newal of their tenure of office is under absolute discretion of the same authorities.

53 Raulencio. P., Competence and Independence of Ward Tribunals in Administration of Justice: A Dissertation submitted at the University of Dar es Salaam in partial fulfillment of the requirement L.L.B (2006) at page 39-40
54 *Ibid*
55 *Ibid*
56 Section 28(2) of Cap 216 R.E 2002
57 LRC Report pp. 45-47
58 LRC Report p. 62-63
59 LRC Report p.59

There are many cases where the local government authorities have been registered as parties on the disputes to be resolved by the tribunals. Where the Ministry for land and the local government authorities have direct interests on cases lodged before the tribunals, the independence of the latter is wanting and justice cannot in the eyes of members of the public be seen to be done.

6.2.2 Security of Remuneration

There is no scheme to remunerate members of the village land councils. It can fairly be said that they work on a pro-bono basis. The ward tribunal members are almost suffering from the same fate. Although the law is providing for the Local government authorities to determine their sittings and allowances, their remuneration is neither fixed nor reliable. In many cases, they are not paid.[60] Where they are paid, remuneration is meagre and normally subjected to inordinate delays. Because of this problem, some tribunals have preferred the system of self-remuneration. This arises where they get their allowances from the case filing fees and from the fines imposed to offenders.[61] Under that circumstance, the more the cases, the more assurance for members to be remunerated. The fewer the cases that are filed to the tribunals and absence of fines imposed to the offenders, the less the opportunity for members to be paid. The latter fact is one among the reasons for the tribunals to register and entertain cases without jurisdiction. The Tribunals also impose high rates of fines to the offenders in order to secure their remuneration through fines.

60 Raulencio No 37 page 36-38
61 Ibid

It should further be noted that there is no uniformity on amount of fee charged when filing cases[62]. Authorities have not formulated regulations on the matter. The tribunals are at liberty to fix any amount of fee charged for case filing.

The worse situation is when members are called to attend seminars. On the study made in Bukoba Rural District, there are cases where members neither receive transport fare nor accommodation allowances. When asked as to why there is no special fund from Bukoba Rural District Council, the then lawyer for the council simply answered "it is because the District Council suffers from shortage of fund."

Members of the tribunals spare their time and sometimes incur expenses for food and transport fare to attend tribunal meetings. Failure to pay them is against their constitutional right of earning out of a rightful work.

Chairpersons and assessors for DLHT are remunerated from the Ministry of land. Their salaries and allowances are determined by the Ministry. Generally speaking, they are civil servants in the public service and there is no special protection on their remuneration.

6.2.3 Immunity and Separation of Powers

Just like judicial officers, tribunals' members enjoy immunity. Section 55 of the Land Dispute Courts Act provides that no matter or thing done by a chairman, member, officer, servant or agent of a Land Village Council or tribunal shall if done in good faith in the execution or purported execution of the provisions of the Act or of regulations made there under be subjected to any action, liability or demand whatsoever.[63] The Land Act extends the immunity even to all officers dealing with land. It states;

S.16. Protection of officers

No officer appointed under this Act shall be personally liable for any act or matter done or ordered to be done or omitted to be done by him in good faith and without negligence and in the intended or purported exercise of any power, or the performance of any duty, conferred or imposed on or allocated or delegated to him by or under this Act.

The law does not expressly provide immunity for the DLHT assessors. This omission presents an obvious absurdity. However, it should be pointed out that since they are performing their duties in the court established under section. 167 of the Land Act, assessors have immunity just like any officer discharging his duties under the Act. Their immunity is implied under section 16 of the Land Act.

There is separation of tribunal members from other offices. The Ward Tribunal and the Village Land Act excludes civil servants from serving as members. The two Acts provide a long list of people under exclusion most of which are in the government service at different capacities.[64]

7. Land Tribunals Vis a Vis the Judiciary

The tribunals are dealing with administration of justice just like the judiciary. The tribunals however have more workload and are overloaded even more than many of the subordinate

62 LRC Report p. 42-44

63 Cap 216 R.E 2002

64 S.5 Cap 206 R.E 2002 and S.60(s) of Cap 114 R.E 2002

courts.[65]

The operation system of the tribunals is quite different with that for the judiciary and some of the remarkable differences are noted below:

Firstly, members of tribunals, the chairpersons and assessors are not judicial officers. Their appointments are not governed and regulated by the Judicial Service Commission. They are recruited by executive authorities and they are as a result not bound by professional ethics and norms of judicial conduct[66]. For the same reasons rules of etiquette applicable to judicial officers are far-off from them.

Secondly, although the tribunals are statutory designated as courts, they are not operating on judicial principles. Institutionally, they are divorced from the judiciary. As they are not answerable to the judiciary, their loyalty is pledged to the executives especially the Ministry responsible for land.

Thirdly, the tribunals are characterised by structural deficiencies. The Chief Justice as the head of the judiciary has neither defined powers nor control over them. The chain of accountability is linked to the executive bodies. While the DLHT is accountable to the Minister for Land, the ward tribunals are accountable to the District Councils and the ward development committees. The Village Land Council on the other hand is accountable to the Village Council. It should further be noted that some of these tribunals do operate and discharge their functions in the Regional or District Administrative Offices.

Fourthly, although the tribunals merge with the judiciary at the High Court level, there is still a confusion between the powers of the Registrar of the High Court with that of the Registrar from the Ministry of Land. Chairpersons of the DLHT do receive directives and orders from the latter which is likely to affect powers and call for the records from the superior courts which are made for appeal and revision purposes. Monthly returns from DLHT are directed to the Registrar with no reversionary judicial powers.

Fifthly, the tribunal's personnel are not trained for administration of justice[67]. Members of the ward tribunals and village land councils are purely lay persons. Not only they are not lawyers but also they do not have basics in law. It should further be noted that the law does not even record literacy as a necessary conditions for membership in these organs. A legitimate question is how those lay persons will interpret and apply land law principles provided under the land statutes and case laws written in legal English? Similarly, unlike judges and magistrates, the tribunal chairpersons do not attend induction courses and continuing legal education provided by the Institute of Judicial Administration Lushoto. The tribunals are not manned by judicial officers and their members and chairpersons are not administrated with judicial oaths.

Sixthly, poor case management system. Tribunal members are not trained in administration of justice. Consequently, they are missing some important case management skills such as facts analysis, application of the law to the facts, legal reasoning and judgment

65 E.g Korogwe DLHT for a long time until 2017 has been serving four districts i.e Handeni, Korogwe, Kilindi and Lushoto. After establishment of Kilindi and Lushoto tribunals, it is currently serving only two districts i.e Handeni and Korogwe.

66 LRC Report p.56

67 See LRC Report at p. 41

writing. Capacity building programs are rarely organised to improve their knowledge and skills. The DLHTs are overloaded with cases. The tribunals do not have special programs like judicial clean up sessions to get rid of backlog of cases. Since the tribunals are detached from the judiciary there is no efficient system of accountability for case delays, under performance and for some other malpractices.

Seventh, constitutionally the judiciary is an organ with the last say in administration of justice. In view of the fact that land conflicts constitute a large number of cases country wise, to divorce the judiciary from handling land cases and deny it administrative and supervisory powers over the tribunals is a serious breach of the cardinal principle of separation of powers.

8.0 Towards Addressing the Problems

To curb the weak points as discussed above, the remedy is manifested in different dimensions which is the subject of the next discussion.

Firstly, the Land Disputes Courts Act should be repealed and other related laws should be amended to get rid of the current awkward structure characterizing the land dispute resolution machinery. Administratively, the village land council and ward tribunals fall under the Regional Administration and local government Authority. While the DLHT falls under the Ministry of Lands and Human Settlement Development, the High Court Land Division and the Court of Appeal falls under the judiciary. The three organs have no operational legal link and are not coordinated to have efficient administration, supervision and management of land courts.

Secondly, all land disputes should be adjudicated by the judiciary. [68]The court structure will run from the Primary Court, District Court, High Court and the Court of Appeal. The DLHT should be repealed. The ward tribunals and the Village Land Councils should be retained only for mediation and reconciliation. The judiciary should therefore have exclusive jurisdiction in administration of justice for land disputes.

Thirdly, the judiciary should recruit competent legal practitioners with skills in adjudication of land disputes. The present chairpersons of DLHT should be integrated into the judicial system after undergoing intensive short courses for capacity building. They should be trained to master judicial practice and procedure.

Fourth, the Land Division of the High Court should be abolished. This is due to the fact that all High Court centres and zones have and should retain their jurisdiction over land matters.

Fifth, existing ward tribunals and the DLHT should finalize proceedings already commenced. Thereafter the two organs will come into a final close up.

Sixth, the democratic principle of separation of powers must be respected. Administration of justice is vested with the judiciary. Executive tribunals with enormous powers divorcing the judicial supervision, control and monitory should never be established,

Seventh, there is a need to have coordination; networking and experience sharing among the stakeholders to have sound machinery for land dispute resolution. There should be involvement

68 LRC Report p.66

and consultation of legal practitioners, stakeholders, litigants, activists, judges, advocates, academicians and NGOs.

9.0 Conclusion

The land tribunals were part of the new land dispute resolution machinery introduced early in 2000s. There are structural and operational deficiencies of the tribunals which have negative impacts on administration of justice. The tribunals have some weak points associated with their composition. Members of ward tribunals and Village Land Councils are lay persons with no basics in legal principles. Their ignorance of the law affects their competence to deliver justice. As there is no sound and reliable capacity building schemes for tribunals' members, chairpersons and assessors, the problem arises on their competence to administer justice clockwise with best and acceptable judicial practice.

Independence of the tribunal is also in issue. Both, the Ministry of Lands and local government authorities have unchecked powers and authority to appoint and dismiss members of the tribunals. Generally, executive has exclusive control, supervision and monitoring of the tribunals.

Based on serious deficiencies characterizing the current system of land dispute resolution, there are urgent calls for law reform. The principle of Separation of powers should be respected. Judicial powers need not be hijacked. For a sound machinery for the land dispute resolution to be in place, there is need to consult the stakeholders such as legal practitioners, litigants, activists, judges, advocates, academicians and Non-Government Organizations.