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“Haki hupewi. Haki udai” [Right is not Granted; You Have to Claim it] What a Litigation Process at the East African Court of Justice Can Tell us about the Pastoralists’ Struggles for Land Rights in Tanzania

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After several years in the Tanzanian courts, without any favourable resolutions, four pastoralist Maasai villages from Loliondo area decided to file a case against the government at the East African Court of Justice (EACJ) in 2017, now motivated by new evictions that happened that year. Filing a lawsuit collectively in this judicial level is unprecedented in the history of the Tanzanian pastoralist and hunter-gatherer peoples.

In this article, I will be focusing on two specific situations related to what has been called “the Loliondo case” that took place during the preparatory meetings at the Pan-African Lawyers Union (PALU) headquarters and the hearings at the EACJ¹, in May and June 2019. In both events, the encounters between lawyers and Maasai villagers (who were the witnesses) highlighted incongruities of translations, showing the existence of different “communities of communication”². Such communities are organised in these social

¹ Both based in Arusha city, north-eastern Tanzania.

² Apel, 1980; Cardoso de Oliveira, 2000; Pacheco de Oliveira, 2014.

situations under "asymmetrical interdependent relations"³ and the effects of the powers issued from these asymmetries help us to better understand the ways in which hierarchy is established in interethnic dialogues. On the other hand, we will also note that the role of the Maasai activists – being "indigenous brokers" who are themselves lawyers or highly educated people and, therefore, master the codes of the different communities of communication – reveals the capacity of making negotiations even under (and through) the logics of hegemonic knowledge.

I will start, however, by giving a brief contextualisation about the reasons behind this litigation process. Connected to these reasons, a few aspects of the activism carried out by the pastoralist (or "indigenous") NGOs will be introduced in the next section in order to provide complementary elements about the pastoralists' struggles for land rights in the United Republic of Tanzania.

The overlaps

"*Haki hupewi. Haki udai.*" I heard this statement once, in a meeting organised by four pastoralist NGOs who wanted to gather updated information on pastoralists' condition in north-eastern Tanzania with regard to land conflicts and evictions that seemed predictable. A Maasai lawyer spoke about the importance of taking action: those pastoralists villagers, who were invited to participate in the meeting, should not expect to take their rights as granted. They should fight for them.

"*Tusikubali tena!*"⁴ [We shall not agree again!]; a Maasai villager resonated, referring to what happened to the Serengeti plains. In 1959, Maasai elders were impelled to sign an agreement, through a "manufactured consent"⁵, in order to relocate their people to Ngorongoro and Loliondo areas, once Serengeti was being declared a national park. Currently, both Ngorongoro and Loliondo are under the status of national protected (or conservation) areas, which has been increasingly imposing more and more limitations for the pastoralist who live there. There have been attempts from sectors of the government at transforming Game Controlled Areas, such as Loliondo, into Game Reserves, another type of conservation area within which human settlements and grazing activities are not allowed. That was the main reason for the arrangement of that meeting with Maasai villagers. Although not having always the same interests neither the same priorities (often, they are even contradictory), these pastoralist NGOs circumstantially work together. Despite – and because of – the friction⁶, they produce movement, that is, they take action to fight for land rights.

In practice, evictions and other types of human rights violations have been happening even within Game Controlled Areas (GCA). To be more precise, most of the land conflicts

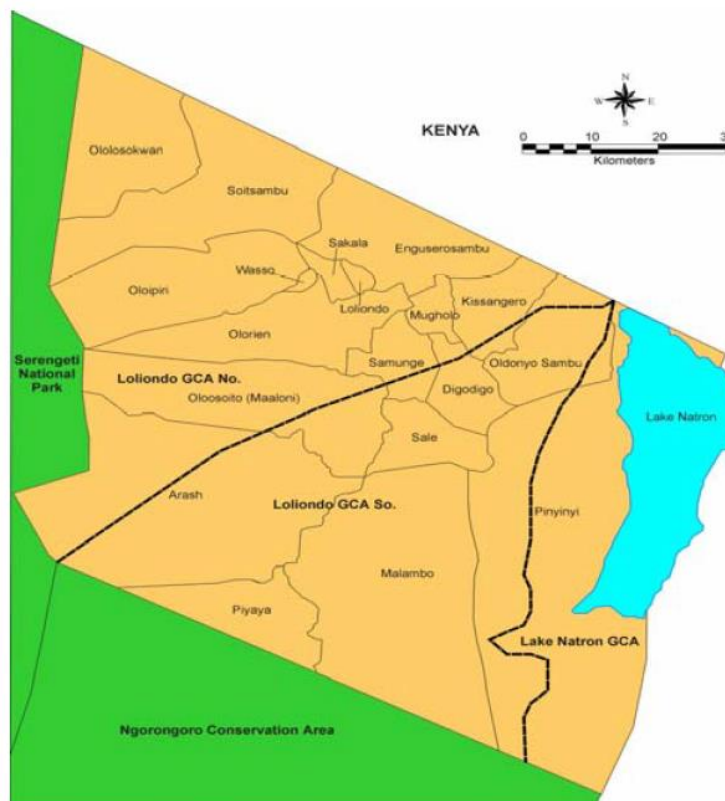
³ De l'Estoile, 2015; Gagné, 2018.

⁴ The language used during the workshop was mostly Kiswahili, the national language of Tanzania, despite the fact that 85% of the participants were Maasai (and some of them could not understand Kiswahili).

⁵ Igoe, 2005.

⁶ Tsing, 2005.

in the centre-north Tanzania take place *mainly* within GCA. The main cause for that is an overlap of land categories in Tanzanian land laws and therefore the different uses made out from these lands: many GCA overlap completely with registered village lands. And, as Nelson has noted, "*the main use of wildlife in Game Controlled Areas is as tourist hunting concessions*" granted by the Tanzanian government "*without the permission or involvement of the landholder*" – in this cases, the registered villages. "*The result is that tourist hunting is conducted extensively on community lands (...) [and] may conflict with livestock grazing or forest products collection or other local economic activities.*" (2005:8)



"Overlap of GCA's and village lands in Loliondo and Sale Divisions, Ngorongoro District. GCA demarcated by dotted line, solid lines are village boundaries." (Nelson, 2005:7)

It is important to note that land tenure conflicts have taken place in Tanzania since colonial times, but they have been recently reinforced by contradictory laws and inadequate implementation of the National Land Policy (1995). There is a lack, for instance, of precise definitions about what a Game Controlled Area may be, and a huge confusion created around the allowance of human settlement and grazing activity within it, a contradiction mainly triggered by the enactment of the Wildlife Conservation Act (2009). This act established restrictions for GCAs that are not in accordance with other still valid laws. Such overlap favours land grabbing in the name of "conservation". In fact, conservation areas destined for safaris and other tourism purposes have become a profitable business for the country's economy and foreign "investors".

As shown on the map, Loliondo is a game controlled area overlapping with several registered villages. A part of Loliondo Game Controlled Area is set aside as a "hunting block" – the "hunting blocks" are areas destined for concessions, where international millionaire companies can sign agreements with the Tanzanian government and use the land for leisure hunting purposes, as private game parks. In 1992, the Dubai royal family was granted the Loliondo block, through its safari company Ortelo Business Corporation (OBC), an agreement that lasted for 25 years and provoked mass evictions (among other human rights violations) six times.

Although pastoralist NGOs have been to the national courts several times, it has not been effective so far, since the actor responsible for implementation is the perpetrator itself, that is, the Tanzanian government. That is why four Loliondo villages decided to file a lawsuit at the East African Court of Justice in 2017. Pastoralist NGOs support the case's costs via the engagement of international partners, while a current "independent activist" from Loliondo – John⁷ – is connecting the different actors (pastoralist NGOs, Maasai witnesses and lawyers).

"The Loliondo case" became worldwide known mainly as a result of *Avaaz* campaigns⁸, which denounced threats and forced evictions of the Maasai of Loliondo villages. As John has once noted, it became a "global scandal", receiving the support of several organisations and groups from all over the world. It also highlighted the participation of the Maasai in the global indigenous movement, through the solidarity manifested towards them from indigenous groups of other continents.



Indigenous youth of Indonesia show their support to the Maasai of Loliondo. Source: "Serge Marti, LifeMosaic. Barisan Pemuda Adat Nusantara (Indonesian Archipelago Indigenous Youth Front). Photo taken August 25, 2016."⁹

⁷ Here anonymised for security reasons.

⁸ *Avaaz* is a "online activist network", i.e., a website destined for the creation of online petitions which are widely disseminated all around the world. See <https://www.avaaz.org/page/en/about/>.

⁹ Laltaika & Askew, 2018:16. Available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/01/Laltaika-and-Askew_UN-paper_rev3.pdf.

The preparatory meetings at Palu

At the end of May 2019, twenty Maasai witnesses from Loliondo came to Arusha in order to be heard by the PALU's lawyers, who took the case on a *pro bono* basis. The meetings were carried out during 3 entire days, in order to file affidavits for the cross-examination. There was not so much time left to register the documents for the upcoming hearings at the court.

John would make translations between Maa (the Maasai's mother tongue) and Kiswahili (the Tanzanian official language) when requested. This would mostly happen when women were interviewed, as most female pastoralists have not been to school and therefore do not speak Kiswahili. The lawyers, therefore, preferred calling first those witnesses who could speak the language – in this case, mostly the men – to avoid using the translator. However, on the third day, the lawyers realised that they had interviewed only 12 villagers (out of 20), and because they would not have enough time to finish interviewing the others and also because they evaluated that most of the affidavits were quite similar, they made the decision to call the remaining group and ask if they wanted to add to what had already stated. The result was a torrent of new information coming from the women. They are, actually, the most affected by the evictions: they are the ones who build the houses and carry out the day-to-day activities with their children in the *bomas* [complex of houses and livestock], while the men are mostly away, grazing cattle or travelling. The Tanzanian lawyers were surprised: they were not aware of that. The women were also the ones who saw the houses burning down and had to run away with only the clothes on their backs. All this means that the burning of the *bomas* is not only a material loss to pastoralist women; it is the loss of their very daily lives.

While translating, John regretted that those women had not been listened to one by one. "*Wanawake Wamaasai wanateseka sana*" [Maasai women suffer a lot], he said. He was aware of the reality back in the village. After that collective talk, John tried to convince the main attorney that it was primordial to listen individually to at least two of those women (in order to prepare their affidavits and make them apt to be called by the judges). One was an elder woman, who had a strong feminist discourse and much more to say; the other, a young mother whose child became disabled after being heavily beaten by the same guards who burnt their *bomas*. The lawyer then chose the younger one, finding it more strategic to be used at the court. The other women's testimonies could be all concentrated in just one affidavit. John also insisted on some categories and themes that should be emphasised by the lawyers, such as vulnerability, genocide, culture and discrimination (as Maasai in a country of a Bantu majority). The lawyer then refused, by saying that the judges would probably not understand, that those were contentious issues, and that they had already enough proofs.

"We should take this opportunity to emphasise our condition as indigenous, Aline.", John told me. "Because if we win this case, it is going to be a reference to many other indigenous

peoples... But these Swahili¹⁰ lawyers don't understand that, because they are also from the main society; they are from the mainstream.", he said.

At the East African court of justice

At the beginning of the hearings, the applicants' lawyers, from PALU, were told that they could choose the witnesses, but preferably those who could speak Kiswahili so that the court clerk could easily translate their testimonies into English. An "ordinary" villager, although being able to speak the national language, found himself in trouble.

"How old are you? In what year were you born?", the government's attorney asks.

"I think I am 40... I am not sure about the year I was born.", the villager replies.

"So you don't remember your age... Where were you when the houses were *supposedly* burning down?"

"I was in the village."

"So did you see the houses burning?"

"No, I didn't because when I knew about the fire, I run away."

"So you mean that you were NOT in the village."

"Yes, I was there in the village, but a bit far from the *bomas*"

"On your affidavit, you are confirming that all the *bomas* in the village were burnt. How can you say so if you weren't in the village?", the attorney says, with a sarcastic smile.

"Yes! The whole village was burnt! Wait, I know you want to confuse me, but I was in the village!"

"How far from the houses in flame? How many meters or kilometres?", the attorney insists.

"I don't know. I just know I was a bit far, but not too much."

"So you cannot confirm where you were exactly. And what was then the date it happened?"

"The date...? The day was... I cannot remember the date...", the villager says.

"My Lady, my Lords, how can we trust in what this person is saying if he does not remember anything?!"

Many Maasai families, especially those whose parents have never been to school, are not used to counting days neither to registering dates. As John has noted, the Maasai calendar is based on the moon's light and their years are counted according to the rains period.

The Maasai activists who attended the session (some of them lawyers) also realised that the language became a problem, as different meanings of the word "village" created misunderstandings. According to them, the word "village" [*kijiji*] in Kiswahili is a more defined area than what it is in Maa. In Maa, village can mean a much broader area; it can actually even represent "the whole world".

It was clear that there were gaps between the different ways of conceiving time and space, and that the government's attorney was taking advantage of a dominant intelligibility and literacy in order to forge contradiction from the witness.

Due to these and other gaps related to incongruities of translation – not just linguistic, but also cosmological –, the activists told the PALU attorneys about the urgent need to let

¹⁰ The (Wa)Swahili are only one among more than 130 ethnic groups in Tanzania, being from Bantu and Arab origins and mainly settled on the coast. Since the national language is Kiswahili (the Swahili's language) and over 90% of the Tanzanian population is of Bantu origin, the Maasai, who are Nilotic speakers, see themselves as a minority and marginalised group. They call the rest of the Tanzanian population "The Swahilis" as a metonymy.

the witnesses speak and express themselves freely in their mother tongue. A Maasai professional translator was then requested to take over the translation. That move made it possible to call the selected Maasai woman (the disabled child's mother) to give her own testimony. I was also told that the PALU lawyers could afterwards file new documents addressing the cultural specificities of the Maasai in order to clarify what was the object of confusion.

Conclusion

The preparatory meetings at PALU and the hearing sessions at the EACJ are highly formal mechanisms of interaction¹¹, where the different actors are in interdependent relations. They need each other as a condition for the existence of those social situations. Although in interdependence, they occupy asymmetric positions, mainly due to the inequality of power which with they are vested.¹² Institutionalised rituals in urban areas often take a (hegemonic) language (in both figurative and literal senses) as granted¹³, not considering *a priori* the fact that the participants do not come all from the same "community of communication". There are also social situations, as we have seen, where the multiple sorts of asymmetries are deliberately used in someone's favour. However, what I want to highlight here is more than the boundaries of the "communities of communication"; instead, I want to shed some light on their porosity aspect and the possibilities of negotiation even under hierarchical interethnic dialogues.

Apel's concept of "communities of communication", as an analytical tool, seems to be useful for the sake of situating the actors in clusters according to their different social strategies, which combine shared values and interests¹⁴. I would add that the contingent aspect can be central in the formation of these communities of communication, revealing the possibility of different arrangements depending on the situations. They must be, therefore, seen as fluid, not as rigid clusters. The concept also allows us to better understand the movements of the indigenous activists, as they can belong to both communities of communication (of lawyers and Maasai villagers) and are circumstantially in transit between them. Eventually, we could see these Maasai brokers as effective translators as they master the codes and "language games" of both communities. In fact, they are as much in a position of transit between the different communities of communication as they are circumstantially constituting their own community of Maasai activists.

We can then observe that indigenous brokers can play an important role in institutionalised ways of governing, not just because they understand the gaps created by hegemonic and ruling knowledge, but because they represent themselves a nuance in these apparent "radical" asymmetries. Through these social situations, we were able to see how these actors negotiate spaces where hegemonic powers would tend to impose themselves. In such cases, the asymmetric interdependent relations should be seen less as arrangements

¹¹ Gagné, 2018.

¹² De l'Estoile, 2015 and Gagné, 2018.

¹³ De l'Estoile, 2015.

¹⁴ Pacheco de Oliveira, 2014.

guided by the differences of power, but rather, as highlighting the interdependence aspect as the *pivot* for negotiation and less dualistic determinisms.

If rights are not granted and it is then needed to fight for them, it is not against the hegemonic apparatus that this fight takes place, but rather, through it. Claiming rights includes participation in asymmetrical interdependent relations as well as to find ways to take action despite – and within – the gaps.

References

- Apel Karl-Otto, 1980, "The communication community as the transcendental presupposition for the social science". In: *Towards a transformation of Philosophy*. London.
- Cardoso de Oliveira Roberto, 2000, "Ação indigenista, eticidade e o diálogo interétnico", *Estudos avançados*, vol.14, n°40, pp. 213-230.
- De l'Estoile Benoît, 2015, « Observer en réunion », *Genèses*, xcvi, 1 : 3-6.
- Gagné Natacha, 2018, « Ethnographie de l'État aux confins de la République. Le dispositif de l'audience et la justice foraine en Polynésie française. », *Presses Universitaires de France, Ethnologie française*, n° 169, pp. 93-106.
- Igoe Jim, 2005, "Power and Force in Tanzania Civil Society: The story of Barabaig NGOs in the Hanang Community Development Project", In: Igoe, J. & Kelsall, T. (eds.). *Between a rock and a hard place*. Durham, Carolina Academic Press, pp. 115-146.
- Laltaika Elifuraha & Askew Kelly, 2018, "Modes of Dispossession of Indigenous Lands and Territories in Africa", paper presented at the United Nations Headquarters, in New York, on 23-25 January 2018.
- Nelson Fred, 2005, *Wildlife Management and Village Land Tenure in Northern Tanzania*. Dar es Salaam, TNRF Occasional Paper, n° 6.
- Pacheco de Oliveira João, 2014, "Metáforas naturalizantes e violência interétnica na Amazônia contemporânea: memórias do terror e instrumentos da etnografia". Rodrigues, Lea Carvalho & Silva, Isabelle Braz Peixoto da (orgs). *Saberes locais, experiências transnacionais: interfaces do fazer antropológico*. Fortaleza, ABA publicações, pp. 73-92.
- Tsing Anna, 2005, *Friction. An ethnography of global connection*, New York, Princeton University Press.