

**COMPULSORY ACQUISITION AND THE RIGHT TO PROPERTY:  
THE GAPS IN THE LEGAL FRAMEWORK, PRACTICES AND  
POSSIBLE SOLUTIONS**

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By  
ANGELA GUMATO BONAYA  
084075

Prepared under the supervision of  
SMITH OUMA

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## **DECLARATION**

I, **ANGELA GUMATO BONAYA**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as the University Supervisor.

Signed:.....

Date:.....

**SMITH OUMA**

## **ABSTRACT**

Compulsory acquisition of land has to be carried out in a manner that strikes a balance between private and public interests without arbitrarily infringing on individual or community rights to property. In order to achieve this, laws governing compulsory acquisition must be clear. The aim of this paper is to find out if there are gaps in the current laws. In particular, it shall focus on the inadequacy of the law in terms of compensating ancestral property rights in land and the lack of a clear time frame within which compensation must be made to the affected land owners. It shall also discuss the current trends of irregular acquisition practices that do not observe the law. This paper shall explain how these inadequacies in the law and irregular acquisition practices infringe on the right to property. This shall be explained with the aid of case law, journal articles, reports and both local and foreign laws. In the end, it shall suggest possible solutions that lawmakers may take into consideration in order to create a watertight legal framework with regards to compulsory acquisition.

## **LIST OF ABBREVIATIONS**

**ACHPR-** African Charter on Human and Peoples Rights

**ACmHPR-** African Commission on Human and Peoples Rights

**ACtHPR-** African Court on Human and Peoples Rights

**FAO-** Food and Agriculture Organisation of the United Nations

**FPIC-** Free, Prior and Informed Consent

**IACtHR-** Inter-American Court of Human Rights

**NLC-** National Land Commission

**SIA-** Social Impact Assessment

**UDHR-** Universal Declaration of Human Rights

**UNDRIP-** Universal Declaration on the Rights of Indigenous People



## LIST OF CASES

1. *Abdulla Akiio & 2 others v Kenya Urban Roads Authority*, Petition No 53 of 2015.
2. *African Commission on Human and People's Rights v The Republic of Kenya*, ACtHPR Application 006/2012 (in relation to the Ogiek).
3. *Africa Gas and Oil Company Limited v Attorney General & 3 others*, Constitutional Petition.
4. *Arnacherry Limited v Attorney General* (2014) eKLR.o.171 of 2016.
5. *Centre of Minority Rights Development (Kenya) and Minority Rights Group (CEMIRIDE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.
6. *Commissioner of Lands and another v Coastal Aquaculture Ltd*, Civil Appeal No. 252 of 1996 reported in KLR (E&L) Vol. 1, 264-295.
7. *Director of Buildings and Lands v Shun Fung Ironworks Ltd* (1995) AC 111, 125
8. *David Kiptum Yator & 2 others suing as Leaders of the Sengwer Community v Attorney General & 5 others* (2013) eKLR.
9. *Five Star Agencies Limited v National Land Commission* (2014) eKLR.
10. *Hawaii Housing Authority v Midkiff*, 467 US 229 (1984).
11. *Horn v Sunderland Corporation* [1941].
12. *Isaka Wainaina v Murito* (1923) 9 (2) EALR 102.
13. *Joseph K Nderitu and 23 others v Attorney General & 2 others*, Constitutional petition No 29 of 2012.
14. *Kanini Farm Limited v Commissioner of Lands* (1996) eKLR.
15. *Kelo v City of New London*, 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).
16. *Kichwa indigenous people of Sarayaku v Ecuador*, IACtHR Judgment of 27 June 2012 (Merits and reparations).
17. *Limo v Commissioner of Lands* KLR (E&L) 175.
18. *Mathatani Limited v Commissioner of Lands* (2013) eKLR.
19. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR Judgement of 31 August 2001, Series C, No. 79, para 149.

20. *Niaz Mohammed v Commissioner of Lands and others* (1996) KLR.
21. *Patrick Musimba v National Land Commission & 4 others*, Petition No. 613 of 2014.
22. *Peter K. Waweru v Republic*, High Court Misc. Civil Application No. 118 of 2004, reported in (2006) 1 KLR (E&L) 677 at 691.
23. *Priest v Secretary of State* [1982] 81 LGR 193,198.
24. *Re Kisima Farm Ltd* (1978) KLR 36.
25. *Saramaka People v Suriname*, IACtHR Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs).
26. *Shalein Masood Mughai v Attorney General & 5 others* (2014) eKLR.
27. *Virenda Ramji Gudka & 3 others v Attorney General* (2014) eKLR.
28. *Virginia Edith Wambui v Joash Ochieng Ougo and Omolo Siranga* (1982-88) 1KAR.

## LIST OF STATUTES AND POLICY DOCUMENTS

1. *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217.
2. *Constitution of Kenya* (2010).
3. *Constitution of Kenya* (1963) (Repealed).
4. *Community Land Act* (Act No. 27 of 2016).
5. *Environmental Management and Coordination Act* (No. 8 of 1999).
6. *Eviction and Resettlement Procedures Bill* (2013).
7. *World Bank Operational Policy on Involuntary Resettlement* 4.12.
8. *Land Act* (No. 6 of 2012).
9. *Land Acquisition Act* CAP 295 (Repealed).
10. *Land (Group Representatives) Act* (Chapter 287, Laws of Kenya) (Repealed).
11. *Land Laws (Amendment) Act* (2016).
12. *Land Registration Act* (No.3 of 2012).
13. *Local Content Bill* (2016).
14. *Mining Act* (No. 12 of 2016).
15. *National Land Policy*, 2009.
16. *National Land Commission Act* (No.5 of 2012).
17. *National Land Policy* (2009).
18. *Native Land Trust Ordinance* (No. 28 of 1938) (Repealed).
19. *Petroleum (Exploration and Production) Regulations*, 1984.
20. *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (India).
21. *The Land Regulations* (2017) (NLC Draft).
22. *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
23. *Village Land Act* (Tanzania).
24. *Valuers Act* (CAP 532) (2012).

## CHAPTER ONE: INTRODUCTION

### 1.1 Background

Land is central to Kenyans since a significant portion of the country's economy depends on agricultural uses of land.<sup>1</sup> It is also the medium that defines and sets together social and spiritual relations across generations.<sup>2</sup> Consequently, compulsory acquisition is a delicate issue especially in this day and age where the government has increasing pressure to deliver public services such as grand infrastructure projects in the face of high demand for land.<sup>3</sup>

Historically, there were irregular allocations by the government while practising compulsory acquisition which was attributed to the abuse and non-adherence to the Land Acquisition Act which governed the acquisition process.<sup>4</sup> Compulsory acquisition was not exercised effectively and accountably.<sup>5</sup> These issues have still not been solved due to the ambiguities in the new laws dealing with compulsory acquisition, in particular, the Constitution and the Land Act.<sup>6</sup>

For example, the laws do not provide criteria for the calculation of compensation to be made to victims of the acquisition. The law only provides for "just" compensation which is very ambiguous.<sup>7</sup> Courts have taken "just and fair" compensation to mean the market value of the property.<sup>8</sup> However, the market value fails to compensate non-monetary aspects such as the spiritual connections communities have to their ancestral lands.<sup>9</sup>

The Constitution also provides for the prompt payment of just compensation to the owner of

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<sup>1</sup> Patrick O. Alila and Atieno R "Agricultural policy in Kenya: Issues and processes" Future Agricultures Consortium Workshop, Institute of Development Studies, 20-22 March 2006, 3.

<sup>2</sup> Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya on principles of a national land policy framework constitutional position of land and new institutional framework for land administration*, 2002, 19.

<sup>3</sup> Food and Agriculture Organization of the United Nations (FAO), 'Compulsory acquisition of land and compensation' *Land Tenure Studies* (2009), 1.

<sup>4</sup> Section 46, *National Land Policy* (2009).

<sup>5</sup> Section 42, *National Land Policy* (2009).

<sup>6</sup> *Constitution of Kenya* (2010) and *Land Act* (No. 6 of 2012).

<sup>7</sup> Article 40(3)(b)(i), *Constitution of Kenya* (2010).

<sup>8</sup> *Kanini Farm Limited v Commissioner of Lands* (1996) eKLR.

<sup>9</sup> FAO, 'Compulsory acquisition of land and compensation', *Land Tenure Studies* (2009), 23.

land that has compulsorily been acquired.<sup>10</sup> The use of the word “prompt” without providing a well defined timeline for compensation has led to delayed payments to the affected persons.<sup>11</sup> This contradicts the principle of just and fair compensation.<sup>12</sup>

Currently, there are still cases on non-adherence by the State to the laws governing compulsory acquisition. The government is still forcefully evicting the Sengwer community from the Embobut forest contrary to the law.<sup>13</sup> Furthermore, since the National Land Commission (NLC) has still not created guidelines for compulsory acquisition, room has been created for such irregular acquisition practices to go on.<sup>14</sup>

Cumulatively, these ambiguities and irregular practices lead to the disregard for the right to property as enshrined in the Constitution through the arbitrary deprivation of property.<sup>15</sup>

## **1.2 Statement of the research problem**

Compulsory acquisition of land must be carried out in a manner that respects the right to property.<sup>16</sup> The law focuses on monetary compensation and does not cater for the compensation of ancestral lands. Also, it doesn’t provide for a clear time frame during which compensation should be paid thus leading to instances of delayed compensation. Furthermore, there has been non- adherence to the laws on compulsory acquisition by the NLC. All these, if not addressed, continue infringing on people’s right to property.

## **1.3 Hypothesis**

This study is based on the presumption that the law on compulsory acquisition in Kenya is inadequate in terms of compensating ancestral property rights in land, there is no clear time frame for payment of compensation and that the relevant authorities involved in the process

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<sup>10</sup> Article 40(3)(b)(i), *Constitution of Kenya* (2010).

<sup>11</sup> *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

<sup>12</sup> *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

<sup>13</sup> <https://reliefweb.int/report/kenya/kenya-defies-its-own-courts-torching-homes-and-forcefully-evicting-sengwer-their> on 15 January 2018.

<sup>14</sup> Section 107(2), *Land Act* (No. 6 of 2012).

<sup>15</sup> Article 40(3)(b)(i), *Constitution of Kenya* (2010).

<sup>16</sup> Kariuki F, Ouma S, Ng’etich R, *Property Law*, Strathmore University Press, 2016, 135.

do not adhere to the already established procedures set out in the Land Act.<sup>17</sup>

#### **1.4 Justification of the study**

This dissertation analyses the gaps in the laws governing compulsory acquisition (in particular, the Land Act) and point out various irregular practices carried out by the relevant authorities. It also deals with the value of community land i.e. ancestral lands and shrines with regards to just and fair compensation. The findings of this research suggest ways in which adequate compensation of ancestral land can be attained. Moreover, it explains how a clear time frame for compensation can be created to avoid delayed compensation and how unfair practices can be curbed to promote land tenure security. By examining the shortcomings of the law as well as lack of adherence to the practical guidelines set out in the law, this study gives possible recommendations that legislators can take into account to improve the law and create a watertight system of compulsory acquisition.

#### **1.5 Objectives**

1. To identify the ambiguities in the laws of compulsory acquisition that affect individual and community land rights.
2. To analyse whether these ambiguities affect individual and community rights to property.
3. To ascertain what constitutes just and fair compensation in the case of ancestral land whose value goes beyond monetary value.
4. To determine whether the relevant authorities involved in the process of compulsory acquisition, adhere to the procedure of compulsory acquisition as set out in the Land Act.
5. To identify possible recommendations to fill the gaps in the legal framework of compulsory acquisition in Kenya.

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<sup>17</sup> Part VIII, *Land Act* (No. 6 of 2012).

## 1.6 Research questions

This study seeks to address the following questions:

1. Are there gaps in the laws that govern compulsory acquisition in Kenya?
2. Are the ambiguities in the laws of compulsory acquisition in Kenya leading to infringement of individual or community land rights?
3. How can land rights be compensated in addition to monetary compensation?
4. Do the relevant authorities involved in the process of compulsory acquisition adhere to the guidelines on the procedure for compulsory acquisition?
5. What are the possible recommendations that can be used to improve the law on compulsory acquisition in Kenya?

## 1.7 Literature review

### i. Compulsory acquisition and the right to property

The right to property is not an absolute right since it is limited by the legal requirement that private property rights must bow to the superior rights of the State when it requires the property for a public purpose.<sup>18</sup>

According to Hugo Grotius, all property is under the eminent domain of the State, and the state can alienate it to meet public needs after compensating the owner of the property.<sup>19</sup>

As explained by Kariuki F, for compulsory acquisition to be justified, two main pre-conditions must be met; the expropriation has to be for a public purpose and there must be payment of just compensation.<sup>20</sup>

These positions are supported by legal instruments such as the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights (ACHPR) which recognise the right to property and allow for its limitation in the case of compulsory

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<sup>18</sup> Paul EF, *Property rights and eminent domain*, Transactional Publishers, New Brunswick, 1987, 185.

<sup>19</sup> Grotius H, 'De jure belli ac pacis' (1652), Nijhoff, The Hague, 1948, as cited in Ramanathan U, 'A word on eminent domain' *International Environmental Law Research Centre* (2009), 1.

<sup>20</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 135.

acquisition.<sup>21</sup> The Constitution of Kenya has similar provisions.<sup>22</sup>

**ii. The effects of the gaps in the law of compulsory acquisition and the irregular acquisition practices in Kenya**

**a) Compensation of ancestral lands**

As stated by Daniel Weldegebriel, compensation of the victim of compulsory acquisition ensures that no single individual bears the entire burden for the benefit of the society at large<sup>23</sup>. The Food and Agriculture Organization of the United Nations (FAO) also says that compensation repays people for the losses they have suffered.<sup>24</sup>

The current laws provide for the payment of just compensation.<sup>25</sup> Just compensation is taken as the market value of the property at the time of compensation as was held in the case of *Kanini Farm Limited vs. Commissioner of Land*.<sup>26</sup> The International Valuation Standard defines market value as the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.<sup>27</sup>

The issue is that monetary compensation alone may not adequately compensate ancestral lands to which people attach great sentimental value as per Margaret Radin's property and personhood theory.<sup>28</sup>

In Kariuki Francis' view, property and spirituality have historically been intertwined in Africa.<sup>29</sup> Okoth-Ogendo proves this by describing the African commons as a trans generational asset which served as the primary economic and social asset individuals and communities drew on, and the fountain from which their spiritual life and political ideology

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<sup>21</sup> Article 17, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) and Article 14, *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217

<sup>22</sup> Article 40, *Constitution of Kenya* (2010).

<sup>23</sup> Daniel W. Gebriel, "Compensation for expropriation in Ethiopia and the UK: A comparative analysis" FIG Congress, Kuala Lumpur, Malaysia, 16-21 June 2014, 4.

<sup>24</sup> FAO, 'Compulsory acquisition of land and compensation' *Land Tenure Studies* (2009), 23.

<sup>25</sup> Article 40(3)(b)(i), *Constitution of Kenya* (2010) and section 111(1), *Land Act* (Act No. 6 of 2012).

<sup>26</sup> *Kanini Farm Limited v Commissioner of Lands* (1996) eKLR.

<sup>27</sup> Section 30 (1), *International Valuation Standards* (2016).

<sup>28</sup> Radin MJ, 'Property and personhood' 34 *Stanford Law Review*, 5 (1982), 956.

<sup>29</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 54.



sprung.<sup>30</sup>

Based on FAO's studies, financial compensation of sacred and religious sites is inappropriate.<sup>31</sup> The money paid cannot fully replace what is lost.<sup>32</sup> Therefore, whenever possible, measures should be taken to avoid destruction of sacred sites and if an affected community can no longer live near its sacred area, the area should be preserved such that community members can continue to visit the site according to traditional practices.<sup>33</sup> These considerations are not factored in the Kenyan legal framework.

#### **b) Lack of a clear time frame for payment of compensation**

The laws also need to provide a clear time frame for the payment of compensation since they currently only provide for "prompt" payment which is ambiguous.<sup>34</sup> The Oxford Dictionary defines prompt payment as immediate or done without delay.<sup>35</sup> Despite this ordinary meaning, there have been instances of delayed payments.<sup>36</sup>

According to the Standard Newspaper in 2016 there was delayed payment of compensation of African Gas and Oil Company by the NLC.<sup>37</sup> Similarly, in the same year, hundreds of people affected by the Standard Gauge Railway Project were at the time, yet to receive payment almost two years after the first phase of compensation began.<sup>38</sup> Such cases of delayed payment go against the principle of just and fair compensation.<sup>39</sup>

#### **c) Irregular acquisition practices**

Based on FAO's study, unfair procedures of compulsory acquisition lead to reduced land

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<sup>30</sup> Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* (2003), 3.

<sup>31</sup> FAO, 'Compulsory acquisition of land and compensation' *Land Tenure Studies* (2009), 33.

<sup>32</sup> FAO, 'Compulsory acquisition of land and compensation' *Land Tenure Studies* (2009), 23.

<sup>33</sup> FAO, 'Compulsory acquisition of land and compensation' *Land Tenure Studies* (2009), 33.

<sup>34</sup> Article 40(3)(b)(i), *Constitution of Kenya* (2010) and section 111, *Land Act* (Act No.6 of 2012).

<sup>35</sup> Oxford English Dictionary, 3<sup>rd</sup> Edition.

<sup>36</sup> *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

<sup>37</sup> 'Wafula Paul: Court slams brakes on SGR in compensation row' *The Standard Newspaper*, 29 June 2016 <https://www.standardmedia.co.ke/article/2000206921/court-slams-brakes-on-sgr-in-compensation-row> on 2 February 2017.

<sup>38</sup> 'Beja Patrick: Hundreds yet to receive compensation for the standard gauge railway land' *The Standard Newspaper*, 18 January 2016 <http://www.standardmedia.co.ke/article/2000188492/hundreds-yet-to-receive-compensation-for-sgr-land> on 2 February 2017.

<sup>39</sup> *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

tenure security, increase tension between the government and citizens and reduce public confidence in the rule of law.<sup>40</sup> Irregular practices which are contrary to the law are seen to be act of impunity by the State.<sup>41</sup>

The case of the Sengwer community in Kenya best illustrates this as there are still attempts to forcefully evict them from their ancestral lands without the due process of the law.<sup>42</sup>

In agreement with Lord Denning, no citizen is to be deprived of his land by the State or any other public authority against his wish unless expressly authorised by the law.<sup>43</sup> The NLC therefore has to strictly comply with the laws in place so as to prevent the arbitrary deprivation of property.<sup>44</sup>

## 1.8 Theoretical framework

### i. Natural law theory of property

Based on natural law, property is a free gift from nature.<sup>45</sup> This shows that the right to property is given to us, not by the laws of the sovereign but by the laws of nature. John Locke recognises the existence of private property by saying that man can acquire private property by mixing his labour with the property.<sup>46</sup>

The right to property is considered the most sacred of all the rights of citizenship, and even more important in some respects than liberty itself.<sup>47</sup> With regards to the right to property, the social contract theory states that the role of the State to the people after they have given up their rights, is to protect these rights and ensure that there is order.<sup>48</sup> Although it is not an

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<sup>40</sup> FAO, 'Compulsory acquisition of land and compensation' *Land Tenure Studies* (2009), 2.

<sup>41</sup> *Arnacherry Limited v The Attorney General* (2014) eKLR.

<sup>42</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14163> on 14 September 2017.

<sup>43</sup> *Priest v Secretary of State* [1982] 81 LGR 198.

<sup>44</sup> *Commissioner of Lands and another v Coastal Aquaculture Ltd*, Civil Appeal No. 252 of 1996 reported in KLR (E&L) Vol. 1, 264-295.

<sup>45</sup> Aristotle, *Politics*, Jowett B (trans), 2005, as cited in Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 29.

<sup>46</sup> Locke J, *Second treatise of government*, Hafner Publishing, New York, 1690, Ch 5, para 26.

<sup>47</sup> Hutcheson J, 'Natural law and the right to property' 26 *Notre Dame Law Review* (1951), 57.

<sup>48</sup> Aondoheмба S, 'Evaluating the social contract theoretical ideas of Jean Jacques Rousseau: An analytical perspective on the state and the relevance to contemporary society, 9, *African Journal of Political Science and International Relations* (2015), 39.

absolute right, governments are formed not to destroy but to protect and expand this natural right.<sup>49</sup>

In line with this, Article 40 of the Constitution provides that the State shall not arbitrarily deprive a person of their property.<sup>50</sup> However, this is not achieved due to cases of irregular acquisition practices, the ambiguities in the law as to how ancestral lands can be adequately compensated and the lack of a clear time frame for compensation.

Also, natural law is the principle behind all positive law and therefore lawmakers need to address this ambiguity in the law and come up with plausible solutions so as to fine tune the current laws to be in conformity with the natural law.<sup>51</sup>

## **ii. Traditional African view of property**

Professor Okoth-Ogendo, as the main proponent behind this theory, refers to communal property as 'commons' which basically means ontologically organised land and associated resources available exclusively to specific communities, lineages or families operating as corporate entities.<sup>52</sup> In African societies land was held as a trans generational asset, managed at different levels of society and used in specific ways such as cultivation, grazing and hunting.<sup>53</sup> This shows that traditionally, land is viewed as a source of livelihood as the community is entirely dependent on it.<sup>54</sup>

According to Hardin, there is a tragedy in having free commons; a good example he gives to explain this is that if a community has a piece of grazing land, each rational human being will add more cattle on the land so as to reap maximum benefit from the land which in the end leads to overuse of the land rendering it unproductive.<sup>55</sup> Okoth-Ogendo strongly rebuts this presumption by stating that the commons are managed and protected by a social

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<sup>49</sup> Hutcheson J, 'Natural law and the right to property' 26 *Notre Dame Law Review* (1951), 57.

<sup>50</sup> Article 40, *Constitution of Kenya* (2010).

<sup>51</sup> Hutcheson J, 'Natural law and the right to property' 26 *Notre Dame Law Review* (1951), 56.

<sup>52</sup> Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* (2003), 2.

<sup>53</sup> Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* (2003), 3.

<sup>54</sup> Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* (2003), 3.

<sup>55</sup> Hardin G, 'The tragedy of the commons' 162 *Science*, New Series, 3859 (1968), 1243-1248.

hierarchy consisting of the family, the clan and the community who deal with issues regarding allocation, use and management of the resources of the commons on the basis of scale, need and function.<sup>56</sup>

This traditional African view of property shows the great importance of land as property to communities in Kenya which still rely on their land as the key source of their livelihood. The issue arises when ancestral community land is compulsorily acquired by the State. Financial compensation is inappropriate to compensate the spiritual ties with the land which cannot be quantified monetarily.<sup>57</sup>

### **iii. Utilitarian theory of property**

This school of thought brings out the concept of greatest good for the greatest number.<sup>58</sup> Compulsory acquisition is supported by this theory as its main objective is the acquisition of private property for the benefit of the public i.e. the greatest good for the greatest number as the society at large will be able to benefit from the acquired property instead of one individual.<sup>59</sup>

The gaps in the law and irregular practices by the relevant authorities during the process of acquisition undermines this very essence of compulsory acquisition. The public loses confidence in the system hence are not willing to give up their property for acquisition which in the end delays the entire process.<sup>60</sup>

### **iv. Social utility theory of property**

Under this theory, property is not a right but a social function.<sup>61</sup> Property is viewed as having internal limits as well as external ones such that the owner of property cannot do whatever he

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<sup>56</sup> Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* (2003), 2.

<sup>57</sup> FAO, 'Compulsory acquisition of land and compensation', *Land Tenure Studies* (2009), 33.

<sup>58</sup> Mill J Stuart, *Utilitarianism*, Savill and Edwards Printers, London, 1863, 14.

<sup>59</sup> Vince Mangioni, "Urban cleansing and renewal: Redefining the principles of compensation in compulsory acquisition," Pacific Rim Real Estate Society Conference, Wellington, 24-27 January 2010, 6.

<sup>60</sup> FAO, 'Compulsory acquisition of land and compensation', *Land Tenure Studies* (2009), 2.

<sup>61</sup> Duguit L, *Les transformations generales du droit prive le code Napoleon*, Chinese version translated by Xi Diping, China University of Political Science and Law Press, Beijing, 2003, 236.

wants with the property.<sup>62</sup> Property should therefore be held to serve a social function and the State should ensure this happens through various measures such as expropriation.<sup>63</sup> This theory is drawn from the fact that man exists in a society and not in isolation.<sup>64</sup>

This theory is very relevant to the purpose of compulsory acquisition which is to meet the public needs.<sup>65</sup> For instance, if minerals are discovered on a person's land, the government has the right to compulsorily acquire the land because minerals are part of public land.<sup>66</sup> The importance of the minerals to the economy and well being of the nation as a whole, brings out the social function of the property in question. It should be used not for the benefit of the individual alone, but for the society at large.

#### **v. Personhood theory of property**

According to Margaret Radin, most people possess certain objects they feel are almost part of themselves.<sup>67</sup> The strength or significance of someone's relationship with property can be gauged by the kind of pain that would be occasioned by its loss; an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement.<sup>68</sup> She gives the example of a wedding ring that is stolen from a jeweller and a wedding ring that is stolen from a lover. In the former, the insurance proceeds can reimburse the jeweller but in the latter, no amount of money can compensate the lover.<sup>69</sup>

The relevance of this theory is that monetary compensation may be adequate for compensating the loss of property which a person does not attach much sentimental value to. However, for ancestral lands and shrine, monetary compensation is not suitable since no amount of value will ever match up to the spiritual and sentimental value that community members attach to the land.

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<sup>62</sup> Foster S, Bonilla D, 'The social function of property: A comparative law perspective' *Fordham Law Review* (2011), 103.

<sup>63</sup> Foster S, Bonilla D, 'The social function of property: A comparative law perspective' *Fordham Law Review* (2011), 103.

<sup>64</sup> Foster S, Bonilla D, 'The social function of property: A comparative law perspective' *Fordham Law Review* (2011), 103.

<sup>65</sup> Article 40, *Constitution of Kenya* (2010).

<sup>66</sup> Article 62(1)(f), *Constitution of Kenya* (2010).

<sup>67</sup> Radin MJ, 'Property and personhood' 34 *Stanford Law Review*, 5 (1982), 957-959.

<sup>68</sup> Radin MJ, 'Property and personhood' 34 *Stanford Law Review*, 5 (1982), 956.

<sup>69</sup> Radin MJ, 'Property and personhood' 34 *Stanford Law Review*, 5 (1982), 956.

## **1.9 Research methodology**

This research shall apply qualitative research methods that include primary and secondary sources of data. The primary sources of data that will be used are international instruments, national laws and case law. Indian laws shall also be used to compare the situation in Kenya. The secondary sources of data that will be relied on are journal articles and books. News articles and internet sources will be relied on too. This will include visits to the library and relevant online sources.

The information obtained during the research shall be used to point out the gaps in the law of compulsory acquisition as well as the possible solutions to the problem.

## **2.0 Chapter breakdown**

This dissertation is broken down into five chapters.

Chapter one focuses on the introduction to the topic and the purpose of the study. It includes the background to the problem, statement of the problem, purpose of the study, research questions, specific objectives of the study, scope and limitations of the study, definition of terms and a chapter summary.

Chapter two deals with the right to property. It explains the importance of the right to private property and the right to communal property. It also brings out some of the competing interests which lead to limitation of the right to property as well as the challenges in regulation of African commons.

Chapter three explains the meaning and purpose of compulsory acquisition, the current legal framework on compulsory acquisition and the current acquisition practices in Kenya.

Chapter four focuses on the ambiguities in Kenya's legal framework on compulsory acquisition. It discusses the inadequacy of the law in catering for compensation of ancestral land, the lack of a clearly defined time frame within which compensation shall be paid and the instances of irregular acquisition practices.

Chapter five gives possible solutions to the gaps in the law on compulsory acquisition as well as a conclusion.

## CHAPTER TWO: THE RIGHT TO PROPERTY IN LAND AND ATTENDANT LIMITATIONS

### 2.1 The right to property

Property is viewed as a complex web of legally enforceable relationships which exist as four entitlements i.e. rights, privileges, powers and immunities.<sup>70</sup> A right defines that which is owed to the right holders by right respecters and is enforceable.<sup>71</sup> In this case, the right holders are the owners of property. A duty is the correlative of a right.<sup>72</sup> A person is said to have a duty when he is commanded by society to act or to forbear for the benefit of another person.<sup>73</sup> The State has the duty to protect a person's property rights.<sup>74</sup> Power is one's ability to alter legal relations.<sup>75</sup> This power is vested in the State by the Constitution under its compulsory acquisition provisions.<sup>76</sup>

The right to property is first recognised by the UDHR which states that everyone has the right to own property alone as well as in association with others and that nobody shall be arbitrarily deprived of their property.<sup>77</sup> The Constitution contains similar provisions.<sup>78</sup> The Constitution also recognises three forms of landholding which are public, private and communal holding.<sup>79</sup> This means that the right to property involves the right to private property, the right to public property and the right to communal property. This chapter shall focus on the right to property in land.

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<sup>70</sup> Munzer S, *A theory of property*, Cambridge University Press, Cambridge, 1990, 20.

<sup>71</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 11.

<sup>72</sup> Hohfeld W, 'Some fundamental legal conceptions as applied in judicial reasoning' 23 *The Yale Law Journal* (1913), 16-59.

<sup>73</sup> Andrews M, 'Hohfeld's cube' 16 *Akron Law Review*, 3 (1983), 473.

<sup>74</sup> Article 21, *Constitution of Kenya* (2010).

<sup>75</sup> Wacks R, *Understanding jurisprudence: An introduction to legal theory*, Oxford University Press, New York, 2012, 234.

<sup>76</sup> Article 40, *Constitution of Kenya* (2010).

<sup>77</sup> Article 17, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>78</sup> Article 40, *Constitution of Kenya* (2010).

<sup>79</sup> Article 61, *Constitution of Kenya* (2010).

## 2.2 The right to private property and its importance

Property rights have been believed to exist even before the law existed; they are natural to us.<sup>80</sup> The ownership of private property is also explained by the labour theory which says that if someone applies his labour to something, that thing becomes his property including the portion of soil reclaimed by occupation and tillage.<sup>81</sup> The institution of private property is driven by the idea that if every person has his own property they will be more motivated to utilize their resources more.<sup>82</sup>

The right to private property is essential for the exercise of individual autonomy as it provides the material substratum that allows people to construct their identities and express their moral commitments.<sup>83</sup> Individual autonomy and property are thus deeply intertwined.<sup>84</sup> The importance of private property to the individual is gauged by the kind of pain the individual feels when he/she loses the property since the property is attached to their personhood.<sup>85</sup>

The Constitution provides for the right to private property by stating that every Kenyan has the right to own property individually.<sup>86</sup> Private land is considered to be registered land held by any person under freehold tenure or leasehold tenure.<sup>87</sup>

## 2.3 The right to communal property and its importance

Before the advent of colonialism, Kenyans relied on the communal property regime.<sup>88</sup> Communal property comprised of ancestral shrines, land, forests, mineral springs, wells and

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<sup>80</sup> Locke J, *Second treatise of government*, Hafner Publishing, New York, 1690, Ch 5, 17.

<sup>81</sup> Hobhouse Lt, 'The historical evolution of property, in fact and in idea' in Gore c (ed), *Property, its duties and rights*, Macmillan, London, 1913, 26.

<sup>82</sup> Aristotle, *The politics*, Everson S (ed), Cambridge University Press, Cambridge, 1988, 49.

<sup>83</sup> Foster S, Bonilla D, 'The social function of property: A comparative law perspective' *Fordham Law Review* (2011), 101.

<sup>84</sup> Foster S, Bonilla D, 'The social function of property: A comparative law perspective' *Fordham Law Review* (2011), 101.

<sup>85</sup> Radin MJ, 'Property and personhood' 34 *Stanford Law Review*, 5 (1982), 956.

<sup>86</sup> Article 40, *Constitution of Kenya* (2010).

<sup>87</sup> Article 64, *Constitution of Kenya* (2010).

<sup>88</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 49.



rivers.<sup>89</sup> The traditional African system of owning property was based on the idea of commons; access to the resources of the commons was open to individuals and groups who qualified on the basis of socially defined membership criteria.<sup>90</sup> The commons were regarded as the primary economic and social asset individuals and communities drew on, and the fountain from which their spiritual life and political ideology sprung.<sup>91</sup>

Spiritual connection with the land was through contact with the soil in which the ancestors were buried.<sup>92</sup> This is shown in the *SM Otieno case* whereby the members of the Luo community argued that Mr. Otieno should be buried in Luo land since he had cultural ties with the land.<sup>93</sup> Consequently, ancestral land is to be honoured based on its unseen value as the indicator of the life force of the ancestors who lie in the soil.<sup>94</sup>

The colonialists later introduced foreign and alien land tenure systems which disrupted the African customary land tenure system.<sup>95</sup> Customary land rights were held to be inferior to the other rights under colonial laws as the western world tried to discredit the communal land tenure to advance their colonisation goals in Africa.<sup>96</sup>

The natives were totally dispossessed of their land by enactment of the Crown Lands Ordinance which vested all the land in the territory under the Crown.<sup>97</sup> Natives in occupation of such land were held to be mere tenants at the will of the Crown.<sup>98</sup> Although the Ordinance created native reserves, there was no protection of the natives' rights since the colonial government took part in violating the native land rights.<sup>99</sup> Under the Native Lands Trust Ordinance, all areas that were formerly known as native reserves were designated as native

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<sup>89</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 49.

<sup>90</sup> Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* (2003), 3.

<sup>91</sup> Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* (2003), 3.

<sup>92</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 55.

<sup>93</sup> *Virginia Edith Wambui v Joash Ochieng Ougo and Omolo Siranga* (1982-88) 1KAR.

<sup>94</sup> Magesa L, *What is not sacred? African spirituality*, Acton Publishers, Nairobi, 2014, 31.

<sup>95</sup> Kamari-Mbote, *Ours by Right: Law, Politics and realities of community property in Kenya*, Strathmore University Press, 2013, 10.

<sup>96</sup> Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* (2003), 5.

<sup>97</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 165.

<sup>98</sup> *Isaka Wainaina v Murito* (1923) 9 (2) KLR 102.

<sup>99</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 165.

lands and a Native Lands Trust Board was established to manage native lands.<sup>100</sup> Post independence, the Land (Group Representatives) Act was adopted with the aim of ensuring that pastoral groups were considered in granting of land rights.<sup>101</sup>

The Constitution of Kenya (2010) marked the first formal legal recognition of community land in Kenya.<sup>102</sup> Community land is defined as land that will vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.<sup>103</sup> This means that so long as a person is a member of the community, he is entitled to access and utilize the resources of the communal land.

Under the Community Land Act of 2016, a community is defined as a consciously distinct and organized group of users of community land who are citizens of Kenya and share a common ancestry, similar culture, socio-economic or similar common interest, geographical space, ecological space or ethnicity.<sup>104</sup>

Similarly, indigenous people are defined as those who having historical continuity, consider themselves as distinct from other societies and are determined to preserve, develop and transmit their ancestral territories and ethnic identity to future generations.<sup>105</sup> The United Nations Declaration on the Rights of Indigenous People (UNDRIP) recognises that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.<sup>106</sup>

Although Kenya has not adopted UNDRIP, it should prevent and provide redress for actions that may lead to destruction of the culture or undermining of the integrity of the distinct group of people which also involves providing effective redress for actions that lead to

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<sup>100</sup> *Native Land Trust Ordinance* (No. 28 of 1938).

<sup>101</sup> *Land (Group Representatives) Act* (Chapter 287, Laws of Kenya) (*Repealed*).

<sup>102</sup> Article 63(1), *Constitution of Kenya* (2010).

<sup>103</sup> Article 63(1), *Constitution of Kenya* (2010).

<sup>104</sup> Section 2, *Community Land Act* (No. 27 of 2016).

<sup>105</sup> Martínez Cobo, 'Study of the problem of discrimination against indigenous populations' 3 Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (1987) para 379-382.

<sup>106</sup> Annex, UNGA, *Declaration on the rights of indigenous peoples*, A/Res/61/295 13 September 2007.

dispossession of their land and resources.<sup>107</sup>

In the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* it was stressed that land is the basis of culture and the spiritual life of indigenous people and the relationship with it is not merely a matter of production but involves a spiritual and material element which they must fully enjoy to preserve their cultural legacy and transmit it to the future generations.<sup>108</sup>

This right to communal property is very unique as it is tied to other rights as was seen in the case of *Centre of Minority Rights(Kenya) and Minority Rights Group International (on behalf of the Endorois Welfare Council) v Kenya*, where it was held that Kenya had violated the Endorois' right to development and that the eviction with minimal compensation violated the Endorois' rights to property, health and culture.<sup>109</sup> The complaints in this case involved the government of Kenya forcibly removing the Endorois community from their ancestral land in Rift Valley, failure to adequately compensate them for the loss of the property, disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture.<sup>110</sup> Similarly, the Kenyan State was held to have violated the rights of Ogiek community when it forcefully evicted them from their ancestral lands in the Mau Complex.<sup>111</sup> Kenya was found guilty of violating the Ogiek's right to property, right to life and the right to practice religion and culture.<sup>112</sup>

With regards to the right to development, the State has to ensure that: development is people-centred; developments respect human rights; communities actively, freely and meaningfully participate in the development; there is fair distribution of the benefits of development; and

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<sup>107</sup> Article 8, UNGA, *Declaration on the rights of indigenous peoples*, A/Res/61/295 13 September 2007.

<sup>108</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgement of 31 August 2001, Series C, No. 79, para 149.

<sup>109</sup> *Centre of Minority Rights Development (Kenya) and Minority Rights Group (CEMIRIDE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.

<sup>110</sup> *Centre of Minority Rights Development (Kenya) and Minority Rights Group (CEMIRIDE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.

<sup>111</sup> *African Commission on Human and People's Rights v The Republic of Kenya*, ACtHPR Application 006/2012 (in relation to the Ogiek).

<sup>112</sup> *African Commission on Human and People's Rights v The Republic of Kenya*, ACtHPR Application 006/2012 (in relation to the Ogiek).

there is no discrimination on any ground.<sup>113</sup>

## 2.4 Limitation of the right to property

The right to property is not an absolute right since the State has the right to deprive a person of their property through compulsory acquisition if the expropriation is for a public purpose, upon the prompt payment in full, of just compensation.<sup>114</sup> Limitation of the right is not easy as it requires striking a balance between the protection of private property entitlements and promotion of the overriding public interest.<sup>115</sup>

Compulsory acquisition is supported by the eminent domain theory which is traceable to the feudal notion of landholding, where the state as the sovereign had radical title to all land in its territory, and could thus take away private property interests.<sup>116</sup> Just as stated in the Constitution, the expropriation had to be for a public purpose and the government had to pay just compensation for taking the property.<sup>117</sup> Compensation makes good the loss to those those who lose their property.<sup>118</sup> Compulsory acquisition ensures that property meets its social function by ensuring property in the hands of a few are used to benefit the wider society<sup>119</sup>

In the case of *Joseph Nderitu v Attorney General*, the court held that property can only be compulsorily acquired if the acquisition is for a public purpose or is in the public interest.<sup>120</sup> This public use requirement behind the practice of compulsory acquisition was also relied on in the case of *Patrick Musimba v National Land Commission & 4 others* where the court held that the standard gauge railway project undertaken by the government had demonstrated the public use requirement and therefore the compulsory acquisition of Mr. Musimba's land was

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<sup>113</sup> UNGA, *Declaration on the Right to Development* RES. 41/128.

<sup>114</sup> Article 40 (3), *Constitution of Kenya* (2010).

<sup>115</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 131.

<sup>116</sup> Paul EF, *Property rights and eminent domain*, Transactional Publishers, New Brunswick, 1987, 185.

<sup>117</sup> Alexander GS and Penalver EM, *An introduction to property theory*, Cambridge University Press,

<sup>118</sup> Grotius H, *De jure belli ac paci*, (1625), Nijhoff, The Hague, 1948.

<sup>119</sup> Foster S, Bonilla D, 'The social function of property: A comparative law perspective' *Fordham Law Review* (2011), 103.

<sup>120</sup> *Joseph K Nderitu and 23 others v Attorney General & 2 others* Constitutional Petition No 29 of 2012.

justified.<sup>121</sup>

Relying on Article 24 of the Constitution, the right to property shall only be limited by law, and then only to the extent that the limitation is reasonable and justifiable and after consideration of nature of the particular right, the importance of the purpose of the limitation, the need to ensure that the enjoyment of rights and freedoms by any individual doesn't prejudice the the rights and the fundamental freedoms of others, and the relation between the limitation and its purpose and whether there are less restrictive means to access the purpose.<sup>122</sup>

In the case of *Saramaka People v Suriname*, the court held that the right to property may be restricted where the restrictions are previously established by law, necessary, proportionate and with the aim of achieving a legitimate objective in a democratic society.<sup>123</sup> The court also held that such restriction should not violate the right of the indigenous people to survival; the State had to ensure effective participation of the people affected by the decision, guarantee the people affected received a reasonable benefit from such plan, and ensure that environment and social impact assessments were undertaken to mitigate negative effects.<sup>124</sup>

This position was also maintained in the case of the *Kichwa indigenous people of Sarayaku v Ecuador* where the court held that consultation should be conducted in good faith following the cultural procedures and must aim to reach an agreement.<sup>125</sup> No relocation of indigenous people is to take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.<sup>126</sup> Also, indigenous peoples have the right not to be subjected to forced assimilation or destruction of their culture.<sup>127</sup>

If people feel that the state is infringing on their right to property in exercising its sovereign

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<sup>121</sup> *Patrick Musimba v National Land Commission & 4 others* Petition No. 613 of 2014.

<sup>122</sup> Article 24(1), *Constitution of Kenya* (2010).

<sup>123</sup> *Saramaka People v Suriname*, Inter-American Court of Human Rights Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs).

<sup>124</sup> *Saramaka People v Suriname*, Inter-American Court of Human Rights Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs).

<sup>125</sup> *Kichwa indigenous people of Sarayaku v Ecuador*, Inter-American Court of Human Rights Judgment of 27 June 2012 (Merits and Reparations).

<sup>126</sup> Article 10, UNGA, *Declaration on the rights of indigenous peoples*, A/Res/61/295 13 September 2007.

<sup>127</sup> Article 8 (1), UNGA, *Declaration on the rights of indigenous peoples*, A/Res/61/295 13 September 2007.

power of compulsory acquisition, they are free to approach the Courts.<sup>128</sup> The role of the courts is to mediate potential conflicts that arise with the exercise of the State's regulatory powers.<sup>129</sup> The courts step in when the State appears to be overstepping its mandate in regulating people's property rights.<sup>130</sup>

In the case of *Abdulla Akiio & 2 others v Kenya Urban Roads Authority* the court held that disputes relating to compulsory acquisition of land were to be resolved by the Environment and Land Court.<sup>131</sup> Furthermore, the governmental decisions on compulsory acquisition are subject to judicial review since they are an exercise of powers donated by statute.<sup>132</sup> The provision in the law for people to seek judicial redress notes the importance of the right to property by checking the compulsory acquisition powers of the State.

## 2.5 Challenges in the regulation of the African commons

Considering the great connection that African communities have with their ancestral lands, the regulation of communal property rights is challenging as it requires striking a balance between the protection of communal property rights and the promotion of the overriding public interest.<sup>133</sup> This is not a problem specific to Kenya alone as the regulation of the commons (indigenous community resources) has generated a lot of debate in areas such as Latin America where the indigenous groups have a sui generis social, cultural and spiritual relationship with their land.<sup>134</sup>

Hardin criticised the common property regime by stating that common resources were non-existent and that there were poorly defined property rights.<sup>135</sup> He said that the commons lead to overuse of pasture on land since people do not consider the exhaustible nature of such resources.<sup>136</sup> Okoth-Ogendo rebutted this by explaining how the African commons are well

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<sup>128</sup> Articles 40 and 66, *Constitution of Kenya* (2010).

<sup>129</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 132.

<sup>130</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 132-133.

<sup>131</sup> *Abdulla Akiio & 2 others v Kenya Urban Roads Authority* Petition No 53 of 2015.

<sup>132</sup> *Re Kisima Farm Ltd* (1978) KLR 36.

<sup>133</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 131.

<sup>134</sup> Fisher AD, Lundberg M, 'Human rights legitimacy in the face of the global ecological crisis: Indigenous peoples' ecological rights claims and the Inter- American human rights system' 6 *Journal of Human Rights and the Environment*, 2 (2015), 183.

<sup>135</sup> Garret Hardin, 'The tragedy of the commons', 162, *Science*, (1968), 1244.

<sup>136</sup> Garret Hardin, 'The tragedy of the commons' 162, *Science*, (1968), 1244.

regulated using internal mechanisms for the management of and determination of access to resources.<sup>137</sup> This shows that the already existing mechanisms African communities have in place with regards to land management are sufficient and therefore the regulation of the commons by the State is may not be necessary.

In the regulation of the commons, another challenge that arises is the failure by the State to respect the principle of free, prior and informed consent (FPIC) which shall be expounded on later. FPIC is an international human rights standard that allows indigenous communities to collectively make decisions through their own freely chosen representatives and customary or other institutions to give or withhold their consent prior to the approval by the government of any project that may affect the lands and resources they customarily own.<sup>138</sup> It is based on the principle of public participation.<sup>139</sup> In Uganda, failure of the government to follow the FPIC principle in the acquisition of communal land to create room for palm oil producers, led to violation of the inhabitants' right to their communal property.<sup>140</sup> The Sengwer indigenous people of Kenya also faced similar challenges around the 1970s when there were repeated efforts by the government to evict them from the Embobut forest without FPIC.<sup>141</sup>

## 2.6 Conclusion

Despite the crucial nature of the right to property, it is not an absolute rights and there are instances where the government needs to step in to regulate the right e.g. through the process of compulsory acquisition. However, the regulation of this right must be based on reasonable and justifiable grounds, in accordance with the law.<sup>142</sup>

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<sup>137</sup> Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* (2003), 2-3.

<sup>138</sup> FAO 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition' *Governance of Tenure Technical Guide*, Rome, 2014,4.

<sup>139</sup> Article 10, *Constitution of Kenya* (2010).

<sup>140</sup> Ouma S, 'Agricultural investments: The new frontier of human rights abuse and the place of development agencies' 12 *Journal of Food and Law Policy*, 2016, 152.

<sup>141</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14163> on 14 September 2017.

<sup>142</sup> Article 24, *Constitution of Kenya* (2010).

## CHAPTER THREE: COMPULSORY ACQUISITION IN KENYA: THE LAW AND CURRENT PRACTICE

### 3.1 The meaning of compulsory acquisition

The compulsory acquisition power of the State is explained by the doctrine of eminent domain where the state as a sovereign has radical title to all land in its territory and can therefore take away private property interests.<sup>143</sup> According to Hugo Grotius, all property is under the eminent domain of the State, and the state can alienate it to meet public needs after compensating the owner of the property.<sup>144</sup>

Private property rights are taken to bow to the superior rights of the sovereign.<sup>145</sup> The compulsory acquisition power of the State is based on the social utility and utilitarian theories as discussed in earlier on since it is carried out for the benefit of the wider public.<sup>146</sup>

To check the sovereign's powers, radical title belongs to the people of Kenya and therefore, the entire process of compulsory acquisition must be conducted in accordance with the law.<sup>147</sup> In the past, the State's compulsory acquisition power was greatly misused by the government leading to illegal and irregular allocations.<sup>148</sup>

Three main pre-conditions have to be met for compulsory acquisition to be justified by a state. These are: the expropriation has to be for a public purpose, the government has to pay just compensation and the acquiring authority has to abide by the principle of free, prior and informed consent (FPIC).<sup>149</sup>

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<sup>143</sup> Paul EF, *Property rights and eminent domain*, Transactional Publishers, New Brunswick, 1987, 185.

<sup>144</sup> Grotius H, '*De jure belli ac pacis*' (1652), Nijhoff, The Hague, 1948, as cited in Ramanathan U, 'A word on eminent domain' *International Environmental Law Research Centre* (2009), 1.

<sup>145</sup> Paul EF, *Property rights and eminent domain*, Transactional Publishers, New Brunswick, 1987, 185.

<sup>146</sup> Foster S, Bonilla D, 'The social function of property: A comparative law perspective' *Fordham Law Review* (2011), 103, and John Stuart Mill, *Utilitarianism*, Savill and Edwards Printers, London, 1863, 14.

<sup>147</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 131.

<sup>148</sup> Section 42, *National Land Policy* (2009).

<sup>149</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 131.



**i. The expropriation has to be for a public purpose.<sup>150</sup>**

The State can only deprive someone of their property if the deprivation is meant to cater for a public purpose.<sup>151</sup> This prevents the abuse of the State's powers as was previously the case in Kenya.<sup>152</sup> During the colonial period, this was the case since people's private property rights were extinguished as they were vested in the crown or other private individuals.<sup>153</sup>

In determining if private use meets the public purpose requirement, the court in *Kelo v City of New London*, ruled that economic development carried out in a private dimension such that its not open to the general public, still constituted a classic government function incapable of distinction from other public purposes previously held by courts.<sup>154</sup> Also, in *Hawaii Housing Authority v Midkiff* it was held that the taking of land concentrated in the hands of a few individuals for distribution to the wider population amounted to a public purpose.<sup>155</sup>

In the Kenyan case of *Joseph K Nderitu v Attorney General* the court held that all persons have the right to property and property can only be compulsorily acquired for for a public purpose or in the public interest.<sup>156</sup> This public purpose must be direct and not remote or fanciful.<sup>157</sup>

Public purposes have been defined to include: infrastructure such as roads, public buildings, religious institutions, public utilities, and any other analogous public purpose.<sup>158</sup> In case this public purpose fails and the land acquired is no longer needed for this purpose, the original owner of the land has pre-emptive rights to the land; the NLC must offer him/her the land for sale first, before anyone else and such owner shall use the money which was given to him as compensation to re-acquire the land.<sup>159</sup> This eliminates any room for land grabbing as the land goes back to the original owner.

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<sup>150</sup> Section 2, *Land Act* (Act No. 6 of 2012)

<sup>151</sup> Article 40, *Constitution of Kenya* (2010).

<sup>152</sup> Section 42, *National Land Policy* (2009).

<sup>153</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 135.

<sup>154</sup> *Kelo v City of New London*, 843 A.2d 500 (Conn. 2004), aff'd, 125 S. Ct. 2655 (2005).

<sup>155</sup> *Hawaii Housing Authority v Midkiff*, 467 US 229 (1984).

<sup>156</sup> *Joseph K Nderitu and 23 others v Attorney General and 2 others* Constitutional Petition. No. 29 of 2012.

<sup>157</sup> *Patrick Musimba v National Land Commission & 4 others* (2016) eKLR.

<sup>158</sup> Section 2, *Land Act* (Act No. 6 of 2012).

<sup>159</sup> Section 110(2), *Land Act* (Act No.6 of 2012).

This approach was applied in the case of *Niaz Mohammed v Commissioner of Lands* and others where the court held that land acquired for a public purpose could not be alienated, transferred or used in any other way other than for the purpose for which it was acquired.<sup>160</sup>

The least restrictive means also have to be applied in limiting the right to property.<sup>161</sup> If there are other ways of catering for that particular public purpose for which the government is acquiring the land, the government should first try those avenues which may be less restrictive to the private property rights of others while at the same time catering to the needs and demands of the public.<sup>162</sup>

**ii. The government has to promptly pay just compensation for taking the property**

The role of compensation is to repay people for the losses they have suffered.<sup>163</sup> It is based on the principle of equivalence which states that the affected landowners should neither be enriched nor impoverished as a result of compulsory acquisition.<sup>164</sup> Compensation also ensures that no single individual bears the entire burden for the benefit of the society at large.<sup>165</sup>

In the case of *Horn v Sunderland Corporation*, the court held that compensation ensures that the loss to the seller is completely made up to him, and that unless he receives a price that fully equals his pecuniary detriment, the compensation will not be equivalent to the compulsory sacrifice.<sup>166</sup>

In the case of *Kanini Farm Ltd v Commissioner of Lands*, just compensation was held to be the market value of the land.<sup>167</sup> Market value is defined as the price which a willing seller might be expected to obtain from a willing reasonable purchaser.<sup>168</sup> Furthermore, according to the decision in *Limo v Commissioner of Lands*, the courts also take into account the

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<sup>160</sup> *Niaz Mohammed v Commissioner of Lands and Others* (1996) KLR.

<sup>161</sup> Article 24, *Constitution of Kenya* (2010).

<sup>162</sup> Article 25, UNGA, *Declaration on the rights of indigenous peoples*, A/Res/61/295 13 September 2007.

<sup>163</sup> FAO, 'Compulsory acquisition of land and compensation', *Land Tenure Studies* (2009), 23.

<sup>164</sup> FAO, 'Compulsory acquisition of land and compensation', *Land Tenure Studies* (2009), 23.

<sup>165</sup> Daniel W. Gebriel, "Compensation for Expropriation in Ethiopia and the UK: A Comparative Analysis", FIG Congress, Engaging the Challenges-Enhancing the Relevance, Kuala Lumpur, Malaysia 16-21 June 2014.

<sup>166</sup> *Horn v Sunderland Corporation* [1941].

<sup>167</sup> *Kanini Farm Ltd v Commissioner of Lands* (1986) KLR 310 and *Patrick Musimba v National Land Commission & 4 others* (2016) eKLR.

<sup>168</sup> *Kanini Farm Ltd v Commissioner of Lands* (1986) KLR 310.

nearness of the land in question to the main town and its nearness to the road access in determining its value.<sup>169</sup>

Since the NLC has not formulated guidelines for compulsory acquisition, the courts have also held that the repealed Land Acquisition Act still applies in this context.<sup>170</sup> In determining the amount of compensation to be paid, the repealed Act focuses on monetary compensation.<sup>171</sup> Such an approach is unsuitable for the compensation of ancestral lands to which communities have strong spiritual and cultural ties.<sup>172</sup>

Moreover, the just compensation has to be paid promptly.<sup>173</sup> This means that this compensation should be paid to those with an interest in the land, immediately and without delay.<sup>174</sup> The law however fails to provide a clear time frame for the payment of compensation which creates room for delayed payments. For example, in the case of *Mathatani Limited v Commissioner of Lands* the court held that the compensation paid to the claimant after four years of the acquisition, was null and void as it was not prompt and therefore not just compensation.<sup>175</sup>

### **iii. The principle of free, prior and informed consent**

Free, prior and informed consent (FPIC) is an international human rights standard that derives from the collective rights of indigenous peoples to self-determination and to their lands, territories and resources.<sup>176</sup> It should be free in the sense that there should be no coercion, intimidation or manipulation.<sup>177</sup> It should also be prior in that consent is sought far enough in advance of any authorization or commencement of activities and the time

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<sup>169</sup> *Limo v Commissioner of Lands* KLR (E&L) 175.

<sup>170</sup> *Five Star Agencies Limited v National Land Commission* (2014) eKLR.

<sup>171</sup> Section 2, Schedule, *Land Acquisition Act* CAP 295 (repealed).

<sup>172</sup> Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* (2003), 3.

<sup>173</sup> Article 40(3)(b)(i), *Constitution of Kenya* (2010) and section 111, *Land Act* (Act No.6 of 2012).

<sup>174</sup> Oxford Dictionary (2nd edition).

<sup>175</sup> *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

<sup>176</sup> FAO, 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition' *Governance of Tenure Technical Guidance*, Rome, 2014, 4.

<sup>177</sup> FAO, 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition' *Governance of Tenure Technical Guide*, Rome, 2014, 5.

requirements of indigenous consultation and consensus processes are respected.<sup>178</sup> The consent must also be informed such that all information relating to the activity is provided to the indigenous people and that the information is objective, accurate and presented in a manner or form that is understandable to indigenous people.<sup>179</sup>

Most importantly, the indigenous people must agree to the activity that is the the subject of the consultation.<sup>180</sup> Consultation with the community must be undertaken in good faith which requires that indigenous views are accommodated in the process or objective justifications are provided as to why accommodation is not possible as was held in the case of the *Kichwa indigenous people of Sarayaku v Ecuador*.<sup>181</sup> This is tied to the element of free consent since these consent should be voluntary, without coercion and influenced by the relevant information regarding the particular circumstance.

In the Kenyan context, FPIC was applied in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya* when the African Commission on Human and Peoples Rights held that the State has a duty, not only to consult the community but to obtain their free, prior and informed consent, according to their customs and traditions.<sup>182</sup>

FPIC is tied to the Constitutional principle of public participation.<sup>183</sup> In the case of *Saramaka People v Suriname*, the court held that the State has to ensure effective participation of the people affected by the decision, guarantee the people affected received a reasonable benefit from such plan, and ensure that environment and social impact assessments were undertaken

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<sup>178</sup> FAO, 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition' *Governance of Tenure Technical Guide*, Rome, 2014,5.

<sup>179</sup> FAO, 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition' *Governance of Tenure Technical Guide*, Rome, 2014,5.

<sup>180</sup> FAO, 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition' *Governance of Tenure Technical Guide*, Rome, 2014,5.

<sup>181</sup> *Kichwa indigenous people of Sarayaku v Ecuador*, Inter-American Court of Human Rights, Judgment of 27 June 2012 (Merits and reparations).

<sup>182</sup> *Centre of Minority Rights Development (Kenya) and Minority Rights Group (CEMIRIDE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.

<sup>183</sup> Article 10, *Constitution of Kenya (2010)*.

to mitigate negative effects.<sup>184</sup>

States have a duty to obtain the FPIC of indigenous peoples for measures that may require removal of indigenous peoples.<sup>185</sup> Any acquisition lacking the free, prior and informed consent of those affected is termed as land grabbing which is unjust and to the legitimacy of the process.<sup>186</sup>

In line with this, development agencies ought to facilitate stakeholder engagements with local communities so as to ensure that there is FPIC from the communities before investors engage with them.<sup>187</sup> This ensures due diligence by development agencies before they carry out any activities involving communal property.<sup>188</sup> This will prevent situations such as in Uganda where the failure of the government to follow the FPIC principle in the acquisition of communal land to create room for palm oil producers, led to violation of the inhabitants' right to their communal property.<sup>189</sup>

Consultation and public participation is also recognised by the Environmental Management and Coordination Act which states that the proponent of an environmental impact assessment shall in consultation with the National Environment Management Authority seek the views of those who may be affected by the project.<sup>190</sup> The Community Land Act also requires that any agreement relating to investment in community land shall be made after free, open consultative.<sup>191</sup>

### **3.2 Compulsory acquisition in Kenya before 2010**

Before the advent of colonialism, the arrival of the Arab traders at the coast disrupted the

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<sup>184</sup> *Saramaka People v Suriname*, Inter-American Court of Human Rights Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs).

<sup>185</sup> Article 10, UNGA, *Declaration on the rights of indigenous peoples*, A/Res/61/295 13 September 2007.

<sup>186</sup> Global Assembly, *Declaration on securing land access for the poor in times of intensified natural resources competition* (Tirana Declaration), International Land Coalition, 2011, 2.

<sup>187</sup> The Thun Group of Banks, 'UN Guiding Principles on Business and Human Rights: Discussion paper for banks on implication of principles' 16-21, 22 (2013).

<sup>188</sup> Ouma S, 'Agricultural investments: The new frontier of human rights abuse and the place of development agencies' 12, *University of Arkansas School of Law Journal of Food and Law Policy*, (2016), 160.

<sup>189</sup> Ouma S, 'Agricultural investments: The new frontier of human rights abuse and the place of development agencies' 12, *University of Arkansas School of Law Journal of Food and Law Policy*, (2016), 152.

<sup>190</sup> Section 17(1), *Environmental Management and Coordination Act* (No. 8 of 1999).

<sup>191</sup> Section 36, *Community Land Act* (Act No. 27 of 2016).

communal land holding system leading to displacement of native Africans who lived along the coast.<sup>192</sup> In 1888, after the introduction of colonial settlement, Kenyan communities were further displaced of their land through an agreement which the Imperial British East African Company signed with the Sultan of Zanzibar granting all land rights in the dominion to the company.<sup>193</sup> This formed the basis of acquisition of land by the British since all the existing community land rights were terminated.<sup>194</sup> The enactment of the Land Titles Ordinance did not help the Africans get back their land since majority of the Africans who were affected by the dispossessions were not aware that the Ordinance existed.<sup>195</sup>

Under the repealed Constitution, land could only be compulsorily acquired if the acquisition was in the interest of defence, public safety, public order, public morality, or the promotion of public benefit.<sup>196</sup> Up until 2012, the Land Acquisition Act governed compulsory acquisition of land in Kenya.<sup>197</sup> However, by virtue of the decision in the case of *Five Star Agencies*, the principles of determining compensation as per the schedule of the repealed Land Acquisition Act are still applicable until the NLC creates new guidelines.<sup>198</sup>

### **3.3 The current legal framework on the procedure of compulsory acquisition in Kenya**

#### **i. The Constitution of Kenya**

The Constitution is the supreme law that grants the State the power to compulsorily acquire private land for a public purpose.<sup>199</sup> This acquisition for a public purpose must be carried out only after the prompt payment of just compensation.<sup>200</sup> Compensation is also provided for as a remedy where there is a breach of a constitutional rights such as the right to property.<sup>201</sup>

Every State organ, State officer or public officer shall also abide by the national values and

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<sup>192</sup> Republic of Kenya, *The final report of the truth, justice & reconciliation Commission of Kenya*, 2013, 169.

<sup>193</sup> Okoth-Ogendo HWO, *Tenants of the crown: Evolution of agrarian law and institutions in Kenya*, African Centre for Technology Studies Press, Nairobi, 1991, 9.

<sup>194</sup> Kariuki F, Ouma S, Ng'etich R, 'Property Law' Strathmore University Press, 2016, 131.

<sup>195</sup> Republic of Kenya, *The final report of the truth, justice & reconciliation Commission of Kenya*, 2013, 173

<sup>196</sup> Section 75(1)(a), *Constitution of Kenya (Repealed)*.

<sup>197</sup> *Land Acquisition Act (Repealed)*.

<sup>198</sup> *Five Star Agencies Limited v National Land Commission* (2014) eKLR.

<sup>199</sup> Article 40(3), *Constitution of Kenya* (2010).

<sup>200</sup> Article 40(3)(b), *Constitution of Kenya* (2010).

<sup>201</sup> Article 23(3)(e), *Constitution of Kenya* (2010).

principles of governance including human dignity, social justice, equality, human rights, non-discrimination of the marginalised, good governance, integrity, transparency and accountability.<sup>202</sup> The NLC should therefore abide by these values. The NLC shall also abide by the principles of land policy such as security of land rights, transparent and cost effective management of land and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.<sup>203</sup>

Since every citizen has the right to access justice the person whose property has been acquired has the right to access a court of law if dissatisfied with the process.<sup>204</sup> The right to fair administrative action which includes expeditious disposal of complaints, petitions and applications for compensation by lawful administrative authorities is also guaranteed.<sup>205</sup>

## **ii. The Land Act**

This Act guides the entire process of compulsory acquisition.<sup>206</sup> Under the Act, the NLC is placed in charge of compulsory acquisition.<sup>207</sup> If either a national or county government is interested in acquisition of land already owned by an individual or community, it must submit a request to the NLC to acquire the land on its behalf.<sup>208</sup> The NLC has the right to reject the request if it goes against the prescribed guidelines and Article 40(3) of the Constitution.<sup>209</sup>

If the NLC fails to acquire the land it must give reasons.<sup>210</sup> However, if it approves of the acquisition it must publish a notice in the Kenya Gazette and the County Gazette to that effect, and deliver a copy of the notice to the Registrar and every person who has an interest in the land.<sup>211</sup> The NLC can then authorise, in writing, any person, to enter the land and inspect and do all that is necessary to ascertain whether the land is suitable for the intended

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<sup>202</sup> Article 10, *Constitution of Kenya* (2010).

<sup>203</sup> Article 60, *Constitution of Kenya* (2010).

<sup>204</sup> Article 40 and 48, *Constitution of Kenya* (2010).

<sup>205</sup> Article 47, *Constitution of Kenya* (2010).

<sup>206</sup> Part VIII, *Land Act* (Act No.6 of 2012).

<sup>207</sup> Part VIII, *Land Act* (Act No.6 of 2012).

<sup>208</sup> Section 107(1), *Land Act* (Act No.6 of 2012).

<sup>209</sup> Section 107(2) (3), *Land Act* (Act No.6 of 2012).

<sup>210</sup> Section 107(4), *Land Act* (Act No.6 of 2012).

<sup>211</sup> Section 107(5), *Land Act* (Act No.6 of 2012).

purpose.<sup>212</sup> In this case, the occupier must give consent to the person inspecting the land to enter the premises or the occupier must be given a written notice of at least seven days of the intention to enter his/her land.<sup>213</sup> If any damage is caused during this entry, the NLC must pay just and full compensation.<sup>214</sup>

For any private land to be acquired, the NLC must certify in writing that the land is required for a public purpose.<sup>215</sup> There must also be just compensation which is to be paid promptly in full to all those who have an interest in the land.<sup>216</sup> In the case where only a part of the land is to be acquired, the NLC must conduct a survey of the land and if it appears that that the part acquired is larger than the size for which compensation has been paid, additional compensation has to be paid for the excess size.<sup>217</sup>

An inquiry as to the compensation must then be conducted to give an opportunity to all persons interested in the land to deliver their written claims to the NLC.<sup>218</sup> After the inquiry, the NLC is required to prepare a separate award every person who has a rightful interest in the land and must notify such persons.<sup>219</sup> The NLC must then pay the compensation promptly in accordance with the award.<sup>220</sup> The NLC may write to the owners in possession of the title documents to deliver them to the Registrar if they had not been previously delivered.<sup>221</sup>

In the case of community land, the compensation shall be paid to the county government which shall hold the money in trust for the community where the community land is unregistered.<sup>222</sup> The original land owner also has pre-emptive rights such that where the public purpose justifying the acquisition fails or does not exist, the NLC must first offer the original owners or their successors the right to re-acquire the land upon restitution to the acquiring authority the full amount which had been paid as compensation.<sup>223</sup> Any disputes

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<sup>212</sup> Section 108(1), *Land Act* (Act No.6 of 2012).

<sup>213</sup> Section 108(2), *Land Act* (Act No.6 of 2012).

<sup>214</sup> Section 109, *Land Act* (Act No.6 of 2012).

<sup>215</sup> Section 110(1), *Land Act* (Act No.6 of 2012).

<sup>216</sup> Section 111(1), *Land Act* (Act No.6 of 2012).

<sup>217</sup> Section 119 *Land Act* (Act No.6 of 2012).

<sup>218</sup> Section 112(1) (2) *Land Act* (Act No.6 of 2012).

<sup>219</sup> Section 114 *Land Act* (Act No.6 of 2012).

<sup>220</sup> Section 115 (1) *Land Act* (Act No.6 of 2012).

<sup>221</sup> Section 121 (1) *Land Act* (Act No.6 of 2012).

<sup>222</sup> Section 6 (2) *Land Act* (Act No.6 of 2012).

<sup>223</sup> Section 110(2) *Land Act* (Act No.6 of 2012).



that may arise are to be directed to the Land and Environment Court for determination.<sup>224</sup>

### **iii. Valuers Act**

The valuation process is guided by the Valuers Act.<sup>225</sup> Only a registered valuer whose name appears in the register can prepare and submit a valuation report.<sup>226</sup> The valuation report is submitted to the NLC who send its own valuers to counter check the proposed values.

### **iv. Community Land Act**

Compulsory acquisition of community land is provided for under Part V of the Act. The Act states that subject to the Constitution and the Land Act, no right over community land may be compulsorily acquired by the State except in accordance with the law, for a public purpose and upon prompt payment of just compensation to the person or persons, in full or by negotiated settlement.<sup>227</sup> Compulsory acquisition is listed as one of the ways community land may be converted to public land.<sup>228</sup> The Act establishes a community assembly which is tasked with the administration and management of community land.<sup>229</sup> Compulsory acquisition of community land is subject to the approval of the members of the registered community in a community meeting.<sup>230</sup> Every person dealing with community land is to observe the principles of land policy as set out in Article 60 of the Constitution and the national values and principles of governance as set out in Article 10 of the Constitution.<sup>231</sup>

The Act also recognises the place of traditional dispute resolution mechanisms and the application of customary law prevailing in the area of jurisdiction of the parties to a dispute.<sup>232</sup> The county government is to hold in trust for a community any monies payable as compensation for compulsory acquisition of any unregistered land.<sup>233</sup> Once the land is registered, the trustee role of the county government shall cease and the respective

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<sup>224</sup> Section 128, *Land Act* (Act No.6 of 2012).

<sup>225</sup> *Valuers Act*, (CAP 532) (2012).

<sup>226</sup> Section 21, *Valuers Act*, 2012 (Cap 532) (2012).

<sup>227</sup> Section 5(4), *Community Land Act* (Act No. 27 of 2016).

<sup>228</sup> Section 22(1)(a), *Community Land Act* (Act No. 27 of 2016).

<sup>229</sup> Section 15, *Community Land Act* (Act No. 27 of 2016).

<sup>230</sup> Section 22(4)(a), *Community Land Act* (Act No. 27 of 2016).

<sup>231</sup> Section 3, *Community Land Act* (Act No. 27 of 2016).

<sup>232</sup> Section 39(1), *Community Land Act* (Act No. 27 of 2016).

<sup>233</sup> Section 6(2), *Community Land Act* (Act No. 27 of 2016).

community shall assume the management and administrative functions.<sup>234</sup> Just like with private land, reversionary interests of any acquired land shall lie with the community in the first instance upon the expiry of such public use interest.<sup>235</sup>

#### **v. Mining Act**

As per the Constitution, minerals are part of public land. The Mining Act provides for compulsory acquisition of land that may contain minerals.<sup>236</sup>

### **3.4 Conclusion**

The process of compulsory acquisition is crucial to the development of the country as it makes available more lands for the State to carry out key infrastructure projects. Since it involves the balancing of private and public interest when regulating property rights, the laws governing the process should be clear and adequate to ensure the public interests are met efficiently. The next chapter shall elaborate this.

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<sup>234</sup> Section 6(7), *Community Land Act* (Act No. 27 of 2016).

<sup>235</sup> Section 22(3), *Community Land Act* (Act No. 27 of 2016).

<sup>236</sup> Section 40, *Mining Act* (No. 12 of 2016).

## **CHAPTER FOUR: THE GAPS IN THE LAW OF COMPULSORY ACQUISITION IN KENYA, THE CURRENT ACQUISITION PRACTICES AND THEIR EFFECTS**

### **4.1 Introduction**

This chapter shall elucidate the gaps in the law of compulsory acquisition as well as irregular acquisition practices. It shall discuss the inadequacy of legal mechanisms to cater for compensation of ancestral lands, the lack of a clearly defined time frame within which compensation should be paid to those whose land has been compulsorily acquired and the irregular compulsory acquisition practises and the general effects of these practises and gaps in the legal framework.

### **4.2 The inadequacy of existing legal mechanisms to cater for compensation of ancestral lands including community land.**

This section shall discuss the different ways in which the current laws are inadequate in catering for compensation of ancestral lands.

#### **i. The ambiguity as to what constitutes just and fair compensation**

The law requires the State to pay just compensation before compulsory acquisition.<sup>237</sup> The meaning of just compensation has not been very clear as there is no fixed criteria set by the current land laws. Black's Law Dictionary states that "just" means "legally right; lawful; equitable".<sup>238</sup>

In the case of *Kanini Farm Limited vs. Commissioner of Land*, it was held that just and fair compensation constitutes the market value of the property.<sup>239</sup> The fact that determination of just and fair compensation is left to the determination of the courts may not be very appealing as it still does not address the inadequacy of the law in catering for ancestral lands.<sup>240</sup> Market value is defined as the estimated amount for which an asset should exchange on the valuation

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<sup>237</sup> Article 40(3)(b)(i), *Constitution of Kenya* (2010) and section 111(1), *Land Act* (Act No. 6 of 2012).

<sup>238</sup> Black's Law Dictionary 9<sup>th</sup> Edition.

<sup>239</sup> *Kanini Farm Limited v Commissioner of Lands* (1996).

<sup>240</sup> *Kanini Farm Limited v Commissioner of Lands* (1996).

date between a willing buyer and willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.<sup>241</sup>

**ii. The inadequacy in considering the market value of land in compensation for ancestral land**

Compensation has a restorative element such that it should put the victim of compulsory acquisition back to the position they were in before the compensation occurred.<sup>242</sup> The problem arises when it is not clear how communities can be restored to the position they were in before the compulsory acquisition of their ancestral lands.

Since the NLC is yet to formulate rules that determine the manner of calculating just and fair compensation, the provisions of the repealed Land Acquisition Act are still to apply.<sup>243</sup> These provisions still deal with compensation from a monetary point of view.<sup>244</sup> Unfortunately, cultural and ancestral factors have still not been considered in determining the value of acquired land since the new draft NLC Regulations also focus on monetary compensation.<sup>245</sup>

Since communities in Kenya have strong spiritual and cultural ties to their ancestral lands, monetary compensation will never compensate the community members since losing their land would be similar to losing their own identity and their personhood as explained by the personhood theory of property.<sup>246</sup>

This is evident from the effects faced by the Ogiek community after their land was compulsorily acquired by the Kenyan government when they were evicted from the Mau Complex.<sup>247</sup> A memorandum that was presented in the National Assembly proved that since their land was taken away, their economy has been a weak one and their social life has been

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<sup>241</sup> International Valuation Standards Council, 'International Valuation Standards', 2017, 18.

<sup>242</sup> Paragraph 2(c), *World Bank Operational Policy 4.12 on Involuntary Resettlement*.

<sup>243</sup> *Patrick Musimba v National Land Commission & 4 others* Petition No. 613 of 2014.

<sup>244</sup> Section 2, Schedule, *Land Acquisition Act* (Chapter 295, Laws of Kenya) (*Repealed*).

<sup>245</sup> Third Schedule, *The Land Regulations* (2017) (NLC Draft).

<sup>246</sup> Radin MJ, 'Property and personhood' 34 *Stanford Law Review*, 5 (1982), 956.

<sup>247</sup> *African Commission on Human and People's Rights v The Republic of Kenya*, ACHPR Application 006/2012 (in relation to the Ogiek).

destroyed due to the lack of a permanent home.<sup>248</sup>

Furthermore, the right to communal property is tied to other rights such as the right to life and the right to development which also have to be safeguarded as indicated in *Endorois case*.<sup>249</sup> In this case, the government of Kenya was found to have violated the the Endorois' rights to development, the right to property, the right to health and culture by evicting them from their ancestral lands.<sup>250</sup> Bearing all this in mind, compensation has to consider all these rights that are being infringed.

In the United Kingdom case of *Director of Buildings and Lands v Shun Fung Ironworks* it was held that fair compensation requires that a person should be paid for the value of the land to him, not its value generally to the acquiring authority.<sup>251</sup>

Considering that compensation of sacred and religious sites is difficult because financial compensation is often inappropriate, whenever possible, measures should be taken to avoid destruction of sacred sites; if an affected community can no longer live near its sacred area, the area should be preserved such that community members can continue to visit the site according to traditional practices.<sup>252</sup> This was applied in the Kongowea Market expansion in Mombasa, Kenya, where a design change was made to take into account a structure of religious and cultural importance which is in line with the principle of minimizing displacement.<sup>253</sup> The Community Land Act does not contain such provisions in a bid to soften the burden communities may face after land acquisition such that they may still be allowed to visit these sacred sites.<sup>254</sup>

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<sup>248</sup> National Assembly Memorandum "Help us live in our ancestral land and retain both our human and cultural identities as Kenyans of Ogiek origin", July 15, 1996, p.9.

<sup>249</sup> *Centre of Minority Rights Development (Kenya) and Minority Rights Group (CEMIRIDE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.

<sup>250</sup> *Centre of Minority Rights Development (Kenya) and Minority Rights Group (CEMIRIDE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.

<sup>251</sup> *Director of Buildings and Lands v Shun Fung Ironworks Ltd* (1995) AC 111, 125.

<sup>252</sup> FAO, 'Compulsory acquisition of land and compensation', *Land Tenure Studies* (2009), 33.

<sup>253</sup> Paragraph 2(a), *World Bank Operational Policy 4.12 on Involuntary Resettlement*.

<sup>254</sup> *Community Land Act* (Act No. 27 of 2016).

### iii. Livelihood restoration and resettlement as a means of compensation

Restoration of livelihoods is an important aspect of fair compensation but has been neglected in the Kenyan legislation.<sup>255</sup> Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.<sup>256</sup> Even though there is public interest in keeping costs as low as possible, this shall not deprive people of equivalent compensation they need in order to re-establish their lives after the loss of their land.<sup>257</sup>

There has been a delay in bringing the resettlement action plan to fruition in Kenya since the Eviction and Resettlement Procedures Bill has still not been enacted.<sup>258</sup> However, the Bill provides for the NLC to pay fair and just compensation to the evicted persons which is as ambiguous as the other laws.<sup>259</sup> Although such vague wording can be seen as suitable for the awarding body to exercise its discretion to award on a case-by-case basis, past acquisition practices have shown instances of victims receiving inadequate compensation.<sup>260</sup> For this reason, the legal framework needs to be clear to ensure the awarding authority makes truly just and fair awards.

In India, the situation is different as there is an entire Act called The Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013.<sup>261</sup> The Act explicitly provides for a Social Impact Assessment study(SIA) which has to be conducted before the acquisition of land by the government for a public purpose.<sup>262</sup> This

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<sup>255</sup> Muwonge A, Kamunyor S, Choi N, Kahindo L, “In search of land: Public land management, compulsory land acquisition and resettlement in Kenya” Draft Report October 2016, World Bank Group, 43.

<sup>256</sup> Paragraph 2(c), *World Bank Operational Policy 4.12 on Involuntary Resettlement*.

<sup>257</sup> FAO, ‘Compulsory acquisition of land and compensation’ *Land Tenure Studies* (2009), 24.

<sup>258</sup> *Eviction and Resettlement Procedures Bill* (2013).

<sup>259</sup> Section 22(3), *Eviction and Resettlement Procedures Bill* (2013)

<sup>260</sup> *Centre of Minority Rights Development (Kenya) and Minority Rights Group (CEMIRIDE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.

<sup>261</sup> *The Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (India).

<sup>262</sup> Section 4, *The Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (India).

SIA guides the process of rehabilitation and resettlement. The Act provides for a rehabilitation and resettlement award which includes the rehabilitation and resettlement amount payable to the affected families and in the case of displaced families, details of mandatory employment to be provided to the members of the affected families, among other factors.<sup>263</sup>

This is not the case in Kenya as the Land Act fails to provide for SIA. This gap in the law is one of the factors leading to inadequate compensation of community land. In India, if the government was to carry out SIA, it would consider the impact that the project would have on the livelihood of the affected communities, public and community properties, sources of water for cattle, community ponds, grazing land, places of worship, land for traditional tribal institutions and burial grounds.<sup>264</sup> Such a comprehensive study would be suitable in Kenya such that the law would consider the value of the land to the affected communities rather than just the market value.

#### **iv. The mining and extractives sector**

Community land may be compulsorily acquired in the event that mineral resources are found on the land.<sup>265</sup> The existing legal framework dealing with oil and mineral exploration does not focus on community land. Concerning the consent required before beginning exploration on land, both the Petroleum (Exploration and Production) Regulations and the Mining Act focus on private land and community land is somehow left open to entry without the protection afforded to private land.<sup>266</sup> This undermines communal property rights as private property rights are given priority.

Usually in the extractives sector in developing countries, human rights are subordinated to

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<sup>263</sup> Section 31(2), *The Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (India).

<sup>264</sup> Section 4 (5), *The Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (India).

<sup>265</sup> Article 62, *Constitution of Kenya* (2010).

<sup>266</sup> Section 6 (2), *Petroleum (Exploration and Production) Regulations*, (1984) and section 7, *Mining Act* CAP 306 (2012).

the promotion of commercial interests in exploiting the mineral resources.<sup>267</sup> With reference to the mining industry and compulsory acquisition, it is of utmost importance for the law on compulsory acquisition to explicitly provide for other forms of compensation other than monetary compensation so as to compensate the true value of the land to the community members.

Contrary to the need to restore the livelihood of communities the existing laws do not expressly provide for local content requirements such that members of the affected community may benefit from the projects carried out on their land.<sup>268</sup> This would have been used as additional means of compensation since it promotes acceptability of the project by the community which is able to take part in the project and earn a living.<sup>269</sup> Parliament is yet to enact the Local Content Bill to address the issue.<sup>270</sup>

#### **v. Compensation using land of similar value**

Land of similar value may also be given as compensation in lieu of the monetary award.<sup>271</sup> This is associated with the resettlement of vulnerable groups.<sup>272</sup> This award may still not be adequate as the new land may have soil of poorer quality and there may be inadequate water and forest resources.<sup>273</sup> The *Endorois case* proves this as the community's cattle died after they were moved from their fertile lands to arid ones.<sup>274</sup>

Also, the land identified for resettlement may be already occupied by communities with strong claims to that land and the introduction of additional people to the area can result in overcrowding, environmental degradation and competition for increasingly scarce

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<sup>267</sup> Dias A, Nwete B, 'Good Governance, Business and Human Rights in Energy Exporting Developing Countries: a Supreme Challenge for Corporate Social Responsibility and Corporate Accountability' 2, *Oil Gas & Energy Law Intelligence*, (2004).

<sup>268</sup> *Community Land Act* (Act No. 27 of 2016) and *Mining Act* CAP 306 (2012).

<sup>269</sup> Muwonge A, Kamunyor S, Choi N, Kahindo L, "In search of land: Public land management, compulsory land acquisition and resettlement in Kenya" Draft Report October 2016, World Bank Group, 43.

<sup>270</sup> *Local Content Bill* (2016).

<sup>271</sup> Section 114 (2), *Land Act* (Act No.6 of 2012).

<sup>272</sup> FAO, 'Compulsory acquisition of land and compensation' *Land Tenure Studies* (2009), 38.

<sup>273</sup> FAO, 'Compulsory acquisition of land and compensation' *Land Tenure Studies* (2009), 40.

<sup>274</sup> <https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights> on 15 January 2018.



resources.<sup>275</sup> This is evident from the *Waki Commission Report* where land was held to be the main cause of the 2007 post election violence.<sup>276</sup> These land issues were deeply rooted in the history of the country where there was marginalization of communities arising from inequities concerning the allocation of land and other national resources.<sup>277</sup>

All the factors discussed above create dissatisfaction among community members because they are not truly restored through monetary compensation.

#### **4.3 Lack of a clearly defined time within which compensation should be paid to those whose land has been compulsorily acquired**

The law provides for the prompt payment in full of just compensation to the person whose land has been compulsorily acquired.<sup>278</sup> The use of the word “prompt” does not provide a specific time frame within which the NLC is to pay this compensation. This has led to instances of delayed payments which beats the purpose of compensation in the first place which is to restore a person or community to the position they were in before the acquisition.<sup>279</sup>

In the case of *Arnacherry Limited v Attorney General* there was delayed compensation by the government as it had not compensated the landowner thirty years after acquisition of the property in question. The court held that the forceful take-over of personal property by the government without prompt and full compensation was very sad and distressing in this day and age where we had come up with a robust Constitution.<sup>280</sup>

Similarly, in the *Africa Gas & Oil Company* case, the company sued for unpaid after the acquisition of its land by the Kenya Railways Corporation.<sup>281</sup> The High Court ruled in favour of the applicant and ordered the respondent to make the payments.<sup>282</sup> Furthermore, according

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<sup>275</sup>FAO, ‘Compulsory acquisition of land and compensation’ *Land Tenure Studies* (2009), 40.

<sup>276</sup> Republic of Kenya, *Report of the Commission of inquiry into post-election violence*, 2008, 23.

<sup>277</sup> Republic of Kenya, *Report of the Commission of inquiry into post-election violence*, 2008, 23.

<sup>278</sup> Article 40 (3)(b)(i), *Constitution of Kenya* (2010) and section 111, *Land Act* (Act No.6 of 2012).

<sup>279</sup> Paragraph 2(c), *World Bank Operational Policy 4.12 on Involuntary Resettlement*.

<sup>280</sup> *Arnacherry Limited v Attorney General* (2014) eKLR.

<sup>281</sup> *Africa Gas and Oil Company Limited v Attorney General & 3 others*, Constitutional Petition No.171 of 2016.

<sup>282</sup> *Africa Gas and Oil Company Limited v Attorney General & 3 others*, Constitutional Petition No.171 of

to *The Standard* Newspaper, hundreds of people affected by the construction of the Standard Gauge Railway were at the time yet to receive compensation almost two years after the first phase of compensation began.<sup>283</sup>

Equally, in the case of *Mathatani Limited v Commissioner of Lands*, the court held that the compensation that was paid was null and void as it did not amount to prompt and just compensation as per the Constitution.<sup>284</sup> In this case, the petitioner's land in Machakos was compulsorily acquired for the construction of the Embakasi-Machakos turn off and Machakos turn off Sultan Hamud.<sup>285</sup> The compensation of the petitioner after four years of the acquisition was held to go against the principle of just and fair compensation.<sup>286</sup>

These delayed payments are not just since the victims of the acquisition may not have the means of acquiring another one piece of land without the payment of compensation as was seen in the *Mathatani Limited case*.<sup>287</sup> The Land Act uses the term "as soon as is practicable".<sup>288</sup> This still does not provide clarity which leaves room for irregular acquisition practices.

The Land Act provides that if compensation is not paid, the Commission shall before taking possession of the land, open a special account into which it shall pay interest on the amount awarded at the base lending rate set by the Central Bank of Kenya and prevailing at that time from the time when possession was taken or compensation was paid, whichever is earlier.<sup>289</sup> This provision sort of creates a penalty for delayed compensation since the government has

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2016.

<sup>283</sup> 'Beja Patrick: Hundreds yet to receive compensation for the Standard Gauge Railway land' *The Standard Newspaper*, 18 January 2016 <http://www.standardmedia.co.ke/article/2000188492/hundreds-yet-to-receive-compensation-for-sgr-land-on> 2 February 2017.

<sup>284</sup> *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

<sup>285</sup> *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

<sup>286</sup> *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

<sup>287</sup> *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

<sup>288</sup> Section 125, *Land Act* (Act No.6 of 2012).

<sup>289</sup> Section 117, *Land Act* (Act No. 6 of 2012).

to pay additional interest on the award.<sup>290</sup> However, it still does not provide clear time frame within which compensation is to be paid to avoid delayed compensation in the first place.

In the Indian context, where compensation for the TNUDP Phase III Project was delayed, the affected parties were paid interest at the rate of 12% on the compensation due to them.<sup>291</sup> The provision for this interest led to satisfaction of the affected people and in the end there were no court cases. The Indian laws also provide for the payment of this interest at the rate of 12% per annum on the market value for the period from the date of publication of the notification of the social impact assessment report until the date of the awards of the Collector or the date of taking possession of the land, whichever is earlier.<sup>292</sup> Such a clear provision is necessary in the Kenyan legal framework so as to curb delayed compensation which in the end serves as an injustice to the affected people.

Furthermore, the Indian laws provide that the acquiring authority must make an award within the period of twelve months from the date of notification and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse.<sup>293</sup> Kenyan laws do not have such a provision which leaves room for delayed compensation.

#### **4.4 Irregular compulsory acquisition practises and the general effects of these practises and inadequacies of the legal framework**

According to Lord Denning, no citizen is to be deprived of his land by the State or any other public authority against his wish unless expressly authorised by the law.<sup>294</sup> The same is espoused in the Constitution which states that the right to property shall not be limited except

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<sup>290</sup> Section 117, *Land Act* (Act No. 6 of 2012).

<sup>291</sup> Mahalingam A and Vyas A, 'Comparative evaluation of land acquisition and compensation processes across the world' 46, *Economic and Political Weekly*, 2011, 99.

<sup>292</sup> Section 30 (3), *The Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (India).

<sup>293</sup> Section 25, *The Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of* (India).

<sup>294</sup> *Priest v Secretary of State* [1982] 81 LGR 193,198.

by law.<sup>295</sup>

In order to curb irregular acquisition practises, the court in the case of *Virenda Ramji Gudka and 3 others v Attorney General* held that the legal provisions on compulsory acquisition have to be complied with in order for the rights of acquisition to crystallise.<sup>296</sup> Likewise, in the case of *Commissioner of Lands v Coastal Aquaculture*, the court held that the procedure for compulsory acquisition as set out in law must be strictly adhered to.<sup>297</sup>

In practice, there have been instances where the acquiring authorities have failed to follow the procedure of compulsory acquisition to the letter as required. In the case of *Shalein Masood Mughai v Attorney General & 5 others*, the petitioners land was acquired for construction of a road. However, the Commissioner of Lands had failed to gazette a notice showing that the government took possession of the land as required by the Land Acquisition Act. The court held that the action of the respondents proceeding onto the land, excavating it and constructing a road on it without a modicum of due process is a violation of the petitioner's fundamental rights and freedoms.<sup>298</sup>

Similarly, the case of *Arnacherry Limited* shows the effects of non-adherence to the law on compulsory acquisition by the acquiring authority.<sup>299</sup> The Court held that in this day and age where we had a robust Constitution, it was disturbing that the State could actively participate in acts of impunity such as the forceful take-over of personal property without due compensation as required by law.<sup>300</sup>

Also, since the 1970s the government of Kenya has made repeated efforts to evict Sengwer community from the Embobut forest without adequate consultation, under just terms that would be fully protective of their rights.<sup>301</sup> Without free, prior and informed consent, the key interests of the Sengwer people were not taken into account during compensation. In 2014,

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<sup>295</sup> Article 24, *Constitution of Kenya* (2010).

<sup>296</sup> *Virenda Ramji Gudka and 3 others v Attorney General* (2014) eKLR.

<sup>297</sup> *Commissioner of Lands and another v Coastal Aquaculture Ltd*, Civil Appeal No. 252 of 1996 reported in KLR (E&L) Vol. 1, 264-295.

<sup>298</sup> *Shalein Masood Mughai v Attorney General & 5 others* (2014) eKLR.

<sup>299</sup> *Arnacherry Limited v The Attorney General* (2014) eKLR.

<sup>300</sup> *Arnacherry Limited v The Attorney General* (2014) eKLR, para 77.

<sup>301</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14163> on 14 September 2017.

the State awarded Kshs, 400,000 to community despite the fact that the Sengwer people never actually consented to leaving their land in exchange for such compensation.<sup>302</sup> To date, the Sengwer people are still being forced to leave the Embobut forest despite an injunction granted in their favour back in 2013 by the Eldoret High Court.<sup>303</sup> During one of the eviction processes, a community member was shot and killed by a Kenya Forest Service warden.<sup>304</sup> These evictions have also involved the torching of houses of the community members which has resulted in community members being left homeless.<sup>305</sup> The community members recognised the fact that the forest needs to be protected and called for the State to engage them in a dialogue process that would promote conservation without infringing on their rights to live on their ancestral lands sustainably on conservation conditions.<sup>306</sup>

Moreover, no member of the Ogiek community was chosen to be part of the Task Force that was set up to implement the 2017 ruling of the ACtHPR thus going against the principle of free, prior and informed consent.<sup>307</sup> It is only fair that the Ogiek people should be able to decide on matters directly affecting their livelihoods. The turmoil that the Sengwer people are currently facing shows the failure of the State to learn from its mistakes with regards to the *Endorois* and *Ogiek cases* which it lost in the regional court.<sup>308</sup>

Generally, the gaps in the law and irregular practises of the State go against the letter and spirit of Constitution which states that the right to property shall only be limited by law,

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<sup>302</sup> <https://reliefweb.int/report/kenya/kenya-defies-its-own-courts-torching-homes-and-forcefully-evicting-sengwer-their> on 15 January 2018.

<sup>303</sup> *David Kiptum Yator & 2 others suing as Leaders of the Sengwer Community v Attorney General & 5 others* (2013) eKLR.

<sup>304</sup> 'Stephen Rutto: outrage after KFS wardens kill Sengwer herder in Embobut forest' *The Star Newspaper* 17 January 2018.

<sup>305</sup> 'Joseph Muraya: Forest is our ancestral land, Sengwer community say resisting eviction' *Capital News*, 4 January 2018 <https://www.capitalfm.co.ke/news/2018/01/forest-ancestral-land-sengwer-community-say-resisting-eviction/>.

<sup>306</sup> 'Joseph Muraya: Forest is our ancestral land, Sengwer community say resisting eviction' *Capital News*, 4 January 2018 <https://www.capitalfm.co.ke/news/2018/01/forest-ancestral-land-sengwer-community-say-resisting-eviction/>.

<sup>307</sup> <https://reliefweb.int/report/kenya/kenyan-government-task-force-implement-african-court-s-ogiek-judgment-deeply-flawed-mrg> on 15 January 2018.

<sup>308</sup> *African Commission on Human and People's Rights v The Republic of Kenya*, ACtHPR Application 006/2012 (in relation to the Ogiek) and *Centre of Minority Rights Development (Kenya) and Minority Rights Group (CEMIRIDE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.

under reasonable and justifiable circumstances.<sup>309</sup>

#### **4.5 Conclusion**

The inadequacy of the existing legal framework on compulsory acquisition is clear as pointed out. The gaps in the law have led to instances of arbitrary deprivation of property contrary to the Constitution.<sup>310</sup> Instances of noncompliance with the law during acquisition have also diminished public confidence in the entire process. Reform and clarity in the existing legal framework are required to better fit different circumstances and strengthen the Constitutional protection of the right to property.<sup>311</sup>

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<sup>309</sup> Article 24, *Constitution of Kenya* (2010).

<sup>310</sup> Article 40, *Constitution of Kenya* (2010).

<sup>311</sup> Article 40, *Constitution of Kenya* (2010).

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1 Introduction

This chapter shall recommend some solutions to fix the gaps in the law of compulsory acquisition as well as ways to avoid further irregular practices by the State during the acquisition process. The possible solutions are discussed below.

### 5.2. The law should provide for compensation of land beyond its monetary value by considering the value of ancestral lands.

With regards to compensation, the Constitution and the Land Act should go further to explain what just and fair compensation entails.<sup>312</sup> As explained earlier, compensation is based on the market value of the land.<sup>313</sup>

Additionally, the new draft Regulations by the NLC focus on monetary compensation, they should be amended to factor in the spiritual value communities attach to their ancestral lands.<sup>314</sup> This is the only way communities can enjoy the right to just and fair compensation.<sup>315</sup>

Generally, the laws should be flexible enough to allow for the determination of appropriate compensation in special cases.<sup>316</sup> This can be achieved by considering both the statutory law and the customary laws of the affected communities in compensation matters so as take into account the true value of such land.<sup>317</sup>

Borrowing from India, Kenya should also provide for comprehensive social impact assessment studies in the law of compulsory acquisition which shall be used to guide compensation and resettlement awards.<sup>318</sup> This way, the NLC would collectively consider factors such as the livelihood of the affected communities, places of worship, burial grounds

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<sup>312</sup> Article 40(3)(b)(i), *Constitution of Kenya* (2010), Section 125, *Land Act* (Act No.6 of 2012).

<sup>313</sup> *Five Star Agencies Limited v National Land Commission* (2014) eKLR.

<sup>314</sup> Third Schedule, *The Land Regulations* (2017) (NLC Draft).

<sup>315</sup> FAO, 'Compulsory acquisition of land and compensation', *Land Tenure Studies* (2009), 23.

<sup>316</sup> FAO, 'Compulsory acquisition of land and compensation', *Land Tenure Studies* (2009), 23.

<sup>317</sup> FAO, 'Compulsory acquisition of land and compensation', *Land Tenure Studies* (2009), 35.

<sup>318</sup> Section 4 (5), *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (India).

and sources of water for cattle in determining compensation of community land in a manner favourable to community members.

In addition, community rights should be safeguarded more in the mining and extractives sector. The law should provide for local content requirements such that members of the affected community may benefit from the projects carried out on their land and improve their livelihood.<sup>319</sup> This can serve as additional means of compensation.

In terms of ancestral lands, the law should also be creative enough to provide for alternative measures to avoid the destruction of sacred sites and if this is inevitable, it should provide for the preservation of such sacred areas so that community members can continue visiting the site.<sup>320</sup>

### **5.3. The law should provide for a clear time frame within which compensation shall be paid to the victims of compulsory acquisition.**

The law provides for the payment of prompt compensation or the payment of compensation as soon as practicable.<sup>321</sup> The use of such ambiguous terms has led to cases of delayed compensation which goes against the principle of just and fair compensation as held in the case of *Mathatani Ltd*.<sup>322</sup>

In order to avoid future cases of delayed compensation, the laws should clearly stipulate a time frame within which compensation should be paid to victims of compulsory acquisition. This certainty will assist the victims to better plan themselves in terms of acquiring other forms of property.

### **5.4. The State should observe the law as it carries out compulsory acquisition.**

With the aim of increasing land tenure security, reducing tension between the government

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<sup>319</sup> *Community Land Act* (Act No. 27 of 2016) and *Mining Act* CAP 306 (2012).

<sup>320</sup> FAO, 'Compulsory acquisition of land and compensation', *Land Tenure Studies* (2009), 33.

<sup>321</sup> Article 40(3)(b)(i), *Constitution of Kenya* (2010) and Section 125, *Land Act* (Act No.6 of 2012).

<sup>322</sup> *Mathatani Limited v Commissioner of Lands* (2013) eKLR.



and citizens and increasing public confidence in the rule of law, the State should comply with the rules on compulsory acquisition.<sup>323</sup> The NLC should carry out compulsory acquisition bearing in mind the State's positive obligation to protect people's property rights.<sup>324</sup> It should observe the strict application of the laws on compulsory acquisition.<sup>325</sup>

It should also be guided by the spirit of good governance and should try its best to balance the public interests and individual/communal interests so as to come up with amicable solutions to resistance they may face during the acquisition face.<sup>326</sup> This way, cases of arbitrary deprivation of property will be brought to an end.

The NLC should also abide by the principles of land policy such as security of land rights, transparent and cost effective management of land and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.<sup>327</sup>

In addition, the principle of FPIC should be observed.<sup>328</sup> This would prevent instances where community members claim they were never consulted as was seen in the case of the Sengwer community who denied consenting to leaving their land in exchange for compensation from the State in 2014.<sup>329</sup> In order to increase public participation in the entire process, the reports by the NLC on valuation and compensation should also be made available to the public for scrutiny in line with Article 35 of the Constitution thus making the Commission transparent and accountable.<sup>330</sup>

## 5.5 Conclusion

Compulsory acquisition is definitely a delicate issue in this day and age in Kenya where the government has increasing pressure to deliver public services in the face of high demand for

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<sup>323</sup> FAO, 'Compulsory acquisition of land and compensation' *Land Tenure Studies* (2009), 2.

<sup>324</sup> Article 21, *Constitution of Kenya* (2010).

<sup>325</sup> *Commissioner of Lands v Coastal Aquaculture* KLR (L&E) 264.

<sup>326</sup> Article 10, *Constitution of Kenya* (2010).

<sup>327</sup> Article 60, *Constitution of Kenya* (2010).

<sup>328</sup> *Centre of Minority Rights Development (Kenya) and Minority Rights Group (CEMIRIDE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.

<sup>329</sup> <https://reliefweb.int/report/kenya/kenya-defies-its-own-courts-torching-homes-and-forcefully-evicting-sengwer-their> on 15 January 2018.

<sup>330</sup> 'Jackline Warui: Corruption and land governance in Kenya' *Adili Issue*, June/July 2015.

land.<sup>331</sup> This dissertation has met its objectives by identifying the gaps in the laws of compulsory acquisition, analysing how these gaps negatively affect individual and community property rights, demonstrating how the State engages in illegal acquisition practices and by suggesting possible solutions to the gaps in the law so as to have a watertight legal framework. In conclusion, the Kenyan laws dealing with compulsory acquisition need to be amended to ensure clarity in the general procedures as well as compensation mechanisms. This will be critical in restoring public confidence in the sole purpose of compulsory acquisition which is to cater for public interests.

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<sup>331</sup> FAO, 'Compulsory acquisition of land and compensation' *Land Tenure Studies* (2009), 1.

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