

**JUST COMPENSATION IN THE COMPULSORY ACQUISITION PROCESS IN
KENYA**

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By

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DECLARATION

I, **NDAMBUKI VICTOR NZIOKI**, 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:

FRANCIS KARIUKI

ABSTRACT

Just Compensation is a vital aspect of compulsory acquisition. It is important that upon completion of compulsory acquisition of land, the victims of the process, are justly compensated, as they have significantly suffered a detriment in the property they initially owned. In order to achieve this, the current provisions on just compensation must adequately be defined in order to ensure that there is no gap in the law concerning the same, to ensure that entities involved in compulsory acquisition, do not take advantage in the ambiguities found within the provision and finally to ensure that court do not set wrong precedence on matter of just compensation. The main aim of this paper, therefore, shall be to explain how to conclusively and in full, define just compensation. The paper shall identify the challenges that are currently present in defining just compensation and how to fully resolve these challenges. This shall be explained through the aid legal statutes, both from the local and foreign perspective, case law from different jurisdictions, journal articles and published books The paper shall conclude by providing summarised proposed solutions, discussed throughout the chapters, on how just compensation should be defined.

A. LIST OF CASES

1. *Kanini Farm Limited v Commissioner of Lands (1996)* eKLR.
2. *Limo v Commissioner of Lands KLR (E&L) 175.*
3. *John Kariuki Macharia v Commissioner of Lands (2014)* eKLR.
4. *Five Star Agencies v The National Land Commission (2014)* eKLR.
5. *Kanini Farm Limited v Commissioner of Lands (1996)* eKLR.
6. *Mike Maina Kamau v Attorney General (2017)* eKLR.
7. *Patrick Musimba v National Land Commission & 4 others (2016)* eKLR.
8. *Erastus Njonjo Mote & 3 others v Attorney General & 2 others (2017)* eKLR.
9. *Mathatani Limited v Commissioner of Lands (2013)* eKLR.
10. *Peaceable d Uncle v Watson (1811).*
11. *London Borough of Harrow v Qazi (2004)* United Kingdom House of Lords.
12. *Armstrong v United States (1960)* United States Supreme Court.
13. *Abraham Lama Wollach N.O. & Another v The Government of the Republic of South Africa & 3 Others (2018)* Land Claims Court of South Africa.
14. *Johannes UYS N.O & Another v Msindo Phillemon Msiza & 2 Others (2017)* Supreme Court of Appeal of South Africa.
15. *Ash and Others v The Department of Land Affairs (2000)*, Land Claims Court of South Africa.
16. *ACmHPR v Republic of Kenya, ACmHPR Comm.006/2012 (2017).*

B. LIST OF LEGAL INSTRUMENTS

1. Land Act (Act No. 6 of 2012).
2. Constitution of Kenya (2010).
3. Land Acquisition Act (Act No.1 of 1894).
4. Land Acquisition Act (Cap 295 of 168) (Repealed).
5. Land Value Index Laws (Amendment) Act (No 15 of 2019).
6. Land Acquisition Act (Cap 295 of 1968) (Repealed).
7. National Land Policy of Kenya (2007).
8. Constitution of The Republic of South Africa (1996).

CHAPTER 1: INTRODUCTION TO THE STUDY

Compulsory acquisition is defined under the Land Act of Kenya, as the power of the State to deprive or acquire any title or other interest in land for public purpose or is in the public interest, under which there shall be swift payment of compensation after the compulsory acquisition has occurred.¹ The Land Act further states under Section 109, that there should full payment and just compensation for any damage caused during entry in the process of compulsory acquisition.²

The Constitution of Kenya provides for recognition of compulsory acquisition by stating that the state shall not deprive any person arbitrarily of land unless that deprivation is a result of acquisition of land, an interest in land, a conversion of an interest in land.³ It also provides another circumstance that a deprivation can be warranted is, if it is for public purpose or in the public interests.⁴ The Constitution provides in addition, that where the is deprivation of property, there should be prompt payment in full of just compensation to the person whom the property was deprived of.⁵

Notably, from the above provisions, there is the use of the wording *just compensation*. However, both statutes do not define what amounts to just compensation. This presents a legal problem, as a court of law cannot accurately determine the scope of what amounts to just compensation upon being presented an issue, concerning the same.

1.1. BACKGROUD TO THE PROBLEM

In 1895, Kenya was declared a protectorate and subsequently in 1897, the Land Acquisition Act of India of 1894 was extended to apply to the Kenyan context as well.⁶

The Land Acquisition Act of India provided that, should it appear to the relevant authorities that the land would be required for public purpose, a notification to that effect would be published in the Official Gazette.⁷ The Act further provided under the same section, that

¹ Section 2, *Land Act* (Act No. 6 of 2012).

² Section 109, *Land Act* (Act No. 6 of 2012).

³ Article 40(3)(a), *Constitution of Kenya* (2010).

⁴ Article 40(3)(b), *Constitution of Kenya* (2010).

⁵ Article 40(3)(b)(i), *Constitution of Kenya* (2010).

⁶ Chelimo S.I, 'Registration of title to land: A critique of the Land Registration Act no.3 of 2012' Published LL.M Thesis, University of Nairobi, 2012,29.

⁷ Section 4(1), *Land Acquisition Act* (Act No.1 of 1894).

upon issuance of notice, any or specific authorities could enter upon that land and compulsorily acquire it if they deem it fit for the use that they have planned for.⁸

The provision for compensation was provided under the same Act where it stated that the relevant authority that made the compulsory acquisition, should make payment in full for all the damage that would be done.⁹

The Act in some instance shows circumstances where the colonial power could still compulsorily acquire land and deny just compensation. The Act provided that in cases of urgency the relevant authority could compulsorily acquire land for a public purpose without issuance of compensation¹⁰ The above-mentioned provision, clearly shows that the colonial powers at that time, disregarded the issue of compensation upon compulsorily acquiring land despite the circumstances involved.

From the above brief analysis, one can infer that the colonial powers did indeed provide an elaborate legislation to guide the process of compulsory acquisition. However, the legislation did not include matters to do with just compensation. Compensation under the Act was only considered in terms of monetary compensation.

The Land Acquisition Act of India was replaced eventually by the Land Acquisition Act of Kenya.¹¹ This was the first local statute that dealt with the issue of compulsory acquisition of land in Kenya. The Act provided that the purpose of compulsory acquisition was for the public benefit.¹² However, it did not provide a definition of what public benefit meant.

The Land Acquisition Act of Kenya provided that where land was compulsorily acquired, compensation was to be made in full to the persons who had an interest in the land.¹³ In this instance, the statute did not provide for just compensation as well.

In the case of *Kanini Farm Limited v Commissioner of Lands*, the court held that just and fair compensation is the market value of the property.¹⁴ However, the market value fails to

⁸ Section 4(2), *Land Acquisition Act* (Act No. 1 of 1894).

⁹ Section 5, *Land Acquisition Act* (Act No 1 of 1894).

¹⁰Section 17, *Land Acquisition Act* (Act No. 1 of 1894).

¹¹Chelimo S.I, 'Registration of title to land: A critique of the Land Registration Act no.3 of 2012' Published LL.M Thesis, University of Nairobi, 2012,30.

¹²*Land Acquisition Act* (Cap 295 of 168) (Repealed).

¹³Section 8, *Land Acquisition Act* (Cap 295 of 168) (Repealed).

¹⁴*Kanini Farm Limited v Commissioner of Lands* (1996) eKLR.

compensate non-monetary aspects such as the spiritual connections communities have to their ancestral lands.

In the case of *Limo v Commissioner of Lands*, the court held that in determining the value of land, compensation should consider the nearness of the land to the main town and also assess the accessibility of the land to roads.¹⁵

In the case of *John Kariuki Macharia v Commissioner of Lands*, the court stated that the factors to be considered in determining compensation are the market value of the suit property, the damage sustained by reason of the acquisition, actual earnings, reasonable expenses incidental to change of residence or place of business, and damages resulting from diminution of the profits of the land between the date of gazettelement and the date of taking actual possession.¹⁶

The case of *Five Star Agencies Limited v The National Land Commission* highlights the fact that the National Land Commission has not yet formulated rules to guide the assessment of just compensation as required by Section 111(2) of the Land Act.¹⁷

The 2010 Constitution of Kenya, taking into consideration the right to own property,¹⁸ provides that where a state deprives a person with an interest to a property, there must be just compensation and payment in full to the person whom the property was compulsorily acquired.¹⁹

The Land Acquisition Act was then repealed by the Land Act of Kenya 2012,²⁰ in accordance with the provisions of Article 40 of the Constitution of Kenya.²¹ The Act states that there should full payment and just compensation for any damage caused during entry in the process of compulsory acquisition.²² In addition, it defines just compensation as a form of fair compensation that is to be decided through the criteria provided by the provisions of the Act.²³

¹⁵ *Limo v Commissioner of Lands* KLR (E&L) 175.

¹⁶ *John Kariuki Macharia v Commissioner of Lands* (2014) eKLR.

¹⁷ *Five Star Agencies v The National Land Commission* (2014) eKLR.

¹⁸ Article 40, *Constitution of Kenya* (2010).

¹⁹ Article 40(3)(b)(i), *Constitution of Kenya* (2010).

²⁰ *Land Act* (Act No.6 of 2012).

²¹ Article 40, *Constitution of Kenya* (2010).

²² Section 109, *Land Act* (Act No 6 of 2012).

²³ Section 2, *Land Act* (Act No 6 Of 2012).

It is important to note that both the Constitution of Kenya and the Land Act of Kenya do acknowledge that there should be just compensation to the persons who had an interest in a certain land or property; however, there is a limited view on what is to amount to just compensation. This leaves a huge vacuum for all kinds of interpretation on the subject matter and therefore, may lead to courts setting inconsistent precedence and lead to the infringement of the right to property.

Additionally, the Land Assessment of Just Compensation rules were promulgated in 2017, and provide that the National Land Commission shall determine an award of compensation based on the market value of the land to be acquired,²⁴ and proceeds to stipulate how the market value shall be determined.²⁵

From the above analysis, it is clear that the law over time has not been able to clearly define what amounts to just compensation and limits it to monetary aspect of compensation only.

1.2. STATEMENT OF THE PROBLEM

For just compensation to be fully defined, it must consider that the same precedes monetary compensation and that the non- monetary aspects are also a key factor in fully defining the same. The law provides a limited scope on just compensation, as it restricts just compensation to monetary compensation to a large extent. Therefore, if this issue is not addressed, a great number of people shall not be justly compensated and their right to property shall be infringed.

1.2.1. RESEARCH OBJECTIVES

The objectives of this study are as follows:

- a. To review the laws governing just compensation during the process of compulsory acquisition in Kenya.
- b. To assess the effectiveness of the laws guiding just compensation and the compliance towards them, in the process of compulsory acquisition in Kenya.
- c. To identify the ambiguities, present in defining just compensation in Kenya.
- d. To examine the scope of just compensation i.e. what aspects should just compensation cover apart from the monetary aspect.

²⁴ Rule 4(1), *Land (Assessment of Just Compensation) Rules* (2017).

²⁵ Rule 4(2), *Land (Assessment of Just Compensation) Rules* (2017).

- e. To identify possible recommendations to achieving a clear definition of what amounts to just compensation in Kenya.

1.2.2. RESEARCH QUESTIONS

This study seeks to address the following questions:

- a. What are the laws that govern just compensation in the process of compulsory acquisition in Kenya?
- b. How effective are the laws governing just compensation during the process of compulsory acquisition in Kenya, and have these laws been complied with?
- c. Are there any ambiguities in defining what amounts to just compensation in the Kenyan legal framework?
- d. Does just compensation only amount to monetary compensation?
- e. What are the possible recommendations that can be used to determine what amounts to just compensation?

1.3. HYPOTHESIS

The definition of what amounts to just compensation during the process of compulsory acquisition, is limited to monetary compensation under the Kenyan law, and has failed to include the non-monetary aspects of the same.

1.4. LITERATURE REVIEW

Compulsory acquisition has been identified as a right to acquire land for the purposes of public benefit and for the common good of the society at large. It follows then that compensation, which stems from compulsory acquisition, must also seek to achieve the common good.²⁶

The now repealed Land Acquisition Act, provided as follows, "Where land is acquired compulsorily under this Part, full compensation shall be paid promptly to all persons interested in the land".²⁷

The Constitution of Kenya 2010 states that where property is taken by the state, it *requires prompt payment in full, of just compensation to the person.*²⁸ The same is also reiterated in the Land Act of Kenya of 2012, where it states that, there should be full payment and

²⁶ Longo JP, 'The Concept of Property and The Concept of Compensation on Compulsory acquisition,' 4.

²⁷ *Land Acquisition Act* (Cap 295 of 168) (Repealed).

²⁸ Article 40 (3), *Constitution of Kenya* (2010).

just compensation for any damage caused during entry in the process of compulsory acquisition.²⁹ From the provisions mentioned, the law pre-supposes that there shall be just compensation where payment has been made. This is also seen in the case of *Kanini Farm Limited v Commissioner of Lands (1996) eKLR*, where the court held that just and fair compensation is the market value of the property.³⁰

In the case of *John Kariuki Macharia v Commissioner of Lands*, the court stated that the factors to be considered in determining compensation are the market value of the suit property, the damage sustained by reason of the acquisition, actual earnings, reasonable expenses incidental to change of residence or place of business, and damages resulting from diminution of the profits of the land between the date of gazettelement and the date of taking actual possession.³¹

The Land Assessment of Just Compensation rules provide that the National Land Commission shall determine an award of compensation based on the market value of the land to be acquired,³² and proceeds to stipulate how the market value shall be determined.³³

It is evident from the above analysis, that just compensation under the Kenyan Legal framework views only monetary compensation as just compensation; this provides a huge vacuum in law. As shall be seen throughout this study, in order to fully define just compensation and provide a conclusive scope of what amounts to the same, non-monetary factors should be considered; doing this shall ensure that there is prevention of infringement of the right to property provided under the Constitution of Kenya.³⁴

Bonaya G. in her paper, explains that for there to be just compensation, it must precede monetary value and be encompass non-monetary aspects of the compensation as well.³⁵ She further adds that compensation a victim of compulsory acquisition is to ensure that one person will not bear a large burden for the benefit of a whole society.³⁶ Though this position is correct, the paper does not delve conclusively in to what constitutes non-

²⁹ Section 109, *Land Act* (Act No 6 of 2012).

³⁰ *Kanini Farm Limited v Commissioner of Lands* (1996) eKLR.

³¹ *John Kariuki Macharia v Commissioner of Lands* (2014) eKLR.

³² Rule 4(1), *Land (Assessment of Just Compensation) Rules* (2017).

³³ Rule 4(2), *Land (Assessment of Just Compensation) Rules* (2017).

³⁴ Article 40(1), *Constitution of Kenya* (2010).

³⁵ Bonaya A.G, 'Compulsory Acquisition and the Right to Property: The Gaps in the Legal Framework, Practices and Possible Solutions' Published Dissertation, Strathmore University, Nairobi, 2018,12.

³⁶ Bonaya A.G, 'Compulsory Acquisition and the Right to Property: The Gaps in the Legal Framework, Practices and Possible Solutions' Published Dissertation, Strathmore University, Nairobi, 2018,16.

monetary aspects of just compensation. This study shall therefore delve into the non-monetary aspects that should be encompassed in describing what just compensation should amount to. The Food and Agriculture Organization of the United Nations in a paper, shows the necessity of non-monetary compensation by stating that money alone cannot put the victims whose land was acquired compulsorily back to the position they were before the acquisition took place.³⁷

A good example of the non-monetary aspect of compensation would be compensation of the customary aspect of the land. Different parts of land are administered through the customary land tenure.³⁸ This means that the land is governed by customary practices under the rule of traditional leaders.³⁹ Such land may include ancestral lands, community lands, among others. Customary land is mostly recognised as public land held in trust by the government, and therefore, considered of no value.⁴⁰ Compensation should therefore recognise customary land as being of value in itself and thus compensate the customary rights held within the land. In addition, compensation of customary should take into consideration the customary laws and practices of that specific land.⁴¹

Francis Thorpe writes that every person is entitled to the protection of their property within a society.⁴² He states that no property can be taken from an individual without his consent for public use; however, where the property is indeed taken for public benefit or public use the person ought to receive reasonable compensation.⁴³ Though the statements made above hold weight in explaining just compensation, the author does not state what reasonable compensation is. The lack of clarity of what a reasonable compensation is, opens room for various self-interpretations of the mentioned text, which will mean that different aspects of just compensation will not be covered. As will be seen in one of the following chapters, determining what is reasonable compensation should be guided by different principles,

³⁷ Food and Agriculture Organization of the United Nations (FAO), 'Compulsory acquisition of land and compensation' Land Tenure Studies (2009), 23.

³⁸ Food and Agriculture Organization of the United Nations (FAO), 'Compulsory acquisition of land and compensation' Land Tenure Studies (2009), 34.

³⁹ Food and Agriculture Organization of the United Nations (FAO), 'Compulsory acquisition of land and compensation' Land Tenure Studies (2009), 34.

⁴⁰ Food and Agriculture Organization of the United Nations (FAO), 'Compulsory acquisition of land and compensation' Land Tenure Studies (2009), 34.

⁴¹ Food and Agriculture Organization of the United Nations (FAO), 'Compulsory acquisition of land and compensation' Land Tenure Studies (2009), 35.

⁴² Thorpe F., 'Federal and State Constitutions' 1909 quoted in Longo JP, 'The Concept of Property and The Concept of Compensation on Compulsory acquisition.' University of Tasmania Law Review, 1983, 5.

⁴³ Thorpe F., 'Federal and State Constitutions' 1909 quoted in Longo JP, 'The Concept of Property and The Concept of Compensation on Compulsory acquisition.' University of Tasmania Law Review, 1983, 5.

which shall be discussed then. By conclusively defining what would be a reasonable compensation, all aspects of what amounts to just compensation will be covered.

Chelimo SM, in her paper states that one of the challenges faced by traditional communities is inadequate compensation.⁴⁴ As has been mentioned earlier, customary land which the traditional communities stay on, was not recognised as land having value and therefore, compensation was made only in terms of the improvements made on the land. This shows that for there to be just compensation, the scope must cover not only individuals, but also take into consideration, the community occupying the land in question. This view draws its tenets from the traditional African perspective, that land was owned communally and was for the benefit of the whole society. This aspect shall form what amounts to the non-monetary aspects of just compensation within this study.

From the analysis made herein, there is need to ensure the presence of a clear way of looking at what amounts to just compensation and providing a conclusive definition of just compensation.

⁴⁴ Chelimo S.I, 'Registration of title to land: A critique of the Land Registration Act no.3 of 2012' Published LL.M Thesis, University of Nairobi, 2012,

1.5. THEORETICAL FRAMEWORK

The study, shall rely on the following theories to justify the need for just compensation:

A. *The African Commons*

Preponed by Professor Okoth Ogendo, he states that commons as a property system not only consists of territorial aspect of the land , but also characterised by additional factors, among which is their permanent availability across generations including the past, present, and future; and notes that this is the matter in which African resources were and still are organised to date.⁴⁵ From this preliminary statement, it is clear that land extends beyond its physical attributes and extends to characteristics such as ties either communal or ancestral, to the land in question.

Under the African commons as well, land is considered to the primary source of economic and social of livelihood for the whole community and individuals as well as the source where they drive their spiritual foundation from.⁴⁶ From this description, it is clear that characteristics of land extend beyond the physical occupation, as some communities have spiritual and communal ties to that communal land in question. Therefore, for just compensation to be fully defined, it must take into consideration the fact that land extends beyond the physical traits, it must consider the different ties present to certain lands such as communal land, when determining what would be the just compensation.

B. *Utilitarian Theory*

This theory outlines the concept of the greatest good for the greatest number, by stating that an action shall be considered one of upholding utilitarianism if it has the ability to benefit a community (which consists of the total individuals present) more than it can be detrimental to the same.⁴⁷ Therefore, for a government action to reflect the principle of utility, the action must as has been above, have the ability to benefit the interests of the community and not cause damage to the same.⁴⁸

⁴⁵ Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' University of Nairobi Law Journal (2003), 107.

⁴⁶ Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion' University of Nairobi Law Journal (2003), 107.

⁴⁷ Bentham J, 'Of the Principle of Utility' in *An Introduction to the Principles of Morals and Legislations*(1781 ed), <<https://www.utilitarianism.com/jeremy-bentham/index.html#one>> , para. VI.

⁴⁸ Bentham J, 'Of the Principle of Utility' in *An Introduction to the Principles of Morals and Legislations*(1781 ed), <<https://www.utilitarianism.com/jeremy-bentham/index.html#one>> , para. VII.

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, which is the public ⁴⁹

For compulsory acquisition to serve the greatest good, it must, during the process, outline how just compensation should be achieved taking into consideration that compensation is more than monetary value of the land or property in question, which shall eventually benefit the interests the victims of compulsory acquisition have in the land.

C. The Eminent Domain Theory

The theory notes that eminent domain encompasses the inherent and necessary power of government to take land for public purposes.⁵⁰

The eminent domain is a relationship between the State and the person who gives consent to the property being compulsorily acquired.⁵¹ A crucial part to the eminent domain is the compensation of the individual whose property is being taken. It therefore follows, that the compensation should reflect the state-person relationship, and therefore, compensation should be structured in a way that as it progresses the state, it also progresses the individual.⁵² Progress of the individual will be realised, if the scope of just compensation is defined in detail.

Additionally, in order to achieve just compensation, compensation should not be viewed as just a form of payment, but as a necessary integral part of the domain of the state.⁵³ This is to mean that, as the state provides the necessary avenues through legislation for compulsory acquisition, it must also integrate into the legislations, a definitive scope of what amounts to just compensation.

⁴⁹ Bonaya A.G,' Compulsory Acquisition and the Right to Property: The Gaps in the Legal Framework, Practices and Possible Solutions' Published Dissertation, Strathmore University, Nairobi, 2018,20.

⁵⁰ Longo JP, 'The Concept of Property and The Concept of Compensation on Compulsory acquisition.' University of Tasmania Law Review,1983,3.

⁵¹ Longo JP, 'The Concept of Property and The Concept of Compensation on Compulsory acquisition,'5.

⁵² Longo JP, 'The Concept of Property and The Concept of Compensation on Compulsory acquisition,' 5-6.

⁵³ Longo JP, 'The Concept of Property and The Concept of Compensation on Compulsory acquisition.' University of Tasmania Law Review,1983,5.

1.6. JUSTIFICATION OF THE STUDY

As has been identified, there is a limited scope of what amounts to just compensation under the Kenyan Law. Lack of a complete definition thereof, may lead to victims of compulsory acquisition not being compensated fully and their right to property infringed. Therefore, this study provides what to consider defining just compensation conclusively.

1.7. RESEARCH DESIGN AND METHODOLOGY

This research uses qualitative research methods that include primary and secondary sources of data. Desktop research has been involved as well.

The primary sources of data that will be used are domestic legislations i.e. The laws of Kenya specifically The Constitution of Kenya, The Land Act of Kenya, The National Land Policy, and the Land Acquisition Act. International jurisprudence shall be relied upon which include statutes from different jurisdictions such as the Constitution of South Africa and Common Law cases and principles.

The secondary sources of data that will be relied on are journal articles, scholarly articles, and books relevant to the subject matter.

Access to the sources referred to, shall be achieved in the following ways:

- Use of the Library resources i.e. relevant case books, textbooks, among others.
- Desktop review: Use of the computer to access relevant material from different sources e.g. Kenyan statutes from the Kenya Law Reports.

The information obtained from the data sources, shall be used to provide a detailed definition of what amounts to just compensation, to identify the gaps present in defining what is just compensation, to provide guidelines that may be considered during just compensation and to finally provide possible solutions to filling in the gaps the laws relating to just compensation.

Comparative studies shall be used; the country that the study shall look into is South Africa, as it provides conclusive definitions and provides a wide scope pertaining the issue of just compensation.

Analysis of the data:

This shall be the most crucial part of the research methodology which shall be done in the following manner:

The data collected shall be summarised and interpreted by way of logical reason. After interpretation, the research shall then determine the pattern or rather the position of how the issue of just compensation has been handled within the Kenyan Legal System.

1.8. LIMITATIONS:

The challenge facing this study is that access to some material is limited, one may need to purchase information and some sources of research information may require verified authority to receive access to them.

1.8.1. CHAPTER BREAKDOWN

CHAPTER 1: INTRODUCTION TO THE STUDY

Chapter one shall focus on the introduction to the topic and the purpose of the study. It will include 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 2: THE LEGAL FRAMEWORK REGARDING COMPULSORY ACQUISITION AND JUST COMPENSATION IN KENYA.

This chapter shall focus on the laws that guide the process of compulsory acquisition and where just compensation comes in. It shall also look at the effectiveness and compliance to the laws put in place concerning the same.

This chapter shall look at different case studies involved in the compulsory acquisition process and how just compensation was affected and in addition, look at how courts have interpreted the issue of just compensation.

The chapter shall also analyse the limitations and the challenges, the law of compulsory acquisition faces in determining a detailed definition of what amounts to just compensation.

CHAPTER 3: PRINCIPLES GUIDING JUST COMPENSATION

This chapter will focus mainly on the principles that should guide the law in defining what amounts to just compensation. The chapter shall look at various schools of thought, that guide the principles themselves.

CHAPTER 4: COMPARATIVE STUDY

This chapter shall investigate the process of just compensation in South Africa as compared to Kenya. The chapter shall focus on the regimes and principles that the country uses in defining what is just compensation and what does it entail.

CHAPTER 5: CONCLUSION, FINDINGS AND RECOMMENDATIONS

This chapter shall conclude the dissertation by giving the findings discovered throughout this study, possible solutions and recommendations that will help in defining what exactly is just compensation.

CHAPTER 2: THE LEGAL FRAMEWORK FOR COMPULSORY ACQUISITION AND JUST COMPENSATION IN KENYA

Introduction:

To effectively define what just compensation is, the starting point should be discussing how the present laws and case precedents have viewed compulsory acquisition and more specifically, the aspect of just compensation after compulsory acquisition occurs.

Therefore, this chapter shall focus on the laws that guide the process of compulsory acquisition and where just compensation comes in. This will be done by analysing the different legislations from the pre-2010 Constitution regime and post the promulgation of the Constitution of Kenya 2010; in addition, it shall look at the effectiveness and compliance of these laws.

The objective of this chapter is to determine whether there are gaps in the law involving compulsory acquisition and what amounts to just compensation.

This chapter shall also touch on the different institutions that are involved in compulsory acquisition and how they operate in matters of just compensation.

Different case studies that involved the compulsory acquisition process and how just compensation was affected shall be investigated and in addition, look at how courts have interpreted the issue of just compensation.

2.1. PREVIOUS AND CURRENT LEGAL STATUTES GOVERNING COMPULSORY ACQUISITION AND JUST MPENSATION:

Over time, Kenyan legislators have drafted and put into force a number of laws that guide issues to do with land. The following section, shall discuss the laws that have guided the process of compulsory acquisition in Kenya:

A. PRE- INDEPENDENCE LEGISLATION:

i. Land Acquisition Act of India

The earliest land law to reflect compulsory acquisition, was the Land Acquisition Act of India which provided that, should it appear to the relevant authorities that the land would be required for public purpose, a notification to that effect would be published in the

Official Gazette.⁵⁴ The Act further provided under the same section, that upon issuance of notice, any or specific authorities could enter upon that land and compulsorily acquire it if they deem it fit for the use that they have planned for.⁵⁵

The provision for compensation was provided under the same Act, where it stated that the relevant authority that made the compulsory acquisition, should make payment in full for all the necessary damage that would be done.⁵⁶

ii. Crown Lands Ordinance

The Crown Lands Ordinance of 1915 came in after and made the provision stating that all land belonged to the Queen and was subject to disposal at her will.⁵⁷ This meant that land could be acquired at any given time and used according to how the colonial power deemed fit without seeking the permission or consent of the natives of the land and granted no form of compensation.

The other effect of the Ordinance was that it extinguished the aspect of communal land and therefore, land could be taken by the colonial powers at will, without compensating the tenants of the land, who were mostly different communities⁵⁸ This was made possible as it upon extinguishing the communal aspect of land, it meant that the natives could not be protected by customary law hence their land could be acquired without adhering to the said customary laws and no form of compensation was made.

iii. Native Lands Trust Ordinance

It was not until 1930, when the issue of compensation for land appropriation was revisited; which led to the enactment of the Native Lands Trust Ordinance.⁵⁹ The Ordinance allowed Natives to be recognised as landowners through being granted leases for a specific period.⁶⁰ The legal effect of this piece of legislation was that, by virtue of the Natives being land owners, compensation was made for any native reserves appropriated for public use. The

⁵⁴ Section 4(1), *Land Acquisition Act* (Act No.1 of 1894).

⁵⁵ Section 4(2), *Land Acquisition Act* (Act No. 1of 1894).

⁵⁶ Section 5, *Land Acquisition Act* (Act No 1 of 1894).

⁵⁷ Karari P, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial Experience'25 Nova South Eastern University1,2018,3.

⁵⁸ Karari P, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial Experience'25 Nova South Eastern University1,2018,3.

⁵⁹ Karari P, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial Experience'25 Nova South Eastern University1,2018,4.

⁶⁰ Karari P, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial Experience'25 Nova South Eastern University1,2018,4.

Ordinance provided that compensation made was to be made in monetary form i.e. compensation through money, but did not expound further than that.⁶¹ Under one of the Parliamentary Hansards, the natives were to be compensated in such a manner a white settler would be compensated if their land was appropriated; this was the first instance of monetary compensation where compulsory acquisition was involved.⁶²

B. POST- INDEPENDENCE LEGISLATION:

a) Pre-2010 Constitution:

i. Land Acquisition Act of 1968(Repealed)

In 1968, the Land Acquisition Act of Kenya(now repealed) came into force, and served as the first regional(local) statute, post-independence, to deal with matters concerning compulsory acquisition in Kenya.⁶³ This Act was the most detailed, in terms of procedure to deal with matters of compensation. The introductory bit of the Act, noted that the purpose of the Act was to guide matters to deal with compulsory acquisition of land, for the benefit of the public.⁶⁴

A notable feature of the Act was that it introduced the term ‘award’ to refer to compensation made after compulsory acquisition was done.⁶⁵The introduction of the term award to refer to compensation, meant that the Kenyan Legal System recognised the importance of compensating upon arbitrarily acquiring land.

The Land Acquisition Act provided a detailed process of handling matters to do with compulsory acquisition. To begin with Sections 3 to 5 of the Act provide the necessary steps to be taken upon entry level of the process of compulsory acquisition. The starting point was that where the Minister at that time was satisfied that there was need to acquire land for public purposes, he was to provide a Gazetted notice, and copies of the same to all the parties that had an interest in the land.⁶⁶

The Act went ahead to note that a mere notice would not suffice entry into the land premise that is meant to be acquired unless two conditions are met: that the owner of the land gives

⁶¹ United Kingdom Parliament Hansard Report,20 December 1932,913.

⁶² United Kingdom Parliament Hansard Report,20 December 1932,911.

⁶³ Preliminary, *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

⁶⁴ Preliminary, *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

⁶⁵ Section 2, *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

⁶⁶ Section 3, *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

consent to entry of the land; if consent was not possible, a notice was meant to be served upon the occupier of the land, which was meant to be given not less than seven days' prior, noting intention to enter the land.⁶⁷

The first instance of compensation is noted under Section 5 of the Act, which states that the Commissioner was meant to compensate in full, for any damages resulting from the entry into the land.⁶⁸ It is important to note that this first compensation done, was only meant to compensate the damage caused at entry level and not for the entire land.⁶⁹ The Act then proceeded to state that where the land was acquired compulsorily, full and prompt compensation was to be made to all the parties that had an interest in that particular land.⁷⁰

Before compensation was made, a number of requirements had to be met:⁷¹

- The Commissioner was meant to lodge a hearing of claims of compensation by any person claiming interest to the land in question.
- The Commissioner was meant to inquire and ascertain who are the interested parties to the land.
- The value of the land being acquired had to be determined by the Commissioner.
- If upon confirmation, there was more than one person having interest in the land, the Commissioner had to determine was the compensation payable to each of the parties involved.
- Every interested party involved in the land acquisition process i.e. the Public body which the land is being acquired for and the party claiming interest, had a right to be heard at an inquiry.

Upon conclusion of the inquiry of compensation, the Commissioner was meant to make a written award, separately for each of the party that had been determined to have a valid interest in the land in question.⁷² The Commissioner was to then give notice to the interested parties of the award and offer of compensation.⁷³ The Commissioner was to then make payments of the compensation within reasonable time after issuing the notice of award;⁷⁴

⁶⁷ Section 4, *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

⁶⁸ Section 5, *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

⁶⁹ Section 5, *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

⁷⁰ Section 8, *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

⁷¹ Section 9(3), *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

⁷² Section 10, *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

⁷³ Section 11, *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

⁷⁴ Section 13(1), *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

This formed what was known as a conclusive award. It is important to note that in some instances, an award could be deemed invalid through the following circumstances:⁷⁵

- The Interested party does not consent to the award given
- There is no person with the authority/competence to receive the award.

ii. The National Land Policy on Compulsory Acquisition:

The National Land Policy has notably informed the legal framework concerning compulsory acquisition, having two drafts of 2007 and the final draft of 2009.⁷⁶ Under the 2007 draft of the Policy, it noted that the established procedures for compulsory acquisition are either abused or not followed, leading to irregular acquisitions.⁷⁷ The Policy proposed:

- That, the Government Review the law on compulsory acquisition.
- That, the institutional framework for compulsory acquisition be harmonised to avoid clashing roles.
- That, a criterion dealing with compulsory acquisition be established, and the need to ensure that processes and procedures are efficient, transparent, and accountable.
- That, the Government Institute legal and administrative mechanisms for the exercise of the power of compulsory acquisition by the State through the National Land Commission.
- That Government should confer pre-emptive rights on the original owners or their successor in title where the public purpose or interest justifying the compulsory acquisition fails or ceases.

The final draft of the Policy in 2009, further elaborated on the issue of compulsory acquisition and compensation in a number of ways:

- By defining it to mean the power of the State to acquire any title or other interest in land for a public purpose, subject to prompt payment of compensation.⁷⁸
- By elaborating on the aspect of development control; the policy defines it to mean the power of the State to regulate property rights in urbanised and rural land, and is

⁷⁵ Section 13(1), *Land Acquisition Act* (Cap 295 of 1968) (Repealed).

⁷⁶ Foreword, *National Land Policy*, Ministry of Lands, Sessional Paper Number 3, 2009, vii.

⁷⁷ Article 46, *Draft National Land Policy*, 2007, 10.

⁷⁸ Article 45, *National Land Policy*, Ministry of Lands, Sessional Paper Number 3, 2009, 11.

based upon the duty of the State to promote public interest in land use.⁷⁹The Policy provides that in matters of development control, the State shall ensure compensation is made where development control amounts to compulsory acquisition.⁸⁰

- The Policy noted that there was need for the Land Acquisition Compensation Tribunal to review its functions to adapt and assert its relevance in matters of compulsory acquisition and compensation.

b) Post 2010 Constitution of Kenya

i. The Constitution of Kenya (2010)

It was with the taking into account the recommendations of the National Land Policy that Article 40 of the Constitution promulgated that every person has a right to own property, either individually or in association with others.⁸¹It further provides that the State shall not deprive any person arbitrarily of their property, unless it concerns public interests; and the deprivation of the property in question, must be carried out in accordance with the provisions of the Constitution and an legislation that requires that just compensation be made in full and as soon as possible.⁸² The Constitution set the foundation that led to enactment of other laws that delved into the issue of compulsory acquisition and just compensation; this is seen where it gives directive that the Parliament is to revise, consolidate and rationalise existing land laws.⁸³

ii. The Land Act

Just compensation under the Land Act of Kenya is defined as a form of fair compensation that is assessed and determined through the criteria set out under the Act.⁸⁴

The aspect of just compensation is then reiterated in The Land Act of Kenya, where the Act provides that just compensation should first be made for any damages resulting from entry into the land for inspection;⁸⁵and upon acquiring the land compulsorily, just compensation shall be made in full and promptly, to every party that establishes they have a legitimate

⁷⁹ Article 48, *National Land Policy*, Ministry of Lands, Sessional Paper Number 3, 2009,12.

⁸⁰ Article 51(f), *National Land Policy*, Ministry of Lands, Sessional Paper Number 3, 2009,13.

⁸¹Article 40, *Constitution of Kenya* 2010).

⁸²Article 40(3) (b) (i), *Constitution of Kenya* (2010).

⁸³ Article 68(a), *Constitution of Kenya* 2010).

⁸⁴ Section 2, *Land Act* (Act No 6 of 2012).

⁸⁵Section 109, *Land Act* (Act No 6 of 2012).

interest in the property in question.⁸⁶ The Act then proceeds to provide that compensation can be done in a number of ways such as; allocating an alternative parcel of land that has similar value, comparable geographical location and land use to the land compulsorily acquired, monetary payment among other forms of payment.⁸⁷

The Act additionally states that payment of compensation shall be made only upon the exercise of due diligence which shall include a final survey and the determination of acreage, boundaries, ownership, and value.⁸⁸

iii. The Land Value (Amendment) Act

The Land Value Index Laws (Amendment) Act of 2019 provides a criterion of what is to be viewed as just compensation in the Kenyan context. The Act provides that there shall be a criterion to determine valuation and compensation for free hold, community and lease hold land.⁸⁹ The Act further provides that there be an amendment to Section 2 of the Land Act, to introduce the definition of just compensation as being a form of fair compensation that is assessed and determined through criteria set out under the Act.⁹⁰

Several requirements are provided by the Act, to be taken into consideration during in determining what would amount to just compensation:

- a. That the compensation be made in good faith;
- b. damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of severing the land from other land;
- c. damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of intention to acquire the land;
- d. the number of persons in actual occupation of the land for an uninterrupted period of twelve years immediately before the publication of notice of intention to acquire the land;
- e. improvements done before the date of publication in the Gazette of the notice of intention to acquire the land;

⁸⁶ Section 111(1), *Land Act* (Act No 6 of 2012).

⁸⁷ Section 111(1B), *Land Act* (Act No. 6 of 2012).

⁸⁸ Section 119, *Land Act* (Act No. 6 of 2012).

⁸⁹ Section 6, *Land Value Index Laws (Amendment) Act* (No 15 of 2019).

⁹⁰ Section 2, *Land Value Index Laws (Amendment) Act* (No 15 of 2019).

- f. damage sustained or likely to be sustained by the occupants of the land at the time of the Commission's taking possession of the land injuriously affecting other property, whether movable or immovable or in any other manner affecting the person's actual earnings;
- g. if, in consequence of the acquisition, any of the occupants of the land will be compelled to change residence or place of business, the payment of reasonable expenses is to be determined by the Commission.⁹¹

iv. Land Assessment of Just Compensation rules

The rules were promulgated by the National Land Commission to give effect to the provisions of the Land Act, which states that the Commission shall draft rules to regulate the assessment of just compensation.⁹² The rules stipulate that the National Land Commission shall determine the amount to compensate (just compensation) victims of compulsory acquisition, based on the market value of the land in question.⁹³ Additional factors to be considered as stipulated by the rules *inter alia* include reasonable expenses incidental to the relocation any of the people with interests in the land or persons who will have to change residence or their place of business due to the acquisition process and,⁹⁴ damages resulting as a loss of profits the land yielded between the gazetted date by the commission of the intention to acquire and the date of actual possession by the National Land Commission.⁹⁵

The above provisions show the efforts by the Kenyan Legal System to provide a scope of what will amount to fair valuation and just compensation in the process of compulsory acquisition however, it does not fully address all the tenets that are required to define just compensation. The provisions stated above do not provide the principles that should guide just compensation, it also heavily places emphasis on the monetary aspect of compensation whereas the correct position should be striking a balance between the monetary and non-monetary aspects of compensation

⁹¹Section 6, *Land Value Index Laws (Amendment) Act* (No 15 of 2019).

⁹² Section 111(2), *Land Act* (No 6 of 2012).

⁹³ Rule 4(1), *The Land (assessment of Just Compensation) Rules* (2017).

⁹⁴ Rule 3(d), *The Land (assessment of Just Compensation) Rules* (2017).

⁹⁵ Rule 3(e), *The Land (assessment of Just Compensation) Rules* (2017).

2.2. ANALYSIS OF THE LEGAL FRAMEWORK

Introduction

Having looked at the legal provisions on compulsory acquisition, and specifically the aspect of just compensation, the following can be inferred:

- a. The Legal provisions over time, have tried to explain in detail how compulsory acquisition should operate and where compensation is necessary.
- b. That, there provisions over time have presented a number of limitations in defining what just compensation should amount to.

This section of the chapter thus discusses the various limitations that the laws on compulsory acquisition presents in defining what amounts to just compensation.

The limitations are as follows:

A. Just Compensation has been partially defined

The law has made a notable endeavour to resolve the issue of just compensation by acknowledging it under the Constitution,⁹⁶and addressing the same under various Sections of the Land Act of Kenya.

The Land Act defines just compensation as a form of fair compensation that is to be decided through the criteria provided by the provisions of the Act.⁹⁷ This definition at face value is rigid, as it limits what amounts to just compensation to the provisions of the Land Act only, this presents a problem as some important aspects of just compensation which are not captured within the Act, may not be considered during interpretation of the same, which may result to the Courts setting inaccurate precedents, when handling matters of just compensation.

⁹⁶ Article 40(3) (b) (i), *Constitution of Kenya* (2010).

⁹⁷ Section 2, *Land Act* (Act No 6 Of 2012).

B. Just Compensation has been limited to the scope of financial compensation

This limitation is premised on the argument that just compensation, is not only limited to financial compensation but is most importantly based on individual preferences, including the preferences of the person the land is being taken away from.⁹⁸ This is to mean that, paying victims of compulsory acquisition in terms of monetary compensation alone, and presuming that they have been fully and justly compensated is a wrong argument.

Some losses occurring from occurring from compensation take up non-monetary forms such as the following:

- Monetary compensation cannot match the loss that one person faces due to the sentimental attachment they have to the property or to the community where the land property lies.⁹⁹
- It is difficult, for monetary compensation to compensate the spiritual attachment that communities have to the land they live on.¹⁰⁰ From the perspective of Traditional African Communities, land did not was not utilised only for social and economic benefits, but was also viewed as a medium of binding together the intra and inter-generational social and spiritual relations; in addition, land among communities is viewed as to belonging to the living, the dead and the unborn.¹⁰¹
- Monetary compensation, deprives the victims of compulsory acquisition, the personal choice they have of considering whether to keep the land in question or perform any other transaction with it.¹⁰²

Another challenge of limiting just compensation to financial compensation, is that it excludes the victims of the acquisition from gaining any wealth that the land may generate in the future;¹⁰³ for example, when land is acquired for building a railway line or a railway station, it increases the value of the land from its initial value, as it receives more economic gain.

⁹⁸ Wyman MK, 'The Measure of Just Compensation'41 *University of California*239, 2007,254.

⁹⁹ Wyman MK, 'The Measure of Just Compensation'41 *University of California*239, 2007,255.

¹⁰⁰ Bonaya A.G,' Compulsory Acquisition and the Right to Property: The Gaps in the Legal Framework, Practices and Possible Solutions' Published Dissertation, Strathmore University, Nairobi, 2018, 10.

¹⁰¹ Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016,152.

¹⁰² Wyman MK, 'The Measure of Just Compensation'41 *University of California*239, 2007,255.

¹⁰³ Wyman MK, 'The Measure of Just Compensation'41 *University of California*239, 2007,255.

In the case of *Mike Maina Kamau v Attorney General*, the court adopted the following view on compensation, “...*that sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.*”¹⁰⁴

Similarly, in the case of *Patrick Musimba v National Land Commission & 4 others*, the Court held that for just compensation to be achieved, the victim must receive a price equal to the monetary loss suffered; and that this can only be realised by referring to the market value of the land.¹⁰⁵

In the Petition case of *Erastus Njonjo Mote & 3 others v Attorney General & 2 others*, the Petitioners contended that the Respondents had not compensated them adequately when their land was compulsorily acquired for purposes of constructing the Northern Bypass, and sought a re-evaluation of the compensation they had initially received.¹⁰⁶ Though the court dismissed the prayers sought for re-evaluation of the compensation, it was still of the view that, if valuation was to be done, it should have been from a monetary based approach.¹⁰⁷

C. The Timeframe for Compensation has not been Clearly Defined

Both the Constitution of Kenya and the Land Act, provide that just compensation shall be made promptly and in full to all parties that have been established to have a legitimate interest in the land.¹⁰⁸ The Land Act additionally adds, that after notice of an award is given, compensation shall be done promptly by the National Land Commission.¹⁰⁹ This presents an issue, as the term ‘promptly’, can be open to self-interpretation by the body compulsorily acquiring the land and therefore lead to delayed just compensation of the affected victim(s), as the provisions do not provide a clear or rather specific time frame for just compensation to occur. The Act further states that The Commission shall, as soon as is practicable, pay full and just compensation to all persons interested in the land;¹¹⁰ this similarly presents the issue of leaving the time-frame of compensation to self-interpretation

¹⁰⁴ *Mike Maina Kamau v Attorney General* (2017) eKLR.

¹⁰⁵ *Patrick Musimba v National Land Commission & 4 others* (2016) eKLR.

¹⁰⁶ *Erastus Njonjo Mote & 3 others v Attorney General & 2 others* (2017) eKLR.

¹⁰⁷ *Erastus Njonjo Mote & 3 others v Attorney General & 2 others* (2017) eKLR.

¹⁰⁸ Section 111, *Land Act* (Act No. 6 of 2012) and Article 40, *Constitution of Kenya* (2010).

¹⁰⁹ Section 115, *Land Act* (Act No. 6 of 2012).

¹¹⁰ Section 125(1), *Land Act* (No. 6 of 2012).

by the relevant authorities and thus leading to the delaying of payment to the victims of compulsory acquisition.

2.3. Case Studies on the Issue of inadequately defining Prompt Compensation

In a number of cases, the failure of defining the term ‘promptly’ has led to delayed compensation of the victims whose property had been compulsorily been acquired.

For example, the Standard Gauge Railway case study seen in the case of *Africa Gas and Oil Company Limited v Attorney General & 3 others*, where the Kenya Railways Corporation had compulsorily acquired land for purposes of construction of the Standard Gauge Railway. Despite the Court ruling in favor of the Applicant and ordering the Respondent to make compensation, it was reported that many of the victims of the compulsory acquisition had not been compensated as late as two years after compensation was to take place.¹¹¹

In another case study of the construction of the Embakasi-Machakos turn off and Machakos turn off- Sultan Hamud Road, seen in the case of *Mathatani Limited v Commissioner of Lands*, the Petitioner’s land had been compulsorily acquired and compensation was made four years after the land was appropriated from the petitioner. The Court held that the compensation that was made to the plaintiff, was not valid as it was not made in accordance with the provisions of the law.¹¹²

From this case, it is clear that the respondent delayed compensation of the land that was compulsorily acquired by virtue of not having a clear time frame by the law on when compensation should be made, and therefore led to unjust compensation.

Conclusion

From the analysis made in this chapter, on the legal framework of compulsory acquisition and more specifically, just compensation, it is clear that the gaps within the law must be rectified to eliminate ambiguities when it comes to just compensation. The next two chapters, therefore, shall provide the necessary guiding tools, to provide an expansive scope of what should amount to just compensation.

¹¹¹‘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 5 December 2019.

¹¹²*Mathatani Limited v Commissioner of Lands* (2013) eKLR.

CHAPTER 3: GUIDING PRINCIPLES AND CONCEPTS TO CONSIDER WHEN DEFINING JUST COMPENSATION

Introduction

As has been identified in the previous chapters, the legal framework covering compulsory acquisition, is silent as to what amounts to just compensation. This chapter, therefore, shall propose principles and concepts that should be considered, in defining what amounts to just compensation.

The principles discussed herein, shall ensure that the definition of just compensation, also encompasses the non-monetary aspect within its scope.

The following should be used as a guide in matters of just compensation:

A. PRINCIPLE OF RESTITUTION

The principle of restitution finds its basis in equity. Black's Law Dictionary defines equity to mean what is just, conforming to the principles of natural justice, is right, fair and is correct in consideration of the facts and circumstances of an individual in a particular case.¹¹³ Equity has also been described as focusing of justice to individuals and overriding set out rules.¹¹⁴

Merriam Webster Dictionary views restitution in two ways namely: the act of restoring something to its rightful owner or making good (compensation) of or giving an equivalent for some injury; it also provides restitution to mean legal action having the purpose to bring about restoration of a previous state.¹¹⁵

These definitions of terms provided above, help put into perspective, the factors that are/ should be considered when defining the principle of restitution, which are as follows:

- a. Where one party is enriched (receives a gain) at the expense of the claimant in question, the party that has received the gain, the best remedy would be one of an equitable nature, specifically that of restitution.¹¹⁶

¹¹³ Black's Law Dictionary, 2 ed.

¹¹⁴ Getzler J, *Rationalizing Property, Equity & Trusts*, 1 ed, Lexis Nexis Butterworths, United Kingdom, 2003, 85.

¹¹⁵ Merriam Webster Dictionary, 11 ed.

¹¹⁶ Getzler J, *Rationalizing Property, Equity & Trusts*, 86.

- b. Although showing enrichment may be a valid ground for restitution, it may be in some circumstances, not necessary.¹¹⁷ The mere fact that a wrongdoing occurred even though enrichment cannot be proven, is a sufficient reason for restitution.¹¹⁸

Relating this principle to just compensation; the State acquiring land from the initial occupier, can be seen as a form of enrichment by the State i.e. the land acquired by the State shall be used for development purposes and increase in value at the expense of the person or people whose land has been possessed. Therefore, just compensation must take into account that the enrichment of the state is at the expense of the victim of compulsory acquisition and thus compensation must be done in a manner that is right, fair and considers every aspect of the facts and circumstances of the person or people in question. This would therefore mean, that just compensation should also consider the non-monetary aspects that have been explained in the previous chapters. In addition, where there was wrongful compulsory acquisition, just compensation should consider the principle of restitution, to ensure accountability when compensating and eradicate land injustices.

The absence of this principle has been seen in the Kenyan legal framework under the well documented case of the Ogiek Community in the African Court on Human and Peoples' Rights (AfCHPR); the case notes that the Government of Kenya compulsorily acquired and forcefully evicted the Ogiek Community from their residence within the Mau forest, in which was their main source of economic, social, and spiritual livelihood.¹¹⁹ The Court held that the Government of Kenya had illegally acquired and evicted the Ogiek Community; and that among the several arguments posed such as the area being a water catchment area did not alone suffice.¹²⁰ Despite the Court granting the judgement in favour of the Ogiek Community, no form of restitution nor compensation has been documented since, in any case, recent reports indicate that the Ogiek community is still being forcefully evicted from their land within the Mau Forests.¹²¹

¹¹⁷ Getzler J, *Rationalizing Property, Equity & Trusts*, 86.

¹¹⁸ Getzler J, *Rationalizing Property, Equity & Trusts*, 86-87.

¹¹⁹ *ACmHPR v Republic of Kenya*, ACmHPR Comm.006/2012 (2017).

¹²⁰ *ACmHPR v Republic of Kenya*, ACmHPR Comm.006/2012 (2017).

¹²¹ Minority Rights Group: Kenya Flouts African Court Judgment, Continues to Evict Ogiek in the Midst of COVID-19 Pandemic, < <https://minorityrights.org/2020/07/17/ogiek-evictions/>> on 27 October 2020.

Therefore, there is need for the tenets of the principle of restitution be incorporated in the Kenyan legal framework to ensure that the enrichment of the State does not come at the expense of the victims whose land has been compulsorily been acquired.

B. PROPERTY IS VALUE-LADEN:

The first principle connotes that property accepts a particular set of values.¹²²This is to mean that when viewing any form of property, it should be considered as to follow certain values; for example in Kenya, the Constitution of Kenya provides that land should be managed in accordance with certain principles such as transparent and cost effect administration of land, ensuring security of land rights, among others.¹²³Another example would be as seen in traditional practice, where land was governed by traditional customary values and practices under the leadership of the traditional leaders.¹²⁴

This principle notes that it is not enough to view property in the sense of being owned (for example: I own a piece of land) but should acknowledge that in every property, there exists a right to that property.¹²⁵ Therefore, for just compensation to be carried out in the right manner, it must take into account that the property such as land is not just mere physical property, but that there are certain rights attached to that land that should be considered; for example, if the State or any entity that wishes to acquire communal land in Kenya, it making compensation, the body in question should also consider the rights relating to Communal land as provided under the Constitution of Kenya.¹²⁶

Perhaps to expound more on the argument that the value of property such as land, proceeds beyond the physical aspect i.e. one cannot always equate property with physical things; one could take note that in Traditional African Communities, land is not just used for economic gain, but it is a source of spiritual ties, connecting the living with the ancestors as has been explained in the previous chapters.

It is thus paramount, that for just compensation to be conclusively defined, it must acknowledge that land exceeds beyond its physical aspect, and therefore must into account

¹²²McFarlane B, Hopkins N and Nield S., *Land Law Text, Cases & Materials*, Oxford University Press, New York, 2009, 32.

¹²³Article 60, *Constitution of Kenya* (2010).

¹²⁴Food and Agriculture Organization of the United Nations (FAO), 'Compulsory acquisition of land and compensation' *Land Tenure Studies* (2009), 34.

¹²⁵McFarlane B *et al*, *Land Law Text, Cases & Materials*, 33.

¹²⁶ Article 60, *Constitution of Kenya* (2010).

more than the monetary aspects such as the market value of the land, and ensure the non-monetary aspects such as the ties the person(s) has towards that land, is also considered.

C. PRINCIPLE OF LEGITIMACY IN PROPERTY

Ben McFarlane *et al* in their book, describe this principle as to mean that when one claims a certain piece of property such as land, they have a right to that property in question.¹²⁷ Having a right to that land, means that one has the right to a certain degree of control over that property and to that effect, gives the person with the right to that property, a legitimate claim to that property.¹²⁸ From the above explanation, one can therefore infer that a legitimate claim in property can only arise where one has proved that they have a right in that property in question.

In the Kenyan context therefore, when the State wishes to compulsorily acquire land, it must establish that they have a legitimate claim under the provisions of Article 40(3) of the Constitution of Kenya.¹²⁹ Similarly, the person whose land is being appropriated must show for purposes of just compensation, which they had a right(s) in the land they were in, so that these rights, may be considered in awarding of the compensation to them. Some of the rights may include the right to own property enshrined under the provisions of Article 40 and Article 65 of the Constitution of Kenya.¹³⁰

D. THE CONCEPT OF SEISIN POSSESSION:

This concept, founded in Common law, states that proprietary rights present in land are based on physical possession and not so much focusing on the idea of having proof of ownership such as a title deed.¹³¹

Under Common Law, being in physical possession of land created a free hold interest to the occupier of the land, which meant that the owner had complete control over the land.¹³²

The only way that possession by the actual occupier could be overpowered, was if another entity had a superior claim to that land.¹³³

¹²⁷ McFarlane B *et al*, *Land Law Text, Cases & Materials*, 33-34.

¹²⁸ McFarlane B *et al*, *Land Law Text, Cases & Materials*, 33-34.

¹²⁹ Article 40(3) (b) (i), *Constitution of Kenya* (2010).

¹³⁰ Article 40 and Article 65, *Constitution of Kenya* (2010).

¹³¹ Gray K. and Gray SF, *Land Law*, 4ed, Oxford University Press, New York, 2006, 91.

¹³² Gray and Gray, *Land Law*, 94.

¹³³ Gray and Gray, *Land Law*, 94.

In the case of *Peaceable d Uncle v Watson*, the Court held that it was key for possession to be proved to serve as evidence to show seisin in a fee simple matter.¹³⁴

The importance of seisin was seen in the case of *London Borough of Harrow v Qazi*, where it was held that even if the person who is in actual possession of the land has no title to the same, they have the right to live peacefully on their property without interference from anyone except when there is another party that poses a better right to possession.¹³⁵

Gray and Gray in their book, solidify this point by quoting a section of a speech noting that a person who is possession even though has no right has a greater right than one a person who is out of possession and has no right as well.¹³⁶

Therefore, relating this to just compensation; when defining just compensation, it must take note of the fact that possession is an important aspect which will influence the form of compensation will take. When the concept of seisin possession is taken into account, the State will then have to compensate not only from a monetary perspective but from a perspective that considers the initial possessor as one who has a right to fair compensation and receiving their correct due by virtue of having a freehold interest in the land. In simple terms, the state in considering seisin possession, will compensate the owner of the land as if they were still the sole proprietor of the land and not as victims of compulsory acquisition.

The concept of seisin possession is also important as it tries to create a balance of interests. Whereas the initial owner has a common law generated free hold interest as has been seen above, if the State can prove that they have a better right to possession such as on grounds of public interest, as has been seen in the *London Borough case*, then an amicable agreement can arise between the person whose land has been acquired and the state, which will lead to just compensation.

Conclusion

From the analysis made above, it is evident that just compensation must borrow from different concepts and principles that have been well established to define just compensation conclusively and incorporate further than the monetary aspect of compensation, the non- monetary aspects as well, in order to have a complete definition.

¹³⁴ *Peaceable d Uncle v Watson* (1811).

¹³⁵ *London Borough of Harrow v Qazi* (2004) United Kingdom House of Lords.

¹³⁶ Gray and Gray, *Land Law*,94.

CHAPTER 4: COMPARATIVE ANALYSIS OF JUST COMPENSATION BETWEEN KENYA AND SOUTH AFRICA

A. Introduction

To properly define just compensation within the Kenyan legal system, it is necessary to view how it has been interpreted in legal systems of other jurisdictions. This chapter thus, shall briefly look at how the just compensation is viewed in South Africa and compare it to the Kenyan legal system, as South Africa offers substantive jurisprudence on the critical aspects required in achieving the issue of just compensation.

4.1. ANALYSIS OF THE LEGAL FRAMEWORK

The pinnacle of just compensation in South Africa is enshrined in its constitution. It provides that where land is expropriated, compensation shall be made subject to which, the amount, time and manner of compensation shall be agreed by the victims whose land was compulsorily acquired or decided by a competent court.¹³⁷

It further states compensation shall be done in a just and equitable manner; equitable to mean that there should be equity between public interests and the interests of those who have been affected by the expropriation process.¹³⁸ For there to be just and equitable compensation, the Constitution of the Republic of South Africa notes that some of the factors to be considered are as follows:¹³⁹

- The history of how the property was acquired and how it has been used.
- How the property is being currently used?
- The current market value of the property in question.
- The purpose for acquiring the property.
- The extent of direct state investment and the amount it would cost to make improvements to the property.

¹³⁷ Article 25(2) (b), *Constitution of The Republic of South Africa* (1996).

¹³⁸ Article 25(3), *Constitution of The Republic of South Africa* (1996).

¹³⁹ Article 25(3), *Constitution of The Republic of South Africa* (1996).

Under South African jurisprudence, the courts have held as follows:

In the case of *Abraham Lama Wollach N.O. & Another v The Government of the Republic of South Africa & 3 Others*, the court held that the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, and having regard to all relevant circumstances.¹⁴⁰

In the case of *Johannes UYS N.O & Another v Msindo Phillemon Msiza & 2 Others*, the court was of the opinion that though determining the market value would be a convenient starting point for matters of compensation, it would not necessarily achieve equitable and just compensation; in order to achieve just compensation, other relevant factors should also hold as much weight as the aspect of market value.¹⁴¹

In the case of *Ash and Others v The Department of Land Affairs*, the court was of the opinion that the correct formula to achieving just and equitable compensation would be by determining the market value of the property in question and thereafter adding to or subtracting from the amount of the market value, as other circumstances may require.¹⁴²

It is important to note that legal framework of South Africa brings to light key issues necessary in the process of just compensation. To begin with, in determining the amount that shall be considered for just compensation, the law requires that the victims of compulsory acquisition be involved in the determination of the award process. This is critical, as the victims of the acquisition will be able to outline the non-monetary aspects of the land they possessed; for example, where a community land is involved, the tenants of the land will be able to identify non-monetary ties present to the land, such as spiritual and sentimental ties that the land may possess.

The other critical non-monetary consideration that presents itself from the legal framework of the South African jurisdiction, is the need to balance the interests of the state and victims of the process of acquisition. As has been mentioned earlier, just compensation must seek

¹⁴⁰ *Abraham Lama Wollach N.O. & Another v The Government of the Republic of South Africa & 3 Others* (2018), Land Claims Court of South Africa.

¹⁴¹ *Johannes UYS N.O & Another v Msindo Phillemon Msiza & 2 Others* (2017), Supreme Court of Appeal of South Africa.

¹⁴² *Ash and Others v The Department of Land Affairs* (2000), Land Claims Court of South Africa.

not to only benefit the state acquiring the land in question but also benefit the victims whose land has been acquired.

From the analysis made in the Kenyan jurisdiction from the previous chapter, the victims of compulsory acquisition are not involved in the process of determining what is just compensation, as that role has been specifically been assigned to the National Land Commission, therefore poses the danger of omitting significant considerations that the victims may have, that would form part of the just compensation process.

Additionally, as has been seen with the case studies in the previous chapters, the issue of not defining what the term promptly means, and not fully defining what is just compensation, has denied the achievement of balancing the interests of the state and the victims of acquisition, as the State benefits more from the process, than the victims themselves therefore causing land injustices and unequitable compensation.

Comparing this to South Africa's perspective of just compensation, it is notable that South Africa's legislation has taken into consideration, more than just the monetary aspect, when it comes to just compensation. This is seen where the Constitution of the Republic of South Africa notes aspects of looking the history of the land, balancing public interests versus the rights of those affected by the expropriation of land and the present and past use of the land in question.¹⁴³

B. Conclusion:

It is evident from the analysis made herein, just compensation within the South African jurisdiction does not limit compensation to the monetary aspect only but other relevant circumstances hold as much weight and significance in order to achieve just and equitable compensation. Therefore, it is necessary that the law on just compensation in Kenya be reviewed in order to ensure that all relevant circumstances i.e. monetary and non-monetary, are taken into consideration without devaluing or disregarding any of the circumstances involved or stipulated by the law.

¹⁴³ Article 25(3), *Constitution of The Republic of South Africa* (1996).

CHAPTER 5: CONCLUSIONS, FINDINGS AND RECOMMENDATIONS

A. INTRODUCTION

It is evident through the research conducted herein, there have been notable efforts by the Kenyan legal system to define what amounts to just compensation, however, the monetary aspect such as the market value *inter alia*, has been overly emphasised, neglecting the other relevant factors that should be considered to achieve just compensation.

To briefly summarise the chapters discussed in this study, Wyman in his paper, states that the end of just compensation is to ensure that each victim of compulsory acquisition is compensated in a manner such that they would not tell the difference as to whether compulsory acquisition took place or not.¹⁴⁴

To put into further perspective, in the case of *Armstrong v United States*, the court held that the purpose of compensation is to prevent the Government from forcing some people to bear public burdens alone; which should be borne by the entire public in order to promote justice and fairness.¹⁴⁵

5.1. FINDINGS

The study herein had set out to achieve *inter alia* the following objectives:

1. To assess the effectiveness of the laws guiding just compensation and the compliance towards them, in the process of compulsory acquisition in Kenya.
2. To identify the ambiguities, present in defining just compensation in Kenya and examine the scope of the same i.e. what aspects should just compensation cover apart from the monetary aspect.

¹⁴⁴ Wyman MK, 'The Measure of Just Compensation,' 243.

¹⁴⁵ *Armstrong v United States* (1960), United States Supreme Court.

Upon completing the objectives set, the following are the findings that the study produced:

1. That the law in Kenya places excess emphasis on monetary compensation as to amounting just compensation, in the process of compulsory acquisition. This has been evidenced the legislations reviewed such as the Land (Assessment of Just Compensation) Rules among others, which states that the National Land Commission shall determine an award of compensation based on the market value of the Land.¹⁴⁶ Additionally, case precedents in the Kenyan jurisdiction also seem to lean towards monetary compensation as to amount to just compensation.
2. That the failure to define just compensation properly has led to land injustices. This can be evidenced by the case studies herein such as the Standard Railway Gauge case where it has been reported that the victims of the land that was acquired for the purposes of the railway, have not yet been compensated as late as two years since the delivery of the judgement against the State compelling it to compensate the victims in question.
3. That despite the efforts by the Kenyan Law to define what is just compensation, it fails to include the non-monetary aspect of the same. This has led to the exclusion of important aspects critical in deciding matters of just compensation.
4. That during the process of compulsory acquisition and just compensation, there is lack of a balance of interests. This has been evidenced by the delays in payment of just compensation by the State upon completion of the process of compulsory acquisition, for example, in the case of case of *Mathatani Limited v Commissioner of Lands*, the Petitioner's land had been compulsorily acquired and compensation was made four years after the land was appropriated from the petitioner.¹⁴⁷
5. The study additionally put to task the hypothesis, "the definition of what amounts to just compensation during the process of compulsory acquisition, is limited to monetary compensation under the Kenyan law, and has failed to include the non-

¹⁴⁶ Rule 4(1), *Land (Assessment of Just Compensation) Rules* (2017).

¹⁴⁷ *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

monetary aspects of the same,” and determined that the hypothesis is true. From the analysis made through the entire study herein, it has been significantly proven and evidenced that the Kenyan legal framework has defined just compensation to largely mean only monetary compensation.

5.2. RECOMMENDATIONS

Having critically analysed and identified the various gaps in the legal system in conclusively defining just compensation, the study proposes the following recommendations to solving the issue of conclusively defining just compensation:

1. That when defining just compensation, the Kenyan legal system should consider the non-monetary aspects involved during compulsory acquisition such as spiritual attachments of ancestral lands, personal attachments to a community, loss of a community among others that have been discussed throughout the study.
2. That in defining just compensation, it should consider the significant common law equitable principles such as restitution and its underlying principles, the concept of seisin possession and the other principles noted in chapter three of this study. By incorporating the mentioned principles, it shall be easier to include the non-monetary aspects of just compensation when defining the same. This will eventually result to having a more inclusive and fair process that will accommodate the interests of both the State and the victims of the land that has been acquired compulsorily.
3. That the amount of compensation to be given to the victims of compulsory acquisition, be agreed upon by both the victims of the compensation and the entity acquiring the land in questions this will bring about, as has been discussed in the previous chapter, balancing of the interest of the victims of compulsory acquisition and public interests.
4. That the term ‘promptly’ be defined conclusively i.e. that a fixed time frame be given to state what amounts to promptly. By having a practicable and reasonable timeframe for compensation, it shall reduce the risk of entities involved in the process of just compensation and compulsory acquisition on self-interpreting the

time period required to compensate the victims of acquisition and eventually lead to the reduction of land injustices.

5.3. CONCLUSION

The Study herein embarked to address the issue presented in the statement of the problem i.e. ‘For just compensation to be fully defined, it must consider that the same precedes monetary compensation and that the non- monetary aspects are also a key factor in fully defining the same. The law provides a limited scope on just compensation, as it restricts just compensation to monetary compensation to a large extent. Therefore, if this issue is not addressed, a great number of people shall not be justly compensated and their right to property shall be infringed.’

From the analysis made in the subsequent chapters, one can conclusively state that the issue presented above has been sufficiently addressed.

It is important, that moving forward, the legal framework concerning just compensation, be revised to ensure that the gaps within the legal provisions are covered and rectified; to also ensure that the courts moving forward, set correct precedents and ultimately ensure that there is fairness and justice within this specific area of law.

In conclusion, the end of just compensation should be as has been stated in the *Abraham Lama Wollach case*, compensation that reflects an equitable balance between the public interests and the interest of those affected.¹⁴⁸

¹⁴⁸ *Abraham Lama Wollach N.O. & Another v The Government of the Republic of South Africa & 3 Others* (2018), Land Claims Court of South Africa.

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