

THE RIGHT TO LAND AND THE PROBLEM POSED BY COMPULSORY ACQUISITION OF COMMUNITY LAND

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DECLARATION

I, RUBY BUYAKI SIMIYU, 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.

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Date:28th July 2021.....

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


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[Supervisor's Name]

ABSTRACT

Compulsory acquisition is a legal tool that is used by the state to acquire land from its citizens. Its justification is for a public purpose. It is a principle enshrined in the law that intends to strike a balance between the interest of the citizens and the public at large. More specific to this study is the compulsory acquisition of community land. This paper aims to look at the gaps in the law that facilitate compulsory acquisition of community land and how it clashes with the principles of communal land holding. Primarily it shall focus on the prompt and just compensation to the community(s) whose land is being compulsorily acquired, guaranteed in law and the ambiguity this presents both in law and in practice. It shall also focus on the failure by the state to take into consideration the values, customs and practices of communities related to the land. It will be supported by journal articles, reports and case law both local and foreign. Finally the paper will conclude by attempting solutions that legislators and policy makers can take into consideration when making laws and policies regarding compulsory acquisition of community land.

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

ASALS- Arid and Semi-Arid Lands

FAO- Food Agriculture Organisation of the United Nations

FPIC- Free, prior and Informed Consent

IACtHR- Inter- American Court of Human Rights

NGOs- Non- Governmental Organization

NLC- National Land Commission

EIA- Environmental Impact Assessment

SIA- Social Impact assessment

UDHR- Universal Declaration of Human Rights

WGIP- Working Group on Indigenous Population/ communities of the African Commission

LIST OF CASES

1. *Abdalla Rhova Hiribae & 3 others v Attorney General & 7 others* (2013) eKLR.
2. *African Commission on Human and People's rights v The Republic of Kenya*, ACtHPR Application 006/2012 (in relation to the Ogiek).
3. *Arnacheny Limited v attorney General* (2014) eKLR
4. *Center of Minority Rights Development (Kenya) and Minority Rights Group (CEMIDRE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.
5. Central Kalahari Legal Case No MISCA 52/2002 In the Matter between *Roy Sesana Keiwa Setlhobogwa and 241 others the Attorney General* (2006).
6. *David Kiptum Yator & 2 others suing as Leaders of the sengwer community v Attorney General & 5 others* (2013) eKLR.
7. High Court civil case No MAHLB 000 393-09 In the matter between *Matsipane Mosehlhanyene & another v attorney General* (2011).
8. *Kanini Farm Limited v Commissioner of Lands* (1996) eKLR.
9. *Kichwa indigenous people of Sarayaku v Ecuador*, IACtHR judgment of 27 June 2012 (Merits and reparations).
10. *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR judgment of 31 August 2001, Series C, No. 79, para 149.
11. *Mulwa Gwanombi v Alidina Visram* (1913) KLR 14 52S.R.O 661. 53.
12. *Patrick Musimba v National Land Commission & 4 others*, Petition No. 613 of 2014.
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Land Act (No 6 of 2012).

Land Acquisition Act CAP 295 (Repealed).

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Native Land Trust Ordinance of 1938 (Repealed).

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (India).

The Land (Assessment of Just Compensation) Rules, 2017.

The Land Value (Amendment) Act (Act No. 15 of 2019).

The Trust Land Act 1968 (Repealed).

Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

Valuation for Rating Act, 1967CAP 266

CHAPTER 1: INTRODUCTION

1.1 Background

Because of its cultural, social, ethnic and family dimensions, land in Kenya has a different meaning for different people. Land defines the social, cultural and political identity of a people.¹ As a developing country, land is an important tool for sustainable development. For the elites land is a marketable commodity whose primary function is to generate profit.² Alternatively, to communities who hold and use land together, land to them is a source of livelihood.³ Land for all these groups is of a paramount importance.

Kenya was colonized by the British and lost land to the colonial masters through laws that were passed by the colonial government to alienate land from natives and vest them to the settlers.⁴ This led to loss of private, public and community lands. In the 1920s, it became a common practice for the British to demarcate reserves in its colonies to avail the natives with land to live in and farm from.⁵ Additionally in the 1930s, these lands were vested in an appointed board of trustees in the then 24 reserves in Kenya, improving their security.⁶ When the governor had to issue leases from the reserves to non-natives, the Native Land Trust Ordinance of 1938 required a consultation with the Local Native Council.⁷ Decisions made regarding this land was to be for the benefit of this land although the scope of the benefit was not defined.⁸

A position of trusteeship was then established where the Native Councils of 1950s and elected county councils after independence in 1963 acted as trustees of native lands for the natives⁹ (as they were known then). Among the powers they held was one to reserve parts of Trust lands for various purposes based on their own discretion.¹⁰ This consequentially, extinguished individual, family, group and tribal customary rights to land.¹¹ The Trust Land Act of 1968 later consolidated this power to the Commissioner of Lands and this further had the effect of alienating more land from communities.¹² Such practices continued even with the promulgation of the 2010 constitution and other laws that recognize customary land holding and protection community land.

¹ Kameri P, 'The Land question in Kenya: Legal and ethical dimensions' *Law Africa*, 1.

² Ongunny P, 'Land conflict in Kenya: A comprehensive view in literature' 53 *The East African Review*, 2019, 1.

³ FAQ's- National Land Commission < <https://www.landcommission.go.ke/article/faqs> > on 14th August 2020.

⁴ Kariuki F and Ng'etich R, 'Land Grabbing, tenure security and livelihoods in Kenya' 9 *African Journal of Legal Studies*, 2016, 82.

⁵ Wily L, 'The Community land act in Kenya opportunities and challenges for communities' *African Lii*, 2018, 7.

⁶ Wily L, 'The Community land act in Kenya opportunities and challenges for communities', 7.

⁷ Wily L, 'The Community land act in Kenya opportunities and challenges for communities', 7.

⁸ Wily L, 'The Community land act in Kenya opportunities and challenges for communities', 7.

⁹ Wily L, 'The Community land act in Kenya opportunities and challenges for communities', 7.

¹⁰ Wily L, 'The Community land act in Kenya opportunities and challenges for communities', 7.

¹¹ Wily L, 'The Community land act in Kenya opportunities and challenges for communities', 7.

¹² Wily L, 'The Community land act in Kenya opportunities and challenges for communities', 7.

The constitution of Kenya requires for an act to be passed that recognizes, protects and registers community lands. Community land is land; legally recorded in the name of group representatives under the provisions of any statute¹³, legally passed to a specific community by statute,¹⁴ has been declared to be community land by statute.¹⁵ Further, it consists of land that is legally managed, dealt with, by specific communities as community forests, places to graze or shrines,¹⁶ ancestral lands and lands previously inhabited by hunter- gatherer communities¹⁷ or it could be land that is legally maintained as trust land by the county governments.¹⁸

The Community Land Act of 2016 gives effect to this provision.¹⁹ The act defines community land as land as defined by the constitution and land converted into community land under any statute.²⁰ There are still loopholes in the law as regards compulsory acquisition and just compensation. Compulsory acquisition is provided for.²¹ The Land Value (Amendment) Act was enacted in 2019 with provisions for compulsory acquisition and valuation of just compensation.²² But there are arguments on the insufficiency of the law to cater for just compensation on community and ancestral lands.

1.2 Statement of the Problem

Section 5(4) of the Community Land Act provides, pursuant to Article 40(3) of the Constitution, that an interest or right over community land can be compulsorily obtained by the state for public purposes, as provided by statute. Further, immediate payment of compensation should be availed to the individual(s) whose land has been acquired; complete or negotiated settlement should be assured.

The problem that this paper seeks to analyze is the ambiguity of the laws on compulsory acquisition and determining the quantifying of just compensation as regards community ancestral lands. The valuation of land using factors such as stamp duty payments and tax returns in valuing land by the Land Value (Amendment) Act, subject community lands to the wrong valuation. Further there is inadequate public participation by the local governments and investors during the acquisition.

The law and practice that are used to determine compulsory acquisition and the just compensation of community's ancestral land have not been adequate in the balancing community and public interests.

¹³ Article 63(2) (a), *Constitution of Kenya*, (2010).

¹⁴ Article 63(2) (b), *Constitution of Kenya* (2010).

¹⁵ Article 63(2) (c), *Constitution of Kenya*, (2010).

¹⁶ Article 63(2) (d)(i), *Constitution of Kenya* (2010).

¹⁷ Article 63(2) (d)(ii), *Constitution of Kenya* (2010).

¹⁸ Article 63(2) (d)(iii), *Constitution of Kenya* (2010).

¹⁹ Community Land Act (Act no 27 of 2016).

²⁰ Section 2, *Community Land Act* (Act no 27 of 2016).

²¹ Section 5(4), *Community Land Act* (Act no 27 of 2016).

²² Land Value (Amendment) Act (Act No. 15 of 2019).

1.3 Aims of the study

This study aims to analyze the loopholes in laws that facilitate irregularities and unfairness in the compulsory acquisition and just compensation of community land. Specifically it will look at the laws, practices and principles that determine the value of ancestral lands in compensating for them. The study will also analyze the problem that is created by the lack of proper public participation regarding the investments by the local governments and investors. It is by doing so, that the study seeks to suggest better ways of accessing and compensating for the value of ancestral lands during compensation of community lands and dissemination of information to the communities.

1.4 Limitation of the study

This study deals with community land rights and the compulsory acquisition of such lands by the state. A limitation to it is that it shall not look at whether the communities' title to land is legal and hence whether the land rights are legitimate.

1.5 Hypothesis

This study operates on the assumptions that:

1. Community land should be held and dealt with in a manner that respects and upholds customary land holding values
2. Kenya has a robust legislation on compulsory acquisition of land
3. The scope of and quantifying of just compensation for community land is insufficient
4. That there are better alternatives to balance the communities' interest of right to property and government's public interest of development

1.6 Objectives of the Study

1. To establish whether customary land holding values are important when dealing with community land
2. To examine the laws and practice that deal with the compulsory acquisition of land in a broader context
3. To determine the extent of the insufficiency of just compensation of community land
4. To give recommendations of better ways to compensate for community land.

1.7 Research questions

1. Is the recognition of communal land holding values important in dealing with compulsory acquisition of community land?

2. What are the laws and practices that provide for compulsory acquisition in Kenya of community land?
3. To what extent are the laws and practices that govern compulsory acquisition and just compensation insufficient?
4. How can the laws and practices of compulsory acquisition and just compensation better incorporate traditional land holding values?

1.8 Methodology

The research will primarily rely on secondary data. Scholarly works such as books, journal articles, dissertations and working papers will be heavily relied on. This will help to show the interpretation and practice of compulsory acquisition of community land and the principles behind it. It will be very useful in coming up with recommendations. Further, heavy consideration on legislation and case law in this field of study will be given in this research.

1.9 Chapter breakdown

Chapter 1: Introduction

This chapter gives an introduction of the problem this study seeks to answer.

Chapter 2: Theoretical framework

This chapter provides the theories that support the right to land for communities and the limitation to this right which supports compulsory acquisition by the state.

Chapter 3: Laws and practice that facilitate Compulsory acquisition of Community land and the loopholes therein

This chapter focuses on the National laws and practice that deal with the right to land and compulsory acquisition of community land. Its analysis intends to prove that they have loopholes that occasions irregularities and illegalities to communities.

Chapter 4: Recommendations and Conclusion

Being the last chapter, this chapter gives the conclusions of the study and provides recommendations and a way forward.

2.0 Summary of overall conclusion

The conclusion drawn is that the law and practice that govern compulsory acquisition disregard the values of community land; making them inadequate. The communities end up at a

disadvantage when their land is compulsorily acquired. The compensation does not take the proper form of valuation of community ancestral lands.

CHAPTER TWO: THE RIGHT TO PROPERTY AND COMMUNITY LAND HOLDING

2.1 The right to property

A right as it relates to property is best understood, according to Wesley Hohfeld, as a complex web of relations enforced by law, seen in four dispensations linked to a counterpart: Right-duty, privilege-no right, power-liability, immunity-disability.²³

Rights are an affirmative claim against another as it defines what is owed to the rights' holder and is enforceable.²⁴ Individuals naturally have the right to own property.²⁵ The enforcement of a right gives corresponds to an existing duty. A duty is owed by the duty bearer either to do or refrain from doing something as it relates the right holder.²⁶ The rest of the world will then owe this duty to the individual(s) with the right to property. A privilege is a freedom from the right or claim from another; it is an entitlement to act in a certain way with no threat of disobeying as nothing is expected of one with a privilege.²⁷ Where one has a privilege, others do not have a right. A power is the ability to alter legal and in other cases moral obligations.²⁸ The state has the power to compulsorily acquire ones land.

The proponents of property rights theories expound in detail the importance of property rights. The stance of the judiciary has been to jealously guard over this right.²⁹ The right is recognized in the UDHR, a non-binding legal document. It states that everyone has the right to own property either alone or together with other people and no one is to be arbitrarily deprived of this property.³⁰

The protection of the right to property is enshrined in the constitution. It provides for the ownership of land as an individual or in association with others.³¹ The property acquired and owned could be of any description³² and in any part of the country.³³ The laws by parliament ought not to permit the arbitrarily deprivation of the right or interest in the property³⁴ or restrict

²³ Kariuki F, Ouma S and Ng'etich R, '*Property law*', Strathmore University Press, 2016, 10.

²⁴ Hohfeld, 'Some fundamental legal conceptions as applied in judicial reasoning' 23 *The Yale Law Journal* (1913), 16-59.

²⁵ Article 40(1), Constitution of Kenya (2010).

²⁶ Andrews M, '*Hohfeld's cube*' 16, *Akron Law Review*, 3 (1983), 473.

²⁷ Corbin A, 'Legal analysis and terminology' 29 *Yale Law Journal* (1919), 167.

²⁸ Wacks R, *Understanding jurisprudence: An introduction to legal theory*, Oxford University Press, New York, 2012, 234.

²⁹ Kariuki et al *Property law*, 134.

³⁰ Article 17, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

³¹ Article 40(1), *Constitution of Kenya* (2010).

³² Article 40(2) (b), *Constitution of Kenya* (2010).

³³ Article 40(1) (b), *Constitution of Kenya* (2010).

³⁴ Article 40(2) (a), *Constitution of Kenya* (2010).

the enjoyment of it.³⁵ Even in the deprivation of this right, the state should carry it out as stipulated by law.³⁶

2.2 Theoretical Framework

2.2.1 African Concept of Property

Okoth Ogendo, in his much acclaimed article ‘The Tragic African Commons’, defines the commons and its system of land holding and use. The commons identifies ontologically organized land and the resources attached to it that is available to corporate entities organized as specific families, clans and/or communities.³⁷ It denoted an ever present availability of the commons to the past, present and future generations.³⁸ There were normative and structural parameters that guided the internal management of and determination of access to the resources.³⁹

On structural parameters, the access was determined on the account of scale, need, function and process while at the normative level access was granted on a membership that was socially defined and required obligations assumed on the basis of reciprocity.⁴⁰ The radical title was entrusted to the prior, current and future generations as a whole and any decision that was made in relating to the land and resources made referenced common values and principles that had already been internalized.⁴¹ This prevented the arbitrary use of the commons to the disadvantage of the different corporate entities with access to it.

Okoth Ogendo asserted that the commons was indeed a property system. This is because the commons are *res communists*, which means that that title to property is held by everyone as a corporate entity.⁴² They had clear rights and duties regarding the commons. Rebutting Garret Hardin and earlier writers on the commons, the commons were not open access systems (*terra nullius*), or a species of the state or social property.⁴³ Further he asserted that the perception that property and more specifically, radical title can only vest in a jural person led to the expropriation, subversion and suppression of the commons for a century.⁴⁴

³⁵ Article 40(2) (b), *Constitution of Kenya* (2010).

³⁶ Article 40(3), *Constitution of Kenya* (2010).

³⁷ Okoth-Ogendo HWO, ‘The tragic African commons: A Century of expropriation, suppression and subversion’ University of Nairobi Law Journal 2003, 2.

³⁸ Okoth-Ogendo HWO, ‘The tragic African commons’, 3.

³⁹ Okoth-Ogendo HWO, ‘The tragic African commons’, 3.

⁴⁰ Okoth-Ogendo HWO, ‘The tragic African commons’, 4.

⁴¹ Okoth-Ogendo HWO, ‘The tragic African commons’, 4.

⁴² Okoth-Ogendo HWO, ‘The tragic African commons’, 5.

⁴³ Hardin G, ‘The tragedy of the commons’ 162 *Science New Series* 3859 (1968), 1243-1248.

⁴⁴ Okoth-Ogendo HWO, ‘The tragic African commons’, 5.

2.2.2 Social contract theory

Thomas Hobbes, John Locke and Jean Jacques Rousseau are the main proponents of this theory. In the beginning man lived in a state of nature with no government or law to govern him.⁴⁵ This led to a state of unrest and insecurity that beckoned them to enter into an agreement to safeguard their interests.⁴⁶ The agreement was two fold in that firstly people undertook to respect each other and live in peace and harmony and secondly, they subjected the whole or part of their rights and freedoms to an authority who they pledge their obedience to.⁴⁷ In return the authority undertakes to protect their life, property and liberty.

The relevance of this theory is that the government at the end of the day is the custodian of most if not all the rights of an individual including the right to property. This means that they can deal with the property of an individual(s) as they want but at the end of the day they have to ensure that no harm befalls these individuals. Hugo Grotius notes that the government may deal with the property as they will to since it is under their eminent domain, but in doing so, they should ensure that it is for a public utility and make good with those who lose their property in so doing.⁴⁸

Compulsory acquisition for a public purpose is legal. However, just and full compensation should be paid to the persons whose land is being compulsorily acquired.⁴⁹ But the gaps in compulsory acquisition and just compensation fly in the face of this expectation as the government fails in its role as custodians.

2.3 Communal ownership of property

Before colonial rule, land was held communally by Africans and the radical title was bestowed to every member of the community.⁵⁰ Customary law governed the relations including property relations among African communities. They were expressive of their social changes, struggles and aspirations.⁵¹ It mirrored the communities' cultural and intellectual accumulation.⁵²

The African concept of property was different from the Anglo- American's in how they related to property.⁵³ Property included land, salt licks, mineral springs, forests, ancestral shrines, water sources and even knowledge passed from each generation to the next.⁵⁴

⁴⁵ Elahi M, 'What is social contract theory?' Philosophy archives, 2005, 1.

⁴⁶ Elahi M, 'What is social contract theory?' Philosophy archives, 2005, 1.

⁴⁷ Elahi M, 'What is social contract theory?' Philosophy archives, 2005, 1.

⁴⁸ Grotius H, 'De jure belli ac pacis libri tres: In quibus jus naturae et gentium, itme juris publici praceipua explicantur' <<https://archive.org/details/hugonisgrottiide00grotuoft>> on 1 December 2020.

⁴⁹ Article 40(3), *Constitution of Kenya* (2010).

⁵⁰ Mbiti J, 'Introduction to African religion', Praeger, New York, 1975, 176.

⁵¹ Kariuki et al, *Property law* 51.

⁵² Ochieng P, 'Cultivating a legally more beneficial future', *The Nation*, Nairobi 1967.

⁵³ Karuki 'et al', *Property Law*, 48.

⁵⁴ Republic of Kenya, *Report of the Commission of inquiry into the Illegal/Irregular Allocation of Public Land, 2004*.

Property was acquired in various ways that included inheritance, economic activities, marriages and intermarriages, conquests and raids and gifts.⁵⁵ Property was viewed as more than physical ‘things’ and extended to cultural, spiritual and social realities.⁵⁶ The living, past and future generations all had equal stake in property.⁵⁷ Specifically, the ancestral lands had a spiritual connection to the past, present and future generations.⁵⁸ It was binding and connected within and across generations.⁵⁹ This cemented the principles of equitability and sustainability.⁶⁰ Property and spirituality were intertwined⁶¹ and African commons was viewed as the fountain of spirituality. Magesa explains this when he states that in daily human conversations, acknowledgement of spiritual agency was express in every aspect of life be it joy or grief and despair or hope.⁶² Communion with ancestral spirits was perpetuated through connection with the soil where the ancestors were buried.⁶³

Magesa is of the view that a person is incomplete without an ancestral identity.⁶⁴ Ancestral lands in this respect are significant as they were homes and represented fulfillment of time, human life and history. In the *SM Otieno case* where the Luo members of the deceased insisted that he be buried in Luo land because of his cultural ties to the land.⁶⁵

According to Earle, property in land was held by a local group and such were inalienable rights that could only be passed down through group membership. Private ownership was present and could be transferred by inheritance.⁶⁶

Other authors are of the view that, land rights have usually been established by birth, parentage and investment of labour.⁶⁷ Therefore land rights were accorded to one by virtue of being a member of the community and employing his/her labour.⁶⁸

The Constitution recognizes the existence of land owned by communities.⁶⁹ Such land belongs to communities based on identity, way of life and the same interest as a community⁷⁰ and further

⁵⁵ Mbiti, ‘*An introduction to African religion*’, 108.

⁵⁶ Kariuki et al *Property law*, 52.

⁵⁷ Okoth Ogendo, ‘*Tragic Africans commons*’, 5.

⁵⁸ Magesa L, ‘*What is not sacred? African Spirituality*’, Orbis Books, Maryknoll, New York, 2003, 59.

⁵⁹ 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.

⁶⁰ Kariuki et al, *Property law*, 53.

⁶¹ Kariuki et al, *Property law*, 54.

⁶² Magesa, ‘*What is not sacred?*’ 58-59

⁶³ Kariuki et al, *Property law*, 55.

⁶⁴ Magesa ‘*What is not sacred?*’ 58-59

⁶⁵ *Virginia Edith Wambui v Joash Ochieng and Omolo Siranga* (1982-88) IKAR.

⁶⁶ Earle T, Property in prehistory: Comparative property law global perspectives accessed a<
<https://www.elgaronline.com/view/edcoll/9781848447578/9781848447578.00008.xml>>on 22nd December 2020.

⁶⁷ Abulai R, Antwi A, ‘*Traditional landholding institutions and individual ownership of land rights in Sub-Saharan Africa*’, *Wolverhampton University*, 7.

⁶⁸ Payne G, *Urban land tenure and property rights in developing countries: A review*, Intermediate Technology Publications, London, 1997.

parliament is tasked with enacting legislation that gives effect to this article.⁷¹ The Community Land Act of 2016 is the result of this this.⁷²

2.4 Importance of community land holding

Community land holding has faced multiple attacks from the inception of foreign laws during colonization but despite this, communities have been resilient in holding their lands.⁷³ Today this phenomena is better understood by communities who property together based on customary law as often referred to as or indigenous people

In moving away from the classical misunderstood concept of indigenous people as natives, The African Commission Working Group on Indigenous Population/ communities (WGIP) defines indigenous peoples based on their unique characteristics. Their culture and way of life largely differentiates from the prevailing society, the longevity of their unique way of life relies on heavily on lands and natural resources, they are victims of discrimination because they are viewed as less developed than the other more influential sector of the society and live in regions that are hard to get to and are subject to repression and unfair treatment within national, political and economic settings.⁷⁴

In the famous *Endorois case*, The Endorois, who are an indigenous people, had been ousted from their home in Lake Bogoria and they had to rely on the discretion of the game reserve authority to access the same.⁷⁵ This hugely restricted them from living according to their pastoral way, utilizing their religious and ceremonial sites and getting traditional medicines.⁷⁶

In the *Ogiek case*, the African Court on Human and Peoples' Rights stated that, it was the connection of the Ogiek to their land that enabled the, to exercise their religion without hindrance; their removal from the Mau forest interfered with this free exercise of religion.⁷⁷ Considering their unique connection between the land and cultural practice, this removal amounted to the violation of their right to culture.⁷⁸ This further meant that their social, economic and cultural progress had been violated.⁷⁹

⁶⁹ Article 63, *Constitution of Kenya* (2010).

⁷⁰ Article 63, *Constitution of Kenya* (2010).

⁷¹ Article 63(5), *Constitution of Kenya* (2010).

⁷² *Community Land Act*, (Act no 27 of 2016).

⁷³ Okoth-Ogendo, 'The tragic African commons', 12.

⁷⁴ Report of the African commission's working group of experts on indigenous populations/communities, 2005, 14-15.

⁷⁵ *Center of Minority Rights Development (Kenya) and Minority Rights Group (CEMIRIDE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.

⁷⁶ *Center of Minority Rights Development and Minority Rights Group (Endorois)*, ACmHPR Comm. 276/03.

⁷⁷ *Center of Minority Rights Development and Minority Rights Group (Endorois)*, ACmHPR Comm. 276/03

⁷⁸ *African Commission on Human and People's Rights v The Republic of Kenya*, ACtHPR, Application 006/2012 (*in relation to the Ogiek*).

⁷⁹ *African Commission on Human and People's Rights v The Republic of Kenya*, ACtHPR, (*in relation to the Ogiek*).

In 2013, when a good number of the Batwa communities of southwest Uganda, also known as the “The Invisible Batwa of Uganda” brought a suit to the Constitutional court. The petition sought among other things; the redress of violations of their human rights that had been ongoing as a consequence of their eviction from their ancestral lands.⁸⁰ This made them squatters in the land of other people and boarders in parks; suffering adverse poverty, malnutrition and health disorders.⁸¹

In the case of *Awes Tingini Community v Nicaragua*, the court ruled that land is important to the way of life and spirituality of indigenous people and this connection transcends production as it involves spiritual and material connotations which they would like for the continuation of their culture to upcoming generations.⁸²

From the above discussion it is clear that land to communities and especially indigenous peoples is important because of its material and immaterial value. Further, access to land gives rise to other rights such as health, cultural and religious rights for these communities.

2.5 The problem community land holding poses

Following the introduction of foreign laws, Judge Hamilton the case, *Mulwa Gwanombi v Alidina Visram*, alluded that since land was owned and used collectively, the sale of such tribal land was not proper and could not confer title.⁸³ From this decision and many which were ruled in the same fashion afterwards, customary land holding was disregarded by formal law and was seen as inferior.⁸⁴

In the famous indigenous people’s cases that have made it to court the argument by the governments echo with the same voice. In *Endorois*, the government argued that the intended tourism project in the Lake Bogoria region would bring growth in the country and hence it would be beneficial if the communities within participated in the country’s democracy to champion for it instead of being self- centered.⁸⁵

In the case of *San*, the government stated that the San residents should be evicted to enable them to reach the growth and progress that the rest of the modern society has gotten to.⁸⁶ Further, they alleged that the San were not legitimate indigenous people as they had digressed from hunting

⁸⁰ Gilbert J, ‘Litigating indigenous peoples’ rights in Africa: potentials, challenges and limitations’, *International and Comparative Law Quarterly*, University of Roehampton 2017.

⁸¹ Woodburn J, ‘Indigenous Discrimination: The Ideological basis for local discrimination against hunter-gatherer minorities in Sub-Saharan Africa’ 1997 20(2) *Ethical and Racial studies*, 345.

⁸² *Mayagna (Sumo) Awes Tingini Community v Nicaragua*, IACtHR judgement of 31 August 2001, series C, No 79, para 149.

⁸³ *Mulwa Gwanombi v Alidina Visram* (1913) KLR 14 52S.R.O 661. 53.

⁸⁴ Okoth-Ogendo, ‘The tragic African commons’, 5.

⁸⁵ *Center of Minority Rights Development and Minority Rights Group (Endorois)*, ACmHPR Comm. 276/03.

⁸⁶ Central Kalahari Legal Case No MISCA 52/2002 In the Matter between *Roy Sesana Keiwa Setlhobogwa and 241 others the Attorney General* (2006).

and gathering to participate in agricultural activities and producing livestock.⁸⁷ Clearly from these arguments, it is clear that there is a lack of political will of the African governments to recognize and protect the customary land holding systems of indigenous people. In Kenya, the Community Land Act was passed 2 years after it was due.⁸⁸ To add to that, it ignores the community land holding system and goes on to create new land management institutions fashioned in the.⁸⁹

2.6 Conclusion

Considering the value and meaning attached to ancestral land, special consideration needs to be taken for compensation during compulsory acquisition of community land. The cultural and spiritual value attached to land need to be considered. With the state's power of compulsory acquisition and the communities' right to property, a balance needs to be found. The problem is that the communities always end up at the shorter side of the bargain. It is important to recognize principles that inform community land holding. The competing interests of the government to develop and the communities' right to property need to be balanced.

⁸⁷ High Court civil case No MAHLB 000 393-09 In the matter between *Matsipane Mosehlhanyene & another v attorney General* (2011).

⁸⁸ Kariuki F and Ng'etich R, '*Land grabbing, tenure security, and livelihoods in Kenya*,' 90

⁸⁹ Part III, *Community Land Act*, (Act No 27 of 2016).

CHAPTER THREE: THE LAW AND POLICY ON COMPULSORY ACQUISITION IN KENYA

3.0 Introduction

This chapter recognizes the laws of compulsory acquisition of land in Kenya that has notably happened in three phases. The first phase was when Kenya was colonized by the British and lost land to the colonial masters through laws that were passed by the colonial government to alienate land from natives and vest them to the settlers. The second phase was in the post-colonial interface where land was key in retaining power by the political elites in the country.⁹⁰ The third and most recent phase, is where local and foreign governments, private investors both citizens and non-citizens and multinational companies are acquiring huge tracts of land for development. This development is seen in mining, huge infrastructural projects, large scale agricultural activities and gazetting of certain areas by the government.⁹¹ The focus of this chapter is on the third phase of compulsory acquisition. It presents the legal analysis of the laws on compulsory acquisition of community land and discusses their adequacy in addressing the issues that come up during such.

3.1 Colonial era

During the colonial period, the British colonialists had multiple laws and concessions that alienated land from the coastal and mainland communities.⁹² Specifically, the Foreign Jurisdiction Act⁹³ was enacted to confer the Queen with power to acquire and control over foreign lands. Where laws made it impossible to acquire land; the British conquered and forcefully evicted communities.⁹⁴ The Maasai and Talai communities were victims of signed agreements between their illiterate community leaders and the colonial masters, alienating them from their land.⁹⁵

⁹⁰ Republic of Kenya, Report of the commission of inquiry into the land law systems of Kenya on principles of a national land policy framework constitutional position of land and new institutional framework for land administration, 2002, 19.

⁹¹ Kariuki F and Ng'etich R, 'Land grabbing, tenure security and livelihoods in Kenya' 9 *African Journal of Legal Studies*, 2016, 79.

⁹² <https://www.afrocave.com/colonial-policies-land-injustices-in-kenya/> accessed on 14 August 2020.

⁹³ Section 1, *Foreign Jurisdiction Act* 1890 (53 & 54 Vict Ch 37).

⁹⁴ <https://www.afrocave.com/colonial-policies-land-injustices-in-kenya/> accessed on 14 August 2020.

⁹⁵ The Maasai Agreements of 1904 and 1911.

3.2 Post-colonial era

Elected county councils after independence in 1963 acted as trustees of native lands for the natives⁹⁶ (as they were known then). Among the powers they held was one to set aside parts of Trust lands for various purposes based on their own discretion.⁹⁷ This consequentially, extinguished individual, family, group and tribal customary rights to land.⁹⁸ The Trust Land Act of 1968 later consolidated this power to the Commissioner of Lands and this further had the effect of alienating more land from communities.⁹⁹ This Act was later repealed.

By virtue of the repealed Constitution, land could be compulsorily acquired if it was in the interest of defense, public order, public morality or the promotion of public benefit.¹⁰⁰ The Land Acquisition Act governed compulsory acquisition in Kenya before it was repealed by the Land Act of 2012. In 2019, the Land Act was amended by the Land Value (Amendment) Act of 2019.

3.3 The current legal framework governing compulsory acquisition in Kenya

I. The Constitution of Kenya

The constitution is the supreme law of the country.¹⁰¹ It provides for the compulsory acquisition of property as long as it is for a public purpose and it is done as provided for by the constitution and any other statute.¹⁰² The process requires instantaneous and just compensation to the individual(s) who is being deprived of his right to property.¹⁰³

When interpreting the constitution and any other law and making or interpreting public policy decisions, state organs, state and public officers are obligated to be directed by the national values or principals.¹⁰⁴ Some of them include; human dignity, safeguarding of the marginalized, principled governance, equality, transparency and accountability.¹⁰⁵

The constitution guarantees property rights.¹⁰⁶ Only the law can provides for limitation of a right in the bill of rights but only as far as the limitation is within reason and justiciable in an open and democratic society.¹⁰⁷ Further, it gives every person whose right has been violated, denied, threatened or infringed upon, the right to institute court proceedings.¹⁰⁸ Community land will

⁹⁶ Wily L, 'The Community land act in Kenya opportunities and challenges for communities', 7.

⁹⁷ Wily L, 'The Community land act in Kenya opportunities and challenges for communities', 7.

⁹⁸ Wily L, 'The Community land act in Kenya opportunities and challenges for communities', 7.

⁹⁹ Wily L, 'The Community land act in Kenya opportunities and challenges for communities', 7.

¹⁰⁰ Section 75(1)(a), Constitution of Kenya (Repealed).

¹⁰¹ Article 2(1) *Constitution of Kenya* (2010).

¹⁰² Article 40(3) *Constitution of Kenya* (2010).

¹⁰³ Article 40(3)(b)(i) *Constitution of Kenya* (2010).

¹⁰⁴ Article 10(1) *Constitution of Kenya* (2010).

¹⁰⁵ Article 10(2) *Constitution of Kenya* (2010).

¹⁰⁶ Article 40(1) *Constitution of Kenya* (2010).

¹⁰⁷ Article 24(1) *Constitution of Kenya* (2010).

¹⁰⁸ Article 22(1) *Constitution of Kenya* (2010).

only be dealt with in a manner that is provided for by law; that specifies the character and scale of the rights of everyone in the community; both as individuals and collectively.¹⁰⁹

II. The Land Act

The Land Act sets out the entire process of compulsory acquisition.¹¹⁰ In the *Patrick Musimba* case, the court noted duly that; part VII of the Act was drafted in a design to ensure that the connection between the governmental development needs and compulsory acquisition was not remote or fanciful but real.¹¹¹ While the state exercised compulsory acquisition, it was necessary for the citizen to be protected from wanton and unnecessary deprivation of his private property.¹¹²

The National Land Commission is given the power to carry out the functions of this Act.¹¹³ In the discharge of this power, the commission or any state or public officers should be guided by values and principles among them according equal chances to persons of all ethnic groups, non-discrimination and securing of the marginalized, engagement of people and other mechanisms to dissolves wrangles in land management except for the court.¹¹⁴

It recognizes customary land rights as a form of land tenure¹¹⁵ and provides for equal acknowledgement and application of land rights from all land arrangements and non-discrimination in owning and utilizing land in whatever tenure system.¹¹⁶

The Act highlights compulsory acquisition as one of the methods of acquiring title.¹¹⁷ If either of the two levels of government finds it essential to take possession of land, the respective government official is needed to make a request for such possession of public land to the commission to obtain this land for their benefit.¹¹⁸ Then the commission goes ahead to determine a principles and standards for such an acquisition.¹¹⁹

In an instant the request does not meet the criterion; the commission is under the liberty to reject a request of getting possession of such land.¹²⁰ Where there is an approval, the commission publishes a notice of the same in the national and county gazette; with a copy of the notice

¹⁰⁹ Article 63 (4), Constitution of Kenya (2010).

¹¹⁰ Part VIII, *Land Act* (Act No. 6 of 2012).

¹¹¹ *Patrick Musimba v National Land commission & 4 others* (2016) eKLR

¹¹² *Patrick Musimba v National Land commission & 4 others* (2016) eKLR

¹¹³ Part VIII, *Land Act* (Act No. 6 of 2012).

¹¹⁴ Section 4, *Land Act* (Act No. 6 of 2012).

¹¹⁵ Section 5(1), *Land Act* (Act No. 6 of 2012).

¹¹⁶ Section 5(2), *Land Act* (Act No. 6 of 2012).

¹¹⁷ Section 7(c), *Land Act* (Act No. 6 of 2012).

¹¹⁸ Section 107(1), *Land Act* (Act No. 6 of 2012).

¹¹⁹ Section 107(2), *Land Act* (Act No. 6 of 2012).

¹²⁰ Section 107(3), *Land Act* (Act No. 6 of 2012).

delivered to the registrar and all people interested in the land.¹²¹ Then the registrar makes an entry in the register of such an acquisition.¹²²

The NLC can later on authorize any person to enter and inspect the land and ascertain the suitability of the land for the purpose it is being acquired for.¹²³ The occupier must give consent for such inspection and be issued with a written notice, with a minimum of seven days prior to the intention to enter the land to be inspected.¹²⁴ In case of any destruction during this process the NLC must compensate the occupier.¹²⁵

Just compensation must be paid instantaneously and in its complete aggregate to all individuals whose interest in the land has been accounted for if land is compulsorily acquired under this Act.¹²⁶ The Commission shall formulate directions to guide the valuation of such redress.¹²⁷ Compensation, in the case of community land, is given to the county government who keep the money in trust for the community in an instance that the land has not been registered.¹²⁸ Where the public purpose is stalls or is inexistence, the NLC shall at first instance offer pre-emptive rights to the first owners or their next- in- line, where they get back the land after restituting to the acquiring authority the aggregate sum of money they had received as compensation.¹²⁹

Any contentions from the process are to be taken to the Land and Environment court for resolving.¹³⁰

III. Valuation for Rating Act

This Act gives power to local governments to value land for the purposes of rates and for any purposes connected or incidental to it. Community land is not considered ratable property under this Act.¹³¹

IV. Community Land Act

This Act purposes to recognize, protect and register community land and rights.¹³² It provides for its management and administration and the role of county governments in relation to this and for

¹²¹ Section 107(5), Land Act (Act No. 6 of 2012).

¹²² Section 107(6), Land Act (Act No. 6 of 2012).

¹²³ Section 108(1), Land Act (Act No. 6 of 2012).

¹²⁴ Section 108(2), Land Act (Act No. 6 of 2012).

¹²⁵ Section 109, Land Act (Act No. 6 of 2012).

¹²⁶ Section 111(1), Land Act (Act No. 6 of 2012).

¹²⁷ Section 111(2), Land Act (Act No. 6 of 2012).

¹²⁸ Section 6(2), Land Act (Act No. 6 of 2012).

¹²⁹ Section 110(2) Land Act (Act No. 6 of 2012).

¹³⁰ Section 128, Land Act (Act No. 6 of 2012).

¹³¹ Section 2, Valuation for Rating Act (CAP 266).

¹³² Community Land Act (Act No. 27 of 2012).

any connected purposes.¹³³ Every person dealing with community land should be guided by the principles.¹³⁴ The state is allowed to control the use of community land.¹³⁵

Subject to the constitution, community land may be under the obligation to be acquired by the state when compensation is paid in an agreed arrangement.¹³⁶

The county government has the mandate to hold in trust unregistered land for communities¹³⁷ and the same for community monies that have been paid toward the acquisition of the land not registered.¹³⁸ After it has been registered, the position of trusteeship ceases and the respective community assumes the management and administrative functions of the land.¹³⁹

A county government is not allowed to deal with as it pleases with community land that has not been registered. It cannot offer for sale, transfer, do away with or change to private use unregistered community land held in guardianship.¹⁴⁰ The Act establishes a community assembly which is tasked with the management and administration of community land.¹⁴¹ It requires the registered members of the community to approve of the compulsory acquisition in a community meeting.¹⁴² Upon the expiry of such public use purpose, the revisionary interest lies with the community at first instance.¹⁴³

V. Land Value (Amendment Act)

This Act seeks to amend the Land Act, The Land registration Act and Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.

It defines just compensation as a form of redress that is evaluated and gauged through process the Act and prompt as; within a reasonable time of, and no more after an year, after the taking of possession of the acquired land by the NLC.¹⁴⁴

Full compensation for compulsory acquisition is defined as the restoration of the value of the land, taking to account all advancements that were made until the date of the publication of notice to obtain the land or any other consideration by the law.¹⁴⁵

¹³³ *Community Land Act* (Act No. 27 of 2012).

¹³⁴ Section 3, *Community Land Act* (Act No. 27 of 2012).

¹³⁵ Section 4, *Community Land Act* (Act No. 27 of 2012).

¹³⁶ Section 4, *Community Land Act* (Act No. 27 of 2012).

¹³⁷ Section 6(1), *Community Land Act* (Act No. 27 of 2012).

¹³⁸ Section 6(2), *Community Land Act* (Act No. 27 of 2012).

¹³⁹ Section 6(3), *Community Land Act* (Act No. 27 of 2012).

¹⁴⁰ Section 8, *Community Land Act* (Act No. 27 of 2012).

¹⁴¹ Section 15, *Community Land Act* (Act No. 27 of 2012).

¹⁴² Section 22(4), *Community Land Act* (Act No. 27 of 2012).

¹⁴³ Section 22(3), *Community Land Act* (Act No. 27 of 2012).

¹⁴⁴ Section 2, *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁴⁵ Section 2, *Land Value (Amendment) Act* (Act No. 15 of 2019).

When the Commission establishes that a request by the acquiring body meets the requirements set forth, it shall cause the land to be mapped out and valued by the commission using the criteria in the Act.¹⁴⁶ Further, it shall establish that the acquiring authority has knowledge of the number and has a register of persons in actual occupation of the land and the period of uninterrupted occupation before the date of request for occupation.¹⁴⁷

It amends the Land Act by inserting a new section immediately after section 107 to read 107A.¹⁴⁸ It provides that the valuation of freehold and community land for compensation shall be based on the criterion of the Act and a land value index developed for that purpose by the executive at both levels and approved by the national assembly and senate.¹⁴⁹ The land value index was foreseen to be developed within six months after the enactment of this statute.¹⁵⁰ The index is an analytical representation of the spatial distribution of the values of land in a given geographical area at a specific time.¹⁵¹

On top of the principles to be used in calculating the value of land in the land value index, the declared value of the land for purpose of payment of rates, rents or stamp duty are to be considered.¹⁵²

The following matters are considered in valuing the land; the harm occasioned or likely to be by persons having an interest(s) at the time of the commission taking possession of land if the land happens to be severed from another land, damage affecting property whether it is movable or immovable or affecting what the person earns, if persons affected are forced to find new residence or place of business, where the commission will determine the payment of reasonable expenses, as a result of diminution of profits before the date of publication of intention to acquire land and the date the commission obtains the land, the effect of any express or inferred condition of title or law which limits the purposed use of the land.¹⁵³ The proof of diminution of profits shall be proved by the existence of profits including evidence of tax returns.¹⁵⁴

The Act further amends section 111 of the Land Act. Compensation may take various forms that include; allocation of an alternative piece of land of the same value and comparable geographical location and land use to the land obtained, cash compensation in lump sum or installments spread over a period of time of not more than a year, the issuance of government bond, grant or transfer

¹⁴⁶ Section 3(4) (a), *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁴⁷ Section 3(4) (b), *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁴⁸ Section 4, *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁴⁹ Section 4, *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁵⁰ Section 4, *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁵¹ Section 4, *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁵² Section 4, *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁵³ Section 4, *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁵⁴ Section 4, *Land Value (Amendment) Act* (Act No. 15 of 2019).

of development rights, equity shares in a government owned entity or any other lawful compensation.¹⁵⁵

This type of compensation seems to be largely focused on physical relocation while sidelining the negative effects of the economic, social and cultural displacement of communities. Compulsory acquisition of community land is normally accompanied with the loss of cultural sites, medicinal plants and critical ecological sites. Assets like cattle dips, boreholes, animal watering points, animal holding grounds and shrines; which are of value to the communities are rarely ever considered for compensation.¹⁵⁶

Where an acquisition is not completed in two years, from the date of publication of the notice of intention to acquire land, the acquisition shall lapse. The owner of the land compulsorily acquired has the right to choose the form of compensation they prefer.¹⁵⁷

The Act establishes a land acquisition tribunal.¹⁵⁸ It has the jurisdiction to decide on appeals relating to the decision of the commission in contentions dealing with the mandatory acquiring of land.¹⁵⁹ The tribunal consists of 3 people appointed by the cabinet secretary through a notice in the Gazette. One person is nominated by the Judicial Service Commission, to be the chairperson, another by the cabinet secretary and another by the Attorney- General.¹⁶⁰ The tribunal has an option to take an expert advice on any matter before it and shall have its own procedure.¹⁶¹ Any person not content with the decision of the tribunal may appeal to the court.¹⁶² There is a concern that the tribunal formed under part VIII of Land Value (Amendment) Act limits the Environment and Land Court's jurisdiction, by having first instance jurisdiction and making expert advice optional.¹⁶³

3.4 An analysis/ gaps of the law and practice in compulsory acquisition

(i) Just compensation and the timeframe of prompt compensation

During compulsory acquisition, just and prompt compensation ought to be paid to the individual(s) whose property is acquired. It cushions against losing property since the individual(s) is taken back to the position they would be if they did not lose the property.¹⁶⁴ The National Land Commission carries out this acquisition after a due process stipulated out in the

¹⁵⁵ Section 5(1) (B), *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁵⁶ Makathimo M, Assessment of policy frameworks and practices affecting land access for oil and gas projects on community land in Turkana county, Kenya', 39.

¹⁵⁷ Section 5(1) (C), *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁵⁸ Part VIII(A), *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁵⁹ Section 133(C) (1), *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁶⁰ Section 133(A) (2), *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁶¹ Section 133(A) (4), *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁶² Section 133(D), *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁶³ Part VIII, *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁶⁴ Wyman K, 'The measure of just compensation' 41 *University of California Davis Law Review Journal*, (2007) 220.

Land Act.¹⁶⁵ The Land (Assessment of Just Compensation) rules, 2017 establishes market value to be the value of land at the date of the publication in the gazette.¹⁶⁶ It further requires that an extra 15% value of the property should be awarded as compensation for disturbance.¹⁶⁷ In instances of community land, compensation will be in the custody of the county government and released to the community, as soon as it is a registered owner.¹⁶⁸ In *Kanini Farm Limited v Commissioner of Lands*, the court held that just and fair compensation is value of the property the market will ascribe to it.¹⁶⁹

The Oxford Dictionary defines prompt as immediate or done without delay.¹⁷⁰ In *Patrick Musimba v National Land Commission & 4 others* even though the court ruled that the defendant had not given adequate compensation in the acquisition of the land, it went on to state that once the value of compensation has been arrived at, the state could go ahead and acquire land even when the same has not yet been paid.¹⁷¹ This is in pursuant to the Land Act that provides for the possession of the land to be taken when there is a case of urgency or if by following the normal procedure the acquisition would be delayed.¹⁷²

In 2016, a large number of people who had lost their land to the construction of the Standard Gauge Railway were yet to receive payment 2 years since compensation began.¹⁷³ Numerous delays in compensation beat the purpose of prompt compensation which is to restore the community to the position they were before the acquisition.¹⁷⁴ In *Arnacherry limited v Attorney general*, the owners of the land had not been compensated for 30 years after their land had been compulsorily acquired.¹⁷⁵

The land Value (Amendment) Act provides that prompt should be a reasonable time and not exceed one year after acquisition.¹⁷⁶ Arguably, one year is still deemed to be long and especially

¹⁶⁵ Section 112, *Land Act Kenya* 2012.

¹⁶⁶ Sec 2 The Land (Assessment of Just Compensation) Rules, 2017.

¹⁶⁷ Sec 6 The Land (Assessment of Just Compensation) Rules, 2017.

¹⁶⁸ Section 6 Community Land Act, 2016.

¹⁶⁹ *Kanini Farm Limited v Commissioner of Lands* (1996).

¹⁷⁰ Oxford English Dictionary, 3rd Edition.

¹⁷¹ *Patrick Musimba v National Land Commission & 4 others* (2016) eKLR.

¹⁷² Section 120 (2), Land Act Kenya, 2012.

¹⁷³ Beja P, 'Hundreds yet to receive compensation for Standard Gauge Railway land, The Standard, The Standard, 18 January 2018-<<https://www.standardmedia.co.ke/coast/article/2000188492/hundreds-yet-to-receive-compensation-for-sgr-land>> on 3 December 2020.

¹⁷⁴ Paragraph 2(c), *World Bank Operational Policy 4.12 on Involuntary Resettlement*.

¹⁷⁵ *Arnacherry Limited v Attorney General* (2014) eKLR.

¹⁷⁶ Section 2, Land Value (Amendment) Act (Act No. 15 of 2019)

where the acquired land is residential.¹⁷⁷ Further, the government budgets for its projects and hence the period for compensation should not span an unreasonable time.¹⁷⁸

(ii) Valuation of community land

In determining the value attached to land, cultural and ancestral factors have not been considered since the value is pegged on monetary terms.¹⁷⁹ The Land Value (Amendment) Act proposes using stamp duty payments to calculate the value of public land to be acquired.¹⁸⁰ This is problematic as it operates on the assumption that all land especially community land is registered and available for sale in the open market.¹⁸¹ Community land has no stamp duty figures since much of it has never been offered for sale and hence it has no basis for value.¹⁸²

The Act further provides that tax returns will be used to calculate loss of profits that land owners might claim from the government when compensating for the value of the land.¹⁸³ This limits the pastoral communities, who derive income from the land that is being sought to be acquired and have no tax returns or stamp duty from such land.¹⁸⁴ This does not reflect the provision of the Community Land Act which provides that the usage and practices of pastoral communities related to land should be given weight.¹⁸⁵

The Land Act in stipulating the factors for consideration in the process for valuation and determination of just compensation makes presumptions on various matters; the existence of a formal property market where information on the same is easily available,¹⁸⁶ the market value encompasses all interest in a property and hence is just, an existence of an up to date formal cadaster with surveyed and registered subject property and that every individual persons rights

¹⁷⁷ Sunday F and Kamau M, 'How billions are lost in Kenya's fraudulent land compensation scams' The Standard, 13 February 2020-< <https://www.standardmedia.co.ke/business/article/2001360306/how-billions-are-lost-in-kenya-s-fraudulent-land-compensation-scams> >on 6 January 2021.

¹⁷⁸ Sunday F and Kamau M, 'How billions are lost in Kenya's fraudulent land compensation scams' The Standard, 13 February 2020-< <https://www.standardmedia.co.ke/business/article/2001360306/how-billions-are-lost-in-kenya-s-fraudulent-land-compensation-scams> >on 6 January 2021.

¹⁷⁹ Section 4, *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁸⁰ Section 4, *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁸¹ Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019_< <https://webcache.googleusercontent.com/search?q=cache:S-1SNSxJolGJ:https://isk.or.ke/wp-content/uploads/2019/09/Press-Statement-by-ISK-Council-on-12th-September-2019-ISK-offices-3.pdf+&cd=8&hl=en&ct=clnk&gl=ke&client=firefox-b-d>> on 28 January 2021.

¹⁸² Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019.

¹⁸³ Section 4, *Land Value (Amendment) Act* (Act No. 15 of 2019).

¹⁸⁴ Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019.

¹⁸⁵ Section 28, *Community Land Act* (Act No. 27 of 2016).

¹⁸⁶ Makathimo M, 'Assessment of policy frameworks and practices affecting land access for oil and gas projects on community land in Turkana county, Kenya' Land Development and Governance Institute, 2019, 37_< <https://www.ldgi.org/index.php/research/95-assessment-of-policy-frameworks-and-practices-affecting-land-access-for-oil-and-gas-projects-on-community-land-in-turkana-county-kenya-2> > on 27 January 2021.

are registered.¹⁸⁷ Over sixty percent of land in Kenya is unregistered.¹⁸⁸ Considering the size of land in the country it flows that developing a land index within six months will be impossible.¹⁸⁹ The land value index that was to be developed is yet to be done.

Most community land is unregistered and is under the trusteeship of the local government.¹⁹⁰ Their rights and interests are mainly communal, and mostly known by the community members themselves.¹⁹¹ Because of this, the presumption of a formal market, registered and recognized rights over such property envisioned by the Act becomes impractical in this context. In compensating for loss of profits, such can only be determined by tracing it to a particular parcel of land adversely affecting nomadic/ pastoral communities who move around.¹⁹²

The chairman of the Land Development and Governance institute noted that community land has always been undervalued because much of this land has not been in the open market and hence it is almost impossible to find its comparable sales figures and establish its value and calculate compensation rates.¹⁹³

The Institution of Surveyors of Kenya observes that subjecting valuation of freehold and community land based on the Land Value Index developed by the Cabinet Secretary in six months is neither possible nor advisable.¹⁹⁴ Valuation of land is a dynamic process and is pegged on the forces of demand and supply; subjecting it to legislative control will cripple the transactions.¹⁹⁵ The tribunal in part VIIIA of the Land Value (Amendment) Act is not representative of professionals in the land sector in its operation.¹⁹⁶ Expert advice is optional.¹⁹⁷

¹⁸⁷ Makathimo M, Assessment of policy frameworks and practices affecting land access for oil and gas projects on community land in Turkana county, Kenya', 38.

¹⁸⁸ Ayodo H, 'Buying unregistered land is risky' The Standard, 8 January 2016 <<https://www.standardmedia.co.ke/business/article/2000226192/buying-unregistered-land-is-risky>> on 27 January 2021.

¹⁸⁹ Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019.

¹⁹⁰ Ayodo H, 'Buying unregistered land is risky' The Standard, 8 January 2016 <<https://www.standardmedia.co.ke/business/article/2000226192/buying-unregistered-land-is-risky>> on 27 January 2021.

¹⁹¹ Makathimo M, Assessment of policy frameworks and practices affecting land access for oil and gas projects on community land in Turkana county, Kenya', 38.

¹⁹² Makathimo M, Assessment of policy frameworks and practices affecting land access for oil and gas projects on community land in Turkana county, Kenya', 39.

¹⁹³ Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019.

¹⁹⁴ Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019.

¹⁹⁵ Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019.

¹⁹⁶ Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019.

¹⁹⁷ Section 133(A) (4), *Land Value (Amendment) Act* (Act No. 15 of 2019).

The Act does not provide for the qualifications of the members that consist of the tribunal, posing a danger to be ineffective by wasting public resources.¹⁹⁸

(iii) Compensation of ancestral lands

Endorois, who are an indigenous people, had been ousted from their home in Lake Bogoria and they had to rely on the discretion of the game reserve authority to access the same.¹⁹⁹ This hugely restricted them from living according to their pastoral way, utilizing their religious and ceremonial sites and getting traditional medicines.²⁰⁰ It was so because these practices were largely tied to their ancestral lands.

During the expansion that happened in the Kongowea market, the design intended was changed to ensure that religious and cultural sites were preserved.²⁰¹

According to Kariuki, property and spirituality have always gone hand in hand in African communities.²⁰² Okoth Ogendo is of the same view because he notes that the relation to property denoted an ever present availability of the commons to the past, present and future generations; the commons was an intergenerational and intragenerational asset which served the economic, social, spiritual and political needs.²⁰³ During compensation of ancestral land, the spiritual and cultural value attached to it is hardly ever ascertainable as it transcends the traditional financial payment.²⁰⁴

Further a study done by FAO shows that financial compensation of sacred and religious sites is inappropriate as the money is incapable of replacing the meaning attached to them.²⁰⁵

3.4 Public Participation

Under the objectives of devolution, public participation is championed for. Devolution was meant to enhance self-governance by the people and improve their engagement in the decision-making processes affecting them.²⁰⁶ Further, it aimed at recognizing the right of communities to govern things that concerned them and facilitate their growth.²⁰⁷ The rights and interests of minorities and marginalized groups ought to be promoted and protected.²⁰⁸

¹⁹⁸ Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019.

¹⁹⁹ *Center of Minority Rights Development (Kenya) and Minority Rights Group (CEMIRIDE) on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/03.

²⁰⁰ *Center of Minority Rights Development and Minority Rights Group (Endorois)*, ACmHPR Comm. 276/03.

²⁰¹ Paragraph 2(a), World Bank Operational Policy, 4.12 on Involuntary Resettlement.

²⁰² Kariuki et al, Property Law, 54.

²⁰³ Okoth-Ogendo HWO, 'The tragic African commons', 3.

²⁰⁴ Okoth-Ogendo HWO, 'The tragic African commons', 3.

²⁰⁵ FAO, 'Compulsory acquisition of land and compensation' FAO, 'Land tenure studies (2009)23.

²⁰⁶ Article 174(c), Constitution of Kenya (2010).

²⁰⁷ Article 174(d), Constitution of Kenya (2010).

²⁰⁸ Article 174(e), Constitution of Kenya (2010).

The principle of public participation is tied to free, prior and informed consent (FPIC), an international human rights tool that develops from the collective rights of indigenous peoples to make decisions as to their lands, territories and resources.²⁰⁹ Free, means that there is no force, manipulation or intimidation.²¹⁰ For it to be prior, the consent ought to be gotten far in advance of any approval or dispensation of activities and the time periods of indigenous persons consultation and consensus processes are upheld.²¹¹ Consent must be informed; information that is objective, precise and dispensed in a manner that is intelligible, relating to the project is made available to the indigenous people.²¹²

It is imperative that Indigenous people agree to the subject of consultation.²¹³ In *Kichwa indigenous people of Sarayaku v Ecuador* the court held that this must be taken in good faith in that the community's views are taken into account in the process and where not, objective justifications are provided as to why their views cannot be feasible.²¹⁴

FPIC was applied in the *Endorois case* where the African Commission on Human and Peoples Rights held that the state has a duty not only to involve the community but to obtain their free, prior and informed consent according to their practices and way of life.²¹⁵ In *Saramaka People v Suriname*, the court held that the state has to ensure adequate engagement of the people affected, receive a reasonable profit from such projects and ensure that environment and social impact assessments were undertaken to alleviate negative effects.²¹⁶

In the case of any acquisition of indigenous peoples, states have a duty to get their FPIC. Any acquisition lacking of this has been inferred to as land grabbing that is unjust to the legitimacy of the process.²¹⁷ Development agencies are also required to facilitate stakeholder engagements with local communities where communal property is involved.²¹⁸ The Community Land Act also obligates agreements relating to investment in community land to be agreed upon a free, open and consultative manner.²¹⁹ This will prevent the situation as in the case of Sengwer where the

²⁰⁹ FAO, 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous people and local communities in relation to land acquisition', *Governance of tenure technical Guidance* Rome, 2014, 4.

²¹⁰ FAO, 'Respecting free, prior and informed consent', 5.

²¹¹ FAO, 'Respecting free, prior and informed consent', 5.

²¹² FAO, 'Respecting free, prior and informed consent', 5.

²¹³ FAO, 'Respecting free, prior and informed consent', 5.

²¹⁴ *Kichwa indigenous people of Sarayaku v Ecuador*, Inter American Court of human Rights, Judgment of 27 June 2012 (merits and Reparations)

²¹⁵ *Center of Minority Rights Development and Minority Rights Group (Endorois)*, ACmHPR Comm. 276/03.

²¹⁶ *Saramaka People v Suriname*, Inter American Court of Human Rights Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs).

²¹⁷ Global Assembly, *Declaration on securing land access for the poor in times of intensified natural resources competition* (Tirana Declaration), International Land Coalition, 2011, 2.

²¹⁸ 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.

²¹⁹ Section 36, Community Land Act (Act No. 27 of 2016).

community denied ever consenting to leave their land in exchange of compensation by the government.²²⁰

The same situation is found at the Tana River delta where in the large scale projects carried out in the region; there is lack of information and misinformation as regards the acquisitions for investments, sabotage of the information meetings and public participation.²²¹ The communities rely on media reports, Non- Governmental Organizations (NGOs) and what their leaders tell them regarding the compulsory acquisition and the projects to be undertaken in their land.²²² They are duped and end up losing their land, relocated without knowing why and never get compensation in this regard.²²³ During the meetings intended to provide them with information, very few members are there and in extreme instances, other community members are ‘imported’ to the meetings to support the projects.²²⁴ These practices fly in the face of FPIC and public participation.²²⁵

3.5 Environmental impact assessment

The Environment and Management Coordination Act was enacted to establish a legal and institutional framework to manage the environment.²²⁶ It provides that a person who intends to carry out a project ought to submit a project report before its commencement.²²⁷ The proponent of the project will then be required to carry out an environmental impact assessment study (EIA) and submit a report to the National Environment Management Authority (NEMA); who will determine from the report the impact of the report to the environment.²²⁸ The EIA is a systematic examination done to establish the impact of a project, activity or Programme in the environment.²²⁹ The EIA will be undertaken by experts on behalf of NEMA.²³⁰

After the study, a notice shall be published for two weeks in the gazette to include; a summary describing the project, the location the project is to be undertaken and the place where the EIA report could be evaluated, reviewed or respected.²³¹ A license is then issued to facilitate sustainable development and sound environment management.²³² A fresh submission of an EIA may be required by NEMA after the license has been issued if there is a weighty change in the

²²⁰ Irungu Houghton, ‘Kenya: Sengwer evictions from Embobut Forest flawed and illegal’ Amnesty International, 2018 accessed on -< <https://www.amnesty.org/en/latest/news/2018/05/kenya-sengwer-evictions-from-embobut-forest-flawed-and-illegal/> > on 10th January 2021.

²²¹ P, Makutsa, ‘Land Grab in Kenya’, 24-26.

²²² P, Makutsa, ‘Land Grab in Kenya’, 26.

²²³ Munguti S and Matiku P, ‘Land Grabbing in the Tana River Delta’, 30.

²²⁴ P, Makutsa, ‘Land Grab in Kenya’, 26.

²²⁵ P, Makutsa, ‘Land Grab in Kenya’, 26.

²²⁶ Short title, Environmental Management and Co- ordination Act (Act No. 8 of 1999).

²²⁷ Section 58 (1), Environmental Management and Co- ordination Act (Act No. 8 of 1999).

²²⁸ Section 58 (2), Environmental Management and Co- ordination Act (Act No. 8 of 1999).

²²⁹ Section 2, Environmental Management and Co- ordination Act (Act No. 8 of 1999).

²³⁰ Section 58 (5), Environmental Management and Co- ordination Act (Act No. 8 of 1999).

²³¹ Section 59 (1), Environmental Management and Co- ordination Act (Act No. 8 of 1999).

²³² Section 63, Environmental Management and Co- ordination Act (Act No. 8 of 1999).

project, the project poses an environmental threat that had not been reasonably foreseeable or the contents in the first EIA were misleading, inaccurate or false.²³³

Generally when an activity out of the usual is happening in a place, a structure new to an environment or where there are major changes in land use, an EIA will be required.²³⁴ For example in agriculture; new crops are introduced, large scale farming is to take place or irrigation.²³⁵

In most cases, EIAs provide the severe impact that the project will have to the local community, but no mitigation is provided for.²³⁶ The implementation of these projects has the effect of causing irreversible damage to the environment and socio-economic harm to the local communities.²³⁷ The requirements in the law for the assessment are carried out in blatant disregard of the law. For example, in the Tana Integrated Sugar Project, the company that was required to carry out the EIA had no experience in this field. Even when the law has provided that there should exist a forum to access the EIAs, it has been impossible to get these reports.²³⁸ With the low literacy levels of communities it proves almost impossible for them to comprehend the contents of the EIA reports.²³⁹ All these factors make them inadequate in this regard.

In India, the government carries out a Social Impact Assessment (SIA) before a project is carried out; stipulated by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013.²⁴⁰ During this, it considers the impact the project would have on the livelihoods of the affected communities, sources of water for cattle, grazing land, community ponds, burial grounds, places of worship and land for traditional tribal institutions.²⁴¹ This makes the SIA that is similar to the EIA in Kenya effective in evaluating the impact of the projects to the environment as well as the local communities

3.6 Conclusion

The laws on compulsory acquisition try to capture the entire process with each conceivable steps being taken into account. The enactment of the successive laws on compulsory acquisition show progression from an ambiguous point of view of what needs to be taken into account to a more clear point. However there are still inadequacies in the laws in compulsory acquisition and

²³³ Section 65, Environmental Management and Co-ordination Act (Act No. 8 of 1999).

²³⁴ Second schedule, Environmental Management and Co-ordination Act (Act No. 8 of 1999).

²³⁵ Second schedule, Environmental Management and Co-ordination Act (Act No. 8 of 1999).

²³⁶ Munguti S, Matiku P, 'Land Grabbing in the Tana River Delta, 34.

²³⁷ P Makutsa, 'Land Grab in Kenya: Implications for small-holder farmers' East African Farmers' Federation, 22.

²³⁸ Munguti S, Matiku P, 'Land Grabbing in the Tana River Delta, 34 .

²³⁹ Munguti S, Matiku P, 'Land Grabbing in the Tana River Delta, 35.

²⁴⁰ Section 4, The right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (India).

²⁴¹ Section 4(5), The right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (India).

compensation of community land. There are gaps that still exist in the timeframe of compulsory acquisition, valuation of community land and compensation of ancestral land.

CHAPTER FOUR: RECOMMENDATIONS AND CONCLUSIONS

4.1 Introduction

This chapter proceeds to give recommendations to remedy the loopholes in the law, its interpretation and practices governing compulsory acquisition of community land. While doing so, it tries to balance the communities' right to land and the need for development.

4.2 Regular publication of land value indices

According to the ISK president, land markets operate on the forces of supply and demand hence compensation should be based off this.²⁴² A better way to improve the valuation policies is by the government publishing the indices to ensure they are based on market values.²⁴³ This will ensure transparency and fair implementation of the Land Value (Amendment) Act.²⁴⁴

4.3 The time frame of compulsory acquisition should be shortened and compensation done before land is acquired

Section 124 of the Land Act was amended to allow the NLC to take possession of the land before compensation.²⁴⁵ Previously, they were required to compensate the land owner prior to taking their land.²⁴⁶ Further the Land Value (Amendment) Act defines prompt as a reasonable period, not exceeding one year.²⁴⁷ Considering that compulsory acquisition deprives land owners of the benefits derived from the land, these provisions are neither reasonable nor fair.²⁴⁸ The time frame for compensation should be shortened to reflect reasonable timing especially where the land acquired is residential, cultural or a spiritual site.

4.4 The land acquisition tribunal should be properly constituted and not limit the courts' jurisdiction

There is a concern that the tribunal formed under part VIII of Land Value (Amendment) Act limits the Environment and Land Court's jurisdiction, by having first instance jurisdiction.²⁴⁹ These concerns are valid and may be addressed if a few things about the tribunal may be amended. The Land acquisition tribunal should be set to represent professionals in the land

²⁴² Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019.

²⁴³ Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019.

²⁴⁴ Press statement by the Institution of Surveyors of Kenya (ISK) on the newly enacted land value index, 12th September, 2019.

²⁴⁵ Section 124, Land Act (No. 6 of 2012).

²⁴⁶ Doshi M and Abdallah A, Key Highlights of the Land Value (Amendment) Act, 2019', Africa Legal Network, 2019.

²⁴⁷ Section 2, Land Value (Amendment) Act (Act No. 15 of 2019).

²⁴⁸ Doshi M and Abdallah A, Key Highlights of the Land Value (Amendment) Act, 2019', Africa Legal Network, 2019.

²⁴⁹ Part VIII, Land Value (Amendment) Act (Act No. 15 of 2019).

sector.²⁵⁰ Expert advice should not be optional but mandatory. Further, The Act should provide for the qualifications of the members that constitute the tribunal.²⁵¹ All these will serve to make the tribunal competent in handling such disputes.

4.5 Customary principles that determine the value of ancestral lands should be considered during valuation of land to be compulsorily acquired

As discussed in the previous chapter, the valuation of community land in monetary terms is inappropriate because the value pegged on them goes beyond monetary value. The case of the expansion at the Kongowea market in Mombasa can be emulated when acquiring land of significant religious and cultural importance.²⁵² Where possible; measures and policies should be put in place to safeguard these sites, which are of great importance to the communities.²⁵³

In India, the government carries out a Social Impact Assessment (SIA) before a project is carried out; stipulated by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013.²⁵⁴ During this, it considers the impact the project would have on the livelihoods of the affected communities, sources of water for cattle, grazing land, community ponds, burial grounds, places of worship and land for traditional tribal institutions.²⁵⁵ When such an assessment is done in Kenya during EIAs, compensation would be done appropriately as the value in considering community land will be holistic. As it stands now, the EIAs are inadequate.

4.6 The laws on compulsory acquisition should be adhered to

The state should comply with the laws on compulsory acquisition to foster land tenure security, reduce tension between the government and the citizens and increase public confidence in the rule of law.²⁵⁶ The NLC should carry out the process stipulated in the Land Act on compulsory acquisition. Public participation is strongly advocated for in the compulsory acquisition of community land. Appropriate means should be used to dispense of the information of the acquisitions and projects. The local leaders in facilitating this should be governed by the values and principles of good governance. The requirements of EIAs and public participation should be

²⁵⁰ Sunday F and Kamau M, 'How billions are lost in Kenya's fraudulent land compensation scams' The Standard, 13 February 2020-< <https://www.standardmedia.co.ke/business/article/2001360306/how-billions-are-lost-in-kenya-s-fraudulent-land-compensation-scams> >on 6 January 2021.

²⁵¹ Sunday F and Kamau M, 'How billions are lost in Kenya's fraudulent land compensation scams' The Standard, 13 February 2020-< <https://www.standardmedia.co.ke/business/article/2001360306/how-billions-are-lost-in-kenya-s-fraudulent-land-compensation-scams> >on 6 January 2021.

²⁵² Paragraph 2(a), World Bank Operational Policy, 4.12 on Involuntary Resettlement.

²⁵³ FAO, 'Compulsory acquisition of land and compensation', Land Tenure Studies (2009), 33.

²⁵⁴ Section 4, The right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (India).

²⁵⁵ Section 4(5), The right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (India).

²⁵⁶ FAO, 'Compulsory acquisition of land and compensation', Land Tenure Studies (2009),2.

adhered to. This will prevent the situation as in the case of Sengwer where the community denied ever consenting to leave their land in exchange of compensation by the government.²⁵⁷

4.7 Conclusion

Compulsory acquisition is a legal tool that avails land to the government for a public purpose; that is mostly development. Community land rights and the value they attach to such land are important. Compensation should therefore be carried in a manner that is reasonable and fair to restore the communities to the position they were, before the compulsory acquisition. This dissertation has established that customary land holding values are important when dealing with community land, Kenya has a robust legal framework that deals with compulsory acquisition of community land, the law on compulsory acquisition as it stands is inadequate in addressing community land and given recommendations on how to compensate for community land.

²⁵⁷ Irungu Houghton, 'Kenya: Sengwer evictions from Embobut Forest flawed and illegal' Amnesty International, 2018 accessed on -< <https://www.amnesty.org/en/latest/news/2018/05/kenya-sengwer-evictions-from-embobut-forest-flawed-and-illegal/> > on 10th January 2021.

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