

ASSESSMENT OF THE CONSTITUTIONALITY OF SECTION 2 AND SECTION 120 OF THE LAND ACT ON PROMPT PAYMENT OF COMPENSATION DURING THE COMPULSORY ACQUISITION PROCESS IN KENYA WHILE COMPARING TO INDIA AND AUSTRALIA.

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School



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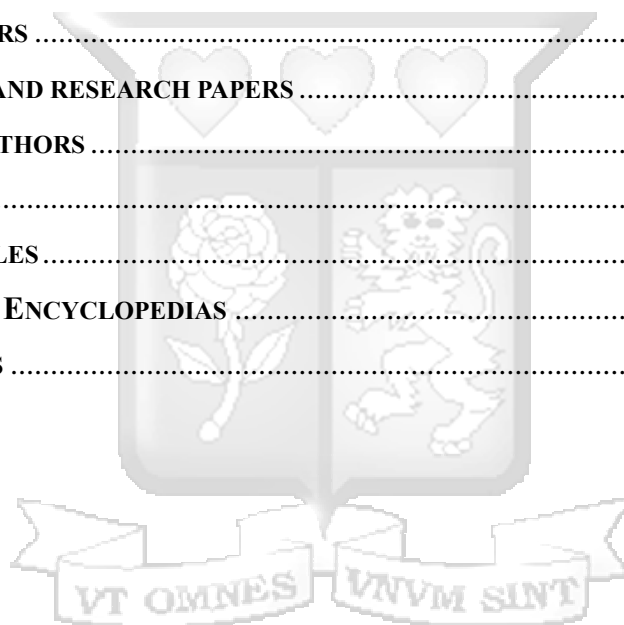
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DECLARATION

I, KURIA YVONNE NJOKI, 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: 07.03.2024

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

Signed: 

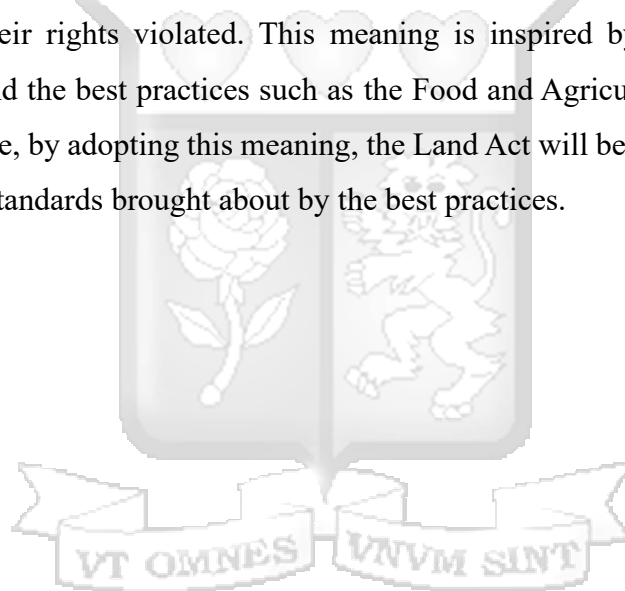
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ABSTRACT

Compulsory land acquisition is an important process that helps with the development of a country. In Kenya, this process is acknowledged in the 2010 Constitution, Article 40. The acquisition ought to be for a public purpose and compensation to be paid justly and promptly as provided by the Constitution and Land Act. Despite this the landowners are being disadvantaged by this process because of the lack of definition of the term prompt. Therefore, this study focuses on the constitutionality of the laws on compulsory acquisition and more so, on prompt payment of compensation by conducting qualitative research. It also conducts a comparative analysis in Australia and India that has laws that ensure that the landowners are not being disadvantaged by the acquisition. This study gives a meaning of what prompt payment is and of which ensures that none of the parties involved in the acquisition are disadvantaged and their rights violated. This meaning is inspired by the systems in both Australia and India and the best practices such as the Food and Agriculture Organization and the World Bank. Hence, by adopting this meaning, the Land Act will be in conformity with the Constitution and the standards brought about by the best practices.



LIST OF ABBREVIATIONS

FAO	Food Agriculture Organization
NLC	National Land Commission
CKRC	Constitution of Kenya Review Commission



LIST OF CASES

Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions (2001), The United Kingdom House of Lords.

Arnacherry Limited v Attorney General (2014) eKLR.

Christabel Akinyi Onyango v Kenya Airports Authority (2013) eKLR.

Isaka Wainaina Wa Gathoro & Another v Murito wa Indagara & Another (1923) KLR.

Mathatani Limited v Commissioner of Lands (2013) eKLR.

Modern Coast Builders & Contractors Limited v National Land Commission (2020) eKLR.

Nightshade Properties Limited v National Land Commission and 3 others (2021) eKLR.

Rajiv Saran v State of Uttarakhand (1998), The Supreme Court of India.

Ravaspaul Kyalo Mutisya v National Land Commission (2022)eKLR.

Roads and Maritime Services v Desane Properties Pty Ltd [2018], New South Wales Court of Appeal, Australia.

State of West Bengal and others v Dilip Ghosh and others (2018), Calcutta High Court.

Wildtree Hotels Ltd v Harrow (2001), The United Kingdom House of Lords.

LIST OF LEGAL INSTRUMENTS

Constitution of Australia (1901).

Constitution of India (2022).

Constitution of Kenya (1963) (repealed).

Constitution of Kenya (2010).

International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

Land Acquisition Act (Act No 1 of 1894) (Repealed).

Land Acquisition Act (Cap 295 of 1968) (repealed).

Land Acquisition (Just Terms Compensation) Act (No. 22 of 1991) (New South Wales).

Land Act (Act No 6 of 2012).

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

Native Land Ordinance (No 22 of 1930) (Repealed).

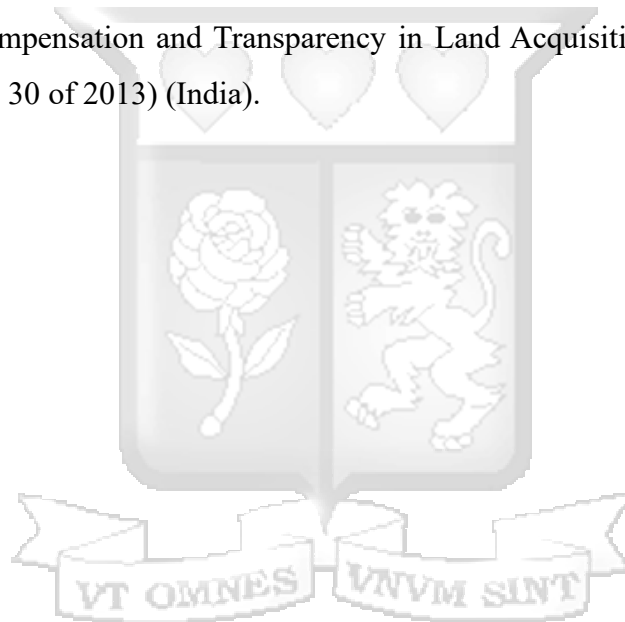
National Land Policy of Kenya (2009).

Roads and Streets Act (no. 12A of 1833) (Australia).

Sydney Water Supply Act (no. 1 of 1833) (Australia).

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

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (No. 30 of 2013) (India).



LIST OF DEFINITIONS

Compulsory land acquisition:

The power of the government to deprive a person of their private right to property for a public purpose or in public interest subject to prompt payment of compensation.

Prompt payment:

Payment before taking possession of the land.



CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 BACKGROUND

Land is fundamental to the economic, social, and cultural development of Kenya and should therefore be held, used, and managed in a manner that is equitable, efficient, productive, and sustainable.¹ Land in Kenya is classified as public land, community land or private land as it belongs to the people of Kenya collectively as a nation, as communities and as individuals.²

Land is a form of real property as entrenched in the Constitution of Kenya.³ The right to property which is entrenched in the Constitution of Kenya provides that every individual in Kenya can own land either individually or as a group.⁴ Legislation then goes ahead to mention methods by which title can be acquired. These methods include allocation, land adjudication process, compulsory acquisition, adverse possession, settlement programs, transmissions, transfers, long-term leases exceeding twenty-one years created out of private land and any other manner prescribed.⁵

This study focuses on the compulsory acquisition method of acquiring titles to land. Compulsory acquisition means the power of the state to acquire title or interest in land for a public purpose or in the public interest subject to prompt payment of compensation.⁶ Acquiring land through this method has always been a delicate issue and has increasingly become a delicate issue nowadays. This is because of the increasing pressure that the government is getting to deliver public services such as infrastructure projects where there is already a high and growing demand for land.⁷ Due to it being a delicate issue, this government power over time has been imposed with two conditions to make the acquisition justified, first the

¹ Article 60, *Constitution of Kenya* (2010).

² Article 61, *Constitution of Kenya* (2010).

³ Article 260, *Constitution of Kenya* (2010).

⁴ Article 40(1), *Constitution of Kenya* (2010).

⁵ Section 7, *Land Act* (Act No 6 of 2012).

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

⁷ Food and Agriculture Organization of the United Nations, 'Compulsory acquisition of land and Compensation' *Land tenure studies* (2009), 1.

being given in 2021.¹⁸ It can be deduced that landowners have to wait for a long time to be compensated and that without the intervention of the courts, the uncompensated period may be longer. This is also seen in the case study of the construction of the Horn of Africa Road in Isiolo which started in June 2022 the landowners are yet to be compensated for the lands which were acquired by the government.¹⁹

Furthermore, The Land Value Amendment Act also provides that once an award has been made the Commission is allowed to take possession of the land provided that the people will not be rendered homeless.²⁰

Contrary to the meaning given in law, of prompt and just compensation during compulsory acquisition, there still exists some ambiguities as to what exactly the law means by prompt and just compensation.

The law does not provide a well-defined time for compensation when using the term prompt. The interpretation of the term in the Land Value Amendment Act states the compensation should be done within one year after the acquisition, however, this interpretation is still ambiguous as it does not give a specified time. Therefore, this leads to land injustices in that some of these people whose lands have been acquired are relying on monetary compensation to be able to relocate. In addition, the Commission takes possession of the land after the compensation award has been issued without considering whether the people will be rendered homeless, which is contrary to the law. This is seen in the case of *Ravaspaul Kyalo Mutisya v National Land Commission*, in that despite the NLC issuing the wrong award, it acquired the land in 2019 and in 2021 it is yet to compensate.²¹ The Appellant also submits that the acquisition has led him to suffer damages and losses and even left him homeless.²² This, therefore, causes injustices due to the lack of prompt compensation.

1.2 STATEMENT OF PROBLEM

Article 40 of the Constitution of Kenya requires prompt payment of full and just compensation for compulsorily acquired land. However, the Land Act provides that compensation should not

¹⁸ *Nightshade Properties Limited v National Land Commission and 3 others* (2021) eKLR.

¹⁹ Luke Awich, 'MPs want payment for compulsory acquired land expedited' *The Star Newspaper*, 11 August 2023 <https://www.the-star.co.ke/news/2023-08-11-mps-want-payment-for-compulsory-acquired-land-expedited/> on 23 August 2023.

²⁰ Section 10, *Land Value Amendment Act* (Act No 15 of 2019).

²¹ (2022)eKLR.

²² *Ravaspaul Kyalo Mutisya v National Land Commission* (2022)eKLR.

be paid more than one year after taking possession of the land, .which causes land injustices as it leads to loss of land rights generally ,for example it renders people homeless and loss of farming land. This study, therefore, assesses the constitutionality of the laws on prompt payment of compensation in Kenya.

1.3. RESEARCH OBJECTIVES

1. To evaluate the legal framework on Compulsory Acquisition in Kenya.
2. To conduct a comparative study with Australia and India on their approach of requiring full payment of compensation before land acquisition.
3. To give an interpretation of how prompt payment of compensation ought to be.
4. To make proposals and recommendations of prompt payment of compensation for compulsorily acquired land in Kenya.

1.4. RESEARCH QUESTIONS

1. What is the legal framework on Compulsory acquisition in Kenya?
2. What is the Australian and Indian approach on requiring full payment of compensation before land acquisition?
3. How prompt payment of compensation during compulsory acquisition should be interpreted?
4. Which proposals and recommendations can Kenya adopt for prompt payment of compensation for compulsorily acquired land?

1.5 HYPOTHESIS

Kenya's statutory provisions on prompt payment of compensation violate article 40 of the Constitution of Kenya on the right to property.

1.6 JUSTIFICATION

The lack of prompt payment of compensation during compulsory acquisition has led to many people suffering from land injustices. This is because it renders most people homeless, especially those who depend on compensation to relocate. Previous studies on compulsory acquisition have focused on just compensation to include also non-monetary compensation. Therefore, this will be useful in trying to address the problem by assessing whether laws currently present on the prompt payment of compensation violate the right to property as entrenched in the Constitution. This will be useful to lawmakers as it will guide them on how

to amend the laws governing the prompt payment of compensation to protect the right to property of individuals. This study will also be useful to adjudicators in adjudicating matters of lack of prompt payment and whether it violates the right to property. It will also tend to be useful to researchers in matters of prompt and just compensation during compulsory acquisition.

1.7 CONCEPTUAL FRAMEWORK

RIGHT TO PROPERTY AS COMPLEMENTARY TO THE SOCIO-ECONOMIC RIGHTS.

The right to property is a fundamental right. It is recognized internationally that everyone has the right to own property individually as well as in association with others.²³ The same recognition is given to the right to property in Kenya according to the Constitution.²⁴ There are three types of human rights protection when it comes to property as highlighted by Allison Clarke. They include the right to state protection against violations of recognized property rights, the right to resources, for example water, from the state that enables the property to flourish and the right to respect and protection of customary relationships between people and their resources, affording the relationship between people and their resources the same protection as formally created property rights.²⁵

The right to property is viewed as a natural right that requires protection to make it possible for individuals to enjoy other rights and freedoms.²⁶ Some of the rights that the right to property makes it possible for individuals to enjoy are socio-economic rights. These rights are rights that provide for the protection of dignity, freedom and well-being of individuals.²⁷ These socio-economic rights include the rights to adequate food, adequate housing, education, health, social security, taking part in cultural life, work, water and sanitation.²⁸ There exists the need to

²³ Article 17, Universal Declaration of Human Rights, 10 December, (1948), 217 A (III).

²⁴ Article 40, *Constitution of Kenya* (2010).

²⁵ Clarke A, 'Property, Human Rights and Communities' in *Property and Human Rights in a Global Context*, Hart Publishing Limited, United Kingdom, 2015, 26-27.

²⁶ Allen T, *Property, and the Human Rights Act 1998*, Hart Publishing Limited, North America, 2005, 20.

²⁷ 'Social and Economic Rights' International Institute For Democracy and Electoral Assistance, August 2014, <<https://www.idea.int/sites/default/files/publications/social-and-economic-rights-primer.pdf> on 27 February 2023.

²⁸ 'Economic, Social and Cultural rights' United Nations Human Rights Office of the High Commissioner <²⁸
<https://www.ohchr.org/en/human-rights/economic-social-cultural-rights#:~:text=Economic%20social%20and%20cultural%20rights,and%20sanitation%2C%20and%20to%20work> on 27 February 2023.

recognize that these rights are derived from the inherent dignity of the human person and the presence of the duty to respect this dignity that every person has.²⁹

Property rights and prosperity are inextricably linked in that a private property system gives individuals the exclusive right to use their resources as they fit.³⁰ Therefore, the right to property is seen as a critical cornerstone for economic growth in that it allows the owners to invest in, maintain and use it to generate income. This is because of the dominion that people have over what is theirs that leads them to take full account of the benefits and costs of employing those resources in a particular manner.³¹ One of the ways the right to property is used to generate income is by receiving rent which offers financial security and prevents individuals from suffering from financial hardships. Which helps the owners to prosper, therefore, boosts the economy.

The right to property is also closely intertwined with the right to adequate housing and social security. The right to adequate housing is entrenched in the International Covenant on Economic, Social and Cultural Rights.³² This right is intertwined with the right to property in that the latter right provides the owners with the security to own land and build their own houses. These landowners will then be able to enjoy their right to housing due to the secure houses they have for themselves. Adequate housing is essential for human survival with dignity.³³ Therefore, it is crucial that the right to property is respected which in turn leads to the socio-economic rights being respected because their violation will lead to the violation of human dignity.

This concept of the right to property as complementary to the socio-economic rights will be used to assess whether the current provisions on timelines for prompt payment of compensation during compulsory acquisition violates the right to property. Doing so will help in assessing whether the laws on prompt payment of compensation during compulsory acquisition violate the socio-economic rights of the landowners.

²⁹ Article 28, *Constitution of Kenya* (2010).

³⁰ Hoskins and O'driscoll, 'The role of property rights in economic development' Libertarianism Organization, 7 August 2003, < [Property Rights: The Key to Economic Development | Libertarianism.org](https://libertarianism.org/property-rights-the-key-to-economic-development) on 27 February 2023.

³¹ Hoskins and O'driscoll, 'The role of property rights in economic development' Libertarianism Organization, 7 August 2003, < [Property Rights: The Key to Economic Development | Libertarianism.org](https://libertarianism.org/property-rights-the-key-to-economic-development) on 27 February 2023.

³² Article 11, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966.

³³ Sidoti C, 'Housing as a Human Right,' National Conference on Homelessness Council to Homeless Persons, Melbourne, 4 September 1966, 1.

1.8. LITERATURE REVIEW

Currently, there exists work on this. The right to property is not an absolute right because it is limited by the legal requirement that private property rights must yield to the superior rights of the state when it is necessary for a public purpose.³⁴ Anyasi in his dissertation highlights how ambiguities in the laws governing compulsory acquisition have resulted in disputes arising as to what constitutes fair, prompt and adequate compensation.³⁵ This is as a result of our legal framework which has enabled private property owners to be unfairly taken off their right to property.³⁶ More focus has been given on just compensation during compulsory acquisition. Scholars like Kariuki and Ng'etich have criticized the compensation process in compulsory acquisition claiming that monetary compensation alone is not enough.³⁷ They go ahead to point out that people lose more than their property as they also lose their source of income, places of worship and cultural activities.³⁸ Bonaya and Ndambuki's dissertations support the views of Kariuki and Ng'etich. They claim that for compensation to be considered just it should not only be monetary but also should include the non-monetary aspect.³⁹

1.8.1 On the process of Compulsory acquisition

Scholars like Kariuki have explained that there exist two main pre-conditions, it is for a public purpose and there is just payment of compensation, which must be met for compulsory acquisition to be justified.⁴⁰ There exists academic literature surrounding the process of compulsory acquisition. Lindsay in her chapter observed that there needs to be evidence in our legal framework produced by the state to the public to convince them that the benefits of the acquisition will outweigh the hardships that they may face.⁴¹

³⁴ Paul EF, *Property rights and eminent domain*, Transactional Publishers, New Brunswick, 1987, 185 as cited in Bonaya A, 'Compulsory Acquisition and the Right to Property: The Gaps in the Legal Framework, Practices and Possible Solutions' Published Dissertation, Strathmore University, Nairobi, 2018, 4.

³⁵ Anyasi J, 'Compulsory Land Acquisition VIS-À-VIS The Right to Property in Land; A Human Rights Discourse' Published Dissertation, Kenyatta University, Nairobi, 2014, 13

³⁶ Anyasi J, 'Compulsory Land Acquisition VIS-À-VIS The Right To Property in Land; A Human Rights Discourse' Published Dissertation, Kenyatta University, Nairobi, 2014, 13.

³⁷ Kariuki F and Ng'etich R, 'Land Grabbing, Tenure Security and Livelihoods in Kenya' 9 *African Journal of Legal Studies*, 2016, 88.

³⁸ Kariuki F and Ng'etich R, 'Land Grabbing, Tenure Security and Livelihoods in Kenya', 88.

³⁹ Bonaya A, 'Compulsory Acquisition and the Right to Property: The Gaps in the Legal Framework, Practices and Possible Solutions' Published LLB Dissertation, Strathmore University, Nairobi, 2018, 5 and Ndambuki V, 'Just Compensation in the Compulsory Acquisition Process in Kenya' Published LLB Dissertation, Strathmore University, Nairobi, 2019, 6.

⁴⁰ Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 135.

⁴¹ Anyasi J, 'Compulsory Land Acquisition VIS-À-VIS The Right to Property in Land; A Human Rights Discourse' Published LLB Dissertation, Kenyatta University, Nairobi, 2014, 7.

Furthermore, Okoth Ogendo in his paper highlights that the state is an inefficient administrator and a predator on people's land in that they tend to occupy lands without acquisition.⁴² In Tanzania, compulsory acquisition is seen as a necessary tool for the state to limit the right to property as long as there is fair and prompt payment of compensation.⁴³ However, the process has been faced with problems due to lack of a clear policy and legal framework which in turn has affected the valuation and compensation process.⁴⁴

In Namibia, the constitution provides for the requirement of public interest as justification for compulsory acquisition.⁴⁵ However, its validity is denied because the entire land reform is a failure and would not be prudent to rely on it given their land regime.⁴⁶

This process of compulsory acquisition is faced with so many challenges that hinder it from being successfully implemented. These challenges were highlighted by Kombe, and they are: delayed and unfair compensation, lack of communication and non-involvement, poor governance, and the disregard of regulations.⁴⁷

According to Bishiri he recognizes that the management of this process plays a crucial role in the lives of the landowners in that it has significant consequences.⁴⁸ In addition, the landowners have no option but to adhere to this process.⁴⁹

1.8.2 On the understanding of prompt payment of compensation in Compulsory acquisition.

There exist different understandings of prompt payment. Many Constitutions provide for prompt payment of compensation during Compulsory Acquisition.⁵⁰ States are required to

⁴²Okoth-Ogendo H.W.O., 'Legislative approaches to Customary Tenure and Tenure Reform in East Africa' In Toulmin, C. and Quan, J. (Eds), *Evolving Land Rights, Policy and Tenure in Africa*, London, 2000 as cited in Anyasi J, 'Compulsory Land Acquisition VIS-À-VIS The Right To Property in Land; A Human Rights Discourse' Published Dissertation, Kenyatta University, Nairobi, 2014, 8.

⁴³Kombe W, "Land Acquisition for public use: Emerging conflicts and their socio-political implications," Ardhi University, Crisis states working papers series 2, October 2010, 4 <<https://assets.publishing.service.gov.uk/media/57a08b2b40f0b652dd000b3e/WP82.2.pdf>> on 03 March 2023.

⁴⁴Kombe W, "Land Acquisition for public use: Emerging conflicts and their socio-political implications," 4.

⁴⁵ Hengari R, 'A Critical Analysis of how Successful The Land Reform Procedures Have Been In Namibia' unpublished LLB dissertation, the University of Namibia, Namibia, 2010, 29.

⁴⁶ Hengari R, 'A Critical Analysis of how Successful The Land Reform Procedures Have Been In Namibia' unpublished LLB dissertation, the University of Namibia, 2010, 29.

⁴⁷ Kombe W, "Land Acquisition for public use: Emerging conflicts and their socio-political implications," 7.

⁴⁸ Bishiri K, 'Compulsory Land Acquisition in Urban Centers and The Protection of Economic Rights in Tanzania Mainland' Published LLB Dissertation, Muslim University of Morogoro, Tanzania, 2020, 20.

⁴⁹ Bishiri K, 'Compulsory Land Acquisition in Urban Centers and The Protection of Economic Rights in Tanzania Mainland' Published LLB Dissertation, Muslim University of Morogoro, Tanzania, 2020, 20.

⁵⁰ Food and Agriculture Organization of the United Nations, 'Compulsory acquisition of land and Compensation' *Land tenure studies* (2009), 26.

recognize all landowners especially the marginalized and vulnerable and provide prompt and just compensation for the acquisition of their land.⁵¹ However, the period of the payment is usually left undefined in the legislations.⁵² Ndambuki notes that the term prompt is open to different self -interpretations by the body acquiring it. ⁵³ This can lead to delayed just compensation of the landowners.⁵⁴ The lack of not defining what the term prompt and fully defining just compensation is seen to have denied the achievement of balancing the interests of the state and the victims of the acquisition.⁵⁵This fails to give a specific timeline as to how before should the government compensate the landowners.

Wendy in her work conducts a comparative analysis of Australia and recommends that Kenya should pay compensation before the state has acquired the land just as is done in Australia.⁵⁶

Blessing in her work tries to define prompt by recommending that states should pay not less than 50% when acquiring land and the balance to be paid within 90 days and that failure to do so should attract an interest rate and a criminal penalty.⁵⁷ She goes ahead to suggest that the Prompt Payment Bill should also include land transactions.⁵⁸

Deneyer-Green and Larbi's works are similar in that they share the same view that there should be prompt, fair and adequate compensation during compulsory acquisition, however, they fail to define how prompt is prompt.⁵⁹

⁵¹ Food and Agriculture Organization of the United Nations, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forest in the Context of National Food Security' para 16.1.

⁵²Food and Agriculture Organization of the United Nations, 'Compulsory acquisition of land and Compensation' *Land tenure studies* (2009), 26.

⁵³ Ndambuki V, 'Just Compensation in the Compulsory Acquisition Process in Kenya' Published LLB Dissertation, Strathmore University, Nairobi, 2019, 24.

⁵⁴ Ndambuki V, 'Just Compensation in the Compulsory Acquisition Process in Kenya' Published LLB Dissertation, Strathmore University, Nairobi, 2019, 24.

⁵⁵ Ndambuki V, 'Just Compensation in the Compulsory Acquisition Process in Kenya' Published LLB Dissertation, Strathmore University, Nairobi, 2019, 33.

⁵⁶ Kuyoh W, "'In the Public Interest ": an Introspection into the Compulsory Acquisition and the right to property 'Unpublished Strathmore University, Nairobi, 2021, 35-36.

⁵⁷ Wanjau B, 'The Due Date: An Introspection into the Right To Property and Prompt Payment for Compulsory Land Acquisition in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2023, 16.

⁵⁸ Wanjau B, 'The Due Date: An Introspection into the Right To Property and Prompt Payment for Compulsory Land Acquisition in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2023, 16.

⁵⁹ Denyer-Green, B., *Compulsory Purchase and Compensation*, 8th ed, Estate Gazette, London, 2005, 110 and Odamelarbi W, 'Compulsory land acquisition in Ghana- Policy and Praxis' 21 *Land Use Policy* 2, 2004, 115-127 as cited in Kweyamba T, 'An Assessment of Promptness and Fairness of Compensation Awardable For Unexhausted Improvement on Land Matters in Tanzania' Published LLM Dissertation, Mzumbe University, Tanzania, 2015, 10.

From experience Nyarko has noticed that governments usually have no incentive to pay prompt and just compensation once they get to possess the property.⁶⁰ The solution which has been given to this is for the law to provide a clear timeline for the payment of compensation to the landowners.⁶¹

Gap/gaps

The existing literature on compulsory acquisition focuses on what constitutes just compensation and recognizes the challenges that the process of compulsory acquisition faces. Some of the existing literature also recognizes that there is need for the law to provide a clear timeline for payment. This study will be a unique contribution, especially in Kenya, whereby it will make an argument for how the lack of prompt payment violates the right to property. It will also add to the discussion of having a clear timeline for payment of compensation by conducting a comparative analysis with India.

1.9 METHODOLOGY

The nature of this research will be qualitative. This study will also be desk based. This research will rely on primary sources for example statutes such as the Constitution of Kenya, the Land Act of Kenya, and the Land Value Amendment Act. This study will also utilize secondary sources such as journal articles, case laws, books, reports, and other internet sources.

The study seeks to examine the process of compulsory acquisition in Kenya with a specific focus on the factors that impede the prompt payment of compensation. This study intends to use legal rules by analyzing the statutes available on the process of compulsory acquisition and the cases on the factors that impede the prompt payment of compensation. I'll be using this doctrinal analysis of the Land Act and Land Value Amendment to show that there is a gap in the process of compulsory acquisition.

The study also seeks to investigate whether the prompt payment of compensation in Kenya adheres to the principle of fair compensation. This will entail looking at books and scholarly articles on what principle of fair compensation is and what constitutes it. Also, a doctrinal analysis of what the courts have said regarding the principle of fair compensation will be

⁶⁰ Nyarko M, 'The Right to Property and Compulsory Land Acquisition in Ghana: An Analysis of the Laws and Policies Toward Greater Protection' Published LLM Dissertation, Makerere University, Uganda, 2014, 4.

⁶¹ Nyarko M, 'The Right to Property and Compulsory Land Acquisition in Ghana: An Analysis of the Laws and Policies Toward Greater Protection' Published LLM Dissertation, Makerere University, Uganda, 2014, 43.

conducted. This will be done to help in making the claim that there is no adherence to the principle of fair compensation.

Finally, this study intends to conduct a comparative study analyzing India and Australia on the approach of prompt payment of compensation. This will entail conducting a comparative analysis between the two countries on the laws that govern prompt payment of compensation and the positive outcomes that Australia and India have experienced by using that approach. This will be helpful in making a prescriptive claim of how the Kenyan law ought to be regarding prompt payment. This is because both requires full payment of compensation before the land is acquired and in India failure to do so attracts penalty. Also, both countries allow the landowners to occupy the house till fully compensated.

1.10 CHAPTER BREAKDOWN

Chapter 1: Introduction to the study: This chapter is an introductory chapter which entails the background of the study, statement of problem, research objectives, justification of the study, hypothesis, and the conceptual framework.

Chapter 2: An Analysis of the Legal Framework for Compulsory Acquisition in Kenya: This chapter will examine the process of compulsory acquisition by focusing on the legal framework that guides the process.

Chapter 3: A Comparative Analysis of the prompt payment of compensation during Compulsory Acquisition in Australia and India: This chapter will conduct a comparative study analyzing Australia and India. It shall investigate the process of compulsory acquisition in Australia and India focusing on the prompt payment of compensation during compulsory acquisition and the positive outcomes it has yielded.

Chapter 4: An interpretation of what prompt payment of compensation during compulsory acquisition ought to be: This chapter will show how the interpretation of prompt payment of compensation during compulsory acquisition ought to be and how the institutions should deal with it.

Chapter 5: Conclusions, Findings and Recommendations: This final chapter shall conclude the study and give recommendations on the findings of the study.

CHAPTER TWO

THE LEGAL FRAMEWORK FOR COMPULSORY ACQUISITION IN KENYA.

2.1 INTRODUCTION

This chapter will look at the primary laws governing Compulsory Acquisition in Kenya. It will do so by looking at the laws that governed this process from before independence to date. The objective of this chapter is to determine whether the interpretation of prompt payment of compensation is constitutional. The purpose of going through the history of the process of compulsory acquisition is to be able to see the timeline the laws before had placed on payment of compensation by the government. This is to be able to detect whether that timeline fits in the definition of prompt payment.

This chapter shall also look into the role that the National Land Commission, Ministry of Lands and the judiciary play in the process of compulsory acquisition.

2.2 PRE-INDEPENDENCE LEGISLATION

In 1895, the British established the East African Protectorate, however, Kenya became a colony in 1920. According to Sorrenson in British Constitutional Theory, a Protectorate was regarded as a sovereign state, and therefore the power vested in the Crown was merely at par with that provided under the Articles of Agreement.⁶² However, for Colonies, the Colony was considered to be part of the dominions of the Crown, and thus the power of the Crown in such a Colony was unlimited, and all land therein belonged to the Crown.⁶³ The Crown was denied the power to expropriate the land of Kenya because Kenya was a Protectorate. This then led to the drive for Kenya to become a Colony so that the Crown would acquire unlimited power over land.⁶⁴ Since Kenya was a Protectorate, the Crown could not implement their imperial projects such as the construction of the Kenya- Uganda Railway.⁶⁵

⁶²Sorrenson, M. The Origins of European Settlement in Kenya. Nairobi: OUP, John Flint, "Wider Background to Partition and Colonial occupation", In "History of East Africa, Edited by Roland Oliver and Gervase Mathew, Oxford, Clarendon, 1968 as cited in Mbila A and Shikoli E, ' Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation' *Kenya Law Review Journal*, 2019, 3.

⁶³ Sorrenson, M. The Origins of European Settlement in Kenya. Nairobi: OUP, John Flint, "Wider Background to Partition and Colonial occupation", as cited in Mbila A and Shikoli E, ' Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation,' 3.

⁶⁴ Mbila A and Shikoli E, ' Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation,' 3.

⁶⁵ Mbila A and Shikoli E, ' Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation,' 3.

Through the East African Order-in-Council in 1897, the British Government extended to the Protectorate the 1894 Indian Land Acquisition Act which was the instrument that was to be used to compulsorily acquire land for the construction of the railway and for the acquisition of the Ten-Mile Zone on each side of the railway line.⁶⁶

I. Indian Land Acquisition Act 1894

Section 4 provided that if the relevant authority finds that the land in any locality appears to be needed for any public purpose a notification to that effect shall be published in the Official Gazette.⁶⁷ This section went further to provide that after a notice had been published any officer could enter into the land and compulsorily acquire it.⁶⁸ However, it also stated that no person shall enter into any building without previously giving such occupier at least seven days' notice in writing of his intention to do so.⁶⁹

Section 5 provided that the officer authorized shall at the time of such entry pay for all necessary damage to be done as a result of their entry into that land as mentioned in Section 4(2) of the Act.⁷⁰ The Act also went ahead to provide in Section 9 that the public notice which shall be caused by the Collector should be given at convenient places or near the land to be taken while stating that the Government intends to take possession of the land and that claims to the compensations for all interested parties in such land may be made to him.⁷¹ This shows that landowners were to be compensated once their lands were compulsorily acquired in that all those who had such claims were to make them to the collector.

Section 31 provided that the Collector shall tender payment of the compensation awarded by him to the persons interested entitled to it.⁷² This section also provided another way that compensation could be made by the Collector through the approval of the Government, the Collector could make any arrangement with a person having a limited interest in such land, either by the grant of other lands in exchange, the remission of land-revenue on other lands held under same title or in such other way as may be deemed to be equitable having regard to the interests of the parties concerned.⁷³ This section provided for other non-monetary means of

⁶⁶ Mbila A and Shikoli E, 'Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation,' 4.

⁶⁷ Section 4(1), *Land Acquisition Act* (Act No 1 of 1894) (Repealed).

⁶⁸ Section 4(2), *Land Acquisition Act* (Act No 1 of 1894) (Repealed)..

⁶⁹ Section 4(2), *Land Acquisition Act* (Act No 1 of 1894) (Repealed).).

⁷⁰ Section 5, *Land Acquisition Act* (Act No 1 of 1894) (Repealed).

⁷¹ Section 9(1), *Land Acquisition Act* (Act No 1 of 1894) (Repealed).

⁷² Section 31(1), *Land Acquisition Act* (Act No 1 of 1894) (Repealed).

⁷³ Section 31(1), *Land Acquisition Act* (Act No 1 of 1894) (Repealed).

compensation which would have been seen as a more suitable method of compensation as it returns the landowner to the position they were before, especially by granting of other lands.

Additionally, for the collector to enter and take possession of the land, Section 36 provided that on payment of such compensation or on executing such agreement, the collector may enter upon and take possession of the land.⁷⁴

This Act also took into consideration the fact that at times the acquisition process would not be completed, so to deal with this Section 48 provided that the completion of acquisition is not compulsory but compensation to be awarded even when the acquisition is not complete.⁷⁵ This section provided that the Government has the liberty to withdraw from the acquisition of any land, however, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice.⁷⁶

This Indian Land Acquisition Act played a huge role in changing the colonial practice of land acquisition from expropriation to compulsory acquisition because it provided for compensation in various sections of the Act such as Section 36.⁷⁷

However, despite the compensatory mechanism provided in the Act, the Colonial Office proceeded to acquire African land without any compensation awarded thereafter leaving them to be squatters in their own land.⁷⁸

II. The East African (Lands) Ordinance-in-Council 1901

The Colonial Office found a fault in the Indian Land Acquisition Act of 1894 in that there was no provision allowing it to resell any African land that it had acquired.⁷⁹ This ordinance was promulgated to confer on the commissioner of the Protectorate the power to dispose of all public lands on such terms and conditions as he might think fit and also to hold the land in trust for the crown.⁸⁰

⁷⁴Section 36(1), *Land Acquisition Act* (Act No 1 of 1894) (Repealed).

⁷⁵ Section 48, *Land Acquisition Act* (Act No 1 of 1894) (Repealed).

⁷⁶ Section 48(1), *Land Acquisition Act* (Act No 1 of 1894) (Repealed).

⁷⁷ Mbila A and Shikoli E, 'Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation,' 4.

⁷⁸ Ogendo H, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, African Center for Technology Studies Press, 1991, as cited in Mbila A and Shikoli E, 'Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation,' 4.

⁷⁹ Mbila A and Shikoli E, 'Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation,' 4.

⁸⁰ Kimaiyo T, 'Ogiek Land Cases and Historical Injustice' Free Africa Tripod, 2004
<https://freeafrica.tripod.com/ogiekland/book/Chapter06.htm> on 2 November 2023.

III. The Crown Lands Ordinance 1902 and 1915

The Crown Lands Ordinance of 1902 asserted that the Crown was the sole owner of all the land and defined the rights that were to be recognized.⁸¹ However, this did not stop them from respecting the customary land rights of the communities to some extent which made the colonialists unhappy.⁸² This ordinance also increased the lease from twenty-one to ninety-nine years and granted a temporary farming license of between one to five years to loyalists.⁸³

The 1915 Crown Lands Ordinance came to repeal the 1901 East African (Lands) Ordinance in Council. In the case of *Isaka Wainaina Wa Gathoro and another v Murito wa Indangara and another*, it was stated that the effect of the repealed 1901 order-in-council led to the taking away of all native rights in land reserved for the occupation of natives, vest all that land in the Crown and leave the natives as tenants at the will of the Crown in the land they actually occupied.⁸⁴ This ordinance declared all land as belonging to the Queen and disposal was subject to her will, dispossessing Africans of the Land.⁸⁵ They were excluded from the most productive regions causing injustices to them in that their land rights were violated. This law also made the natives become tenants of their own land and some were even pushed to reserves that were unfavorable to them. It also went ahead to award white settlers freehold titles of 1000 acres of land and a security of tenure of up to 999-year leases.⁸⁶

IV. The Native Land Trust Ordinance of 1930

This Ordinance was enacted to cushion the natives' grievances challenging the concept that all land belonged to the crown.⁸⁷ This ordinance granted natives leases of up to thirty-three years making them landowners.⁸⁸ Therefore, the landowners were entitled to compensation for their native reserves which would be appropriated for public use.⁸⁹ The Compensation was in the form of monetary compensation.⁹⁰

⁸¹ Kimaiyo T, 'Ogiek Land Cases and Historical Injustice' Free Africa Tripod, 2004 <https://freeafrica.tripod.com/ogiekland/book/Chapter06.htm> on 2 November 2023.

⁸² Kimaiyo T, 'Ogiek Land Cases and Historical Injustice' Free Africa Tripod, 2004 <https://freeafrica.tripod.com/ogiekland/book/Chapter06.htm> on 2 November 2023.

⁸³ Southall R, 'The Ndungu report: Land & Graft in Kenya' 103 *Review of African Political Economy* 1, 2005, 144.

⁸⁴ (1923) KLR.

⁸⁵ Wanjala S, 'Essays on land law: the reform debate in Kenya' University of Nairobi Research Archives, 2000, 288 < <http://erepository.uonbi.ac.ke/handle/11295/88553> > on 2 November 2023.

⁸⁶ Karari P, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial Experience' 25 *Nova South Eastern University* 1, 2018, 3.

⁸⁷ Karari P, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial Experience,' 4.

⁸⁸ Karari P, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial Experience,' 4.

⁸⁹. Section 16, *Native Land Ordinance* (No 22 of 1930) (Repealed).

⁹⁰ United Kingdom Parliament Hansard Report, 20 December 1932, 911.

2.3. POST-INDEPENDENCE PERIOD

2.3.1. Pre-2010 period

i. Independence Constitution of 1963

The Independence constitution provided that every person in Kenya had the right to the protection of the privacy of his home and other property and from deprivation of property without compensation.⁹¹ Moreover, it provided for the conditions which need to be satisfied for property to be compulsorily acquired.⁹² These conditions were: 1) the taking of possession is necessary in the interests of defence, public safety, public order, public morality, public health, town, and country planning or the development or utilization of any property in such manner as to promote the public benefit, 2) the necessity, therefore, is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property and 3) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.⁹³ Therefore, the Government was obliged to give prompt payment of the full compensation of the land compulsorily acquired.⁹⁴ This was the main reason the term compulsory acquisition was used as opposed to expropriation in that the landowners were to be adequately compensated after their land has been acquired so as to be able to purchase another land.⁹⁵

Every person who was affected directly by the compulsory acquisition had a right of direct access to the Supreme Court for: the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and the purpose of obtaining prompt payment of that compensation.⁹⁶ This was the effect of the Independence Constitution to be able to correct the wrongs that the Colonial land laws and policies had been able to do on Kenyan landowners.⁹⁷

ii. Land Acquisition Act of 1968 (Repealed)

⁹¹ Section 14 (c), *Constitution of Kenya* (1963) (repealed).

⁹² Section 19 (1), *Constitution of Kenya* (1963) (repealed).

⁹³ Section 19 (1), *Constitution of Kenya* (1963) (repealed).

⁹⁴ Section 209 (2), *Constitution of Kenya* (1963) (repealed).

⁹⁵ Mbila A and Shikoli E, 'Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation,' 7.

⁹⁶ Section 19 (2), *Constitution of Kenya* (1963) (repealed).

⁹⁷ Mbila A and Shikoli E, 'Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation,' 8.

This Act was the first local Act to make provision for the compulsory acquisition of land for the public benefit.⁹⁸ This act was largely influenced by the Indian Land Acquisition Act which was used by the British to compulsorily acquire land in Kenya.

The Minister must be satisfied that the land is required for public use.⁹⁹ Thereafter, the preliminary stages of acquisition began. They included that if the Minister was satisfied that the need for a particular land was to be acquired, the Commissioner ought to then cause notice to be published in the Gazette and the interested parties informed.¹⁰⁰ The second stage was that after the notice has been published, the Commissioner may authorize any person to enter upon the land which the notice has been published for and survey it.¹⁰¹ However, the authorization would not suffice for entry to a building, enclosed court, or garden attached to a dwelling house unless two conditions are met: consent of the occupier or not less than seven days' notice in writing of the intention to enter.¹⁰² Finally, after the survey has been done the interested parties shall be fully compensated for any damage that has resulted from the entry.¹⁰³

Afterwards, when satisfied with the survey, the commissioner shall issue a notice, to be published in the Gazette, that the government intends to acquire that particular land.¹⁰⁴ The interested parties in that particular land were entitled to full and prompt compensation.¹⁰⁵ It is important to note that the first compensation done was only to compensate the damages caused by the entry into the land¹⁰⁶ while for the second compensation, it was to compensate for acquiring the land compulsorily.¹⁰⁷ The compensation for acquiring the land compulsorily could be in the form of money or land of equal value to the one acquired.¹⁰⁸

The Act went further to provide that after a notice of an award has been issued to all interested persons the compensation would be paid as soon as is practicable by the Commissioner.¹⁰⁹ Additionally, if the compensation was not paid on or before taking possession an interest on

⁹⁸ Long title, *Land Acquisition Act* (Cap 295 of 1968) (repealed).

⁹⁹ Section 6 (1), *Land Acquisition Act* (Cap 295 of 1968) (repealed).

¹⁰⁰ Section 3, *Land Acquisition Act* (Cap 295 of 1968) (repealed).

¹⁰¹ Section 4 (1), *Land Acquisition Act* (Cap 295 of 1968) (repealed).

¹⁰² Section 4 (2), *Land Acquisition Act* (Cap 295 of 1968) (repealed).

¹⁰³ Section 5, *Land Acquisition Act* (Cap 295 of 1968) (repealed).

¹⁰⁴ Section 6 (2), *Land Acquisition Act* (Cap 295 of 1968) (repealed).

¹⁰⁵ Section 8, *Land Acquisition Act* (Cap 295 of 1968) (repealed).

¹⁰⁶ Section 5, *Land Acquisition Act* (Cap 295 of 1968) (repealed).

¹⁰⁷ Section 8, *Land Acquisition Act* (Cap 295 of 1968) (repealed).

¹⁰⁸ Section 12, *Land Acquisition Act* (Cap 295 of 1968) (repealed).

¹⁰⁹ Section 13, *Land Acquisition Act* (Cap 295 of 1968) (repealed).

the award of not less than six percent per annum from the time of taking possession until the time of payment shall be paid by the Commissioner.¹¹⁰

iii. National Land Policy 2009

It also recognized that compulsory acquisition is usually allowed if the land is for a public purpose and that the interested parties are subject to prompt payment of compensation.¹¹¹ It also recognized that the reason why compulsory acquisition in the past was experiencing a lot of challenges was because the established procedures are either abused or not adhered to which in turn leads to irregular acquisition.¹¹²

This policy proposed duties to the government on matters dealing with compulsory acquisition. These duties are: that they review the law on compulsory acquisition, harmonize the institutional framework for compulsory acquisition to avoid overlapping mandates, establish compulsory acquisition criteria, processes and procedures that are efficient, transparent and accountable, institute legal and administrative mechanisms for the exercise of this power by the state through the NLC and confer pre-emptive rights on the original owners or their successor where the public purpose or interest justifying the process fails or ceases.¹¹³ The main purpose for instituting legal and administrative mechanisms for the exercise of this power by the state through the NLC was so as to remove the state from dealing with compulsory acquisition so as to have it conducted in a fair and just manner.

Moreover, this policy created the Land Acquisition Tribunals under the Land Acquisition Act. It was to deal with appeals that arose from the compensation of compulsorily acquired land.¹¹⁴ Furthermore, the Constitution of Kenya and the Land Act are elaborate policy responses of this policy which was meant to address the challenges that have bedeviled land regulation which includes the compulsory acquisition powers of the state.¹¹⁵

However, this policy has faced some challenges which has led to the failure to implement the directions it has provided and the constitutional provisions on community land tenure regime in that among many problems that community land was facing due to lack of legal recognition,

¹¹⁰ Section 16 (1), *Land Acquisition Act* (Cap 295 of 1968) (repealed).

¹¹¹ Paragraph 45, National Land Policy, Ministry of Lands, Sessional Paper Number 3, 2009,11

¹¹² Paragraph 46, National Land Policy, Ministry of Lands, Sessional Paper Number 3, 2009,11

¹¹³ Paragraph 47, National Land Policy, Ministry of Lands, Sessional Paper Number 3, 2009,11

¹¹⁴ Paragraph 259, National Land Policy, Ministry of Lands, Sessional Paper Number 3, 2009,11

¹¹⁵Kuyoh W, "In the Public Interest ": an Introspection into the Compulsory Acquisition and the right to property 'Unpublished Strathmore University, Nairobi, 2021, 3.

protection and registration, the land was being provided for compulsory acquisition without adequate, just, fair and prompt payment of compensation.¹¹⁶

2.3.2 Post-2010 period

i. The Constitution of Kenya, 2010

The 2010 Constitution of Kenya promulgated that every Kenyan has the right to own property either individually or in association with others.¹¹⁷ It then went further to provide that a person cannot be deprived of their property by the State unless it is for a public purpose or in the interest of the public.¹¹⁸ However, the parties deprived of their property ought to be compensated in full and promptly.¹¹⁹ This is because the amount of compensation and time and manner of the payment ought to be just and equitable to reflect an equitable balance between the public interest and the interests of those affected by the acquisition.¹²⁰ This article was as a result of the examination that the Constitution of Kenya Review Commission conducted to know the place of property and land rights in the law of Kenya so as to be able to recommend an improvement that will secure the fullest enjoyment of land and other property rights.¹²¹ Additionally, the Commission recommended that the state right to compulsory land acquisition should conform to some principles which among them was that there ought to be prompt payment of compensation so as to ensure that the payment is just and equitable.¹²²

Furthermore, it establishes the National Land Commission which was one of the proposals proposed in the National Land Policy and the Constitution of Kenya Review Commission.¹²³ This Commission is the manager of public land, articulator of the National Land Policy and investigator of historical land injustices among other responsibilities.¹²⁴ The Commission came into place to divest the state of the power of dealing with land so as to be able to have an independent body in charge of such a delicate matter in the society.

ii. Land Act of 2012

¹¹⁶ Lumumba O, 'Kenya Land Policy Making, Implementation and Outcomes this far' *3 African Journal on Land Policy and Geospatial Sciences* 1, 2020, 152,

¹¹⁷ Article 40(1), Constitution of Kenya (2010).

¹¹⁸ Article 40(3), Constitution of Kenya (2010).

¹¹⁹ Article 40(3)(b), Constitution of Kenya (2010).

¹²⁰ CKRC, *The Final Report of the Constitution of Kenya Review Commission*, 2005, 288.

¹²¹ CKRC, *The Final Report of the Constitution of Kenya Review Commission*, 2005, 271.

¹²² CKRC, *The Final Report of the Constitution of Kenya Review Commission*, 2005, 288.

¹²³ Article 67(1), Constitution of Kenya (2010).

¹²⁴ Kenya Human Rights Commission, *Redress for Historical Land Injustices in Kenya*, 30 December 2023, 4.

After the 2010 Constitution, the Land Act 2012 was passed to be Kenya's land regulations legislation. This Act came into place to repeal the Land Acquisition Act as it encompassed all land transactions thus resulting in reforms in the land administration. It gave effect to Article 68 of the constitution by revising, consolidating, and rationalizing the land laws to provide for the sustainable administration and management of land.¹²⁵

Part IV of this Act deals with the governing of compulsory acquisition.¹²⁶ Compulsory acquisition is defined as the power of the State to deprive or acquire any title or other interest in land for a public purpose subject to prompt payment of compensation.¹²⁷ Unlike the Land Acquisition Act, it went ahead to define public purpose to mean the purposes of transportation, public buildings, public utilities, public parks, security and defence installations, settlement of squatters, the poor and landless, and the internally displaced persons, and any other analogous public purpose.¹²⁸ The Act went ahead to provide that if land is acquired compulsorily, all interested persons in the land are entitled to just compensation which ought to be paid promptly in full.¹²⁹

The National Land Commission established in the Constitution is the one mandated to compulsorily acquire land on behalf of the National or County Government.¹³⁰

The Current Process of Compulsory Acquisition

This process begins when either of the devolved government is satisfied that it may be necessary to acquire land which will then lead the Cabinet Secretary to submit a request for acquisition of public land to the Commission to acquire the land on its behalf.¹³¹ Thereafter, the Commission publishes a notice to show the intention to acquire the land in the gazette.¹³²

Once the notice to show intention to acquire has been published the Commission may authorize any person to enter that land and inspect it so as to see if it fits the intended purpose.¹³³ However, this authority does not extend to entering a building unless there's consent from the occupier or a notice of not less than seven days was issued to the occupier.¹³⁴ Finally, after the

¹²⁵ Long title, *Land Act* (No.6 of 2012).

¹²⁶ Part IV, *Land Act* (No.6 of 2012).

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

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

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

¹³⁰ Kenya Land Alliance, *A Guide on Public Land Acquisition within Community Land*, 31 December 2023, 16.

¹³¹ Section 107(1), *Land Act* (No.6 of 2012).

¹³² Section 107(5), *Land Act* (No.6 of 2012).

¹³³ Section 108(1), *Land Act* (No.6 of 2012).

¹³⁴ Section 108(2), *Land Act* (No.6 of 2012).

survey has been done the interested parties shall be fully compensated for any damage that has resulted from the entry.¹³⁵

Afterwards, the Commission shall appoint a date for inquiry, which shall be published in the Gazette, whereby they shall listen to issues of propriety and claims for compensation by the persons who are interested in the land.¹³⁶ Interested parties include the land occupiers, the owners, and their spouses.¹³⁷ This inquiry will also require that the interested persons deliver a written claim of what they expect to be compensated.¹³⁸

The Commission then prepares a separate award of compensation to every person who has an interest in that land once the inquiry is over.¹³⁹ Thereafter, provide those parties each with their own notice of award and offer of compensation.¹⁴⁰

Once the notice of award has been given to the interested parties, the Commission may go ahead and take possession of that land so long as they serve every person with a notice stating the day that they are to possess the land.¹⁴¹

Thereafter, the Commission ought to pay compensation promptly in accordance with the awards to the interested parties.¹⁴²

This process has been contested for many reasons and one of them being the prompt nature that is required of the compensation. Before the amendment that allows the commission to pay compensation within a year after possessing the land,¹⁴³ the law required that the commission paid compensation before possessing the land.¹⁴⁴ However, this was not always the case as seen in *Arnacherry Limited v Attorney General* whereby it had taken the State thirty years to compensate for a land that it forcefully acquired, Justice Lenaola noted that indeed it was distressing to be in such a position considering the robust Constitution that Kenya has.¹⁴⁵

Similarly, in the case of *Christabel Akinyi Onyango v Kenya Airports Authority*, the respondent violated the petitioner's rights to property as provided under Article 40 of the Constitution by

¹³⁵ Section 109, *Land Act* (No.6 of 2012).

¹³⁶ Section 112(1), *Land Act* (No.6 of 2012).

¹³⁷ Section 107(7), *Land Act* (No.6 of 2012).

¹³⁸ Section 112(2), *Land Act* (No.6 of 2012).

¹³⁹ Section 113(1), *Land Act* (No.6 of 2012).

¹⁴⁰ Section 114(1), *Land Act* (No.6 of 2012).

¹⁴¹ Section 120(1), *Land Act* (No.6 of 2012).

¹⁴² Section 115(1), *Land Act* (No.6 of 2012).

¹⁴³ Section 2, *Land Value Amendment Act* (No.15 of 2019).

¹⁴⁴ Section 12, *Land Value Amendment Act* (No.15 of 2019).

¹⁴⁵ (2014) eKLR.

failing to pay her prompt compensation for acquisition as it had been five years.¹⁴⁶ This was the same position held in *Modern Coast Builders & Contractors Limited v National Land Commission*.¹⁴⁷

Additionally, even with the amendment requiring compensation to be paid within one year the commission has failed to do so. This is seen in the *Ravaspaul Kyalo Mutisya v National Land Commission* in that it acquired the land in 2019 and in 2021 it is yet to compensate.¹⁴⁸

iii. Land Value Amendment Act of 2019

This is an amendment to the Land Act, the Land Registration Act, and the Prevention, Protection, and Assistance to Internally Displaced Persons and Affected Communities Act to provide for the assessment of the land value index in respect of compulsory acquisition of land.¹⁴⁹

This act defines prompt to be not more than a year after taking possession of the land by the Commission.¹⁵⁰ It also went ahead to provide different forms of compensation which include: the allocation of alternative parcel of land of equivalent value, monetary payment either in lump sum or in installments spread over a period of not more than one year, issuance of government bonds, grant of development rights as may be prescribed, equity shares in a government-owned entity or any other lawful compensation.¹⁵¹

2.4 CONCLUSION

At first, Africans were to be expropriated their land however this changed when the Indian Land Acquisition Act came into place as it advocated for Compulsory Acquisition. All the Acts as well as the Constitution provide that parties who have an interest in a land should be compensated promptly. However, they fail to offer a proper definition of how prompt, thus being unconstitutional. This is because it violates one's right to property as envisaged in the Constitution as it renders the interested persons landless.¹⁵²

¹⁴⁶ (2013) eKLR

¹⁴⁷ (2020) eKLR.

¹⁴⁸ (2022)eKLR.

¹⁴⁹ Long title, *Land Value Amendment Act* (No.15 of 2019).

¹⁵⁰ Section 2, *Land Value Amendment Act* (No.15 of 2019).

¹⁵¹ Section 5, *Land Value Amendment Act* (No.15 of 2019).

¹⁵² Article 40(3)(b), Constitution of Kenya (2010).

CHAPTER THREE

A COMPARATIVE ANALYSIS OF THE PROMPT PAYMENT OF COMPENSATION DURING COMPULSORY ACQUISITION IN AUSTRALIA AND INDIA.

3.1 INTRODUCTION

This chapter will conduct a comparative analysis of the compulsory acquisition process in Australia with a specific focus on New South Wales and India with a special emphasis on the prompt payment of compensation during the compulsory acquisition. It will look at the legal framework guiding compulsory acquisition in those two countries. The ultimate purpose of this comparative analysis is to analyse the lessons that Kenya can learn from these two jurisdictions on how to ensure prompt payment of compensation.

In this regard, chapter four will attempt to provide how prompt payment of compensation ought to be interpreted drawing inspiration from Australia and India.

3.2 AUSTRALIA

3.2.1. Analysis of the Compulsory Acquisition Framework in Australia

During the British settlement in Australia, the Crown Land Doctrine of Tenure was adopted which stated that the every acre of land in the country was held by the King.¹⁵³ In the New South Wales colony, the Crown owned all the land within its boundaries and since by this time, the Laws of England had been adopted by the colony, these statutes allowed the Crown to take land.¹⁵⁴ These England statutes which were adopted provided a process through which to assess and make payment of monetary compensation.¹⁵⁵ This legislative framework in the statute established the basis of land compensation law in this colony and provided that it could not be taken by the Crown unless provided by law and that compensation assessment was subject to the determination by an independent body.¹⁵⁶

Furthermore, property ownership rights in Australia were limited by a principle of limited sovereign rights which implies that property ownership was not absolute.¹⁵⁷ This meant that

¹⁵³ Burn E and Cartwright J, *Cheshire & Burn's Modern Law of Real Property*, 18 ed, Oxford University Press, 2011 as cited in Sturgeon J, 'Compulsory Acquisition Compensation: Homeowner Attitudes and the Principle of Equivalence' Published, University of Queensland, Australia, 2018, 84.

¹⁵⁴ Sturgeon J, 'Compulsory Acquisition Compensation: Homeowner Attitudes and the Principle of Equivalence' Published, University of Queensland, Australia, 2018, 84.

¹⁵⁵ Sturgeon J, 'Compulsory Acquisition Compensation: Homeowner Attitudes and the Principle of Equivalence' Published, University of Queensland, Australia, 2018, 85.

¹⁵⁶ Bladen F, 'Historical Records of New South Wales' 7 *Sydney Government Printer*, 1901 as cited in in Sturgeon J, 'Compulsory Acquisition Compensation: Homeowner Attitudes and the Principle of Equivalence' Published, University of Queensland, Australia, 2018, 85.

¹⁵⁷ *Wildtree Hotels Ltd v Harrow* (2001), The United Kingdom House of Lords.

the Crown could take back the land as they had that power.¹⁵⁸ However, for the Crown to exercise the power two conditions ought to have been present: that the land was taken for a public purpose and that the dispossessed owner must receive fair compensation.¹⁵⁹

The first legislation that provided for the compulsory acquisition of private land in the colony of New South Wales was the Sydney Water Supply Act of 1833 which was to facilitate the construction of a water tunnel between Alexandria and Sydney.¹⁶⁰ This Act provided that individuals whose private lands shall have been encroached for the purpose of building this tunnel should receive a reasonable compensation.¹⁶¹ Additionally, the compensation to be paid was to be determined by an independent assessor.¹⁶² Following soon after was the Roads and Street Act which provided for the opening, construction, alteration and improvement of roads within the colony.¹⁶³ The Act provided that once compensation shall be paid to the parties lawfully entitled the land shall then become vested in the Governor of that said Colony for the use of the public.¹⁶⁴ Additionally, it provided that if the payment for compensation shall not be made within twelve months after the verdict of the jury had been given it shall be rendered void and thus have no effect.¹⁶⁵

The compulsory acquisition power in New South Wales is enshrined in the Commonwealth Constitution of Australia. It provides that the Parliament of the states that form part of the commonwealth of Australia has the power to legislate any laws for the peace, order, and good government of the Commonwealth with respect to the acquisition of property on just terms from any State or person.¹⁶⁶ This provision, however, through the Commonwealth parliament does not grant general powers of acquisition of property for any purpose which it is empowered to execute.¹⁶⁷

¹⁵⁸ *Wildtree Hotels Ltd v Harrow* (2001), The United Kingdom House of Lords.

¹⁵⁹ *Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions* (2001), The United Kingdom House of Lords.

¹⁶⁰ Sturgeon J, 'Compulsory Acquisition Compensation: Homeowner Attitudes and the Principle of Equivalence' Published, University of Queensland, Australia, 2018, 85.

¹⁶¹ Section 1, *Sydney Water Supply Act* (no. 1 of 1833) (Australia).

¹⁶² Section 3, *Sydney Water Supply Act* (no. 1 of 1833) (Australia).

¹⁶³ Sturgeon J, 'Compulsory Acquisition Compensation: Homeowner Attitudes and the Principle of Equivalence' Published, University of Queensland, Australia, 2018, 85

¹⁶⁴ Section 12, *Roads and Streets Act* (no. 12A of 1833) (Australia).

¹⁶⁵ Section 13, *Roads and Streets Act* (no. 12A of 1833) (Australia).

¹⁶⁶ Section 51 (xxxi), *Constitution of Australia* (1901).

¹⁶⁷ Coppel E, Henderson A, Levy H, Lowenstern R, Mann L and Phillips P, 'Compulsory Acquisition of Land in Australia' 3 *Journal of Comparative Legislation and International Law* 4, 1921, 251-252.

The Land Acquisition (Just Terms Compensation) Act guides this process in New South Wales in that it applies to the acquisition of land by an authority of the State which is authorized to acquire the land by compulsory process.¹⁶⁸ One of the main objectives of this Act is to try and encourage acquisition of land by agreement instead of the compulsory process.¹⁶⁹ In this regard, the Act provides for a minimum period of negotiation by agreement of six months before commencing the acquisition process.¹⁷⁰ This provision is to show the value the State has on agreements before trying to compulsorily acquire the land and serves as an encouragement for parties to try reach an agreement within the given period in that they are involved in the process as it is done through agreements between the parties. Additionally, negotiations often tend to lead to an economically efficient and socially optimal solutions like those that tend to cater to the societal welfare of the people while maximizing the resources.¹⁷¹ An example of economically efficient and socially optimal solutions that can come from acquisition negotiations is when the authority and the owner of the land reach an agreement whereby they will acquire the whole parcel of land instead of a piece of it while on the other hand catering to the societal welfare by providing services that will be useful to the society. Once the period of six months collapse, and there is no agreement, the authority issues a proposed acquisition notice at least ninety days before the land is compulsorily acquired.¹⁷² Thereafter, the authority must acquire the land by compulsory process or withdraw the proposed acquisition notice.¹⁷³ This provision has been regarded by courts as one of some importance in that it grants the landowner protection by having the opportunity to negotiate with the acquiring authority and this authority ought to negotiate in good faith.¹⁷⁴ In the case of *Roads and Maritime Services v Desane Properties Pty Limited*, it was seen that Desane was afforded a period of negotiation which was done in good faith.¹⁷⁵

A party affected by this acquisition has the right to be compensated by the New South Wales State as provided for in the Act.¹⁷⁶ This compensation that the landowners have a right to ought

¹⁶⁸ Section 5 (1), *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

¹⁶⁹ Section 3 (1), *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

¹⁷⁰ Section 10 A, *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

¹⁷¹ Mahalingham A and Vyas A, 'Comparative Evaluation of Land Acquisition and Compensation Processes across the World' 46 *Economic and Political Weekly* 32, 2011, 96.

¹⁷² Section 13 (1), *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

¹⁷³ Section 14 (1), *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

¹⁷⁴ *Roads and Maritime Services v Desane Properties Pty Ltd* [2018], New South Wales Court of Appeal, Australia.

¹⁷⁵ *Roads and Maritime Services v Desane Properties Pty Ltd* [2018], New South Wales Court of Appeal, Australia

¹⁷⁶ Section 37, *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

to be not less than the market value of that land that has been compulsorily acquired.¹⁷⁷ This provision on compensation is guided by the principle of Value to owner which usually guides the land acquisition process in Australia.¹⁷⁸ This principle aims at compensating landowners to the tune of the market value of the land together with other losses suffered by the claimant.¹⁷⁹ This principle ensures that the owners are compensated for the tangible and intangible loss. In regards to this, the factors to be considered when compensating the owner of the land are: the market value of the land on the date of its acquisition, any special value of the land to the person on the date of its acquisition, any loss attributable to severance, any loss attributable to disturbance, the disadvantage resulting from relocation and any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins.¹⁸⁰

Compensation notice ought to be given within 45 days after the publication of the acquisition notice, which states their entitlement to compensation and the amount as determined by the Valuer- General who is guided by the Value to Owner principle.¹⁸¹ The Valuer-General is an independent statutory officer who is appointed by the Governor of New South Wales to oversee the valuation system and in land acquisition matters they ensure that owners are fairly compensated when their land is compulsorily acquired.¹⁸² Once the person entitled to compensation accepts the amount offered, compensation is to be made within 28 days of the receipt of a claim of compensation and any relevant documents of title.¹⁸³ The amount offered for compensation may be challenged in the Land and Environment Court within 90 days.¹⁸⁴ This allows the persons entitled to be involved in the determination of the amount to be compensated if they find it not to be fair.

Additionally, during this period, the former owner of the land has the right to occupy the land until compensation is fully paid or an advance payment of not less than 90 per cent of the amount to be compensated is given to them.¹⁸⁵

¹⁷⁷ Section 10 (1) (a), *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

¹⁷⁸ Mahalingham A and Vyas A, 'Comparative Evaluation of Land Acquisition and Compensation Processes across the World,' 95.

¹⁷⁹ Mahalingham A and Vyas A, 'Comparative Evaluation of Land Acquisition and Compensation Processes across the World,' 95.

¹⁸⁰ Section 55, *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

¹⁸¹ Section 42 (1), *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

¹⁸² < https://www.valuergeneral.nsw.gov.au/about_us > on 24 January 2024.

¹⁸³ Section 44(2), *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

¹⁸⁴ Section 45(1) (b), *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

¹⁸⁵ Section 34 (1) (a) and (b), *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

3.3 INDIA

3.3.1. History and analysis of the Compulsory Acquisition framework of India

The land acquisition law in India originated from the Bengal Regulation of 1824 enacted by the East India Company.¹⁸⁶ It only applied to the Bengal Province. This regulation enabled the British government to obtain, at a fair valuation of land or other immovable property required for developmental works such as building of roads, canals and other public purposes.¹⁸⁷ In 1850, the British extended the regulation to Calcutta with the objective of confirming the title to lands in Calcutta for public purposes.¹⁸⁸ By 1857, all the laws on land acquisition were consolidated to form Act VI of 1857 which was to be applicable to the whole of British India and was for Railways and other Public Purpose.¹⁸⁹ This Act VI of 1857 was then replaced by Act X of 1870, however, the latter one was made ineffective through a Supreme court decision.¹⁹⁰ This decision to make the Act ineffective was decided in the case of *Radhey Shyam Through LRs and others v State of U.p and Others* this was because the mechanism provided by the Act in the case of a dispute on amount offered in lieu of acquisition proved to be ineffective because a lot of time was consumed in litigation.¹⁹¹ After the repeal of the 1870 Act, the 1894 Land Acquisition Act was enacted by the British Government.¹⁹²

The 1894 Act was enacted for the purpose of facilitating acquisition of private land by the Government for public purposes.¹⁹³ This Act was the one that was extended to the Kenyan Protectorate to be used to compulsorily acquire land for the construction of the railway and for the acquisition of the ten-mile zone on each side of the railway line.¹⁹⁴ After India gained its independence in 1947, the governing principles of Land Acquisition remained unchanged and the Land Acquisition Act of 1894 was adopted.¹⁹⁵

¹⁸⁶ Verma S, 'Subverting the Land Acquisition Act 2013' 50 *Economic and Political Weekly* 37,2015,18.

¹⁸⁷ Mohanty H and Hota S, 'The Evolution in Recognition of Land Rights in India: A Study of Legislations Pertaining to Acquisition of Land' Social Science Research Network, 2021, 1.

¹⁸⁸ Ananth V, 'The Evolution of the Land Acquisition Act' Mint, 22 May 2015

<https://www.livemint.com/Politics/T2tN2OWzJly9SuFgsGsmHN/The-evolution-of-the-Land-Acquisition-Act-from-1824-to-2015.html> on 14 January 2024.

¹⁸⁹ Neeraj SA, 'Land Acquisition Acts: A Long History of Injustice' 7 *Journal of Research in Humanities and Social Science* 7, 2019, 33.

¹⁹⁰ Mohanty H and Hota S, 'The Evolution in Recognition of Land Rights in India: A Study of Legislations Pertaining to Acquisition of Land' Social Science Research Network, 2021, 1.

¹⁹¹ *Radhey Shyam Through LRs and others v State of U.p and Others* (2011), The Supreme Court of India.

¹⁹² Neeraj SA, 'Land Acquisition Acts: A Long History of Injustice,' 34.

¹⁹³ Mohanty H and Hota S, 'The Evolution in Recognition of Land Rights in India: A Study of Legislations Pertaining to Acquisition of Land' Social Science Research Network, 2021, 2.

¹⁹⁴ Mbila A and Shikoli E, 'Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation,' 4.

¹⁹⁵ Neeraj SA, 'Land Acquisition Acts: A Long History of Injustice,' 34.

This Act provided that for the collector to enter and take possession of the land they had to pay the compensation owed to the owner first.¹⁹⁶ Furthermore, this Act was viewed to have played a huge role in changing the colonial practice of land acquisition from expropriation to compulsory acquisition as it provided for compensation.¹⁹⁷

The right to property is protected in the Constitution. It provides that one cannot be deprived of their property unless by authority of law.¹⁹⁸ However, one can be deprived of this right to property if the Government acquires land for its own use, hold and control and for public purpose.¹⁹⁹ This was supported in the case of *Rajiv Saran v State of Uttarakhand* whereby it was held that the incident of deprivation of property within the meaning of Article 300A of the Constitution normally occurred mostly in the context of public purpose and that any law which deprives a person of his private property for private interest will be amenable to judicial review.²⁰⁰ This Article of India's Constitution is in line with Kenya's constitution in that it acknowledges that one can only be deprived of their right to property if the property is acquired for public purposes.²⁰¹

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act serves as the guide for compulsory acquisition in India after the 1894 Land Acquisition Act. It begins by providing that if the Government finds any land to be required for public purpose it ought to issue a preliminary notice that they are to acquire that land.²⁰² This is similar in Kenya in that the Commission ought to publish a notice to show intention to acquire a piece of land.²⁰³ Afterwards, the Government can send its representatives to survey the piece of land they are to acquire and determine the extent.²⁰⁴ Thereafter, the Administrator for Rehabilitation and Resettlement shall undertake a census of the affected families so as to be able to determine how to rehabilitate and resettle them.²⁰⁵ After this has been determined,

¹⁹⁶ Section 36(1), *Land Acquisition Act* (Act No 1 of 1894) (Repealed).

¹⁹⁷ Mbila A and Shikoli E, 'Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation', 4.

¹⁹⁸ Article 300 A, *Constitution of India* (2022).

¹⁹⁹ Section 2, *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (No. 30 of 2013) (India).

²⁰⁰ *Rajiv Saran v State of Uttarakhand* (1998), The Supreme Court of India.

²⁰¹ Article 40 (3), *Constitution of Kenya* (2010).

²⁰² Section 11, *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (No. 30 of 2013) (India).

²⁰³ Section 107(5), *Land Act* (No.6 of 2012).

²⁰⁴ Section 12, *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (No. 30 of 2013) (India).

²⁰⁵ Section 16, *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (No. 30 of 2013) (India).

the collector shall publish a public notice stating that the Government intends to take possession of the land and that claims to compensations and rehabilitation and resettlement for all interests in such land may be made to him.²⁰⁶ The Act provides that the compensation to be paid shall be determined by the market value of the land.²⁰⁷

Additionally, during this period, the owner of the land shall remain in the land until the full payment of compensation as well as rehabilitation and resettlement entitlements are paid.²⁰⁸ This provision has been interpreted by courts as in the Telangana High Court to mean that it is a mandate that the land owner can only be dispossessed by the Collector after ensuring full payment of compensation as well as rehabilitation and resettlement entitlements.²⁰⁹ The same position was held in Calcutta High Court in the of *State of West Bengal and others v Dilip Ghosh and others* where the petitioners land was taken by the Government for the purpose of constructing a road, however, they were not compensated as required by the law.²¹⁰ where it ruled that the West Bengal government cannot take land forcefully until and unless it pays full compensation to the landowners as provided under Section 38 of the Act.²¹¹

3.4. CONCLUSION

From this Chapter, it can be noted that these two countries have some similarities in the compulsory acquisition process. In these countries, their land acquisition process tends to protect the landowners and ensure that they are compensated before the land is acquired. This in turn serves as security for the landowners and prevents any chance for them to be left homeless or landless.

²⁰⁶ Section 21, *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (No. 30 of 2013) (India).

²⁰⁷ Section 27, *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (No. 30 of 2013) (India).

²⁰⁸ Section 38, *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (No. 30 of 2013) (India).

²⁰⁹ Indulia B, 'Telangana HC| Loss of land trauma for Indian farmer thus lawful compensation, rehabilitation, resettlement should be guaranteed' SCC Unlike, 9 June 2020

<https://www.sconline.com/blog/post/2020/06/09/telangana-hc-loss-of-land-trauma-for-indian-farmer-thus-lawful-compensation-rehabilitation-resettlement-should-be-guaranteed/> on 10 January 2024.

²¹⁰ *State of West Bengal and others v Dilip Ghosh and others* (2018), Calcutta High Court.

²¹¹ 'Government must pay full compensation to owners before acquiring land: Calcutta High Court' United News of India, 25 October 2023 <http://www.uniindia.com/govt-must-pay-full-compensation-to-owners-before-acquiring-land-cal-hc/east/news/3075832.html> on 10 January 2024.

CHAPTER FOUR

AN INTERPRETATION OF WHAT PROMPT PAYMENT OF COMPENSATION DURING COMPULSORY ACQUISITION OUGHT TO BE

4.1. INTRODUCTION

This chapter shall give an interpretation of what prompt payment of compensation during compulsory acquisition should be. It shall discuss how the comparative analysis in the previous chapter will help to fill in the gaps in Kenya when it comes to prompt payment of compensation during compulsory acquisition. It will be relying on courts interpretations and best practices such as FAO and World Bank. By doing so, it shall also guide the institutions on how to deal with it.

4.2. THE AMBIGUITY AS TO WHAT PROMPT MEANS WHEN REFERRING TO THE TIME TO WHICH COMPENSATION SHOULD BE PAID TO THOSE WHOSE LAND HAS BEEN COMPULSORILY ACQUIRED.

The law provides for prompt payment in full of just compensation to the persons whose land has been compulsorily acquired.²¹² Prompt has been defined as to be done or given without delay, which includes within a year.²¹³ According to World Bank, prompt payment of compensation for land and assets mean payment before taking possession.²¹⁴ Before the amendment of the Land Act, there was no specific timeline for compensation. However, in *Mathatani Limited v Commissioner of Lands*, it had taken them four years to be compensated, but this was ruled unjust because it failed to fall within the definition of prompt.²¹⁵ After the amendment, it provided that prompt was to be interpreted to be not more than a year after taking possession of the land by the Commission.²¹⁶ However, there have been several instances where this provision is not being adhered to. This is seen in the case of *Ravaspaul Kyalo Mutisya v National Land Commission* within two years after acquiring the land, the owners were yet to be compensated.²¹⁷

²¹² Article 40(3)(b), Constitution of Kenya (2010).

²¹³ Encyclopaedia Britannica, 7 ed.

²¹⁴ World Bank, Guidance Note for Borrowers: ESS5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement, 2018, 10.

²¹⁵ (2013) eKLR.

²¹⁶ Section 2, *Land Value Amendment Act* (No.15 of 2019).

²¹⁷ (2022) eKLR.

These instances of delayed compensation have led to the violation of the right to property of the landowners. This violation is brought about by the ambiguity as to what prompt is due to the lack of exact and specific timelines.

4.3. HOW THE SYSTEM OF PAYMENT OF COMPENSATION IS REQUIRED BEFORE POSSESSION OF THE LAND IN AUSTRALIA AND INDIA WILL FILL IN THE GAPS IN KENYA

4.3.1. Australia

From Australia, we shall be focusing on the aspect of the specific timelines given by the laws and the ability of the landowner to possess the land till fully compensated. The laws in New South Wales in Australia provide that once the person entitled to compensation the award, the compensation ought to be made within 28 days, of the receipt of a claim of compensation and any relevant documents of title.²¹⁸ According to the definition of prompt provided by World Bank, it can be deduced that Australia pays compensation to the victims of compulsory acquisition promptly. Additionally, this law provides a specific timeline as to which the landowners ought to be compensated thus offering clarity. This specific timeline is in line with FAO in that it provides that legislations should ensure that people receive full payment of compensation in a timely manner.²¹⁹

This is very different in Kenya, in that it only provides that the compensation ought to be within a year. This, therefore, leads to the violation of the right to property in that compensation that is paid eight months after the land acquisition cannot be viewed as prompt. Hence, having a law that specifies the timeline such as the one in Australia will help to ensure that everyone's rights are protected and leaves no room for misinterpretation by the National Land Commission. This will also be in line with the best practice provided by FAO.

Furthermore, Australia grants the former owner of the land, during this period, the right to occupy the land until compensation is fully paid or an advance payment of not less than 90 percent of the amount to be compensated is given to them.²²⁰ This provision prevents the

²¹⁸ Section 44(2), *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

²¹⁹ Food and Agriculture Organization of the United Nations, 'Compulsory acquisition of land and Compensation' *Land tenure studies* (2009),25.

²²⁰ Section 34 (1) (a) and (b), *Land Acquisition (Just Terms Compensation) Act* (No. 22 of 1991) (New South Wales).

landowners not to be left landless and most especially homeless. It acts as security to the landowners that if the land is to be acquired, they ought to be sorted first.

This can be seen as another interpretation of prompt in that it ensures that the collectors are alert and compensate the landowners to be able to acquire the land and carry out the public purpose. In Kenya, such will help prevent instances of people being left landless and homeless especially those who solely rely on that piece of land as it will enable them to occupy the land until they are compensated so as to be able to afford to relocate and start over. This in turn will protect their right to property.

4.3.2. India

The repealed Act provided that for the collector to be able to enter and take possession of the land they want to acquire they ought to have compensated the owner first.²²¹ This was in line with the provisions of the World Bank in that compensation ought to be paid before taking possession.²²² Moreover, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act provides that during this period of acquisition, the land owner shall remain in the land until the full payment of compensation as well as rehabilitation and resettlement entitlements are paid.²²³ This can be seen to be as per the guidelines of FAO in that legislation ought to ensure timely compensation.²²⁴ Like Australia, this provision in India is to prevent instances whereby people are left landless, most especially homeless due to delays of compensation. In addition, India provides that apart from receiving compensation, landowners are entitled to receive rehabilitation and resettlement entitlements. This ensures that the compensation they are given is for the loss suffered and is not to be used to resettle them at another place. Moreover, since it is the State which is acquiring their land, it shows responsibility on their end in that they will not abandon their Citizens but rather ensure they have been resettled at another place.

Having this system in Kenya, of requiring compensation to be paid before possession and establishing a restoration scheme will help prevent people from being left landless and

²²¹ Section 36(1), *Land Acquisition Act* (Act No 1 of 1894) (Repealed).

²²² World Bank, *Guidance Note for Borrowers: ESS5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement*, 2018, 10.

²²³ Section 38, *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* (No. 30 of 2013) (India).

²²⁴ Food and Agriculture Organization of the United Nations, 'Compulsory acquisition of land and Compensation' *Land tenure studies* (2009), 25.

homeless. This is per the guidelines provided by the World Bank²²⁵ Hence, protecting the right to property. This will also allocate responsibilities to the State to ensure that their people are resettled and not just paying them compensation and letting them be.

4.4. CONCLUSION

From the above, it can be seen that allowing landowners to occupy the land till they are fully compensated is the most accurate interpretation of the term prompt when it comes to compensation in that it tends to put both the interests of the landowners and the State at the center and arrive at a reasonable compromise. By doing so, it tends to protect the right to property as enshrined in the Constitution and, therefore, deemed to be constitutional as it will be in line with the requirements of the Constitution. In addition, this interpretation of prompt will be in line with the interpretation given by the best practices such as FAO and World Bank



²²⁵ World Bank, Guidance Note for Borrowers: ESS5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement, 2018, 10.

CHAPTER FIVE

CONCLUSION, FINDINGS AND RECOMMENDATIONS

5.1. INTRODUCTION

This chapter serves as the conclusion of the whole study. It will tend to provide the findings gathered from it and make recommendations towards those findings. By doing so, it will be able to assess whether or not this study has truly fulfilled its objectives as outlined in chapter one of this research paper.

5.2. FINDINGS

The paper assessed the constitutionality of the laws that guide prompt payment of compensation during compulsory acquisition in Kenya.

Chapter Two analyzed the legal framework that guides the process of compulsory acquisition in Kenya. It started by looking at the history of compulsory acquisition in Kenya and the laws that guided it at that time till now. The analysis was set out to identify whether the laws define prompt payment. Even in history, the laws failed to define what prompt in prompt payment of compensation meant, therefore, leaving room for ambiguity. The finding of this chapter is that this lack of definition of the term prompt existed before the current laws on compulsory acquisition leaving room for people's rights to be violated.

Chapter three conducted a comparative analysis in Australia and India on requiring full payment of compensation before the acquisition of the land by the state. It looked at the legal framework and case laws guiding compulsory acquisition in both Australia and India. The finding of this chapter is that the requirement of full payment of compensation before acquisition in these two countries tends to protect the landowners from being left homeless or landless.

Chapter Four sought to give an interpretation of how prompt payment ought to be. The finding of this is a result of the comparative analysis conducted in the previous chapter in that the most accurate definition of prompt is allowing the landowners to occupy their lands till they are fully compensated.

5.3. RECOMMENDATIONS

5.3.1. The need for compensation to be fully paid before the land is acquired.

As discussed in Chapter three and four, the term prompt payment to be interpreted to mean that compensation ought to be fully paid before the land is acquired to serve as security to

landowners that they will not be left landless or homeless. Therefore, Land Act should be amended to include this provision in the interpretation section.

5.3.2. Need for the introduction of Rehabilitation and Resettlement Scheme

One of the lessons Kenya can learn from the comparative analysis with India in Chapter 3 is that apart from compensation, landowners are entitled to rehabilitation and resettlement entitlements which are also to be paid before acquisition for the monetary part. These entitlements ensure that landowners are not displaced as a result of the acquisition and that the compensation money is not used wholly to resettle them. Therefore, this scheme will be of help to ensure that people are not left homeless because of compulsory acquisition.

5.3.3. Need for NLC to acquire the land after paying full compensation.

As discussed in Chapter 4, land should be acquired after payment of full compensation. Since the NLC is the one responsible for acquiring land on behalf of the acquiring authority, Section 111 of the Land Act ought to be amended to ensure that the acquiring authority deposits the funds before acquisition so that NLC can pay the landowners before acquiring the land.

5.3.4. Need for digitization and automation by NLC.

Additionally, NLC should implement digital platforms for submitting claims, process documentation and track the status of compensation payments to help reduce data entry errors and speed up flow of information as a method of streamlining the compulsory acquisition process. Which in turn helps to expedite compensation payments to affected parties.

5.3.5. Need for a suitable compensation for those evacuated from their ancestral lands

Similar to Australia and the Commonwealth Countries, the element of compensation in Kenya should be based on the principle of “value to the owner” which in addition to compensating according to the market value of the land, they are also compensated on other losses they have suffered both tangible and intangible.

5.4. CONCLUSION

This study has proved its hypothesis, fulfilled the research objectives and has responded to the problem statement. The objectives of this study were as follows:

1. To evaluate the legal framework on Compulsory Acquisition in Kenya.
2. To conduct a comparative study with Australia and India on their approach of requiring full payment of compensation before land acquisition.
3. To give an interpretation of how prompt payment of compensation ought to be.

5.4.1. Objective i

This study has assessed the legislative. Policy and institutional framework for compulsory acquisition more so prompt payment as well as the jurisprudence. This highlights the ambiguities that exist.

5.4.2. Objective ii

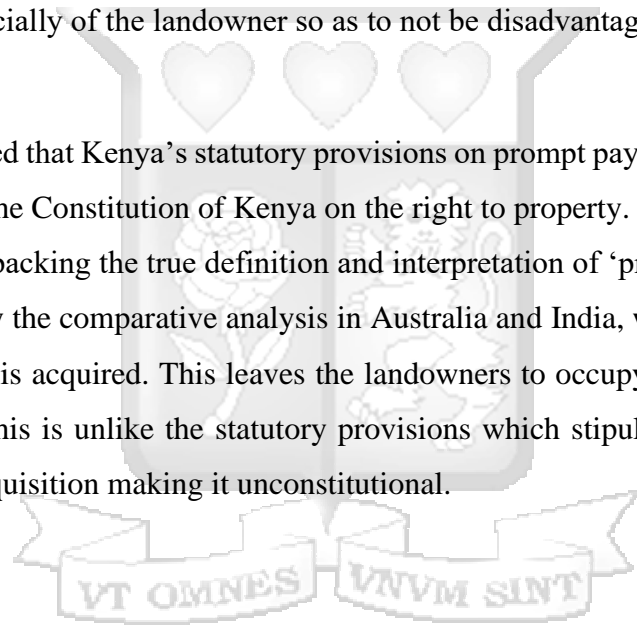
The comparative analysis done by this study has established the protective measures taken by Australia and India to protect the landowners from being disadvantaged by the acquisition.

5.4.3. Objective iii

This study has established the most appropriate interpretation of what prompt payment of compensation during compulsory acquisition means. This interpretation tends to protect the right to property especially of the landowner so as to not be disadvantaged.

5.4.4. Hypothesis

The study hypothesized that Kenya's statutory provisions on prompt payment of compensation violate Article 40 of the Constitution of Kenya on the right to property. This study has proved this hypothesis by unpacking the true definition and interpretation of 'prompt' as stated in the constitution guided by the comparative analysis in Australia and India, which is interpreted to mean before the land is acquired. This leaves the landowners to occupy the land till they are fully compensated. This is unlike the statutory provisions which stipulate that prompt mean within a year after acquisition making it unconstitutional.



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