

RESEARCH PAPER:
**“IN THE PUBLIC INTEREST”: AN INTROSPECTION INTO THE COMPULSORY
ACQUISITION AND THE RIGHT TO PROPERTY**

By;

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DECLARATION

I, KUYOH WENDY JENNIFER do hereby declare that this research paper 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 cite or referred to are accordingly acknowledged.

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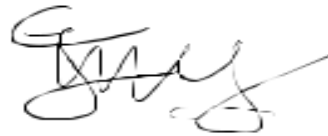
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ABSTRACT

There are various laws in Kenya that govern compulsory acquisition powers of the State, mainly the Constitution, the Land Act and the Land Acquisition Act. Despite these various provisions provided by the legal instruments to effectively govern the compulsory acquisition of land process, cases challenging the process still arise. This study intends to assess the extent to which land legislation has guided the enactment of laws on compulsory acquisition. It will also seek to analyse the shortcomings facing the implementation of provisions of land legislation on compulsory acquisition powers of the State. It will further seek to analyse how successful countries have exercised the compulsory acquisition powers of the State as well as to make recommendations on policy and legal reform to adequately address the challenges that often affect the compulsory acquisition powers of the State. For the purpose of this research, various property theories will be used to make a comprehensive assessment of the problem. The study will be a qualitative analysis that will rely on statutes and case law as well as secondary sources.

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- Arnacherry Limited v Attorney General* (2014) eKLR.
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- Isaka Wainaina Gathomo & Another v Morito Indagara & the Attorney General of Kenya* (1923) KLR.
- James Shikwati Shikuku v County Government of Kakamega & 3 others* (2016) eKLR.
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- Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* (1982), The Federal Court of Malaysia.
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- Patrick Musimba v National Land Commission & 4 others* (2012) eKLR.
- Rickets v Metropolitan Rail Co* (1867), The United Kingdom House of Lords.
- Vanhorne's Lessee v Dorrance* (1975), The Supreme Court of United States.
- Windtree Hotels Ltd v Harrow* (2001), The United Kingdom House of Lords.

LIST OF LEGAL INSTRUMENTS

Kenyan Laws

Community Land Act (Act No.27 of 2016).

Constitution of Kenya (2010)

Land Act (Act No.6 of 2012).

Land Laws (Amendment) Act (Act No.28 of 2016).

Land Registration Act (Act No.3 of 2012).

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

National Land Commission (Act No.5 of 2012).

National Land Policy (2009).

Registered Land Act (1963).

Valuers Act (CAP 532) (2012).

International Conventions

African Court on Human and Peoples' Rights

Australian Laws

Constitution of Australia (2012)

Land Acquisition (Just Terms Compensation) (New South Wales)

Malaysian Laws

Constitution of Malaysia (1957)

Land Administration Act (Malaysia)

Land Acquisition Act (Malaysia)

LIST OF ABBREVIATIONS

ACmHPR	African Commission on Human and Peoples' Rights
FAO	Food and Agricultural Organization
LA	Land Act
NLC	National Land Commission
RLA	Registration Land Act
US	United States of America

CHAPTER ONE

1.0 INTRODUCTION

Prior to the enactment of the independence Constitution, Kenya had been plagued by the erosion of the land customary tenure systems that governed land ownership in the pre-colonial times. This came after Kenya was declared a British Protectorate in 1985 which called for the exercise of British jurisdiction over the Kenyan territory.¹

The customary land system of ownership was characterized by communal ownership which was referred to as the 'commons' or the public land which were the resources available to the community. The system held out was to be used in a way that will benefit all generations and thus implied sustainability in land use.²

As a result of the transplantation of laws by the British, customary land tenure systems were diminished. There was inequitable distribution of land, where noble individuals held large tracts of land, this started to show the abuse of eminent domain power by the colonial masters. The question of the advancement of public interest was viewed in consideration of whose interest was being advanced.³

The reasons for the displacement of Africans from their land was mainly in the interests of the British colonialists who occupied the territory and wanted to benefit from the resources of the fertile land areas. Land in Kenya retains its centrality as it was the basis for the struggle for independence and this explains why it has been the subject of legal interventions.⁴

In order to address the weaknesses in land laws that displaced Africans from their land, several land laws were brought into place and this included land reforms that conferred registered titles to all instruments as was set out in the Registered Land Act (1963).⁵ At independence however, it seemed that the land that had been alienated would be restored by the conversion of the native land

¹ Kenya Law, *Report of the Commission of inquiry into the Illegal/Irregular Allocation of Public Land*, 17 December 2004, 2.

² Okoth-Ogendo H, 'The tragedy of the African commons: A century of expropriation, suppression and subversion' 1 *University of Nairobi Law Journal*, 2003, 2-3.

³ Ondili M, 'Eminent Domain: The Perpetual Rights of the Indigenous People of Kenya to Land Ownership' 2 *Strathmore Law Review* 1, 2017, 30.

⁴ Kenya Law, *Report of the Commission of inquiry into the Illegal/Irregular Allocation of Public Land*, 17 December 2004, xvii.

⁵ Section 4, *Registered Land Act* (1963).

reserves to trust land but this was contrary as the Government took over from the colonial masters and it continued to deprive the existing communities of their land rights.⁶

There was an evolution of land tenure from communal land ownership to private property rights and Africans would acquire individual title to the land. In the evolution of land laws, among the matters that necessitated change in the land law regime according to Sessional Paper No.3 of 2009 on the National Land Policy include compulsory acquisition.

In order to make the law on the compulsory acquisition powers of the State more effective, among the laws that recognized the sensitivity of land include the 2010 Constitution of Kenya that recognizes the right to acquire property and the State shall not arbitrarily deprive a person from this right unless through the compulsory acquisition powers for public purpose or interest.⁷ The recommendations brought out prompt payment in full and just compensation.⁸

It was hoped that the implementation of the law on compulsory acquisition powers of the state would result in effective and efficient application of the State's powers in property regulation. In the case of *Patrick Musimba v National Commission & 4 others* for instance, the National Land Commission and the Kenya Railways Corporation had not given adequate compensation during the acquisition process however the court said that once value of compensation has been determined, the State can go ahead and acquire the land.⁹ The effect of the cases that arise is that the Land Act and the Constitution have not dealt with issues that require certainty. This has affected the implementation of large infrastructure projects, in many instances leading to additional costs for taxpayers as well as protracted court cases.¹⁰

1.1 STATEMENT OF THE PROBLEM

Land laws are critical in ensuring effective regulation that requires striking of a balance between private property protection and promoting the public interest.¹¹ It was expected that the enactment of the Land Act (2012) and the implementation of the Constitution provision that relate to land

⁶ Constitution of Kenya Review Commission, *Final draft*, 2005, 270.

⁷ Article 40, *Constitution of Kenya* (2010).

⁸ Article 40 (3) (b), *Constitution of Kenya* (2010).

⁹ *Patrick Musimba v National Land Commission & 4 others* (2012) eKLR.

¹⁰ Muchira N, 'Sections of the Land Act against the law, say Kenyan surveyors' *The East African*, 14 September 2019-www.theeastafrican.co.ke/news/ea/Sections-of-land-act-against-the-law-say-kenyan-surveyors/4552908-5273110-rwyd1nz/index.html on 19 March 2020.

¹¹ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 131.

would improve land regulation even in relation to the compulsory acquisition powers of the State. The Land Act provides for what entails public purpose as purposes such as transportation including roads, canals among others, also public buildings including schools; public utilities for water; public parks, gardens; security and defence installations.¹²

The meaning of public purpose however does not appear to have had an effect or certainty as envisioned. Land regulation is still plagued by issues such as how the land's use can qualify to be of public interest. Also, what amounts to a just and adequate compensation has not been provided for. In this regard therefore, there has been a number of cases being filed in courts with regard to the compulsory acquisition powers of the State. It is therefore easy to surmise that the exercise of compulsory acquisition powers can be violated.¹³

Compulsory acquisition is still done with uncertainty. This research seeks to review the application of the Land Act and the Constitution of Kenya in regards to compulsory acquisition as well as highlight its shortcomings and ambiguities.

1.2 JUSTIFICATION OF THE STUDY

This study has both academic and policy relevance. From an academic perspective, it will contribute to the gaps in the compulsory acquisition powers of the State and more specifically the application of the Land Act and Constitution within the land regulation framework.

The Constitution of Kenya and the Land Act are also elaborate policy responses of the National Land Policy Sessional Paper meant to address the challenges that have bedevilled land regulation including the compulsory acquisition powers of the State. Studies that assess its application are thus important in advancing the policy agenda. This study will therefore add to the emerging study that seeks to add recommendations on how the law on compulsory acquisition can be made more effective.

1.3 STATEMENT OF AIM AND OBJECTIVES

The aim of the research is to investigate the application of various land legislations in relation to compulsory acquisition powers of the State.

¹² Section 2, *Land Act* (Act No.6 of 2012).

¹³ Kariuki, Ouma and Ng'etich, *Property Law*, 135.

1. To assess the extent to which land legislation has guided the enactment of laws on compulsory acquisition.
2. To analyse the shortcomings facing the implementation of provisions of land legislation on compulsory acquisition powers of the State.
3. To analyse how successful countries have exercised the compulsory acquisition powers of the State.
4. To make recommendations on policy and legal reform adequately address the challenges that often affect the compulsory acquisition powers of the State.

1.5 RESEARCH QUESTIONS

1. To what extent has land legislation guided the enactment of laws on compulsory acquisition by the National Land Commission?
2. What are the shortcomings facing the implementation of land legislation provisions on compulsory acquisition?
3. How have successful countries exercised the compulsory acquisition powers of the State?
4. What are the recommendations on policy and legal reform to adequately address the challenges that often affect the compulsory acquisition powers of the State?

1.6 HYPOTHESES

The research is based on the following hypotheses:

1. That authorities do not adhere to the already set out procedures set out in the Land Act with regards to compulsory acquisition.
2. Lack of a clear parameter of what constitutes public interest presents a challenge when it comes to compulsory acquisition powers of the State.
3. There are inherent weaknesses in Kenyan legislation which make it ineffective in ensuring the effective compulsory acquisition process.

1.7 THEORETICAL FRAMEWORK

Granting property rights to individuals in a particular way has been justified by use of property theories.¹⁴ The theories explain the interests to be served in a property system and vary from human independence to the well-being of individuals.¹⁵ Firstly, the natural rights theory to property which is based on natural law and implies that property is a gift of nature originally granted free to humankind.¹⁶ While writing on the labour theory, John Locke stated that property rights are natural rights of individuals governed by the principles of natural justice.¹⁷ The natural rights theory is in line with *Article 40 (2)* that prohibits arbitral deprivation of a person's property or deprivation of the enjoyment of the right.¹⁸

Another theory that ties in property rights is the social utility theory where property rights are granted because of the benefit of social welfare.¹⁹ Property is thus a social function and not a right and thus has limits and moves away from the idea that property is a dominion that one has over something.²⁰ This relates to compulsory acquisition powers of the State as seen in *Article 40 (3) of the Constitution* that limits the deprivation of a person of property if it results from acquisition for a public purpose.²¹

In relation to the right to a clean and healthy environment that includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, this is seen in *Article 42 of the Constitution*.²²

Another important theory that relates to compulsory acquisition is utilitarianism-traditional theory where utilitarianists view property as a positive right created to achieve social and economic goals.²³ The objective of compulsory acquisition with respect to the utilitarianism theory is to deprive the use of land for public benefit which is the greatest good for the greatest number of

¹⁴ Bell A and Parchomovsky G, 'A theory of property' 90 *Cornell Law Review*, 2005, 549.

¹⁵ Alexander G and Peñalver E, *An introduction to property theory*, Cambridge University Press, Cambridge, 2012, 6.

¹⁶ Kariuki, Ouma and Ng'etich, *Property Law*, 29.

¹⁷ Locke J, *Second treatise of government*, Hafner Publishing New York, 1690, Ch 5, para 26, as cited in Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 30.

¹⁸ Article 40 (2), *Constitution of Kenya*, 2010.

¹⁹ Kariuki, Ouma and Ng'etich, *Property Law*, 37.

²⁰ Gray K and Gray S, 'The idea of property in land', in Bright S and Dewar K (eds), *Land Law: Themes and Perspectives* Oxford University Press, 20.

²¹ Article 40 (3), *Constitution of Kenya* (2010).

²² Article 42, *Constitution of Kenya* (2010).

²³ Panesar S, 'Theories of private property in modern property law' 15 *Denning Law Journal*, 2000, 132-136.

people. The traditional African view of property, on the other hand refers to property as a transgenerational asset and communal property as commons.²⁴ The traditional view of property depicts it to be of intrinsic value and thus if the State compulsorily acquires property for monetary compensation then it may serve as inappropriate due to the spiritual nature held out by the use of land.²⁵

1.8 RESEARCH METHODOLOGY

This research shall apply primary and secondary sources of data. The primary sources that will be used include but not limited to Acts of Parliament including the Land Act (2012) as well as Kenyan and foreign case law, also the Constitution of Kenya (2010). The secondary sources that shall be applied include books, journal articles, self-published articles and internet sources.

1.9 LITERATURE REVIEW

Regulation of land rights is seen as an instrumental area as it often requires striking a balance between the protection of private property and promoting an overriding public interest.²⁶ In the recent past, there have been cases cited in respect to the just compensation process ranging from the Lamu Port-South Sudan-Ethiopia Transport (Lapsset) corridor project, the standard gauge railway, the Mombasa-Nairobi pipeline and titanium mining in Kwale have wired controversy.²⁷ A review of the literature will be done based on different scholarly views and recent case law with regards to comparing the issues that arise out of the eminent domain powers of the State.

Paul Ocheje in his article argues that public interest for forced evictions is a myth and proposes three alternatives for forced evictions including inappropriate planning laws of colonial origin, corruption and failure to develop land reforms.²⁸ He states that public interest is simply advertised as the justification for mass dislocation of people with reference to the eviction of the Ogiek from

²⁴ Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion', *University of Nairobi Law Journal*, 2003, 3.

²⁵ FAO, 'Compulsory acquisition of land and compensation', *Land Tenure Studies* 2009, 2.

²⁶ Kariuki, Ouma and Ng'etich, *Property law*, 131.

²⁷ Muchira N, 'Sections of the Land Act against the law, say Kenyan surveyors' *The East African*, 14 September 2019-www.theeastafrican.co.ke/news/ea/Sections-of-land-act-against-the-law-say-kenyan-surveyors/4552908-5273110-rwyd1nz/index.html on 19 March 2020.

²⁸ Ocheje D, ' "In the Public Interest": Forced Evictions, Land Rights and Human Development in Africa' 51 *Journal of African Law* 2, 2006, 173.

the Mau forest in Kenya.²⁹ I however disagree on one of the alternative that he proposes for failure to develop land reforms. This is because of the National Land Policy Reforms developed in Kenya were developed to maintain an effective land management system however I am in support of the other alternatives.

David Ross Olanya analyses land acquisitions with regards to indigenous people and states that the loopholes that exist include failure to consider non-market values and ignoring the impact of unintended effects such as favouring some users at the expense of others. He further states that one of the public domain failures is the lack of participation of the indigenous peoples in decision making processes with regards to land that impacts on their livelihood.³⁰ Public participation is clearly an important element in a democratic regime as enshrined in *Article 118 of the Constitution*.³¹

Temmers Boggenpoel makes a constitutional analysis of the compulsory transfer of encroached-upon land. He states that the transmission of land may have constitutional implications. He further states that the transmission may be unlawful because it may not comply with the arbitrariness requirement where there is insufficient reason for the deprivation.³² I critique his point on its unlawfulness as compulsory acquisition is provided for in *Article 40 (3) of the Constitution* as well as the Land Act.³³ However, it may be arbitrary where insufficient reasons for the transmission are given.

Micheal Gyan analysed the right to property and compulsory acquisition on a human rights perspective, he says that many Third World countries have been opposed to the full recognition of the right to property.³⁴ He says that the scope of public interest should be defined in order to allow for judicial review.³⁵ He however states that it may be virtually impossible to challenge

²⁹ Ocheje D, ‘ “In the Public Interest”: Forced Evictions, Land Rights and Human Development in Africa’ 51 *Journal of African Law* 2, 2006, 178.

³⁰ Olanya D, ‘Indigenous peoples and customary land rights: Public policy discourse of large-scale land acquisitions in East Africa’ 10 *US-China Law Review* 620, 213, 630.

³¹ Article 118, *Constitution of Kenya* (2010).

³² Boggenpoel T, ‘Compulsory transfer of encroached-upon land: A constitutional analysis’ 76 *Journal for contemporary Roman-Dutch Law* 313, 2013, 320.

³³ Article 40 (3), *Constitution of Kenya* (2010).

³⁴ Gyan M, ‘The right to property and compulsory land acquisition in Ghana: A human rights perspective’ 27 *African Journal of International and Comparative Law* 1, 2019, 102.

³⁵ Gyan M, ‘The right to property and compulsory land acquisition in Ghana: A human rights perspective’ 27 *African Journal of International and Comparative Law* 1, 2019, 114.

compulsory acquisition in Kenya due to the provision as set out in *Section 2 of the Land Act* that sets out a public purpose clause.³⁶ Despite this provision, there still has been many court cases that arise out of the process.

Bausista Victoria gives a public-interest perspective in her study on corruption. She asks what constitutes of public interest and whose evaluation should be considered because it is often left out or even when it is defined, they are not put out into the norms of bureaucratic behaviour.³⁷ It may appear that due to the unclear procedures, public interest may be a myth and thus I am in agreement with Victoria.

Preeti Sampat gives reference to a 1952 judgement that states that the phrase ‘public purpose’ has to be construed according to the spirit of the times in which the particular legislation is enacted and so construed.³⁸ What constitutes of public purpose has however been construed in the spirit of the times as per *Section 2 of the Land Act*.³⁹

According to the Food and Agriculture Organization of the United Nations, the factors that lead to unjust compensation include poorly drafted laws and regulations that create conflicting outcomes and also the less negotiating power of affected owners. The determination of equivalent compensation is difficult when people do not have clear legal rights to the land.⁴⁰ I am in agreement with FAO when they say that the guiding principles should be those of equity and equivalence however the question that arises is that what amounts to the principles?⁴¹

Lorenzo and Brendan in their article state that the notion of public purpose is a contentious issue where authorities have expropriated land for commercial purposes and legislators are well placed to define public interest but the lack of clear parameters or redress mechanisms can make land rights insecure.⁴²

³⁶ Gyan M, ‘The right to property and compulsory land acquisition in Ghana: A human rights perspective’ 27 *African Journal of International and Comparative Law* 1, 2019, 115.

³⁷ Bautista V, ‘Public-Interest perspective: A neglected dimension in the study of corruption’ 31 *Philippine Sociological Review* 3/4, 1983, 45.

³⁸ Sampat P, ‘Limits to absolute power: Eminent Domain and the Right to Land in India’ 48 *Economic and Political Weekly* 19, 2013, 45.

³⁹ Section 2, *Land Act* (Act No.6 of 2012).

⁴⁰ FAO, ‘Compulsory acquisition of land and compensation’ *Land Tenure Studies*, 2009, 25.

⁴¹ FAO, ‘Compulsory acquisition of land and compensation’ *Land Tenure Studies*, 2009, 23.

⁴² Schwartz B and Cotula L, ‘Towards fair and effective legislation on compulsory land acquisition in Cameroon’ International Institute for Environment and Development, 2018, 3.

Sebastian and Ajay state that the problems underlying compulsory acquisition today are uncertainties, risks and delays that have brought about resistance on the part of the displaced.⁴³ The lack of clarity of land title holders bring about an issue as seen in the Kenyan case of *Henry Wainaina & another v National Land Commission* where the plaintiff sought an order restraining the National Land Commission from paying any sums of compensation to any persons other than the rightful land owners. The court however dismissed the suit on lack of merit.⁴⁴ I am thus in support that lack of clarity may have an effect on the transmission process.

The idea of just compensation is that it should be the person whose property was acquired as stated by Wyman in his article and thus in support that just compensation is to take the person back to the position they would be before the property was compulsorily acquired.⁴⁵ This statement may not regard factors such as the intrinsic nature that land may have on the owner which may not be compensated for monetarily.

Section 124 of the Land Act empowers the National Land Commission to compulsorily acquire land before making payment.⁴⁶ This in my opinion is contrary to the Constitutional requirement for prompt and full payment for any property forcefully acquired.⁴⁷ Also this prompts a critique of the judgement in the *Patrick Musimba case* where other than the public use requirement that was justified, the court highlighted that once the value of compensation had been determined, the State could go ahead and acquire the land notwithstanding the unpaid compensation.⁴⁸ My opinion is that acquisition of land already deprives the owner the benefit of use of the land and thus justice would be served if compensation would be paid before taking possession.

The US Supreme Court addressed the question in the case of *Kelo v City of New London* where the complainants alleged that the development plan would not constitute a public purpose and the court used a broad approach in determining what would constitute of public purpose. The second approach was that the property needs not be open to the general public.⁴⁹ This approach of public

⁴³ Morris S and Pandey A, 'Towards Reform of Land Acquisition Framework in India' 42 *Economic and Political Weekly* 22, 2007, 2083.

⁴⁴ *Henry Wainaina Wakihoro & another v National Land Commission & 2 others* (2018) eKLR.

⁴⁵ Wyman K, 'The measure of just compensation' 41 *University of California Davis Law Review* 1, 2007, 239.

⁴⁶ Section 124 (3), Land Act (Act No.6 of 2012).

⁴⁷ Article 40 (3) (b) (i), *Constitution of Kenya* (2010).

⁴⁸ *Patrick Musimba v National Land Commission & 4 others* (2014) eKLR.

⁴⁹ *Kelo v City of New London* (2005) The Supreme Court of the United States.

purpose has been adopted in Kenya law as seen in the case of *Joseph K Nderitu and 23 others v Attorney General and 2 others*.⁵⁰

There are thus various views that have been held out ranging from a human rights perspective to constitutional matters as well as uncertainty in the law on what just, adequate and public interest amount to.

1.10 CHAPTER BREAKDOWN

The study is divided into five chapters. The first Chapter brings out an introduction and background to the study, the statement of the problem, purpose of the study, hypothesis and research questions.

Chapter two analyses the extent to which land legislation has guided the enactment of legislation on compulsory acquisition

Chapter three analyses the shortcomings facing the implementation of land legislation and the possible reasons for its failure.

Chapter four will give a comparative study of successful countries with regards to compulsory acquisition powers of the State.

Chapter five gives a conclusion as well as the recommendations to the identified gaps on the law of compulsory acquisition.

⁵⁰ *Joseph K Nderitu and 23 others v Attorney General and 2 others* (2012) eKLR.

CHAPTER TWO

LEGAL FRAMEWORK GOVERNING COMPULSORY LAND ACQUISITION IN KENYA

2.0 Introduction

This chapter seeks to interrogate the legal framework governing compulsory land acquisition in Kenya. Its specific objective is to establish the extent to which compulsory acquisition powers of the state has been anchored in the law and to form a foundation in understanding the centrality of land. The chapter will begin by giving an evolution of land laws that involved compulsory acquisition in Kenya. It will proceed to give a brief overview of the current legal framework governing land in general in Kenya and then give a critical analysis of the specific legal framework provisions governing compulsory acquisition powers of the State. As a result, the chapter shall lay bare the inadequacies of the existing legal and institutional framework for compulsory acquisition in Kenya.

2.1 What is Compulsory Acquisition?

Compulsory acquisition arises out of the cherished right to property and this sanctity can be seen in the case of *Vanhorne's Lessee v Dorrance* where Justice Patterson implied that the right to property is an inherent an inalienable right of man and that preserving the right to property is an object of social compact.⁵¹ There are two principles that have qualified the almost absolute right to land and the first is that the use of land should not hinder another person's use of his or her land and from this, the police power of the state arises.⁵² Police powers do not take away the property rights unlike compulsory acquisition but rather regulates the right to property.⁵³

The second principle that has qualified the almost absolute right to land arises out of a legal requirement that property rights are a subject of superior sovereign which ideally, is the State and so when called upon to surrender the property, one must abide.⁵⁴ This is essentially the rationale behind compulsory acquisition. The origin of this principle can be traced to feudal times of holding land where the state was the title holder to all the land in its territory and this then disregards

⁵¹ *Vanhorne's Lessee v Dorrance* (1975), The Supreme Court of United States.

⁵² Paul E, *Property rights and eminent domain*, Transaction Publishers, New Jersey, 1987, 185.

⁵³ Aketch M, 'Land, the environment and the courts in Kenya', Background Paper for the Environment and Land Law Reports (2006), 25-< <https://profiles.uonbi.ac.ke/amigai/publications/23-land-environment-and-courts-kenya>> on 10 September 2020.

⁵⁴ Paul E, *Property rights and eminent domain*, Transaction Publishers, New Jersey, 1987, 185.

holding of private property however, in the Kenyan context where land now belongs to the people of the Republic, due process during acquisition must be followed.⁵⁵ Whenever land would be expropriated, two conditions would be fulfilled. Firstly, the purpose of expropriation must qualify to be that of public use and the state would then pay just compensation.⁵⁶ The rationale behind the two preconditions on compulsory acquisition is to restrict the state's power. Without a restriction then right to property by individuals or communities can be abused.⁵⁷ Debates however have arisen with regards to compulsory acquisition as will be seen in the subsequent chapters.

2.2 Historical Antecedents of Compulsory Acquisition Powers

Before the advent of colonialism, land in Kenya was community land where the communities had their own ways marking their boundaries without interfering with the rights of the neighbouring communities and the method of dispute resolution was by the use of community leaders.⁵⁸ It is to note however that although the current land law focus is on individualization of land rights, there are still communities that manage land communally and this was due to denial of suppression and the resilience of the relevant communities.⁵⁹

Land acquisition began when Kenya was allocated to the British following the 1885 Berlin Conference in Germany that sought to partition Africa by the European powers.⁶⁰ This was done without regard to the peoples right to land and thus the purpose for the acquisition was to advance the interests of the British.⁶¹ The whole the Kenyan territory was declared to be Crown Land and this meant that the land was subject to the control of the British Crown and thus shifting ownership rights from communities through massive expropriation of the land.⁶² The court in the case of *Isaka Wainaina Gathomo v Morito Indaraga* stated that indigenous peoples are just tenants to the

⁵⁵ Paul E, *Property rights and eminent domain*, Transaction Publishers, New Jersey, 1987, 185.

⁵⁶ Kariuki, Ouma and Ng'etich, *Property Law*, 135.

⁵⁷ Rakove J, *Original meanings: Politics and ideas in the making of a constitution*, Alfred Knopf, New York, 1996, 314-315.

⁵⁸ Ibrahim Mwachane, 'Land policies in East Africa: Is there a way and goodwill for Implementation?' International Conference on Land policies in East Africa, Kampala, 4-5 October 2012.

⁵⁹ Okoth-Ogendo H, 'The tragedy of the African commons: A century of expropriation, suppression and subversion' 5.

⁶⁰ Ndungu P, 'Tackling land related corruption in Kenya' International Office of Cadastre and Land Records, 3 November 2006-< <https://www.oicrf.org/-/tackling-land-related-corruption-in-kenya>> on 27 August 2020.

⁶¹ Ndungu P, 'Tackling land related corruption in Kenya' International Office of Cadastre and Land Records, 3 November 2006-< <https://www.oicrf.org/-/tackling-land-related-corruption-in-kenya>> on 27 August 2020.

⁶² Ndungu P, 'Tackling land related corruption in Kenya' International Office of Cadastre and Land Records, 3 November 2006-< <https://www.oicrf.org/-/tackling-land-related-corruption-in-kenya>> on 27 August 2020.

Crown and thus implying the abolishment of the indigenous peoples right to land.⁶³ This confirmed the shift of land rights to the British Crown through land alienation.

Towards the end of colonialism, there was need to increase the security of land tenure and thus legislation was put in place and this included the Registered Land Act that was repealed by the Land Registration Act of 2012. The Registered Land Act made provisions for registration of land title.⁶⁴ It was expected that the transfer of land rights from the colonial power to the indigenous peoples would take effect however Kenya adopted the colonial land laws with the powers of alienating land transferred to the President of Independent Kenya.⁶⁵

The repealed Constitution provided for the reasons to limit the right to property when it is justifiable and necessary for reasons such as public safety, public order, public health as well as if it is in the interests of public defence.⁶⁶ The compulsory acquisition powers of the State was governed by the Land Acquisition Act that is now repealed and it provided for acquisition where land was to be used for a public purpose and that it was necessary and justifiable.⁶⁷ The award to the interested persons was to be made promptly, in full and in addition to that a fair hearing of claims would be granted to the interested parties.⁶⁸ This Act although repealed, the provisions still apply in the current legal framework as provided for in the Land Act. This is as seen in the case of *Five Star Agencies Limited v National Land Commission* which was in respect to the acquisition of land by the National Land Commission in order to construct the Nairobi Southern bypass and the procedure provided for was as per the repealed Land Acquisition Act.⁶⁹

The valuation of land was guided by the Valuers Act which provided for purposes connected to valuation that determined the value of the land that was done by experts.⁷⁰ Several sections of the Land Act have since been amended by the Land Value (Amendment) Act of 2019.⁷¹

⁶³ *Isaka Wainaina Gathomo & Another v Morito Indagara & the Attorney General of Kenya* (1923) KLR.

⁶⁴ Preamble, *Registered Land Act* (CAP 300) (1989)

⁶⁵ Ndungu P, 'Tackling land related corruption in Kenya' International Office of Cadastre and Land Records, 3 November 2006-< <https://www.oicrf.org/-/tackling-land-related-corruption-in-kenya>> on 27 August 2020.

⁶⁶ Article 75 (1), *Constitution of Kenya (Repealed)*.

⁶⁷ Section 6, *Land Acquisition Act* (CAP 295) (2010).

⁶⁸ Section 9, *Land Acquisition Act* (CAP 295) (2010).

⁶⁹ *Five Star Agencies Limited v National Land Commission* (2014) eKLR.

⁷⁰ Preamble, *Valuers Act* (CAP 532) (2012).

⁷¹ Preamble, *Land Value (Amendment) Act* (Act No.15 of 2019).

From this foundation, we see how the ownership of land has been a key issue and was the cause of conflict of colonialism. The next section will recognize the improvements land laws has over compulsory acquisition powers of the State by analyzing the legal framework in place.

2.3 Current Legal Framework Governing Land in Kenya

In order to assess the legal framework governing compulsory acquisition powers of the State, it is important to recognize the centrality of land that is evident from the efforts of enacting legislation governing land as property. Land has overtime continued to be a valuable resource that has been a source of living for man, this is evident for Africa and specifically in the Kenyan context where agriculture is key to the economy as seen in the Kenya Vision 2030.⁷² As seen in the evolution of land laws in Kenya, land reforms were pushed by colonial systems. The matters that necessitated a change in the land regime were brought out in the National Land Policy of 2009 which included compulsory acquisition powers of the State to take away an interest in land for a public purpose.⁷³

The supreme law of the land in Kenya which is the 2010 Constitution dedicates the whole of its Chapter 5 to matters touching on land and environment.⁷⁴ It defines what it is and sets up a legal framework for the use and management of land. Land is defined to include the earth's surface and the subsurface rock, both on or under the surface of a water body, marine waters, natural resources that are on or under the surface as well as the air space above the surface.⁷⁵ Land in Kenya is categorized as either public, community or private land.⁷⁶ Public land is held by a county government in trust for the county residents.⁷⁷ Community land is held by communities based on their ethnicity, culture or similar community of interest.⁷⁸ Private land on the other hand is held by any person under freehold or leasehold tenure or as declared by an Act of Parliament.⁷⁹

The Constitution includes the role of Parliament in enacting legislation that touch on land matters such as its regulation.⁸⁰ The various pieces of legislation thus have a backing by the Constitution.⁸¹

⁷² Ibrahim Mwachane, 'Land policies in East Africa: Is there a way and goodwill for Implementation?' 12.

⁷³ Section 46, *National Land Policy* (2009).

⁷⁴ Article 2 (1), *Constitution of Kenya* (2010).

⁷⁵ Article 260, *Constitution of Kenya* (2010).

⁷⁶ Article 61 (2), *Constitution of Kenya* (2010).

⁷⁷ Article 62 (2), *Constitution of Kenya* (2010).

⁷⁸ Article 63, *Constitution of Kenya* (2010).

⁷⁹ Article 64, *Constitution of Kenya* (2010).

⁸⁰ Article 68 (c), *Constitution of Kenya* (2010).

⁸¹ Chapter 5, *Constitution of Kenya* (2010).

The enacted land laws by Parliament include the Land Act that was enacted in 2012 that sought to consolidate the various land laws and also to provide for sustainable use of land and its resources. Its aim reiterates *Article 68 (a) of the Constitution* and therefore giving effect to it.⁸²

The Land Registration Act of 2012 was also enacted by Parliament to rationalize and consolidate the registration of land titles.⁸³ This pertains to the right to own land in Kenya.⁸⁴ The National Land Commission Act of 2012 gives the functions and powers of the National Land Commission that is established under the Constitution.⁸⁵ Another piece of legislation enacted by Parliament that governs land is the Community Land Act of 2016 that gives effect to the Constitution that recognizes and protects community land rights.⁸⁶

The Land Laws (Amendment) Act brought about amendments to the Land Act, Land Registration Act as well as the National Land Commission Act. The Act was to align land laws to the Constitution and thus correcting the errors in the Acts.⁸⁷ Having analyzed the relevant legal framework governing land laws, the next section will analyze the specific legal framework provisions that govern compulsory acquisition in Kenya.

2.4 Specific legal provisions governing compulsory acquisition powers of the State

2.4.1 The Constitution of Kenya 2010

The right to acquire and own property in any part of Kenya has been guaranteed in the Constitution however, this right may be limited in certain circumstances that result to compulsory acquisition powers of the state.⁸⁸ The Constitution provides for acquisition in its Chapter Five only if it is for a public purpose or in the public interest but with the guidance of the legislation. The deprivation of land must be compensated for promptly, in full payment and justly. It also guarantees for the right to access the court for any person with interest in land and this is because compulsory acquisition is an administrative process.⁸⁹ The National Land Commission that derives its

⁸² Preamble, *Land Act* (Act No.6 of 2012).

⁸³ Preamble, *Land Registration Act* (Act No.3 of 2012).

⁸⁴ Article 40, *Constitution of Kenya* (2010).

⁸⁵ Section 5 (1), *National Land Commission* (Act No.5 of 2012).

⁸⁶ Preamble, *Community Land Act* (Act No.27 of 2016).

⁸⁷ Preamble, *Land Laws (Amendment) Act* (Act No.28 of 2016).

⁸⁸ Article 40 (3), *Constitution of Kenya* (2010).

⁸⁹ Article 40 (3), *Constitution of Kenya* (2010).

functions from the Constitution of Kenya may alienate public land on behalf of national and county governments but with prior consent.⁹⁰

2.4.2 The Land Act

Part VIII of the Land Act is dedicated to compulsory acquisition interests in land and it is set out as one method of acquiring land.⁹¹ For land to be converted from one category to another, for example from being private owned land to public land it must be in line with the Land Act as well as other laws.⁹²

The process of compulsory acquisition in Kenya starts when the national or county government is satisfied that the land is fit for compulsory acquisition. A request is then submitted to the National Land Commission which then acts on behalf of either the national or county government.⁹³ This Commission however, has the powers to reject an application by the relevant government if the guidelines provided to it as per the current Constitution has not been adhered to.⁹⁴ In the case where a request of the relevant authority is rejected, the relevant authority is updated within fourteen days of the decision.⁹⁵ When the Commission approves of the process, a notice shall be served to any person who appears to be interested in the land as well as the Registrar. A Gazette notice shall also be published to that effect and an entry shall be made by the Registrar to register the intention to acquire the land by the relevant government.⁹⁶

The power to enter and inspect the land is limited in that it does not include entering a building or an enclosed garden attached to the house unless the occupier's consent has been granted.⁹⁷ The National Land Commission must however certify that the land is to be acquired in the public interest or is for a public purpose.⁹⁸ The Land Act reiterates the current Constitution with regards to just and prompt compensation in full to the persons who had interests in the subject land.⁹⁹ An interest in land has been defined in the Act to imply a right over land.¹⁰⁰ The interested persons

⁹⁰ Section 5 (2) (a), *National Land Commission* (Act No.5 of 2012).

⁹¹ Section 7 (c), *Land Act* (Act No.6 of 2012).

⁹² Section 9 (1), *Land Act* (Act No.6 of 2012).

⁹³ Section 107 (1), *Land Act* (Act No.6 of 2012).

⁹⁴ Section 107 (3), *Land Act* (Act No.6 of 2012).

⁹⁵ Section 3, *Land Value (Amendment) Act* (Act No.15 of 2019).

⁹⁶ Section 107 (5), *Land Act* (Act No.6 of 2012).

⁹⁷ Section 108 (2), *Land Act* (Act No.6 of 2012).

⁹⁸ Section 110 (1), *Land Act* (Act No.6 of 2012).

⁹⁹ Section 111, *Land Act* (Act No.6 of 2012).

¹⁰⁰ Section 2, *Land Act* (Act No.6 of 2012).

have a right to bring forth propriety issues as well as issues of compensation and the Commissioner receives written claims and looks into determining who the interested parties are.¹⁰¹

A notice of award is then served on the interested parties and the compensation is then paid according to the award that was filed in the office of the Commission.¹⁰² It is to note however that, some sections of the Land Act touching on compulsory acquisition have been amended by the Land Value (Amendment) Act.

2.4.3 The Land Value (Amendment) Act

This Act came into force and has amended various sections of the Land Act as well as the Land Registration Act. It also provides for the assessment of land value that was a key issue when it came to the compulsory acquisition process.¹⁰³ This Act addressed some of the gaps in the law that existed with regards to compulsory acquisition powers of the state. It defines just compensation to mean that fair compensation and what amounts to fair is as provided for in the Act.¹⁰⁴

The Act further defines prompt as reasonable time that does not exceed more than a year which comes about when the National Land Commission takes possession of the subject land. Essentially, the National Land Commission is allowed to take possession of the land and pay compensation at a later date. The definition of full includes restoring the land value, taking into consideration the improvements that were made on the land as at the date when an intention to acquire the land was served to the interested parties.¹⁰⁵

This Act establishes the Land Acquisition Tribunal that is in charge of the hearing of disputes with regards to compulsory acquisition and has the power to confirm or quash the decision of the National Land Commission.¹⁰⁶

The Act provides that valuation shall be based on a Land Value Index approach and the factors that are taken into consideration include the declared value of land for purposes of payment of rates, rents or stamp duty. Also, the increase in value of land as a result of improvements made.¹⁰⁷

This Act also increases the forms of compensation to allocating another piece of land of the same

¹⁰¹ Section 112, *Land Act* (Act No.6 of 2012).

¹⁰² Section 115, *Land Act* (Act No.6 of 2012).

¹⁰³ Preamble, *Land Value (Amendment) Act* (Act No.15 of 2019).

¹⁰⁴ Section 2, *Land Value (Amendment) Act* (Act No.15 of 2019).

¹⁰⁵ Section 2, *Land Value (Amendment) Act* (Act No.15 of 2019).

¹⁰⁶ Section 13, *Land Value (Amendment) Act* (Act No.15 of 2019).

¹⁰⁷ Section 4, *Land Value (Amendment) Act* (Act No.15 of 2019).

value of the acquired one, giving out of a government bond to the interested party, monetary payment, equity shares, grant or transfer of development rights as well as any other lawful compensation.¹⁰⁸

2.4.4 The Community Land Act

The Community Land Act serves as an important piece of legislation in compulsory acquisition process because unlike other categories of land, community land in some cases are not registered and thus making it the responsibility of the relevant county governments to hold the compensation from compulsory acquisition in trust for the community.¹⁰⁹ This Act however serves as a milestone as the previous legislation governing land did not cater for the registration of community land which was a huge part of land tenure in the advent of colonialism.¹¹⁰

Compulsory acquisition is listed as one of the ways community land may be converted to public land.¹¹¹ Just like other categories of land, communities have the right to land and can only be compulsorily acquired if it is in the public interest or for a public purpose and it is only upon just and prompt compensation to the relevant community.¹¹² Approval by community members in a meeting prior to the conversion of land shall be done in accordance with the law.¹¹³

2.4.5 The Mining Act

The Constitution of Kenya in defining land includes natural resources on or under the surface and this definition includes minerals.¹¹⁴ The Mining Act which gives effect to the current Constitution in so far as it applies to minerals gives the Cabinet Secretary responsible for mining the power to take steps under the law of compulsory acquisition.¹¹⁵

2.5 Conclusion

From this chapter, we see how the law has come into place to cater for compulsory acquisition of land in Kenya. The various pieces of legislation including the Constitution illustrates that the right to have interests in land may be limited by the State. The next chapter will look into the

¹⁰⁸ Section 5, *Land Value (Amendment) Act* (Act No.15 of 2019).

¹⁰⁹ Section 4, *Community Land Act* (Act No.27 of 2016).

¹¹⁰ Section 11, *Community Land Act* (Act No.27 of 2016).

¹¹¹ Section 22 (1) (a), *Community Land Act* (Act No.27 of 2016).

¹¹² Section 5, *Community Land Act* (Act No.27 of 2016).

¹¹³ Section 22 (4), *Community Land Act* (Act No.27 of 2016).

¹¹⁴ Article 260, *Constitution of Kenya* (2010).

¹¹⁵ Section 40, *Constitution of Kenya* (2010).

shortcomings that has faced the implementation of land legislation and the possible reasons of its failure.

CHAPTER THREE

SHORTCOMINGS FACING IMPLEMENTATION OF LAND

LEGISLATION PROVISIONS ON COMPULSORY ACQUISITION

3.1 Introduction

This chapter of the dissertation is structured to pay attention to the gaps that still exist in the compulsory acquisition process of land after the enactment of the Land Value (Amendment) Act of 2019. The specific objective of this chapter is to establish that as a matter of right, individuals and communities are entitled to benefit from having interests in land and secondly that the lack of proper legal framework to govern compulsory acquisition of land may lay ground for conflicts against the State over land.

3.2 Inadequacy of legal mechanisms to cater for compulsory acquisition of land

This section shall give an analysis of how the current system of land laws is inadequate to cater for compulsory land acquisition.

3.2.1 Acquisition of land before payment of compensation

Before the enactment of the Land Value (Amendment) Act, it was required that interested parties are given compensation prior to the National Land Commission taking possession of land.¹¹⁶ The provision of the Land Act was however amended by deleting the implication to pay compensation before the National Land Commission took possession.¹¹⁷ The Land Value (Amendment) Act in defining 'prompt' allows the National Land Commission to compensate interested parties within a reasonable time that does not exceed one year after taking possession of the land.¹¹⁸ This does not cater for the need of the affected parties and does not serve as reasonable reparation but instead gives the National Land Commission a wide discretion and thus the power may be abused.

This may specifically affect interested parties who used the land for residential purposes or communities whose ancestral lands are threatened without prior compensation. It may be argued that one year is a long period to be regarded as prompt as opposed to an expected compensation before the National Land Commission takes possession of the land. This issue of time compensation has been contested even when the law required for immediate compensation and

¹¹⁶ Section 125, *Land Act* (2012).

¹¹⁷ Section 12, *Land Value (Amendment) Act* (Act No.15 of 2019).

¹¹⁸ *Land Value (Amendment) Act* (Act No.15 of 2019).

this is seen in the case of *Arnacherry Limited v Attorney General* where Justice Lenaola noted that it was a distressing Petition and it was contrary to its expectation that compensating for a forceful takeover of property by the State would take thirty years.¹¹⁹ This is also seen in the case of *Mathatani Limited v Commissioner of Lands* where compensation was not paid to the petitioners four years after acquisition of land for the construction of turn-offs.¹²⁰ The court found this to be a breach of the principles of justice and fairness.¹²¹

The consequence of this provision is that it is uncertain because it does not specify the time for compulsory acquisition payment by the State to the interested parties. This provision would require the interested parties to carefully choose the form of compensation preferred to them as compensation may come later.

3.2.2 Undistinguished criteria of land valuation (The Rigid Nature of Land Valuation Criterion)

Land in Kenya is categorized as either private, public or community land.¹²² Land valuation has overtime been contested and this has resulted to amendments to the Land Act by introducing different criteria for the evaluation of community land as well as freehold land when it comes to compulsory acquisition.¹²³ The valuation of these two categories of land is based on the Land Value Index developed by the Cabinet Secretary.¹²⁴ The Land Value Index is a representation of the value of land in a specific geographical area at a certain time.¹²⁵ This Land Value Index approach is essentially developed by considering a market value approach to compulsory acquisition. Community Land is also managed pursuant to the Community Land Act.¹²⁶

The gap arising is that the Land Act does not sufficiently distinguish how land value is assessed for private land and community land.¹²⁷ Using the market approach method has in the past been a contentious issue because it does not fulfill the purpose of just compensation which should take

¹¹⁹ *Arnacherry Limited v Attorney General* (2014) eKLR.

¹²⁰ *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

¹²¹ *Mathatani Limited v Commissioner of Lands* (2013) eKLR.

¹²² Article 61 (2), *Constitution of Kenya* (2010).

¹²³ Section 4, *Land Value (Amendment) Act* (Act No.15 of 2019).

¹²⁴ Section 107A, *Land Act* (Act No.6 of 2012).

¹²⁵ Section 107A (3), *Land Act* (Act No.6 of 2012).

¹²⁶ Section 37, *Land Act* (Act No.6 of 2012).

¹²⁷ Wily A, 'Analysis of the Land Value (Amendment) Act' Natural Justice, 9 October 2019-

<https://naturaljustice.org/wp-content/uploads/2020/01/Analysis-of-the-Land-Value-Amendment-Act.pdf> on 3 October 2020.

the interested party to the same position they would be if their property had not been compulsorily acquired.¹²⁸ It is thus evident that compulsory acquisition aims at balancing the protection of the right to property and promoting public interest.¹²⁹ The issue that often arises is whether the compensation is adequate? This issue is seen in the case of *Patrick Musimba v National Land Commission & 4 others* and the court stated that once the value of compensation is determined, the land can be compulsorily acquired even though compensation had not been paid and this disregarded the issue on adequate compensation.¹³⁰

Using the Land Value Index approach for community land disregards several factors owing to the emotive nature of community land where the affected community has spiritual and cultural ties to the land.¹³¹ Compulsory acquisition of community land leads to disruption of their livelihoods due to the historical and socio-cultural use of the land as well.¹³² It subsequently leads to the undervaluing of the land and also, for unregistered community land, there is a high risk of undervaluation. This is because the Land Value Index approach may use outdated information in government records.¹³³

Using the Land Value Index approach may also result in delays due to the process of developing the value that must be approved in the National Assembly or Senate. The landmark case of the Ogiek community at the African Court on Human and People's Rights illustrated the spiritual connection of the Ogiek to their land.¹³⁴ Essentially, the right to development is tied to the right to property as seen in the *Endorois case* where the Government of Kenya deprived the indigenous community of their right to development by evicting them from their ancestral lands.¹³⁵

¹²⁸ Wyman K, 'The measure of just compensation' 41 *University of California Davis Law Review* 1, 2007, 239.

¹²⁹ Kariuki, Ouma and Ng'etich, *Property Law*, 138.

¹³⁰ *Patrick Musimba v National Land Commission & 4 others* (2014) eKLR.

¹³¹ Radin MJ, 'Property and personhood' 34 *Stanford Law Review* 5, 1982, 956.

¹³² Wily A, 'Analysis of the Land Value (Amendment) Act' *Natural Justice*, 9 October 2019-
<https://naturaljustice.org/wp-content/uploads/2020/01/Analysis-of-the-Land-Value-Amendment-Act.pdf> on 3 October 2020.

¹³³ Wily A, 'Analysis of the Land Value (Amendment) Act' *Natural Justice*, 9 October 2019-
<https://naturaljustice.org/wp-content/uploads/2020/01/Analysis-of-the-Land-Value-Amendment-Act.pdf> on 3 October 2020.

¹³⁴ *African Commission on Human and Peoples' Rights (on behalf of the Ogiek) v Republic of Kenya*, ACtHPR Application 006/2012.

¹³⁵ *Centre of Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, ACmHPR Comm 276/03.

3.2.3 Public Purpose Question

Compulsory acquisition is only exercisable if the land is acquired for a public purpose or the purpose of acquisition is in the public interest.¹³⁶ The Land Act gives the scope of what constitutes public purpose and it includes transportation uses such as the building of a railway and bridges, public utilities such as those for water and sewage.¹³⁷ It also includes the construction of public buildings that include schools and hospitals.¹³⁸ This section provides for any other analogous purpose to constitute public purpose and thus it leaves a wider space for its interpretation.¹³⁹

The gap that arises here is that the state can acquire land and transfer it to a private individual based on nepotism or cronyism and use the justification as falling under the scope of an ‘analogous purpose’.¹⁴⁰ There is a blurred distinction on what fully constitutes of public purpose and thus can be used for the convenience of the State.¹⁴¹ This degree of uncertainty has in the past been a contentious issue as seen in the landmark case of *Kelo v City of New London* where the issue was whether the properties were acquired for a public purpose? The properties were acquired for a social utility use and it was the State’s expectation that the project would increase employment as well as increasing the tax that would be collected.¹⁴² The court held that the State had met the public purpose threshold because it would increase the base of tax.¹⁴³

In the Kenyan case of *Joseph Nderitu v Attorney General*, the court highlighted that land can only be acquired compulsorily if it is for a public purpose or it is in the public interest.¹⁴⁴ It is to note however that the degree of uncertainty in the provision may only help where the State would want to acquire land for purpose that was never anticipated for at the time the Land Act was enacted.¹⁴⁵ In the case of *Commissioner of Lands v Coastal Aquaculture* the Court of Appeal held that a State failed to comply with the law because the purpose for compulsory acquisition was not disclosed.¹⁴⁶

¹³⁶ Article 40 (3), *Constitution of Kenya* (2010).

¹³⁷ Section 2, *Land Act* (Act No.6 of 2012).

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

¹³⁹ Section 2, *Land Act* (Act No.6 of 2012).

¹⁴⁰ Kariuki, Ouma, Ng’etich, *Property Law*, 135.

¹⁴¹ Lindsay J, ‘Compulsory Acquisition of Land and Compensation in Infrastructure Projects’ 1 *PPP Insights* 3, 2012, 2.

¹⁴² *Kelo v City of New London* (2005) The Supreme Court of the United States.

¹⁴³ *Kelo v City of New London* (2005) The Supreme Court of the United States.

¹⁴⁴ *Joseph K Nderitu & 23 others v Attorney General & 2 others* (2012) eKLR.

¹⁴⁵ Lindsay J, ‘Compulsory Acquisition of Land and Compensation in Infrastructure Projects’ 1 *PPP Insights* 3, 2012, 2.

¹⁴⁶ *Commissioner of Lands & another v Coastal Aquaculture Limited* (1996) eKLR.

It is clear that eminent domain can easily be abused by the State in the name of an ‘analogous public purpose’.

3.2.4 Uncaptured list of interested persons

The different categories of land may further be held as a leasehold tenure, freehold tenure, customary land rights or other forms of partial interests such as having the rights of way.¹⁴⁷ When land is compulsorily acquired, several people having interests in the land may significantly be affected¹⁴⁸ The Land Act defines an interest as a right over land and thus the process may not significantly capture the compensation of the relevant parties as various tenures capture multiple layers of rights.¹⁴⁹

The law of compulsory acquisition process fails to capture other potential rights and thus such as customary land rights that may specifically be affected. Although community land may be registered, some customary land rights still remain unregistered.¹⁵⁰ The issue that arises in compulsory acquisition is who is to be compensated? The law on compulsory acquisition answers this question by looking at the relevant registered parties and a concern arises particularly where only a small fraction of the state’s land has been registered.¹⁵¹

A gap arises where there are multiple rights over land or the land is unregistered and thus identifying the interested parties is a challenge that brings rise to policy questions where compensation of land that is not legally recognized is to be made. Compulsory acquisition does not cater for derivative rights. These are rights in land that do not give the holder possession over the land.¹⁵² They are catered for under the Land Act to include easements and licences.¹⁵³ They may to some extent be minimally affected by the compulsory acquisition process and thus qualify to be interested persons however compensation does not cater for such parties. The law should thus be amended to cater for a case-to-case approach when it comes to determination and compensation of the interests over land

¹⁴⁷ Section 5 (1), *Land Act* (Act No.6 of 2012).

¹⁴⁸ Lindsay J, ‘Compulsory Acquisition of Land and Compensation in Infrastructure Projects’ 1 *PPP Insights* 3, 2012, 5.

¹⁴⁹ Section 2, *Land Act* (Act No.6 of 2012).

¹⁵⁰ Section 11, *Community Land Act* (Act No.27 of 2016).

¹⁵¹ Lindsay J, ‘Compulsory Acquisition of Land and Compensation in Infrastructure Projects’ 1 *PPP Insights* 3, 2012, 5.

¹⁵² Kariuki, Ouma and Ng’etich, *Property Law*, 238.

¹⁵³ Part X, *Land Act* (Act No.6 of 2012).

Proof of ownership of land has to be shown before compensation and this is seen in the case of *James Shikwati Shikuku v County Government of Kakamega* where the court held that the interested parties had a right to compensation however, the court orders would only come to play once the parties would prove the ownership of the land.¹⁵⁴ This concludes that compulsory acquisition does not cater for the multiplicity of land rights that may be affected and thus brings out a gap in compulsory acquisition laws of the State.

3.2.5 Procedural aspect gaps in compulsory acquisition

Procedural fairness is an important principle of decision making and is strengthened as a Constitutional requirement which implies that everyone has a right to a procedurally fair administrative action.¹⁵⁵ The efficiency and speed of the compulsory acquisition process is also important in safeguarding the interests of the affected party and also serves as their right.¹⁵⁶ Limiting procedures may have adverse effects on the affected parties.¹⁵⁷ The court in the case of *Commissioner of Lands v Coastal Aquaculture* emphasized the need to follow procedure in effecting the compulsory acquisition process.¹⁵⁸

One procedural gap includes weak decision-making power of the public and this hinders the right to participate. This decision-making power is particularly relevant for community land and this can be seen in the *Endorois case* where the complainants alleged that they were not given prior, informed consent and stated that consent required that they were given the opportunity to participate and thus the State, in evicting them from their land was in breach of their right of development.¹⁵⁹ The African Commission agreed that it was the responsibility of the Kenyan state to carry out a consultation process in a manner that the representatives of the community would be informed in the agreement as well as participate in the process.¹⁶⁰

¹⁵⁴ *James Shikwati Shikuku v County Government of Kakamega & 3 others* (2016) eKLR.

¹⁵⁵ Article 47 (1), *Constitution of Kenya* (2010).

¹⁵⁶ Article 47 (1), *Constitution of Kenya* (2010).

¹⁵⁷ Lindsay J, 'Compulsory Acquisition of Land and Compensation in Infrastructure Projects' 1 *PPP Insights* 3, 2012, 5.

¹⁵⁸ *Commissioner of Lands v Coastal Aquaculture* (1996) eKLR.

¹⁵⁹ *Centre of Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, ACmHPR Comm 276/03.

¹⁶⁰ *Centre of Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, ACmHPR Comm 276/03.

When it comes to the hearing of disputes relating to the acquisition process, they are handled by the Land Acquisition Tribunal that has the power to vary, confirm or quash the decision made by the National Land Commission.¹⁶¹ This was an amendment to the Land Act as disputes were previously handled in the Environment and Land Court as seen in the case of *Abdulla Akiio v Kenya Urban Roads Authority* where the court held that the court responsible for hearing matters related to compulsory acquisition is the Environment and Land Court.¹⁶²

The powers of the tribunal are limited in that where the land is in possession of the National Land Commission, no order can stop further development of the land if public funds have been set aside and this stops the grant of conservatory orders once the State has a project underway. This arises as a gap as many respondents would seek stay orders to prevent the State from acquiring their land without regard to due process as seen in the case of *Joseph Nderitu v Attorney General* where the petitioners sought conservatory orders.¹⁶³

Limiting the powers of the Tribunal may be seen to be advantageous to the State but to the detriment of the affected parties in that, the State would not incur costs that arise out of delays caused by an injunction as seen in the *Patrick Musimba case* where the Kenya Railways Corporation stated that any kind of restraining order would result in giving all the respondents unnecessary expenses as well as litigation.¹⁶⁴ Ideally, conservatory orders would be served where due process had not been followed by the State in compulsory acquisition and limiting the powers of the court thus hinders the process to the advantage of the State.

To conclude, the gaps that go against due process go against the spirit of the law and there is still leeway to improve the process of compulsory acquisition by aiming towards an efficient process in how the law is spelt out as well as putting it in practice.

3.3 Conclusion

From this chapter, we see that even with the amendments to the Land Act provisions that touch on compulsory acquisition, there are still gaps that arise as a result of the inadequacy in the legal

¹⁶¹ Section 133C (7), *Land Act* (Act No.6 of 2012).

¹⁶² *Abdulla Akiio & 2 others v Kenya Urban Roads Authority* (2015) eKLR.

¹⁶³ *Joseph K Nderitu & 23 others v Attorney General & 2 others* (2012) eKLR.

¹⁶⁴ *Patrick Musimba v National Land Commission & 4 others* (2016) eKLR.

framework. The subsequent chapter will look into a comparative study of the countries that attempted to bridge the gaps of compulsory acquisition.

CHAPTER FOUR

COMPULSORY ACQUISITION IN A COMPARATIVE TEXT: AN ANALYSIS OF THE AUSTRALIAN AND MALAYSIAN EMINENT DOMAIN MECHANISMS

4.0 Introduction

This chapter being broader seeks to explore the different mechanisms used by the two states in the compulsory acquisition process of land. The goal of the chapter is to generally highlight the different ways the compulsory acquisition process is carried out to ensure a just process. Learning from the experiences of these countries, Kenya could include some practices and avoid some. In developing the chapter, keen interest is given to the extent to which contentious issues arising out of compulsory acquisition have been handled and the consequences.

As opposed to Kenya, Australia and Malaysia are quite developed. This part of the study chooses to settle on a comparative approach between Australia with a specific focus on New South Wales, a county in Australia and also Malaysia. This is because of the peculiar processes that were adopted in the common law systems. Australia's experience is substantially different from Malaysia's. In this regard chapter five of this paper will attempt to develop a proposal for Kenya's compulsory acquisition process drawing inspiration from the both countries.

4.1 The Australian Experience

4.1.1 A brief Background of Australia's Social Political Context

The Australian Constitution provides for a system of governance that establishes a federal government and under the federal system, power is distributed between the central and regional governments.¹⁶⁵ As of 2020, Australian's population is estimated at 25.4 million people with the State of New South Wales accounting for 8.1 million of the people thus making it Australia's most populated state. Since the country attained independence in 1788, it has experienced a series of evolution of land laws ranging from registering already existing customary indigenous land-owning groups in the territory.¹⁶⁶

¹⁶⁵ Section 1, *Constitution of Australia* (2012)

¹⁶⁶ Weiner J and Glaskin K, 'Customary Land Tenure and Registration in Papua New Guinea and Australia: Anthropological Perspectives' *Customary Land Tenure & Registration in Australia and Papua New Guinea*, ANU Press, 2007, 3.

Compulsory acquisition of land in Australia can be traced to two traditions: The private property theory advanced by Locke and Blackstone as well as the European public law theory of eminent domain gained from the United States Constitution.¹⁶⁷ John Locke when writing about the labour theory argued that property rights are natural rights and thus should be governed by the principles of natural justice and thus required for full market value compensation when property was compulsorily acquired.¹⁶⁸

The first step taken to register land can be traced way back to 1817.¹⁶⁹ In Australia, the private ownership rights have a limitation based on a principle known as limited sovereign rights that implies that ownership rights are not absolute.¹⁷⁰ This meant that even with ownership rights, the Crown had the power to exercise compulsory acquisition rights. This was subject to the conditions that it must be taken for a public purpose and the owner must receive fair compensation thus adopting the common law position.¹⁷¹

The first piece of legislation that contemplated the acquisition of private land for public purposes and compensation provisions for New South Wales was the Sydney Supply Water Act of 1833. Its purpose was to aid the construction of a water tunnel and this was followed after by many other pieces of legislation that can be traced to the current legislation.¹⁷²

4.1.2 The Legal Architecture of Australia's Compulsory Acquisition framework

The principal law in Australia's compulsory acquisition powers is the Constitution. It makes provisions regarding compulsory acquisition and gives Parliament the powers to make laws for the peace, order and good governance of the Commonwealth with respect to the acquisition of property on terms that it is just and it applies to any State or person.¹⁷³ The Australian Constitution expressly grants compulsory acquisition powers for property. This proposition is further anchored

¹⁶⁷ Stubbs M, 'The eminent domain in Australia: the 'individual rights' approach to Section 51 (xxxii) of the Australian Constitution' Published, University of Adelaide, vii.

¹⁶⁸ Locke J, *Second Treatise of Government*, Hafner Publishing, New York, 1690, 26.

¹⁶⁹ United Nations Centre for Humans Settlements (Habitat), *Development of Land- Title Registration Systems- A developed Country experience Australia*, 1993, 5.

¹⁷⁰ *Windtree Hotels Ltd v Harrow* (2001), The United Kingdom House of Lords.

¹⁷¹ *Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions* (2001), The United Kingdom House of Lords.

¹⁷² Sturgeon D, 'Compulsory Acquisition Compensation: Homeowner Attitudes and the Principle of Equivalence' published, The University of Queensland, Australia, 2018, 85.

¹⁷³ Section 51 (xiii), *Constitution of Australia* (1901).

by the Land Acquisition (Just Terms Compensation) Act of 1991 that provides for the period during which the acquiring authority needs to acquire the land.¹⁷⁴

The common question that arose out of the justification to compulsorily acquire land is what qualifies to be ‘just’? This can be traced back to the case of *Grace Brothers Pty Ltd v Commonwealth* that led to two approaches to the interpretation of just.¹⁷⁵ The first approach focusing on compulsory acquisition as a legislative power and the second approach viewing property rights as individual rights that are entitled to full market value compensation when compulsorily acquired.¹⁷⁶ This to date is seen as a problematic ground for most states when it comes to determining the compensation value.

One of the objectives of the Land Acquisition (Just Terms Compensation) Act is to encourage the acquisition of land by an agreement rather than a compulsory process.¹⁷⁷ The Act thus requires the authority to make a genuine attempt to acquire the land through an agreement with the parties. The Act further allows for land to be acquired by a compulsory process under the Act or the Public Works and Procurement Act of 1912, that allows for resumption or appropriation.¹⁷⁸ An agreement is economically efficient and also results in socially optimal solutions.¹⁷⁹ The question then arises is what amounts to a genuine attempt and can be seen in the case of *Joyce v Health Administration Corporation* where the affected parties challenged the genuine attempts of the compulsory acquisition process however, the court found it against the applicant.¹⁸⁰

The Just Terms Act provides for a 6-month pre-acquisition negotiation period during which the acquiring authority makes an attempt to acquire the land by an agreement and thus fulfilling one of the objectives of the legislation.¹⁸¹ This encourages parties to put in efforts to reach an agreement by the end of the fixed negotiation period. Land is acquired for the purposes that the

¹⁷⁴ Section 10 A, *Land Acquisition (Just Terms Compensation)* (New South Wales).

¹⁷⁵ *Grace Brothers Pty Ltd v Commonwealth* (1946), The Australian High Court.

¹⁷⁶ *Grace Brothers Pty Ltd v Commonwealth* (1946), The Australian High Court.

¹⁷⁷ Section 3 (1) (e), *Land Acquisition (Just Terms Compensation)* (New South Wales).

¹⁷⁸ Section 2, *Land Acquisition (Just Terms Compensation)* (New South Wales).

¹⁷⁹ Mahalingham A and Vyas A, ‘Comparative Evaluation of Land Acquisition and Compensation Processes across the World’ 46 *Economic and Political Weekly* 32, 2011, 95.

¹⁸⁰ *Joyce v Health Administration Corporation* (2018), The Supreme Court of New South Wales.

¹⁸¹ Section 10 A, *Land Acquisition (Just Terms Compensation)* (New South Wales).

Parliament has the power to define by legislation, this in effect gives a wide range of interpretation in the event the purpose of acquisition is challenged.¹⁸²

The principle that guides land acquisition in Australia is the ‘Value to owner principle’ which aims at compensating the landowners with regards to market value as well as other losses suffered by the land owners.¹⁸³ An affected party has the right to be paid compensation by the State.¹⁸⁴ The Just Terms Act provides that the value of compensation shall not be less than the market value.¹⁸⁵ The Valuer-General who determines the amount of compensation after having analyzed a list of issues that the authority believes are relevant to the determination of compensation.¹⁸⁶

The principle takes into account several factors that relate to land acquisition and aims to compensate the affected parties for not only the land value but also the tangible and intangible benefits that are attached to the land.¹⁸⁷ Ideally, the value to owner principle takes socio-economic considerations into account.¹⁸⁸ The factors to be considered include the market value of the land when it was acquired, the special value of the land to the interested party at the date it was acquired, any loss that is attributable to severance as well as disturbance, the disadvantage that came along with relocation and also, any increase or decrease in the land value at the date of compulsory acquisition.¹⁸⁹

The compensation is paid within 45 days after the publication of the acquisition process and a notice given to the interested parties of the process of compulsory acquisition as determined by the Valuer-General.¹⁹⁰ The compensation period may be extended however it must not exceed 60 days with an exception of when a number of interested parties claim compensation.¹⁹¹ The

¹⁸² Mahalingham A and Vyas A, ‘Comparative Evaluation of Land Acquisition and Compensation Processes across the World’ 95.

¹⁸³ Mahalingham A and Vyas A, ‘Comparative Evaluation of Land Acquisition and Compensation Processes across the World’ 95.

¹⁸⁴ Section 37, *Land Acquisition (Just Terms Compensation)* (New South Wales).

¹⁸⁵ Section 10 (1) (a), *Land Acquisition (Just Terms Compensation)* (New South Wales).

¹⁸⁶ Section 41, *Land Acquisition (Just Terms Compensation)* (New South Wales).

¹⁸⁷ Mahalingham A and Vyas A, ‘Comparative Evaluation of Land Acquisition and Compensation Processes across the World’ 95.

¹⁸⁸ Mahalingham A and Vyas A, ‘Comparative Evaluation of Land Acquisition and Compensation Processes across the World’ 95.

¹⁸⁹ Section 55, *Land Acquisition (Just Terms Compensation)* (New South Wales).

¹⁹⁰ Section 42 (1), *Land Acquisition (Just Terms Compensation)* (New South Wales).

¹⁹¹ Section 42, *Land Acquisition (Just Terms Compensation)* (New South Wales).

compulsory acquisition process allows for the interested party to occupy the land until compensation is paid.¹⁹²

The compensation paid may be challenged before the Land and Environment Court within 90 days of receiving the compensation notice.¹⁹³ This gives interested parties the right to challenge the compulsory acquisition process.

4.2 The Malaysian experience

4.2.1 A brief background of Malaysia's Socio-Political Context

The Constitution of the Republic of Malaysia provides for a system of governance that establishes a Federal government that adheres to a Federal Constitution as their supreme law of the land.¹⁹⁴ As at 2020, the population of Malaysia is estimated to be 32.7 million and since the country attained independence in 1963, it has experienced a series of evolution of land laws ranging from registration of land to amendment of compulsory acquisition laws. Land ownership in Malaysia is governed by the supreme law of the land, the Constitution.¹⁹⁵ It is also governed by the National Land Code of 1965 as well as the Land Acquisition Act of 1960 that specifically aims towards the compulsory acquisition process.

Malaysia has a unique experience of land registration due to the Torrens system of land registration which is conveyancing by registration and certificate rather than by deed.¹⁹⁶ The rationale behind this system is to register the title to the land thus ensuring a degree of certainty to the land title.¹⁹⁷

4.2.2 The Legal Architecture of Malaysia's Compulsory Acquisition framework

Land ownership in Malaysia is a limited right under the law and the Constitution provides that the right shall only be limited when adequate compensation is given.¹⁹⁸ One such legislation that limits the right to land ownership is the Land Acquisition Act of 1960 which is done for any public purpose.¹⁹⁹ Unlike many other compulsory acquisition processes in other countries, Malaysia

¹⁹² Section 10 A, *Land Acquisition (Just Terms Compensation)* (New South Wales).

¹⁹³ Section 4 (2), *Land Acquisition (Just Terms Compensation)* (New South Wales).

¹⁹⁴ Article 1 (1), *Constitution of Malaysia* (1957).

¹⁹⁵ Article 4 (1), *Constitution of Malaysia* (1957).

¹⁹⁶ Walker C, 'The Torrens System', 2 *Virginia Law Review* 1,1916, 2.

¹⁹⁷ Walker C, 'The Torrens System', 2 *Virginia Law Review* 1,1916, 2.

¹⁹⁸ Article 13, *Constitution of Malaysia* (1957).

¹⁹⁹ Section 3 (1) (a), *Land Acquisition Act* (Malaysia).

allows for any person or corporation to acquire land for any purpose which in the opinion of the State Authority, is beneficial to the economic development of the State.²⁰⁰

The scope of what amounts to public purpose has thus not been defined however, it has been interpreted in the court case of *Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* where the court held that the term ‘public purpose’ has a broad definition and it is appropriate to apply a simple test to see whether the purpose serves the general community’s interest.²⁰¹ Malaysia thus gives a more generic definition to what amounts to a public purpose that can be subject to interpretation when a potential dispute arises.²⁰²

A claim for compensation on land acquisition can only be made by an interested person. This has been expressly defined as one who claims an interest in compensation but excluding a tenant at will.²⁰³ The payment of compensation is done with reference to several factors that are considered by the Land Administrator who obtains a written opinion from the land valuer before making an award.²⁰⁴ Malaysia uses a comparable sales technique method to determine the fair market value of land. The authorities take into account the average of the sales of land in a specific area over a recent period of time.²⁰⁵ The First Schedule of the Land Acquisition Act takes into consideration other factors such as severance damage and injurious affection.²⁰⁶

Adequate compensation has not been defined in legislation however, reference can be drawn to the English case of *Ricketts v Metropolitan Rail Co* where the court defined compensation as a restitution mechanism to place the dispossessed landowner to the same position as though the land had not been acquired.²⁰⁷ This case lays the fundamental principle for compensation of land that has been acquired by the Government.

A notice is given prior to the compulsory acquisition process and this is to make the interested party aware that the land may be subject to land acquisition by the Government.²⁰⁸ The award

²⁰⁰ Section 3 (1) (b), *Land Acquisition Act* (Malaysia).

²⁰¹ *Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* (1982), The Federal Court of Malaysia.

²⁰² Mahalingham A and Vyas A, ‘Comparative Evaluation of Land Acquisition and Compensation Processes across the World’ 95.

²⁰³ Section 2, *Land Acquisition Act* (Malaysia).

²⁰⁴ Section 12 (1), *Land Acquisition Act* (Malaysia).

²⁰⁵ Mahalingham A and Vyas A, ‘Comparative Evaluation of Land Acquisition and Compensation Processes across the World’ 96.

²⁰⁶ First Schedule, *Land Acquisition Act* (Malaysia).

²⁰⁷ *Ricketts v Metropolitan Rail Co* (1867), The United Kingdom House of Lords.

²⁰⁸ Section 8, *Land Acquisition Act* (Malaysia).

given by the Land Administrator may be challenged pursuant to the Land Acquisition Act however, it is to note that the scope of objections has been limited to be in relation to the amount of compensation, persons entitled to the compensation, apportionment and objections that relate to the measurement of land.²⁰⁹ The Land Administrator refers the objections presented to the High Court.²¹⁰

4.3 Conclusion

From this Chapter, it is seen that there are many similarities that can be drawn from countries in the compulsory acquisition process and each country seeks to come up with a fair way of the process through adopting various mechanisms. It can be seen that a land acquisition policy that aims at providing a fair method of assessing land value based on the direct and indirect costs of the land acquired is a potential strategy that could minimise disputes. On the brighter side, Kenya is not far away from the positive aspects of compulsory acquisition.

There are some important lessons that can be drawn from Australia and Malaysia as well as redesigning the laws to the suitability of the State. All these lessons shall be discussed in the final chapter of this study that seeks to make recommendations for the Kenyan case.

²⁰⁹ Section 37, *Land Acquisition Act* (Malaysia).

²¹⁰ Section 38 (5), *Land Administration Act* (Malaysia).

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS FOR THE KENYAN CASE

5.1 Introduction

Having fulfilled the aims of this research paper, this final chapter seeks to make recommendations on policy and legal reform to adequately address the challenges that often affect the compulsory acquisition powers of the State as well as give a conclusion. The specific objective of this chapter is to show that there is still room for policy and legal reforms that can ensure a transparent and fairer compulsory acquisition process thus minimizing conflict between the interested parties and the State. It seeks to make the laws of compulsory acquisition more effective thus reducing suffering by affected parties that resist to the State's development process.

5.2 Recommendations on the overcoming challenges

In order to make the compulsory acquisition process more effective for development projects, this next section of the research paper has made recommendations as follows: -

5.2.1 The law should provide for compensation before acquisition of land

As seen above, the Land Act was amended by deleting the implication to pay compensation before the National Land Commission took possession of the land.²¹¹ The Land Act should provide for the payment of compensation before the acquisition as this aligns with the Constitutional requirement of prompt payment.²¹² This will borrow from the Australian compulsory acquisition process and will effectively cater for the need of affected parties as well as serve as a means of restitution.

The law should further provide for a specific time frame at which compensation should be paid. This will borrow from the Australian experience of compulsory acquisition and will assure the interested parties of compensation. Parties should thus receive compensation in full at a specified time before the National Land Commission takes possession of their land. Also, occupiers on the land should be given a reasonable time to vacate in respect of the acquisition process. Untimely compensation has overtime created a lot of pain and agony to the interested parties. A clear time limit placed to ensure that the acquisition process is not unduly long can be amended in legislation

²¹¹ Section 12, *Land Value (Amendment) Act* (Act No.15 of 2019).

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

by providing that the acquisition process will be abandoned if it has not been completed within a specific period of time. Also, when considering the reasonable amount of time for the compensation to be paid, the circumstances of the interested parties should be looked at, for example, the value of livelihood of communities to avoid creating homeless persons.

5.2.2 The ‘Public Purpose’ question should be justified

As seen above, the compulsory acquisition process provides a blurred distinction as to what constitutes of public purpose.²¹³ The legal issues on compulsory acquisition have largely been left out to case law. In order to justify the purpose of compulsory acquisition, the law should allow for participation by the wider public on whether a relevant project amounts to public purpose.

This will avoid the situation where land is acquired to the benefit of a few individuals.²¹⁴ This relates back to the role of participation of the public. It will further uphold the principles of good governance and transparency as enshrined in the Constitution.²¹⁵ The reason for acquisition should thus be widely published and left to the determination by the public on whether the acquisition will bring about development in their favour.

A clear process should thus be set out on how the ‘public purpose’ question will be achieved in order to avoid cases such as the *Kelo v City of New London* which was a landmark case where the issue before the court was whether the properties were acquired for a public purpose?²¹⁶ The State should thus carry out an inquiry process before funds are allocated for a particular project.

5.2.3 The law should clearly distinguish the Land Valuation criterion

As seen above, the Land Value Index approach to valuation of land may not achieve the purpose of balancing the protection of the right to property and promoting the public interest.²¹⁷ The criteria for land valuation of freehold land and community land should be separated in legislation and this is due to the different pieces of legislation that govern the different types of land ownership. The values the land have should be distinguished to cater for a restitutive approach towards compensation. An alternative would be to create a specific Land Value Index for community land

²¹³ Lindsay J, ‘Compulsory Acquisition of Land and Compensation in Infrastructure Projects’ 2.

²¹⁴ Kariuki, Ouma and Ng’etich, Property Law, 135.

²¹⁵ Article 10, *Constitution of Kenya* (2010).

²¹⁶ *Kelo v City of New London* (2005) The Supreme Court of the United States.

²¹⁷ Kariuki, Ouma and Ng’etich, Property Law, 138.

considering the intrinsic nature of the land and thus taking into account factors such as the loss of livelihood.

The Land Acquisition Act should be specific but flexible enough thus giving room to determine a restitutive compensation for all categories of land. The process can borrow from Australia as seen above which takes into account both tangible and intangible benefits that are attached to the land. Developing a participatory process for the interested parties minimizes challenging the compensation value that further delays the acquisition process.

The definition of ‘just’ as amended in the Land Act does not depict clearly what it entails as seen above.²¹⁸ The Act should thus further explain what amounts to a ‘just’ compensation that is in line with the Constitution.²¹⁹ The law should be flexible to allow for the determination of compensation on a case-to-case basis as the needs of interested parties may be different depending on the category and use of the land.²²⁰ Borrowing from Australia and Malaysia, the law on compulsory acquisition should consider other factors other than just the market value of land such as the special value of land at the date of acquisition and any disadvantage that came along with relocation.²²¹

The law on compulsory acquisition should also provide an exhaustive list of interested parties that captures other potential rights that may specifically be affected by the process especially where multiple rights or land is still unregistered. Potential rights such as derivative rights should also be taken into consideration when determining the land valuation criteria and this is due to the fact that they may be minimally affected by the acquisition process as seen above.

5.2.4 The procedure of compulsory acquisition should be reviewed

As seen above, procedural fairness is an important principle that results in efficiency in the process.²²² The process should uphold the decision-making power of the interested parties and this encourages a negotiation process in compulsory acquisition that minimizes conflict.²²³ This approach may borrow from the Australian experience that provides for 6-month pre-negotiation

²¹⁸ Section 2, *Land Value (Amendment) Act* (Act No.15 of 2019).

²¹⁹ Article 40 (3) (b) (i), *Constitution of Kenya* (2010).

²²⁰ FAO, ‘Compulsory acquisition of land and compensation’, *Land Tenure Studies* (2009), 35.

²²¹ Mahalingham A and Vyas A, ‘Comparative Evaluation of Land Acquisition and Compensation Processes across the World’ 95.

²²² Article 47 (1), *Constitution of Kenya* (2010).

²²³ Article 10 (2) (a), *Constitution of Kenya* (2010).

period.²²⁴ The right to negotiate on the acquisition terms should thus be firmly embedded in the laws of compulsory acquisition. This will bring about a friendlier approach of compulsory acquisition and thus a willing seller-willing buyer approach upheld

It is important especially for communities to be consulted before the process and will not result to the issues as brought out in the *Endorois case* where the complainants were not given prior informed consent and thus hindered their right to participate.²²⁵ Coming up with amicable solutions to the process can only be achieved if the principle of good governance is taken into consideration.²²⁶

For prior consent to be achieved, notices should be published in local dialects and should not only be limited to the Kenya Gazette but also newspapers, announced in radios to reach a wide population especially for the case of community land.

In exercising the right to the appeal, the Tribunal should not have a restrictive power that vastly affect the process to the detriment of the interested parties. As seen above, the Tribunal cannot grant stay orders where resources are already allocated for the project. Conservatory orders should thus not be restricted as they serve where due process has not been followed by the State during acquisition.

5.3 Conclusion

This paper has illustrated that the laws governing compulsory acquisition in Kenya are unfair and undemocratic. The existing legal framework pointed out in chapter 2 of this paper has not effectively dealt with the challenges and there is need to re-examine the relevant Acts of Parliament to be in line with the 2010 Kenyan Constitution. It is to note however, that the Land Laws (Amendment) Act that brought amendments to the Land Act of 2012 as well as the Land Registration Act has improved the process. The process still fails to embrace the principles such as negotiation and consultation of the public and thus it is against the Bill of Rights.

Case law has illustrated that the delay in the acquisition process is as a result of legal challenges that come about as a result of affected parties challenging the legality of the process. It is important

²²⁴Section 10 A, *Land Acquisition (Just Terms Compensation)* (New South Wales).

²²⁵ *Centre of Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, ACmHPR Comm 276/03.

²²⁶ Article 10 (2) (c), *Constitution of Kenya* (2010).

to lay out satisfactory approaches to ensure that affected parties feel that restitution has been carried out on their end. The State has an obligation to ensure that interested parties are not negatively affected as a result of the compulsory acquisition process and this will result in economic growth.

Unless the laws are revised to present a fairer process, the compulsory acquisition process will still remain unpopular and will attract conflict and this is due to the centrality of land to the people of Kenya.²²⁷ If the process is exercised democratically, fairly, transparently and in good faith, it will be instrumental to the development of the State and most importantly will certainly get public support.²²⁸ This is because development actions that are insensitive to the aspirations of the people such as those that ignore certain aspects, violate the rights of the people. It is without doubt that the regulations and legal framework should achieve a level of certainty and provide clear guidelines to achieve the goals of compulsory acquisition.²²⁹ Finally, compulsory acquisition is disruptive and thus when the process does not achieve fairness, it results to negative impacts on the State.

²²⁷ Sifuna N, 'Using eminent domain powers to acquire private lands for protected area wildlife conservation: A survey under Kenyan law' 2 *Law, Environment and Developmental Journal* 1, 2006, 102.

²²⁸ Sifuna N, 'Using eminent domain powers to acquire private lands for protected area wildlife conservation: A survey under Kenyan law' 102.

²²⁹ Murali K and Vikram A, 'Land acquisition policies-A global perspective' 6 *International Journal of Scientific and Research Publications* 5, 2016, 410.

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