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**Delivering Public-Private Partnership Infrastructure Projects in Kenya; The
Quest for Efficient Compulsory Land Acquisition Processes.**

Nathaniel Chisenga Munga

**Submitted in partial fulfillment of the requirements for the Degree of Master of
Laws at Strathmore University**

**Strathmore Law School,
Strathmore University,
Nairobi, Kenya.**

November 2020.

DECLARATION.

I, **NATHANIEL CHISENGA MUNGA**, do declare that this study has not been submitted nor approved for the award of any degree by this or any other University. I also declare that to the best of my knowledge and belief, this thesis does not contain any material previously published or authored by any other person except where acknowledgement and reference has been made in the thesis itself.

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DEDICATION

I wish to dedicate this work to my Supervisor, Profesor Jacob Sitati, my lovely spouse, Eunice Wangui Macharia- Chisenga, my dear parents Mr. Alfred Munga and Mrs. Sophie Munga, my siblings Emmanuel, David, Peter and Martin Munga, to Eng. Julia Ondeyo, the World Bank fraternity and to the Kenya National Highways Authority fraternity for their support that has brought me this far.

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13. The 44th Amendment Act, 1978 of India.
14. The 5th Amendment Act of the U.S.A. (United States of America).

LIST OF ABBREVIATIONS.

| | |
|-----------------------|---|
| CS | Cabinet Secretary. |
| CEC | County Executive Committee Member. |
| CRBC | China Road & Bridge Corporation. |
| ELC | Environment and Land Court. |
| EXIM | Export-Import Bank of China. |
| GoK | Government of Kenya. |
| IDPs | Internally Displaced Persons. |
| IMF | International Monetary Fund. |
| JKIA | Jomo Kenyatta International Airport. |
| KeNHA | Kenya National Highways Authority. |
| KeTRACO | Kenya Electricity Transmission Co. |
| KPLC | Kenya Power and Lighting Co. |
| KRC | Kenya Railways Corporation. |
| LA | Land Act, 2012. |
| LAPPSSET | Lamu Port-South Sudan-Ethiopia Transport Corridor. |
| LAT | Land Acquisition Tribunal. |
| LCB | Land Control Board. |
| LoS | Letter of Support. |
| LRA | Land Registration Act |
| LVA | Land Value (Amendment) Act |
| MOTIHUD&PW | Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works. |
| NLC | National Land Commission. |
| PAP | Project Affected Person. |
| PIIP | Privately Initiated Investment Proposal. |
| PPP | Public-Private Partnership. |
| RAP | Resettlement Action Plan. |
| RDF | Railway Development Fund. |
| SG | Sovereign Guarantee. |
| SGR | Standard Gauge Railway. |

ABSTRACT.

Bringing about economic development in a country like Kenya requires opening up of the vast semi-rural areas. This calls for the provision of land for public infrastructure development, the backbone for building the economy.

This study sought to investigate the legal framework of compulsory acquisition and whether the current legislative framework is sufficient to favour Public Private Partnerships investments in the country. The study examined primary as well as secondary sources of literature and delved into the historical development of land rights in Kenya.

The study then evaluated the gaps in the existing legislative framework that governs PPP infrastructure projects and compulsory land acquisition processes and provisions involved in the implementation of a PPP Project. It also evaluated the financial considerations and the negative impact on investor confidence that this legislative framework has had on the development of infrastructure through the PPP model.

The study then focused on a case study of the Standard Gauge Railway Project as a sample past experience, albeit a hybrid PPP and thereafter, carried out a comparative study on different jurisdictions which are considered as strong or weak eminent domain jurisdictions.

The findings made were that first, there is a need to attain a position where the government holds superior rights over land in Kenya. This will facilitate land acquisition. The second finding that was made was that the rights of individual land owners ought to be protected by the state and that there needs to be a balance between the state's superior power to compulsorily acquire private land and the protection of rights of individual land owners and persons with any interest in land. The third finding made was that the legislative framework in Kenya for compulsory acquisition would greatly facilitate PPPs if the opposing interests implemented the recommendations of this study to achieve the balance required in the protection of land rights.

The main recommendations proposed by the study were amendments to various law to establish a clear-cut path to effective compulsory land acquisition legislative framework that PPP investors can deem predictable, efficient and enhances viability of PPP projects.

The study proposes these measures based on the realization that the Kenyan Government has called for different innovative ways of financing public infrastructure projects which situation has been necessitated the ballooning public debt and lack of sufficient funds for development. The Kenyan Government therefore is pushing for the injection of focus on the Public- Private Partnerships sector where land acquisition continues to play an essential role in the successful and timely delivery of a successful infrastructure project.

CHAPTER 1.

1.0. INTRODUCTION

This study's main objective is to seeks to outline the effectiveness and efficiency of the eminent domain process in Kenya. It seeks to analyse the effectiveness of the land expropriation process to facilitate Public-Private Partnership (PPP) projects, maintaining its specific focus on the Kenyan context. In this regard, it examines the impact of this process on the overall project delivery and outlines the significant challenges currently faced by investors and public implementing agencies in a PPP project's successful delivery. It seeks to investigate the leading causes of this inefficiency and the lapses that exist within the process.

To achieve this, the study explores a historical examination of Kenya's land management systems and regimes throughout the years to date. The legislative and regulatory framework is also examined to identify problems in compulsory land acquisition that trace their origin to insufficiency of the legal and regulatory framework. In this regard, the main focus is placed on the critical legislation being the LA¹ and the LRA², among other significant pieces of legislation and how they integrate with the legislative framework envisioned by the Public Private Partnerships Act, 2013. The extent to which previous studies have examined the problem is also discussed in the literature review, noting, in particular, the effects of the process on the cost and timelines of a PPP project on investors and taxpayers as well as the need to have the land acquisition debacle addressed promptly. The study draws from previously proposed and discussed concepts in the international study of the problem and attempts to narrow the focus to the Kenyan jurisdiction.

1.1. BACKGROUND

The concept of Land Expropriation or Compulsory Land Acquisition as it is known in Kenya proceeds from the Common Law doctrine of 'Eminent Domain' which is essentially one of the exceptions to an individual's absolute right to ownership of property. It provides that individuals may own land and land rights although his/her rights are subject to those of the State, albeit pursuant to fulfilling of specific prerequisites such as the demonstration of the need by the State and the proof of payment of just compensation. This is in accordance with Article 40(3)(b)(i), Constitution of Kenya (2010). These prerequisites may vary with jurisdiction³.

¹ Act No. 6 of 2012.

² Act No. 3 of 2012.

³ Grotius H, *De jure belli ac pacis* (1652).

In Kenya, these rights are enshrined in the Constitution of Kenya, 2010 and the LA,⁴ and it, therefore, means that these individual rights play a significant role in determining PPP land acquisition process length and its effects on the delivery of a successful PPP Project.

Bringing about economic development in a country like Kenya requires opening up of the vast semi-rural areas. This calls for the provision of land for public infrastructure development, the backbone for building the economy. Developed in the year 2008, Vision 2030, together with the Big Four Agenda of the Government of Kenya and complemented by the United Nations Sustainable Development Goals, presented the need for countries and especially African states to begin competing on a global level with world-class infrastructure networks and service delivery options. This includes but is not limited to the long-term development of adequate road networks, electric and eco-friendly railway networks, high volume transacting seaports, high traffic and efficient airports, deep capacity channels and waterways, and affordable and efficient telecommunications networks.

The Kenyan Government, in coordination with the Kenya Ports Authority, is currently developing the LAPSSET, and connecting the corridor with the roads through the Kenya National Highways Authority (KeNHA). The Lamu- Garissa-Isiolo Road Project is among these initiatives, including other roads being constructed in the are the ever-rising demand for public land.

To quote Muwonge, Senior Urban Specialist, The World Bank at Nairobi, Kenya, from his article, *In Search of Land: Public Land Management, Compulsory Land Acquisition and Resettlement in Kenya*⁵;

“The principle behind public land is that it is held in trust for the people by the government. Public land is, therefore, to be used for the benefit of the citizens of the country to serve the public interest. Infrastructure investments such as roads, railways, schools, sewage and water treatment plants, serve a public purpose. There should be a ready supply of public land on which to construct these projects, particularly in urban areas where the need is greatest. With a projected urbanisation of 50% by 2030, Kenya’s urban areas must provide key urban services and infrastructure, all of which require public land. Effective public land

⁴ Act No. 6 of 2012.

⁵ Muwonge A, Kamunyori S, Narae C and Kahindo L, ‘In search of land: Public land management, compulsory land acquisition and resettlement in Kenya’, *World Bank*, 2016.

management will enable Kenya to harness the benefits of urbanisation towards growth and poverty alleviation”.⁶

Muwonge attributes the unavailability of ready public land to sub-optimal public land management in the past. He opines that over the last several decades, public land management practices have been sub-optimal owing to its diminishing size due to loss to individual grabbers. He further argues that, immediately after independence, Kenya had a significant supply of public land (then known as government land) vested in the then Commissioner of Lands Office and that poor public land management practices since then have resulted in a situation in which much of the stock of public land has been lost to individual uses. To this end, he notes, the allocation of public land has often been done irregularly with little oversight, and consequently, the land has been developed in a fashion that did not adhere to any required public purpose.⁷

It is these issues that this study seeks to interrogate effectively to decipher the real inhibitors of efficient compulsory land acquisition in Kenya for infrastructure PPP projects.

1.2. PROBLEM STATEMENT

The compulsory land acquisition process in Kenya as contained in Part VIII of the LA, 2012 is extremely long. This process arguably works for the usual projects carried out by the Government. However, it poses different challenges to PPP Projects. This is because a PPP project’s success is measured by the quality, delivery of the intended result, the cost-effectiveness and the promptness of delivery of the project.

The Project site is a key priority in a PPP project because, without it, no other considerations can stand. Issues such as access to the project site are at the core of the investor’s appetite and where the investor deems the project as being too lengthy, expensive and complex, then their appetite for the project diminishes rapidly. The responsibility for availing the Project Site unencumbered is normally placed in the hands of the Contracting Authority. This is a great risk to bear. However, the reason for this is because the Contracting Authority has the power for eminent domain/compulsory land acquisition powers and especially where the land or Project Site is not already in the ownership of the state.⁸ This means that the Contracting Authority retains the risk and it implies that it will pay compensation to the investor should this risk materialise at any point,

⁶ Muwonge *et al*, ‘In search of land’ *World Bank*, 2016.

⁷ Muwonge *et al*, ‘In search of land’ *World Bank*, 2016.

⁸ E. Yescombe, Edward Farquharson, *Public-private partnerships for infrastructure – Principles of policy and finance*, 2nd ed, Butterworth-Heinemann, 2007, 152 para 12.2.2.

and there is a failure by the Contracting Authority to provide an encumbrance-free Project Site to the private investor. This risk may therefore easily materialise where there is litigation on ownership of property between the state and a private individual landowner or where the individual landowner challenges the compensation process or value or the acquisition is challenged for not meeting the threshold required for the intended purpose to be considered as ‘public interest’.

Lenders would ordinarily not lend unless the Project Site is guaranteed by the Contracting Authority⁹. The PPP Act, 2013, under the Third Schedule at Item No. 5, equally recognises this principle and provides that one of the minimum requirements of a Project Agreement ought to be a definite position on the ownership of the project assets, the obligations of parties related to the handover and receipt of the project site.¹⁰

Professor A. Akintoye states that Land access has a significant impact on the overall cost of a PPP Project.¹¹ Monteiro R.S. buttresses this argument as he states that when the probability of land issues and such circumstances materialising is not well thought out, there could be a significant impact on the cost and timelines of a PPP project.¹² This study, therefore, recognises the problem that there currently exists a risk concerning land acquisition for PPP projects; the effectiveness of acquisition in Kenya and the effect of delays impacts successful delivery of a PPP project¹³.

The problem, therefore that this study seeks to solve is the fact that Government has become heavy laden with debt due to infrastructure projects and has shifted towards the implementation of infrastructure projects through PPPs. However, the argument and the fact that PPPs are more cost-effective is under threat due to the legal and regulatory challenges facing the process of compulsory land acquisition for PPP projects and investors are finding it more and more difficult to justify the viability of undertaking PPP projects in Kenya.

1.3. RESEARCH OBJECTIVES

- a) To establish the importance of the role played by the PPP project land acquisition process in the PPP project roll-out phase.
- b) To investigate the impact of the current law regarding land acquisition for PPP projects in terms of financial cost, timelines and overall successful delivery of PPP projects in Kenya.

⁹ E. Yescombe, *et al*, *Public-private partnerships*, 153 para 12.2.1.

¹⁰ Section 5, *Third Schedule, PPP Act (2013)*.

¹¹ A. Akintoye, *Policy, management and finance of public-private partnerships*, 2009.

¹² Monteiro RS, *Public-private partnerships: Some lessons from Portugal*, 2005, Luxembourg, Vol. 10, Iss. 2, 73-81.

¹³ Osborne S, *Public-Private Partnerships: Theory and Practice in International Perspective*, 2005.

- c) To identify the gaps in the current legal framework for the land acquisition process for PPPs that hinder the achieving of a robust, adequate and sufficient legal framework for land acquisition and compensation that supports PPP projects in Kenya.
- d) To investigate the regulatory changes that can be put in place to streamline the legal process of compulsory land acquisition for PPP projects in Kenya to reduce delays and enhance efficiency in PPP project delivery and investor confidence.

1.4. RESEARCH QUESTIONS

- a) What is the importance of the role played by the PPP project land acquisition process in the PPP project roll-out phase?
- b) What is the impact of the current law regarding land acquisition for PPP projects in terms of financial cost, timelines and overall successful delivery of PPP projects in Kenya?
- c) What are the identified gaps in the current legal framework for the land acquisition process for PPPs that hinder the achieving of a robust, adequate and sufficient legal framework for land acquisition and compensation that supports PPP projects in Kenya?
- d) What are the regulatory changes that can be put in place to streamline the legal process of compulsory land acquisition for PPP projects in Kenya to reduce delays and enhance efficiency in PPP project delivery and investor confidence?

1.5. LITERATURE REVIEW

Scholars in the PPP and eminent domain realm believe that the land acquisition issue is as important as any other in the delivery of a successful infrastructure project. Sebastian and Ajay¹⁴ state that uncertainties, risks, delays related to the land acquisition, protests and resistance on the part of displaced persons, has become the most significant bottleneck for investments, especially in the infrastructure sector¹⁵. He further states that land acquisition has been an issue around which mobilisation and protest have taken place in many countries leading to stalled PPP projects. Stephen Osborne also argues that there perpetually exists a risk regarding land acquisition processes for PPP projects globally.¹⁶ Scholars however, also admit that there are challenges faced due to the perception of land ownership in Kenya and African states. Mbote PK explains that the onset of greater development including infrastructural development threatens the right of

¹⁴ Sebastian M, Ajay P, 'Towards reform in land acquisition', 2007, *British Council* 1.<
<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.514.4610&rep=rep1&type=pdf>>.

¹⁶ Osborne S, *Public-private partnerships: Theory and practice in international perspective*, 2000.

indigenous people to own land because of the use of the power of the state to convert private or protected property to the needs of the state, otherwise known as eminent domain¹⁷.

The land acquisition process in African states is largely borrowed from colonial legislation and, in most instances, is accompanied by bureaucratic processes that do not fit the African context. Kenya was colonized by the British and this colonization had significant effects on the land tenure regime as seen in Kenya today despite various post-colonial enactments intended at rectifying these effects. Kariuki F, states that while post-colonial legislation was valuable to the economy, these enactments allowed the Government to use land administration powers such as that of eminent domain to take land from communities that relied on it for sustenance and identity purposes. Attempts to involve local communities in the planning for and allocation of land fell short of fully addressing the grievances of the respective communities¹⁸.

In developing countries, the leading causes of delays in the land acquisition process are generally grouped into four (4) principal factors, namely: resettlement issues with political interference; non-availability of land with a higher cost of land transactions; weak planning institutions; and rehabilitation issues with extensive legal delays.¹⁹

In this study, the focus shall be placed on the leading causes of delays in the Kenyan land acquisition process. These include delays in the actual legally prescribed procedure of compulsory acquisition; finance mechanisms/processes and (un)availability of ready funding for compensation payments; court delays on litigation on land acquisition compensation; social and community issues in land acquisition; environmental issues and concerns in land acquisition; delays in the relocation of existing utilities in infrastructure projects; and political influence in the delivery of infrastructure projects.

The importance of addressing these issues before engaging in any PPP infrastructure project discussion is highlighted by Monteiro when he states:

¹⁷ Kameri-Mbote P, 'The land question in Kenya: Legal and ethical dimensions', International Environmental Law Research Centre, Governance, 2009, 8.

¹⁸ Kariuki F, 'Securing Land Rights in Community Forests: Assessment of Article 63 (2) (d) of the Constitution' published LLM Thesis, University of Nairobi, Nairobi, 2013, 17.

¹⁹ Adeniyi O, Awodele O, 'Investigation into the causes of delay in land acquisition for PPP projects in developing countries' *Journal of Engineering, Design and Technology*, Vol. 15 Issue: 4, pp.552-570 <<https://doi.org/10.1108/JEDT-05-2016-002>>.

“Although all contracts allocated design and construction risks to the concessionaire, the public partner was responsible for delays in land expropriations and for substantial changes in projects imposed by environmental regulators or unilateral public sector decision. Indeed, land expropriation schedules were too tight, and environmental regulations, decisions by local authorities, and the successful lobbying by pressure groups forced significant project changes after contracts had been signed”.²⁰²¹

So complex is the issue of land acquisition in Kenya that some multinationals such as Tullow Oil Plc have been forced to almost exit the scene of doing business in Kenya due to misunderstandings between the entities and the local communities.²² Some of the communities in Kenya still hold land as trust land and community land. These include mostly the indigenous people and the marginalized communities. Sing’oei A notes this and states that marginalized and indigenous people still face a significant risk of their rights being ignored and not taken into account in land administration debates²³. Community land, therefore, presents a situation whereby the idea of the person to whom compensation is to be paid remains convoluted, making the process even more difficult and time-consuming.²⁴

Okoth O acknowledges this debacle and notes that besides the system of semi-private ownership of property, there was also a system of communal ownership of property, specifically land ownership, by the community. This system was defined by three characteristics; that the land was held for all generations, the land was managed at different levels of social organisation, and the land use was function-based²⁵.

This can be clearly distinguished from the colonial system of land administration as noted by Syagga P when he states that the colonial scheme of land administration was based on a willing buyer willing seller model and benefited the politicians who belonged to the majority ethnic

²⁰ Sebastian M *et al* ‘Towards reform in land acquisition’, 2007.

²¹ Monteiro RS, *Public-private partnerships* (2005) 73-81.

²² Shadia N, ‘Tullow shuts down Kenyan oilfield operations due to unrest’ Daily Nation, 25 July 2018, 1- <<https://www.reuters.com/article/us-tullow-kenya/tullow-shuts-down-kenyan-oilfield-operations-due-to-unrest-idUSKBN1KF27G>> on 25 July 2018.

²³ Report for Minority Rights Group International, Kenya at 50, *Unrealized Rights of minorities*, Korir Sing’oei Abraham, January 2012.

²⁴ KNHCR- *Report on the stakeholder consultations held in Turkana county*, 2017. <http://nap.knchr.org/Portals/0/Reports/Turkana%20regional%20consultation%20report.pdf?ver=2017-09-04-174649-783>.

²⁵ Okoth-Ogendo HWO, ‘The tragic Africa commons: a century of expropriation, suppression and subversion’, 2002, 2-3 — on 27 July 2016.

groups and colonial sycophants further empowering the elite Africans and disenfranchising those who could not buy that which they may have historically been entitled to²⁶.

PPP projects are not spared by the land acquisition debacle if the Kinangop Wind Farm Arbitration²⁷ which later proceeded to Arbitration in London, is anything to go by. The same applies to the Cortec Mining Cases against the Government of Kenya where the local communities were not engaged and that it was alleged that the Cortec Mining Site was preserved as an archaeological site and was never demarcated for mining activities²⁸.

Relocation of public utilities is also a significant factor that could influence the delivery of an infrastructure PPP project such as a road. This is because utilities also share the road reserve with other public services. Slow relocation of utilities by utility providers in Kenya such as the Kenya Power & Lighting Company (KPLC), Kenya Electricity Transmission Company (KETRACO) alongside water distribution entities, can be a delay factor in land acquisitions.

Muwonge, in his Report,²⁹ also ropes in the issue of devolution and the part that it plays in adding to the complexity of land acquisition processes.

On Devolution specifically, he notes that the split of legal and administrative powers over public land under the devolved system, and the required level of cooperation and collaboration required between the county and the national level should streamline the demarcation, custody, access and management of public land in a way that it can accommodate future needs. The common perception is that no public land exists that is unencumbered and available for allocation for public uses or to encourage investment, especially in locations where it is most needed³⁰. Counties are beginning to undertake inventories of public land, though progress on that activity is uneven across counties due to different priorities, resource constraints and technical capacity^{31,32}.

²⁶ Syagga P, 'Public land, historical land injustices and the new Constitution' 'The Society for International Development, Constitutional Working Paper Series Number 9, 2011,' 10.

²⁷ *Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others* [2016] eKLR.

²⁸ State Law Office, 'Kenya prevails in a USD 200 Million arbitration case against cortec mining' State Law Office, 28 October 2018- <<https://www.statelaw.go.ke/kenya-prevails-in-a-usd-2000-million-case-icsid-arbitration-case-against-it-cortec-mining-case/>> on 22 October 2018.

²⁹ Muwonge *et al*, 'In search of land' *World Bank*, 2016.

³⁰ Kamau S, 'In effect, the state of land tenure in Kenya lacks clarity with ill-defined categories', The Land development and governance institute, 2016-<<https://www.coursehero.com/file/p190p3/In-effect-the-state-of-land-tenure-in-Kenya-lacks-clarity-with-ill-defined/>>

³¹ Kamau S, 'In effect, the state of land tenure in Kenya lacks clarity'.

³² Muwonge *et al*, 'In search of land' *World Bank*, 2016.

On a separate tangent, he determines that to understand and address the challenges facing the process of compulsory land acquisition in Kenya; there is a crucial need to garner a firm understanding of the evolving legal, regulatory and institutional framework of public land management and land acquisition in the country within the context of devolution. He adds that, to this end, it is necessary to inform ongoing policy dialogues at national and county level on public land management and land acquisition and resettlement policies to achieve national development goals.

Muwonge adds that, from the World Bank experience, an urgent need has been identified which seeks to document the challenges of land acquisition and resettlement as experienced in operations of the World Bank within Kenya, particularly for urban projects (e.g., infrastructure development) that might entail compulsory acquisition, and examine the adequacy of Resettlement Action Plans (RAPs) and guidelines for valuation and compensation.³³ Substantially, to provide recommendations for action to address the challenges presented by public land management, land acquisition and resettlement.

Additionally, political pressure can contribute to a slow or stalled land acquisition process. This is more so when political representatives push for the compensation of Project Affected Persons (PAPs) who did not deserve compensation for illegality reasons, i.e. when illegal encroachers demand compensation for road reserve land that they settled on illegally. In this instance, there arises a need to allocate a budget for an exercise that was not envisaged; the official government records indicated that the land intended for the project was legally unoccupied whereas the position on the ground was quite to the contrary.

Arimoro A states that the efficiency in compulsory land acquisition in PPPs is of greater importance because while in Government-funded projects the land risk is not pronounced, in PPPs, investors treat the land acquisition risk as a make-or-break factor in negotiations and in determining the viability of a PPP project. Thus, land acquisition constitutes a critical area that PPP investors must consider before entering into PPP transaction deals in any country.³⁴

³⁴ A Arimoro 'Public-private partnership and the right to property in Nigeria' (2019) 19 *African Human Rights Law Journal* 763-778-<<http://dx.doi.org/10.17159/1996-2096/2019/v19n2a10>>

Taking a look at the history of highway construction in the US, in 1958, the Ohio Court of Appeal recognised this risk in its decision regarding construction of highways and roads in “*re Appropriation for Highway Purposes, '4 a reading of the chapter on Appropriation of Property in the Ohio Revised Code' 5*” that amended the eminent domain legislation in a way that allowed for the immediate taking of possession as soon as the value of compensation is determined and the monies deposited in Court. This would then allow the construction to proceed even when disputes remained pending in Courts. This is the position that this study advocates.

In this regard, Jack L. Renner states that “..before these amendments, would have led one to believe that although a separate finding of value of the land and the structures thereon would be required, still the Director of Highways had the immediate right of entry on the property after determining its value, making the appropriate entry in the journal of the Department of Highways,' 7 and depositing the appraised sum with the court”. The Ohio Court of Appeal, further stated that “..a ruling to the effect that construction be stayed would, without doubt, easily deter the completion of a proposed highway project since it is doubtful that any private contractor would begin work until the state had certified that the right-of-way was clear and that his entry thereon would not subject him to personal liability from an unpaid and contesting property owner”.

Further, the Ohio legislature proposed “..to alleviate the probability of such delay, amending the pertinent sections to grant the director power to take possession immediately upon depositing the appraised value in court, with the limitation that without the owner's or occupier's consent the director may not take possession of any structure before the expiration of sixty days from the service of notice”.³⁵

Renner J stated that “Under the Ohio REV. CODE §§ 5519.01-.03 (1957), the wording of the amendments to the highway appropriation procedure show a clear intendment on the part of the legislature to allow the property - even when there are structures thereon - to be appropriated without delay, and rarely will the court go against the apparent intention of the legislature. Ohio's rulings on the purpose of the jury's view would not be a deterrent factor in reaching such a result”. Various writers have recognised the need for State Power of compulsory acquisition of land in the first instance, leaving the aspect of compensation to be deliberated as a side factor, not hindering the possession of the land for construction to be able to proceed in a timely fashion.

³⁵ Renner J, *Eminent domain: Corduroy road to Ohio's super highways*, 9 W. Res. L. Rev. 457 (1958) - <<https://scholarlycommons.law.case.edu/caselrev/vol9/iss4/10>>.

Goldstein A states that “..one justification for government provision of roads is that the power of eminent domain is necessary in order to overcome holdout problems and obtain right-of-way properties”.³⁶

Jones advocates for this power to be arbitrarily vested in the government. Jones writes that “the power of eminent domain is a fundamental and necessary attribute of government”³⁷

Epstein buttresses this argument as he states that;

“the formation and operation of the state, moreover, requires transferring resources from private to public use. Yet the power in the state to take for public use arises because the state will not obtain the resources needed to cooperate by voluntary donation or exchange. [T]hese exchanges do not occur voluntarily and must therefore be coerced (1985, 4). By accepting the theoretical arguments that (1) the government must be the provider of certain goods and services, such as roads, and that (2) difficulties, such as the holdout problem, will prevent the government from obtaining the resources, including right-of-way properties, required to produce those goods and services..”.

Kulick (2000, 679–91) advocates for “state power of eminent domain and the limited ability of individual landowners to challenge that acquisition and proposes the elimination of constitutional constraints that eliminate the government’s power to force involuntary transfers of property”³⁸.

This study, therefore, recognises Stephen Osborne’s argument that there perpetually exists a risk regarding land acquisition processes for PPP projects globally³⁹. It subsequently seeks to examine the effectiveness and efficiency of the land acquisition process in Kenya and the effect of delays in this process on the successful delivery of a PPP project and to propose recommendations on the solution to this debacle.

1.6. ASSUMPTION.

This study is, therefore, an inquiry into the assumption that an effective and efficient legislative framework governing the land acquisition process is a crucial aspect in the successful delivery of

³⁶ Goldstein A, *Private enterprise and highways. In private sector involvement and toll road financing in provision of highways*. 1987, 1107. (Washington, D.C.: Transportation Research Board).

³⁷ Jones, S, ‘Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment’ *Syracuse Law Review* 50: 285–314

³⁸ Kulick P, ‘Rolling the dice: Determining public use in order to effectuate a “public-private taking”: A proposal to redefine “public use.”’ *Law Review of Michigan State University–Detroit College of Law* 3: 2000, 639–91.

³⁹ Osborne S, *Public-Private Partnerships*, 2000.

infrastructure Public-Private Partnership projects in Kenya. It will, therefore, proceed based on the assumption that implementing policy and legal changes through the addressing of gaps in the provisions relating to Compulsory Land Acquisition contained in the LA 2012, the LRA 2012, The Land Value (Amendment) Act⁴⁰, 2019 and the Public-Private Partnerships Act, 2013⁴¹ will increase the successful delivery of PPP projects in Kenya.

This above assumption will be the guide to the study, and in examining the assumption, this study will look into the various legislative sections that could aid the strengthening of the legal framework of land acquisition to make it more robust, effective, efficient and capable of unlocking PPP infrastructure project delays related to the right of way.

In examining the assumption, this study will examine the sufficiency of Section 107 of the LA 2012, Section 28 (e) of the LRA, 2012 on overriding interests of the State with regards to compulsory land acquisition, sections of the Land Value Amendment Act, 2019 (which, at Section 12, amended Section 125 of the LA, 2012) and whether its strict application could allow for the State's taking possession of compulsorily acquired land before paying full compensation and whether this will increase the successful delivery of PPP projects in Kenya, and finally, Section 133(C)(1) of the Land Value Amendment Act, 2019⁴² that proposes the Land Acquisition Tribunal which would hear appeals from the NLC on matters compulsory acquisition and thereby, increase the successful delivery of PPP projects in Kenya;

1.7. THEORETICAL FRAMEWORK

The Utilitarianism Theory: Utilitarianism is one of the most powerful and persuasive approaches in the study of philosophy. Utilitarianism is generally held to be the view that the right action is the action that produces the most good to the greatest number of people in a given society. The utilitarianism theory is mostly attributed to Jeremy Bentham (1748–1832)⁴³.

The utilitarianism theory has been used in this study to explain the concept of eminent domain from an ethical perspective. Dr. Professor Steven Mintz, in his legal blog *Ethics Sage*, on December 13, 2017 published that one of the main ethical reasoning and theories behind eminent domain is that of utilitarianism.

⁴⁰ Act No. 15 of 2019.

⁴¹ Act No. 15 of 2013.

⁴² Dena K, 'President Kenyatta assents to land value amendment irrigation bills and other acts' State House Website, 2019 <<http://www.president.go.ke/2019/08/02/president-kenyatta-assents-to-land-value-amendment-irrigation-bills/>>.

⁴³ Stanford Encyclopaedia of Philosophy: 'History of Utilitarianism', March 2009.

He states that “Utilitarianism, sometimes known as Consequentialism, is a moral philosophy that holds the morally right course of action in any situation is the one that produces the greatest balance of benefits over harms for everyone affected. Consequentialism is used to assess the moral rightness of alternative courses of action by determining all the foreseeable benefits and harms that would result from each course of action and then choose the course of action that provides the greatest net benefits”⁴⁴.

He further states that “in eminent domain cases, it might be argued from a consequentialist perspective that the end result of taking private land is always justified so long as it produces greater benefits for the community. The reasoning would be that regardless of how the property is acquired, so long as it brings greater benefits to the community than it costs, it’s acceptable to buy out the landowners”.

However, in examining both sides of the theory, Mintz states that “there is also an inherent problem in this kind of reasoning, arguing that it relies on an ‘*ends justifies the means*’ approach”. He therefore, poses the question: “Does the projected increase in jobs, economic wealth, tax revenue and so on outweigh the costs to the community? How can we account for a diminished quality of life? How can we justifiably quantify the loss of one’s property or home?”

Mintz concludes by stating that the application of the theory of Utilitarianism, as above, is actually a proponent argument for eminent domain. However, he insists that “the ethical point is that certain rules should never be violated including those in the Constitution”. This, he notes, “drives the argument back to the convoluted point of just compensation and, perhaps more important, just acquisition of private property for public purpose”.

This study therefore recognizes the theory of utilitarianism as a theory that significantly explains the concept behind eminent domain. It argues that the use of the theory of utilitarianism can be the driving force behind a PPP project which is scheduled to benefit a significant number of members of the public and this theory is therefore used to justify the inconvenience caused to a select few individuals albeit whose rights must also be protected in a fair balance without jeopardising the project.

The Social Contract Theory: The Social Contract Theory attributable to Thomas Hobbes and Jean-Jacques Rousseau fronted the view that individuals cede some of their rights such as property

⁴⁴ Mintz-< [13](https://www.ethicssage.com/2017/12/eminent-domain-and-googles-proposed-campus-in-san-jose.html#:~:text=Another%20ethical%20reasoning%20method%20is%20Utilitarianism%2C%20sometimes%20known%20as%20Consequentialism.&text=In%20eminent%20domain%20cases%2C%20it,greater%20benefits%20for%20the%20community.>-</p></div><div data-bbox=)

rights to the state which ensures that all individual's rights are preserved but in the general good of all the members of the society who have so surrendered such rights.⁴⁵ The ultimate good is then measured through an evaluation in terms of the consequences produced. Thomas Hobbes states that "the Social contract theory is a theory that views an individual's moral, social or political obligations as being dependent on a contract or agreement among them to form the society in which they live". *Socrates* invokes a social contract argument to explain to *Crito* why he must remain in prison and accept the death penalty. The social contract theory is mostly associated with philosophers Thomas Hobbes, John Locke and Jean-Jacques Rousseau.

This theory is vital in the development of a legal framework for compulsory land acquisition as it places the rights of the individual below the rights of the State and the rights of the majority, the individual having surrendered his rights to the State in exchange for the State making certain decisions that may sometimes be for the greater good but may affect the individual. This is the essence of subordinating an individual's right to their private land over the State's rights over the land for use for a public purpose.

In a sense, this theory goes hand in hand with the theory of *utilitarianism*, which mainly propagates for that which brings the greatest joy to a greater multitude over individualism.

According to John Locke under the social contract theory, "individuals surrender their rights to the formation of societies which are based on the voluntary agreements to create political societies whereby individuals agree to each give up the executive power and to hand over that power to the public power of a government and after that, having done this, they then become subject to the will of the majority through the decisions of the State"⁴⁶. In other words, the individuals submit themselves to the will of that body and that body is expected to wield a certain form of democratic decision making towards making decisions for the majority as a people. Locke expects that "one becomes a subject of this body, either from its commencement or after it has already been established by others, only by explicit consent. Having created this political and social body through their unfettered consent, all individuals then gain three things being laws, judges to adjudicate laws and the executive power that is needed for the enforcement of these laws".

The individuals give, among other rights, their rights to land in certain circumstances through statutes such as the LA. Therefore, the compulsory acquisition is embedded within the social contract and ought to be an indefeasible right of the state to acquire land required for public

⁴⁵ Stanford Encyclopaedia of Philosophy: 'History of Utilitarianism', September 2010.

⁴⁶ Locke J, 'The Social Contract According to John Locke' June 17, 2018

purpose absolutely and based on the necessary, just compensation. This study therefore uses this theory to advance the argument in favour of eminent domain for PPP projects which would benefit a majority of the members of the public. However, this study also recognizes that the individual land owners have rights which ought to be protected and attempts to draw a balance between the two competing interests.

The Theories in relation to Eminent Domain:

A combination of the above two theories results in the concept of the regulatory power of the state over land such that the State is the absolute proprietor of land in the country save for certain interests that are protected by the law and subject to basic human rights provided for under the Constitution.

The concept of eminent domain draws from these historical, philosophical theories such that the citizens expect efficient services through PPPs and thereby, land resources must be availed by the state to achieve these needs and to develop projects such as infrastructure that benefit the entire population rather than the few individual landowners that are to be affected by the project's land acquisition exercise through deprivation of their property.

The departure point of this study shall, therefore be the theory formulated by Stephen Osborne in his study of Public-Private Partnerships Projects from the global international perspective. He attributes the challenges faced by PPP investors and stakeholders in general PPP projects to poor financial modelling⁴⁷. Specifically, however, he attributes the significant challenges faced by PPP investors in infrastructure projects, to land acquisition. Stephen Osborne argues that there perpetually exists a risk concerning land acquisition processes for PPP projects globally. Without proper planning and expedition of these processes, a PPP investor or stakeholder risks project stalls or costly penalties in the form of liquidated damages for delays.

A second theory is proposed to the effect that the challenges faced by PPP infrastructure projects are attributable to land acquisition, but specifically, to various historical phenomena surrounding the land regime in Kenya and which factors ultimately resulted in an inefficient legal framework for compulsory land acquisition.

This is the theory fronted by Muwonge Abdu in his 2016 World Bank Report. On page 40 of the report, Muwonge summarises the factors that should be addressed in legislation or policies dealing

⁴⁷ Osborne S, *Public-Private Partnerships*, 2000.

with compulsory land acquisition include the following: (i) a clear definition of what constitutes “public purpose” or “public interest”; (ii) clear standards for determining property valuation and compensation; (iii) requirements related to consultation with affected individuals and groups—including women and vulnerable groups, to promote transparent processes as well as requirements for public participation, communication of information and disclosures contained in the Constitution of Kenya, 2010 (iv) eligibility criteria for recognition of legitimate rights’ holders; and (v) the right to due process and appeal in an independent forum in cases of dispute.⁴⁸

In Kenya, property rights are not absolute. This has been the case since the first constitution was ever enacted. Whereas individual landowners may hold rights to property ownership individually, the government retains the ability to infringe on those rights, often in support of national and public interests. Moreover, freehold land is also held on terms that are subordinate to certain powers of the state.⁴⁹ The legislation provides the government with authority to extinguish, restrict or limit private property rights: Veit P states that “..this is the power of **eminent domain**, being the authority to acquire private property compulsorily. Eminent domain derives its roots from the feudal administrations whereby the sovereign, who in this case is the Government, possesses an arbitrary and radical title to all land situate in its jurisdiction and thereby the invoking of this eminent domain power by the Government extinguishes and supersedes any subsidiary property rights that individuals may have. This power therefore means that the State can order involuntary vesting of land from individual land owners to the State or its constituent agencies”.

He adds that “the power of the State to exercise eminent domain is mandated by Article 40(3)(b) of the 2010 Constitution, The Kenyan government possesses the power to determine and control the land rights of landowners, and this extends to ordering statutory restrictions on the use and sale of agricultural land. Although freehold tenure is the most desired and secure regime of land ownership, it only accounts for twenty percent of Kenya’s land. The procedures for eminent domain are described in the LA; the government can acquire private property for specific public purposes, subject to the prompt payment of compensation. While citizens can use the courts for redress, *the law does not require the government to engage the public in the decision to acquire land, but only for establishing who is eligible for compensation and for the proposed development on the acquired land* through the Environmental Impact Assessment (EIA) process”⁵⁰.

⁴⁸ Muwonge *et al*, ‘In search of land’ *World Bank*, 2016.

⁴⁹ Veit P, ‘Government Control of Private Land Use in Kenya’ *Gates Open Research*, May 2011, 2.

⁵⁰ Veit P, ‘Government Control of Private Land Use in Kenya’ 2011.

However, this theory of absolute ownership of the State has been watered down leading to numerous instances of litigation on aspects relating to compulsory land acquisition that ordinarily should not be litigious since the regulatory framework is robustly already in favour of state eminent domain. Should this aspect be streamlined, compulsory acquisition processes would become seamless, expeditious, affordable, efficient and invoke a sense of predictability and instil investor confidence to PPP private investors and lenders in the PPP realm. It would also reduce the significant costs and contingencies incurred in PPP projects due to litigation and other processes that inhibit the efficient delivery of these projects due to the lack of unencumbered access to Project Site.

Therefore in this regard, this study seeks to highlight the assumption that implementing policy and legal changes through the addressing of gaps in the provisions relating to Compulsory Land Acquisition contained in the LA 2012, the LRA 2012, The Land Value (Amendment) Act, 2019 and the Public-Private Partnerships Act, 2013 will increase the successful delivery of PPP projects in Kenya.

Further, it seeks to highlight the possibility that such legislative changes, such as those in the Land Value Amendment Act, 2019 could solve the compulsory acquisition issues faced by the Government of Kenya in the present day, both on costs and legislative flaws. Of course, challenges are anticipated, such as the question of whether the Government can legislate land value vis a vis market rates driven by pure supply vs demand economics. This question alone could lead to a myriad of litigation challenges which will be highlighted in the discussion surrounding our case study- The Standard Gauge Railway Project⁵¹.

1.8. SCOPE OF THE STUDY

The scope of this thesis is to investigate the effects and importance of an effective land acquisition process and compulsory land acquisition legislation in the implementation of successful and timely PPP Infrastructure Projects in Kenya. A PPP project's success is often measured by the quality, delivery of the intended result, the cost-effectiveness and the promptness of delivery of the project. Any process in PPP implementation that is not favourable to the Parties' delivery is a threat to the attractiveness and viability of the PPP model as a choice for State projects. The research is therefore focused on analyzing the legal framework for land acquisition for development purposes and its impact on past, current, and planned PPP projects case studies in the Kenyan context.

⁵¹--<[www.krc.go.ke/standard gauge railway](http://www.krc.go.ke/standard_gauge_railway)>.

1.9. SIGNIFICANCE AND JUSTIFICATION OF THE STUDY

To date, there has been a total of Seventy-Two (72) PPP Projects initiated in the country since the enactment of the PPP Act in 2013.⁵² However, only one (1) project has been listed by the National Treasury PPP Unit as having reached financial close. “Financial close” refers to the point at which all the project and financing agreements have been signed, all conditions on those agreements have been met, and the private party to the PPP can start drawing down the financing to start work on the project.⁵³ Recently the Nairobi- JKIA (Jomo Kenyatta International Airport) Expressway was launched, which is expected to overtake most projects in the pipeline due to its urgency and ranking in terms of importance. It is expected to ease traffic congestion within the city centre and to facilitate air travel to and from the region’s financial hub, Nairobi.

Financing for PPP Projects will be virtually impossible should the Lender not be guaranteed that the State or the Implementing Agency has provided the Private Party with access to the project site. This is because there would be no infrastructure project to implement if there is no land and because most, if not all, lending agreements require this as a condition precedent to the signing of any financing agreement. Hence, projects would not get to financial close without the site being available⁵⁵.

The Gap that this study seeks to fill:

This study acknowledges that there is a gap in existing literature in that, there needs to be a real discussion on the This being the case, there have been no studies on how the compulsory acquisition legal framework phenomenon has affected the implementation of Kenyan PPP projects. Recent studies have been advancing towards understanding why financial modelling is a crucial hindrance to delivering infrastructure projects in the Kenyan context.⁵⁶

This study thus contributes to existing literature in the field from the perspective of Kenyan State Agencies and County Governments envisioning the use of the PPP model to deliver infrastructure projects. The findings would also be beneficial to the Transaction Advisors in various PPP projects and to the legislators in Kenya as they seek to make amendments to the PPP Act, 2013 to create a conducive environment for the PPP model to thrive.

⁵² PPP Unit: PPP Pipeline, Kenya.

⁵³ PPP Knowledge Lab, ‘Achieving contract effectiveness and financial close’ -- <https://pppknowledgelab.org/guide/sections/72-achieving-contract-effectiveness-and-financial-close>.

⁵⁴ E. Yescombe, *et al*, *Public-private partnerships*, 2007.

⁵⁵ A. Akintoye, *Policy, management and finance of public-private partnerships*, 2009, Chapter 12.

⁵⁶ Odhiambo C, ‘The challenges of financially closing PPP projects in Kenya’ *Kiptiness & Odhiambo* 2018.

The study fills this gap through its very significant contribution to existing literature along this tangent of compulsory land acquisition for PPPs because it is being undertaken at a time when the Government of Kenya has declared its four pillars of the Big Four Agenda which are food security, affordable housing, universal health care, manufacturing and job creation. This essentially means that the attention that the infrastructure sector has enjoyed is no longer being directed to it, but the elements of the Big Four Agenda. Infrastructure projects are now sidelined.

Although they could arguably be seen as the “enablers” of the Big Four Agenda, they are not a priority.⁵⁷ The Government of Kenya made a declaration in July 2018 to the effect that it had frozen and would not approve any new projects until older projects are all completed.⁵⁸ This was a move aimed at cutting back on funding due to the inadequacy of financial resources.

Additionally, the Government of Kenya faced sanctions from the International Monetary Fund (IMF) in the year 2018 due to substantial debt uptake in comparison to its annual GDP. This meant that infrastructure projects based on debt finance were no longer viable for the country. Public-Private Partnerships remain the only viable option for future infrastructure projects. For this reason, the legislative changes proposed herein would create a seamless environment for PPP infrastructure projects to thrive and move the Government away from debt as the primary financing option. It is on this significant fact that this study derives its great benefit and importance to the country and the public at large.

Lastly, the study shall be of great benefit to the Strathmore University fraternity as it provides a continuity of literature in the PPP field and an avenue for future students to advance their research in the field for the good of the Kenyan public.

1.10. APPROACH AND METHODOLOGY

This study draws mainly from primary and secondary sources of data and literature. The primary sources that will be relied on include case law, constitution(s), statutes and regulations. The secondary sources to be used include encyclopedias, treatise and law journals, among others. The study shall achieve its objectives through an evaluation of the current laws and regulations

⁵⁷ --<[https://vision2030.go.ke/towards-2030/The Big Four Agenda](https://vision2030.go.ke/towards-2030/The%20Big%20Four%20Agenda)>.

⁵⁸ PSCU, ‘Uhuru: No new government projects until ongoing ones are completed’ Business Daily Africa, 20 July 2018 --<<https://www.businessdailyafrica.com/news/Uhuru--No-new-govt-projects-until-ongoing-ones-are-completed/539546-4673426-4j2e2s/index.html>>

affecting compulsory land acquisition in Kenya. There will be a review of academic journal articles, and reports concerning the issue of eminent domain. The study contains a review of the existing legislative framework of eminent domain/land acquisition in Kenya, from the Constitution of Kenya, the LA, 2012, the LRA and rules of procedure.⁵⁹ It also derives knowledge from judicial decisions and precedents, newspaper analyses, reviews and personal experience. The approach is through various arguments, opinions, theories and perceptions by various authors, transaction advisors and stakeholder in the PPP realm. The methodology includes a case study of the “Standard Gauge Railway (SGR) Project” and a brief discussion on the development of land rights over time in Kenya and the land acquisition process as well as the challenges experienced thereof of some of the significant infrastructure projects in Kenya.

While the main focus shall be on the Standard Gauge Railway (SGR) Project- albeit a hybrid PPP project undertaken during the year 2013 to date (Phase 2) and with feasibility studies having been conducted as early as the year 2009⁶⁰, this study shall also make a brief mention of other projects with similar salient features and challenges. Lastly, this study shall present a comparative study of various jurisdictions which are considered as being either strong or weak eminent domain jurisdictions in the global sphere from the perspective of Government’s superior ability to compulsorily acquire private land.

1.11. LIMITATIONS AND ASSUMPTIONS

This study is limited geographically and, in its approach, and methodology. Geographically, it is confined to only the jurisdiction of the Republic of Kenya in so far as looking at the legislative framework. It does not concern itself with the East Africa Region nor any other context, although some of the projects studied herein may be trans-boundary projects. However, it will make some comparative studies with other jurisdictions for purposes of understanding the Kenyan context and borrowing good practices to be adopted to strengthen the Kenyan legislative framework. The approach and methodology are limited to a case study of the SGR project as a significant project and other infrastructure projects generally.

The study acknowledges that the choice of the SGR Project as a case study presents certain limitations in that the SGR Project is not strictly a PPP Project but a hybrid between PPP and

⁵⁹ <<http://www.kenyalaw.org>>

⁶⁰ Nduire J, ‘History made as Kenya launches 327bn standard gauge railway’ Construction Kenya, 31 May 2017 <https://www.constructionkenya.com/2946/kenya-standard-gauge-railway/> on 31 May 2017.

Government to Government Procurement. However, the SGR project was implemented largely as a PPP in terms of the reality on the ground and for this reason, it has been selected as a representative project for the entire industry due to its massive scale and significance to the Kenyan economy.

It is presumed to be able to paint a broader picture of all the infrastructure projects, given its multi-sectoral effects and given that it is a recent project having been undertaken during the tenure of the current legislative framework, being the New Constitution of Kenya 2010, the LA, 2012 and the LRA, among others and by the state institutions thereunder and currently subsisting⁶¹. It assumes that the reader is already familiar with the primary laws and regulations governing land ownership, transfer, acquisition and dispossession in Kenya generally since delving into these processes at this juncture, would divert the study from its core intended objective.

1.12. CHAPTER BREAKDOWN

This enquiry is presented through six (6) structured chapters. The current chapter, Chapter 1, merely serves as an introduction to the thesis, highlighting the background to the problem, the research problem, the theoretical framework, the assumptions, the research questions, the approach and methodology, the limitations and assumptions and the chapter breakdown.

Chapter 2 highlights the historical development of the aspect of Eminent Domain in Kenya, which is also known as Compulsory Land Acquisition and its development over time leading to the current legislative framework currently in place in Kenya today, with a highlight of its successes and its gaps up until the recent enactment of the Land Value (Amendment) Act.

Chapter 3 examines the regulatory framework of compulsory acquisition for implementing PPP projects in Kenya as currently contained within the legislative framework in Kenya and examines the various constitutional and statutory provisions in detail and how these provisions inhibit the successful and efficient implementation of PPP projects.

Chapter 4 is a historical chapter which attempts to bring out the very essence of the Compulsory Land Acquisition process within PPP infrastructure projects thereby highlighting the effects and the dire consequences that inefficiencies in the land acquisition process has on such projects and

the economy generally and the gains to be made from the amendments proposed in this study's hypotheses.

Chapter 5 involves a case study of the Standard Gauge Railway Project as a Hybrid PPP Project and briefly analyzes a few more similar infrastructure projects implemented by the Government of Kenya to bring out the salient features and the role that land acquisition played in the hampering of timely completion of the projects⁶².

Chapter 6 highlights the findings of the study and engages in a discussion on these findings to elucidate the value addition of this thesis to the literature surrounding this important aspect of compulsory land acquisition. This chapter also guides the reader to the logical conclusion derived from the study and the recommendations enumerated.

⁶² Kenya Railways Corporation--<<http://www.krc.co.ke>>.

CHAPTER 2.

THE HISTORICAL CONCEPTS AND THEORIES UNDERPINNING THE CURRENT LEGISLATIVE FRAMEWORK FOR COMPULSORY LAND ACQUISITION IN PPP PROJECTS.

2.0. INTRODUCTION:

This thesis builds on to the argument that for government/public PPP Infrastructure projects to thrive, a robust eminent domain/compulsory acquisition legal framework needs to be in place and in favour of the government rather than in favour of individual landowners. In this regard, the strength of the regulatory framework is measured by how efficiently government can acquire the land it needs from individuals, to put it into better use that benefits the entire public at large and has a greater impact on both the economy and the livelihoods of the public, including the individuals dispossessed of that land.

This thesis fronts a key argument that this strong position will inspire investor confidence in investing in PPPs in Kenya, given that the land acquisition risk is one of the biggest risks that investors face in PPP projects. This strong position can only be achieved through fostering the proposition that the State must be vested with all land ownership rights in the Kenyan jurisdiction while individuals could also hold ownership rights, albeit of a lower ranking than the rights of the State. It is of utmost importance to discern that this proposal does not dispel the need for compensation provisions, but instead pushes for the dispelling of the ability of individual landowners to stop compulsory acquisition by the State which ought to be, as the name suggests, *compulsory*. Essentially, the landowner's right to challenge the compulsory acquisition ought to be based on compensation alone, i.e. Whether the compensation award is adequate or sufficient but not to stop the project which is set to benefit the general public since the balance of convenience does not lean towards individual landowners but in favour of the general public set to benefit from the PPP project.

It is perhaps on this basis that the Tanzanian Public-Private Partnerships Act, 2010 at Section 14 provides that any dispute arising from a PPP agreement entered into in terms of the Act shall be resolved through negotiation, mediation or arbitration. It specifically and intentionally excludes Courts. It provides so perhaps in anticipation of the challenges that the parties may undergo including on issues of right of way.

Currently, the compulsory acquisition legal framework in Kenya would be classified as average. This is because, while it has in place measures and legal provisions that give the government

overriding interests⁶³ over all land, it takes away those measures with another hand through other provisions that water down the absolute nature of the government's compulsory acquisition powers. The calibre of rights that water down these powers are;

- The perceived and inherent right to approach Courts/invoke the jurisdiction of the Courts in the first instance in a compulsory acquisition dispute;
- The right of an individual to obtain injunctive orders over a public benefit billion-dollar infrastructure project that is vital and instrumental to economic benefit for the public as a whole; and;
- The right of the individuals and the Courts to blatantly disregard the cost factor that just a single day of delay could mean to the Government should a project outsourced to a Contractor be halted/injuncted, and provisions for charging of liquidated damages subsist within the contract.

The journey of the legal framework of compulsory acquisition for PPPs to the point it stands today commenced from the concept of public trusteeship over land, which facilitated the regulation over property rights and rights to land ownership. This aspect of eminent domain and development control generally, stemmed from historical times under the Roman Law concept of *dominium eminens* meaning 'sovereignty over territory'⁶⁴. It flows from the notion that the State has radical title over all land within its borders and can compulsorily acquire it for state-related uses. However, it has to be shown that the land is meant for public use and that the owner will be restituted to his original position financially as he was before the acquisition, that is, by adequate monetary compensation or an equivalent land swap.⁶⁵ These ideologies were after that adopted into Sections 75, 117 and 118 of the defunct Kenyan Constitution and the Land Acquisition Act (now repealed).

The concept of eminent domain in Kenya developed majorly through legislation coupled with judicial precedents. It ultimately was adopted into the Constitution of Kenya 2010 and the LA, 2012 at Sections 107 to 133, Part III of the Act, that remains operational to date.

Throughout this journey of the evolution of compulsory acquisition rights of the State, the historical concepts underpinning compulsory acquisition have continued to be present as shall be discussed hereinafter.

⁶³ Section 28(e), LRA, (Act No. 3 of 2012).

⁶⁴ Bondi D. Ogolla & John Mugabe, 'Land tenure systems and natural resource management', 107.

⁶⁵ Gray K, 'The idea of property in law – Land law, themes and perspectives', 1998, 15.

2.1. THE CONCEPT OF PROPERTY RIGHTS REGULATION;

In regulating property rights, Government powers have been found to raise critical issues spanning from Constitutional ones to simply human rights issues which have been deemed by some quarters to have not been exercised effectively nor accountably by the State. These are powers arising out of the concept of compulsory acquisition or eminent domain and the concept of development control. To exercise such powers effectively and in an accountable manner, criteria ought to be met that rationalises land use plans through processes that are public benefit-driven (i.e. State-driven) and to ensure that land is vested sovereignly in the government- as in the case of Tanzania (a hybrid of the Ujamaa system⁶⁶) rather than have the current state in Kenya where under the Constitution of Kenya, radical title (ultimate ownership) is vested in the people of Kenya collectively as a nation, as communities and as individuals. The vesting of title to land, in its sovereignty, in the people, has hampered the development of public infrastructure and utilities by the Government as the Social Contract has progressively been hampered and the State has found itself held hostage by individuals.⁶⁷

In order to deliver PPP projects seamlessly, access to the Project Site has to be provided. Therefore, the most important aspect that has to be recognised by all parties, state, individuals and judicial forums is that in Kenya, individual property rights are not absolute. Individual landowners hold rights to property ownership individually. Veit P states that “Nevertheless, the government retains the ability to infringe on those rights, often in support of national and public interests. Freehold land is also held on terms that are subordinate to certain powers of the state, including the power of eminent domain”.⁶⁸ As the sovereign, therefore, the state holds a radical title to all land within its territory. The exercise of eminent domain extinguishes all private property rights and *forces involuntary transfers of property from private owners to the government or its designated agency.*

The government’s power to compulsorily acquire land for public purposes is authorised by Article 40(3)(b) of the 2010 Constitution. Veit P further adds that “though the Kenyan government has considerable authority to invoke the procedures for compulsory acquisition as prescribed in the LA and to acquire private property for specific public purposes, subject to the prompt payment of compensation”. Currently, the judicial forums and the public at large have held a misguided notion

⁶⁶ Alistair E, ‘What was Ujamaa and how did it affect Tanzania’ *ThoughtCo*, 2019
<https://www.thoughtco.com/what-was-ujamaa-44589>.

⁶⁷ Thoreau H, ‘Social Contract Theory’ *Antilogicalism*, 2016, 1 --<<https://antilogicalism.com/tag/political-philosophy/page/2/>> on 6 May, 2016.

⁶⁸ Veit P, ‘Government Control of Private Land Use’ 2011.

that the right of citizens to access redress from Courts is open-ended and at their discretion. This cannot be further from the truth. The Constitution is clear that while the individual landowners can use the courts for redress, *the law does not require the government to engage the public in the decision to acquire land, but only for establishing who is eligible for compensation and for the proposed development on the acquired land* through the Environmental Impact Assessment (EIA) process⁶⁹.

The PPP projects present a rather peculiar situation in that in a PPP project; the acquiring party will normally be the Contracting Authority which will be a public entity. There is a risk of the public assuming that the land is being acquired for the public entity, and therefore there is no issue of urgency or costs. However, where PPP projects are concerned, an investor will not be able to commit any lender without the guaranteed access to the site. This is why this study deems it important that this process must be expedited or that this situation not be allowed to arise at all. The moment an investor sees that there is a myriad of cases filed in Court seeking injunctions to halt the land acquisition, their confidence and interest in the project plummets. Success in a grant of an injunction spells doom for the project, and an entire investment is lost.

It is therefore key that investors are guaranteed of a legal framework that assures them of access to the site with the Contracting Authority left to handle the cases in court which are only seeking the Court's direction on how much compensation is payable while the project is left to proceed.

Article 66 (1) provides that the State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning and that Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies. This grants the State the power through Parliament to legislate on state regulation on the use of land. Subsequently, Parliament enacted the LA and the LRA, which sought to operationalise this provision to assist the state to achieve this function, i.e.. Land-use planning. In this regard, the state plans for infrastructure needs of its citizens and invokes eminent domain to achieve this function.

This is what this study concerns addresses. It seeks not to investigate whether the purpose of acquisition meets the 'public purpose test' but rather seeks to answer the question "*..assuming all viability tests have been met for a proposed PPP project, what specific hurdles caused by compulsory acquisition are encountered during the process and how can the regulatory framework of compulsory land acquisition be tweaked in order to unlock these inefficiencies*" This study, therefore, starts from the assumption that this public purpose test and other tests have already been

⁶⁹ Veit P, 'Government Control of Private Land Use' 2011.

met. It, therefore, is more concerned with the compulsory acquisition process itself and the (regulatory framework) inefficiencies that it presents and subsequently, how these inefficiencies hamper the delivery of PPP projects in Kenya that involve compulsory land acquisition.

2.2. THE CONCEPT OF DEVELOPMENT CONTROL;

Development control refers to the absolute power of the Government to exercise control and oversight over rights in property within its borders, be it rural or urban land. It is a State's responsibility to ensure that the use of land promotes the interest of the public over and above the interests of individuals. This is what forms the backbone of compulsory acquisition. If development control is used extensively and properly, it would automatically bring about the utilitarian result of the use of land responsibly and in a manner that ensures sustainability. Development control requires that, without fail, Government implements its activities in a manner that is efficient and coordinated and in so doing, achieving a regulatory framework and a Land Use Plan that is extremely effective and efficient.

To achieve this, the Government has to implement specific, intentional measures such as to align development control with land ownership which shall ultimately be vested in the state. Given the devolution of power into Counties as brought about by the Constitution of Kenya 2010, Government needs to empower all planning and development agencies in the country further to regulate land use with the interest of the general public being placed on a higher pedestal to that of individuals.

Additionally, the Government needs to create a balance between providing safeguards against development control which disregards the compensation bit of compulsory acquisition and on the other hand, compensation wrangles which ought not to stall public projects especially in the realm of PPPs.

This could be done by ensuring that the Government introduces escrows in PPP land acquisition transactions under the purview of the NLC where compensation funds can be deposited in the meantime, even as disputes are ongoing; meanwhile, the public projects proceed as planned. Ultimately, should a higher compensation be ordered by the Court or tribunal more than what was initially awarded, then the aggrieved party will be given the appropriate remedy without affecting the Government PPP projects? This will instil investor confidence, and the country will see a steep rise in the number of PPP projects being introduced.

2.3. THE CONCEPT OF OWNERSHIP, POSSESSION AND TITLE;

Ownership or title to land in Kenya is dependent on various factors, including the processes through which the same title or ownership of land can be lost as well as can be acquired by an individual. Understanding that the concepts of ownership, possession and title are not in any way absolute, is the key to understanding the problems facing our country with regards to compulsory acquisition for PPPs today. Prof. Tom Ojienda, in his book, *Conveyancing, Principles and Practice*, reminds us that “it is essential in order to understand where the law is coming from and what it is striving to protect”.⁷⁰ He further states that “the idea of jural relation is as important for legal phenomena as is the idea of (Newton’s) gravitation for physical phenomenon”⁷¹. Of course, the underlying idea of property stems from the basic idea that a right can exist in a thing. In fact, in simple terms, ownership is a right in something. Two historical jurisdictions enable us to understand that two schools of thought exist in trying to decipher what exactly it means to be in ownership of something⁷²;

The Roman Law School of Thought;

One is the Roman Law school of thought; which treated the idea of ownership as an absolute and indefeasible right of one to enjoy and to be able to equally “dispose of something in an absolute manner and termed it *dominium*”⁷³. It equates the concept of ownership and by extension, the concept of possession, to an absolute relationship of owner and the owned between a person and a thing whose severance by another party entitles the aggrieved party to restitution in the form of damages that were referred to as ‘*vindicatio*’, popularly known in modern parlance as damages⁷⁴.

The English Common Law School of Thought;

The second school of thought originated from the English common law which distinguished ownership from other forms of handling of a thing, known simply as possession. English law, therefore, does not recognise an absolute right of ownership but equates the right to a thing, as *seisin*. Hence, under English land law “ownership is not absolute; rather, it is fragmented amongst a number of competing users”.⁷⁵

⁷⁰ Prof. Ojienda T, *Conveyancing- Principles and practice*, Law Africa Pub., Nairobi, 2008.

⁷¹ Prof. Ojienda T, *Conveyancing*, 2008.

⁷² Prof. Ojienda T, *Conveyancing*, 2008.

⁷³ Acta Juridica 1 ‘The Roman Law Concept of *Dominium* and the Idea of Absolute Ownership’ *Hein Online*, 1985.

⁷⁴ Petrak M, ‘The concept of the general *vindicatio* action in the roman legal tradition and *de lege ferenda*’ *Research Gate*, 2013.

⁷⁵ Kocourek A, ‘Jural Relations’ 1927 (2nd edn, 1927) 26.

Therefore, the main take away from this comparative exercise of the two ideas of ownership is the fact that in law, the concept of ownership lies more on the subjective or relative side than on the absolute side. Ownership in English Law is neither a fixed nor guaranteed entitlement over anything and more so overland⁷⁶.

It is this the Roman Law School of Thought that this thesis wishes to concern itself with as it seeks to propagate the concept that Ownership is never absolute. As much as the Constitution of Kenya vests land in the people, the people have equally vested their rights in the Government under the Social Contract theory. Therefore, they have vested the state with the necessary powers to make decisions on their well-being and on their behalf, including the decisions to dispossess some individuals (albeit with just compensation) of their land, for the use that will enhance the greatest happiness to the greatest number of people. In this notion, it incorporates both the Social Contract and the Utilitarian theories⁷⁷. Therefore, Prof. Ojienda T states that “where ownership of land in Kenya has been vested on a person or people, it does not automatically mean that the owner is guaranteed indefinitely, in fact, far from it. It only means that the person holds that land, just in so far as the State has not required it for a greater public purpose”⁷⁸. This scenario, of course, differs from the possible scenario where an individual’s ownership rights may be defeated to the state through a debt (inland rates or rent for example) as a creditor or in the fulfillment of a judgment or a decree mostly through the exercise of a statutory sale. Compulsory Acquisition in the strict sense here does not encompass loss of an individual’s land through such modes as discontinuance or dispossession through other means including the effluxion of time (adverse possession)⁷⁹.

2.4. THE CONCEPT OF OVERRIDING INTERESTS;

Article 40 (3) of the Constitution of Kenya provides that the State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, under Chapter Five⁸⁰; or the deprivation is for a public purpose or in the public interest and is carried out per the Constitution and any Act of Parliament that requires prompt payment in full, of just compensation to the person.⁸¹

⁷⁶ Prof. Ojienda T, *Conveyancing*, 2008.

⁷⁷ ‘The History of Utilitarianism’ - Stanford Encyclopedia Sep 2014.

⁷⁸ Prof. Ojienda T, *Conveyancing*, 2008.

⁷⁹ Prof. Ojienda T, *Conveyancing*, 2008.

https://ayerangagodfreyblog.files.wordpress.com/2016/07/ojienda_book-conveyancing-principles.pdf.

⁸⁰ Constitution of Kenya, 2010.

⁸¹ --<<http://www.klrc.go.ke/index.php/constitution-of-kenya/112-chapter-four-the-bill-of-rights/part-2-rights-and-fundamental-freedoms/206-40-protection-of-right-to-property>>.

Although Article 40 (3) of the Constitution gives compulsory acquisition a higher threshold than ordinary overriding interests, but for purposes of the LRA, the right to compulsory acquisition is listed as a subset of overriding interests. Section 28 is titled “overriding interests” whereas the right to compulsory acquisition is listed as one of the overriding interests as a subset (e). Under Section 28 of the LRA, the following Overriding Interests are recognised without their registration in the Land Register;⁸² “(a) spousal rights over matrimonial property; (b) trusts including customary trusts; (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (d) natural rights of light, air, water and support; (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; (f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies; (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land; (h) rights acquired or in process of being acquired by any written law relating to the limitation of actions or by prescription; (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by any power conferred by any written law; and (j) any other rights provided under any written law”⁸³.

The reason why overriding interests concern the compulsory acquisition arena is that, under the LRA⁸⁴, overriding interests supersede individual interests to land which is what enables the State to acquire private land at a value compulsorily. Prof Ojienda notes overriding interests as “the very fact that there exist certain kinds of interests in land which are made binding to a third-party purchaser automatically, despite them not appearing or normally not shown on the title deeds or disclosed in abstracts of title”.⁸⁵ This presents a challenge to land purchasers because they are not able to fully and confidently say that they have done complete due diligence based only on the inspection of the title.⁸⁶

Overriding interests make it an impossibility to compact an accurate record on the register of the relevant title. Therefore, Prof. Ojienda advises that “it behoves a purchaser dealing with registered land to first seek additional information beyond the register in a similar fashion as if he or she were dealing with unregistered land”⁸⁷. Differently put, he states, “a purchaser of registered land is required to additionally obtain information about the possible presence of overriding interests

⁸² LRA (Act No. 3 of 2012).

⁸³ --<<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/RegisteredLandActCap300.pdf>>.

⁸⁴ Act No. 6 of 2012, Laws of Kenya.

⁸⁵ Prof. Ojienda T, *Conveyancing*, 2008.

⁸⁶ Prof. Ojienda T, *Conveyancing*, 2008.

⁸⁷ Ayerangagodfreyblog.files.wordpress.com

through physical inspection of the land itself and of enquiries made through persons living on the premises”⁸⁸.

This concept of overriding interests is important to the doctrine of compulsory land acquisition because the State’s rights to compulsorily acquire land are overriding interests under the LA (L.A.). This is the position that this study advocates for its strengthening to ensure that the needs of a few individuals do not curtail the State’s development plans, more so where adequate compensation is payable. The only disputes that could arise are therefore monetary, which ought not to hold a project, but to be pursued separately even as the project is left to proceed. “*Overriding interests, therefore, take the position of a group of interests in registered land which have been singled out either as having such distinct public and social importance and vitality or as involving such important development agenda such as to merit indefeasible protection which derives not from the force of register but from the force of statute.*”⁸⁹ This study addresses this important principle.

In so doing, the process of compulsory land acquisition is made seamless. This streamlines the process of access to Project Site by PPP project implementors since compulsory land acquisition for the PPP project would become seamless, expeditious, affordable, efficient and invoke a sense of predictability and instil investor confidence to PPP private investors and lenders in the PPP realm. It would also reduce the significant costs and contingencies incurred in PPP projects due to litigation and other processes that inhibit the efficient delivery of these projects due to the lack of unencumbered access to Project Site.

2.5. THE THOERY OF THE SOCIAL CONTRACT.

The Social contract theory is defined by Socrates to be “a theory that views an individual’s moral, social or political obligations as being dependent on a contract or agreement among them to form the society in which they live”. *Socrates* invokes a “social contract argument to explain to *Crito* why he must remain in prison and accept the death penalty”. The social contract theory is associated with modern moral theory and modern political theory and is propagated by philosophers Thomas Hobbes, John Locke and Jean-Jacques Rousseau.

This theory is vital in the development of a legal framework for compulsory land acquisition as it places the rights of the individual below the rights of the State and the rights of the majority, the

⁸⁸ <https://www.lawgazette.co.uk/news/the-mirror-cracked-the-contradiction-between-the-idea-behind-registered-land-and-the-concept-of-overriding-interests-/19462.article>

⁸⁹ K.J. Gray & P.D. Symes, ‘Real property and real people: Principles of land law, Butterworths, London, p. 332.

individual having surrendered his rights to the State in exchange for the State making certain decisions that may sometimes be for the greater good but may affect the individual. This is the essence of subordinating an individual's right to their private land over the State's rights over the land for use for a public purpose.

In a sense, this theory goes hand in hand with the theory of *utilitarianism*, which mainly propagates for that which brings the greatest joy to a greater multitude over individualism.

According to John Locke under the social contract theory, "individuals surrender their rights to the formation of societies which are based on the voluntary agreements to create political societies whereby individuals agree to each give up the executive power and to hand over that power to the public power of a government and after that, having done this, they then become subject to the will of the majority through the decisions of the State"⁹⁰. In other words, "the individuals submit themselves to the will of that body and that body is expected to wield a certain form of democratic decision making towards making decisions for the majority as a people". Locke states that "one becomes a subject of this body, either from its commencement or after it has already been established by others, only by explicit consent. Having created this political and social body through their unfettered consent, all individuals then gain three things being laws, judges to adjudicate laws and the executive power that is needed for the enforcement of these laws".

The individuals give, among other rights, their rights to land in certain circumstances through statutes such as the LA. Therefore, the compulsory acquisition is embedded within the social contract and ought to be an indefeasible right of the state to acquire land required for public purpose absolutely and based on the necessary, just compensation.

CONCLUSION.

The discussed theories and concepts have played a big role in the manner in which the Kenyan land regime structure has evolved and specifically, has informed the basic tenets behind the rationale of compulsory land acquisition in the country. Whereas the theories and concepts were discussed in a critique framework where both the positive and negative propagations of the theories and concepts were analyzed, this study has focused on the arguments under the theories.

⁹⁰ Locke J, 'The Social Contract According to John Locke' June 17, 2018

CHAPTER THREE

3.0. A CURSORY LOOK AT THE CURRENT LEGISLATIVE FRAMEWORK OF COMPULSORY ACQUISITION/EMINENT DOMAIN AND THE IDENTIFIED GAPS IN KENYA.

3.1.1. The Constitution of Kenya, 2010.

Compulsory acquisition could be defined as the right or power of the government to alienate or acquire ownership, title or other interests in land belonging to a private individual for a public purpose, subject to just payment of compensation. Compulsory acquisition is provided for in the Constitution of Kenya 2010. The Constitution, under Article 40 (3) provides for the State's power to deprive individuals of their private property in certain specific instances. These instances include the acquisition of that interest compulsorily for public interest/use/purpose and according to the provisions of Statutes and with prompt compensation.

Article 61 provides that all land in Kenya is owned collectively by the people as a nation. This is intentional wording meant to remove the aspect of individualism from the concept of land ownership. Under Article 66, the Constitution further provides for the State's power to regulate the use of any land or any interest over any land in the interest of the people.

The Constitution of Kenya, 2010 sets the center stage for all matters eminent domain. It recognizes the bare fact that Government will one day find itself in a situation where it will require land for compulsory acquisition for certain projects that it considers as public use. It also recognizes that this land may already be in use and being occupied by private individuals. Given that the Government's investment shift has moved towards PPP frameworks, it therefore follows that this area needs to be relooked at with an eye that favours the implementation of PPP projects.

This study wishes to draw a balance between two competing rights, those of individual land owners and those of the Government in the acquisition of land. This analogy also has to keep in mind the fact that the rights of the Government to acquire land compulsorily also goes hand in hand with the rights of the public who stand to benefit from the acquisition such as, the right to good infrastructure, the right to social amenities, health facilities and so on. In essence, this calls for a balance between Articles 40 (1), (2) and (3) of the Constitution on the one hand, and Article 40(3), Article 43, Article 60 and Article 66 of the Constitution on the other hand.

Article 40 (1), (2) and (3) provide for the rights of individuals to own land and not to be denied his rights to such land by the State unless the same is for public interest, acquired through compulsory acquisition and there is payment of just compensation. These Articles alone, advocate for the rights of individuals *vis a vis* the ownership of land.

Article 40(3), Article 43 and Article 66 provide for the limitation of the above rights. They also provide for the conditions or circumstances under which, the rights of the individuals above, may be limited by the State such as by eminent domain. Article 43 provides for the right to economic and social rights including the rights to highest standard of wealth attainable, adequate housing, reasonable sanitation facilities, clean and safe water facilities, education and educational facilities among other fundamental rights. These facilities all delineate public functions which are to be provided by the State. The State's key resource in delivery of these services is funding and physical infrastructure. The State has therefore been utilizing the PPP framework to provide these facilities through building of hospitals, water resources among others. It is therefore important that this Article of the Constitution be given due attention and the State needs to have more leeway in terms of the seamless and unhampered acquisition of land resource for these functions.

Additionally, Article 60 also provides for the use of land in Kenya to be held, used and managed in a manner that is equitable, efficient, productive and sustainable and most importantly, in line with the National Land Policy. The land policy is where most infrastructure projects are based from. The land policy recognizes the needs of the people in terms of infrastructure and other physical facilities. Therefore, the State will definitely require these land resources for its activities and this is recognized under the policy.

Having discussed the various Articles in the Constitution, this study fronts the opinion that Article 40(3) and Article 61 of the Constitution of Kenya, 2010 have created a gap which has given rise to a situation where there is a lack of/diminished State Supremacy Rights in Land Ownership. In essence, Article 61 creates the main hurdle that hampers efficient compulsory acquisition by introducing the fact that the State does not own arbitrarily own the land, i.e. Holding it in trust for its citizens as is the case in other jurisdictions such as neighbouring Tanzania. Article 61 of the Constitution of Kenya 2010 states that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.

This is of course an ideal situation for private land owners in Kenya. However, this study advocates for a different kind of situation whereby there is need to find a balance of ensuring that the State has superior rights over acquisition of private land in Kenya, while still ensuring that the rights of the individuals are taken into account. One of the ways to solve this debacle would be to put in place a State-driven robust compulsory acquisition legal framework, and thereby allow Kenya to move from being a weak compulsory acquisition jurisdiction/eminent domain jurisdiction to a reliable eminent domain jurisdiction.

In Tanzania, which is considered a robust eminent domain jurisdiction, the Constitution states that all land is vested in the government to hold on behalf of its citizens. This means that there is little or almost no challenge that can be waged on the State on compulsory land acquisition provided the State has set aside funds for the project including compensation of landowners. All disputes after that proceed separately even as the project advances and awards and compensations are made separately without affecting the project.

Kenya needs to make deliberate efforts towards an efficient compulsory acquisition legal framework; therefore, through the attainment of a State Supremacy position.

A State Supremacy position is advantageous for several reasons, the first of which is that it becomes more difficult for compulsory acquisition to be challenged on any other basis other than on allegations of inadequate compensation. This aspect of challenging eminent domain over inadequate compensation is however not a major concern to a PPP investor because the parameter of compensation alone, ordinarily and under the rule set out in *Giella vs Cassman Brown* on the grant of mandatory injunctions, would not suffice before a judicial forum to injunct a PPP project because it is an action capable of monetary restitution.

The second reason why a State Supremacy position is advantageous is that the burden of proof and the burden of convenience shifts and tilts in favour of the State and it is upon the private landowner to prove that his claim is not capable of monetary restitution. This argument would be almost impossible to table before a judicial bench.

The State Supremacy position therefore, must be buttressed through intentional and direct legislative changes to give the State an upper hand in exercising development control over land and general property rights.

Article 40(3) of the Constitution of Kenya is a total contrast from that of India, which is considered a robust compulsory acquisition jurisdiction. Today, India is one of the fastest-growing countries in the world in terms of infrastructure. Public-Private Partnerships have mostly facilitated this. In Kenya, under the Constitution 2010 Article 40(3), the right to property and land by individuals is

considered a fundamental right. This was the position that India was in before its Constitutional amendment through the 44th Amendment Act of 1978 such that the right to property was deleted from the list of fundamental rights of an individual, giving more power to the State in cases of eminent domain/compulsory acquisition⁹¹. Thus, “if a legislature makes a law in India depriving a person of his property, it will not be unconstitutional. The aggrieved person shall have no right to move the court under Article 32”⁹². Thus, the right to property is no longer a fundamental right in India and remains only a constitutional right.⁹³

Adopting an amendment to the Kenyan Constitution similar to the Forty-Fourth Amendment of 1978 or adopting statutes and subsidiary legislation that would deliver an equivalent desired result, would mean that the judiciary would be able to exercise their discretion on a wider spectrum other than they would, having been constrained by the rigid band of human rights that does not allow even the slightest deviation in terms of violations. This would essentially erase the right to property from the list of fundamental rights with an introduction of a new provision, that provides that “no person shall be deprived of his property save by authority of the law”. This amendment would imply that the right to property is no more a fundamental right but a constitutional or legal right similar to any statutory right which in the event of a violation, the remedy obtainable to an affected person is through the High Court and which would ordinarily only entitle the aggrieved party to compensation having been pitched against the entire public who seek to benefit from the PPP project being envisioned.

The Proposal:

State Supremacy with regard to compulsory Acquisition.

State Supremacy will move Kenya towards an efficient compulsory acquisition legal framework and therefore, the State Supremacy position has to be attained. This is proposed to be achieved through the implementation of policy and legal changes through the amendment of the Constitution under Article 40(3) similar to the transformation that India underwent through the 44th Amendment Act of 1978 effectively converting the individual right to property/land from a fundamental right to only a constitutional right. The gains to be made from this amendment is two-fold. The first is that as a mere constitutional right, the rights of the private landowner shift from the heavily protected realm of fundamental rights to a constitutional right to property that is capable of restitution through the provision of adequate compensation or even alternative land in

⁹¹ en.wikipedia.org

⁹² en.wikipedia.org

⁹³ India 44th Amendment Act of 1978.

another area where the landowner can still enjoy his/her rights to property as if the same was not interfered by the State from the very beginning. Secondly, because the burden of proof and the burden of convenience shifts and tilts in favour of the State, the landowner inherits a heavier task of proving that his claim is not capable of monetary restitution. This argument would not be able to injunct a PPP project but merely direct the judicial issue to a question of ‘how much is just compensation’.

Of course, the above proposals do not come without hurdle considering the rigidity and resistance of the Kenyan Constitution to the amendment. As outlined under Chapter Sixteen, Articles 255, 256 and 257 of the Constitution. However, if this can be attained, Kenya would have made a significant stride towards being a strong compulsory acquisition jurisdiction unlocking the challenges of land-intensive PPP infrastructure projects as a result.

3.1.2. The LA, 2012.

The power to compulsorily acquire land in Kenya by the State under the LA is vested through Part VIII of the LA, which commences from Section 107 of the LA, 2012⁹⁴. The compulsory acquisition of interests in land is deemed to arise whenever the national or county government is satisfied that it may be necessary to acquire some privately owned land and it ought to do so as per the processes and procedures that are outlined by the LA, 2012 under Section 110.

The Government does so through its agency, the NLC (the Commission), which is established under Article 67 of the Constitution. The need for which the land is acquired must be public and must not be a private need where the land is acquired for a private entity in the guise of a public need.

Section 107 provides that where the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary (C.S.) or the County Executive Committee (CEC) Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf and the Commission has prepared guidelines to be adhered to by the acquiring authorities in the acquisition of land.

Section 107 (2) gives the Commission power to reject a request by an acquiring authority, to undertake an acquisition if it establishes that the request does not meet the threshold prescribed under Section 107(2), Section 81 of the LA, 2012 and Article 40(3) of the Constitution.

⁹⁴ <Kenyalaw.org>

The LA requires that all compulsory acquisitions be gazetted through the publishing of a notice to that effect in the Kenya Gazette and the relevant County Gazette and after that delivering copies of the notices of gazette to the Registrar and to every affected person who appears to the Commission to be interested in the land.

Upon achieving this, the registrar makes an entry in the register of the intended acquisition, and the land is georeferenced and authenticated by the Surveyors within the Commission's office or authority responsible for the survey at both the national and county government.

The detailed process of land acquisition is outlined step by step under Section 110 of the LA, 2012 commencing with the respective Cabinet Secretary or the County Executive Committee Member who lodges a request for exercise of eminent domain to the NLC to acquire the land on its behalf⁹⁵. As it can be seen, there exists no avenue for disputing a compulsory acquisition initiated by the State even though avenues exist for the challenging of the quantum of the award or the valuation of the land parcel in question.

This study therefore finds that Section 107 of the LA presents a gap in the process of compulsory acquisition in Kenya. Section 107 of the LA provides for the Preliminary procedure for compulsory acquisition. It states under subsection 1 that whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf.⁹⁶ However, this section fails to account for one major requirement which is the need for Section 107 of the LA 2012 to expressly provide for the non-challengeable nature of the right of the State to compulsorily acquire private land once identified (and only leaving room for deliberation on the compensation payable) in line with Article 40 (3) of the Constitution of Kenya. This is the additional provision that is required.

The concept of eminent domain in Kenya is different from the general concept of eminent domain available in other jurisdictions across the globe. The Kenyan regime allows for the recognition of two regimes of property rights, the first being freehold ownership and the second being leasehold ownership of land. Both regimes remain subject to the State power of eminent domain which makes the Kenyan perspective on land ownership quite different from other jurisdictions, mainly due to the historical concept of land ownership held by local communities before the development

⁹⁵ <Kenyalaw.org>.

⁹⁶ --<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%206%20of%202012>>.

⁹⁷ Section 107(1) The LA, (Act No. 6 of 2012).

of formal political and government systems. For instance, although many jurisdictions subject the power of eminent domain to the Bill of Rights, the same is not true in Kenya due to the unique status of Kenya's Government being the holder of absolute rights over land.

Therefore, the most important aspect that has to be recognised by all parties, state, individuals and judicial forums is that in Kenya, individual property rights are not absolute. Individual landowners hold rights to property ownership individually. P Veit states that “..nevertheless, the government retains the ability to infringe on those rights, often in support of national and public interests. Freehold land is also held on terms that are subordinate to certain powers of the state, including the power of eminent domain”.⁹⁸

He further states that “..as the sovereign, therefore, the state holds a radical title to all land within its territory. The exercise of eminent domain extinguishes all private property rights and *forces involuntary transfers of property from private owners to the government or its designated agency*”.

Section 133C of the Land Value (Amendment) Act somewhat partly attempted to cure this gap and vested the power of hearing appeals from decisions of the NLC, and this will increase the successful delivery of PPP projects in Kenya. This was intended to divest judicial courts with the power in the first instance to entertain disputes over eminent domain.

However, despite Section 133C, some ELC Courts have either disregarded or simply not been aware of the amendment and continue entertaining court actions in the first instance. This, therefore, brings to the fore the need for a new publication of the LA 2012 fully incorporating these amendments in the body of the Act and avoiding the need for cross-referencing between two Acts in a bid to create more awareness on the provisions.

3.1.3. The LRA, 2012.

Section 28 of the LRA subjects all registered land to overriding interests which may for the time being subsist and affect the land, without their being noted on the register. Specifically, Section 28(e) subjects all land in Kenya to the overriding interests of the State in compulsory acquisition should the need arise. Section 28(e) provides for the overriding interests of the State as “rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law”⁹⁹.

⁹⁸ P. Veit, ‘Government Control of Private Land Use in Kenya’, 2011, 2.

⁹⁹< https://en.wikipedia.org/wiki/Eminent_domain;en.wikipedia.org>.

Although Section 25 of the LRA provides for the rights of a proprietor of land which attach to ownership rights as being of significant importance, Section 25(1)(b), diminishes this importance of individual ownership to a point where these same rights of a proprietor are overridden by the overriding interests of the State under Section 28 (e) of the LRA¹⁰⁰.

Section 25 emphasises the sovereignty and supremacy of the right of the State in compulsory acquisition to the extent that it provides that “the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register”.¹⁰¹

This study identifies a gap in Section 28(e) of the LRA in so far as regards the position of eminent domain in the hierarchy of land rights. Section 28 (e) of the LRA provides for overriding interests of the State with regards to compulsory acquisition. However, this Section has not been given the proper wording in order to achieve the weight that it deserves by judicial decisions, thus making compulsory acquisition by the State, a difficult process. In essence, overriding interests ought not be subjected to Court determination where the State has identified the need through a legally sound process and is willing to settle any disputes on the quantum of compensation once the Court (or Tribunal) case is determined. Currently, Section 28(e) states that “unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register- rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;”¹⁰². Section 28(e) ought therefore to include a provision such as that applicable in China (through a proviso) stating that “*unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register- rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law*¹⁰³. *The overriding interest with respect to compulsory acquisition shall not be challengeable save for the determination of*

¹⁰⁰ <https://en.wikipedia.org/wiki/Eminent_domain>.

¹⁰¹ <<http://kenyalaw.org/caselaw/cases/view/321>>.

¹⁰² The LRA (Act No. 3 of 2012).

¹⁰³ The LRA (Act No. 3 of 2012).

the amount of compensation payable;” This is the position and wording contained in China law which has made it have a very efficient compulsory acquisition legal framework.

Most writers have described China as having a robust compulsory acquisition framework but have discredited it for human rights violations, a notion which this author disagrees with. Zhu Keliang has stated thus;- that “the outcries by landowners in China over compulsory acquisition actually do not stem from the State supremacy right over land in eminent domain, but rather, arise from the deep-rooted belief that, despite the fact that just compensation is enshrined in the law with respect to the relocating of affected individuals from their land, the authorities tasked with ensuring compliance have failed to oversee this process leaving peasant farmers at the mercy on unscrupulous corrupt officers who ultimately deny the land owners their deserved compensation”.¹⁰⁴ The plight by China landowners is therefore not against the notion of State supremacy rights in land acquisition but on other factors, majorly compensation, which is curtailed by corruption.

This author concludes that effecting an amendment to expressly provide for the impeachability of Section 28 (e) of the LRA, 2012 on overriding interests of the State with regards to compulsory land acquisition, will increase the successful delivery of PPP projects in Kenya;

3.1.4. The Land Value (Index)(Amendment) Act, 2019;

The Land Value (Amendment) Act, 2019 (hereinafter “the Act”) commenced on 19th August 2019 having been assented to by the President of the Republic of Kenya on 2nd August 2019. The Act, in its preamble, seeks to standardise land values for purposes of valuation and ultimately compulsory acquisition by the State for projects and other public purposes¹⁰⁵.

The Act does so by amending some provisions of the Land, the Land Registration as well as the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Acts¹⁰⁶.

In its amendments to the LA, it majorly introduces amendments to the main sections within the LA that provide for compulsory acquisition, i.e. Sections 107 (by amending Section 107 itself and further introducing Sections 107A and 107B. It also amends Section 133 and introduces Section 133A, 133B, 133C, 133D and 133E.

¹⁰⁴ Zhen S, ‘Eminent domain in the United States and China: Comparing the practice across countries’ *Inquiries Journal*, 2017 <<http://www.inquiriesjournal.com/articles/1703/eminent-domain-in-the-united-states-and-china-comparing-the-practice-across-countries>>.

¹⁰⁵ <www.africalegalnetwork.com>.

¹⁰⁶ <www.africalegalnetwork.com>.

The Act aims at enhancing the effectiveness and efficiency of the compulsory acquisition process through the standardization of land values in Kenya on a regional basis to ensure expediency in the compulsory land acquisition process.

A key gain achieved by the Act is to the effect that it is now possible for the State to acquire private land prior to compensation whereas prior, the NLC (NLC) had to compensate owners of private land before taking possession of the land¹⁰⁷. This new provision now enables the NLC to possess the land and compensate at a later date within an acceptable period of time (not later than one year)¹⁰⁸. This new enactment is a bold step by the State of the direction that compulsory acquisition has taken and will take in the future. Compulsory acquisition is moving towards the State sovereignty position that will soon make it entirely unchallengeable except on the quantum of the award and which will nevertheless not halt a project. It is extremely beneficial for PPP's to thrive in addition to other infrastructure projects that require intensive land acquisitions such as roads construction projects.

Human Rights activists have termed these provisions as being oppressive, mainly where the property was residential¹⁰⁹. Section 107A(7)(c) by providing for reasonable expenses such as rent where the landowner has to relocate his residence for a while. Likewise, under Section 2, the Act defines “prompt” to mean that compensation could be paid within one (1) year which the activists have termed as unconstitutional because the Constitution of Kenya 2010 expressly provides for “prompt” payment of compensation before taking possession¹¹⁰.

The Act further introduces Sections 113A, 133B, 133C, 133D and 133E which sections set the framework for the setting up of the Land Acquisition Tribunal (LAT) and trimming the jurisdiction of the judicial courts to hear compulsory jurisdiction disputes in the first instance¹¹¹.

This Land Acquisition Tribunal (the Tribunal) is now poised to adjudicate matters related to all aspects of the eminent domain process and in solving such disputes, look into the decision of the NLC¹¹². It thus relegates the courts and especially the Environment and Land Court (ELC) from hearing these matters in the first instance and somewhat strips the courts of original jurisdiction in

¹¹⁰ [Openknowledge.worldbank.org](https://openknowledge.worldbank.org)

¹¹¹ <https://www.africalegalnetwork.com/kenya/news/key-highlights-land-value-amendment-act-2019/ww.africalegalnetwork.com>

¹¹² www.africalegalnetwork.com

matters compulsory land acquisition. The ELC is then left to exercise only appellate jurisdiction on questions of law only¹¹³. Article 159 of the Constitution recognizes the Tribunals established in Kenya as part of the judicial system and no less.

Compulsory land acquisition has also been curtailed by numerous Court Orders emanating from Courts stopping projects due to individual persons' interests without regard to the needs of the general public. This Act, therefore, introduced Section 133C such that where the NLC has taken the land, no court can issue an order stopping any development of the land if public funds have already been committed to its development. "In essence, this provision bars the Court from granting stay orders, including interim injunctions, once a government project is underway".

Doshi M states that "the basis of all the above amendments under the Land Value (Amendment) Act, 2019 is primarily to the effect that the State is making deliberate efforts to ensure that future projects, especially infrastructure and by extension PPP Projects, do not incur additional unanticipated costs due to delays occasioned by court stay orders as has been the case in the past. The discussions culminating into the tabling of the Land Value (Amendment) Bill was initially originated due to the Standard Gauge Railway project where the Courts stalled construction due to disputes relating to the compulsory land acquisition process, leading to substantial additional costs that almost crippled the project implementation"¹¹⁴.

Doshi M further states that "another gain by the Act is that it introduces a fixed/set criterion for assessing the value of compulsorily acquired land within certain regions by making an informed and carefully calculated assumption of the value of land generally in specific areas/regions within the country. The Act then provides that valuation of all private land for purposes of acquisition and compensation shall be based on the Land Value Index. This index is developed by the NLC to provide an analytical representation of the spatial distribution of land values in a given geographical jurisdiction at a specific time/period. Although this Index is yet to be gazette, it is already under development by the national government in conjunction with the county governments"¹¹⁵.

The modalities of the workings of this system will become more evident with time as the Act is being implemented as it is relatively new legislation having been enacted in the year 2019.

¹¹³ <https://www.africalegalnetwork.com/kenya/news/key-highlights-land-value-amendment-act-2019/>

¹¹⁴ Doshi M, Abdallah A, 'Key highlights of the land value (amendment) act 2019' 2019.

¹¹⁵ Doshi M, Abdallah A, 'Key highlights of the land value (amendment) act 2019' 2019.

This study has therefore identified gaps that still require buttressing under the Land Value (Amendment) Act, 2019. Sections 11 and 12 of the Land Value (Amendment) Act 2019 are amendments to Sections 124 and 125(1) of the LA both of which dispense with the requirement of paying compensation before taking possession of the land by the State.

Section 11 amends Section 124(3) by deleting the words “after paying full compensation” such that it reads, “.. The Commission may ~~after paying full compensation~~ (deletion mine), take possession of the land by entering, personally or by agents, on the land and positing on the land a notice in the prescribed form that possession has been taken off the land, and shall serve a copy of the notice on the occupier.” Section 12 amends Section 125(1) by deleting the words “before taking possession” such that it reads, “..The Commission shall, as soon as is practicable, ~~before taking possession~~ (deletion mine) pay full and just compensation to all persons interested in the land”. The effect of these amendments is that the State is now able to take possession of the land even before paying full compensation¹¹⁶.

Section 12, therefore, needs to be further buttressed to provide for an additional section to Section 125 that reads that “Actions challenging the payment of compensation shall only be filed in accordance to Section 133C (2) of this Act (to the Tribunal) and shall be subject to the limitations provided for under Section 133D(2) (Appeals to the Court only on matters of Law). This will bring more clarity to this provision and give it the rigidity it needs to withstand judicial challenges¹¹⁷.

Therefore, “effecting this amendment and the strict application of Section 12 (or Section 125) of the Land Value (Amendment) Act, 2019 to allow for the State’s taking possession of compulsorily acquired land prior to paying full compensation, will increase the successful delivery of PPP projects in Kenya”. In addition, effecting a further amendment to Section 133(C)(1) of the Land Value Amendment Act, 2019¹¹⁸ (such that the Land Acquisition Tribunal shall only hear appeals from the NLC on matters of the amount of compensation payable and person to be paid and not the process of acquisition), will increase the successful delivery of PPP projects in Kenya.

This author concludes that the Legal framework for compulsory land acquisition in Kenya has come a long way since the repeal of the Land Acquisition Act to the latest development is the

¹¹⁶ The Land Value Index (Amendment) Bill, 2018, <<https://dokeza.mzalendo.com/bills/land-value-index-laws-amendment-bill-2018/>>.

¹¹⁷ The Land Value Index (Amendment) Bill, 2018, <<https://dokeza.mzalendo.com/bills/land-value-index-laws-amendment-bill-2018/>>.

¹¹⁸ Kanze D, ‘President Kenyatta assents to land value amendment bill, irrigation bills’ *State House*, 2019 <http://www.president.go.ke/2019/08/02/president-kenyatta-assents-to-land-value-amendment-irrigation-bills/>.

enactment of the Land Value (Amendment) Act, 2019. Indeed, the country has made enormous strides in the right direction. However, there still exist gaps in the framework that ought to be filled if Kenya is to create an environment where infrastructure projects, and in particular, PPP projects, can thrive.

CHAPTER FOUR.

THE IMPACT OF THE CURRENT COMPULSORY ACQUISITION PROCESS ON PPP INFRASTRUCTURE PROJECTS IN KENYA.

4.0. INTRODUCTION.

The role of the Compulsory Land Acquisition process in PPP infrastructure projects in Kenya cannot be downplayed. Indeed, despite its challenges and lacunae, it is a vital process in the handing over of the Right of Way in PPP Infrastructure projects and will normally be a condition precedent to any Project Agreement being executed by a potential investor.

4.1. THE COMPULSORY LAND ACQUISITION PROCESS IN KENYA.

The process of Compulsory Acquisition is outlined in the LA, 2012, from Sections 107 to 133¹¹⁹. The same is very detailed, and therefore for purposes of this study, we shall rely on the summarised process as outlined by the Late Hon. Justice J.L Onguto in the case of Patrick Musimba vs The NLC and & others (Petition No. 613 of 2014) as follows;

“Section 107 of the LA empowers the NLC with the mandate over compulsory acquisition and to thereby commence the land acquisition process on behalf of the acquiring entity¹²⁰. The purpose for which the land is acquired ought to be a strictly vetted purpose with public interest or in the as required by the Constitution at Article 40”¹²¹.

Justice Onguto stresses that “the reason for the acquisition should not be merely argumentative but directly public purpose. In my view, Justice Onguto stresses this particular point to avoid instances such that the land is acquired under the guise of public use only to be transferred to a private party on the argument that the private party’s contribution to the economy will be of a greater public good as has happened in some jurisdictions¹²². The NLC, therefore, needs to beyond reproach in this instance through objective engagements with the acquiring entity and originating detailed reports on justification of its need for the land”¹²³.

The emphasis on this process of compulsory land acquisition is to be placed on Justice Onguto’s remarks that “...an analysis of Sections 107 through 110 of the LA reveals that the land owner’s

¹¹⁹ --<Krc.co.ke>.

part to play in this process is little to none at all, but of a distant bystander with substantial interest in the land”.¹²⁴

This study highlights the realization that, with time, the landowner has been elevated to a point where they can overcome the overriding interests vested upon the State concerning public projects and obtain injunctive orders barring projects leading to huge losses occasioned to the taxpayer whereas this ought not be the case.

It is common that an investor’s due diligence would normally begin from his/her research on the regulatory framework, the investor is most likely to be wary of whether a very important aspect such as right of way or access to site is guaranteed or not and whether it would then be viable to consider an investment destination such as Kenya. In a time like this when the Government of Kenya is looking to push the agenda for PPPs, this author argues for efficient eminent domain processes as a way of inspiring investor confidence through ensuring that all stumbling blocks and inefficiencies are eliminated.

This author will, therefore, argue in Sections 3.2 and 3.3 that the numerous gaps and flaws have weakened the compulsory acquisition process and the power of the State leading to PPP investor flight to more favourable jurisdictions. As a result, the tax-paying public eventually lose a significant amount of PPP projects to other jurisdictions that are more PPP investor-friendly and whose legislative framework is more favourable for implementation of PPPs as well as losing funds in unnecessary litigation and delays, which funds could have been put to better use or even in other projects.

4.2. THE IMPACT OF THE COMPULSORY ACQUISITION PROCESS ON PPP INFRASTRUCTURE PROJECTS.

4.2.1. Cost Impact- Monetary Impact on PPP Projects.

Since Independence, a significant and steady rise in foreign investments has been seen in Kenya especially in the PPP infrastructure sector which has seen the development of crucial infrastructure that has opened up some areas of the country and boosted the economy immensely. This, coupled with Kenya’s enactment of its PPP framework through the PPP Act, (Act No. 15 of 2013), has spurred interest in the infrastructure sector where private investors come into the jurisdiction to partner with the Government for the provision of efficient public services¹²⁵.

¹²⁴ *Patrick Musimba v The NLC and & others*, 2014.

¹²⁵ Act No. 15 of 2013.

For many of these investors looking to invest in infrastructure and specifically PPP projects, however, issues relating to the land acquisition have cast a dark shadow on the successful prospects of actualising their intentions.

Land being a key part of any infrastructure project, investors would ordinarily ensure that they transfer the land risk to the Party who is best placed to handle it, the Government. They would also ordinarily insist on having the right of way as a Condition Precedent. Therefore, the key is the land acquisition undertaking, that most investors and lenders are willing to walk away where the same is not guaranteed for project bankability. They will therefore seek other favourable jurisdictions to invest in or make the project more expensive than it ought to be due to the risks posed by the land acquisition debacle. In PPP projects, this affects the numbers that determine project viability and profitability.

However, over and above the already complex and bureaucratic processes associated with land acquisition, disagreements between the State, the Courts, the Counties and Individual landowners over the compulsory acquisition of land for PPP project development and cancellation of titles over irregular ownership are now becoming more common leading to investors shying away from Kenya as a choice jurisdiction for PPP investments.

The importance of land rights to the bankability of a project cannot be over-stated especially because a good number of the associated risks subsist throughout the life of the project. Interviews with Officers of one of the major players in the PPP Sector in Infrastructure, the Kenya National Highways Authority, (the Authority) reveal that most of their projects have often faced hurdles due to skyrocketing costs of land acquisition and delays due to court injunctions stemming from land acquisition disputes as can be seen in Table 1 below¹²⁶.

The figures on table 1 are calculated based on the Valuation Roll created by the NLC during the process of compulsory acquisition. The Valuation Roll is compounded and a total cost sum encompassing both the monetary valuation of the parcels of land acquired and additional costs and disbursements utilized during the acquisition are factored in. Thereafter, the Kenya National Highways Authority incorporates the costs of litigation involved in any parcel(s) together with any judgments ordered, both decretal sums and costs as well as advocates fees, and factors this

¹²⁶ KeNHA Highway Planning and Design Directorate, 2019.

into the total sum. The figures are therefore a true account of all-inclusive compulsory acquisition costs in the road projects listed.

Table 1: Sample List of Projects undertaken by KeNHA and their approximate compulsory acquisition costs.

| ROAD | Amount Awarded |
|---|-----------------------|
| Siaya-Ruamba Road | 12,346,615.00 |
| Eldoret-Webuye(Kilimani Quarry) | 12,822,095.00 |
| Bachuma Gte - Maji ya Chumvi Project | 14,115,127.00 |
| Homabay- Mbita | 15,672,565.00 |
| Ndori-Ngiya Road | 20,237,255.00 |
| Webuye-Malaba-(Malakisi Bridge) | 21,134,477.00 |
| Chiakariga-Meru Road | 22,085,794.00 |
| Suna-Kehancha | 28,361,545.00 |
| Kainuk Bridge & Approach Roads | 34,869,358.00 |
| Oljoro-Orok-Dundori-Olkalou | 36,814,774.00 |
| Thua-Bridge | 49,494,319.00 |
| Kisumu Boys -Mamboleo Junction | 49,846,380.00 |
| Kirigiti-Riuki-Ngewa Road | 50,754,811.00 |
| Rumuruti-Maralal | 60,494,089.00 |
| Dundori-Olkalou-Njabini | 65,420,745.00 |
| Siaya-Ruamba Road 2 | 70,835,413.40 |
| Mariakani-Kilifi | 71,564,480.00 |
| Ena-Ishiara- Chiakariga-Meru Road | 82,313,971.00 |
| Londiani Fortenana Muhoroni | 90,128,215.00 |
| Chepterit-Baraton- | 94,316,650.00 |
| Emali- Oloitoktok Road | 114,803,684.00 |
| Kericho-Interchange | 163,997,795.00 |
| Kisumu-Kakamega Road | 195,580,615.00 |
| Merile- Marsabit | 273,524,100.00 |
| Ahero-Interchange | 276,312,590.00 |
| Kisumu-Kisian-Nyamasaria Road | 289,236,892.00 |
| Enjinja-Bumala (C30) | 295,895,575.00 |
| Sotik – Ndanai | 297,098,883.50 |
| Lokichar - Lodwar- Nadapal/Nakodok (Lokichoggio - Lodwar Section) | 359,796,780.00 |
| Lanet-Njoro-Mau summit Inter-Change. | 361,493,995.00 |
| Kangema-Gacharage | 373,833,787.50 |
| Chebilat-Chabera | 429,766,548.00 |
| Nuno-Modogashe | 454,886,956.49 |
| Kisumu-Kakamega-Kitale Road | 522,358,595.00 |
| Kibwezi-Mutomo | 781,540,484.05 |
| Mwatate-Taveta | 833,628,238.00 |

| | |
|--------------------------------------|-------------------|
| Kisumu-Nothern bypass | 949,251,855.00 |
| Arusha- Namanga | 1,033,807,050.00 |
| Port Riezt-Moi International Airport | 2,490,868,466.00 |
| Magongo & Oil Refinery (A109L) | 2,612,732,546.47 |
| Athi River - Machakos Turnoff | 3,015,317,012.60 |
| Nairobi - Thika Highway (A2) | 3,903,899,130.00 |
| Eldoret Bypass | 4,118,859,066.94 |
| Nairobi Southern Bypass | 4,389,401,647.00 |
| Mombasa-Mariakani | 4,721,908,900.75 |
| MPARD | 5,784,909,298.91 |
| James Gichuru-Rironi*** | 10,082,738,979.46 |

***Source: KeNHA Highway Planning and Design Directorate.**

While the above are not all PPP projects, the Respondents confirmed that the acquisition process affects PPP projects handled by the organization in a similar fashion and in worse ways in a PPP situation. It is clear therefore that the above inefficiencies apply across the board, both for general infrastructure projects and for PPP projects as is the case for the James Gichuru- Rironi Road Project*** which is a constituent section of the larger PPP Nairobi-Nakuru-Mau Summit road project that is set to be a toll road¹²⁷.

A key point to note from the Authority's reports is that a major part of the compulsory acquisition costs often does not even relate on the cost of the actual land, but the cost of the legal hurdles and delays that are occasioned by the courts and the weak legal framework that governs land acquisition. The Authority expends a significant budget annually to a tune of approximately 30 to 50 million on average as its budget on legal fees alone, a significant number of its cases being related to compulsory land acquisition. This is besides the amounts it risks paying as judgments and damages for orders granted against it and in favour of aggrieved landowners under the compulsory acquisition processes under its various projects all over the country¹²⁸.

The Authority also indicates that there are several PPP projects still yet to be rolled out for which the NLC has been engaged and compilation of the compulsory land acquisition costs is still being undertaken through Resettlement Action Plans (RAPs) exercises.

As can be seen, this is an indication of the cost implications of the land acquisition process gaps and why these gaps must be plugged if the PPP infrastructure sector is to flourish. A detailed discussion on how gaps in the compulsory acquisition process can give rise to significant cost implications is outlined in Section 4.1 of this study using the SGR as a case study, even though it is not strictly a PPP as will be explained therein.

¹²⁷ KeNHA Highway Planning and Design Directorate, 2019.

¹²⁸ KeNHA Highway Planning and Design Directorate, 2019.

4.2.2. Delays Impact on Infrastructure Projects (Loss of Days);

Delays in land acquisition processes could be caused by various issues, including the nature of the process itself. However, major delays in Kenya's PPP projects or infrastructure projects generally, is attributable to court injunctions and stay orders.

For private investors looking to engage in PPP projects that are not roads for example, (i.e. Setting up a power plant) the other significant hurdle they will encounter is the requirement for Land Control Board (LCB) consent¹²⁹. The legal framework does not allow for foreign ownership of land but a lease for 99 years. It also requires the Land Control Board to exercise oversight over land transactions to ensure that agricultural land is not overly fragmented leading to food insecurity and it, therefore, makes it mandatory for parties to obtain Land Control Board consent for transactions involving the sale, transfer, lease, charge and subdivision etc. of agricultural land, which includes land, not within a municipality or township. Given the land-intensive nature of most infrastructure projects, most project sites are located in partly rural areas, invariably making the land agricultural¹³⁰.

The Land Control Boards are charged with ascertaining that certain conditions are met before granting their consent. The situation becomes even more complicated with foreigners or foreign entities looking to get into PPPs. Although the public body is required to facilitate this process, this phenomenon sometimes poses a challenge hence creating delays. More importantly, a Land Control Board is required to refuse consent where the application is by a non-citizen or a private company having any non-citizen shareholder. This poses a significant challenge considering the capital-intensive nature of infrastructure projects, which in most instances calls for some level of foreign investment.

The recently enacted Energy Act, 2019, requires national and county governments to facilitate the acquisition of land for energy infrastructure development, for example, including PPPs¹³¹. One of the suggestions floated is that the government could facilitate such land acquisition by exempting all infrastructure projects, from the provisions of the Land Control Act¹³². If granted, this would go a long way towards easing the set-up of projects in Kenya¹³³.

¹²⁹ Land Control Act, Laws of Kenya.

¹³⁰ Mwachane I, 'Land control board are the dull but key organs we must harness' Daily Nation, 31 August 2018 <https://www.nation.co.ke/oped/opinion/Land-control-boards-are-the-dull-but-key-organs/440808-4738164-cn5vhf/index.html> on 31 August, 2018.

¹³¹ The Energy Act, 2019 Laws of Kenya.

¹³² Prof. Ojienda T, *Conveyancing*, 2008.

¹³³ Rodl & Partner, Highlights of Kenya's energy act' *Rodl & Partner*, 2019

<<https://www.roedl.com/insights/erneuerbare-energien/2019-05/highlights-of-kenyas-energy-act-2019>>.

A detailed discussion on how gaps in the compulsory acquisition process can give rise to significant loss of days and delays is outlined in Section 4.2 of this study using the SGR as a case study.

4.2.3. Investor Appetite Loss due to Inefficient Legal Framework for Land Acquisition;

Investor appetite for PPP infrastructure projects is dependent on many factors. However, the land being a major constituent factor in infrastructure projects, it then means ordinarily that right of way is an issue that concerns many private investors looking to invest in Kenya. In Kenya, the PPP sector has attracted many investors, some through Privately Initiated Investment Proposals (PIIP) which goes to show that investors, by themselves, are identifying investment opportunities which they would like to pursue even without the Government having to prompt any bids. However, investors value the stability of various factors in a potential investment destination, key among them, the guaranteed availability of the resources required for the project they wish to undertake. In PPP projects, one primary resource is land.

The PPP Act, 2013 under Section 5 of the Third Schedule provides that one of the minimum contractual obligations contained in a Project Agreement as being, the confirmation of the ownership of the project assets, the obligations of parties related to the handover and receipt of the project site. This means that without this confirmation of the availability of the site, the PPP infrastructure project is likely to stall. Additionally, there have been calls for Government not to undertake any projects before the landowners have been fully compensated.¹³⁴¹³⁵

It is, therefore, not surprising that investors are wary when it comes to the land acquisition related aspects of a project.

This issue becomes even more convoluted where the land to be acquired is community land such as in the case of Mombasa County's challenge over the SGR Project Phase 1, as will be seen in Chapter 4. The Nairobi County Government similarly filed a suit against Embakasi residents stating that "the land was Nairobi County Land held in trust for Nairobi residents"¹³⁶. The same issue was replicated in the Mariakani area of Kilifi County. Inadequate or inconsistent community consultation can be fatal to a PPP project, especially where community members hold a subjective and inflated estimation of their entitlement and which the Government wishes to acquire.

¹³⁴ Oruko I, 'Pay landowners before projects , urge governors' 4 October, 2018
<https://www.nation.co.ke/counties/Pay-landowners-before-projects/1107872-4790640-v9jy4w/index.html> on 4 October, 2018.

¹³⁵ Mwakio P, 'Compensate us before mwache dam starts, locals plead with state' 12 February 2020
<https://www.standardmedia.co.ke/article/2001360206/compensate-us-before-mwache-dam-starts-locals-plead-with-state> on 12 February, 2020.

¹³⁶ Prof. Ojienda T, *Conveyancing*, 2008.

It is common for disputes to occur especially where the community is concerned over what it considers to be insufficient compensation for land, the effects of projects on the community and the perception of minimal and not directly beneficial benefits from infrastructure projects. This phenomenon is referred to as the “social license” in Kenya and prevailed in the case of the Kinangop Wind Power project which collapsed based on land and community disputes, thereby underpinning the importance of a proper and continuous community management plan especially for land acquisition.

The Government and PPP investors must, therefore, consult effectively with communities in order to recognise legitimate land rights, assess the impact of the project on local land rights and livelihoods and establish conditions for a productive relationship with the community before proceeding to compulsory acquire the land in question.

The weak land acquisition legal framework problem creates an element of risk which only a few investors are willing to take. The risk appetite for an investor must be high for them to consider infrastructure development in Kenya that involves land acquisition. However, there are still those who are willing to invest in PPP projects that involve land acquisition- but at a cost. This cost manifests itself in project negotiations, and investors become willing to accept the risks, albeit upon the Government issuing them with safety nets and security which would guarantee their projects.

Other than insisting on the Right of Way being a Condition Precedent entitling them to walk-away rights, they further seek instruments such as Sovereign Government Guarantee (SG), Letters of Support from the Government (Through the National Treasury) and sometimes even physical infrastructure as security for the project failing due to right of way failures such as Ports, Harbours and Airports. This situation is prevalent with Chinese private partners.

In conclusion, land acquisition challenges could turn out to be a discouraging factor for investors in the infrastructure development arena in Kenya.

Positive strides, such as through the Land Value (Amendment) Act, are already addressing the concerns enumerated above, but there remains much more to be pursued.

Although land-related project challenges are not peculiar to Kenya, the situation in Kenya is exacerbated by the prevalence of a legislative framework that largely allows the understatement of the importance of the State’s position and capacity to invoke overriding rights over individual rights to enhance utilitarianism in infrastructure projects.

This inevitably means that the Government, as well as private project investors, will have to dedicate significant time and resources to examine and put in place adequate risk mitigation measures to deal with a series of land-related hurdles hampering the delivery of a project site.

The next section looks into the gaps in this legislative framework and examines the proposed measures of remedying these gaps.

CHAPTER FIVE.

A CASE STUDY OF THE KENYA STANDARD GAUGE RAILWAY (SGR) PROJECT AS A HYBRID PPP INFRASTRUCTURE PROJECT IN KENYA.

5.0.INTRODUCTION.

The Standard Gauge Railway Project is one of the iconic infrastructure projects to ever be rolled out in Kenya. Its implementation brought major learning lessons, legislative changes, ideological changes and policy changes.

Fig. 1: The Standard Gauge Railway Project Route.



Source:www.krc.go.ke

However, although commonly misconstrued, the Standard Gauge Railway Project was/is not a Public-Private Partnership Project mainly because it deviates from the major components of a strict PPP Project. It instead falls under a new category of contracts that have come to be termed as Government-to-Government Procurement Contracts. This is where the law allows projects financed through concessional loans and grants from foreign governments (in this case, the Chinese Government through China Export-Import Bank (EXIM)) to be exempt from Kenyan procurement law. Terms and conditions imposed by such concessional loans and grants were therefore not subject to the procurement law and were, therefore, strictly speaking, not done under a PPP arrangement although it was largely implemented as a PPP Project. The National Treasury has termed it a 'Hybrid PPP'.

This project has, therefore, been selected for the case study due to its financial and social impact magnitude and the lessons that it provides on matters of compulsory land acquisition, there having been no project bigger than the SGR since Independence. The Project shall only be studied through

Phase 1 being Mombasa to Nairobi and partly incorporating Phase 2 (Nairobi to Suswa in Rift Valley). Phase 3 and the Uganda arm of the SGR is excluded.

5.1. EXAMINING THE COST IMPLICATION OF COMPULSORY LAND ACQUISITION ON THE SGR PROJECT AS A SAMPLE PPP PROJECT AS A RESULT OF AN INEFFICIENT LEGAL FRAMEWORK.

The Standard Gauge Railway Project Phase 1 was launched in October 2013 at an initial total cost of Ksh. 327 billion. The Project scope entailed the construction of a standard gauge rail network with a route length of 472 kilometres and a total track length of 609 kilometres. Also, the scope encompassed construction of intermediate freight exchange and passenger stations at Mariakani, Miasenyi, Voi, Mtito Andei, Kibwezi, Emali and Athi River towns within Kenya. The Contractor was also to build twenty-three (23) crossing (passing) stations and eight (8) underpasses for animals within Tsavo National Park¹³⁷.

The cost was to be financed through a loan from EXIM Bank of China of Kshs. 294.3billion (90% of the cost of the project) which was to be a part concessional loan and part commercial loan. The Government of Kenya's (GoK) contribution was at 10% being the sum of Kshs. 32.7 billion (10% of the cost of the project) and which the GoK was to finance by Railway Development Fund anchored on a levy of 1.5% on the cost of overseas imports¹³⁸.

Being a road construction that was to span over 472 kilometers through both urban, semi-urban and rural areas and which was not to utilise the existing railway corridor, intense compulsory land acquisition was required to enable the project be implemented successfully. The land acquisition was also heightened by the need to achieve greater train speeds and hauling capacity which could only be achieved through avoidance of hills and steep areas and ensuring the train path had the least curves as possible.

The Cost of Land acquisition for the project was initially pegged at Kshs. 15 billion financed from Railway Development Fund at the time when feasibility studies were done and project documents executed¹³⁹. At this juncture, already the cost of land acquisition had gobbled up almost half of the GoK's contribution to the project. By the time the SGR Project was coming to a close, the cost

¹³⁷ --<http://krc.co.ke/?page_id=1562>.

of land acquisition had accumulated to Kshs. Sh33 billion or 10 per cent of the project cost of Sh327 billion, basically the entire of GoK's contribution to the Project!)¹⁴⁰

Of importance to note is that the general acreage of land to be acquired did not actually change in increasing fashion. The acreage remained largely the same. However, by the end of the project, the compulsory land acquisition costs had doubled. What changed, was actually the cost as a result of the inefficient land acquisition processes that led to exaggerated land costs, delays occasioned by legal suits in Court, delays occasioned by injunctions and liquidated damages for delays occasioned by the Government's side which under the contract, was responsible for provision of the right of way. At this time, the average land costs within the Counties had skyrocketed and landowners challenged the NLC valuations in Court on the basis of private valuations carried out by the landowners themselves through private valuers and based on exaggerated market rates.

It is also important to note that the above figure of Kshs. 33 billion encompasses only strictly the cost of acquisition compensation and have not taken into account the litigation costs surrounding the land acquisition process. This includes legal fees, surveyors and valuation fees and court filing and attendance fees for various State Officers which amounts could even raise the figures further.

5.2. EXAMINING THE DELAYS THROUGH LOSS OF DAYS DUE TO INEFFICIENT LEGAL FRAMEWORK FOR LAND ACQUISITION PROCESS FOR THE SGR PROJECT.

When the SGR Project kicked off, the initial budget for land acquisition having been pegged at Kshs. 15 Million. However, immediately after the launch, land acquisition problems began to rear their heads leading to the project losing a significant amount of time, almost one (1) year due to land acquisition challenges, taking its completion date and launch by H.E. the President, Uhuru Kenyatta on 31st May 2017.

Delays similarly stalled phase 2 of the SGR due to land acquisition challenges including court matters filed by Ngong' residents and was delayed by a total of 365 days (1 year).¹⁴¹ The delays in Phase 1 (Mombasa- Nairobi) were caused by a myriad of legal suits filed by County governments such as Mombasa County Government and Nairobi County Government as well as local communities. Individuals also filed injunctions and legal suits and obtained orders

¹⁴⁰ Otuki N, 'Compensation for SGR land exceeds budget by 2.8bn' Business Daily Africa, 14 November, 2016 <https://www.businessdailyafrica.com/economy/Compensation-for-SGR-land-exceeds-budget-by-Sh2-8bn/3946234-3452294-22gh77/index.html> on 14 November, 2016.

¹⁴¹ Gitonga A, 'Naivasha SGR stretch completed' Standard Digital News, 19 September, 2019 <https://www.standardmedia.co.ke/business/article/2001342459/naivasha-sgr-stretch-completed>.

temporarily blocking the project's advancement due to a weak legal framework for compulsory acquisition that allowed for such Orders to be issued by the Courts.

Wang Y states that “in Mombasa County, the land compensation disputes, backed by political power and judicial decisions, posed significant obstacles to the SGR railway construction¹⁴². According to the Daily Nation, “the China Road and Bridge Corporation (CRBC) accused the County Government of Mombasa County of interfering in the acquisition of land and the construction process based on pending resettlement and compensation issues”¹⁴³.

Wang Y further expounds in his report that “Mr. Muhammad Swazuri, the then Chairman of NLC, blamed the problems on the project compensation on local political leaders, an issue that incited resentment from the people of the Coastal region of Kenya. The Governor of Mombasa County, Hon. Ali Hassan Joho, argued that resettlement and compensation issues ought to be viewed from a historical context, and that the community interest that flows from the custodial nature of community land ought to be included in the evaluation by the NLC and Kenya Railways Corporation (KRC). This of course would have driven the cost further up”¹⁴⁴.

Wang Y adds that “historical political and social grievances within the Kenyan Coast stems from long-standing land ownership disputes between the traditional local community members of coastal origin and who live on the land without title deeds, and migrants from other parts of Kenya who were issued title deeds by the government and settled on the most productive coastal land in the Coast without considering incumbents' traditional forms of land ownership, ie. Community ownership arising from trust set-ups. These grievances are commonly referred to in Kenya as *historical injustices*”.

He goes on to add that “the disputes that delayed the project did not only originate from the Coastal region. Similarly, in Embakasi, the Nairobi County government, through the then Governor Evans Kidero, obtained a court order to prevent land owners on the construction site from claiming compensation, claiming that the owner of the land was the County Government and not individuals. While the residents had settled on it illegally, no one had objected to the illegal

¹⁴² Wang Y, Clientelism at work? A case study of Kenyan Standard Gauge Railway project, Taylor & Francis Online, 11 November 2019 <<https://doi.org/10.1080/20780389.2019.1678026>>.

¹⁴³ Wang Y, ‘African politics meets Chinese engineers: The Chinese-built Standard Gauge Railway project in Kenya and East Africa’ China Africa Research Initiative, Paper 13, 2017. <<https://static1.squarespace.com/static/5652847de4b033f56d2bdc29/t/594d739f3e00bed37482d4fe/1498248096443/SGR+v4.pdf>>.

¹⁴⁴ Wang Y, ‘African Politics Meets Chinese Engineers’.

settlements for decades which brought about arguments of Project Affected Persons (PAP's) who the Constitution of Kenya now recognizes".¹⁴⁵

Nevertheless, ultimately, the Government realised it was losing too many days trying to acquire the entire right of way before commencing works and decided to commence the construction starting with the available parcels even as the court battles raged on over other parcels. The Kenya Railways Corporation (KRC) being the responsible public agency, made a request for acquisition to NLC through its parent ministry, the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (MOTIHUD&PW). Thereafter, the KRC provided the list of the properties to be affected and provided maps with which they forwarded the documents to NLC to verify the parcels and the ownership, the NLC being the custodian of ownership records in Kenya¹⁴⁶.

The NLC sent surveyors to the ground to verify the parcels and the beacons and upon finalizing this process, published a Notices of Intention to Acquire the land in the Kenyan gazette and also in the dailies informing the people that land is going to be acquired. Immediately the affected members of the public were seized of the gazettelements, numerous court suits were again filed by individuals based on compensation. NLC acquired more than 4,616 hectares of land, within the stretch from Mombasa to Nairobi. The legal framework governing compulsory acquisition in Kenya did little to assist the project in moving forward. This is because landowners had high expectations of getting unjustified and exaggerated sums for their land and promptly so.

This is what the State hopes to fix using the Land Value Index. Where the NLC gave a valuation less than what the landowners wanted, they would rush to Court and block the project from continuing. This again, is what the State hopes to achieve by the Land Value (Amendment) Act's introduction of the Land Acquisition Tribunal, which will avoid Court Orders for stay and injunctions that normally stall projects.

The other big challenge leading to numerous days of delays on the SGR project was occasioned by the challenging of NLC's valuation figures with most of the landowners holding the misconstrued belief that they could engage private valuers to give them favourable land valuations obtained privately (sometimes through bribes) and use these exaggerated valuations to challenge NLC's valuations in court.

These back-and-forth processes involving the Courts created delays and loss of days in the implementation of the SGR Project. The NLC would be unable to disburse any funds to the rightful

¹⁴⁵ Wang Y, 'African Politics Meets Chinese Engineers'.

owners of land where the compensation had been challenged. This in turn, created additional delays in the disbursement of funds from the Railways Development Fund (RDF) occasioned by basic issues such as the NLC or agency appointed to disburse the funds not having the correct names of the parties to be compensated or their beneficiaries¹⁴⁷.

The above issues of the concern over the right owners of certain parcels of land and their beneficiaries is slowly being solved through the digitization of land records which has meant that manipulating and falsifying records has become difficult due to system restrictions and limited access reserved to only those with the requisite clearance levels. This has made it more difficult to perpetrate fraud as it was when the land records were purely hard-copy documents stored in open shelves within the land registries.

However, the recommendations that this study proposes will streamline the land acquisition processes undertaken by the NLC as well as the Court processes handled by judicial officers through limiting the open discretion of judicial officers and instead tying them to a direct and predictable process and determination in accordance with the law and in favour of the development agenda of the State. The recommendations will also create investor confidence by making it difficult for monetary claims which are capable of assessment and closure to stall expensive and time-bound projects aimed at a greater public good.

5.3. EXAMINING THE IMPACT ON PPP INVESTOR CONFIDENCE DUE TO INEFFICIENT LEGAL FRAMEWORK FOR LAND ACQUISITION PROCESS FOR THE SGR PROJECT.

The compulsory land acquisition problems that faced the SGR project still continue to haunt other non-PPP infrastructure projects as we have seen in Chapter 4 hereinbefore. Investors have been keeping a close eye on the investment environment in Kenya and potential future PPP investors easily access media information on the problems that previous investors have faced in Kenya due to the compulsory acquisition framework. These problems, in equal measure, also face PPP projects currently being implemented in Kenya today and especially linear projects such as road construction which requires large tracts of land such as the Nairobi-Nakuru-Mau Summit Road Project which is a 175-kilometer toll road to be built at a cost of Kshs. 180 Billion with a compulsory land acquisition bill of around 6.4 billion. The LAPSSET project (Lamu-Garissa-Isiolo Road Project) as well as the Mombasa Expressway and the (Jomo Kenyatta International Airport (JKIA) Expressway are also geared to expend significant portions of their budgets to land acquisition costs as the near future will reveal.

¹⁴⁷ Wang Y, 'African Politics Meets Chinese Engineers'.

All these projects have communicated a desire by PPP investors to get more comfort for investment in the Kenya PPP sector. These signals have been portrayed in the form of additional security that investors need to ensure their investment will not go to waste due to compulsory acquisition issues and other challenges. Investors look for additional comfort in the form of;

- (i) **Letters of Support** - Letters of Support (LoS) in Kenya are issued by the Cabinet Secretary for National Treasury in consultation with the Debt Management Office and the PPP Committee and are intended to insulate a private investor and lenders from certain elements of risks (in this case, we are only focusing on land acquisition/right of way risks).¹⁴⁸ The LoS cushions the private investors where upon entering into a contract with a government entity, such entity is unable to perform its obligations under the contract due to the occurrence of certain risk such as providing that, upon the happening of an event that triggers the Government's obligations thereunder, it will "purchase" the underlying project, often at a prescribed or pre-determined value. The Letter of Support is couched in language that ensures the instrument is not construed to be a guarantee¹⁴⁹. The reason LoS's are important to this study is that they are now considered as a must-have nowadays by investors to cover right of way risks. This is drawn from what investors deduced from the challenges that were faced by the SGR project especially in land acquisition. Getting LoS's therefore becomes a hurdle often prone to delays because the National Treasury undertakes a rigorous process before granting one.
- (ii) **Sovereign Guarantees from the State** - Sovereign guarantees are guarantees given by host governments to assure project investors and lenders that the government will take certain actions or refrain from taking certain actions that would affect the project.¹⁵⁰ The right of way risk is normally allocated to the government entity hence, the private investors nowadays seek a sovereign guarantee from the government guaranteeing that it will provide right of way or sometimes even a blanket sovereign guarantee of all project risks.¹⁵¹ Investors, since the SGR experience, now insist on this guarantee even though it is difficult to obtain in Kenya given that it requires approval by the National Assembly. As a result, it adds to unnecessary delays in PPP projects roll out and hampers their efficient delivery¹⁵².

¹⁴⁸ Kontos M, Situma D, Karanja R, 'Kenya Letter of Support' *Walker Kontos Online*, 2017 <<http://www.walkerkontos.com/uploads/news/id24/Kenya%20-%20Letter%20of%20Support%20-20November%202017.pdf>>.

¹⁴⁹ Kontos M *et al* 'Kenya Letter of Support'.

¹⁵⁰ FindLawAttorneys Writers, 'Sovereign guarantees in project finance' *Find Law*, 2017 <<https://corporate.findlaw.com/business-operations/sovereign-guarantees-in-project-finance.html>>.

¹⁵¹ World Bank Group, 'Sovereign Guarantees' National Standard, 2018 <<https://www.nationalstandardfinance.com/news/sovereign-guarantees/>>.

¹⁵² World Bank Group, 'Sovereign Guarantees'.

- (iii) Back-Up Fund(s)** - A Back-Up Fund, is a fund created for purposes of assuring an investor that should the project be delayed due to some circumstance (in this case, lack of right of way), then the private Party can draw funds from the backup fund to meet its obligations to the lenders. After the compulsory land acquisition challenges that faced the SGR, these backup fund requests from investors have become commonplace. This is more so in financed PPPs where the lenders have subjected the investors to timelines in the financing agreement, and they expect their payments at a certain time regardless of whether the project has kicked off at the scheduled time or not. The Investor could ordinarily find themselves in a quagmire if the project has been delayed due to right of way and yet the lender's payments have fallen due. In the absence of the investor's ability to influence the financial structure of the transaction, the investor may want a government to give it assurances to access monies from some fund (e.g. Road Maintenance Levy Fund in the case of a toll road) and so on. Obtaining these approvals involve complex contractual arrangements which may take much time leading to delays in PPP projects taking off. An example of this is that investors in PPP roads construction petitioned the government to establish a Public Roads Toll Fund (through amendments to the Public Roads Toll Act) to serve as a security fund for their investments¹⁵³.
- (iv) Project Viability** – Due to the compulsory land acquisition issues experienced with the SGR, investors have become more rigid when it comes to vetting the viability of PPP projects in Kenya. This is because a weak compulsory land acquisition legal framework creates expensive land acquisition processes (court suits, delays and so on). It, therefore, means that whereas a project could ordinarily have been done for Kshs. 100 Million, it could shoot upwards to 150 Million simply after factoring land acquisition costs and delays. For an investor looking at profit margins, they may simply classify the project as no longer viable due to the cost implications that come with it. This issue deters many investors, therefore, from investing in PPPs in Kenya and hampers the development of the sector as a whole.
- (v) Project Period/Length** – Following from the above aspect of viability, the compulsory acquisition could also affect the duration/timelines of a project, thus making it less attractive. Investors who have drawn experiences from the SGR project will attest to this aspect. Where a PPP road project, for example, is to be completed in 5 years and tolled for 20 years would be attractive to an investor, a similar project completed in eight years (due to compulsory acquisition challenges) and tolled for a further 20 years could be unattractive to the same investor. Timelines are key in PPP projects because investors want to complete a project,

¹⁵³ --<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PublicRoadsTollAct_Cap407_.pdf>.

make their profit margins and move to the next. The longevity of projects due to compulsory acquisition issues could curtail the development of PPPs in Kenya in this manner. Project timelines have therefore become an issue of great debate between investors and government ever since the SGR project and this issue is likely to be debated even more in future PPP projects.

What the above goes to demonstrate is that compulsory land acquisition is a debacle that has had a huge impact on investor confidence and investor appetite for PPP projects in Kenya. This is the reason for which this study is pursued, to address the weaknesses in the legal framework of PPPs and to unlock PPPs for the flourishing of the Kenyan economy.

5.4. COMPARATIVE JURISDICTIONS – STRONG AND WEAK EMINENT DOMAIN JURISDICTIONS TO LEARN FROM.

Kenya can be said to be an average eminent domain jurisdiction. The Kenyan legal framework for eminent domain for PPPs contains legal provisions that give the government overriding interests over all land. However, while the legal framework gives these powers, it takes away those powers with another hand through other provisions that water down the absolute nature of the government's compulsory acquisition powers. This creates legal ambiguity which opens up the realm of compulsory acquisition to discretion of judicial officers and to the interpretation of individuals and lawyers appearing before them.

The calibre of rights that water down these powers are such as; the perceived and inherent right to approach Courts/invoke the jurisdiction of the Courts in the first instance in a compulsory acquisition dispute; the right of an individual to obtain injunctive orders over a public benefit billion-dollar infrastructure project that is vital and instrumental to economic benefit for the public as a whole; and; the right of the individuals and the Courts to blatantly disregard the cost factor that just a single day of delay could mean to the Government should a project outsourced to a Contractor be halted/injuncted, and provisions for charging of liquidated damages subsist within the contract. This comparative study seeks to demonstrate the legislative gains made by jurisdictions considered as strong eminent domain jurisdictions and at the same time contrasting with the challenges being faced by jurisdictions considered as weak eminent domain jurisdictions.

5.4.1. Strong Eminent Domain Jurisdictions- (India).

Mahapatra and Dhahanjay gives us a background on the Indian Constitution and states that “the Indian Constitution originally provided for the right to property under Articles 19 and 31. Article 19 guaranteed to all citizens the right to 'acquire, hold and dispose of property'. Article 31 provided that ‘No person shall be deprived of his property save by authority of law.’ It also provided that

compensation would be paid to a person whose property had been 'taken possession of or acquired' for public purposes. In addition, both the state government as well as the union (federal) government were empowered to enact laws for the 'acquisition or requisition of property' (Schedule VII, Entry 42, List III). It is this provision that has been interpreted as being the source of the state's 'eminent domain' powers"- Mahapatra and Dhahanjay.

They further state that "the provisions relating to the right to property were changed a number of times. The 44th amendment act of 1978 deleted the right to property from the list of Fundamental Rights.¹⁵⁴ A new article, Article 300-A, was added to the constitution to provide, 'No person shall be deprived of his property save by authority of law.'¹⁵⁵ Thus, if a legislature makes a law depriving a person of his property, it will not be unconstitutional. The aggrieved person shall have no right to move the court under Article 32. Thus, the right to property is no longer a fundamental right, though it is still a constitutional right. If the government appears to have acted unfairly, the action can be challenged in a court of law by citizens".¹⁵⁶

5.4.2. Strong Eminent Domain Jurisdictions- China.

Shitong Q states that "...The United States has put great emphasis on private property rights. He argues that this is not the case in China and that in fact, in China, the concept of land vesting in individuals absolutely, is non-existent.¹⁵⁷ China boasts of a double land ownership mechanism owing to the fact that it was prior a Communist nation: By double, we mean, land in the urban setting is owned by the Government whereas land in the rural areas is owned by the villagers although there is still some concept of oversight being exercised by the Government even in rural land control.¹⁵⁸ The Constitution of China allows the obtaining and use of rural land by citizens through fixed-term contracts for certain periods, ranging from thirty (30) years and this is restricted as to use, such as, agricultural use only.¹⁵⁹ In a way, it can be said that the Constitution prevents the private transfer of land in rural settings virtually and legally an impossibility".¹⁶⁰

5.4.3. Strong Eminent Domain Jurisdictions- Tanzania.

In neighbouring Tanzania, all land is vested in the government to hold on behalf of its citizens. Foreign companies can obtain a right of occupancy from the government, provided that

¹⁵⁴ The Constitution (Amendment)". *Indiacode.nic.in*. Retrieved 2016-08-08.

¹⁵⁵ Article 300A- The Constitution of India.

¹⁵⁶ Mahapatra D, 'Should right to property return?' *The Times Of India*, 28 February 2009.

¹⁵⁷ Shitong Q, *The politics of Chinese land: Partial reform, vested Interests and small property*, 2016, 75.

¹⁵⁸ Shitong Q, *The politics of Chinese land*, 2016, 75-77.

¹⁵⁹ Shitong Q, *The evolution of relational property rights: A case of Chinese rural land reform*, 2015, 119.

¹⁶⁰ Shitong Q, *The evolution of relational property rights*, 2015, 120.

they have a Certificate of Incentives issued by the Tanzania Investment Centre. Uganda, on the other hand, has similar land ownership structures to those of Kenya but the Uganda Investment Authority has a one-stop shop for investors, which includes an embedded land registry function which assists in the verification of land ownership. Perhaps then, there are some practices which Kenya can borrow from its East African counterparts, in order to reduce the current land acquisition difficulties faced by investors in the PPP infrastructure sector.

5.4.4. Weak Eminent Domain Jurisdictions- (Japan).

According to Homa T, "...many countries recognise the eminent domain to a much lesser extent than the English-speaking world or do not recognise it at all. Japan, for instance, has very weak eminent domain powers, as evidenced by the high-profile opposition to the expansion of Narita International Airport, and the disproportionately large amounts of financial inducement given to residents on sites slated for redevelopment in return for their agreement to leave, one well-known recent case being that of Roppongi Hills".¹⁶¹

Putting in place appropriate and accessible grievance mechanisms: Although perhaps not necessary where only a few landowners are affected, where projects involve large-scale resettlement, international practice and some national laws encourage the creation and use of local, targeted and accessible bodies to deal with grievances, at least as a first step. This reduces the problem of complaints being immediately funnelled into court systems, which often have a reputation for being slow, backlogged and expensive. Properly constituted, a grievance mechanism would involve representation from amongst the affected community, some government representation from institutions not directly involved in the acquisition and other independent experts. This needs to be accompanied by clear communication channels and proactive measures to improve the legal literacy of affected people.¹⁶²

5.4.5. Weak Eminent Domain Jurisdictions- (The U.S).

According to Mills J, "The Fifth Amendment of the United States of America gives a constitutional power unto the government to be able to appropriate privately owned land and utilize it for a public purpose with the sole condition that just compensation is duly paid to the land owner".¹⁶³

¹⁶¹ Homma T, *Six Strata: Roppongi hills redefined*, London: Heibonsha (ISBN 4582277594) 2006.

¹⁶² Mills J, 'Compulsory acquisition of land and compensation in infrastructure projects', *World Bank*, 2006.

¹⁶³ U.S. Const. amend. V.

CHAPTER SIX.

FINDINGS, RECOMMENDATIONS AND CONCLUSION.

6.0.INTRODUCTION.

The previous detailed chapters and the case study of the Standard Gauge Railway Project, together with other infrastructure projects, have elucidated the numerous gaps in the legal framework that this study initially set out to examine. These gaps need to be plugged if PPP infrastructure projects are to thrive in Kenya, and if investors are to gain the requisite confidence to invest in this economy.

6.1. FINDINGS OF THE STUDY.

The findings from the study as presented are key to the onward and further development of the field of compulsory acquisition by Government for not only infrastructure projects nor only PPP projects, but to an extent, even normal fully-funded government projects.

This study set out to investigate the importance of the role played by the PPP project land acquisition process in the PPP project roll-out phase. The key finding in this regard was that the compulsory land acquisition process plays a key role in the PPP project roll out phase because without the land, the Project cannot take off. It is also true that without the land, no lender would be willing to prop a potential private party for project because a project's bankability is dependent on the availability of the key resources, top among them, land.

The second question that the study sought to decipher was on the impact of the current law regarding land acquisition for PPP projects in terms of financial cost, timelines and overall successful delivery of PPP projects in Kenya. This study revealed that the costs were quite significant and colossal sums which gobbled up a significant bulk of project funds leading to reduction on the project scope owing to diversion of project funds towards claims and disputes. The costs also came with time delays and many contracts and projects experience variations and extensions of time leading to delayed service delivery to the people.

This study also set out to identify gaps in the current legal framework for the land acquisition process for PPPs that hinder the achieving of a robust, adequate and sufficient legal framework for land acquisition and compensation that supports PPP projects in Kenya. It is a finding of this study that the various gaps discussed herein have a significant impact on the PPP projects. These gaps need to be eradicated through the recommendations presented hereinafter by this study to ensure a streamlined efficient compulsory acquisition process is achieved.

A key question investigated by this study as well, was as regards the regulatory changes that can be put in place to streamline the legal process of compulsory land acquisition for PPP projects in Kenya to reduce delays and enhance efficiency in PPP project delivery and investor confidence. The study revealed that the regulatory changes on the Constitution can be done through statute laws that deliver the intended results in so far as Articles 40(3), Articles 43, 60, 61 and 66 are concerned. The changes proposed to the LA, the LRA and the Land Value (Amendment) Act will go a long way in boosting PPP projects uptake in Kenya.

The additional findings of this study were that there are strong compulsory acquisition jurisdictions and weak ones. The most efficient jurisdictions are those that have amplified the State's supremacy rights in all land, public and private to the extent allowable under compulsory acquisition. Further on in this chapter, the need to balance the interests of the State and Landowners shall be briefly addressed.

6.2. CONCLUSION.

These conclusions guide us to the recommendations that are made by this study. The recommendations, if implemented, will ensure that Kenya makes significant and bold step towards an economic environment that champions development through Public-Private Partnerships that spur the country's growth and prosperity. The detailed recommendations are discussed under 6.3 below.

6.3. RECOMMENDATIONS.

6.3.1. A harmonized balance between the Superior Acquiring Rights of the State and the Interests and rights of the Individual land owners.

Having compared various countries on the importance of having a strong and weak eminent domain legal framework, we shall now look at the proposed ideal solution that this study presents which is largely drawn from the United States of America which has dealt with the issue of eminent domain extensively resulting in numerous and detailed judicial engagements culminating into decisions such as the decision in *Kelo vs City of New London* where the concept of 'Public Purpose' was dealt with at great depth.

Looking at the concept of eminent domain through the eyes of the USA, many scholars have dwelt on the discourse on what constitutes 'public use' and what constitutes 'just compensation'.

However, for Kenya, the interest that this study seeks to invoke is one that sets in motion an attempt at a balance between the interests and rights of the land owners and the Government.

Wendell E, in 'Beyond Kelo' states that "...Despite the fact that 'just compensation' has now come to be understood to mean market value that is fair and acceptable in the USA, there is no hard cast definition of public interest or public use that has been so accepted. The powers of the Government in eminent domain has been subject of discussion for ages dating back to the 1800s, until Kelo introduced new arguments and a new angle to the arguments surrounding the topic. This of course was a response to the position taken by the Supreme Court when it ruled that a city or government was capable of legally compulsorily acquiring private land for another private party in the name of 'commercial development' with a disclaimer that the commercial venture must demonstrate a clear benefit to members of the public. Not many people understand but, the holding in Kelo, according to Wendell, has been similar to the Court's prior decisions in this field."¹⁶⁴ The Court determines the element of public use according to its discretion, and usually on a case by case basis".¹⁶⁵

What Kenya can borrow from the USA to drive towards this balance, is that, in the U.S. "the Courts leave it to the Legislature to develop clearer directions on this particular issue". However, Ellickson argues that "The fact that there is no clear cut parameter for public use, the judicial officers have dangerously become fact finders rather than implementors of a well-known and widely accepted rule of thumb".¹⁶⁶ In Ohio, *Norwood, Ohio v. Horney*¹⁶⁷ the Court held that "an the public use conundrum cannot be merely satisfied on the basis that there is a commercial benefit and a financial benefit accruing. It has to be more than that. In fact, the Courts should not pledge allegiance or support to any legislative decision to the effect that there shall be commercial benefit to the public arising from a certain project...the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to a community." But in New York, *Goldstein v. N.Y. State Urban Dev. Corp.*¹⁶⁸, the Court ruled that "Only the legislature can define the parameters for eminent domain and not the Courts." The above two determinations have equally remained applicable and binding with the Supreme Court taking a general view that States can determine their own scope of public use by themselves.¹⁶⁹

¹⁶⁴ Ellickson p.904.

¹⁶⁵ Ellickson p.904.

¹⁶⁶ Wendell E, *Beyond Kelo*, 2006, 902.

¹⁶⁷ Ellickson p.920.

¹⁶⁸ 110 Ohio St. 3d 353.

¹⁶⁹ 921 N.E.2d 164 (2009).

It is this study's finding and recommendation therefore that efficient land acquisition processes are facilitated by having national laws that vest ownership of land in the government from the moment an expropriation decree is issued, leaving compensation as a post-taking obligation of government only but the rights of the individual land owners must always be taken into account and the protection of these rights must run parallel to, and be visible throughout the process of compulsory land acquisition.

This approach, which can be found in several countries including the USA, and which ought to be expressly adopted in Kenyan law, is to not require the full provision of compensation as a prerequisite for the government taking possession of the land in question but to include, at least, a showing by the acquiring entity that the funds for compensation have been set aside before government decision-makers approve the taking and that the rights of the individual land owners are going to be guaranteed such as having an escrow account whereby the land owners are part of the signatories to the accounts.

To prevent the possibility of development being stalled indefinitely by affected people challenging the compensation in court, several laws (as well as the World Bank's Involuntary Resettlement Policy) provide for the possibility of establishing an escrow account for the payment of compensation when disputes have been finally adjudicated.

6.3.2. Proposed Balancing of State and Land Owner's Interests.

The proposal by Ellickson rings true in that he states that "...several jurisdictions, among them the United States and China, have left the crucial aspect of balancing the needs and interests of stakeholders in compulsory land acquisition, to the respective subsidiary governments such as states and counties. The deliberate avoidance of defining public use by the Supreme Court of the USA has left a gap which Judges have taken advantage of to fill this gap with their own personal views and beliefs on a case by case basis. It has been recommended by Ilya Somin that the USA would be in a better position if it pressured its Supreme Court to stipulate a clear and predictable definition of public use that leaves little room for maneuvering".¹⁷⁰ He further states that "...Although this may sound like a proposal to strengthen the power of the State on the use of eminent domain, it is not, but in fact it is a way to ensure that eminent domain, in its genuinely deserved and justified circumstances, must be decided on the basis of deliberations by democratically elected local officials rather than by judicial officers"¹⁷¹.

¹⁷⁰ Ellickson p.918-19.

¹⁷¹ Wendell E, *Beyond Kelo*,

2006.<http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2226&context=faculty_scholarship>.

6.3.3. Effecting the Amendments to the Legal Framework.

Lastly, this study recommends the implementation of policy and legal changes through the addressing of gaps in the provisions relating to Compulsory Land Acquisition contained in the LA 2012, the LRA 2012, The Land Value (Amendment) Act¹⁷², 2019 and the Public-Private Partnerships Act, 2013 which will increase the successful delivery of PPP projects in Kenya. This includes implementing the amendments proposed in this study to Section 107 of the LA 2012 to expressly provide for the non-challengeable nature of the right of the State to compulsorily acquire private land once identified (and only leaving room for deliberation on the compensation payable) in line with Article 40 (3) of the Constitution of Kenya, will increase the successful delivery of PPP projects in Kenya.

Additionally, this study recommends an amendment to expressly provide for the impeachability of Section 28 (e) of the LRA, 2012 on overriding interests of the State with regards to compulsory land acquisition and calls for a strict application of the Land Value Amendment Act, 2019 (which, at Section 12, amended Section 125 of the LA, 2012) to allow for the State's taking possession of compulsorily acquired land before paying full compensation. This study further recommends the deterrence of compulsory acquisition disputes from the Courts for their reference to the tribunals through an amendment to Section 133(C)(1) of the Land Value Amendment Act, 2019¹⁷³ (such that the Land Acquisition Tribunal shall only hear appeals from the NLC on matters of the amount of compensation payable and person to be paid and not the process of acquisition).

With these recommendations implemented, Kenya will have made a significant and bold step towards an economic environment that champions development through Public-Private Partnerships that spur the country's growth and prosperity.

God bless Kenya.

¹⁷² Act No. 15 of 2019, Laws of Kenya.

¹⁷³ Dena K, 'President Kenyatta assents to land value amendment irrigation bills and other acts' State House Website, 2019 <<http://www.president.go.ke/2019/08/02/president-kenyatta-assents-to-land-value-amendment-irrigation-bills/>>.

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APPENDIX A: TURN IT IN ORIGINALITY REPORT.

APPENDIX B: ETHICS REVIEW CLEARANCE.