

Application of the Doctrine of Eminent Domain in Kenya: Towards A Rights-Based Approach to Compensation

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Abstract

Compulsory acquisition of land in Kenya can be traced from the colonial era where colonial masters compulsorily acquired African land in Kenya without compensating the owners of the land. It should, however, be contrasted with expropriation, which is a form of compulsory acquisition in which the landowner does not receive a just and fair compensation. This paper will argue that in the colonial era, African land in Kenya was expropriated by the colonial regime without provision for a just and fair compensation. The current study sought to trace this history of compulsory acquisition of land in Kenya, the legal regimes governing compulsory acquisition of land, the current modalities on compensation and their shortcomings, and to critically analyse the legal regimes with a view to recommending alternative modalities for compensation once the state acquires private land for public purpose. The study finds that the parameters for compensation as provided for in the legal regime governing compulsory acquisition of land and subsequent compensation lack consistency and reliability, based on a critical analysis of cases where such compensation has been awarded in the past. It therefore recommends the use of rights-based approaches to compensation based on the United Nations Development Program's Human Rights Based Approaches.

Keywords: Eminent Domain; Police power; Public Purpose; Property Rights; Rights-based Approaches; Compensation

1.0 Introduction

Eminent domain is the power of the state to acquire private property for public purposes, subject to prompt compensation.¹ The Food and Agriculture Organisation Land Tenure Studies² define

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eminent domain as the ‘power of the government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit the society’.³⁴ It is one of the two methods that the state uses to regulate the use of private land. The other method is police power. Okoth Ogendo⁵ notes that eminent domain is derived from the feudal notion that as the sovereign, the state holds the radical title to land and therefore reserves the power to force involuntary transfer of land from private ownership to public ownership. Land so acquired is used for such public purposes as construction of roads, health centres, mining activities, schools and other public amenities. This paper analyses the legal framework governing eminent domain in Kenya, Kenyan court decisions regarding the determination of compensation, and then present a rights-based approach to compensation for land.

2.0 Legal and Institutional Framework Governing Compulsory Acquisition of Land in Kenya

In the colonial era, African land was expropriated from Africans without any form of compensation. This is contrasted with compulsory acquisition in the sense that expropriation is not followed by the payment of a just and fair compensation to the landowner. Expropriation is, however, a variant of compulsory acquisition. The only differentiator is the presence or absence of a just and fair compensation. The Indian Land Acquisition Act⁶ was applied in acquiring African land because there was no legislation in place to legalize the acquisition. Other land regimes included the Independent Constitution, the Land Acquisition Act of 1968, the Constitution of Kenya of 2010 and the Land Act⁷ which repealed the Land Acquisition of 1968.

¹Migai J.M, (2006). "Land, The Environment and Courts in Kenya: Background Paper for The Environment and Land Law Reports". A DFID/KLR Partnership.

²Food and Agriculture Organization of the United Nations (2008), “Compulsory Acquisition of Land and Compensation”, Rome Available at <http://www.fao.org/docrep/011/i0506e/i0506e00.htm> last accessed on Friday, August 9, 2019

³ *Ibid*

⁴ This is the constitutional power of the state to make, adopt or enforce laws for the protection of the health, safety, security, or public order of its citizens. Under this power, the state or its assigns can regulate the use of private land by use of enactments. The National Environmental Management Authority in Kenya regulates the use of land in this case.

⁵Ogendo, H.W.O. (1978). *The Political Economy of Land Law: An Essay in the Legal Organization of Underdevelopment in Kenya, 1895-1974. PhD Dissertation, Yale 1978* . University of Nairobi School of Law. See also Wanjala, S. (2000). *Essays on Land Law: The Reform Debate in Kenya*. Faculty of Law, University of Nairobi.

⁶The Indian Land Acquisition Act of 1894.

⁷Act No. 6 of 2012.

This section analyses the provisions of these laws with regard to compulsory acquisition of land and subsequent determination of the quantum of compensation.

2.1 Pre-Independence: From Expropriation to Compulsory Acquisition of Land

The British established the East African Protectorate in 1895 but the Kenya Colony was established in the year 1920. The enactment of the Foreign Jurisdiction Act in England in 1890 which was subsequently amended in 1913 brought to an end a dilemma regarding how the power of the Crown was to be exercised in a Protectorate. Such exercise of power, as Okoth Ogendo aptly puts it, was to be through Orders-in-Council.⁸ Sorrenson writes that in British Constitutional Theory, a Protectorate is regarded as a sovereign state and therefore the power vested in the Crown is merely at par with that provided under the Articles of Agreement.⁹ This is at variance with what happens in a Colony because in a Colony, the Colony is considered to be part of the dominions of the Crown and thus the power of the Crown in such a Colony is unlimited and all land therein belongs to the Crown.¹⁰ By Kenya being a Protectorate, the British Colonial Officers were denied the power to alienate land for developmental projects for example the construction of the Kenya-Uganda Railway line.

Since the Crown wanted to expropriate African land in Kenya, there was need to change the status from that of a Protectorate to a Colony so that it would acquire unlimited power to land. In 1896, when the British Foreign Office was considering whether or not to expropriate land in Kenya, the Colonial Office was asked for an advisory opinion on Crown rights to land in case of a Protectorate. The advice given by the Colonial Office was that acquisition of partial sovereignty in a Protectorate did not in any way carry with it any title to the soil. Following this advice, the Protectorate Authorities were constrained against implementing their imperial

⁸Ogendo, H.W.O. (1991). *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*. Nairobi: African Center For Technology Studies (ACTS) Press.

⁹ Articles of Agreement were often drawn up in advance of a lease or a conveyance. They set out the conditions that were to be included. They duplicate in many respects the resulting deeds. They also worked as contracts, for example for proposed sales of timber, wood, coal, stone, or other produce. They could also be drawn up as preliminary agreements for marriage settlements, enclosures, exchanges, arbitrations - indeed anything that required agreement between two or more parties. Definition copied verbatim from University of Nottingham, "Manuscripts and Special Collections", Available at <
<https://www.nottingham.ac.uk/manuscriptsandspecialcollections/researchguidance/deedsindepth/associated/articles.aspx>> Accessed on July 2, 2021

¹⁰Sorrenson, M. (1968). *The Origins of European Settlement in Kenya*. Nairobi: OUP, John Flint, "Wider Background to Partition and Colonial occupation", In "History of East Africa, Edited by Roland Oliver and Gervase Mathew, Oxford: Clarendon.

projects for example the construction of the Kenya-Uganda Railway line to link the Coast to the Interior.

This therefore meant that the Protectorate Authorities were now constrained against implementing their imperial projects. In 1897, through the East African Order-in-Council, the British Government extended to the protectorate the 1894 Indian Land Acquisition Act, the instrument that was to be used to compulsorily acquire land for construction of the railway and also for the acquisition of the Ten-Mile Zone on each side of the railway line. The Ten-Mile zone was to be used for construction of British Government buildings and for other public purposes.¹¹ The object of the Act was to amend the law for the acquisition of land for public purposes and for the companies. This Act changed the colonial practice of land acquisition from expropriation to compulsory acquisition because it provided for compensation.

The Act also provided that an additional 13% of the market value of the land shall be added onto the compensatory award to cater for the compulsory nature of the acquisition and the duration that the Collector has taken since publishing the notification of intention to acquire the land and the time of the actual acquisition. This therefore meant that the longer the Collector took before he actually took possession of the land, the more the compensatory award he would pay the landowner.

It is notable that the law which the Colonial Regime adopted to legalize its acquisition of African land in Kenya had actually provided for a compensatory mechanism yet the Colonial Office proceeded to acquire the land without any compensation awarded thereafter. Instead, the colonial regime opted to expropriate the land from Africans. African land in Kenya was alienated and the landowners were left to be squatters in their own land.¹²

There was however a problem with the Indian Land Acquisition Act of 1894 with regard to resale of the already acquired land. There was no provision authorizing the Colonial Office to resell any African land that it had acquired from Africans. The East African (Acquisition of Lands) Order-In-Council was therefore enacted in the year 1898. The Order-in-Council provided that land acquired under the Indian Land Acquisition Act was to vest in the Commissioner of the

¹¹Mweseli, Tim, "The Centrality of Land in Kenya: Historical Background and Legal Perspective", in Wanjala, S. (2000). *Essays on Land Law: The Reform Debate in Kenya*. Faculty of Law, University of Nairobi.

¹²Ogendo, H.W.O. (1991). *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*. African Center For Technology Studies (ACTS) Press.

Colony in trust for the crown and he had the permission to resell it as he desired. This Order-in-Council was soon followed in by the East African Land Regulations of 1898 which were meant to facilitate the acquisition of land for settlers to settle and farm in.

The import of the regulations was to distinguish between land falling within the Sultan's Dominion of Zanzibar, which also formed part of the Protectorate, and land forming the rest of the Protectorate.¹³ As for the land falling within the Sultan's Dominion of Zanzibar, the Commissioner could sell the freehold title to land which was not the private property of the Sultan. However, for the rest of the land on the Protectorate, the Commissioner could only offer 21-year certificates which were later converted to 99-year certificates.¹⁴ However, these certificates were merely licenses to occupy the land and not title documents serving as proof of ownership. This is because the position of Crown's right to land in the rest of the protectorate was still unresolved.

In 1899, the Law Officers of the Crown were asked by the Foreign Office for an advisory opinion on this impasse because the Crown wanted to acquire the rest of the land falling outside the railway line zone. This advisory opinion, which was favourable to the Crown, had to be legalised through an Order-in-Council. In 1901, the East African (Lands) Order-in-Council was therefore promulgated. The effect of the 1901 Order-in-Council, which was repealed by the 1915 Crown Lands Ordinance, was stated by Barth C.J in *Isaka Wainaina WA Gathoro & Kamau WA Gathumo v Murito Wa Indangara & AG*¹⁵ as "...to take away all native rights in land reserved for their occupation, vest all land in the Crown and leave natives as tenants at the will of the Crown in the land actually occupied..."¹⁶

Africans in Kenya were therefore to remain squatters in their own land and also as 'tenants of the Crown'. Kenya became a Colony in the year 1920 and this was effected through the Kenya (Annexation) Order in Council, 1920. The effect of becoming a Colony, under a Governor, was that the White Highlands were to belong to the settlers while Africans continued working for the

¹³Smokin C. Wanjala, "Land Ownership and Use in Kenya: Past Present and Future", in Wanjala, S. (2000). *Essays on Land Law: The Reform Debate in Kenya*. Faculty of Law, University of Nairobi.

¹⁴Ibid, pp. 7.

¹⁵[1922-1923] 9 KLR 102.

¹⁶The brief facts of the case were that the applicants were entitled to possession of a piece of land in Kabete, which they alleged that it had been the subject of a trespass by one Murito Wa Indangara and another and that the claim rested on derivation of title by purchase from the Ndorobo before colonization and eventual settlement of European settlers.

settlers in lands that previously belonged to them and which were compulsorily acquired without compensation.

This trend of acquiring land without compensating the owners was slightly changed by the Mining Ordinance¹⁷, section 15(3)(2) of which stated that compensation was to be paid only for disturbance and for buildings or crops destroyed or damaged. The principles of compensation under this Act did not, however, contemplate open market value of land as would have been the case where settler land was involved in the acquisition. This was clear discrimination in compensation models. After being evicted from their land, the evictees would be resettled on other native people's land. The Chief Native Commissioner was quoted stating:

“...We have got to wound their susceptibility and in some cases I am afraid we may even have to violate some of their most cherished and possibly even sacred traditions if we have to move natives from land on which according to their own customary law they have an inalienable land to live, and settle them on land in which the owner has, under that same customary law an indisputable right to eject them...”¹⁸.

More instruments were promulgated to further facilitate acquisition of land for development projects under the British Colonial rule in Kenya. One such instrument is the Land Control (Amendment) Ordinance¹⁹ which created a Land Control Board. The object of the Ordinance was to provide advice to the Governor regarding the suitability of land required for settlement and also to recommend the price at which such land was to be acquired.²⁰ Sections 11-12 and 15-16 of the Ordinance stated that the Governor was required to also consult with the Highlands Board on the most appropriate sale of any piece of land. If a negotiation failed, the Governor was to instruct the Commissioner to acquire the land compulsorily if it was not being put to any constructive use. Such land was however supposed to be acquired after a full inquiry and assessment by a Board and presided over by a judicial officer. Most importantly, compensation of the land was payable at the full market value. Suitable adjustments on the market value were

¹⁷No. 6 of 1912.

¹⁸Mr. A. De V. Wade at P. 511 of the LegCo Debates, 1932.

¹⁹The Land Control (Amendment) Ordinance Of 1948.

²⁰Ogendo, H.W.O. (1978). *The Political Economy of Land Law: An Essay in the Legal Organization of Underdevelopment in Kenya, 1895-1974. A Dissertation Submitted in Partial Fulfilment of the Requirements for the Degree of Doctor of the Science of Law at the Law School, Yale 1978*. University of Nairobi School of Law.

also supposed to be made to reflect any disturbance, damage or expenses that may have arisen as a result of the acquisition.²¹

The effect of these pre-independence land laws was to facilitate the acquisition of land by Colonial Officers compulsorily and without any due compensation. Africans in Kenya were therefore made squatters in their own land and as Okoth Ogendo notes, the landowners were never consulted before any acquisition of their land was done.²²

2.2 The Independence Constitution

Kenya's Independence Constitution was promulgated in the year 1963, the year when the country became independent. The Independence Constitution recognized the negotiated agreements arrived at during the Lancaster House Conferences by stating that there was going to be no more expropriation of land owned by private individuals without following a due process and paying adequate compensation.²³

Chapter II of the constitution provided for the Protection of Fundamental Rights and Freedoms of the individual. Section 14(c) in particular provided that every person in Kenya had the right to protection of the privacy of his home and other property and from deprivation of property without compensation. Does this right to protection of the privacy of the person and from deprivation of property also include the payment of a just and fair compensation? The import of compulsory acquisition, as juxtaposed with expropriation, is to adequately compensate the landowner after their land has been acquired. This enables the landowner to procure alternative land elsewhere in place of the land that the state has acquired.

Section 19(2) provided that every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have access to the Supreme Court for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the

²¹Sections 17-28 of the ordinance.

²²*Supra*, note 20 at page 45.

²³The Lancaster House conferences were three meetings (1960, 1962, and 1963) in which Kenya's constitutional framework and independence were negotiated in London. The first conference was under the chairmanship of Secretary of State for the Colonies Iain Macleod in January 1960. There was no agreement, and Macleod issued an interim constitution. The second conference commenced in February 1962, and a framework for self-governance was negotiated. The 1963 conference finalized constitutional arrangements for Kenya's independence as a dominion, marking the end of more than 70 years of colonial rule

amount of any compensation to which he is entitled and for the purpose of obtaining prompt payment of that compensation. The Independence Constitution therefore had the effect of righting the wrongs that the Colonial land laws and policies had done on Kenyan landowners. Although the Independence Constitution did not have a specific chapter on land, this paper takes “property” to also constitute land.

2.3 The 1969 Constitution

. In 1969, sections of the Independence Constitution were amended to produce a slightly revised version of the Independence Constitution. Section 75(1) of the 1969 Constitution stated the conditions that had to be fulfilled before property was compulsorily acquired by the state. These are:²⁴

- a) The taking of possession or acquisition is necessary in interests of defence, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefits,
- b) The necessity is such as to afford reasonable justification for the causing of any hardship that may result to any person having interest in or over property, and
- c) Provision is made by law applicable to that taking possession or acquisition for prompt payment of full compensation.

The 1969 Constitution did not, however, define what was meant by the phrase “full compensation”. Furthermore, it did not state the modalities of awarding such compensation. There was need for legislation which provided for the modalities of awarding compensation in a manner that was detailed. The Land Acquisition Act²⁵ was enacted in 1968 to govern the land acquisition process and also provide for compensation mechanism.

2.4 Compulsory Acquisition of Land under the Land Acquisition Act²⁶

Section 6 of the Act empowered the Minister to direct the Commissioner of Lands to compulsorily acquire land for such purposes as defence, public safety, public order, public morality, public health, town and county planning and development and utilization of any

²⁴Kenyan Constitution, Repealed by the Constitution of Kenya of 2010.

²⁵Cap 295, Laws of Kenya

²⁶Ibid

property in such manner as to promote the public benefit. Section 8 of the Act provided that where land was compulsorily acquired under section 6, full compensation was to be paid to all persons interested in the land.

Section 1(1) of the Schedule to the Act defines market value of land as ‘the market value of the land at the time of the publication of the notice to acquire the land in the Gazette’. Section 2 of the Schedule on the other hand stated the matters to be considered when determining the compensation award for a landowner whose land had been compulsorily acquired by the state. The section below will analyse the parameters for compensation under the Land Acquisition Act.

2.4.1 A Critical Analysis of the Parameters provided for in the Land Acquisition Act

Although the Land Acquisition Act was repealed by the Land Act, it is important to examine the parameters that were provided for under the repealed Act. The argument is that these factors were not adequate and most of them were never applied by courts in determining the amount of compensation as will be seen in a number of cases. These factors are: damage sustained or likely to be sustained by reason of severance of the land in question from the rest of the landowners land, damage sustained or likely to be sustained on other movable or immovable property or on earnings, damage sustained by change of residence and the expenses incidental thereto and damage sustained as a result of diminution of profits.²⁷

2.4.1.1 Market Value of the Land

The Land Acquisition Act provided that the market value of land at the time of the issuance of the notification of intention to compulsorily acquire land by the acquiring authority shall be used to compensate the landowner for their land. The definition of market value was however problematic. Section 1(1) of the Schedule to the Act defined market value as “the market value of the land at the date of publication in the Gazette of the notice of intention to acquire the land”. Courts have however gone ahead to expound on this definition as was the case in *Many vs. The Collector*²⁸ where the court defined market value of land as:

²⁷ See Okoth Ogendo, at Note 20

²⁸[1957] EA 125.

“...the price which a willing vendor might be expected to obtain from a willing purchaser and that a willing purchaser is one who, although he may be a speculator, is not a wild or unreasonable speculator”.

In *Kanini Farm Ltd v Commissioner of Lands*²⁹, the court defined market value as the price which a willing seller might be expected to obtain from a willing purchaser. Here, the court awarded the cost of redesigning the plot layout and for reduced value to the remaining plots to the appellants, costs that should in the circumstances cover any injurious affection to the remaining land. In *John Kariuki Macharia v Commissioner of Lands*³⁰, the court (Nyamweya J) defined market value of land thus;

“... It is the unimproved site value of the suit property and the value of the developments thereon in the open market at the time of gazettelement of the notice of intention to acquire the suit property...”

The problem with basing the compensation award on market value of land has been that compulsory acquisition of land is a forced transaction.³¹ It does not happen at the will of the buyer and the seller and this makes it difficult to determine the market value since the parties do not have equal bargaining power.³² The principles of freedom of contract and *laissez faire* economics where the buyer and the seller are free to determine the price of the commodity in question are therefore not applicable in compulsory acquisition of land. There are a number of reasons as to why it may not be easy to value land according to the ambulatory market rates. These reasons are anchored on the peculiar attributes of land which are succinctly stated by Kameri-Mbote³³ who states that land appreciates in value, it can be passed from generation to generation, it is sacrosanct, the claim of the state to permanent sovereignty over its natural resources is predicated on land, and that placing a market value on such land would mean that the sovereignty of the state keeps changing as does the market value of land, besides demeaning the sovereignty of the state.

²⁹[1984] KLR 120.

³⁰[2014] eKLR.

³¹Wright, Robert R. (1994). *Land Use*. West Publishing Company: Black letter series.

³²Davies, K. (1984). *Law of Compulsory Purchase and Compensation*. London: Butterworth, pp. 6-7.

³³Mbote, Patricia Kameri, (2006)“Righting Wrongs: Continuous Dispossession in Post-Colonial Contexts”. Keynote Speech at the Conference in Land Restitution in South Africa: International Environmental Law Research Centre available at <http://www.ielrc.org/content/c0612.pdf>.

Owing to these attributes, and the fact that courts have had problems in defining market value of land³⁴, it is not in the interest of the landowner that the quantum of compensation be based on market value of land at the time of issuance of the notification of intention to acquire the same by the acquiring authority.

2.4.1.2 Damage by Reason of Severance of the Land in Question

That compulsory acquisition of land is a disruptive exercise to those who are affected by such acquisition hence the likelihood to adversely affect their lives cannot be gainsaid. This is because most projects initiated by the government are disruptive of the activities that the landowner engages themselves in their parcel of land. Remaining on the land after part of it has been acquired would jeopardize their health and well-being. Such projects as mining, construction of dams, construction of highways and industries involve heavy machinery which may even cause pollution of the environment surrounding the acquired land.

The difficulty that arises when land is partially acquired for developmental purposes arose in the case of *The Collector v Abdulla Pirmohamed & Others*³⁵ where the court held that the owners of the land were entitled to full compensation of the land and that the land be valued on the basis that it was located close to a highway. Partial acquisition of the land is problematic because the landowner will no longer use the land as they used it before the acquisition. Therefore, in the interest of justice, the whole of the parcel of land should be acquired and satisfactory measures put in place to ensure that the landowner is reinstated to their pre-acquisition status.

2.4.1.3 Damage on Other Movable or Immovable Property or on Earnings

Though compulsory acquisition of land has its own benefits to the livelihoods of the entire population of people in the context of the projects to be undertaken on the land, it is inimical to the livelihoods of the affected families. One of the problems is that it causes displacement of people from their ancestral land and this includes displacing families from their homes, detaching farmers from their farm land, dissociating business people from their businesses and

³⁵[1958] EA 616.

establishes business empires and also breaking well established relationships in neighbourhoods.³⁶

A group of people may as well be separated from their religious and cultural establishments especially those who have shrines and other places of worship. Besides, some of these dispossessions and displacements are difficult to compensate in monetary terms, yet the landowner is left to suffer the injustice of inadequate compensation.³⁷ The parameter is therefore written on paper but has hardly been applied in determining the quantum of compensation.

In *Maisha Nishike Limited v The Permanent Secretary, Ministry of Lands & 5 others*³⁸, the petitioner's parcel of land was acquired for the construction of the Nairobi Northern By-Pass Road. Valuation for the said parcel of land was conducted by City Valuers Limited to be Kshs. 126,000,000/- but the government reviewed this value downwards to Kshs 82,800,000. According to the respondents, this award was based on the market value of the land and compensation for disturbance which is presumed to be 15% of the total value of the land. According to the petitioners, a certain amount of what they had itemized as the compensable amount was to cater for disturbance, another amount to cater for severance while the other amount would cater for affection and 15% to be paid on the market value of the land as disturbance too.

Although the High Court held that it did not have the jurisdiction to hear and determine a land acquisition case following the establishment of the Land and Environment Court to hear and determine such matters, this was a good opportunity to move away from market value of land and consider other factors like disturbance, diminution of profits and severance of part of land from the main land.

2.4.1.4 Damage sustained by Change of Residence and the Expenses Incidental Thereto

³⁶See for example Jonathan M. Lindsay, (2012). "Compulsory Acquisition of Land in Infrastructure Projects". *PPP Insights. Vol.1, Issue3* <<http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Compulsory%20Acquisition%20of%20Land%20and%20Compensation%20in%20Infrastructure%20Projects.pdf>> Accessed May 16, 2015. Lindsay writes that whenever people are displaced, their cohesion, livelihood patterns and way of life may not be adequately compensated in terms of compensation packages.

³⁷Ibid, at page 2.

³⁸[2013] eKLR.

Compulsory acquisition of land forces landowners to move from their place of residence in search of other places to establish a new residence. The loss occasioned thereon is difficult to compensate.³⁹ Besides, decided cases show that courts are mostly interested in the market value of land at the time of the issuance of the notification of intention to acquire the land in question.⁴⁰

2.4.1.5 Damage sustained as a Result of Diminution of Profits

The publication of the notice to acquire the land places the landowner in a dilemma. Due to this dilemma, he/she is usually not sure whether to continue with the economic activities that were being undertaken on the land or to stop everything and vacate the land. The resultant loss does not just concern profits; it includes psychological and emotional loss too. The latter may not be adequately compensated following this criterion and besides, the cases discussed by this paper do not show a single instance where the courts considered diminution of profits as a factor to consider when making a determination as to the quantum of compensation.

In *John Kariuki Macharia v Commissioner of Lands*⁴¹ the appellant's land measuring 0.1008 ha was compulsorily acquired by the government for the construction of the Nairobi-Thika Superhighway. Three valuation reports conducted by the appellant's registered private valuer in 2010 and 2011 valued the suit land as Kshs 68,962,000/-, Kshs 68,965,000/- and Kshs 54,117,000/- respectively but government valuation report valued the suit land at Kshs 10,870,000/-. The appellant was not satisfied with this value because of a number of reasons. First, his land adjoined the highway hence it should have been valued highly owing to the economic value it had. Secondly, the relocation from his preferred land to an unknown location would lead to losses in his business and thirdly his assets should not be diminished but should rather reinstate him to the financial position he was in before the acquisition of the land. The court calculated the compensable amount to be Kshs 18,223,480/-.

³⁹S. Keith, P. McAuslan, R. Knight, J. Lindsay, P. Munro-Faure and D. Palmer, *Compulsory acquisition of land and compensation*. (FAO Land Tenure Series, 2008). The authors state that for compensation to be adequate, it must be based on the principle of equity and equivalence, that is, the measure of the compensation should be aimed at ensuring that people are neither enriched nor impoverished.

⁴⁰See for example In *Limo v Commissioner of Lands* [1990] 1 KLR where the Court held that although other factors such as nearness of the parcel of the land to a town and a major road are also considered, it would not interfere with the disputed award because other parcels of land previously sold within the area had shown a similar trend in costs as per the market value. The court would also have considered the importance of the project because it was for the construction of a water dam. The court therefore relied on market value instead of considering other factors.

⁴¹[2014] eKLR.

It is clear that this value did not include the developmental value of the suit property including fencing and erecting the structures therein, a 15% addition to the unimproved site value of the suit property, the loss of earnings during the transitional period of the acquisition of the land by the commissioner and cost of alternative accommodation and relocation of the appellant. Further, the compensable amount arrived at by the court did not consider that the appellant was a person with a disability under the Persons With Disabilities Act, Chapter 133 Laws of Kenya and article 54 (1) (c) of the constitution who had the right of access to social amenities and all other things that they may need for their survival. This failure of the court to consider such parameters is evidence that the compensable amount rarely includes the loss of profits by the landowner when their land is acquired by the state.

In conclusion, this paper argues that even if the National Land Commission was to decide to revert back to the parameters provided in the repealed Land Acquisition Act, it would still not be adequate because of the reasons given in this section.

2.5 The National Land Policy of 2009

The National Land Policy in paragraph 46 provided that the established procedures for compulsory acquisition are either abused or not adhered to leading to irregular acquisitions. The Policy then stated that the government would take a number of measures in order to remedy this situation.⁴² Paragraph 232 proposed a National Land Commission which would carry out the functions provided in paragraph 233. With regard to compulsory acquisition of land, paragraph 233(d) provided that the Commission shall exercise the powers of compulsory acquisition and development control on behalf of the State and local authorities or governments. Under the National Land Policy therefore, the National Land Commission has the powers to compulsorily acquire land for public purpose on behalf of the National and County governments.

2.6 Constitution of Kenya 2010

Article 61(1) of the 2010 Constitution states that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. The import of this article is

⁴²Republic of Kenya, 2009. Ministry of Lands: “Sessional paper No. 3 of 2009 on National Land Policy, Government Printer, Nairobi.

that Kenyan people should be involved in dealings involving their land. Article 66(1) stipulates 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. This article appears to contradict article 61(1) because in such regulation, it does not state that the state shall consult its people to whom the land belongs.

Article 40(3), under the Bill of Rights, states 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, or is for a public purpose or in the public interest and is carried out in accordance with the Constitution. Article 40(3)(b) continues by stating that such acquisition must be followed by prompt payment in full and just compensation to the person from whom such land is acquired and that such acquisition also allows any person who has an interest in, or right over, that property a right of access to a court of law.

The National Land Commission is established under article 67 of the Constitution to, among other functions; manage public land on behalf of the national and county governments and to perform any other function prescribed by national legislation.⁴³ Article 68 provides that parliament shall revise, consolidate and rationalize existing land laws. It is with this regard that the Environment and Land Court Act was enacted in 2011 and Land Act enacted in the year 2012.

2.7 The National Land Commission Act⁴⁴

The NLC Act was enacted in 2012 to establish the National Land Commission and for connected purposes⁴⁵. Part II sets out the functions and powers of the NLC. Among other functions and powers, the Commission shall manage public land on behalf of the national and county governments, alienate public land on behalf and with the consent of the national and county government, manage and administer land in accordance with the principles of land policy set out in article 60 of the Constitution and the National Land Policy and to monitor and have oversight responsibilities over land use planning throughout the country.

⁴³Articles 67 (2) (a) and 67 (3) respectively.

⁴⁴No 5 of 2012.

⁴⁵Section 3 of the Act.

Section 6 gives the Commission all the powers necessary for the execution of its mandate under the Constitution, the Act and any other written law. In essence, this section gives the NLC unlimited powers with regard to the administration of land in the country. Whereas the Land Act states thirty-five functions of the NLC, the Land Registration Act states six functions and the Constitution states nine functions, the NLC Act states nine functions to be carried out by the NLC. The 24th of the NLC functions in the Land Act mandates the NLC to make laws to govern the acquisition and just and adequate compensation of land. The 25th function gives the Commission the power to hold inquiry, award and promptly pay a just compensation before taking possession of the acquired land.

The National Land Commission has severally been sued under the new land law regime with regard to compulsory acquisition of land. The latest series of matters pertains to the acquisition of land for the construction of the Standard Gauge Railway (SGR) connecting Mombasa to Nairobi. In *Mwavumbo Group Ranch v National Land Commissions & 6 others*,⁴⁶ for example, the respondents sought a declaration that the refusal by the respondents to compensate the petitioner for the 174,646 hectares (436,615 acres) of its land was a breach of their fundamental right to land as enshrined under article 40(3)(b)(i) of the Constitution of Kenya. The petitioners also wanted the respondents to value the land and pay the required compensation. The respondents had not given the petitioners any reason for their failure to compensate them. The respondents argued that the petitioners had not exhausted the remedies provided for under sections 112 to 120 of the Land Act.⁴⁷ These sections outline the procedure that landowners are supposed to follow to pursue compensation by the National Land Commission after their land has been acquired. The court adopted the reasoning of the respondents and argued that the petitioners should first exhaust these remedies.

In *Hamisi Tsuma Mwero v National Land Commission & 4 others*,⁴⁸ the petitioners argued that their land of approximately 246.86 hectares or 610 acres had been acquired by the National Land Commission for the construction of the Standard gauge Railway yet the owners had not been awarded compensation. They averred that such an acquisition was unconstitutional, fraudulent

⁴⁶ [2017] eKLR

⁴⁷ No. 6 of 2012

⁴⁸ [2017] eKLR

and unlawful for being in breach of Articles 40, 47(1) and (2), 60(1) (a) and (d), 62(2), 67(2) and 201 of the Constitution. The respondents argued that the ownership of the suit land had been disputed and that the petitioners had not proved that the land belonged to them. The court upheld the arguments of the respondents by holding that the petitioners did not present an arguable case.

The NLC has faced serious fraud allegations pertaining to the compensation of land owners whose land was compulsorily acquired during the construction of the Second Phase of the Standard Gauge Railway. In January 2019, the Commission released Kshs. 4 billion to compensate these landowners whose land had been acquired, but they had not received any compensation, a long time after their land had been acquired. Only a few landowners would, however, be compensated as the rest had not provided sufficient documentation to warrant their compensation.⁴⁹

These landowners were, however, not compensated, as the Director of Public Prosecutions stopped the process, citing fraud allegations in the compensation process. Some of the allegations were that the National Land Commission was colluding with land cartels to inflate the market prices of land. This is one of the drawbacks of relying on market value of land as the basis of compensation, as alluded to in the previous sections of this paper. The Ethics and Anti-Corruption Commission would therefore commence investigations into the matter immediately.⁵⁰

On April 17, 2019, Mohamed Swazuri, the Chairman of the National Land Commission, was charged with graft arising from the irregular compensation of landowners for the land acquired during the construction of the Standard Gauge Railway. The Chairman was charged with other officials of the Commission. Other allegations were money laundering, dealing with suspect property, fraudulent acquisition, and unlawful acquisition of public property.⁵¹ The officials were later freed on bail and the case is still in court at the time of writing this paper. Basing

⁴⁹ See, Standard Digital, “Land Commission caves to pressure, release part of SGR compensation”, January 25, 2019, available at <https://www.standardmedia.co.ke/article/2001310698/nlc-releases-sh4b-as-part-of-sgr-land-compensation>, accessed on August 10, 2019.

⁵⁰ See Citizen Digital, “SGR land compensation to be stopped – DPP”, March 29, 2019. Accessed at <https://citizentv.co.ke/news/sgr-land-compensation-to-be-stopped-dpp-229015/> on August 10, 2019

⁵¹ See Capital News, “Swazuri, ex-NLC officials arrested over Sh100mn land compensation fraud”, April 17, 2019, accessed at <https://www.capitalfm.co.ke/news/2019/04/swazuri-ex-nlc-officials-arrested-over-sh100mn-land-compensation-fraud/> on August 19, 2019

compensation on market value is, therefore, prone to abuse as officials are likely to collude with fraudulent landowners to inflate the price of land for selfish gain.

In 2017, the National Land Commission promulgated the Land (Assessment of Just Compensation) Rules, pursuant to section 112(2) of the Land Act.⁵² Rule 3 lists the factors that the Commission would consider in assessing the value of land. These factors are similar to the factors that were listed under the repealed Land Acquisition Act and which this paper has already discussed in previous sections. Under Rule 4, the Commission will determine the compensation award based on the market value of land. This paper has outlined the dangers of valuing land on the basis of market dynamics. Factors that the Commission would not consider while calculating the compensation award include the urgency of acquisition, any disinclination of people interested in the land, and any increase in the market value of the land following the Commission's expression of interest to acquire the land. Failure to consider these factors is likely to make compulsory acquisition of land similar to expropriation.

2.8 The Environment and Land Court Act⁵³

The Act was enacted pursuant to article 162(2)(b) of the Constitution to establish a Superior Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land and to make provision for its jurisdiction, functions and powers, and for connected purposes⁵⁴. Section 4(1) establishes the Environment and Land Court Act which has the status of the High Court of Kenya. Among other functions, sub-section (2)(b) of section 13 provides that the Court shall have jurisdiction to hear disputes relating to compulsory acquisition of land. It is therefore the court that takes over the functions of the Land Acquisition Compensation Tribunal which was established under section 29(2) of the Land Acquisition Act. In *Maisha Nishike Limited v The Permanent Secretary, Ministry of Lands & 5 others*⁵⁵, (discussed earlier in this paper), the matter was initially filed at the High Court. However, noting that that the wrong forum cannot yield the right results, the court was of the opinion that although the Land Acquisition Act had been repealed by the Land Act of 2012 which rendered

⁵² Legal Notice No. 283, available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN283_2017.pdf, accessed on August 10, 2019.

⁵³This Act was enacted by the Kenya parliament in 2011.

⁵⁴Long title of the Act.

⁵⁵[2013] eKLR.

the Tribunal null and void, there was established a National Land Commission and the Environment and Land Court with the jurisdiction of hearing and determining the matter. The court therefore dismissed the petition for want of jurisdiction.

This means that the Land Court has already taken up its jurisdiction to hear matters pertaining to compulsory acquisition of land. Since its establishment, the ELC has heard and determined a number of cases. A case in point is *Isabel Waithira Njoroge v Permanent Secretary Ministry of State for Provincial Administration & Internal Security & 4 others*⁵⁶ where the petitioner's land had been compulsorily acquired for the construction of a Chief's Camp and a Police Station but was not compensated for after the acquisition. The ELC (Gacheru J), noting that monetary compensation must be reasonable and fair taking into consideration the circumstances of each case, awarded the petitioner Kshs 2,000,000/- as compensation and proceeded to hold that the petitioner's right to property as protected by article 40 was violated. Further, the Court held that failure to award compensation to the petitioners was a breach of their right to fair administrative action which is safeguarded by article 47 of the Constitution.

The ELC also heard and determined the case of *Kariuki Macharia v Commissioner of Lands*⁵⁷ where the appellant's land measuring 0.1008 ha was compulsorily acquired by the government for the construction of the Nairobi-Thika Superhighway. He then launched an appeal with the Land Acquisition Compensation Tribunal established under the Land Acquisition Act but before the case could be determined, the said Act was repealed by the Land Act of 2012.

This meant that the Environment and Land Court was now vested with the jurisdiction to hear the case. The Court (Nyamweya J), noted that the process of compulsory acquisition of the land commenced in the year 2008 when the Land Acquisition Act was still in force and therefore the compensation mechanism was the one provided for in the said Act. The judge however failed to state why the said Act would still apply when it had already been repealed by the Land Act. There was also no mention of any transitional provisions as provided for in the 2010 constitution. The introduction of a specialised court to hear matters regarding land and environment makes it

⁵⁶[2014] eKLR.

⁵⁷[2014] eKLR.

possible for such matters to be heard faster and therefore rulings on compensation delivered promptly.

2.9 The Land Act

The Land Act⁵⁸ was enacted pursuant to article 68(1) of the constitution to revise, consolidate and rationalize existing land laws. It repealed two Acts: The Wayleaves Act⁵⁹ and the Land Acquisition Act⁶⁰. Section 2 defines compulsory acquisition as “the power of the State to deprive or acquire any title or other interest in land for a public purpose subject to prompt payment of compensation”. Part Three of the act is dedicated to compulsory acquisition of interests in land and section 107 in particular states that whenever the national or county government is satisfied that it is necessary to acquire some particular land, the respective cabinet secretary or the county executive committee member shall submit a request for the acquisition to the National Land Commission to acquire the land on its behalf.

The upshot of this is that it is only the National Land Commission that is mandated to compulsorily acquire land on behalf of the two governments. Section 111 on the other hand provides that if land is acquired compulsorily under the Act, just compensation shall be paid promptly in full to all persons whose interest in the land have been determined. The Commission is mandated to make rules to regulate the assessment of just compensation.

The parameters that were set out under the Indian Land Acquisition Act and the Kenyan Land Acquisition Act are therefore conspicuously missing under the new Land Act but instead the Act authorizes the National Land Commission to promulgate rules to regulate the assessment of just compensation as per the act. These rules have not yet been promulgated at the time of writing this paper. Furthermore, all disputes regarding land and environment are to be heard by the Land and Environment Court which is a division of the High Court. The enactment of the new Land Act rendered such institutions as Land Acquisition and Compensation Tribunal defunct since they were established under the repealed Land Acquisition Act.

⁵⁸Act No. 6 of 2012.

⁵⁹Cap 292, Laws of Kenya.

⁶⁰Cap 295, Laws of Kenya.

3.0 A Rights-based Approach to Compensation

The modalities provided for under the Land Acquisition Act⁶¹ lacked consistency and reliability. The Act did not state if other interests and rights to land that are not legally recognized were to be compensated for. Not all landowners in Kenya have title deeds to their parcels of land and therefore not all land in Kenya is formally and legally owned. Kenya has squatters, encroachers, illegal landowners, community land holders and lessees, to name a few. The factors that were considered in calculating the compensation award under the Land Acquisition Act have informed the content of the Land (Assessment of Just Compensation) Rules of 2017 as they are similar. There is need to depart from these factors as they have proved to be ineffective. Article 40 of the Constitution of 2010 guarantees all citizens a right to property.

A law authorizing compulsory acquisition and providing for compensation models should also state how all categories of rights to land should be compensated for.⁶² The Land Acquisition Act did not have this provision. This is aggravated by the fact that the current Land Act places this burden on the National Land Commission to determine on a case-by-case basis the quantum of compensation. Based on article 40 of the Constitution of 2010 which guarantees all citizens the right to property, this section seeks to explore a rights-based approach to compensation for land that is compulsorily acquired by the state.

3.1 The Fundamentals of Rights-based Approaches

According to the United Nations Development Programme,⁶³ a Human Rights-Based Approach (“HRBA”) is important for protecting and promoting human rights in order to achieve peace, sustainable human development, democracy and security. These, the UNDP notes, are the pillars of the United Nations which are also entrenched in national constitutions. The manual also discusses the main benefits of implementing a HRBA to development. These are: first, a HRBA promotes realization of human rights and helps government partners to achieve their human rights commitments. Second, it improves transparency and increases accountability. Third, it increases and strengthens the participation of the local community. Fourth, it reduces

⁶¹Cap 295, Laws of Kenya, enacted in the year 1968.

⁶² See FAO, *supra*, note 2

⁶³UNFPA, [2010]. “A Human Rights-Based Approach to Programming: Practical Implementation Manual and Training Materials”. *Harvard School of Public Health, Programme on International health and Human Rights*. <http://www.uonfpa.org>.

vulnerabilities by focusing on the most marginalized and excluded in the society and fifth, there is a high likelihood that it will lead to a sustained change because human rights-based programmes have great impact on policy and practice, structures, norms and values. Although HRBAs were not specifically designed to inform the calculation of the compensation award in compulsory acquisition of land, it is submitted that they can be so applied, as they are in line with article 40 of the Constitution of Kenya, regarding the right to property.

The manual also discusses three rationales which make the HRBA to development important and worth adopting. These are the intrinsic rationale, the instrumental rationale and the institutional rationale.⁶⁴ The intrinsic rationale for adopting a HRBA to development stipulates that HRBA's are based on universal values of equality, solidarity, freedom etc. and that there should be common standards for men, women and children of all nations. Further, the rationale assumes that HRBA has the tendency to "move development action from the optional realm of benevolence (or charity) into the mandatory realm of law".⁶⁵

The instrumental rationale focuses on analysing the discriminatory practices, the inequalities and unjust power relations that exacerbate conflict and act as drawbacks to development.⁶⁶ The rationale emphasizes on the participation of the local community in the developmental processes and the accountability of the government in the discharge of its mandate. The institutional rationale focuses on the holistic nature of human rights and therefore advances a holistic and comprehensive approach in addressing the violations attendant thereto. It recommends that the economic, civil, political, social and cultural aspects of a problem be addressed holistically. The approach therefore recommends the use of international human rights mechanisms in the analysis of a problem and the means of addressing it.

In the perspective of UNDP therefore, a HRBA suggests that real success in developmental projects can best be registered by giving the poor, the marginalized, the vulnerable or the

⁶⁴Weerelt, P.A *Human Rights-based Approach to Development Programming in UNDP – Adding the Missing Link*, UNDP. Page 18.

⁶⁵UNFPA, Strategic Plan, 2008-2011: Accelerating Progress and National Ownership of the ICPD Programme of Action, DP/FPA/2007/17, p. 10.

⁶⁶Ibid, page 11.

affected groups a stake in the processes leading to the decisions affecting them. It involves empowering the people to participate in making decisions with regard to the things that affect them. As such, a HRBA to development seeks to provide guidelines on what developmental projects should focus on so that the freedoms, dignity and well-being of the people are safeguarded.⁶⁷

HRBA's identify the human being as the bona fide claimant against injustice and the state organ as the cause of the injustice. As such, the approaches stipulate how the state organ should proceed with the developmental projects so that injustice, inequality and poverty are alleviated. When these are not alleviated and the result is injustice, HRBA's provide the channels for redress. These channels are also based on the fundamentals of human rights as are universally accepted.⁶⁸

The human rights-based approaches are embedded in the Constitution of Kenya 2010 under the Chapter on Bill of Rights.⁶⁹ The focus here is article 40 of the Constitution which guarantees the right to property to all citizens. The argument is that when that right is violated through the sovereign authority of the state, compensatory mechanisms that follow the same rights-based channel as the law guaranteeing the right should be followed. This is the essence of a HRBA to development as proposed by the UNDP. This paper will therefore explore the possible ways of applying the HRBA's to the concept of compulsory acquisition of land and compensation. It is argued that compulsory acquisition is also a development project hence the application of HRBA's proposed by the UNDP.

3.2 Why a Rights-based Approach?

Compulsory acquisition requires finding the balance between the public need for land on the one hand, and the provision for land tenure security and the protection of private property rights on the other hand.⁷⁰ In order to find this balance, a state must put in place principles that show

⁶⁷ See van der Ploeg, L., & Vanclay, F. (2017). "A human rights based approach to project induced displacement and resettlement". *Impact Assessment and Project Appraisal*, 35(1), 34-52.
<https://doi.org/10.1080/14615517.2016.1271538>

⁶⁸Ibid, page 20.

⁶⁹Chapter 4 of the Constitution of Kenya 2010.

⁷⁰Food and Agriculture Organization of the United Nations (2008), "Compulsory Acquisition of Land and Compensation", Rome Available at <http://www.fao.org/docrep/011/i0506e/i0506e00.htm> last accessed on Friday, January 19, 2015, 2015 at 1300hrs.

obedience to and support for the well-established rights of individual persons. Through legislation, these principles should state in mandatory terms the basis of compensation to affected families and also guarantee them that their rights would be respected, right from the right to own property to the right to fair administrative action.⁷¹

The rights-based model proposed here seeks to provide answers to a number of questions: Should holders of partial rights for example leases also be compensated? How do we compensate for religious rights on land that has been compulsorily acquired by the state? Should loss of customary rights in land also be compensated? What about squatters; are they bona fide owners of land who should also be compensated for loss of their place of residence? How do we compensate for informal rights in land and illegal uses; can we place a monetary value on such land? A rights-based approach can best answer these questions.⁷²

A number of international instruments support the right of individuals to own property and dispense with it in a manner that they want. Most of such instruments employ a human rights approach to the right of ownership of property. The following section will explore the provisions of selected international instruments regarding the right to own property and subsequent just and adequate compensation.

3.3 Application of the HRBA in Selected International Instruments

Article 17 of the Universal Declaration of Human Rights provides that “every person has the right to own property alone as well as in association with others”⁷³. It further provides that “no person shall be arbitrarily deprived of his property”⁷⁴. Compulsory acquisition of land has a tendency to arbitrarily deprive landowners of their rights to land when the acquisition is not followed by just and adequate compensation. This is against the dictates of the Universal

⁷¹ Hoops B, Saville J, Mostert H. 2015. “Expropriation and the endurance of public purpose: lesson for South Africa from comparative law on the change of expropriatory purpose”. *Eur Property Law J.* 4:115–151.

⁷² Adam AB, Owen JR, Kemp D. 2015. Households, livelihoods, and mining-induced displacement and resettlement. *Extr Ind Soc.* 2:581–589

⁷³Universal Declaration of Human Rights, 1948.

⁷⁴Ibid, article 17.

Declaration of Human Rights. In order to be qualified, compulsory acquisition of land must be followed by payment of just and adequate compensation to the affected landowner.⁷⁵

Article 14 of the African Charter on Human and Peoples' Rights⁷⁶ provides that the right to property shall be guaranteed and that it may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws. These appropriate laws in our context include the Land Act and the Land Acquisition Act which legalize compulsory taking of private property for public purposes. Article 21.1 provides that all people shall be free to dispose of their wealth. In case this wealth is spoilt, the affected persons shall have the right to lawfully recover the property and also have the right to adequate compensation.⁷⁷

Regarding the rights that indigenous people have to land, article 27 of the United Nations Declaration of the Rights of Indigenous Peoples provides that indigenous people have the right to restitution of their land, territories and resources which they traditionally owned or otherwise occupied and which have been confiscated, occupied, used or damaged without their free and informed consent.⁷⁸ The article proceeds to provide that where this restitution is not possible, the people have the right to just and fair compensation. Such compensation, unless otherwise freely agreed upon between the people and the acquiring authorities, shall take the form of lands, territories and resources equal in quality, size and legal status.⁷⁹

Whereas demands may be tabled on board for restitution of lands of equivalent value, size and quality, questions arise as to how possible that can be. It is practically difficult to have land that bears all the qualities and environmental features of the land that the state acquired from the land owner. The best approach is to incorporate the principle of equity and equivalence.⁸⁰ This

⁷⁵ Doyle C, editor. 2015. Business and Human Rights: indigenous peoples' experiences with access to remedy. Case studies from Africa, Asia and Latin America [Internet]. [cited 2019 August 10]. Available from: http://www.iwgia.org/publications/search-pubs/publication_id=713

⁷⁶Of 1986.

⁷⁷ Hanna P, Vanclay F. 2013. Human rights, indigenous peoples and the concept of free, prior and informed consent. *Impact Assess Project Appraisal*. 31:146–157

⁷⁸ Hanna P, Vanclay F, Langdon J, Arts J. 2016. The importance of cultural aspects in impact assessment and project development: reflections from a case study of a hydroelectric dam in Brazil. *Impact Assess Project Appraisal*. 34:306–318

⁷⁹Article 27 of the United Nations Declaration of the Rights of Indigenous Peoples of 1994.

⁸⁰Food and Agriculture Organization of the United Nations (2008), "Compulsory Acquisition of Land and Compensation", Rome Available at <http://www.fao.org/docrep/011/i0506e/i0506e00.htm> last accessed on Tuesday 20th, 2015 at 1400hrs.

principle does not demand that the land to be used in restitution be exactly the same as the land that had been acquired by the state. A number of sub-principles accompany this principle of equity and equivalence:

First, the quantum of compensation should be commensurate with the losses that the landowner suffered when their land was compulsorily acquired by the state. It should neither be more nor less than such loss. Second, Balance of interests: compulsory acquisition of land is done in the public interest. This is because the projects carried out on the land are meant to benefit the community at large. On the other hand, the landowner has got his/her own interests too: compensation. These interests must be balanced during compensation in such a manner that ensures none jeopardizes the other in the process. Third, Flexibility: the legislator may be able to foresee all the factors and elements of compensation when legislating on compulsory acquisition laws. Some issues are dynamic and may not be incorporated in the statute at the time of enactment. This raises the need for flexibility in the wording of the land statute so that the issues that were not foreseen by the statute can be inferred by courts of law during the construction of the statute.

This would ensure that landowners do not go uncompensated for their land due to a mistake in the wording of a statute hence a cause for injustice and a violation of their rights. Fourth, both formal and informal land rights should be considered for compensation. Some people occupy parcels of land as squatters, others as holders of leases and others as illegal owners of the land. If this is the case and it happens that the land they occupy is compulsorily acquired by the state, a human rights-based model of compensation would provide that such compensation be based on the value of assets they own other than the value of the land because it does not legally belong to them.⁸¹

Squatters may also be resettled in other land away from the project and a simple form of payment given to them to cater for the displacement cost especially if they are poor and they do not have the financial muzzle to offset their displacement expenses. Fifth, fairness and transparency: the acquisition process should be conducted in a manner that follows the principles

⁸¹Bruce J. et. al. Land Law Reform: Achieving Development Policy Objectives. (World Bank Law, Justice and Development Series, 2006). At page 10.

set out in article 60(1) of the constitution. These include transparency, fairness, elimination of all forms of discrimination and sustainable and productive management of land resources.

In this regard, the landowners should be involved in the whole process right from issuance of the acquisition notice, explanation of the public interest giving rise to the acquisition, calculation of the compensation award, payment of the award promptly, being assisted to acquire alternative land to resettle and being afforded an opportunity to file claims in a court of law if they are not satisfied with what the acquiring authority offered as compensation to them.⁸²

A rights-based model of compensation is anchored on the premise that the acquisition of private property occurs in the public interest and that the acquisition deprives the expropriatee of his bundle of legal rights. Compensation therefore follows the acquisition in an attempt to iron out the inequalities occasioned on the landowner by the acquisition. What the model seeks is distributive justice and not an assessment of value on open market basis.

Justice, as Robert Nozick⁸³ notes, is predicated upon three principles: justice in acquisition of property, justice in the transfer of the property and justice in rectification of past injustices through compensation. There can be no justice where the three principles are not followed.⁸⁴ This would be a violation of the rights of the individual whose property has been compulsorily acquired by the state. Land laws must therefore provide for a procedure to be followed by the landowner where such injustice has been committed on them.⁸⁵

A rights-based model also seeks to assess compensation following the principles which are applicable to the tortious model of assessment of damages. As such, the purpose of compensation is to indemnify the affected landowner following the principle of *restitutio in integrum*⁸⁶ i.e. to restore the landowner to the financial position he was in before the acquisition of his land. This cannot be done by valuing the land on basis of open market value. The prevailing market value cannot restore the landowner to his pre-acquisition status. It can only value land as a commodity being sold on a willing-seller-willing-buyer basis. The question that arises here is whether it is

⁸²Article 60(1) of the 2010 Constitution.

⁸³Robert Nozick, (2013), *Anarchy, State and Utopia*, Basic Books; Second Edition, page 46.

⁸⁴*Ibid*, page 56.

⁸⁵Keith S, et al. *Compulsory Acquisition of Land and Compensation*. (FAO Land Tenure Series, 2008), page 21.

⁸⁶According to Black's Law Dictionary, the phrase simply refers to "restoring a person to their status quo ante", i.e. the position they would have been had the injury not occurred. It seeks to wholly compensate the victim of the injury for the loss they have suffered.

really possible to restore the landowner to his pre-acquisition status. This question has been answered by the principle of equity and equivalence discussed herein above.⁸⁷

Jude Wallace⁸⁸ outlines the fundamentals of a human rights-based model of land acquisition and compensation. First, the model should acknowledge the entitlement of all displaced persons including those persons having formal legal rights, persons whose claims are legally recognizable under national law and also those persons who do not have either formal legal rights or even whose claims are not recognizable under the national laws of the state in question. The latter category includes squatters and encroachers. Second, the model should ensure that all victims of displacement can access resettlement assistance.

Strategies should also be put in place to ensure that displaced persons are compensated for such factors as loss of employment, loss of land and non-land assets and not just the loss of their land.⁸⁹ Third, any such model should provide for a methodology of calculating the rate of compensation at the full replacement cost. This is because a displaced landowner is forced to start life afresh in a different land and therefore the cost of the displacement should be catered for by the compensation award.

Finally, the model should make provision for participation of and consultation with the victims of the displacement exercise and all other interested parties. Such consultation should concern the impact the contemplated project shall have on the livelihoods of the people, the land acquisition criterion and the compensation methodology.⁹⁰

Whereas Wallace was of the opinion that a human rights-based model of compensation of interests in land should factor in both recognized and unrecognized legal land rights and claims, questions always arise as to which interests in land should be compensated under any model. The section that follows will recommend a way of compensating various interests in land applying

⁸⁷*Supra*, Note 6, page 8.

⁸⁸Wallace, J (2010). "Land Administration in Developing Economies", *International Federation of Surveyors* <http://www.fig.net/resources/monthly_articles/2010/february_2010/february_2010_wallace.pdf>. Accessed May 17, 2015.

⁸⁹*Ibid.*

⁹⁰*Ibid.*

the rights-based approach of compensation. Those rights include customary land rights, religious rights on land, and partial interests in land and easements, to name a few.

3.4 Applying the Rights-Based Model in Compensation of Various Interests in Land

There is need to discuss a number of interests and rights in land that were not mentioned in the repealed Land Acquisition Act and how the rights-based model can be applied to compensate for such interest when compulsorily acquired by the state for public purpose.

3.4.1 Compensation for Partial Acquisition

Land may be acquired partially for such purposes as servitudes or easements. In such a case, the landowner need not relocate, although he may be forced to do so depending on the disturbance occasioned by the construction of the easement or the burden of the servitude. In such a case, a rights-based approach to compensation would recommend that valuation of the land be based on the principles that govern acquisition of a whole parcel of land.⁹¹ Other factors to be considered are the projected increase in the value of the remaining parcel of land and the additional damage occasioned on the landowner where the project includes installation of underground pipes or electrical appliances. This is because the installation would interfere with the soil profile and strength of the land.⁹²

3.4.2 Compensation for Acquisition of Partial Rights in Land

Partial rights in land include leases and sharecropping agreements. Land in this case is not exempt from acquisition in case the state wants to start a project which is beneficial to the whole community. In this case, such land should be compensated for on the basis of equivalence and equity. As such, the lessee should as much as possible be restored to his pre-acquisition status.

⁹¹Jonathan M. Lindsay, (2012). “Compulsory Acquisition of Land in Infrastructure Projects”. *PPP Insights. Vol. 1, Issue 3* <<http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Compulsory%20Acquisition%20of%20Land%20and%20Compensation%20in%20Infrastructure%20Projects.pdf>> Accessed May 16, 2015. Lindsay writes that partial acquisition of land leads to disturbance as the owner of the land is left to suffer the effects of the development project. Some projects are disruptive and even pollute the environment. The owner is therefore better off surrendering the whole parcel of land and looking for an alternative parcel to settle.

⁹²*Supra*, note 6 at page 20. FAO Land Tenure Studies only initiate the discussion about various interests in land and the researcher picks up from there to make suggestion for a rights-based model of compensation to govern the acquisition and subsequent compensation of these interests.

One such restoration could be to award the lessee the replacement cost of having to find another land to lease.⁹³

Such replacement cost must factor in the amount of monthly rent, the cost of disturbance in having to terminate an immature lease as a result of the acquisition and the cost of relocation. Another approach would be to calculate the compensation on the basis of the value of the lease rights, the term of the lease, the amount of investment done on the leased land and the probability of renewing the lease and hence factor in the remaining number of years or months, whichever is the case.⁹⁴

3.4.3 Compensation for Acquisition of Religious Rights in Land

As is the case with other interests in land, land used for religious purposes may not be spared by the state if the project to be started on it is in the public interest. Such acquisition may not be adequately compensated on the basis of open market values. This therefore brings in the need for a rights-based model of compensation which factors in all the rights of the believers to worship their Supreme Being, to assemble and the right to conscience.⁹⁵

The compensation for a temple, a church, or a mosque could be based on the cost of acquiring a place for constructing a similar place of worship, the cost of the new site and the cost occasioned by the disturbance of having to relocate to a new site.⁹⁶ Difficulties will, however, arise where the site is a burial or a shrine because these are associated with religious and more spiritual connotations. No financial compensation would replace a shrine or a burial site.⁹⁷ The best approach would be to preserve the site so that the associated people can occasionally visit it for their religious duties, or even lease the same to them after fully compensating them for the whole parcel of land.

⁹³Supra, note 111, at page 7, Lindsay however notes that such a cost may also be difficult to calculate because of the emotional attachments to the piece of land on the owner.

⁹⁴Supra, note 6. Again, the projected suggestions have been initiated by the writer.

⁹⁵Article 32 of the Constitution of Kenya of 2010.

⁹⁶See for example Kotey, N. A. (2002). Compulsory acquisition of land in Ghana: Does the 1992 constitution open new Vistas? In Toulmin, C., Delville, P.L. and Traoré. S (Eds). *The dynamics of resource tenure in West Africa*, London, GRET/IIED, James Currey & Heineman, pp.121-130.

⁹⁷Most Kenya communities for example the Kamba, Kalenjin and the Maasai still have shrines where they make offerings by slaughtering animals. This is meant to appease the spirits and also to pray for blessings for example in form of rain. Moreover, churches, mosques etc. are constructed on parcels of land. When such land is compulsorily acquired by the state, difficulties arise on how to compensate it because of the religious attachment that the people have to such lands. Monetary compensation may not be adequate in such cases.

3.4.4 Compensation for the Acquisition of Customary Land

In many parts of the country, land is owned under customary tenure whereby selected traditional leaders administer the land on behalf of the people in accordance with customary practices. The Kenya constitution under article 63 recognizes community land rights. The term community does not just refer to customs, but rather an identity characterized by similarity in culture, ethnicity or similar community of interest.⁹⁸ Such community land could be land owned by groups registered under any law, ancestral land and trust land. Under whichever category community land falls, it is not exempt from acquisition by the state where such acquisition is in the public interest.

Under article 16(1), the International Labour Organization's Convention Concerning Indigenous and Tribal Peoples in Independent Countries⁹⁹ provides that landowners shall be allowed to return to their land when the reasons for their relocation cease to exist and where possible. If returning to the land is not possible, article 16(4) provides that the people shall be provided with land equal in quality and size with the land from which they were relocated. Such land must be suitable for them to fend for their present and future needs. If the people prefer to be compensated for the same, the article provides that they shall be compensated in accordance with appropriate guarantees.

If such customary land must be compensated in monetary terms, it should be based on the relevant customary laws of the community whose land is being acquired so that their customs, beliefs and needs are put into account in line with their rights.¹⁰⁰ Valuation of the land in terms of open market may pose many challenges because there are a number of shared resources in the land.¹⁰¹

That means that it may be difficult to determine who is best placed to receive the monetary compensation. Such an award may also be susceptible to discrimination of women, children and the disadvantaged in the society from which the land is acquired. Where the state provides

⁹⁸Article 63 of the Constitution of Kenya of 2010.

⁹⁹No. 169 of 1989.

¹⁰⁰Ibid, article 16(4).

¹⁰¹Section 5 of the Kenya Community Land Bill, 2014, for example states that the state may acquire community land for public purposes but subject to the safeguards provided for in article 40 of the Constitution. Further, the Bill states that no right on community land may be expropriated or confiscated except by law in the public interest and in consideration of payment of just compensation to the persons from whom the rights have been expropriated.

alternative land for the people to be resettled in, it must also make provision for the shared social amenities that the community left behind such as schools, churches, hospitals and water points.¹⁰²

3.4.5 Compensation for Acquisition of Informal Land Rights and Land Owned Illegally

Informal land rights include those owned by residents in informal settlements and squatters. Such people are entitled to assistance in case of compulsory acquisition of the land in which they reside especially if they are poor. They deserve to be settled in an alternative land and given assistance to enable them to settle down.

The compensation amount should be based on the replacement cost of having to settle in a different land away from their original settlement. The replacement cost should reflect the equivalent cost of the buildings and other structures on the acquired land. It is not in dispute that people residing in an informal settlement are not allowed to construct permanent structures because such structures do not conform to the set building standards and regulations. A rights-based approach would however provide that all people have the right to housing¹⁰³ and owning property¹⁰⁴ and it is the duty of the state to provide such. It therefore follows that such an illegality does not prevent them from being compensated for the loss of their property upon compulsory acquisition of the land they were residing in.

Illegal land rights on the other hand include cases where the rich illegally occupy land which legally belongs to other people or even the state. Whereas it is not in order to promote an illegality by compensating holders of an illegal title to land, a rights-based model of compensation would propose that the affected persons be fully compensated for the land on the basis of replacement cost and later on cases opened against them to explain how they acquired the title.¹⁰⁵ A rights-based model will not allow the illegal title holders to be left without a place

¹⁰²According to the rights-based model suggested here.

¹⁰³Article 43 of the 2010 Constitution

¹⁰⁴Article 40 of the 2010 Constitution

¹⁰⁵Jonathan M. Lindsay, (2012). "Compulsory Acquisition of Land in Infrastructure Projects". *PPP Insights. Vol. 1, Issue 3* <<http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Compulsory%20Acquisition%20of%20Land%20and%20Compensation%20in%20Infrastructure%20Projects.pdf>> Accessed May 16, 2015. The author opines that the right to property is a guarantee to all citizens regardless of what the community perceives about them. According to him, any illegality should be addressed in courts of law in separate suits.

to reside in case the land they were occupying is compulsory acquired. The two shall be handled separately i.e. the illegality and the compensation process, so that their right to housing and ownership of property is protected.¹⁰⁶

4.0 Conclusion

An analysis of national and international instruments shows that people's right to property, in this case land, should not be abrogated from. There is a general inclination by all the instruments and policies towards ensuring that people's right to property when awarding compensation to land is protected. This is supported by article 40 of Kenya's Constitution of 2010. The protection should be expressly stated in law. A critical analysis of the provisions of the land Act of 2012, the National Land Commission Act of 2011, the activities of the National Land Commission, and the Land (Assessment of Just Compensation) Rules of 2017 shows that compensation for land is not sufficient, hence the large number of cases being filed in the land and Environment Court challenging the compensation award. It has also been argued that market value of land is a dynamic concept, and, considering the peculiar characteristics of land, it does not provide a just and adequate compensation for land. Considering these inadequacies of the current legal framework on compulsory acquisition of land and compensation, there is need for alternative approaches to compensation.

A right-based approach to compensation has therefore been proposed, basing on the UNDP HRBA's to development. Such an approach ensures that all rights and interests in land are adequately compensated for, unlike a market-based approach that only focuses on compensating formal rights to land. A rights-based approach further ensures that the people's right to property is always protected: before acquisition, during acquisition, after acquisition and the subsequent compensation. It is in line with the HRBA to compensation to conclude with the wise words of Elias, JSC in *Ereku v. Military Governor Mid-Western State of Nigeria & Ors*¹⁰⁷, while adopting the views of Swift, J in *Bowman, South Shields (Thames Street) Clearance Order 1931*¹⁰⁸:

“...When an owner of property against whom an order has been made under the Act comes into this Court and complains that there has been some irregularity in

¹⁰⁶As provided for under articles 43 and 42 of the 2010 constitution respectively

¹⁰⁷ *Supra*.

¹⁰⁸ (1932) 2 KB 621.

the proceedings and that he is not liable to have his property taken away, it is right, I think, that his case should be entertained sympathetically and that a statute under which he is being deprived of his rights to property should be construed strictly against the local authority and favourably towards the interest of the applicant, inasmuch as he for the benefit of the community is undoubtedly suffering substantial loss, which in my view must not be inflicted upon him unless it is quite clear that Parliament has intended that it shall.”¹⁰⁹

¹⁰⁹ *Ibid* at 633.