

A RESEARCH PROJECT

ON

LAND ACQUISITION FOR SELECTED ROAD PROJECTS IN KENYA

BY

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DECLARATION

I **James Mwai Muriithi**, hereby declare that this paper is my original work and has not been submitted for any other examination neither has it been published elsewhere.

Signature:

Date:

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

Supervisor (Prof. P.M Syagga, PhD):

Date:

DEDICATIONS

This work is dedicated to my late Dad, my mother Mary and my family especially my wife Leah for standing by me through all my joys and struggles.

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ABSTRACT

Sustainable development requires Governments to provide public facilities and infrastructure that enhance the interests of the natural environment. An early step in the process of providing such service is the acquisition of appropriate land. In some cases, several locations could be suitable for such purposes and the Government may not be able to purchase land at one of the locations through the land market. In other cases, specific land parcels are required but the land may not be on sale at the time it is required. In order to obtain land when and where it is needed, Governments have the power of compulsory acquisition of land that can compel owners to sell their land in order for it to be used for specific purposes. Compulsory land acquisition has always been emotive and delicate especially with the rapid growth and change in land use. When implemented poorly it can be abused. This paper provides advice on how governments can equitably and efficiently acquire land necessary for development. It is intended for use by policy makers and landed professionals.

In Kenya like in many other states, even if legislations exist which gives the acquiring authority mandate to acquire land compulsorily for public use; the process is not without challenges. These challenges make the acquisition process lengthy, protracted, complex and costly. This research aims to unearth these challenges and recommend possible solutions to mitigate them by examining seven road projects which were carried out by the Government in the last seven years. Questionnaires were administered to government valuers and affected landowners to capture their views on land acquisition challenges. The findings reveal that, the challenges facing the process are legal, social, economic and environmental ones. Another significant finding of this research is that the duration taken to acquire land for a road project is not necessarily determined by the area of land acquired and the length of the road.

Chapter one of this research report outline the introduction, problem statement and research methodology while Chapter two provides literature review on right to private property, justification of land acquisition and its history in Kenya. The Chapter also reviews literature on the process and procedures of land acquisition in Kenya and highlights recent court decisions. Chapter three presents information on the best practices or the working principles of land acquisition while Chapter four

deals with data presentation and analysis. Lastly, Chapter five provides research findings including conclusions and recommendations. The recommendations relates to planning, publication of notices, public hearing, valuation and compensation, taking possession, appeals and assistance of the affected households.

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1. CHAPTER ONE

1.1. INTRODUCTION

Compulsory land acquisition in common law is the inherent power of the state to seize a citizen's private property, expropriate property, or rights in property, without the owner's consent (FAO,2008). It can also be described as the right and action of the Government to take property not owned by it for public use (Chan, 2003). In the United States, this right is known as eminent domain while the action is known as condemnation (Eaton, 1995). In some countries, a variety of bodies such as counties, municipalities and parastatal (quasi-government) organizations may have the power to undertake compulsory land acquisition processes, with each having its own regulatory guidelines. These bodies in some cases are required to make an offer to purchase the property before resorting to the use of eminent domain (Rachael, 2007).

According to West Encyclopedia of America Law (n.d), the exercise of eminent domain in other countries is not limited to real property. Governments may also condemn personal property, such as supplies for the military in wartime, franchises, as well as intangible property such as contracts, patents, trade secrets, and copyrights. The right of governments to use the power of compulsory land acquisition can therefore be described as the concept of expropriation, which is based on a sovereign's power of eminent (ultimate) domain. This power is generally accepted worldwide and allows the State to take private land for the good of the society. Much of the laws pertinent to eminent domain in developing countries are inherited from former colonial powers (Kitay, 1985).

Methods of obtaining access to land by judicial procedures when negotiation fails are available in almost all countries. Examples of compulsory land acquisition include nationalization and expropriation. Land banking (purchase of land reserves) is a comprehensive long-term approach, including both compulsory and non-compulsory land acquisition, while land readjustment and negotiation are non compulsory approaches. However, expropriation is the one mostly used in many countries as it acts more as a deterrent to private landowners from withholding land which is required for public purposes (ESCAP, 1985).

Property is acquired either for Government use or for delegation to third parties who will devote it to "public use." The most common uses of property taken by eminent domain are public utilities, transportation-related projects and construction of state and municipal facilities such as schools, parks, airports, dams, reservoirs; hospitals and public housing. Compulsory acquisition can also be used for prevention of blight, remediation of environmental contamination (brownfield remediation) and economic development. The use of eminent domain solely for economic development purposes is minimal compared, but increasingly being practiced worldwide, with the use of eminent domain for other purposes, such as transportation-related projects (GAO, 2006).

Eminent domain indicates that the Government is taking the property or has an interest in it and the only thing that remains to be decided when the process is instituted is the amount of just compensation (Brown, 1991). In some cases the right to take may be challenged by the property owner on the grounds that the attempted taking is not for a public use, or has not been authorized by the legislature, or because the acquiring body has not followed the proper procedure required by law. In most countries this is made possible by having a separation between the acquiring and confirming body so that those affected can appeal against the terms of the acquisition.

In Kenya, the process is guided by the Constitution and various statutes which include Land Acquisition Act Cap 295(1968) and Way leaves Act Cap 292(1912) both of which has been repealed and replaced with Land Act, 2012 Part viii (Compulsory acquisition of interest in land) and Land Act, 2012 Part X (Easement and analogous right) respectively. Other acts includes:-Trust Land Act Cap 288(1939), Energy Act, 2006 (Electric Power Act Cap 314), Water Act, 2002 and finally the Local Authority Act Cap 265.

1.2. PROBLEM STATEMENT

Compulsory land acquisition is essential in a market economy to deal with certain aspects of market failures and in the interests of enhancing the welfare of the citizens. These include the need to provide collective goods such as, infrastructure network and public services (schools, hospitals, parks etc), regeneration where the

state may need to disrupt a prisoners' dilemma situation, as well as, to some extent, the redistribution of wealth to less affluent income groups (Grover et al, 2007). The intention of compulsory land acquisition is to reduce the costs to the public of obtaining these Government services.

Compulsory acquisition is inherently disruptive. Even when compensation is generous and procedures are generally fair and efficient, the displacement of people from established homes, businesses and communities will still entail significant human costs. Where the process is designed or implemented poorly, the economic, social and political costs may be enormous as may lead to:-reduced tenure security, reduced investments in the economy, weakened land markets and opportunities created for corruption and the abuse of power (FAO, 2008).

Sebastian & Ajay (2007, p. 1) claims that uncertainties, risks, delays related to the land acquisition, protests and resistance on the part of displaced persons have become the most significant bottleneck for investments, especially in the infrastructure sector. Even if many other poor persons gain from the development projects, the political basis for anti- developmentalism is large when project violate the core principle of being at least pareto-optimal- i.e. not hurting some people while leading to income rises for many others. Therefore, land acquisition has been an issue around which mobilization and protest has taken place in many countries.

According to the European Convention on Human Rights (Article 1 of Protocol No.1), everyone has the right to use, develop, sell, destroy or deal with his or her property in any way they please (Human Right Act, 1998). Section 40 of the new Kenya Constitution under the bill of rights guarantees protection of right to property and unlike the old Constitution Section 40(3b) not only requires prompt payment in full but insists on just compensation to a person who has been deprived his/her right over or interest in a property. Rachelle (2007) maintains that the right to protection of property means that public authorities cannot interfere with the way that property is used unless there is a law that lets them do it and unless it is justified. This means that no one can be deprived of his or her property except where the action is permitted by law and justifiable in the public or general interest.

The main dilemma for developing countries has been how to adapt systems of expropriation with the aim of provision of collective goods without destroying private property rights. It is argued that compulsory acquisition systems in market economies involve two challenges. One is the creation of procedures to expropriate private property that ensure that fundamental human rights, in particular, the peaceful enjoyment of private property, are not breached. The other challenge, apart from the constitutional mandate, is the provision of adequate and prompt compensation for those whose property has to be expropriated so that they are not made worse off by the process (Grover et al, 2007).

Jeremy (2006 p.15) observes that the growth of Government and the need to provide public goods has greatly eroded the once powerful protections of private property rights though the use of the power of eminent domain. It has also spawned numerous Government, social, and public programs that greatly diminished private property rights (FAO, 2008.) The traditional and constitutional protection of private property stands in the way of many of the public programs that politicians seek to implement. It should be noted that a state's treatment of the right to private property is one of the most telling indicators of the character and nature of its governance. Where strong private property rights exist, freedom and liberty almost always abound. Where private property rights do not exist, or where the protections of these rights are weak, Government control and domination prevails. Thomas Jefferson said:-

“the defense of private property is the standard by which ‘every provision’ of law, past and present, shall be judged.” (Jeremy, 2006).

There is tremendous logic and justice in making a property owner's compensation prompt and just. To provide owners anything less than the total value of the property taken is to place a disproportionate share of the costs of the public project on the individual owner whose property is taken. If the project is a legitimate public use or public project, the public should share equally in the cost. Those already required to surrender their property for the project should not also be forced to bear a disproportionate share of the cost of the project. The just compensation requirement should “prevent the public from loading upon one individual more than his/her just share of the burdens of government.” for their losses or not.

The real division when it comes to eminent domain is the takers versus the taken from or, as one commentator more eloquently stated,

“those who want to save their homes, farms, and businesses, and those who want the power to take them. More specifically, the division is special interests versus grassroots, the politically connected versus the politically disconnected, the empowered versus the powerless, and, ultimately, the Government and those to whom the government has granted extraordinary power versus the people. It is simply a question of the weak against the strong.” (Jeremy, 2006.)

The legal and administrative process of obtaining the right to expropriate is often time-consuming both for the developer and the government. On the side of land owners the process normally causes a lot of pain and stress to the affected households due to delay in conclusion of the acquisition process. Acquisition procedures are also complicated as they require a considerable number of skilled and experienced staff making the process costly. To make the matter worse in recent years the discussion of the use of compulsory purchase in developing countries has been rather limited. Old methods and procedures, although ineffective and unpopular continue to be used. This means that no new legislations; practices and methods for compensation valuation have been adopted. These factors have made compulsory land acquisition very unpopular.

In Kenya under Section 40 of the new Constitution, the state is empowered to acquire private land compulsorily for public benefit upon prompt payment in full, of just compensation. The principal legislation which guides the process is the Land Acquisition Act Cap 295 which has now been repealed and replaced with the Land Act, 2012 Part viii (compulsory acquisition of interest in land). This part of the Act is yet to be effective in land acquisition process because the National Land Commission was constituted recently and we are still in a transitional period.

Under Cap 295 a formal request is placed to the Commissioner of Lands by the benefiting authority (ministries, parastatals or public institutions). The Commissioner will then forward the application to the Minister in charge of Lands. If the Minister is satisfied that the land is required for public purpose, he/she directs the Commissioner to acquire that land. The Commissioner then publishes a Notice

of Intention to acquire the land in the Kenya Gazette, side by side with the Notice of Inquiry. After the inquiry, the landowners are issued with awards of compensation. If the landowner accepts the award, compensation is paid and a formal Notice of Taking Possession and Vesting the land in the Government is given. According to the land acquisition (compensation tribunal) rules, 2010 any person who is aggrieved by an award of the Commissioner as specified in Section 29 (7) and (8) of the Act may apply to the Tribunal in accordance with these Rules.

According to the Land Act, 2012 Part viii whenever the National or the County Government is satisfied that there is need to acquire land, the respective Cabinet Secretary or County Executive Committee shall submit the request to the National Land Commission to acquire land on its behalf. The Commission shall certify, in writing that the land is required for public purposes or in the public interest as per Section 110. A notice of the acquisition shall be published in the gazette and the county gazette as specified in Section 107 (5) of the Land Act, 2012. Section 107(2) states that the Commission shall prescribe the criteria and guidelines to be adhered to by the acquiring authorities and as per Section 111(1) the Commission shall make rules to regulate the assessment of just compensation. Any dispute arising during the acquisition shall be referred to the Environment and Land Court for determination as per Section 128 of the Land Act, 2012.

As compulsory land acquisition plays a major role in public service delivery, the process in principle needs to be simple, prompt, just and compatible with the International Convention on Human Rights Article 17 Section (1) which states that, everyone has the right to own property alone as well as in association with others and Section (2) which states that..." no one shall be arbitrarily deprived of his property" (Grover et al, 2007). This is also the case with Section 75 and Section 40 of the old and the new Kenya Constitution respectively which protects the rights of private property. Section 40(i) of the new Kenya Constitution states that..." every person has the right either individually or in association with others to acquire property".

In Kenya this principle of prompt and just compensation appears to be mostly contravened as is evidenced by the high number of delayed or stalled government road projects due to resistance and protests by landowners and politicians through

litigations challenging either the process or the amount of compensation awarded. The net effect is that the process has become complicated, time consuming and costly.

This research is a timely response to unearth the challenges facing compulsory land acquisition with a view to recommending possible solutions. This is intended to support land tenure and land administration officials, valuers and civil society partners who are involved in compulsory land acquisitions. The research does not seek to be exhaustive but rather reflects what “good practices” are.

1.3. OBJECTIVES OF THE STUDY

- To review the existing processes and procedures of compulsory land acquisition in Kenya for road construction.
- To examine the challenges facing the process of compulsory land acquisition in Kenya for road construction and in particular prompt payment of just compensation.
- To make recommendations that will improve the process and procedures so that the standards of prompt payment in full, of just compensation are achieved in future.

1.4. HYPOTHESIS

The current procedures and process of compulsory land acquisition for road construction projects leads to high costs and delays.

1.5. JUSTIFICATION OF THE STUDY

In Kenya, literature on compulsory land acquisition is limited. Some of the available literature among others relates to: impact of compulsory land acquisition on displaced households (Syagga and Olima, 1995), expropriation of land for urban development (K’Kakumu), causes of variation in valuation for land compensation (Kimutai, 1995), the impact of compulsory land acquisition (K’Kakumu, 1999), public use, a looming crisis in compulsory acquisition (Njoroge, 2010) and economic development as a public purpose in compulsory acquisition (Muthama,

2010). The challenges involved during compulsory land acquisition, especially delays in the process, have not been addressed. This study aims at investigating the causes of delay in compulsory land acquisition processes and procedures and how they affect the issue of prompt payment in full, of just compensation to the affected landowners. The land owners are supposed to be compensated fairly and promptly to avoid any human suffering during provision of public goods by the Government. It is expected that the findings of this study will enable the government and the National Land Commission to improve on the existing procedures and process of compulsory land acquisition and hence improve on its service delivery to the public. The Government will also be able to get land for provision of public goods fast and easily. The displaced persons will be able to receive fair and prompt compensation hence reducing their resistance to Government projects which involve the power of compulsory acquisition and finally professionals in the in land management field will be able to improve on their approach in decision making especially regarding compulsory purchase and acquisition of land.

1.6. SCOPE OF THE STUDY

The study limits itself to the challenges of compulsory land acquisition in road construction projects with special reference to the Land Acquisition Act, Cap 295 (repealed and replaced with Land Act, 2012 Part Viii) of the Laws of Kenya and the new Kenya Constitution Section 40 as well as the old Constitution Section 75. The study will examine seven road projects in Kenya, which have been carried out by the Ministry of Roads in conjunction with the Ministry of Lands for the last six years. Examination of properties which were affected by the acquisitions for road construction projects will be the main focus as they appear on the gazette notices and payment schedules.

1.7. SIGNIFICANCE OF THE STUDY

By pointing out the challenges and means to their correction the study will be significant with regard to:-

- 1) Ensuring the constitutional mandate of prompt payment in full, of just compensation is achieved.

- 2) Reducing resistance against government sponsored road projects by affected landowners.
- 3) Reducing the cost involved when government projects are delayed due to compensation disputes.
- 4) To help the government to establish compulsory acquisition criteria, processes and procedures which are efficient, transparent and accountable.

1.8. LIMITATIONS OF THE STUDY

- 1) Due to bureaucracy and confidentiality involved in accessing government information the study was confined to seven road projects where data was available.
- 2) It was costly to collect data because the road projects were situated in different regions in Kenya and as such the data collection period took longer than was planned.
- 3) The research project main focus was on the Land Acquisition Act Cap 295 as it was carried out during a transitional period when the Land Act, 2012 Part Viii (Compulsory acquisition of interest in land) was enacted to replace this Act. However, the New Act has not addressed the problems of this research as it is a replica of the old Act, save for a few changes.

1.9. RESEARCH METHODOLOGY

This section deals with the methodology of the study. The areas discussed include research design, sampling, data collection techniques, analysis and presentation.

1.9.1. Research Design

A design is the plan with which the research project is executed. The appropriateness of a design is dependent on the objectives of the research and the required data. This study necessitates a combination of quantitative and qualitative methods of doing research. Denzin (1970) further suggested the use of triangulation in conducting research. Hart (1987) similarly argued for the appropriateness of both quantitative and qualitative designs in social sciences research. All the arguments presented here suggested that the use of a combination of approaches is a plausible research design.

1.9.2. Sampling

Is the process of selecting a sample, how sampling is identified depends on the research question to be answered. For this study random sampling was used for selecting the seven road projects. These road projects which were examined are:-

(i) Nairobi Southern Bypass

This is a dual carriageway international trunk road, approximately 29.2 Kilometres long. It is situated in the City of Nairobi and in Kikuyu Division of Kiambu County. The road starts from Mombasa Road near the Eastern Gate Way of Nairobi National Park and terminates on Nairobi - Nakuru Road on the Western outskirts of Kikuyu Town.

(ii) Embakasi - Machakos Turnoff

The project is located in Machakos County in Kenya. It commences at the end of the dual carriageway at Embakasi and runs southeastwards ending at Machakos turnoff. The road is 33.5 Kilometers long. The project covers a section of the main Nairobi – Mombasa Highway and forms part of the Northern Corridor of the Trans Africa Highway.

(iii) St Mary's - Gitugu Road

Situated in Kangema Division, Muranga North District in Muranga County. The road commences at Gitugu and ends at St Mary's Secondary School near Murang'a Town. The project covers a distance of 29.2 Kilometres.

(iv) Wote - Makindu Phase 1

A 23 Kilometres class C road in Makueni District where more land was needed for expansion of the existing road reserve.

(v) Wote - Makindu Phase 2

A 25 Kilometres class C road in Makueni District where more land was needed for expansion of the existing road reserve.

(vi) Email - Oloitoktok Road

This involved a road covering a distance of 100 Kilometres in Kajiado. Realignment of the existing road was needed to create a 40 metres road reserve. The road starts at Emali and ends at Oloitoktok Town.

(vii) Meru (Ruiru) -Isiolo Road

This was a road where the existing reserve fell short of the required width of 25 metres necessitating acquisition of land. The road provides a shorter route to Isiolo from Meru.

1.9.3. Data Collection Techniques

The research instruments employed included both primary and secondary data.

1.9.3.1. Primary Data

Primary data were collected through the survey method using a questionnaire format with both open-ended and closed questions.

1.9.3.2. Secondary Data

The research relied on secondary data obtained from published and unpublished material that existed prior to this research. These were found in libraries, the internet, and other publications such as newspapers, journals, articles, books, Acts of Parliament, Kenyan Constitution, Conference and seminar papers among others.

1.9.4. Methods of Data Collection

a) Primary data collection

- i) Questionnaires: These were given to the respondents who answered at liberty. 10 questionnaires were administered to government valuers and all responded. A total of 70 questionnaires were administered to landowners, this represent 10 questionnaires for each of the seven selected road projects. So in total 80 questionnaires were administered.

- ii) Personal interview: This is an informal open-ended technique and involves direct and free discussion with the respondent. This was done to both government valuers and landowners.
- b) Direct field observations: This involved personal visits by the researcher who recorded features and/or events as they occurred.
- c) Secondary data collection

This involved reviewing of reports from published and unpublished materials that were prepared before this research. This involved reading of books, articles, journals, seminar papers and reports on compulsory land acquisition. The data obtained comprised both quantitative and qualitative information such as historical background, population and maps of the area of study.

1.9.5. Data Analysis and Interpretation

This section deals with the techniques that have been used in the analysis and interpretation of data collected. Both qualitative and quantitative techniques were used. Data collected was edited and cleaned to ensure that all questionnaires were completed and that the responses are legible and consistent. The responses were then coded along the key study variables to facilitate data entry and analysis using statistical package for social sciences and Microsoft excel. The analysis undertaken was mainly descriptive statistics to summarize the findings and to enable the researcher make comparisons and ranking.

1.9.6. Data Presentation

Data was presented in written text, tables and figures (graph, chart) depending on the type of data under consideration and the intended output to be relayed.

1.10. DEFINITION OF KEY TERMS

Blighted areas- these are areas that, by reason of deterioration, faulty planning, inadequate or improper facilities, deleterious land use or the existence of unsafe structures, or any combination of these factors, are detrimental to the safety, health or welfare of the community (GAO, 2006).

Brownfield site- a real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant (GAO, 2006).

Compulsory acquisition- is the power of government to acquire private rights land without the willing consent of its owner or occupant in order to benefit society. It is also important to note the different terms used for the right and action of compulsory acquisition. In the United States, this right is known as 'eminent domain', the action is known as 'condemnation' (Eaton, 1995). In United Kingdom, New Zealand and Republic of Ireland the rights and action are known as compulsory purchase, in Australia resumption or compulsory acquisition while in South Africa and Canada its known as expropriation (Nelson, 2003). In Kenya "setting apart" for Trust Land and "Compulsory acquisition" for all registered private land.

Economic development- is the increase in the standard of living in a nation's population with sustained growth from a simple, low-income economy to a modern, high-income economy. Its scope includes the process and policies by which a nation improves the economic, political, and social well-being of its people.

Highest and best use- Highest and best use is defined as the reasonable probable and legal use of vacant land or an improved property that is physically possible, legally permissible, appropriately supported, financially feasible, and that results in the highest value (Appraisal institute, 2002).

Land banking- this is the practice of acquiring land and holding it for future use.

Land readjustment- a technique where a group of neighbouring landowners in an urban-fringe area are combined in a partnership for the unified planning, servicing

and subdivision of their land with the project costs and benefits being shared between the landowners (ESCAP, 1985).

Nationalization of land -the elimination of private ownership of land and the transfer of the land to state ownership (ESCAP, 1985).

2. CHAPTER TWO: LITERATURE REVIEW

2.1. INTRODUCTION

Compulsory acquisition requires finding a balance between the public need for land on the one hand, and the provision of land tenure security and protection of private property rights on the other hand as it can be inherently disruptive. Even when compensation is generous and procedures are generally fair and efficient, the displacement of people from established homes, businesses and communities will still entail significant human costs. Where the process is designed or implemented poorly, the economic, social and political costs may be enormous. Attention to the procedures of compulsory acquisition is critical if a government's exercise of compulsory acquisition is to be efficient, fair and legitimate.

Chapter one has introduced the study and the problem statement. Chapter two contains literature review on Kenya and other developed countries pertaining to the importance of right to private property, justifications and main elements of eminent domain, the chapter further examines highest and best use in relation to land acquisition and the history of acquisition in Kenya including the procedures of land acquisition. Finally the chapter highlights some recent court decisions on land acquisition cases in the country.

2.2. THE IMPORTANCE OF RIGHT TO PRIVATE PROPERTY

According to Jeremy (2006, pp.1-3) right to private property is one of the fundamental rights of a free society. It protects all persons, regardless of gender, race, age or socio-economic status, and it provides a bulwark against tyranny and arbitrary or abusive governmental action. Without this right, the people cannot be truly free and independent of their government. As George Washington proclaimed "Private property and freedom are inseparable." Section 40(1) of the new Kenya Constitution under the bill of rights guarantees protection of right to property and also Section 40(3b) of the old Constitution. The same is the case with Article 2 Protocol 1 of the European Convention on Human Rights. In the case of *Torino Enterprises Limited v. Attorney General, Nairobi High Court, Petition 38 of 2011*, the judge declared that the acquisition of the suit property by the respondent was done in contravention of Article 40(3) of the Constitution of Kenya and the Land

Acquisition Act, and thus the occupation, retention, detention and any continued occupation of the said portion of the suit land amounts to compulsory acquisition, without compensation contrary to Article 40(3) of the Constitution of Kenya.

Jeremy (2006, pp.1-3) further argues that right to private property protects individuals in many ways. First, it divides power, both between the Government and the people and between the people themselves. It provides individuals with a sphere of freedom and independence in which each individual may act unmolested by government or by others.

Secondly, the right to own, possess, use, and dispose of property allows people to gain true security and independence, in addition to giving individuals the opportunity to attain a better quality of life. Private property gives individuals control over goods, resources, and means of production, which in turn lends individuals the opportunity to obtain economic independence and security. Meanwhile, thousands of citizens all over the world have shed their blood to preserve this cherished right for themselves and their posterity. This was the case with the Mau Mau resistance in Kenya during the colonial times. They started an uprising in 1952 in an attempt to reclaim their land and freedom.

Thirdly, the right to private property empowers the people and leads to political freedom. In any society where the right to private property existed without political freedom, the people could simply remove themselves from the oppressive state or finance a revolution, just as their forefathers did. Finally, Jeremy (2006) states that right to private property undergird and protect all other rights. It truly is “the guardian of every other right.”

2.3. JUSTIFICATIONS FOR COMPULSORY ACQUISITION (PUBLIC INTERESTS)

According to Kalbro (2007, pp. 2-3) changes of land use, property subdivision, ownership and rights can often be achieved by voluntary agreement, based on negotiations between buyer and seller but property owners can be forced to surrender property and rights against their wishes. Thus it is legally possible for a buyer to acquire properties/rights at a lower price than would probably have resulted from free negotiations with the seller. Fundamentally, then, the coercive rules are

related to the amount of compensation to be paid. This price regulation, then, presupposes the existence of a public interest, the more detailed implications of which have been defined through legislation and case law in different countries. The question has also been discussed, however, in the academic discipline commonly termed “law and economics”. In Kenya the state is empowered under Section 40(3) of the new Constitution to acquire private land if the acquisition is for public purposes or in the interest of the public upon compensation.

The siting of many facilities – roads, railways and utilities, for example – is often more or less confined to certain places. In other words, certain specified areas of land are needed for the purpose, and so the buyer (Government) cannot approach any property owner whatsoever with a view to acquiring the necessary land on the open market. The seller, accordingly, has a monopoly status in relation to the buyer.

If then, compulsory purchase was not possible; these measures could be prevented by the owner refusing to part with his land. The owner of strategically situated land could frustrate measures which are desirable from a community viewpoint. In other words, the owner could veto the implementation of a planned use of the land. One argument in favour of compulsory purchase legislation, then, is that it prevents the individual property owner from acquiring such power (Kalbro, 2007). In the case of *Maisha Nishike Ltd vs the Commissioner of Lands, (Nairobi Law Courts) Miscellaneous Civil Application 66 of 2010*, the court ruled that despite the fact that the owner was asking for a compensation amount which was way beyond the award given by the Commissioner of Lands, the public interest outweighed individual benefits and the stay orders prohibiting the contractor from entering the land were lifted and the owner asked to pursue the issue of the amount compensated with the Land Acquisition and Compensation Tribunal.

Kalbro (2007) states that in the situations described above, it is also conceivable that the property owner is not prepared to go to the extent of refusing to sell on any account. But in order to agree to a sale, the owner, conscious of occupying a monopolistic situation, demands a very high, “unreason-able”, price. A second argument in favour of legislation, then, is that it prevents a property owner from obtaining monopolistic profits by owning land, which happens to occupy a strategic position. So the main reason for sanctioning compulsory acquisition is the buyer’s

need of certain specified areas of land, and the concomitant risk of his having to pay a higher price than he would if there were more potential sellers, and also of the cost of negotiations being unnecessarily high. This is well illustrated by the case

The buyer's need of a certain particular area of land is commonly regarded as a necessary precondition for the justifiability of compulsory acquisition, but it is not the sole precondition. The purpose of the acquisition has to be rated, generally speaking, "important". If, for example, I wish to add a few square metres of my neighbour's property to my front lawn, this definitely requires a particular area of land, but the requirement will not justify compulsory acquisition, because my front lawn can hardly be termed an important purpose. In order for a purpose to be important from a public point of view, the benefits of the purpose/acquisition have to be significant to a larger group of people, as is normally the case, for example, with common facilities like roads, utilities and green spaces.

Finally, in order to legitimate compulsory acquisition, the purpose of the purchase has to be "profitable" in the view of society, i.e. the value of the new land-uses must exceed the value of the existing use (Kallbro, 2007).

The repealed land Acquisition Act Section 6(1) states under which conditions the government can acquire land for public benefits which include among others defense, public safety, public order, public morality etc. In the new Land Acts, 2012 Section 107(2) the National Land Commission has been given powers to prescribe a criteria and guidelines on how land will be acquired for public purpose.

Public interest is further stressed in the case of *Rodgers Mwema Nzioka v. The Attorney General (1st respondent) and The Commissioner of Mines and Geology (2nd respondent)*, (Nairobi Law Courts) *Petition 613 of 2006*, the court held that in practice, where resources have been discovered in a private land there is a shared ownership of the land in that the minerals until extracted form part of the land. In such situations the Court has to balance the individual rights of ownership with the public interest of having the resources exploited for the public good. The judge further stated that the articulation of the public interest by the state agents cannot be reasonably taken to be violations of the Constitution or the right of access be taken to be trespass or forcible entry provided the public interest is asserted in a humane

and reasonable manner. The offer by the Government of a monetary sum, plus an offer of alternative resettlement including compensation for trees and crops and other items as set out in the Mining Act cannot by any standard be said unreasonable or conducive to violation of rights and freedoms of the land owners.

2.4. ELEMENTS OF EMINENT DOMAIN

Greenberg (2008, pp. 2-4) state that to exercise the power of eminent domain, there are four elements that a state must prove in almost every country: - (1) private property (2) must be taken (3) for public use (4) and with just compensation. These elements have been interpreted broadly as follows:-

2.4.1. Private Property

According to West Encyclopedia of America Law (n.d.) the first element requires that the property taken be private. Private property includes land as well as fixtures, leases, options, stocks, and other items. The power of eminent domain may be exercised over any property, real or personal, public or private. A taking may be made of all or a portion of a property, in fee, of an easement or of any property right including a leasehold, and may be made either permanent or temporary.

2.4.2. Taking

Green (2008) points out that, the second element refers to the taking of physical property, or a portion thereof, as well as the taking of property by reducing its value. Property value may be reduced because of noise, accessibility problems, or other agents. Dirt, timber, or rock appropriated from an individual's land for the construction of a highway is taken property for which the owner is entitled to compensation. In general, compensation must be paid when a restriction on the use of property is so extensive that it is tantamount to confiscation of the property.

West Encyclopedia of America Law (n.d.) observes that some property rights routinely receive constitutional protection, such as water rights. For example, if land is changed from waterfront to inland property by the construction of a highway on the shoreline, the owners of the affected property are to be compensated for their loss of use of the waterfront.

Another property right that is often litigated and routinely protected is the right to the reasonable and ordinary use of the space above privately owned land. Specifically, aircraft flights over private property that significantly interfere with the property owner's use may amount to a taking. The flights will not be deemed a taking unless they are so low and so frequent as to create a direct and immediate interference with the owner's use and enjoyment of the property.

2.4.3. Public Use

West Encyclopedia of America Law (n.d.) confirms that the third element, public use, requires that the property taken be used to benefit the public rather than specific individuals. Whether a particular use is considered public is ordinarily a question to be determined by the courts. To determine whether property has been taken for public use, the courts first determined whether the property was to be used by a broad segment of the general public. The courts have recently continued to expand the definition of public use to include aesthetic considerations. In *Berman v. Parker*, 348 U.S. (1954), the Court ruled that slums could be cleared in order to make a city more visually attractive. In the case of *Commissioner of Lands and Another v. Coastal Acquaculture Ltd. (Civil Appeal No. 252 of 1196), Nairobi*, the high court ruled in favour of the appellant by holding that, when giving notice during the acquisition the public purpose and the public body for which the land was been acquired was not stated. The same was expressed in the case of *Kisima Farm Ltd v. Commissioner of Lands, Nairobi High Court, and Miscellaneous Civil Case No. 62 of 1978*. Other cases illustrating public purposes controversies include: - *Susan Kelo v. City of New London (USA)*, the *Arsenal Case (England) Alliance Spring Co. Ltd. and Others v. the First Secretary of State [2005] EWHC (Admin)*, *Elizabeth Pascoe v. First Secretary of State, EW High Court, Sept. 2006* and *Judith Karassik v. State of Israel (2001)*.

2.4.4. Just Compensation

The Kenya Constitution Section 40 3b (i) require prompt payment in full, of just compensation to the person affected by the acquisition. Anuar & Nasir (2006, pp 1-2) point out that the term compensation when used in the context of deprivation of land it means *recompense or amends*. It means the sum of money which the owner

would have got had he sold the land on the open market plus other losses which result from the resumption. The repealed Land Acquisition Act Cap 295 under the Schedule Section 1(2) states the matters to be considered in determining compensation while under the Land Act, 2012 these matters are under review as per Section 111(2).

Just compensation mandates that the amount of compensation awarded when property is seized or damaged through condemnation must be fair to the public as well as to the property owner. What should be the measure of compensation? According to Elliott (1977), there is nothing in any compulsory acquisition laws mentioned on the measure or yardstick to apply in assessing the compensation. As the result of the unusually open texture of the legislation, the measure of compensation was left to the arbitrators or juries to determine.

The courts tend to emphasize the rights of the property owner in eminent domain proceedings. The owner usually has not initiated the action but has been brought into the litigation because his or her property is needed for public use. The owner must participate in the proceedings, which can impose an emotional and financial burden.

The measure of damages is often the fair market value of the property that is harmed or taken for public use. The market value is commonly defined as the price that reasonably could have resulted from negotiations between an owner who was willing to sell it and a purchaser who wanted to buy it. In the case of *Kanini Farm Ltd v. Commissioner of Lands*, (High Court Nairobi Land Acquisition Act Appeal No 1 of 1981), the court observed that market value as a basis of assessing compensation is the price that a willing seller is expected to obtain from a willing purchaser; the purchaser may be a speculator but a reasonable one.

The value of real property is assessed based on the uses to which it reasonably can be put. Elements for consideration include the history and general character of the area; the adaptability of the land for future buildings; and the use intended for the property after its taking (Crouch, 1960). Generally, the best use of the land is considered to be its use at the time it was condemned, even though the condemnor might not intend to use the land in the same manner as the owner. Crops, grass, trees, minerals, rental income, and all other items that fairly enter into the question

of value are taken into consideration when determining just compensation. The amount of compensation should be measured by the owner's loss rather than by the acquiring body gains, and the owner should be placed in as good a financial position as he or she would have been in had the property not been taken (Monongahela, n.d.). The compensation should be paid in cash, and the amount is determined as of the date title vests in the acquiring body. Interest is paid on the award until the date of payment.

Greenberg (2008) confirms that there are three generally accepted methods of or approaches to calculating fair market value. These methods are commonly referred to as the market data approach, the capitalization of income approach and the depreciated reproduction cost approach.

Sales Comparison or Market Data Approach

In the case of *Kanini Farm Ltd v. Commissioner of Lands*, (High Court Nairobi 1981), the judge stated that in determining the amount of compensation which ought to be paid the court should take into consideration the comparable sales and awards on other acquisitions of land of similar character. The market data or direct sales comparison approach is generally regarded as the most reliable method of determining fair market value for unimproved residential, commercial and industrial land. Improved residential properties and, to a lesser extent, commercial and industrial properties, are often valued using this approach also. These properties tend to have very active markets where hundreds of real estate transactions, driven solely by forces at work in the open market, can be observed, analyzed and compared to the property in question. A sequence or steady volume of sales of ordinary commercial and residential properties similar in essentials to the subject property, in relative proximity to the subject and reasonably near the taking (date of valuation) in point of time is generally accepted as an accurate reflection of how the market would have responded had the property been offered for sale to the hypothetical willing buyer by the hypothetical willing seller.

The Income Approach

There is a direct relationship between the value of a property and the net income it produces. Apartment buildings, office buildings and shopping centers are income

producing properties. Generally, the owner of an income producing property has purchased the property as an investment, expecting to receive a higher or preferred rate of return on the investment than that which would have otherwise been available from other potential investments. Return on the investment is measured by income to the owner. Income to the owner of real estate is expressed in terms of rent. Gross income is all the rent and other payments made by the tenant to the landlord (e.g., real estate tax apportionment, insurance and utilities, etc.). Net income is gross income (or gross rent) less an amount for an anticipated or projected vacancy factor and for expenses incurred by the owner in the operation of the property. The value of the investment can be determined if the rate at which the income was being generated was known or could be determined. That rate of return, in real estate, is known as the capitalization rate. The income approach converts the net operating income into an indication of value by capitalization.

The Cost Approach

The Sales Comparison and Income Approaches are market methodologies to determine value formulated to reflect how the market would have responded had the property been available for sale. In some states, cost is a widely accepted approach to value but in most, cost is reserved for valuation of special purpose properties, properties which are not commonly bought and sold on the open market, cost is an accepted measure of value. But cost is not value. Cost of reproduction or of replacement may be used to determine value so long as each are adequately discounted for physical, function and economic obsolescence. Cost of repair, cost to cure, cost of recent improvements as well as projected cost of potential improvements as part of an opinion of financial feasibility finds its way into many cases (Greenberg, 2008).

2.5. OTHER FORMS OF LAND ACQUISITIONS

2.5.1. Inverse Condemnation

According to Wikipendia (n.d.) an increase in environmental problems has resulted in a new type of eminent domain proceeding called inverse condemnation. In this proceeding, the property owner, rather than the acquiring body, initiates the action. The owner alleges that the Government has acquired an interest in his or her

property without giving compensation, such as when the Government floods a farmer's field or pollutes a stream crossing private land. An inverse condemnation proceeding is often brought by a property owner when it appears that the taker of the property does not intend to bring eminent domain proceedings.

2.5.2. Private Compulsory Acquisition

Wikipedia (n.d.) points out that some decades ago in many countries expropriation, for the most part, was carried out by "the public", meaning national or local Government, and the involvement of public interests did not, normally, need to be challenged. It went more or less without saying that when public authorities had to acquire land, this was a matter of public interest.

A more complicated scene has evolved, however, during the past twenty years or so, due to the privatisation of traditionally public undertakings. For example, former State Bodies for telecommunications, with a monopoly of telecommunication services, has now become limited companies operating for profit. Private consortia are developing new generations of mobile telephony.

Given this transfer of formerly public tasks to the private sector and the need of land for different purposes the question of private compulsory acquisition has arisen. This being so, the question is how is the "public interest" requirement to be met in order for compulsory acquisition to be possible?

2.6. HIGHEST AND BEST USE IN EMINENT DOMAIN

Wayne, Mai & Partiner (n.d., pp. 1-2) found that in all valuations assignments, opinions of value are based on use. Highest and best use reflects the assumption that the price a buyer will pay or that a seller will accept for an asset is based on the most profitable use of the asset. Highest and best use of a property provides the foundation for the competitive position of a property as viewed in the market place. When valuation appraisal is carried out for litigation or eminent domain the issue of contested highest and best use is always an important question to the jury. According to Appraisal Institute (2006) highest and best use is defined as the reasonable probable and legal use of vacant land or an improved property that is physically possible, legally permissible, appropriately supported, financially

feasible, and that results in the highest value. *In Kanini Farm Ltd v. Commissioner of Lands*, where the land owner had challenged the acquisition on the ground that the land been acquired was valued as agricultural while change of user had already taken place to residential the court held that it was fair the property be treated as residential in assessing the compensation.

A recent report (International Accounting Standard Board 2008) argues that underlying the definition and meaning of highest and best use are four implicit criteria that a property must meet:-

2.6.1. Physically possible

Every asset has physical characteristics (attributes) e.g. size, shape, terrain accessibility frontage depth availability etc. Some might have positive attributes that enhance their value. Others have negative attributes that decrease their value.

Intangible and financial assets do not have physical substance. They are unique assets that often have only one use: that for which they have been created. Similarly, a financial asset cannot be converted into another contract without it becoming a different financial asset. As a result, the entity's current 'use' of such assets will be their highest and best use.

2.6.2. Legally permissible

International Accounting Standard Board (2008) states that, legally permissible uses relate to whether the asset legally can be used differently from its current use. A property might be currently zoned for residential use, but nearby properties are being rezoned and converted to commercial use. Must the highest and best use assume its current residential use? or can the entity assume the property is rezoned to commercial use? Some interpret "legally permissible" to mean that an entity can only evaluate the property's highest and best use as a residentially zoned property. However, if there is evidence that rezoning would be approved, it would be reasonable assume that the highest and best use of the property is commercial use.

The entity would take a number of considerations into account in determining whether or not, for example rezoning, could be legally obtained. The probability of a

zoning change could be based on one or more of the following:- the site is not physically suitable for the use currently allowed by zoning, but is physically suitable for the land development forecasted for the potential use; the potential use is compatible or can be designed to be compatible with adjacent land uses; the potential use of the site conforms to the city's comprehensive plan; public good can be shown for the potential use of the site, which means that some level of economic demand should be considered along with other public interests; there is a history of approved zoning changes to similar properties in similar locations in other parts of town; or no nearby neighbourhood association is known to oppose similar zoning changes requests that would accommodate the forecast use for the subject.

It is worth noting that legally permissible pertains to the laws of a particular country or jurisdiction and that the different potential uses must be legal in that jurisdiction. The legally permissible criterion is also relevant for intangible and financial assets. When applying the legally permissible criterion, an entity must consider whether other potential uses for its intangible or financial assets would be legally permitted in its jurisdiction.

2.6.3. Financially feasible

IASB (2008) asserts that once the potential uses are identified using the first two criteria (physical and legal), the entity can test those uses for financial feasibility. Financial feasibility means that the proposed use of a property must generate adequate income to justify the costs of construction (development costs) plus a profit for the developer. Generally, any use that produces a positive investment return is considered financially feasible. 'Costs to develop property' include the following direct and indirect costs: -development costs; land acquisition costs; the costs of obtaining necessary approvals and permits (including the uncertainty or risk that such approval will not be obtained); land building costs; architectural and engineering costs; and management costs. These costs do not include the cost of disrupting the business or relocating the entity's staff. A market participant would not compensate the selling entity for those costs.

2.6.4. Maximum productive

Of the financially feasible uses, the one that produces the highest residual land value consistent with the rate of return warranted by the market for that use is the highest and best use (IASB, 2008).

Wayne, Mai & Partiner (n.d., pp. 3-6) assert that when the appraisal assignment involves an improved property an opinion of highest and best use as improved is also provided by the appraiser. This opinion considers the use that should be made of the site, given the existing improvement and the conclusion of highest and best use as vacant. Highest and best use as improved may involve: - continuation of the existing use; renovation, expansion or rehabilitation of the existing use; conversion of the existing use; demolition of the existing use; and some combination of the above.

Wayne, Mai & Partiner (n.d., pp. 3-6) reasons that highest and best use as improved, analysis also considers additional questions regarding existing improvement. In the analysis of legal permissibility, the appraiser must determine if the existing improvement are in compliance with current legal requirement and/or restrictions. The appraiser must also consider any physical and functional deficiencies of the existing improvements.

Eaton (1995) states that the courts have universally held that property acquired under the sovereign's power of eminent domain is to be valued in recognition of the highest and best use. When the highest and best use of land is disputed, it is for the jury to decide which use is appropriate, and thus whether the condemnee's evidence of valuation is correct, when it determines the market value of the condemned tract. It disagrees that the land owner has a legal right to designate unilaterally an economic unit for valuation purposes that the condemnor cannot controvert (Eaton, 1995).

In cases involving partial taking the appraiser must estimate the highest and best use of the whole property before the taking, and the remainder property after the taking. In estimating the highest and best use of the whole property, any special or "project" influence soft the proposed project is disregarded. Estimation of the highest and best use of the remainder property is more often difficult in that the impact of the

proposed project must be considered e.g. the improvement may have physical or functional issues present in the remainder situations which were not present in the whole property, before the taking. Therefore, when considering the highest and best use of the remainder, issues to consider remainder include but are not limited to:- material and substantial denial of access; parking loss; internal circulation; safety concern due to proximity of the new right of way; cost- to- cure; and property rights acquired such as easements.

Reliable prediction of highest and best use allows an appraiser to develop valuation techniques, market data, and assumption relevant to estimated highest and best use. A market value based on anything but probable use would likely be in insignificant error of what price would actually be paid if the property was sold as of the date of value. In simple terms highest and best use is a technical procedure for predicting what probable use a market value estimate should be based. This situation involves nothing less than the interaction of all factors that affect how individuals and groups decide to utilize a parcel of land either vacant or developed. Therefore, the appraiser's estimate of highest and best use will have a significant impact on the valuation of real estate and by extension, just compensation in eminent domain proceeding (Wayne, Mai & Partiner, n.d.).

When selecting comparable data, the general principle hold that, whenever, possible property being appraised should be compared with recent transaction of similar properties in the market. In some situation similar transaction are often unavailable and the appraiser may need to consider market data in other areas or of other types. The appraiser may also decide to use more dated sales or to solicit the opinion of buyers, sellers, tenants, estate agents or other market participants. Admissibility of solicited opinions may be in question; however, it is prudent to consider information from additional sources where data is not available. Notwithstanding comparable properties of a different highest and best use (regardless of how physically similar to the subject) are usually eliminated from further analysis or discounted by other means. The comparable properties must have the same highest and best use as the subject property.

Comparable properties fall into two categories. First are those that are comparable to and competitive with the property being appraised and have demonstrable effect on

the prices or other relevant components of the market in question and the others are those which are comparable but not competitive with the subject.

In addition following the selection and analysis and selection of comparable data, the appraiser must perform the following tasks in developing an opinion on the land value:-gather data on actual sales; identify the similarities and differences in the data; Identify the of each potential comparable sale; identify units highest and best use of comparison that explain market behavior; adjust the sale prices of the comparables to account for dissimilar characteristics of the land being appraised; form a conclusion as to the market value of the subject land being appraised

Wayne, Mai & Partiner (n.d.) further states that an appraiser should understand fully the concept of comparability and should avoid comparing properties with different highest and best use, limiting their search for comparables, or selecting inappropriate factors for comparison. Comparable sales need not be in the immediate vicinity of the subject land, so long as they meet the test of similarity (City of Austin v. Cannizo, 153 tex.324,267 s.w. 2d 808,815(1954). Wayne, Mai & Partiner (n.d.) also notes that the term comparable does not mean identical (City of Wichita falls v. Willam W. Rust,468 s.w.2d 581,586 (tex civ.app.fort worth 1971,writ dism'd)). Identical sales are not required in the comparable sales comparison method. The important thing is that the valuation witness appreciates and adjust for the differences which necessary exist (Corbin,504 S.W. 2d at 831). In comparable sales analysis the appraiser finds data for similar properties, then makes upward or downward adjustment to these sales based on differences in the subject property.(City of Harlingen v. Sharboneau,48 S.W. 3rd at 177). Property difference always exist and difference in opinions by experts will always exist. An appraiser is not required to locate identical properties, and there is no absolute formular or defination which constitute similar or like property (Southwestern Bell Telephone Co. v. Ramsely,542 S.W 2rd at 476).

Finally, Wayne, Mai & Partiner (n.d.) points out that an appraiser and the appraisal procces always result in an estimate and should not construed as a scientfic process resulting in a totally predictable value or outcome. Thus, when it comes to estimating highest and best use and selecting comparable data in eminent domain valuations, the appraiser is not only confined by the availability of market data, but

by strengths and weakness of their own judgement and experience. Analysis of the highest and best use of land, as though vacant, and of the property, as improved , is essential in the valuation processin that it helps the appraiser identify comparable properties. In the eminent domain environment and other possible litigation arenas, appraiser should always conduct their work under prevailing professional, legal and ethical standards. Though appraisal assingments under all circumstances are important obligations that should perform with complete objectivity and integrity, appraising in the arena of eminent domain carries its own unique civic responsibily in that the landowner's right to just compensation is a vital constitutional right. Implicit in the appraiser's value estimate towards just compensation is an obligation of fairness to both the government, as well as the individual property owner. Therefore, if the estimate of the highest and best use are related selection of comparable data is potentially in error, so too might be the estimate of just compensation.

2.7. HISTORY OF COMPLUSORY LAND ACQUISITION IN KENYA

According to West Encyclopedia of America Law (n.d.) the concept of eminent domain is not new. It has existed since biblical times, when King Ahab of Samaria offered Naboth compensation for Naboth's vineyard (1 Kings Chapter 21, Verse 1-3). In ancient Rome, the Roman Government could seize property for public projects, provided they compensate the owners. In 1789, France officially recognized a property owner's right to compensation for taken property, in the French Declaration of the Rights of Man and of the Citizen, which reads, "Property being an inviolable and sacred right no one can be deprived of it, unless the public necessity plainly demands it, and upon condition of a just and previous indemnity."

According to Wikipedia (n.d) English sovereigns enjoyed similar powers, such that by the time of the American Revolution the power of the British Government to take private property for public uses was well established. The first case of eminent domain in English law is called the "Dobbie Process" or the "King's Prerogative in Saltpeter Case". The English king needed saltpeter for munitions and took a saltpeter mine from a private individual. The private party sued the king and the court established the right of the sovereign to take "private property for public use" without liability for trespass but requiring payment of compensation for the taken

saltpeter. When the colonies became the United States and the English Common Law was adopted as the law of the new nation, this principle was recognized.

According to Sorrenson (1968), in Kenya Compulsory acquisition of land for development purposes began with the onset of colonial administration. The first major development project for the colonial administration was the construction of the Kenya - Uganda Railway from the shores of the Indian Ocean to the shores of Lake Victoria. In this instance the purpose was not directly for urban development but for a transportation network which eventually led to the springing up of major urban centres across Kenya.

In 1896 Hardinge, the "Commissioner of the East Africa Protectorate" established a Commission to value for compensation of about 400 acres of land on Mombasa Island and the adjoining Kilindini foreshore required by the Railway Authority (Sorrenson, 1968). However, the Commission was resisted by European and Indian settlers, who had bought land from the local Arabs arguing that Hardinge had no legal authority to expropriate the land. In response to this, Hardinge borrowed the "Indian Land Acquisition Act" of 1894, which provided for the compulsory acquisition of land from British subjects for public works to apply to the protectorate (Sorrenson, 1968). Though this Act originated from India it borrowed heavily from the English law (Kimutai, 1995). The law was immediately used to acquire land for railway purposes in Mombasa town. This marked the beginning and origin of land acquisition law as applied in Kenya today. The Indian Land Acquisition Act was later replaced by the Land Acquisition Act of 1968 (Cap 295) laws of Kenya which has now been repealed and replaced with Part viii of the Land Act, 2012.

In the case of native land, Hardinge simply issued a proclamation reserving all land for railway purposes for a mile on either side of the line beyond the coastal strip, subject to any right that were proved to his satisfaction (Sorrenson ,1968). In this case no law was applicable.

According to Kimutai (1995) the history of trust land in Kenya dates back to the period before Kenya gained independence. It started when the Colonial Government appointed a Land Commission under the chairmanship of Morris Carter to investigate how the 1930 Ordinance was operating, the present and future land needs

of the natives and the nature of claims that the natives had on land alienated to non natives. The Commission recommended that the boundaries of the native reserves be entrenched in an order in council. This was done in 1938 Native Lands Trust Ordinance that vested the reserves in a Trust Land Board (Onalo, 1986). The board was charged with the responsibility of representing Africans interest. In all cases where the governor wanted to exclude land from the reserve for a public purpose he had to be satisfied that the idea was consented to by the majority of the Africans in the area and specifically that the local native council had passed a resolution in its favour. In addition the trust land board had to be consulted and consent to the exercise. Thus for the first time elaborate legislative provisions for setting apart of trust lands appeared, covering such matters as compensation, notification and Gazettements. The governor still retained the power to exclude land from the native reserves for certain purposes.

During independence, the Constitution Section 208 converted all the land in the former African reserves into trust lands vested in the County Councils to be held in trust for their occupation. The way the trustees are to administer the land is set out in the Trust Land Act Chapter 288. It is this law that set out the procedure for setting apart of trust land both by the Council and the Government (Onalo, 1986).

As explained earlier in Kenya today the right of expropriation is entrenched in the new Constitution under the bill of rights (Chapter 4) Section 40 and the process is guided by several Acts of Parliament. The principal one being the Land Acquisition Act Cap 295 (repealed and replaced with the Land Act, 2012 Part Viii), which empowers the Government to acquire land for public body where the acquisition is necessary for public interest. The County Government under Section 107(1) of the new law has also been empowered to acquire land like the National Government. The Trust Land Act Cap 288 Section 13 (1) empowers local authority to expropriate land for local needs, which may include urban development and Section 7 (1) of same Act empowers the Government to expropriate trust land for public needs. Some aspects of compulsory land acquisition were discussed in the case of *New Munyu Sisal Estates Ltd v. the Attorney General of Kenya, H.C.CC NO. 320 of 1969*. The case concerned itself with the question of quantum of compensation but went further into the question of law regarding compulsory acquisition at large i.e.

the Kenyan Constitution, the Indian Land Acquisition Act 1894, and the Land Acquisition Act 1968 (repealed) and Agriculture Act Cap 318 Of the laws of Kenya (Onalo, 1986).

2.8. COMPLUSORY LAND ACQUISITION PROCEDURE AND PRINCIPLES IN KENYA

2.8.1. The procedure

When can land be acquired compulsorily?

Section 6(1) of Cap 295 of Compulsory Land Acquisition Act states that where the Minister is satisfied that any land is required for purposes of a public body he may direct the Commissioner of Lands to acquire the land compulsorily. Under the Trust Land Act Cap 288 Section 7 (1) when written notice is given to a Council, under Subsection (3) of Section 118 of the old Constitution the President after consultation with the Council can give a notice for setting apart of land for the purposes of:- the Government of Kenya; body corporate establish for public purposes by an Act of Parliament; a company registered under the law relating to company in which shares are held by or on behalf of the Government of Kenya and prospecting for or the extraction of minerals or mineral oils

Inquiry as to compensation

As per Section 9 of Cap 295 the Commissioner appoint a date not earlier than 30 days and not later than 12 months after publication of notice to acquire, for the holding of an inquiry for the hearing of claims into compensation by the interested persons. The claim by the interested persons should be delivered to the Commissioner not later than the date of the inquiry. The Trust Land Act does not provide for inquiry but a notice of setting apart is given under Section 7 (1) of Cap 288.

Award

Section 10 (1) of Cap 295 states that upon conclusion of the inquiry the Commissioner of Lands shall prepare a written award with separate award for each interested person. Under Section 10 (2) the award should contain:- the area of land

acquired; the value of the land; and the amount of compensation payable. Under Section 9 subsections (2) & (3) of Cap 288 compensation, assessment and award are carried out by the District Commissioner after consultation with the Divisional Board in case of setting apart by the Government or the Council.

When can compensation be withheld?

Under Section 13 (1) of Cap 295 the Commissioner of Lands can withhold compensation in cases where:- there is no competent person to receive the award; the person entitled does not consent to receive the award; or there is a dispute as to the right of the person entitled to receive the award or as to the share in which it is to be paid. Any amount of compensation, which is not paid, is deposited in the court as under Section 13(2) and attracts interests of 6.0% as from the time of taking possession until the payment is made

When should Compensation be paid?

Section 8 of Cap 295, Section 8(1) of Cap 288 and Section 75 Subsection 1(c) of the Constitution of Kenya requires that where land is acquired compulsorily or set apart full compensation should be paid promptly.

Taking possession and vesting

Section 19 (1) of Cap 295 states that after the award has been made the Commissioner shall take possession of the land on a specified day and the title vested in the government. Under Section 19 (2) of the same Act in case of emergency the Minister may direct the Commissioner of Lands to take possession of uncultivated or pasture or arable land notwithstanding that no award has been made.

Which matters are to be referred to court?

Under Cap 295 there are three instances where matters are referred to court. The first instance is under Section 28 (1) where the Commissioner of lands is empowered to refer the following matters to court:- the construction, validity or effect of any instrument; the persons interested in the land; the extent and nature of the interest; the person to whom compensation is payable; the share in which compensation is to be paid to tenants in common; the question whether or not any part of the building is

reasonably required for the full and impaired use of the building ; or the condition of any land at the expiration of the term for which it is occupied.

The second instance is under Section 29 (1) where the interested person has the right of access to the high court in respect to the determination of his interest or right in or over land; or the amount of compensation paid or offered to him and finally the public body for whose purpose the land is acquire may appeal to court against the amount of compensation awarded; or the amount compensation paid or offered. In situations where the interested person is dissatisfied with the award given by the Commissioner of Lands Section 29 of Cap 295 establishes a Land Acquisition Compensation Tribunal to hear such claims.

How are notices served?

This is specified under Section 33 of Cap 295 and notices are supposed to be served by:- delivering to the person personally; sending it by registered post; leaving it with the occupier of the land where the where about of the person is not known or where there is no occupier by affixing it upon some prominent part of the land; or If it a body corporate, society or association of persons by serving it personally on the secretary, director or other officers, or by leaving it or sending it by registered post, where there is no registered post at any place where it carries on business.

2.8.2. Compensation Principles in Kenya

According to section 1(1) of Cap 295 of the schedule market value means market value of the land at the date of publication the Gazette of the intention to acquire the land. The matters which are to be taken into consideration in determining the amount of compensation include:- the market value; damages sustained or likely to be sustained by persons interested in the land by reasons of severing the land from his other land; damages sustained or likely to be sustained by persons interested in the land by reasons of acquisition injuriously affecting his other property whether movable or immovable, in any other manner or his actual earning; reasonable expenses incidental to the change of residence or place of business; or damages resulting from diminution of the profits of the land between the date of gazette of the notice to acquire the land and the date of possession by the Commissioner.

Section 3 of the schedule of this act specifies which matters are to be ignored when determining the amount of compensation. Which includes:- the degree of urgency which has led to the acquisition; any disinclination of the person interested to part with the land; damages sustained by the person interested which if caused by a private person would not be a good cause of action; damage which is likely to be caused to the land after the date of gazette of notice of the intention to acquire the land or in consequence of the use to the land will be put; any increase in value of the land likely to accrue from the use to which it will be put when acquired; and any outlay on additions or improvements to the land, incurred after the date of publication in the gazette of the notice of the intention to acquire the land unless the addition or improvements were necessary for the maintenance of part of the building in proper state of repair. Section 4 of the schedule states that to the amount of compensation determined 15% of the market value should be added.

2.8.3. Differences between the new Land Act, 2012 Part Viii and the repealed Land Acquisition Act Cap 295

Table 2-1 below highlights the main differences between Cap 295 and the new Land Act, 2012 Part Viii. The new Act borrows heavily from the old Act save for some few changes. However, it is important to note that the Act has a major error as Section 107 (1) indicates that the acquisition is of public land instead of stating that acquisition is for private land. Other minor errors noted include misplaced heading of subtitles of the Act especially from Sections 117 to 126. There is need therefore for the stakeholders especially the National Land Commission and the Ministry of Lands to review the Act and sort out such mistakes to avoid difficulties during implementation.

Table 2-1: Differences between the new Land Act, 2012 Part VIII and Land Acquisition Act Cap 295

Process	Land Acquisition Act Cap 295	Land Act, 2012 Part VIII
Authority to acquire	Whenever the Minister of lands is satisfied that any land is required for public purpose he may direct the Commissioner of Lands in writing to acquire the land compulsorily under Section 6(1).	Under Section 107(1) the National or the County Government submit the request to acquire land through the respective Cabinet Secretary or the Executive Committee Member in writing to the National Land Commission.
Compensation amount held	Under Section 13(2) any compensation which is not paid or paid to the court before the taking of possession of the land, the Commissioner shall pay interest of 6% per annum from the time of taking possession until the time of payment or payment into court	Any compensation amount held is supposed to be deposited in a special account held by the Commission as per Section 115(2) and attracts interest at the prevailing bank rates as per Section 117
Taking possession	Section 19(1) states that taking possession can take place after the landowner has been issued with an award.	Section 120(12) states that only after the award has been made and the amount of first offer has been paid can the Commission take possession.
Dispute arising	Under section 28 disputes regarding amount of compensation is to be referred to the Land Compensation Tribunal while other disputes are to be handled by the courts as per Section 29.	Under Section 128 all compensation disputes are to be referred to the Land and Environmental Court.

Process	Land Acquisition Act Cap 295	Land Act, 2012 Part Viii
Serving notices	Notices are served through the Kenya Gazette as per Section 33	In addition to Kenya gazette Section 131(1e) states that the Commission may advertise in two newspapers with national circulation.
Compensation principles	Were done under Section 1(1) of the schedule.	Currently under review

2.9. CURRENT TRENDS IN THE LAW OF COMPULSORY LAND ACQUISITION IN KENYA

Compulsory land acquisition in Kenya has always been a delicate issue and is increasingly so nowadays in the context of rapid growth and changes in land use. The government is under increasing pressure to deliver public services in the face of high and growing demand for land. The current state of economic development continues to create a voracious appetite for space to meet the demand for industrialization, infrastructure building, urban expansion and resource extraction. Finding a way to balance the needs of economic growth, equitable distribution and human rights, rescuing these complex and sometimes conflicting objectives makes it necessary for policy makers, valuers, surveyors and lawyers to keep abreast of current developments in the field and practice of compulsory acquisition, and particularly with the principles of law established by recent court decisions in the country.

2.9.1. Recent Court Decisions

2.9.1.1. Use of land acquired compulsory and alienation of public land.

Niaz Mohamed Jan Mohamed v. Commissioner of Lands & Four (4) others (Mombasa High Court, 1996)

Niaz Mohamed Jan Mohamed was the owner of a plot in Mombasa. During construction of Nyali Bridge in 1979, it became necessary to construct a new access road to Kisauni and Nyali estate. The road traversed his plot amongst others and therefore, the Land Acquisition Act was invoked to acquire an area of 0.37 acres traversed by the road with respect to his plot. After construction of the road, Niaz enjoyed a road frontage and direct access to that road until November 1995 when it is alleged that the Commissioner of Lands, with the knowledge of the Municipal Council of Mombasa created a new leasehold title from a small portion which remained uncovered by the tarmac road and allocated it to the 3rd, 4th and 5th defendants. Niaz saw this as an attempt to interfere with his easement rights of access to the new road and its road reserve, and also an attempt to unlawfully alienate public land to private developers. He filed a suit against the defendants and filed an application for an injunction to prohibit the defendants from developing or dealing in the suit land until determination of the case. It was contended for the 3rd, 4th and 5th defendant that the suit land was vested in the government and could be dealt with by the government under the Government Lands Act and the remaining portion was not a road reserve.

The court held that there is no right of compulsory acquisition of land by the government for purposes other than those provided for in the Constitution of Kenya Section 75 (old Constitution) whose spirit is carried forward in the Land Acquisition Act itself, particularly in Section 6. There is no provision in law that upon compulsory acquisition of land and vesting of that land in the government the land is to be used by the government in any manner it desires. The land must be used, for a lawful purpose, which is the one for which it was acquired. The court further added that the land in issue was acquired for the construction of a public road and it does not matter that the entire portion was not used for that purpose. The unutilized portions in the court's view would remain as a road reserves. Since the acquisition

was done for the purpose of making a public road the land vested in the local authority, the Municipal Council of Mombasa, to hold in trust for the public in accordance with the law. This included the portion utilized for the tarmacked road and the remaining portions which form part of the road reserve. Such trust land can neither be alienated by the Local Authority nor the Government under the Government Land Act. The applicant had a right to assume that the unutilized portion would remain a road reserve and he would continue to enjoy all the rights and privileges of a frontage to the road and enjoy the resultant easement of direct access to that road. The court further held that no amount of money can compensate the infringement of such right or atone for transgressions against the law. A public or common nuisance is an act which interferes with the enjoyment of a right which all members of the community are entitled to, such as the right to fresh air, to travel on the highway etc. The remedy of public nuisance is by indictment, information or injunction at the suit of the Attorney General.

2.9.1.2. Change of user and valuation for compensation

Kanini Farm Ltd v. Commissioner of Lands, (High Court Nairobi Land Acquisition Act Appeal No 1 of 1981)

The appellant's land was compulsorily acquired by the government under the Land Acquisition Act (Cap 295). The appellant challenged the compensation awarded on the grounds that the Government valued the property as agricultural land when it had already changed user to residential and that some of the recipients of compensation were trespassers of the land.

The court held that a person whose land is acquired is entitled to prompt payment of full compensation as a result of the acquisition as provided for under Section 75 (1) (c) of the Constitution and Section 8 of the Land Acquisition Act (Cap 295). When land is compulsorily acquired under the Land Acquisition Act an inquiry to determine the person's interested in the land, the value of the land and the compensation to be paid must be held as required by Section 9 (3) of the Act. Further, the court said that market value as a basis for assessing compensation is the price which a willing seller might be expected to obtain from a willing purchaser, the purchaser may be a speculator but a reasonable one. The changes of user of the

suit land, from agricultural to a residential character was approved before the acquisition, therefore it was fair and just that the property should be treated as residential in assessing compensation. In determining the amount of compensation which ought to be paid the court should take into account comparable sales and awards on other acquisition of land of similar character. And finally, the court held that the burden is on the appellant challenging the adequacy of the compensation to prove that the award of compensation is wrong.

2.9.1.3. Public body and public purposes

- a. Commissioner of Lands & Another v. Coastal Acquaculture Ltd. (Civil Appeal No. 252 of 1196).

The case arose out of a decision by the Commissioner of Lands to give notice on 5th November 1993 of an intention to acquire a parcel of land in Tana River belonging to Coastal Acquaculture Ltd (L.R. Nos. 17600 and 17601/2), known as Ngomeni Peninsula, which was approximately 2674 hectares. The land acquisition was done in reliance of the powers under Section 75 of the old Constitution and the Land Acquisition Act Cap 295. The purpose for which the acquisition was done was stated to as being for Tana Delta Wetlands. The respondent were dissatisfied with the decision of the Commissioner of Lands to compulsory acquire their land and brought a case in the High Court challenging that decision. The High Court through Justice Ringera ruled in their favour by holding that the public purpose and body for which the land was being acquired was not stated.

On appeal to the Court of Appeal this position was upheld. Although arguments were made both in the High Court and in the Appeal Court that Tana River Delta Wetlands was not a geographical cum ecological description, but a public body for purposes of compulsory acquisition, and further that the term wetland was an international term of art indicative of a water catchment area, the court still held that the purported acquisition did not comply with the strict requirement of the law on compulsory acquisition. The decision was not made because wetland management was not a public purpose but because this was not expressly stated in the notice. On appealing Justice Tunoi in his ruling concurred.

This matter was later referred to the COMESA Court of Justice in 2001 (The Republic of Kenya and the Commissioner of Lands v. Coastal Acquaculture Ltd. Reference NO. 3/2001). The court held that under the COMESA Treaty by Article 26, the respondent being a legal person resident in a Member State may have the requisite *locus standi* to refer proceedings to the Court for determination only if it has exhausted all local remedies in the National Courts or tribunals of Kenya. But in this case the respondent filed a Civil Suit No.2421 of 1996 in the High Court of Kenya at Nairobi entitled Coastal Acquaculture Ltd. v. Commissioner of Lands and Attorney-General, seeking damages purportedly suffered as a result of the prohibited attempts by the applicant to compulsorily acquire the said parcels of land. The respondent however did not prosecute that action to finality in the High Court of Kenya. The respondent withdrew that action just before commencing these proceedings in COMESA Court. The court argued that the withdrawal by the respondent of its action for damages in Civil Suit No. 2421 of 1996 did not constitute an exhaustion of the respondent's legal remedies in the municipal courts of the Republic of Kenya such as to grant the respondent a *locus standi* to commence the Reference. Finally, the court was wholly in agreement with the view expressed by Justice Ringera and upheld by the Court of Appeal of Kenya that once the responsible Minister certifies that the land is required for the purpose of the Land Acquisition Act. The acquisition can only be withdrawn as a matter of ministerial discretion where the Minister is satisfied for any reason that it is no longer necessary to proceed with the acquisition. A Court of law cannot direct the Minister to withdraw the acquisition, save perhaps in proceedings where the legality of the acquisition is successfully challenged. The court further found that the matter of the compulsory acquisition of respondent's parcels of land was still pending in the Republic of Kenya and the respondent is precluded by the proviso to Article 26 from commencing a reference in the COMESA Court.

- b. Kisima Farm Ltd v. Commissioner of Lands (Nairobi High Court, Miscellaneous Civil Case No 62 of 1978)

Kisima Farm Ltd, the applicant company, applied *ex parte* to the High Court for leave to issue an order of prohibition against the Commissioner of Lands from continuing with an inquiry into claims for compensation by persons interested in two

portions of land at Timau (Land Reference Nos 2812/ R2812) which were being used by the applicant company as one unit together with two other pieces of land (Land Reference Nos 72262 and 2811/R).

The application arose out of two Gazette Notices, Notices 3678 and 3679, dated 20th December, 1977 which had been issued under the hand of the Commissioner of Lands. In the first of these Gazette Notices, the Commissioner of Lands gave notice that the government intended to acquire these two pieces of land for a public purpose, under Section 6(2) of the Land Acquisition Act; and under the second notice, that consequential inquiry into claims for compensation would be held by him pursuant to Section 9(1) of the Act on the 8th February 1978. The applicant contended that the Commissioner of Lands had failed to specify the public body and public purpose for which the land was being acquired. On the other hand the respondent argued that the existence of a right of appeal under Section 29 of the Act precluded the applicant from seeking for an order of prohibition.

The court held that the Commissioner of Lands, in determining claims to compensation under Section 9 of the Land Acquisition Act, is under a duty to act judicially and, accordingly, an order of prohibition may be made in (in a appropriate circumstances) to restrain him from continuing the holding of the inquiry into compensation. The existence of a right of appeal from the decision of the Commissioner of Lands does not preclude the grant of an order of prohibition.

2.9.1.4. Sanctity of Legal title deed in land acquisition

- a. Torino Enterprises Limited v. Attorney General, Nairobi High Court Petition 38 of 2011

Torino Enterprises Limited acquired all that parcel of land known as L.R. No. 22524, Grant Number IR 85966 on 26/4/2001 situate in Embakasi within the City of Nairobi, for a term of 99 years, which term commenced on 1/1/2000 for a consideration from Renton Company Limited, which the company had also acquired it for value from the Nairobi City Council ('NCC').

Though it acquired the suit land (which measures 83.910 hectares or 207 acres), with the intention of developing residential quarters for commercial sale, sometime

in the year 2005, the Department of Defence ('DOD'), encroached on the suit land, hived off and fenced of a total of 90 acres there from, and that though, it wrote and requested DOD to desist from trespassing on the said land, DOD however persisted and actually proceeded to construct a demining college on the land, and that it has now been denied its right to develop the suit land.

The petitioner was of the view that the said encroachment and total dispossession of 90 acres of the suit land by DOD was illegal, as it was done without following the laid down statutory procedures for there was no indication whatsoever, that the same had been acquired under the Land Acquisition Act (Cap 295). It was also aggrieved by the fact that there had been no prior indication by the Government or any of its arms that there would be need to compulsorily acquire the said portion of 90 acres, and in the circumstances it was of the view that the said action is unlawful and amounts to illegal dispossession of its land, especially because it never consented to the occupation, neither had its title to the suit land been revoked or cancelled, nor has DOD compensated it or paid it any profits for the said use and occupation.

The petition was however opposed by DOD, by claiming that sometimes in 1984, DOD, intimated that it intended to acquire land in the area where the suit premises are situated; that because the said land was then registered in the name of NCC, DOD though the Ministry of Defence has been trying to acquire the land and that the transaction leading to the ownership of the suit land by the petitioner was illegal; that the petitioner does not have a clean title to the suit property, and that the said proprietorship goes against public interest and policy.

Justice Jeanne Gacheche declared that the acquisition of the suit property by the respondent was done in contravention of Article 40(3) of the Constitution of Kenya and the Land Acquisition Act, and thus the occupation, retention, detention and any continued occupation of the said portion of the suit land amounts to compulsory acquisition, without compensation contrary to Article 40(3) of the Constitution of Kenya. The respondent was ordered by the court to restore the possession of the suit land back to the petitioner or alternatively to pay to the petitioner the current market value of the said land.

b. Ocean View Plaza Ltd v. Attorney General (Civil Case No 527 of 2001 ‘B’ Mombasa High Court)

The Registrar of Titles wrote a letter to the plaintiff requiring him to surrender the title deeds of the two subject properties on the grounds that the allocation thereof had been cancelled. The Registrar of Titles took the action because the two plots had allegedly been created on a road reserve, which had telephone cables and water pipelines passing underneath. The plaintiff instituted this suit challenging the action of the Commissioner of Lands.

The court held that the allotment of land to a citizen or others is protected under the Constitution, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under the Land Acquisition Act. Where the compulsory acquisition procedure would be applied it would or should be applied uniformly and without discrimination against all the parties concerned. The Commissioner’s letter was therefore discriminative. The attempt by the Commissioner of Lands to cancel the two subject title deeds lacks the legal efficacy it would require to succeed and is therefore null and void. Finally, the court held that plots are surveyed by the Government Survey Department before title documents are prepared and issued. The ground given for cancellation could easily have been discovered before titles were prepared and issued.

2.9.1.5. Properties under receivership and compensation

Bank of India v. Commissioner of Lands & Another, (2011) Nairobi High Court Petition 641 of 2008

Associated Sugar Company Limited owned six parcels of land in Kwale. On 15th December, 2006, by a Gazette Notice No. 10327 dated 15th December, 2006 in the Kenya Gazette, the Commissioner of Lands published a notice of intention to acquire the suit properties for construction of Ramisi Sugar Factory Project, together with a notice that the inquiries would take place on 30th January, 2007. During the inquiry, Bank of India disclosed that the properties were charged and by reason of various non-repayments and other breaches by the Chargor (Associated Sugar

Company Limited), of the terms of the said charges, the properties were put under receivership. The bank presented their claimed to the Commissioner of Lands.

The petitioner also disclosed that by an agreement dated 20th November, 2006 he had already accepted an offer from a willing buyer of the properties, and had taken the decision to sell to it the suit properties. The buyer had already paid a deposit of 10%.

On 28th April, 2008 through the media the petitioner learnt that Kwale International Sugar Company was clearing the suit land. On 30th May, 2008 the petitioner carried out official searches on the suit properties which revealed that the Commissioner of Lands has already taken possession of the two main sections of the suit properties without any award having been given.

The argument in this case was who between the registered owner and the chargee was entitled to receive the award and compensation. The petition was filed before the Constitution of Kenya, 2010 was promulgated. It follows therefore that the Sections of the Constitution cited in the petition are of the repealed Constitution, Section 75(1).

Justice D. Musinga in his ruling declared that it is the petitioner as the legal chargee of the suit properties, who is entitled to compensation for the suit properties which have been compulsorily acquired by the Government and not the registered proprietor thereof, Associated Sugar Company Limited. The Commissioner of Lands was given a duration of six (6) months to make an award and offer of compensation to Bank of India failure to which the bank should be given possession of the suit lands.

2.9.1.6. Compensation and taking possession

- a. Shanzu Investments Ltd v. Commissioner of Lands (Court of Appeal at Nairobi Civil Appeal 100 of 1993).

By a Gazette Notice Number 4937 dated 26th September, 1990 the respondent gave notice pursuant to Section 6(2) of the Land Acquisition Act, Cap 295 of the Laws of Kenya, of compulsory acquisition of the appellant's two plots

situated in Mombasa. In pursuance of Sections 10 and 11 of the said Act, the respondent made an award of compensation and notified the appellant of it on the 4th November, 1990. The appellant promptly accepted the said award on 7th November, 1990, and the respondent immediately went into occupation of the said lands.

On 4th May, 1992 the appellant filed a suit for the recovery of the amount of compensation awarded to it with interest thereon at the commercial rate of 24% per annum from 7th November, 1990 until payment in full together with the costs of the suit. The respondent failed to file a defence within the prescribed period and the appellant consequently obtained on ex-parte judgment for the amount claimed at the interest rate of 24%. Four months afterwards the respondent brought up an application in the Superior Court by way of the Notice of Motion seeking a review of the said judgment so as to vary the rate of interest.

The Appeal Court comprising of three judges (Kwach, Tunoi and Muli) held that in the circumstances the just course here was to allow the appeal, set aside the order setting aside the judgment and hold that on the material before the Superior Court there were sound grounds on the basis of which that court could grant the application for review for “any other sufficient reason” and vary the interest awarded in the decree and review the judgment as sought. In pursuance of Section 3 (2) of the Appellate Jurisdiction Act, Cap 9 the court restored the judgment for the appellant against the respondent in the principal sum of the initial award with interest at the rate of six per cent per annum from the date of taking possession by the respondent until the date of filing suit and thereafter at court rates until payment in full.

2.9.1.7. Public interest vs. private interest and compensation

Maisha Nishike Ltd v. the Commissioner of Lands High Court at Nairobi (Nairobi Law Courts) Miscellaneous Civil Application 66 of 2010

The Commissioner of Lands through Gazette Notice Nos. 2240 and 2241 of 2nd March, 2010 had instituted proceeding to acquire the applicant plot measuring 1.1998 hectares among others for construction of Nairobi Northern Bypass. Inquiries were held and the registered owner presented its claim. The Ministry of Road

through the Kenya Urban Roads Authority meanwhile continued with construction of the road. Maisha Nishike the registered owner went to court to stop the contractor from entering their land unless they have been compensated. Stay orders prohibiting the contractor from entering the land were issued on 30th July, 2010 and extended on 24th January, 2011 by Justice Wendoh.

The Ministry in their defence argued that the stay orders had stopped completion of the said road. The contract for the construction of the road was awarded to China Road and Bridge Corporation and the contract period set as 36 months from 17th April, 2009. The construction of the road was almost complete save for the portion that passes through the suit property.

The Ministry further stated that the continued existence of the order of stay is highly prejudicial to the Government as the contractor has threatened to lodge claims, in the sum of Kshs.2,000,000/= per day against the Government for idle equipment, plant and labour. It was further stated that the Government through the Commissioner of Lands had prepared an award and offered to pay compensation to the ex parte applicant. However, the applicant wanted much higher compensation.

The respondents submitted that the public interest in the construction of the Nairobi Northern By-pass Road far outweighs the private interest of the ex parte Applicant. He further submitted that the Government stands to lose a huge amount of money if the order of stay remains in force

The applicant stated that the respondent had violated the orders of stay that had been granted by the court and consequently, the court cannot aid a party who is in contempt of its orders. He further stated that the ex parte applicant's application for contempt of court ought to be heard first before the respondents' application is considered.

The court held that during the site visit on 25th February, 2011 it was clear that the Nairobi Northern By-pass Road was almost complete except the portion that is supposed to traverse the suit property. The construction stopped following issuance of the orders now sought to be vacated or varied, although it has been claimed by the ex parte applicant that the respondents and/or their agents did not fully comply with

the order of stay. Indeed there is an application for contempt of court filed by the ex parte Applicant which was yet to be heard.

The court further stated that the real issue in dispute is the amount of compensation that is payable to the ex parte applicant. The Commissioner of Lands had assessed the sum payable whereas the ex parte applicant wanted a higher compensation. It is that dispute that has stalled the said project. Under Article 40 of the Constitution of Kenya, 2010, the ex parte applicant cannot be deprived of its property unless the deprivation results from an acquisition of the land in accordance with Chapter 5 of the Constitution or where the land is required for a public purpose or in the public interest and the acquisition is done in accordance with the provisions of the Constitution. In such instances, appropriate compensation has to be paid to the ex parte Applicant

The judge said that the court does not have powers to determine the amount that is payable as compensation to the ex parte applicant. Section 29 (7) of the Land Acquisition Act provides that a person dissatisfied with an award that has been made by the Commissioner of Lands may apply to the Land Acquisition Compensation Tribunal to determine the amount payable.

The court further said that the project which had stalled was of great public benefit and the Government was likely to pay considerable amount of liquidated damages due to delay in finalization of the project. The applicant did not stand to gain at all by such delay. The judge was of the view that if for any reason the respondents' award had not formally been served upon the ex parte applicant, such service ought to be effected forthwith so that the ex parte applicant can formally decide to accept or reject the same. The judge vacated the orders of stay to enable the respondents proceed with the construction of the said road.

These few cases highlighted in this chapter have given an insight on how Kenyan courts have made decision regarding land acquisition. The topic is expanding and becoming controversial and as stated above there is need for all the actors to get involved in land acquisition developments especially in our courts. Issues of land acquisitions in Kenya have never been into people's mind unless affected a situation which if it continue will make the matters worse.

2.9.2. Reasons Hindering Land Acquisition Reforms in Kenya

According to Virginia Institute of Policy Report (2006) the failure by parliamentarian to enact meaningful reforms in the area of land acquisition is partly to blame because most representatives are not affected or threatened by compulsory land acquisition. Those with political power are rarely targeted for compulsory acquisition and on the rare occasion are they required to surrender their property. They seldom have to go to court to obtain just compensation. The single largest factor leading to refusal to enact meaningful legislation of compulsory land acquisition reforms is pure politics or special interest.

The report further argues that large companies and politicians have enough resources to fight land acquisition unlike small landowners who do not have the capacity to fight court battles. This is done through giving favours and gifts to the politicians, paying lobbyist groups to oppose proposed acquisitions. Politicians are further given campaign money for their re-election campaigns to speak against proposed acquisitions.

Conflict of interest especially with lawyers whose law firms get a lot of fund from compulsory acquisition cases as well will always fight against such reforms, the report says. In the Kenyan situation as is been experienced with the land reforms bills, politicians fight behind the scene to either kill or water down bills to a point that even if they are enacted they provide little change.

Another factor is failure by individual property owners to get involved in the legislation process involving compulsory land acquisition. This is so because, of lack of interest or hope. Secondly, even if individuals have been involved in the process the balance of power between the individual property owners and politician makes it very difficult for owners to accomplish any meaningful reforms. And finally, because compulsory acquisition has not been in the people mind unless personally affected most of them are contented to go with life as usual.

The policy reports also point out that on the other hand judges like politicians are isolated from the menace or threat of compulsory acquisition. Many judges do not understand the harshness of this power because they do not feel threatened themselves. Secondly, courts do not seem to grasps the nature of compulsory

acquisition cases and tend to view the property owners in negative light. The law suit does not arise out of any failure, or alleged misconduct of the owner. The litigation arises due to the benefiting body though the acquiring authority desiring the owner's property and has chosen to take it. The only quilt the owners bears is his constitutional right to be free from unlawful takings and to receive just compensation for lawful takings, acquiring authority and benefiting bodies often portray land owners as road blocks to progress or as stubborn holdout standing in the way of public projects or as greedy individuals looking for a windfall. Many judges tend to trust the acquiring authority and distrust the land owners. Another reason lies in the changing view of the important of right to private property rights and the judges 'view of the courts' own role in the process. In the country result oriented courts struggling to save public programs and projects that are repugnant to the traditional and constitutional protection of the private property have chipped away at private property rights in order to sustain these programs. These result oriented courts have either stood by or winked at the statutes and individual takings that should be struck as unconstitutional, or, at times wholly rewritten constitutional protections of private property thorough judicial construction or reinterpretation.

In Kenya today as land laws are been reviewed in line with the new constitution the Land Acquisition Act Cap 295 has been repealed and replaced with the Land Bill, 2012 Part Viii which has given the National Land Commission power under section 107(2) to prescribe the criteria and guidelines to be adhered to by the acquiring authorities in acquisition of land.

Land acquisition is one of the most controversial and politically sensitive instruments of state power anywhere in the world. Depending on how it is used, it can clear the way for rapid economic transitions, technological progress and inclusive growth, or it can trample on property rights, the economic interests of poor and vulnerable groups, and fundamental principles of justice. The current review of land laws including acquisition of land, is clearly a long overdue attempt to address the inadequacies of the colonial Land Acquisition Act, which has been merrily exploited by commercial interests, corrupt politicians and an indifferent state to promote widespread land grab at the expense of the poor.

2.10. Conclusion

Private property rights in most countries are protected in law usually by the Constitution or the bill of rights of those states. This is to ensure that owners of properties are not deprived off their property by the state or any state organ. Anybody who desires to use or acquire an interest in a private property must have the consent of the owner. The government in the process of provisions of public goods finds itself in a situation desiring to take private property. In order to discourage individuals from hindering the government from accessing land for public purpose, statutes have been legislated to ensure that land is available for government use at any time the need arise. These laws allow the government to acquire land compulsory from the landowners without their consent and they are carefully crafted to protect property owners against been deprived of their property arbitrary. In many states, for any compulsory acquisition to take place there must be a private property which must be taken for public purposes and with just compensation.

In determination of just compensation there are three methods which are generally acceptable which include: - sales comparison method, income method and the cost approach. In arriving at the compensation amount the valuer/appraiser must take into consideration the highest and best use of the property been acquired if the element of just compensation is to be achieved.

In Kenya like other countries rights to private property is enshrined in the Constitution. In the process of provision of public goods the government has always found it necessary to acquire private property since colonial times. The colonialist used the India Land Acquisition Act up to 1968 when it was replaced by Land Acquisition Act Cap 295 which has been repealed and replaced with the Land Act, 2012 Part Viii. The reasons, procedure, principles of compensation and dispute resolution mechanisms are defined in our laws. However issues have always arisen regarding the adequacy of compensation amount, procedure and process as seen from the few court cases discussed previously. This has demonstrated that our laws have not addressed fully the problem arising from land acquisition process.

The matter has now been left to the Nation Land Commission which has been given powers to prescribe a criteria and guidelines to be adhered to by the acquiring authorities in land acquisition under Section 107 (2) and to make rules to regulate the assessment of just compensation under Section 111 (1) of the Land Act, 2012.

3. CHAPTER THREE: CONCEPTUAL FRAMEWORK

3.1. INTRODUCTION

In the previous chapter we have reviewed literature on right to private property, the four elements of eminent domain and the history and procedure of land acquisition especially in Kenya. The chapter has also discussed in details current court decisions on land acquisition and also pointed out the reasons hindering reforms in land acquisition laws. Chapter three documents the working principles of a good compulsory land acquisition process as discussed by the America Association of Realtors. The principles provide a good guide for people who work in land administration and all those with an interest in land, land tenure and their governance. These principles explains what constitutes good practice in this area and are likely to be of most importance for use in countries that are seeking to understand land acquisition and to improve their own legislation and procedures of compulsory purchase and compensation.

3.2. WORKING PRINCIPLES ON USE OF EMINENT DOMAIN

3.2.1. Purpose of Working Principles

A recent report (America National Association of realtors 2008) suggest that the Working Principles are designed to help real estate professionals evaluate eminent domain legislative proposals as they are introduced in their state legislatures and decide, based upon their particular state circumstances, how to position themselves with respect to the proposed legislation. For this reason, the Work Principles are grouped into two categories: (1) General Working Principles and (2) Working Principles Applicable to Use of Eminent Domain for Economic Development.

The first category includes those Principles that Realtors should take into account in considering all types of proposed eminent domain legislation. For this reason, the Principles in this category make reference, as appropriate to the particular Principle, to local government prepared redevelopment plans.

The second category of Principles is for use by Realtors in addressing the specific use of eminent for economic development purposes in those states where the policy

position of Realtors supports the use of eminent domain for the purpose of economic development, but with substantive and procedural restrictions designed to limit the potential for abuse of the use of the eminent domain power in such circumstances.

3.2.2. General Working Principles

Principle No. 1: Avoidance (of use of Eminent Domain)

According to the report principle 1 require *alternatives analysis* similar to analysis required for environmental impact analysis that considers all reasonable alternatives to the use of eminent domain consider all alternative approaches/tools, as appropriate, including:

- Alternative design of site plan, or location of road or infrastructure facility
- Acquisition through “voluntary” sale
- Adaptive reuse
- Tax Increment Financing (TIF)
- Tax Incentives

If use of eminent domain is for redevelopment, give the property owner the opportunity to rehabilitate property or participate in development/redevelopment.

Rationale for Principle:

Eminent domain should be a means of “last resort.” In most countries environment regulatory bodies provide a model that has meaningful applicability to such an important issue as whether or not the taking of private property is necessary to achieve public benefits. By analogy to the environmental impact statement (EIS) that must be prepared by a state agency, a local government would be required to rigorously explore and objectively evaluate all reasonable alternatives to achieving a public purpose that would “avoid” the taking of private property. The alternatives analysis would require the government’s good faith consideration of all reasonable alternatives to the use of eminent domain. In Kenya this principle is normally

violated as road designs are normally done in Nairobi using Registry Index Maps without taking into consideration the situation on the ground.

Principle No. 2: Inclusive Process

Hold public hearing(s) on the avoidance analysis (required by Working Principle No. 1). If, after public hearing(s) on the avoidance analysis of a proposed use of eminent domain, the use of eminent domain is still determined by government to be the preferred alternative, hold public hearing(s) on any revisions made to the plan for the takings of private property. Require legislative body approval of use of eminent plan by super majority. If use of eminent domain involves a redevelopment plan, define the legislative plan approval process as *administrative*, allowing greater judicial scrutiny of decision (America National Association of Realtors, 2006).

Rationale for Principle:

One of the objections of landowners whose properties are made the target of an eminent domain action is that the procedures required by state law are not adequate to ensure meaningful opportunity for those landowners and citizens generally, to be heard. By tying the public hearing process to the step of reviewing the results of the avoidance analysis before an eminent domain plan is formally proposed, there is a greater opportunity for landowners and citizens to ensure that government will either avoid the use of eminent domain altogether, or revise its plan so as to minimize the use of eminent domain. Because the courts traditionally have shown great deference to “legislative” determinations of public purpose, a statutory change that expressly characterized such determinations as “administrative”— requiring findings of fact and conclusions — would allow for greater judicial scrutiny and probing of the record in each case. This principle is normally applied in Kenya but local leaders especially politicians interferes with the process for political reasons.

Principle No. 3: (Truly) Just Compensation

The report (America National Association of Realtors 2006) defines just compensation to include:

- Fair market value

- Attorneys fees
- Temporary housing
- Lost business revenue
- Severance damages
- Relocation costs

In cases of eminent domain for economic development: Provide that just compensation include value beyond fair market value based on a reasonable percentage of the value of the future use of the property taken by eminent domain.

Rationale for Principle:

The rationale for this principle flows from the logic of recognizing that fair market value (based on the willing seller/willing buyer rule) is not sufficient to adequately compensate owners whose properties are condemned. Most professionals in real estate argue that “just” compensation to affected property owners should cover not only the value of the property condemned but also all other reasonable and necessary costs generated by the condemnation action. Working Principle No. 3 defines just compensation in this manner and further supports the possibility in the case of takings for economic development of an “add on” to the final just compensation figure based on the value of the future use of the condemned property. Although the law in Kenya calls for just compensation, it is normally difficult to achieve this because of the challenges involved in the process of acquisition making the affected landowners to wait for a longer time before they receive the compensation amount.

Principle No. 4: (Post Taking) Accountability

Finally, according to the report (America National Association of Realtors 2006) principle 4 states that Public benefits identified in a proposed taking must be realized. Implementation of plan involving eminent domain must include mechanisms to ensure that public benefits are realized.

Rationale for Principle:

The potential for “abuse” in the use of eminent domain is government’s failure to put in place mechanisms that ensure that there is sufficient public control to ensure that the stated public benefits will, in fact, be realized. State law should require that such mechanisms (whether by contract, public retention of fee interest or other method) be included for the exercise of eminent domain to be valid. One other method would be to provide that if a proposed taking involves transfer of property to a private entity, and the property is not developed in accordance with the stated public purpose of the taking, the property reverts to public ownership, with the accompanying obligation to carry out the stated public purpose of the taking (America National Association of Realtors, 2006). This principle in Kenya is very well protected by the courts although in some instances public officers in the Land Ministry with the support of political leaders have been illegally allocating land which had previously been acquire for public use e.g. the Kenya Airport Authority land in Syokmau. The court had to intervene for the land to revert back to Kenya Airport Authority.

3.2.3. Economic Development Working Principles

The America national association of realtors report states that these Working Principles are directed specifically at existing or proposed legislation that allows for the use of eminent domain to achieve economic development purposes. As used here, the term *economic development* means the devotion of land in a community to commercial and/or industrial uses for the purpose of increasing the tax base, increasing employment, increasing tax revenues or improving the general economic health of the community (America National Association of Realtors, 2006).

Principle No. 1: Government – Complementary Role in Real Estate Market

According to principle 1 of the report Government should not act as a public land speculator. Government should limit its role to providing regulatory relief and infrastructure and tax incentives. Government should intervene in the market place to assemble land only where the private market has refused to do so (e.g., “blighted” properties (properly defined – See Working Principle No. 4 below); brownfields).

Rationale for Principle:

As professionals who play a critical role in helping to facilitate property transfers and land assembly in the real estate market, Realtors do not want Government to act as a real estate broker in the private market and use eminent domain in an attempt to achieve speculative ends. Eminent domain should be used “only when necessary to materially advance a real and substantial public use,” and government should provide “persuasive, objective evidence that the project, and the resulting public use, will in fact be realized.”

However, there are circumstances (e.g., properties that are “blighted” or are brownfields), when the private market does not always act to redevelop specific parcels or assemble land, where land assembly is necessary. These are the limited circumstances when it is proper for Government to use its power of eminent domain to intervene in the market to help to assemble land or provide opportunities for redevelopment of parcels so as to induce the private market to start to work again in these areas, developing property and producing needed housing and economic activity (jobs). In Kenya, where the government has tried to acquire land for redevelopment it has always been met with resistance by the tenants, landowners or the civil societies. This was the case in Shauri Moyo and Bahati Estates where the City Council wanted to demolish the existing structures and build modern houses. Redevelopment is not very popular in Kenya and the Government in recent days has avoided interfering with real estate market but the net effect is that land prices have seriously skyrocketed especially in urban areas.

Principle No. 2: Definition of Public Need

Principle 2 of the report states that Government should define and establish public need for a development plan through a comprehensive planning process. The comprehensive planning process should include specific studies that document public need. The local legislative body should affirm public need.

Rationale for Principle:

Comprehensive land use plans may, at times, be used by government to justify regulatory actions that Realtors believe will negatively impacts on the real estate

market. However, requiring that public need for a development plan be established through the public planning process is an important step that should precede any conclusions about the “public benefits” that are expected to flow from a proposed development plan. A required public process that involves preparation and scrutiny of studies that document the public need(s) that will potentially be served by a development plan will increase the likelihood that true public need(s), if any, will be identified and supported by the community. If local legislative bodies, in turn, are required to formally ratify the judgments made in the plan, the local citizens can ensure that there is political accountability to decisions that are made on the basis of the development plan that emerges from the comprehensive planning process (America National Association of Realtors, 2006). In our country the public purpose has always been stated but sometimes controversy always arises whether the acquisition for economic development is for public purposes. The interpretation has always been left to the courts to decide. Currently with the repealing of the Land Acquisition Act Cap 295, The National Land Commission has been mandate to come by with criteria and guidelines under which land is to be acquired for public purposes under Section 107 (2) of the Land Act, 2012.

Principle No. 3: Defining Public Benefit

The report states that principle 3 requires analysis of all alternatives to taking of property under the development plan (based on Working Principle No. 2 above). Require cost-benefit analysis of development plan and of possible takings of property identified in the plan. Require that specific public benefits be identified that include more than projections of additional tax revenue.

Rationale for Principle:

One of the important issues arose in the *Kelo –Vs- City of New London (2005)* case was how private benefit and “incidental public benefit” can meaningfully be separated. Realtors may reasonably insist that the Government identify and explain in concrete terms the public benefits that are expected to flow from a development plan. This should be done in terms of the generally well-established principles and methodologies for economic impact analysis, including cost-benefit analysis and multiplier analysis. The government has the burden to make sure the record

adequately explains the expected economic impacts of a development plan. In Kenya although we have the EMCA Act in place which requires that environmental impact analysis should be done for all projects, in most cases they are poorly and hurriedly done and in some cases they are not done at all.

Principle No. 4: Meaningful Definition of Blight

Finally according to the report principle 4 imply that blight should be narrowly defined to include certain basic concepts such as:

- Public nuisance
- Attractive nuisance
- Tax delinquency greater than property value
- Threshold standard for extent of blight required in area of multiple parcels

Rationale for Principle:

In the *Kelo* case, the state statute in question declared that economic development is a public purpose and authorized the use of eminent domain to achieve that purpose. Most states do not have this type of pure economic development statute. However, every state does have statutory enactments that permit the exercise of eminent domain by municipalities for the elimination of “blight,” sometimes also described as “slum clearance”. When this form of eminent domain is exercised, the condemning authority acquires private property and eliminates the blight and then must put the property to a productive use, frequently transferring the property to private developers or entities for development. The state cases that address the constitutionality of blight statutes uniformly hold that the act of elimination of blight itself constitutes a public purpose, and a public use, even though the property may ultimately be transferred to a private property owner or development entity.

Because under many state statutes the definition of blight includes vacant or unproductive property, and government may declare an area blighted that may include certain parcels that are not blighted, these statutes may result in the use of eminent domain for economic development purposes. Proposed eminent domain

legislation or constitutional amendments that simply declare that eminent domain may not be used for economic development purposes, or forbid the transfer of condemned property to a private entity if the intention of the condemnation is for private economic development purposes, but do not address definitions and provisions in the existing state blight statutes, may only create more uncertainty or loopholes in the eminent domain law of the state. Realtors should seek meaningful reform of the definition of blight under their state's blight statutes in order to ensure that such statutes do not serve as an indirect means to achieve economic development of properties that are not truly blighted and reasonably should be excluded from any municipal economic development or redevelopment plan (America National Association of Realtors, 2006). Slum clearance in Kenya has always been a very thorny issue simply because; the laws lack clear guidelines especially with the definition of blight. This loophole in law is used by politicians to incite the landowners and occupants against the Government. Lack of clear ownership documents in slum areas is also a major problem where compensation is involved.

3.3. Conclusion

For any government when dealing with legislations on compulsory land acquisition which is not for economic development there are four principles which should always be in the minds of the stakeholders and policy makers. Firstly, the government should explore all other methods of obtaining land and should only compulsory acquire when it is absolutely necessarily. Secondly, the whole process of acquisition must always be inclusive. Thirdly, compensation should be truly just and finally, every player in this process must be accountable.

Where compulsory acquisition involves economic development there are four principles which must be addressed by the legislations of any state Firstly, the government should limit its role to that of a facilitator and not a land speculator i.e. government should provide evidence that that the project and the resulting public use is realized. Secondly, public need should be clearly defined and established. Thirdly, the public benefit should be established thoroughly by carrying out cost benefit analysis of the development plan and finally the definition of blighted properties should be well defined.

4. CHAPTER FOUR: DATA ANALYSIS, PRESENTATION AND INTERPRETATION

4.1. INTRODUCTION

Chapter three has outlined the working principles of eminent domain as presented by America National Association of Realtors. Chapter four provides an analysis of the research findings on the challenges of compulsory land acquisition on seven road projects, which were carried out by the Ministry of lands for the last six years. This is as per the data obtained from Government valuers and affected landowners, who were the interviewees. The data is presented in the form of charts, graphs, tables and percentages. Qualitative and quantitative analysis techniques were utilized to aid in the presentation and interpretation. Presentation of data is in three sections; section one being presentation of data obtained from government valuers, section two presents data obtained from landowners and finally section three is an analysis of road project completion time.

4.2. Data from Government Valuers

4.2.1. Data on Road Projects

Table 4-1 below summarizes data on each road project under study which includes: - distance total area of land acquired, number of affected landowners and duration taken to complete the project.

Table 4-2 below shows the distribution of the road projects according to the road distance. It's clear from the table that the longest road project is Emali-Oloitoktok (36.51%) followed by Meru -Isiolo Road (12.41%). The road with the shortest distance is Wote-Makindu Phase 1 (8.40%) followed by Wote- Makindu Phase 2 at 9.13 % with Southern Bypass and St. Mary's- Gitugu Road taking 10.66% each.

Table 4-1: Summarized Data on Road projects

No	Project	Distance (KM)	Area (Ha)	No. of land-owners	Duration (Months)	Registration (Clean Titles)
1	Southern Bypass	29.2	48.33	300	20	184
2	Machakos – Embakasi Turnoff	33.5	83	159	18	43
3	Wote – Makindu Phase 11	25	68.64	138	15	120
4	Emali – Oloitoktok	100	340.5	272	19	211
6	Wote – Makindu Phase 1	23	35.2	82	11	63
7	St Mary’s -Gitugi	29.2	15.61	549	18	408
8	Meru-Isiolo	34	16.76	75	21	60

Source: Fieldwork, 2010**Table 4-2: Proportion of road projects according to distance**

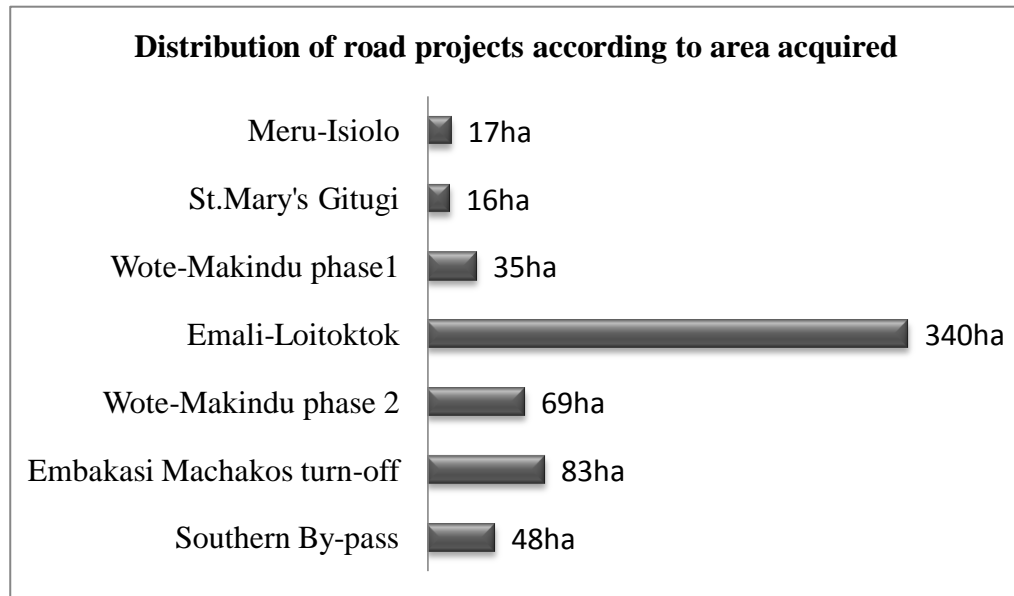
Road project	Distance in percentage
Southern by pass	10.66%
Embakasi Machakos Turn-off	12.23%
Wote-Makindu phase 2	9.13%
Emali Loitoktok	36.51%
Wote-Makindu phase 1	8.40%
St.Mary’s Gitugi road	10.66%
Meru-Isiolo	12.41%

Source: Field survey, 2010

Graph 4-1 below shows the distribution of the road projects according to the area covered. It is clear from the graph that the road project which was having more area of land for acquisition was Emali-Oloitoktok with 340 hectares followed by Embakasi Machakos Turnoff (83 hectares). Meru Isiolo with 17 Ha/34 Km and St. Mary’s Gitugi Road with 16 Ha/29.2 Km, although longer than Wote Makindu Phase 1 (35 Ha/ 23 Km) and Wote Makindu Phase 2 (69 Ha/ 25Km) had smaller areas in hectares for acquisition. This was as a result of the fact, that the width needed for expansion was smaller for both roads than the Wote Makindu Roads. Secondly, expansion of roads is normally not uniform since some sections of a road

may need more land than others, depending on the road design and existing road reserve.

Graph 4-1: Distribution of road projects according to area acquired



Source: Field survey, 2010

Table 4-3 shows the number of landowners in percentage for each road project. The road project which was having the highest number of affected landowners was St. Mary's Gitugi road at 34.86%, Emali Oloitoktok was ranked second at 17.27 % followed by Embakasi Machakos Turnoff (10.10%), Wote Makindu Phase 2 (8.76%), Wote Makindu Phase 1 (5.21%) and then lastly, Meru-Isiolo road at 4.76%. St. Mary's Gitugi (29.2 Km) although shorter than Emali Oloitoktok road (100 Km), had very many numbers of landowners because of high population density in Muranga, unlike Kajiado (Emali- Oloitoktok) where population density is low. Land also in this area has been subdivided into small units (land fragmentation), while in Kajiado land is still owned in large units by individuals or group ranches for instance the Mbirikani and Kimana group ranches. Meru- Isiolo road had the least number of landowners (82), as the acquisition was only done in very small sections of the road. This was because; the existing road reserve was enough for the new road, except in sections where deviations of the new road were done from the existing reserve, and where more land was needed for Bus Park.

Table 4-3: Road project Percentage of Landowners

Road project	Percentage of Landowners
Southern by pass	19.05%
Embakasi Machakos Turn-off	10.10%
Wote-Makindu phase 2	8.76%
Emali Loitoktok	17.27%
Wote-Makindu phase 1	5.21%
St.Mary's Gitugi road	34.86%
Meru-Isiolo	4.76%

Source: Field survey, 2010

According to table 4-4 below St. Mary's Gitugu road had the highest number of titles at 37.47%, ranked second was Emali Oloitoktok road at 19.38%, followed by Southern Bypass with 16.9%, Wote Makindu Phase 2 (11.02%), Wote Makindu Phase 1 (5.79%), Meru Isiolo (5.51%) and ranked last was Embakasi Machakos turn off at 3.95 %.

Table 4-4: Percentage of clean titles

Road project	Proportion of clean titles
Southern by pass	16.90%
Embakasi Machakos Turn-off	3.95%
Wote-Makindu phase 2	11.02%
Emali Loitoktok	19.38%
Wote-Makindu phase 1	5.79%
St.Mary's Gitugi road	37.47%
Meru-Isiolo	5.51%

Source: Field survey, 2010

There were more titles in St. Mary's Gitugi road because of land fragmentation as a result of high population density in Central Province. Another reason is that in Central Province, people have a lot of attachment to land and therefore they normally process their titles faster to ascertain ownership. Southern bypass is situated in an area with high population density with most section of the road falling within urban setup. Roads in Ukambani and Maasai land had fewer titles because of low population density and they are situated in dry zones where demand for land is

low. In Kajiado land is normally owned communally though group ranches which own large tracts of land such as Mbirikani and Kimana group ranches.

4.2.2. Challenges (Valuers)

According to the respondents various kinds of challenges were indentified which have been grouped into:-legal, social, economic, political and environmental challenges.

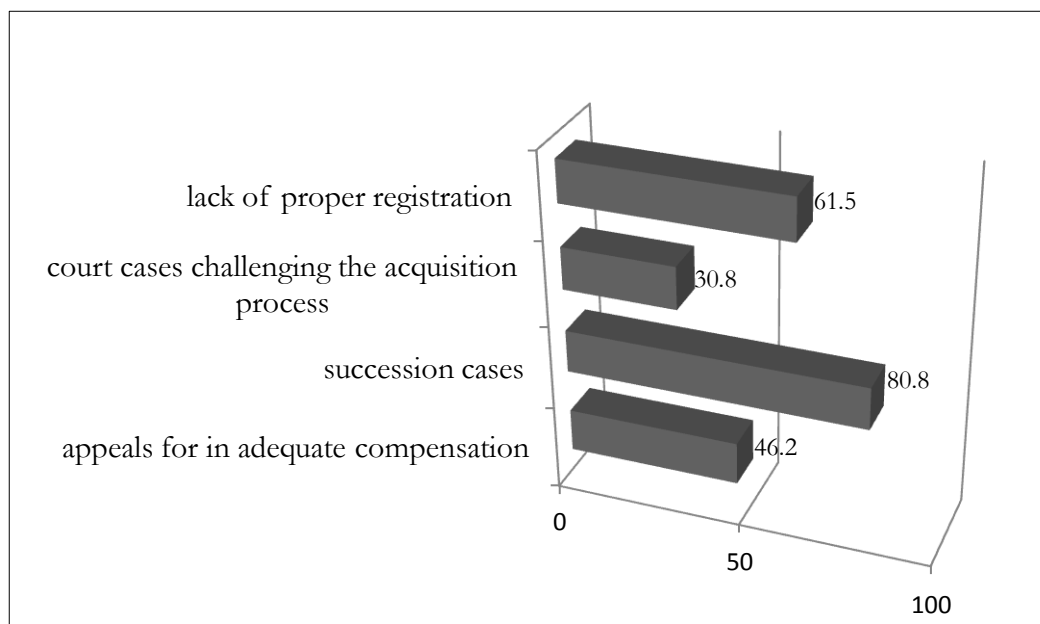
Legal challenges

Graph 4-2 below shows that in the category of legal challenges succession matters were ranked the highest at 80.8%, this is because most of the land especially in rural areas is still registered under deceased persons, as the beneficiaries do not expedite the succession process when the registered owner passes away. They avoid the process because it is lengthy, costly and complicated.

Lack of proper registration documents was ranked second at 61.5%. This was noted in areas where share certificates from land buying companies, allotment letters from Councils and letters of offer from settlement fund trustees (SFT) are in use. In some regions in Kenya, land adjudication process has not yet been completed a situation which complicate the matter more. In other instances, landowners because of lack of funds, and lengthy process involved in registration of land, may fail to process the title awaiting to get funds or assistance from relatives, local politicians or the government.

Appeals for inadequate compensation was ranked third at 46.2% and finally court cases challenging the process come last in this category at 30.8%.

Graph 4-2: Legal challenges



Source: Field survey, 2010

In developing countries, according to Food and Agricultural Organization of the United Nation (2008) most of these legal challenges were noted to occur during compulsory acquisition of land. Lack of proper registration documents was attributed to lack of effective and efficient land registration systems, which leads to most of the people being unable to access proper land ownership documents. Succession issues arise simply because beneficiaries are not able and are not aware of how to deal with them on time, due to poverty and illiteracy level. Appeal against inadequate compensation, was also a major problem because of misunderstanding by the land owners of what constitute just compensation, and lack of adequate knowledge by appraisers on calculation of fair compensation.

Unlike developing countries, in developed states according to Food and Agricultural Organization of the United Nation (2008) the only major issues in the category of legal challenges are the court cases challenging the acquisition process. This is so because in these countries the meaning of public purpose and use of compulsory acquisition has been expanded overtime. The citizenry awareness and knowledge about the law makes them always to run to courts for interpretation as to whether the acquisitions meet the threshold of a public purpose, and whether the intended use is legal. Lack of proper registration documents and succession cases

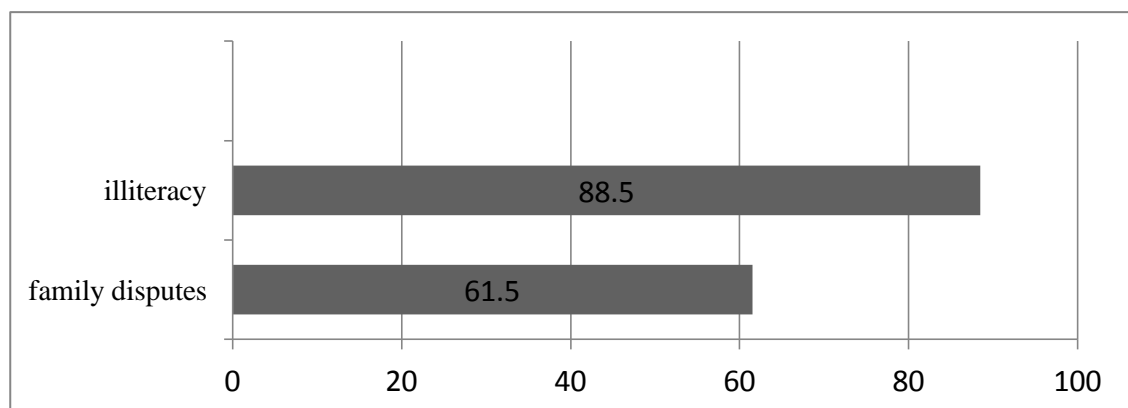
are issues which rarely arise. This is simply because in developed countries land registration systems are highly computerized and developed, and the court systems are easily available and accessible to the citizen.

Social challenges

Graph 4-3 below shows that illiteracy level (88.5%) was the most prominent social challenge compared to family disputes at 61.5%. This is because most of the landowners are elderly people who are not educated. This makes communication very difficult throughout the whole process, as most of them have to rely on their children, relatives or local leaders to read and understand notices, awards or communicate during inquiries. Family disputes especially in extended families was also found to contribute significantly to social challenges. Families in most cases are not able to agree on who is to represent them during inquiries or the entire compensation process as they do not trust one another.

Social challenges according to United States government accountability office (2006) were noted to occur only in poor countries where poverty and illiteracy level are high. In developed countries these challenges rarely occur because the living standards are high and the population is well educated. This therefore means that communication is not a barrier at all during the acquisition process.

Graph 4-3: Social challenges



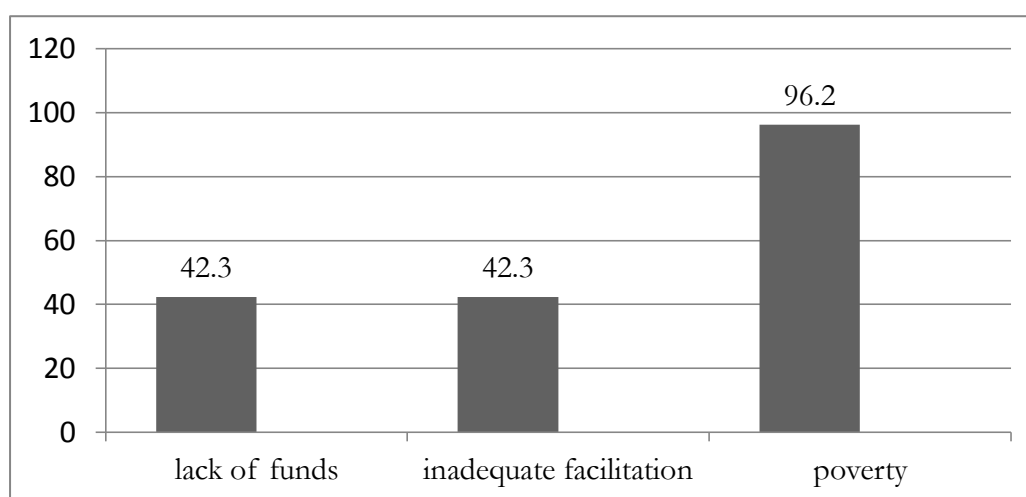
Source: Field survey, 2010

Economic challenges

Most of the respondents, according to graph 4-4 below cited poverty as a major factor affecting the acquisition process at 96.2% in this category of economic challenges. Poverty level is very high in rural areas as a result of minimal economic activities.

Lack of funds by the acquiring authority for compensation to the affected landowners even when valuations have been done and awards given was equally ranked with inadequate facilitation at 42.3 %. Lack of funds leads to interested persons having to wait for the money to be sourced elsewhere for compensation to be done. Inadequate facilitation for government officers was mentioned by the respondents to occur in terms of transport, stationeries and travelling allowances.

Graph 4-4: Economic challenges



Source: Field survey, 2010

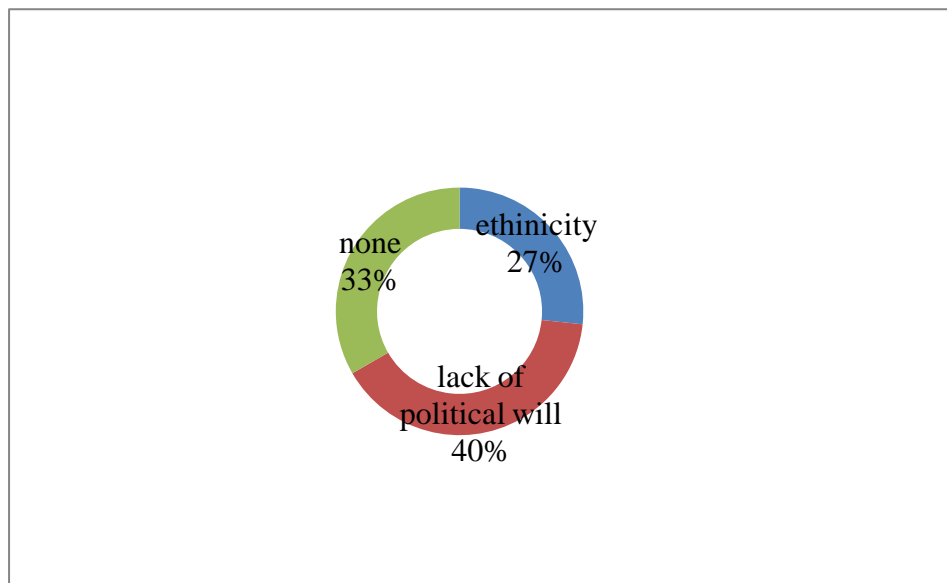
According to Kitay (1985) economic challenges mostly occur in poor countries especially the developing countries. This is simply because in these countries funds are not enough to fund development projects and also meet the basic needs of the population, and when they are available sometimes they are diverted to other basic projects like education and feeding the population. Compulsory acquisition of land for development is seen as a secondary need. Unlike in the poor countries, according to the Kitay (1985) economic challenges rarely do occur in states with high living standards. This is because the gross domestic products of these countries are usually high and funds are available for development projects.

Political challenges

Pie chart 4-1 below shows lack of political will as one of the major political challenge at 40%. This is manifested through incitement of the landowners by politician to reject road projects, and failure to give road project priority when allocating funds. Ethnicity was ranked second at 27% in this category, where some residents resist road project just because it does not benefit their community alone.

Politician whether in developing countries or developed countries will always interfere with development projects by inciting the residents against government projects according to Virginia Institute of Policy Report(2006). Some of them do so just to be seen to be with the electorate in order to gain political mirage and others to get economic gains from the companies implementing the projects.

Pie Chart 4-1: Political challenges



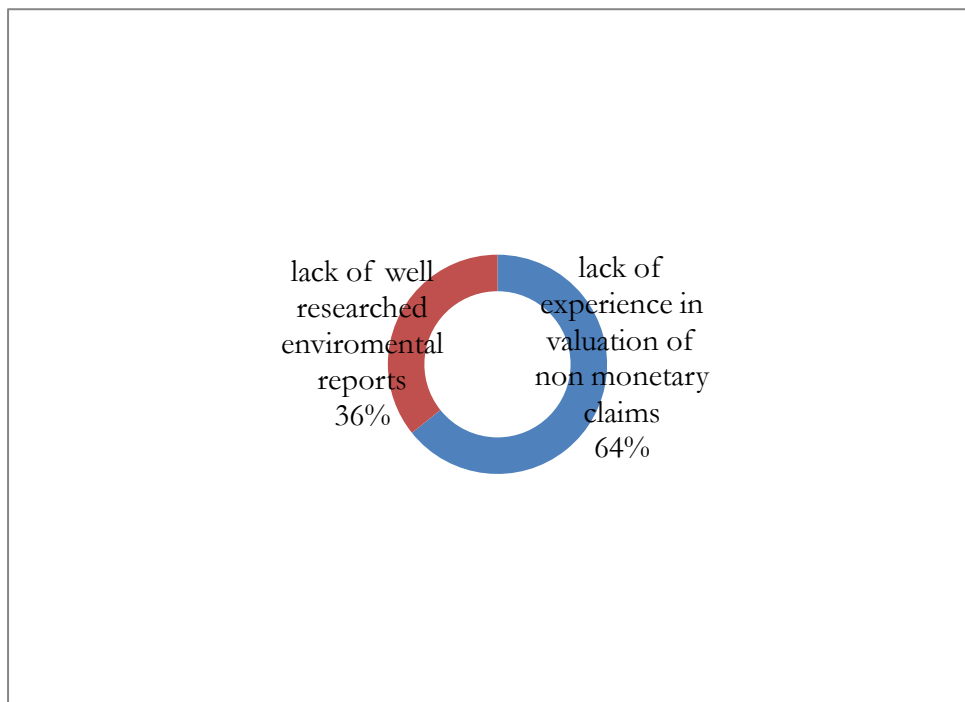
Source: Field survey, 2010

Ethnicity does not feature prominently in developed states because of good government policies which create equality unlike in developing states where some groups feel marginalized.

Environmental challenges

In pie chart 4-2 below most of the respondent (64%) cited lack of knowledge to value non monetary claim such as religious, cultural and historical sites as a major challenge in valuation for compensation. Also cited in this category of challenges is the valuation of burial sites and recreation areas. 36% of the respondents felt that where Environmental Impact Assessment Reports have been carried out, they are not exhaustively done, which leads to inadequate information prior to commencement of the acquisition process. Where they have been done they are not availed to the valuers and finally, most valuers are not trained in EIA.

Pie Chart 4-2: Environmental challenges



Source: Field survey, 2010

According to America Institute of Real Estate Appraisers (1961) lack of well trained professionals in the area of valuation for compensation and environmental impact assessment is always an issue in poor countries. In the developed countries professionals in valuation and environmental impact assessment are well trained and experienced and therefore environmental challenges rarely do occur during

compensation process. Also in the third world although natural resources like forest, rivers lakes and ocean are very important people do not attach a lot of value to them like in developed countries.

Other challenges

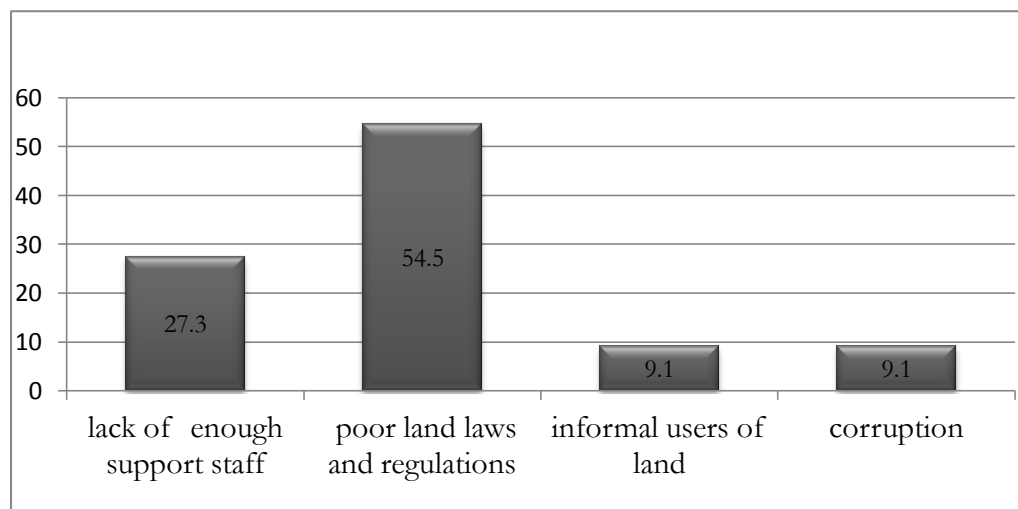
Graph 4-5 below shows other challenges which were mentioned by valuers, starting with poor land laws and regulation. In Kenya there are 32 statutes dealing with land ownership and use with most of them overlapping leading to poor institutional framework. Some of these acts include:- Government Land Act (Repealed), Registration of Titles Act (Repealed), Land Titles Act (Repealed), Registration of Documents Act Cap 285, Registered Land Act (Repealed), Trust Land Act Cap 288, Survey Act Cap 299, Agriculture Act Cap 318, Land Control Act Cap 302, Land Planning Act Cap 303, Land Consolidation Act Cap 283, Land Adjudication Act Cap 284, Land Acquisition Act Cap 295 (Repealed), Rent Restriction Act Cap 295, The Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Cap 301, Way Leave Act Cap 292 (Repealed), Stamp Duty Act Cap 480, Land (Group Representative) Act Cap 287, Mining Act Cap 306, Rating Act Cap 267, Succession Act Cap 372, Trustee (Perpetual Succession) Act Cap 286, Limitation of Action Act Cap 22, Distress for Land Act Cap 293, Indian Transfer of Property Act of 1882 (Repealed), Planning Act and Sectional Properties Act (Onalo,1986). The government has recently in line with the new constitution enacted several land laws to replace the repealed ones. These new laws are: - The National Land Commission Act, 2012, Land Registration Act, 2012 and Land Act, 2012.

According to Odhiambo & Nyagito (2002) at independence Kenya had two substantive regimes in property law i.e. Customary Property Law, and English Property Law. The net effect of these systems on land administration was to perpetuate a dual system of economic relationships consisting of an export enclave controlled by a small number of European settlers and a subsistence periphery operated by a large number of African peasantry. This has led to certain overlaps and institutional conflicts with regard to land use issues. For example the Government Lands Act (Cap 280) empowers the President to make grants of freehold to individuals. This law lacks provisions stipulating the conditions under which such grants may be made. The multiplicity of laws regulating the

management of land related resources in Kenya has over the years led to the establishment of various agencies charged with the duty of overseeing the implementation of these laws. These agencies and institutions have diverse and often conflicting mandates, thus lacking any form of co-ordination to administer natural resources hence, the enactment of Environmental Management and Co-ordination Act. However, its implementation is likely to be affected by the parallel legal regimes/laws still in existence.

Another instance where overlapping is noted is in that although Local Authorities and Country Council under the Trust Land Act own land in trust for the benefit of the people, the Commission of Land as a direct representative of the president has on many occasion allocated trust land to individuals in total disregards of the community interests.

Graph 4-5: Other challenges



Source: Field survey, 2010

According to graph 4-5 above poor laws and regulations challenge contributes to 54.5% of all the challenges under this category.

Lack of enough valuation assistance in the valuation department, was also stated by 27.3% of the respondents.

Lastly, Corruption in Government departments involved in the process took 9.1% followed with the same percentage by informal users of land. Informal users of land

especially squatters pose a serious problem when determining their eligibility for compensation for their structures and eventual removal from the acquired land.

According to according Virginia Institute of Policy Report (2006) poor laws and regulation and informal land users are challenges which are found almost in all the third world countries. In developing world where land laws have developed over time these problems rarely occur. The same case applies with lack of enough staff because poor countries are not able to employ and maintain staff due to shortage of funds. The problem of informal user of land is more disturbing in African countries where the white settlers disposed the indigenous of their land a problem which persisted even after independence. This problem has been made worse by the ever increasing population rendering most people landless. In Kenya this problem is more prominent in the coastal region.

Table 4-5: Percentage of challenges according to the type

Challenge group	Percentage
Social	19.31%
Economic	24.26%
Legal	27.23%
Political	9.90%
Environmental	13.86%
Others	5.45%

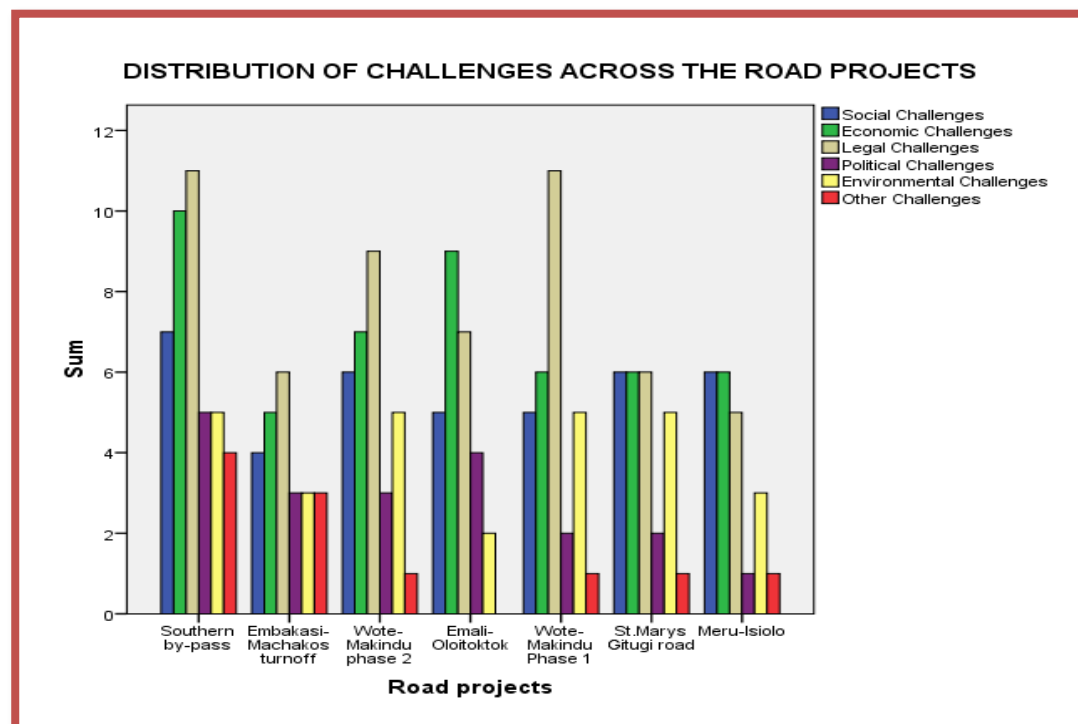
Source: Field survey, 2010

Table 4-5 above shows the general distribution of the challenges according to the type. The highest ranked were legal at 27.23% followed by economics at 24.26 %. Social challenges were ranked third at 19.31 % followed by environmental ones at 13.86% and then at the bottom were political challenges. The reason why legal challenges are ranked the top can be attributed to the fact that land acquisition involves acquiring of private property rights without the owners concept and therefore owners of these rights always run to courts for protection.

Graph 4-6 shows distribution of the various challenges according to the road project. It is clear from the graph that legal challenges were most prominent followed by economic challenges in most of the roads with the exception of Emali- Oloitoktok road where environmental challenges were the most common. This is because in Kajiado land is normally used for ranching and game reserve and this present a challenge to the valuers when valuing such land. In Meru- Isiolo and St. Mary's Gitugu Roads the challenges were almost homogenous as these roads are situated in areas with similar environmental and socio- economic characteristics.

Legal challenges occur almost in every government project involving compulsory acquisition of land whether in developed or developing countries according to Virginia Institute of Policy Report(2006). This is simply because it involves a desire by the state to acquire people's rights to private property and people always tend to defend these rights. According to Food and Agricultural Organization of the United Nation (2008) economic challenges are very prominent in all developing countries because of lack of funds and diversion of project funds coupled with embezzlement of government funds by government officials.

Graph 4-6: Distribution of Challenges



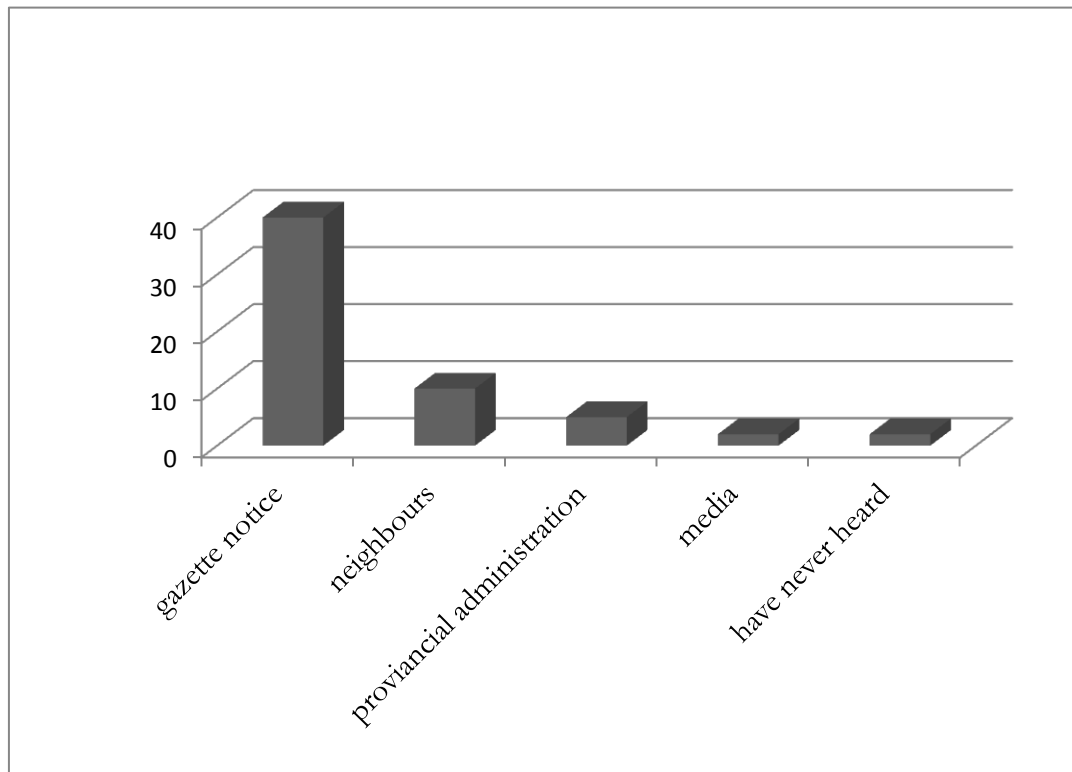
Source: Field survey, 2010

4.3. Data on landowners

4.3.1. How landowners get to know about the acquisition of their land

Graph 4-7 below shows gazette notice is the main mode of communication; but it does not reach to all the affected persons on time. Some of the affected persons get to know about the acquisition, through other means which include: - their neighbours, followed by the provincial administration and at the far end is the media. It is also interesting to note that a few individual especially those who stay away from their land and do not have relatives in the area where land is been acquired end up not knowing about the acquisition at all.

Graph 4-7: How landowners get to know about the acquisition of their land



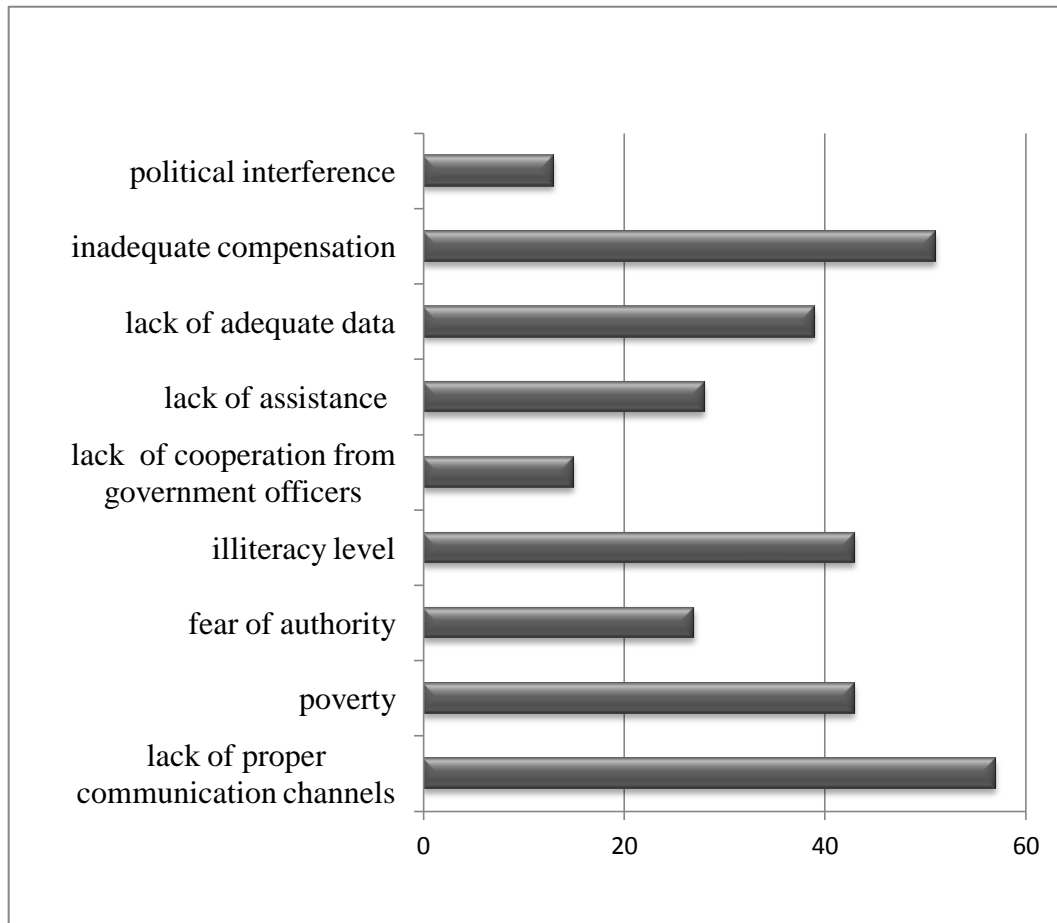
Source: Field survey, 2010

4.3.2. Challenges (Landowners)

Graph 4-8 below shows several challenges which were identified by landowners, with the highest ranked been lack of proper communication. According to the respondents this was especially so with notices of intention to acquire, inquiries and taking possession which were not received on time. Where they were delivered to the

owners on time, understanding them was a problem since some of them are not literate. Language used during inquires also worsened the issue of communication, as most inquiries are not conducted in the local languages.

Graph 4-8: Landowners Challenges



Source: Field survey, 2010

The second ranked challenge after lack of proper communication was inadequate compensation. The respondents claimed that although they agreed to be paid the amount awarded, they later realize that when the payment is delayed within an year or so, the value of their land normally goes up more than the amount they were compensated.

Poverty and illiteracy were also mentioned by the respondents. This was more so in the rural areas where income levels are very low. Because of poverty the affected persons are not able to meet the expenses that come with the acquisition process e.g.

transport costs, acquiring of legal documents, hiring of advocates and valuers, filling succession cases and completing subdivision schemes.

Illiteracy level makes matters the worse because communication during the acquisitions process is normally a problem as the affected landowners have to rely on their relatives, friends and local leaders to read and communicate during this period.

Lack of data to assist the affected landowners to lay their claim as required by law, was also cited as a major challenge. Respondents claimed that it is very difficult to get sales comparables from their neighbours, as land is normally sold with a lot of secrecy. The matter is made worse by the inability to access sales record in the land registry.

Another challenge is lack of assistance from private valuers and advocates because of the costs involved in hiring them. Most of the affected landowners are in rural area where poverty levels are high.

Interference with the project by the local politician (Councilors and Member of Parliament) was also mentioned with fear of the acquiring authority ranked last in this category.

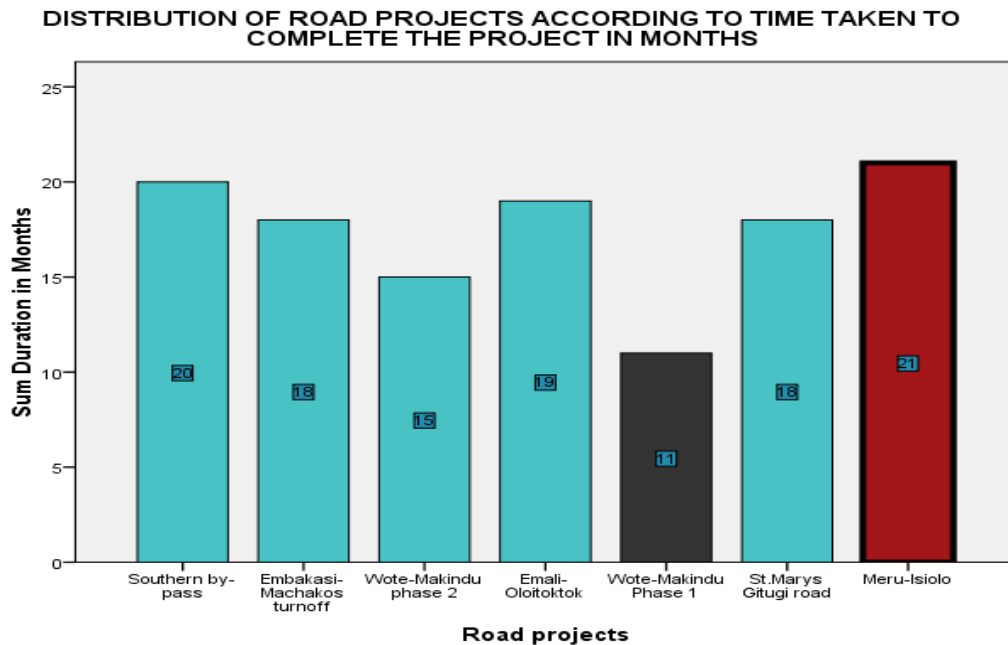
According to the literature review most of these challenges mostly occur in poor countries where education standards are low, high poverty levels and poor land registration systems. In developed countries where education and living standards together with highly developed land registration systems these problems rarely do they occur.

4.4. Project completion time

From graph 4-9 below it is clear that valuers took the longest duration in months (21) to complete the project when working on Meru-Isiolo road (34 Km/16 Ha) while they took the shortest time while working on the Wote-Makindu phase 1 and 2 which took 11 and 15 months respectively. All the other roads though having different areas and distances almost took the same period of time to complete. Southern bypass lead this pack with 20 months, followed by Emali -Oloitoktok (100 km/340 Ha) with 19 months, Embakasi Machakos turnoff and St. Marys Gitugi took

18 months each. It is therefore clear that the time taken to complete a project is not related to the area of land acquired or the distance of the road.

Graph 4-9: Road Projects Acquisition Duration



Source: Field survey, 2010

4.4.1. Factors affecting road project completion time

The time that a road project takes during land acquisition as can be seen from the data depends on several factors:-

Firstly, on the number of valuers working on the project, Meru Isiolo, although having small area to be acquired took longer time because, the numbers of valuers working on the project were fewer compared to other roads.

Secondly, on the level of developments on the properties affected. Southern bypass and Embakasi- Machakos turnoff roads were situated in areas with massive developments and thus the complexity of the acquisition process and longer acquisition period. Wote Makindu and Email-Oloitoktok roads although having more areas of acquisition and longer road distances are situated in areas with very few developments and farming activities unlike St. Mary’s Gitugi road and Meru-Isiolo roads where farming activities are quite intensive. The level of development is

also determined by the location of the road project. Those project situated in urban areas are likely to have more developments than those in rural areas.

Thirdly, on the number of landowners affected. In areas with high population density land fragmentation is quite high resulting to high no of landowners affected. This is more so with St. Mary's Gitugi (549) and Southern Bypass (300) which took long period to be completed although they were shorter roads compared with others.

Fourthly, the challenges involved in each project also determine the duration taken to complete each project as seen from the previous data. These challenges are quite unique to each road project depending on the location and timing of the project; ranging from legal, social, economic and environmental challenges.

4.5. Conclusion

In my data analysis and interpretation I have dealt with data obtained from government valuers and the affected landowners. The data analysis has shown that there various challenge which occur during the process of compulsory acquisition of land for road construction projects in Kenya. These challenges are legal, social, economic and environmental challenges.

From my research it is very clear that the existing procedures and processes of compulsory land acquisition in Kenya are not well designed to eliminate or minimize these challenges. Because of this the amount of compensation to the affected persons, takes long to be received, and the road projects contract periods are extended at a cost. This leads me to accept my hypothesis that the current procedures and process of compulsory land acquisition for road construction projects leads to high costs and delays.

Another significant finding of this research is that the duration taken to complete land acquisition for a road project is not necessarily determined by the area of land acquired and the length of the road. This is normally determined by the number of valuers working on the project, level of developments on the properties to be acquired, number of affected landowners and lastly the challenges faced in each project.

5. CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1. CONCLUSIONS

When governments compulsorily acquire land, they have an obligation to ensure that the process is done and completed in an equitable and transparent manner. People should not be impoverished because their land was acquired by the state. Equitable and transparent procedures are needed for economic growth; compulsory acquisition will destabilize the economy if investors perceive that their rights to land are not adequately protected by the government.

The literature review and survey results revealed that delay in the process of land acquisition is perceived by the respondents to be one of the factors which hinders the fulfillment of prompt payment in full of just compensation as required by the new Constitution under the Bill of Rights and the old Constitution Section 75. The delay is as a result of economic, social, legal, environmental and technical aspects. Economic challenges include: lack of funds by the acquiring authority, poverty among landowners, inadequate compensation and poor facilitation for government officers. Legal challenges are litigations either challenging the process or succession cases. Social challenges include family disputes, illiteracy, communication barriers and ignorance among the affected landowners. Also in this category is the failure by most people including professionals to understand the laws of land acquisition. Environmental challenges include lack of experience by government valuers on how to value for non economic uses such as religious, historical sites and cultural issues also included in this category is failure to carry out thorough EIA reports. Finally there are the technical challenges where the ministry lacks enough experience personnel in land acquisition matters and limited research in the area of compulsory land acquisition in Kenya.

The data analysis has supported our hypothesis that the existing procedure and process of compulsory land acquisition are not able to effectively deal with the challenges mentioned above and there is need for the process and procedure as they are in the Land Acquisition Act to be re-examined especially now that the land laws are being reformed in line with the new constitution. The main goal will be to make

the acquisition law efficient and effective to reduce suffering by the landowners occasioned by unjust compensation and reduce resistance to government projects.

There is danger when acquisition processes last for a long time, creating long-term insecurity and uncertainty for owners and occupants of land. Other problems which may arise when compulsory acquisition is not done well include: - reduced investments in the economy, weakened land markets, opportunities created for corruption and the abuse of power, delayed projects and inadequate compensation paid to owners and occupant.

It is important, therefore, that satisfactory approaches are in place and effectively implemented to ensure that communities and people are placed in at least equivalent positions to those before the land acquisition. Prerequisites for this are appropriate legal frameworks and capacities for implementation, and good governance and adherence to the rule of law. Legislation should provide that the acquisition will be regarded as abandoned if the process is not completed within a specified period as a result of delays by the acquiring agency. Legislation to establish the government's power to compulsorily acquire land should be written clearly and with precision. It should ensure that people know what their rights are throughout the process, and that the decisions and actions of government officials are well structured and controlled. Unclear laws and regulations can lead to poorly-implemented procedures.

Land acquisition need not necessarily present the best alternative for government to secure land for development. Other alternatives such as direct purchases through negotiation and joint venture are the alternatives available for government to exercise rather than solely depending on land acquisition powers. According to Usilappan (2000), land acquisition is a complex process, is sensitive in nature, and needs pragmatic approach to deal with. Wherever possible, land developments should be carried through the process of normal economic supply and demand. Evidence from practitioners in most countries indicates that a standard premium is added to the valuation achieved via the statutory basis of compensation in instances where the owner is prepared to allow the State to purchase their property by negotiation; indeed, current negotiation and mediation practice suggests that some parties are trying to adopt a workable approach to compensation. It remains to be seen, however, whether the principles of valuation by the court in land reference

cases are recognized to give space for compensation that addresses the issue of delayed of compensation. To secure just terms and sustainable outcomes, all parties need to be made more aware of the implications attached to following different statutory pathways for compensation. An impartial interpretation of the law and a better understanding of the principles and good practice of valuation will lead to an adequate compensation settlement.

Finally, the problems of compensation are more than just a matter of law and valuation; it is a matter of justice between society and man. “The word compensation would be a mockery if what was paid was something that did not compensate”

5.2. RECOMMENDATIONS

From the literature review and data analysis it is clear that a well designed compulsory land acquisition process for development project should follow several steps. In each step to minimize the challenges mention in the previous chapter this research has made recommendation as follows:-

5.2.1. Step 1: Planning

In the previous chapter it was found that most of the affected landowners only learn about government projects during land acquisition stage. This is because of failure by acquiring authority and benefiting body to put in place proper mechanisms to ensure that all affected landowners and interested groups are involved during the initial planning stages. To ensure good planning the following issues need to be addressed:-

- Attempts to acquire the land through voluntary sale and purchase should be made before using the power of compulsory acquisition. This way a friendly atmosphere will be developed and a willing seller- willing buyer altitude can be encouraged.
- An impact assessment should always be done to evaluate the environmental, social and economic impacts of the project before the process of acquisition is allowed. In Kenya, until recently road projects were done without Environmental Impact Assessment (EIA) reports. This scenario changed

when EMCA Act, 1999 was enacted which gave rise to National Environmental Management Authority (NEMA). In situation where they are carried out they are poorly and hurriedly done because of lack of experienced personnel and the costs involved.

- Resettlement Action Plans (RAP) should be thoroughly carried out to ensure that the funds set aside are enough to compensate the landowners. In some cases these reports are shoddy and the amount the government is advised to set aside for compensation fall short with a substantial margin. These reports need to be carried out by experienced experts in corroboration with valuers.
- Plans for the projects should be on public display and available to the affected persons, providing an opportunity for people to review and submit objections unlike the current situation where these plans are only availed during acquisition in the Commissioner of Lands office or the acquiring body (Ministry of Roads). These plans should be displayed even at the village level. The Land Act, 2012 has empowered the County government through the National Land Commission to acquire land, we this scenario will be improved.
- Relevant data should be collected on land rights for the parcels to be acquired which should also address the issue of indigenous community. This is to ensure the rights of vulnerable groups which include women, children, ethnic minority and the elderly are put into consideration. In the current situation only the tenure details are collected mainly from the land registry. This is likely to differ with the situation on the ground because of the informal subdivisions which have already been carried out and have not been registered.
- A Geographical Information System (GIS) based Land Information System (LIS) offers obvious advantages for managing people movement, consultation, and planning associated with land delivery and especially compulsory acquisition. The government should ensure that good land records through the use of GIS which is use in most of the developed countries.
- During this stage the Minister before authorizing acquisition of land for public purpose should confirm that funds for acquisition are actually

available and have been set aside. This will avoid scenarios where an acquisition is commenced and completed only for the acquiring authority to claim later that funds are not available to compensate affected landowners.

5.2.2. Step 2: Publication of notices

In data analysis it was found that notices of intention to acquire and conduct inquiry do not reach the landowners on time and to address this problem the following need to be done during this stage:-

- The notice should be widely published and served to all affected individuals. This can be done especially through the local churches, provincial administration and village elders. It should also be made mandatory for the district land offices/ county offices to have all the information about the acquisition for the affected persons to access instead of travelling all the way to Nairobi
- The notice should be published in local newspapers in all local languages or dialects, communicated orally at community meetings, over the radio and in other ways appropriate to the local population. Currently the notice of intention to acquire and inquiry is only published in the Kenya gazette which is only accessible to few individuals in the urban centre and in particular Nairobi. The Land Act, 2012 has empowered the Commission when serving notices to published them not only in the gazette or the county gazette but also in two national dailies with wide circulation. It remains to be seen how effective this will be.
- The notice should include a comprehensible map of the land to be acquired. Currently in Kenya the notices only contain the names of the landowners and the area acquired. In case affected persons want to view the map he/she is advised to visit the Commissioner of Lands office in Nairobi.

5.2.3. Step 3: Public hearing stage

Poverty and illiteracy were among the problems mentioned as affecting most landowners in the rural areas. This means people are not able to travel to places of inquiry due to lack of fare and even where they attend inquiry meetings they are

conducted either in English or Kiswahili. To address this problem the following is recommended:-

- There is need, to make sure that affected landowners and occupants should be given an opportunity to be heard and to have their concerns acknowledged and addressed by the acquiring agency. This can be achieved by making sure that the meetings are held at times and places that are convenient for all affected people, both men and women, and should be planned and designed with local communities to ensure that all are heard, especially the vulnerable (women, children, ethnic minority and the elderly).
- In addition to the national languages use during inquiry, local languages should also be used in presentations and discussions.
- The places of meetings should also be fixed with consultation with the landowners unlike the current situation where government officers sitting in Nairobi fix inquiry meeting places based on the data available.
- Transport should also be provided for those who do not have the means to travel if the distance involved is long.

5.2.4. Step 4: Valuation and compensation

Inadequate compensation was a major challenge which normally causes delays in implementation of government projects as landowners appeal the compensation awarded to them. To address this problem the following need to be done:-

- In calculating compensation amount valuers use market value without taking into consideration the concept of highest and best use. This was the issue in *Kanini Farm Ltd v. Commissioner of Lands, (High Court Nairobi, 1981)*, where land was valued as agricultural while change of user had already been done. There is need for the concept to be considered when calculating market value to minimize appeals of compensation by landowners.
- An open and reliable real property sale price register must be available to all parties. Currently data available in the land registry is distorted because land owners always quote low figures to evade payment of stamp duty. Where it is correctly quoted it is very difficult for landowners to access them because of government bureaucracy.

- Administrative organisations should have a leading role of giving guidelines, which are related to valuation issues. Government has to take charge of research of land price information, price factors and their effects on land prices. It is necessary to organise valuation studies and research in Universities for valuers and supporting experts. Government has to have a leading role to make research and develop valuation issues related to compensation.
- Strict measures should be taken to avoid manipulation of data by private valuers in collaboration with landowners and government valuers with the aim of getting higher compensation.
- Regulations should be specific enough to provide clear valuation guidelines, but flexible enough to allow room to determine equivalent compensation in all situations.
- Valuation and compensation should be based on both de facto and de jure rights.
- Where communities lose access to sustainable resources such as forests, waterways or grazing lands, they should be provided with replacements in kind or compensated for per capita yearly use.
- Vulnerable groups should be provided with training or financial support if the acquisition results in the loss of their livelihoods.
- The acquiring agency should take steps to ensure that there are a sufficient number of independent valuers and advocates to help people to assess their compensation claims.
- People should receive full payment of the agreed upon compensation sum in a timely manner unlike some situation where compensation even takes more than 2 years for payment to be done. This creates a lot of pain and agony to the affected families. The Land acquisition laws in Kenya need to be amended to provide a clear time frame within which payment should be paid instead of the current situation where the Act provides for prompt payment.

5.2.5. Step 5: Taking Possession

It was found that in some instances the government enters the land even before compensation money has been paid like in the case of *Maisha Nishike v.*

Commissioner of Lands, (Nairobi Law Courts, 2010). To reduce resistance during taking possession by affected landowners and interested persons the following need to be done:-

- Possession should not be taken unless at least a substantial percentage of the agreed upon compensation offer has been paid. If the remainder is unpaid, interest on the remainder should accrue from the date of possession.
- People should be given a reasonable time to vacate, while respecting the need to keep to the project schedule.
- Farmers should be allowed time to harvest that year's crops, or receive full compensation for the crops.
- A clear time-limit should be placed to ensure that the acquisition process is not unduly long. Legislation should provide that the acquisition will be regarded as abandoned if the process is not completed within a specified period as a result of delays by the acquiring agency. In Kenya the Land Acquisition Act need to be amended to make it clear the period within which an acquisition is valid because the Act is silent on this matter.
- Acknowledge entitlement of all displaced persons, including persons with formal legal rights, persons whose claims to land are potentially recognizable under national law and persons who have neither formal legal rights nor land claims recognized or recognizable under law, such as squatters and encroachers. In the current situation the Land Acquisition Act does not recognize squatters for compensation.
- Ensure that all displaced persons are eligible for resettlement assistance and compensation for loss of non-land and land assets, including those without legal titles to land or any recognizable legal rights to land.
- Calculate the rate of compensation at full replacement cost.
- Provide relocation assistance for physically displaced persons, including a livelihood assistance or income rehabilitation program for economically displaced persons at full replacement cost.
- Upon taking possession the government should ensure that all the survey maps and title deed are amended on time to reflect the new areas. Currently this is normally done by the landowners because although the onus falls on

the government it take too long or it is not done at all. This is loading more cost to the affected individuals.

5.2.6. Step 6: Appeals

It was found that most affected landowners have little knowledge about land compensation tribunal or the courts to forward their appeals and where they are aware there are unable to meet the costs involved. There is need therefore to ensure that:-

- People should have prompt, unrestricted rights to appeal to an independent body for the delay of payment without good cause.
- Appeals provide necessary oversight, a crucial check on state power. Supervision by a reviewing body can stop corruption, correct error, and insure that justice is done.
- Hearings should take place at a time and place and in a language convenient to people.
- Because review processes can be hard for claimants to access due to language barriers, distance, formality, costs, etc, government may set up alternative review mechanisms that are informal, locally located, inexpensive, and accessible technically to the layperson.
- The court or reviewing body should adjudicate matters in a public and transparent manner.
- Procedures should be conducted at low or no cost to people. Only in exceptional circumstances should costs be awarded against them.
- Prompt and speedy trial of acquisition cases should be held to avoid the landowners suffering and minimize costs.
- Proceedings should be conducted in a manner easily understandable and accessible to people. The procedures should not be intimidating to people, and should allow them to present their own cases. Unlike the current situation where owners of land are seen as criminals resisting government projects. The law suit does not arise out of any failure, or alleged misconduct of the owner. The litigation arises due to the benefiting body though the acquiring authority desire the owner's property and has chosen to take it.

5.2.7. Step 7: Assistance

As seen from the data analysis most of the landowners are poor and acquisitions also affect vulnerable groups. These are people in need of assistance if they are to receive fair compensation the state should give them help to understand every aspect of the process. They may need assistance contesting the decisions and actions of the acquiring agency, getting second opinions on the value of their land, and ensuring that compensation is paid. This can be done through the help of NGO's and CBO's. These organizations help the land owners by:-

- i. Educating people about their rights,
- ii. Advocate on behalf of the community and teach people negotiation skills to argue for equitable compensation.
- iii. Assist people to organize themselves to argue for their concerns and needs, to fight for transparency and due process during the procedures and to request higher compensation standards.
- iv. Be advocates for vulnerable subgroups within the affected population and help them to protect their rights.
- v. Play the role of a watchdog, monitoring the acquiring agency's actions to ensure that it is following the legally prescribed processes in a transparent and equitable manner.

However, the burden of assistance falls on the state: which should put in place legislation to address the imbalance of power by providing mechanisms to assist people to become better advocates for themselves.

5.3. Areas of Further Study

1. Critical analysis of the effects of the new land laws on compulsory land acquisition in Kenya.
2. Effects of compulsory land acquisition on land values in Kenya.
3. Regression analysis on challenges of compulsory land acquisitions.

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APPENDIX 1: ABBREVIATIONS

CAP	-	Chapter
CBO	-	Community Based Organization
DOD	-	Department of Defence
ECHR	-	European Convention on Human Rights
EIA	-	Environmental Impact Assessment
EIS	-	Environmental Impact Statement
EMCA	-	Environmental Management and Co-ordination Act
ESCAP	-	Economic and Social Commission for Asia and the Pacific of the United Nations
FAO	-	Food and Agriculture Organization of the United Nations
GAO	-	United States Government Accounting Office
NCC	-	Nairobi City Council
NEMA	-	National Environmental Management Authority
NGO	-	Non Governmental Organization
TIF	-	Tax Increment Financing
RTA	-	Registration of Title Act
GIS	-	Geographical Information System
LIS	-	Land Information System
RAP	-	Resettlement Action Plan

APPENDIX 2: QUESTIONNAIRE TO GOVERNMENT VALUERS

Land Acquisition for Selected Road Projects in Kenya

Name of the Valuer-----

Position of the respondent

- a. Valuer 1
- b. Senior valuer
- c. Chief valuer
- d. Principle valuer
- e. Assistant Deputy Commissioner of Lands (Valuation)
- f. Senior Deputy Commissioner of Lands (Valuation)

1. What is your level of education?

- a. Tertiary
- b. University
- c. Post graduate

2. How long have you worked with the Ministry of Lands?

- a. Below 10 years
- b. 10-20 years
- c. Above 20 years

3. (i) Were you involved in valuation for compensation in any of the listed road project? If yes, please tick.

No.	Project	Tick
a.	Southern bypass	
b.	Machakos –Embakasi Turnoff	
c.	Wote – Makindu Phase 11	
d.	Emali – Oloitoktok	
e.	Wote – Makindu Phase 1	
f.	St Mary’s –Gitugi	
g.	Meru-Isiolo	

(ii) Please give details

Project	Distance	Area (Ha)	No. of land owners	Duration	Registration
	KM			(Months)	(Clean Titles)
Southern bypass					
Machakos –Embakasi Turnoff					
Wote – Makindu Phase 11					
Emali – Oloitoktok					
Wote – Makindu Phase 1					
St Mary’s -Gitugi					
Meru-Isiolo					

4. What were the challenges encountered in the acquisition if any? Please tick

(i) **Legal**

- a. Appeals due to inadequate compensation
- b. Succession cases
- c. Court cases challenging the process
- d. Lack of proper registration

(ii) **Social**

- a. Family disputes
- b. Illiteracy

(iii) **Economic**

- a. Poverty
- b. Inadequate facilitation
- c. Lack of funds

(iv) **Political**

- a. Political interference
- b. Ethnicity issues

(v) **Environmental**

- a. Valuation for non-economic uses e.g. religious, historical and cultural claims
- b. Lack of well researched environmental impact assessment reports

(vi) **Others** (please specify)

- a.
- b.
- c.
- d.
- e.
- f.

5. In your opinion, what would you suggest as mitigation measure to address the above listed challenges in the process? Please explain

- i.
- ii.
- iii.
- iv.

6. Please give any other comment?

APPENDIX 3: QUESTIONNAIRE TO LANDOWNERS

Land Acquisition for Selected Road Projects in Kenya

Name of the respondent.....

Title No.....

1. Age of the respondent

- i. Below 20 years
- ii. 20-40 years
- iii. 40-60 years
- iv. Above 60 years

2. Level of education of the respondent

- i. None
- ii. Primary
- iii. Secondary
- iv. Tertiary
- v. University
- vi. Post graduate

3. Were you affected by land acquisition for the road project?

- i. Yes
- ii. No

4. If yes how did you come to know that you were affected?

- i. Have never learnt about it
- ii. Gazette notice
- iii. Media
- iv. Neighbors
- v. Provincial administration
- vi. Others(specify)
 - a.
 - b.
 - c.
 - d.

1. Which of the listed processes were you involved in? please tick

- i. Planning for the project
- ii. Inquiries
- iii. Receiving of award for compensation
- iv. Signing of statement for acceptance/rejection of compensation award
- v. Receiving of compensation money
- vi. Notice of taking possession

2. What were the challenges encountered during the entire process of acquisition?
Please tick.

- i. Lack of proper communication channels
- ii. Poverty
- iii. Fear of the acquiring authority
- iv. Lack of knowledge about land acquisition
- v. Illiteracy/language barrier
- vi. Lack of cooperation from government officers
- vii. Lack of technical assistance e.g. hiring of valuers & advocates
- viii. Inadequate compensation
- ix. Lack of adequate data
- x. Political interference
- xi. Others (please specify)
 - a.
 - b.
 - c.
 - d.
 - e.

3. What in your opinion should be done to improve the process? Please explain

- i.
- ii.
- iii.
- iv.
- v.