



**Drylands Learning and
Capacity Building Initiative
for Improved Policy and
Practice in the Horn of Africa**

REPORT ON VALUATION OF COMMUNITY RANGELANDS IN KENYA
SUBMITTED TO DLCI

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ABBREVIATIONS

NLC	-	National Land Commission
IVS	-	International Valuation Standards
IVSC	-	International Valuation Standards Council
ISK	-	Institution of Surveyors of Kenya
DCF	-	Discounted Cash Flow
HPM	-	Hedonic Pricing Method
WTP	-	Willingness to Pay
WTA	-	Willingness to Accept Payment
TEV	-	Total Economic Valuation
CVM	-	Contingent Valuation Method
KENHA	-	Kenya National Highways Authority

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1.0 Executive summary

Kenya has put in place a legal and policy framework that recognizes and protects property rights. It categorizes property rights as public, private and community. Payment for prompt and just compensation upon expropriation of property rights is safeguarded by the Constitution. The determination for the compensation amount is guided by the Constitution, the Land Act 2012 and the Land (Assessment for Just Compensation) Rules 2017. The Land Value (Amendment) Act 2019 that seeks to amend the Land Act 2012 and also introduce the Land Value Index, The existing Statute, the Rules and the Bill will together form the future basis for undertaking valuations for compulsory acquisition in Kenya.

The current valuation practice in Kenya is guided by Kenyan statutes and the International Valuation Standards developed by International Valuation Standards Council. The methods employed in valuation are mainly those applied in conventional real estate and asset valuations with specific legal adaptations for subjects addressed by the laws of Kenya. The most commonly applied are market, income and cost-based approaches. There exists other methods that have addressed the valuation of environmental resources, and livelihood systems. These include: contingent valuation; hedonic pricing; total ecosystem services valuation; Total Economic Valuation among others. These methods have registered limited official and practical application in valuation of property and assets in Kenya. The valuation methods adopted have largely been determined by the purpose of valuation. The conventional real estate methods are limited on the valuation of rangelands since they seem to disregard indirect and system wide values and focus on productivity and substitution principles that are backed by empirical official information characteristically obtained from static conventional enterprises. The other methods seem to be system wide focused and geared towards informing specific policy and management decisions though they offer useful insights towards identifying indirect values and values for non-market goods and services.

In the case of community lands the subject of valuation vary across different communities and is highly related to the customs, practices, physical attributes, livelihoods and economic activities. It comprise legal, economic, social, cultural and environmental dimensions that take varied forms depending on purpose, community/ies context and timing. The variables that contribute to the value are not just influenced by the host community but also the neighboring communities and their social economic activities.

There are gaps and challenges relating to the statutory provisions and rules on valuation for compulsory acquisition relating to dependency on the market approach alone as a basis of valuation. The lack of recognition of non-static enterprises like nomadic pastoralism risks undervaluing community lands and breaches the constitutional protection of property. Insistence on the use of only Government records in making of the Land Value Index without input from the public, practitioners, researchers and professional bodies risks reliance on outdated and incomplete information that will lead to under-valuation especially for unregistered community land. The lengthy process of establishing the Land Value Index which requires the approval of Senate and National Assembly breaches the requirement for prompt payment of compensation. The composition of the Land Acquisition Tribunal whose membership is exclusively determined by the state in a non-competitive or representative manner and without any set qualifications serves to frustrate independent and competent resolution of valuation disputes.

The legal, policy and practice guidelines relating to valuation of land for compulsory and voluntary acquisition of community land should be revised to incorporate other basis of valuation such as gross replacement cost, equitable value, social value, environmental value for assets and resources not traded in the formal property markets. The statutes, regulations and rules for compensation of land rights should recognize non static enterprises like pastoralism and allow for compensation of non-quantifiable losses in the form of solatium¹. The valuation processes should allow for participation of stakeholders such as the affected communities, researchers and private practitioners. The valuation processes should be time bound and dynamic to fully accommodate consideration of the diverse contexts and factors determining value. Compensation amounts should not be fixed legislatively by political representatives. The Tribunal should comprise a membership with qualifications that reflect expertise and understanding of diverse valuation, environmental, social and economic aspects while respecting diversity of representation.

¹ Solatium – This is payment for non quantifiable losses such as emotional and spiritual disruptions. It is a socially constructed phenomenon and is negotiated on a case by case basis depending on context and local laws.

2.0 Objectives of Study

The study was guided by the following objectives:

- i) To examine the methodologies and practice of valuation in Kenya in the context of unregistered community land.
- ii) To examine the practice of valuation of community rangelands in Kenya
- iii) To review the legal and policy framework governing valuation for compulsory acquisition of community land in Kenya.
- iv) To make recommendations that would improve Policies and Approaches to Valuation and Compensation of community land in Kenya.

3.0 Methodology

The study was made up of a literature review, key informant interviews, and discussion of initial findings at a workshop organized on 27th June 2019. The results are presented and discussed in a thematic format.

4.0 Background and Introduction

Land in Kenya is classified as public, community or private². The Land Act 2012 is the main framework governing administration and management of public and private land while community land governance is addressed under the Community Land Act 2016. Community land vests in and is held on the basis of ethnicity, culture or similar community of interest. It includes land held by group representatives; community forests, grazing areas, shrines, land traditionally held by hunter gatherer communities; land lawfully held as trust land by County Governments and any land lawfully declared to be community land by law³.

The Constitution of Kenya protects everyone's right to own property anywhere in Kenya either individually or in association without any discrimination. It is provided that the State shall not deprive any person of property or interest in property unless it is in accordance with the Constitution and established statutory law⁴. In cases where the land is compulsorily acquired for public purpose or in public interest; prompt payment of full and just compensation is required.

Statutory provisions have been made under the Land Act, 2012 to guide the process of determining and making compensation for compulsorily acquired land rights. In addition, subsidiary legislation to guide assessment for just compensation in form of Rules⁵ have been developed by the National Land Commission (NLC), and approved by Parliament. Recently the Land Value (Amendment) Act, 2019, was passed by both the National Assembly and the Senate and assented by the President on 2nd August 2019. This Act is aimed at amending various sections of the Land Act 2012, the Land Registration Act 2012, Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act and provides for a Land Value Index and compulsory acquisition.

Concerns have been raised by communities and stakeholders that the value of rangelands has often been understated and that government policies and practices relating to acquisition have often not displayed the full appreciation of uses of such land. Uses like pastoralism appear to have been routinely undervalued thus

² Government of Kenya, 2010, The Constitution of Kenya Art.61, Government Printer, Nairobi

³ Government of Kenya, 2010, The Constitution of Kenya Art. 63, Government Printer, Nairobi

⁴ Government of Kenya, 2010, The Constitution of Kenya Art. 40, Government Printer, Nairobi

⁵ Government of Kenya, 2017, Land (Assessment of Just Compensation) Rules, Government Printer, Nairobi

allowing the promulgation of inappropriate policies⁶. Government statistics often display undervaluation of pastoralism and related land uses thus contributing to increased incidences of poverty and environmental degradation.⁷ Use of government generated indices based on statistics and valuation models that do not capture the full value of rangelands and their uses poses the risk of violating the Constitutional protection of property rights and the requirement for just and prompt compensation.

It is with the foregoing background that this report seeks to review legal and policy frameworks practices and methodologies relating to and affecting valuation of community land with a specific focus on rangelands. The review is geared towards identifying gaps and limitations that adversely affect the determination of just and fair compensation values for compulsory acquisition purposes as well as voluntary acquisitions and make recommendations to address them.

5.0 Valuation Practice in Kenya

The valuation practice in Kenya is governed by the Valuers Act Cap 532, which provides for a Valuers Registration Board that regulates the practice and conduct of Registered Valuers. For registration by the Board one is required to be a full member of the Institution of Surveyors of Kenya (ISK) Chapter of Valuation and Estate Management Surveyors. Upon registration and obtaining the license to practice, valuers are required to follow the various foundational principles set by the Constitution of Kenya, relevant statutes, regulations, guidelines and standards set by ISK and the International Valuation Standards Council (IVSC).

Among the notable statutes governing valuation is the Valuation for Rating Act Cap 266 and the Rating Act Cap 267 which deals with valuation and administration of property rates. The Land Act No.6 of 2012 makes provisions for the National Land Commission (NLC) to make rules to govern valuation 'Assessment for Just Compensation'⁸ for compulsory acquisition purposes following repeal of the Land Acquisition Act Cap 295. The NLC in exercise of these powers, made and published in the Gazette the Land (Assessment of Just Compensation) Rules 2017. The Land Value (Amendment) Act 2019 which among other provisions for establishment of the Land Value Index and the Land Acquisition Tribunal.

6.0 Real Estate and Assets Valuation Methods

Valuers in Kenya, being members of the Institution of Surveyors of Kenya (ISK), subscribe to the International Valuation Standards (IVS) set by the IVSC. These standards together with the guidelines set under the ISK Valuers and Estate Management Surveyors Handbook prescribe the concepts, approaches and bases for undertaking valuation in Kenya. These standards, guidelines principles and concepts therein serve the purpose of promoting consistency and transparency in valuation practice. The standards⁹ prescribe three approaches that underpin valuation methods. These approaches are:

- (i) Market Approach
- (ii) Income Approach
- (iii) Cost Approach

⁶ Davies, 2007, Total Economic Valuation, WISP, IUCN

⁷ COMESA, 2010, Assessing Total Economic Value of Pastoralism, COMESA

⁸ Government of Kenya, 2012, Land Act no. 6 of 2012 S. 111, G Government Printer, Nairobi

⁹ IVSC, 2017, International Valuation Standards, IVSC, London

The market approach derives the value of an asset by comparing the asset with comparable (similar) assets for which sale price information is available. It assumes all assets are sold and bought in an open market. The income approach establishes an indication of value by converting future cash flow from an asset to a single present value, taking account of time value for money. It assumes assets are held for investment purposes. The cost approach seeks to determine the value of an asset using the economic principle that a buyer will pay no more for an asset than the cost to obtain an asset of equal utility, in normal circumstances whether by purchase or by construction.

Based on these approaches the following valuation methods have been variably applied in the valuation of assets in Kenya:

- (i) Direct Sales Comparison (Comparable) Method
- (ii) Income Capitalization (Investment) Method
- (iii) Profits (Accounts) Method
- (iv) Replacement Cost Method
- (v) Reproduction Cost Method
- (vi) Summation (Contractors) Method

6.1 The Direct Sales Comparison method

This is based on comparing the asset to be valued with similar or identical properties and prices achieved for them, allowing for differences between them, thus arriving at the likely price to be attained for the subject asset. This is done systematically by: identifying the units of comparison that are used by *participants* in the relevant market; selecting the relevant comparable transactions; calculating the key valuation metrics for those transactions; undertaking comparative analysis of qualitative and quantitative similarities and differences between the comparable *assets* and the subject *asset*; making necessary adjustments to the valuation metrics to reflect differences between the subject *asset* and the comparable *assets*; applying the adjusted valuation metrics to the subject *asset*, and reconciling the indications of value¹⁰. It should however be observed that real properties are heterogeneous by nature. They can never be identical. They are differentiated by location, the physical state, tenure, use, date and time of construction or acquisition. These characteristics of property and the dependence on existence of a vibrant property market with readily available information limits the application of this method at times.

6.2 Income Capitalization (Investment) method

This is based on the principle that assets are acquired for investment purposes. It seeks to value the future flow of income by discounting it at an appropriate rate of interest to determine its present value. It mainly employs the Discounted Cash Flow (DCF) technique. This involves choosing the most appropriate type of cash flow for the nature of the subject *asset*; determination of the most appropriate explicit period over which the cash flow will be forecast; preparation of cash flow forecasts for that period; determination of the appropriate terminal

¹⁰ IVSC, 2017, International Valuation Standards , IVSC, London

value for the nature of the *asset*; selection of the appropriate discount rate, and application of the discount rate to the forecasted future cash flow, including the terminal value to establish the total present value.¹¹

6.3 Profits (Accounts) Method

The method computes the value of an asset based on the actual business volume achieved. It is premised on the fact that properties held for business purposes depend on unique factors which influence the sales and profit levels achieved and therefore difficult to compare with others. Knowledge of the type of business and ability to interpret books of accounts and profits is critical in the determination of value¹². The method is applied to properties that are sold as part of business for instance hotels and petrol stations. The value of the asset is established by deducting all working expenses from the total sales to establish the net profit. This net profit is adjusted to reflect an efficient operator. The operators share (fee) is then deducted to leave the landlords share (rental value) which is then capitalized to establish the value of the asset.

6.4 Replacement Cost Method

This method generally establishes the cost of a modern equivalent *asset*, which is one that provides similar function and equivalent utility to the *asset* being valued, but which is of a current design and constructed or made using current cost-effective materials and techniques¹³.

Frequently the cost of replacement is adjusted for physical deterioration and all relevant forms of obsolescence. After the adjustments, it is referred to as depreciated replacement cost. Replacement cost is arrived at by calculating all of the costs that would be incurred by a reasonable person seeking to create or obtain an asset providing equivalent utility; determining whether there is any depreciation related to physical, functional and external obsolescence associated with the subject asset, and deducting the total depreciation from the total costs to arrive at a value for the subject asset.

6.5 Reproduction Cost Method

This entails computing the cost of recreating a replica of an asset. The method is applied when the cost of a modern equivalent asset is greater than the cost of recreating a replica of the subject asset, or the utility offered by the subject asset can only be provided by a replica.

¹¹ IVSC,2017, International Valuation Standards, IVSC, London

¹² Britton, et al. 1989,Modern Methods of Valuation, London

¹³ IVSC, 2017, International Valuation Standards, IVSC, London

6.6 The summation (Contractors) method

This entails the adding up of values / costs of each component of the asset. The component values/costs are established using the appropriate valuation approach. The method assumes that all the costs incurred by a developer in the development of an asset plus the profits constitute the value of that asset. This method sums all the costs of finance, design, acquisition, planning and approval, site clearance, services, construction, developers profit to establish value of an asset. It is used to value development properties or specialized properties.

It should be observed that the purpose of the valuation assignment and the nature of the subject asset determine the method that is adopted for valuation. Valuers in Kenya generally apply the above methods depending on the instructions of the client and in line with the standards¹⁴. It should however be noted that the standards acknowledge and allow for some valuation assignments to be guided by laws of the jurisdiction where the valuation assignment is being undertaken. In Kenya valuation for compulsory acquisition and valuation for rating purpose are for instance provided for by the Land Act No.6 of 2012, Valuation for Rating Act Cap 266 and the Rating Act Cap 267 respectively.

The methods outlined above are normally applied to conventional real estate. The valuation practice seldom involves valuation of communal rangelands particularly those under pastoralism except when valuations have been sanctioned by statutes (law) or development project financiers such as the World Bank and the International Finance Corporation (IFC). In the instances where such valuations have been undertaken, the methodologies adopted have been guided by internal institutional standards and guidelines. The IFC for instance requires compliance with Standard Five that addresses land acquisition and involuntary resettlement occasioned by projects¹⁵. This standard allows for application of livelihood loss valuations which are not accounted for in the conventional real estate valuation methods discussed above. The closest that valuers in Kenya have gone in undertaking valuations of the rangelands is when dealing with valuation of ranches. In valuation of ranches the methods outlined above have been applied depending on the purposes and scope of valuation. It is worth noting that the ranches have formal enterprise management approaches with elaborate information management systems that make analysis of cash flows and costs relatively empirical, and application of market, income and cost based approaches convenient. The valuations are largely based on carrying capacities of the land in terms of livestock production or rents and income streams from the production activities undertaken in the ranches.

7.0 Other Approaches to Valuation

Besides the real estate and assets based valuation methods discussed above, there are other approaches to valuation that have developed from environmental management, livelihood safeguards and resource management concepts. These approaches include; Total Economic Valuation (TEV), Total Ecosystem Services

¹⁴ IVSC, 2017, International Valuation Standards, IVSC, London

¹⁵International Finance Corporation, 2012, Performance Standard 5, Land Acquisition and Involuntary Resettlement

Valuation, Contingent Valuation Method (CMV) based on Willingness To Pay method (WTP) or Willingness To Accept (WTA), Hedonic Pricing Method, and Cost Benefit Studies.

Contingent Valuation Method aims at measuring the compensating or equivalent of an asset in question. This compensation or equivalent is established by either the WTP or WTA approaches. The WTP entails asking the affected persons the amounts they would be willing to pay to retain the good or service. This amount is taken to represent the value of the good or the service. WTA on the other hand queries the affected persons on the amount they are willing to accept as payment for the loss of good or service. The amount thus established is assumed to be the value of the good or service in question¹⁶.

Hedonic Pricing Method seeks to estimate economic prices for ecosystems or environmental services based on consumer choices for composite goods¹⁷. The assumption is that goods or services are valued for their utility bearing attributes. For instance, what would be paid extra for a house with ocean view would constitute the value contribution associated with the ocean. The extra price paid for land next to a river would comprise the value associated with the river.

Cost Benefit Studies strive to capture all the impacts of an option both negative (costs) and positive (benefits). The sum of all the impacts individuals affected is aggregated and analyzed to determine whether the option brings forth a net benefit or a net cost.¹⁸

As was cited earlier the purpose determines the approach to valuation. **The Environmental management based methods** are geared to supporting conservation decisions and policies. Their adequacy or lack of it has been discussed only in that context and not as a means of deriving equity following involuntary acquisition. The Contingent Valuation models have been criticized for reliance on hypothetical scenarios rather than real choices and the disparities between values for the same good arrived at by use of WTP and WTA¹⁹. Travel Cost and Hedonic pricing also suffer from limitations where there are no behavioral trails or observed market transactions²⁰. **The ecosystem services valuation approaches** are limited in application given that ecosystems services may not be quantified on a per acres basis as property valuers would prefer²¹. Despite the limitations outlined with respect to environmental management oriented approaches, they offer logical basis for estimating the value of public or communal goods and services not traded in the market which can be applied in evaluating policy and management options.

The Total Economic Valuation (TEV) of pastoralism seeks to capture the full range of costs and benefits emanating from an activity. It aims at identifying, quantifying and aggregating all values associated with an activity, thus capturing a whole range of direct and indirect values whether measurable or not²². This

¹⁶ FAO, 2000, Application of Contingent Valuation in Developing Countries, FAO, Rome, Italy

¹⁷ Anita K., Umesh.J, 2016, Effects of Environmental Services by Hedonic Pricing Model, International Journal of Engineering Vol.5

¹⁸ Graves p., 2013, Environmental Economics; An Integrated Approach, CRC Press, Colorado, USA

¹⁹ Andrea B., 2004, Assessment of the Application of Contingent Valuation Theory to Bio-Sequestered Carbon

²⁰ Allen T.L, Etal., 2013, Potential for Valuing Rangeland Ecosystem Services on Public Rangelands

²¹ Ibid.

²² Davies, J(2007, Total Economic Valuation of Pastoralism in Kenya, WISP, IUCN

framework provides a sound conceptual basis of estimating the contribution of an activity with multiple values that cannot effectively be captured by relying only on official government statistics and market based methods. It has effectively been applied to estimate the value of pastoralism in Kenya with the results that indicate significant variation from official government statistics²³. The approach though offering a systematic way of identifying direct and indirect values that are either measurable or not measurable does not offer a site specific method that gives a per acre estimate of value but rather gives a system wide valuation of a production activity. It also doesn't distinguish specific dry season grazing areas, water points or mineral licks that are essential for the functioning of the rest of the land area under pastoralism. Neither does it quantify different layers of user rights. It is more suited at supporting macro- economic and policy decision making. It nonetheless provides a sound basis for capturing the system wide contribution (value) of a non static enterprise like pastoralism that is practiced on rangelands and would provide valuable inputs that can supplement the conventional real estate valuation methods in building land value indices for community rangelands.

8.0 The Subject of Valuation in Community Rangelands in Kenya (What is to be valued?)

The subject of valuation in community lands can be located in the Constitutional definition of community lands, which include those:

- i) registered in the name of group representatives (group ranches);
- ii) lawfully transferred to a specific community or declared to be community land by an Act of Parliament;
- ii) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
- iii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; and
- iv) lawfully held as trust land by the county governments (trust lands)²⁴.

From the face of this Constitutional definition the subject appears straight forward but the practical disaggregation of attributes and interests in context is complex and displays great heterogeneity. This variability in subject is displayed by the results of key informant interviews on what constitutes the subject of community land valuation in the three cases highlighted below:

a) Turkana County²⁵

Physical attributes of land within this county vary in terms geological and ecological characteristics. The soils comprise sandy, volcanic, clay, alluvial and mixed types. The topography varies from lowlands, plains, and mountains. There is fertile farming land (both irrigated and non-irrigated) in the lower Turkwel river basin, wet and dry season grazing areas, drought fall back areas, forests, wildlife areas, caves and historical sites, mining and petroleum production areas, fishing sites, bee keeping sites etc. The land uses beyond the urban areas vary depending on the ecological and geological characteristics, cultural and traditional practices, development

²³ Ibid.

²⁴ Government of Kenya, 2010, The Constitution of Kenya Art. 63(2), Government Printer, Nairobi

²⁵ Based on an interview with Dr Gregory Akall, consultant, by Mwenda Makathimo, June 2019

interventions. The land uses include livestock keeping, fishing, subsistence farming, bee keeping, hunting and gathering, artisanal mining, cultural ceremonies and social gathering, worship, spiritual shrines, tourism, forestry, archeological and heritage among others. These uses may change depending on the seasons and climatic conditions. Farming land is for instance converted to grazing land during dry seasons and after crops have been harvested.

The physical extent of community land is not defined by conventional administrative or cadastral boundaries but by cultural, use and control. Cultural definitions of boundaries vary depending on rights under consideration. For instance, there is the larger territorial boundary comprising the areas occupied by all the nineteen Turkana subgroups (the outer boundary). Each of the subgroups also have their boundaries within the area covered by the external boundary. Families also have their boundaries defined by trees under a system termed as the *Ekwar system*. Individuals also have control areas called *Eree*.

The property rights over this land are a continuum that include: territorial control and ownership that is collective to all; subgroup use and control; family use and control; individual control and use including in irrigation schemes, access for members across and within subgroup-controlled areas, access and use by neighbors and friends of families for some resources such as water from wells (*Akare*); access and use by neighboring communities outside the territorial boundary, including migratory rights. These rights are exercised within customary rules and regulations that are not in writing but well known and respected by community members.

b) Marsabit County²⁶

Land within Marsabit County comprises diverse landscapes including high altitude mountains with rain forests, other forests, farmlands, plain grasslands, deserts, lake shores and desert oasis. The soils include: volcanic, loamy, sandy, clay and rock outcrops. The land uses vary across the landscapes and include livestock keeping, fishing, subsistence farming, hunting and gathering, social and cultural activities including traditional religious practices, sources of traditional medicine and herbs, forestry, tourism and wildlife.

The land is mainly owned by three distinct ethnic communities namely: Borana, Rendille; and Gabra. Each of the communities have distinct territorial zones that they have traditionally controlled. The boundaries of the territorial zones are identified by geographical features that are historically acknowledged. The land is not under conventional cadastral and land administration system. Each of the communities have distinct cultural backgrounds and have agreed customary rules governing land use and occupation. Despite the various communities having distinct land control and ownership rights they have reciprocal use rights for pasture land and water resources. The customary rules are administered by the elders of the respective communities. The clans, families and individuals in these communities have collective ownership rights, occupation rights, use rights for pasture and other natural resources. They exercise control over any settlements though they practice pastoralism which is characterized by temporary settlements. As a general rule, communities may not graze in one area for more than three months continuously to avoid degradation. Permanent settlements are mainly found in urban areas and market centers. Neighboring communities have migratory, access and use rights subject to the customary rules and regulations of the host communities.

²⁶ Based on an interview with Dr Achiba Gargule, FCDC, by Mwenda Makathimo, June 2019

The various landscapes have different uses at different times. The desert is for instance used for grazing during rainy seasons whereas the highlands are used for grazing during dry seasons. The oases are shared by all communities. Land use at times is influenced by cultural events for instance the circumcision period among the Rendille community may dictate where animals will be grazed. Land is viewed as a symbol of community identity and physical features named with respect to historical and cultural events.

c) Isiolo County – Merti Rangeland²⁷

The Merti Rangeland in Isiolo County comprises the area outside Isiolo town comprising dry season grazing areas, wet season grazing areas, small subsistence farming areas, markets and urban settlements. The soils comprise mainly sandy and mixed soils. The landscape is mainly savannah grassland and with varying intensity of vegetation cover with some hills. The dominant land use is livestock keeping, complimented by small scale subsistence farming, and there are locations with social amenities, and cultural and traditional shrines. In addition to these uses land is viewed as defining community identity. The boundaries for the rangeland are determined by geographical features historically recognized by communities such as hills.

The rangeland is mainly occupied and controlled by the Borana community. The clans, families and individuals do not have direct control over the rangeland. It is governed by elders following customary rules and regulations, with families and individual members having use and access rights. Community members are not allowed to dispose of land by sale since it is considered as an inter-generational asset. Neighboring communities from Marsabit, Wajir, Garissa and Samburu have migratory, use and access rights subject to the Borana community rules and regulations. These rights are seasonal and the neighboring communities are not allowed to establish permanent settlements. There are community boreholes situated at different locations but controlled by elders to avoid use during unauthorized seasons or acting as an incentive for permanent settlement. This ensures that the grazing patterns are maintained to avoid land degradation or depletion of pasture before the onset of rainy seasons²⁸.

From the descriptions above it is clear that the subject of valuation varies across different communities and is highly related to the customs, practices, physical attributes of the land, livelihoods and economic activities. It comprises legal, economic, social, cultural and environmental dimensions that take varied forms depending on purpose, community(ies) context and timing. The variables that contribute to the value are not just influenced by the host community but also the neighboring communities and their social economic activities. Some of the variables like those related to culture and spiritual practices may not be directly quantifiable. The rights and tenure arrangements include individual, family, clan, ethnic groups and subgroup, state and private. The physical scope can be ascertained by social mapping that takes into account the cultural and social dynamics together with community acknowledged geographical features. It is however not supported by the current cadastral system. Effective scoping when dealing with valuation of particular community land is therefore necessary if accurate and just values are to be returned.

²⁷ Based on an interview with Jarso Mokku, CEO, DLCI, by Mwenda Makathimo, June 2019

Having addressed the subject of what is to be valued it is necessary to review how valuation of land for compulsory land acquisition purposes is done in Kenya. As earlier indicated valuation for compulsory land acquisition is guided by statutes. Adoption of any new approaches whether from a real estate, livelihood, safeguards or environmental management perspective will require legal and policy changes. The section below discusses the legal provisions that guide the approaches and methods for carrying out valuation for compulsory acquisition of property in Kenya.

9.0 Valuation of Property for Compulsory Acquisition Purposes in Kenya

Valuation of property for compulsory acquisition is necessitated by the provisions of Art 40(3) (b) of the Constitution²⁹ which allows the state to acquire property, interests and rights over property in accordance with the provisions of any Act of Parliament for public purpose or in public interest provided that *'Prompt Payment in Full of Just Compensation'* is made to the affected person. The determination of the 'Just Payment' for the property right or interest becomes the subject of valuation. Article 40(4) of the Constitution allows for provisions to be made for compensation to be paid to occupants in good faith not holding title to land where land is acquired for public purposes or in public interest. Assessment of 'Just Payment' to such occupants in good faith is therefore a subject of valuation.

In line with the Constitutional provisions, the Land Act, 2012 has made provisions to guide the process of compulsory acquisition of land and the attendant processes. The Land Act³⁰ outlines public purposes to include roads, canals, highways, railways, bridges, wharves and airports; public buildings including schools, libraries, hospitals, factories, religious institutions and public housing; public utilities for water, sewage, electricity, gas, communication, irrigation and drainage, dams and reservoirs; public parks, playgrounds, gardens, sports facilities and cemeteries; security and defence installations; settlement of squatters, the poor and landless, and the internally displaced persons; and any other analogous public purpose. Land and property compulsorily acquired for these purposes is therefore what constitutes the subject of valuation.

Section 111(1) of the Land Act provides that should land be acquired compulsorily, just compensation shall be paid promptly in full to all persons whose interest in land have been determined. The National Land Commission is given powers under Section 111(2) of the Land Act to make rules to regulate the assessment of just compensation. The National Land Commission in exercising these powers made and published in the Kenya Gazette the Land (Assessment for Just Compensation) Rules 2017.

These rules³¹ give the procedure and considerations for valuation of property and interests in land for purposes of payment of compensation to the affected persons. The rules interpret 'Market Value' to mean the value of the land at the date of publication in the Gazette of the notice of intention to acquire the land. The Rules provide that the Commission shall consider the following factors when assessing compensation:

(i) *the market value of the land;*

²⁹ Government of Kenya, 2010, The Constitution of Kenya Art. 40, Government Printer, Nairobi

³⁰ Government of Kenya, 2012, Land Act no. 6 of 2012, S.3, Government Printer, Nairobi

³¹ Government of Kenya, 2017, Land (Assessment of Just Compensation) Rules, Government Printer, Nairobi

- (ii) *damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of severing the land from his or her other land;*
- (iii) *damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of the acquisition injuriously affecting his or her other property, whether moveable or immovable in any other manner or his or her actual earnings;*
- (iv) *reasonable expenses incidental to the relocation any of the persons interested or who will be compelled to change residence or place of business as a consequence of the acquisition;*
- (v) *damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the Commission takes possession of the land.³²*

In addition to these factors, the Commission is required to determine the award taking into consideration the effect of conditions of the title or law which regulates the use of the subject property. Increases in the market value of the subject property are disregarded if the increases arise from:

- (i) *Improvements by the owner after the date of the publication of the notice of intention to acquire the land.*
- (ii) *Use of land contrary to the law or detrimental to the health of the occupiers of the premises or public health.*

The Rules direct that the following shall not be considered in the determination of compensation:

- a) *The degree of urgency which has led to the acquisition.*
- b) *Any disinclination of the person's interest to part with the land.*
- c) *Damages sustained by the claimant which will not represent a good cause of action³³.*
- d) *Damages which are likely to be caused to the land after the publication of the acquisition notice or as a consequence of the future land use.*
- e) *Increases in land value likely to accrue from its future use after acquisition.*
- f) *Any development at the time of acquisition notice, unless these improvements were necessary for maintaining the land.³⁴*

In addition to the amounts determined above the Rules provide that the Commission shall add a sum of fifteen percent of the market value of the amount of compensation for disturbance. From the foregoing outline of the considerations in valuation, it is clear that the market value of the affected property, injurious and severance effects on the remaining property, costs of relocation, loss of profits plus the statutory disturbance form the core contents of compensation payment amount.

These considerations in valuation will be significantly affected by the changes introduced by the Land Value (Amendment) Act 2019. The Act amends section 107 of the Land Act 2012 and creates the Land Value Index generated by the Cabinet Secretary in consultation with County Governments and approval of the National Assembly and the Senate as the foundational basis for determining compensation for Freehold and Community

³² Ibid.

³³ A set of facts sufficient to justify the right to sue for property or for enforcement of rights

³⁴ Government of Kenya, 2017, Land (Assessment of Just Compensation) Rules, Government Printer, Nairobi

Land³⁵. This, by implication, makes the Government the regulator of value though, property prices and input costs are not based on any Government regulations. The proposed law gives no room for participation of stakeholders including valuers, the private sector, professional bodies, researchers and public in the process of making the index.

The Act gives the main inputs to be used in computing the index as declared value for payment of rates, rents and stamp duty. It further requires the affected persons to provide tax returns as proof of existence of profits from the subject property³⁶. These requirements are not practical when dealing with most community rangelands in Kenya given that they are not rateable; are hardly transacted in property markets and therefore no stamp duty payment or rents are declared. The tax return requirements totally disregard the subsistence and livelihood aspects of the land use activities over rangelands.

The Land Value Act establishes the Land Acquisition Tribunal appointed by the Cabinet Secretary. The membership of the tribunal consists of one person nominated by the Judicial Service Commission, who shall serve as the chairperson; one person nominated by the Cabinet Secretary and one person nominated by the Attorney General³⁷. This membership does not include representation from other stakeholders besides government appointees. The private sector, professional valuers, land users and other stakeholder are not represented. The skewed representation creates bias in favour of the Government which is always a party in compulsory land acquisition matters. The Land Value (Amendment) Act 2019 does not provide any qualifications for persons to be appointed to the tribunal leaving room for people without relevant skills and knowledge to be appointed. All matters relating to compulsory acquisition, creation of wayleaves, easements and public right of way shall in the first instance be referred to the Tribunal³⁸. This provision serves to delay or technically frustrate the right of property owners to take a matter to the Environment and Land Court. These provisions are a serious affront to the right to property as protected by art.40 of the Constitution of Kenya 2010.

10.0 The practice of valuation of rangelands in Kenya

Recent studies reveal that the actual valuation of rangelands in Kenya has not followed any legal, policy, guidelines or conventional basis. Communities living around oil project sites in Turkana indicated that no valuation was done for compensation of their land acquired for the oil exploration and production project sites. The Turkana County Council (the predecessor of the County Government) negotiated and allocated land directly to the investor. The County Government however leases sites for extractive projects at a flat rate of one million Kenyan Shillings per site per year as per the Finance Act³⁹. This rate is not informed by any valuation approach or method.

³⁵ Government of Kenya, 2019, Land Value (Amendment)Act, Government Printer, Nairobi

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Makathimo , M., 2019 Assessment of Policy Frameworks and Practices Affecting Land Access for Oil and Gas Projects in Turkana County Kenya, LDGI, Nairobi, Kenya

The communities living along the LAPSET corridor in Isiolo similarly reported that they did not receive any compensation for land acquired by KENHA (Kenya National Highways Authority) for the Isiolo - Moyale road except those who had leases or title deeds. The others were compensated for permanent physical structures only. The basis for valuation of land was not disclosed to the public and the discussions on acquisition were done between the County Council and KENHA. Compensation payments for land were made directly to the Council⁴⁰.

In each of the cases no regard for loss of livelihoods or social cultural or loss of environmental resources was made. There was an inherent assumption that lack of formal property markets, title deeds and cadastral systems implies low or no value for the land.

11.0 Gaps and challenges in valuation of property for compulsorily acquisition purposes

The statutory considerations and processes for valuation and determination of just compensation outlined above presume the following:

- (i) Existence of a formal property market where information about transactions is readily available.
- (ii) That Market Value approach is conclusive and results in 'Just' amounts for compensation purposes.
- (iii) The existence of land use plans and zoning regulations governing land uses.
- (iv) There exists an up-to-date formal cadaster where subject properties are surveyed and registered.
- (v) Individual persons' interests in property are registered and can be quantified or shares established.
- (vi) The permanent settlement of affected persons.
- (vii) That formal Government statistics and records are up to date, complete and proof of just values.

These assumptions do not always hold in communal rangelands that constitutes more than sixty percent of Kenya's land mass⁴¹. Transactions over this type of land are not supported by the national cadaster and are not processed through the Land Registries. No formal information repositories or indices exist. Land rights are not recorded anywhere but known within the communities. Most rights are communal and land resources are thus shared. The land uses are regulated through customs and norms. Formal planning rules, regulations and zoning with the attendant controls are not applicable. A majority of people in these regions lead a nomadic way of life and therefore do not have permanent residences, and formal property markets do not exist.

The fact that no formal market transactions have been registered over these types of land presents challenges as to how open market values are established. The valuation considerations provided for under the Land Act of 2012 and the Land (Assessment for Just Compensation) Rules 2017 and the Land Value (Amendment) Act 2019 therefore face limitations in practical application over these types of property. This in turn poses challenges as to how just and fair compensation is arrived at given that the statutory methodologies are based on assumptions of existence of a formal property market. The statutory provisions cover physical relocation and appear not to address economic displacement of persons with unregistered property rights. Loss of profits addressed under the considerations seems to only regard property owners with enterprises traceable to the particular parcel of land for which tax returns have been made. This excludes the non-static enterprises

⁴⁰ Kibugi R., Etal., 2016 Large Scale Land Acquisition for Investments in Kenya, LDGI, Nairobi, Kenya.

⁴¹ Government of Kenya, 2009, Sessional Paper No3.of 2009 on National Land Policy, Government Printer, Nairobi

reflected in nomadic lifestyles of pastoralist communities that occupy rangelands. It further ignores the loss of livelihoods and subsistence values associated with range land based production systems.

The valuation approach prescribed ignores other resource values save for those reflected in a property market set up. Loss of medicinal plants, cultural sites, social identity and management, critical ecological services are not regarded.

The factors outlined under the Rules do not address how public assets and communal facilities are to be valued. Assets like schools, cattle dips, social halls, boreholes, animal watering points, communal tanks, water supply systems, animal holding grounds, shrines, and other cultural assets are not traded in any market. Their value cannot be established using the market approach and these facilities do not generate direct incomes and therefore income capitalization or profits methods cannot help determine their value. The consideration and approach provided by the Rules and the Statute are blind to methodologies suitable for valuation of special use facilities like cattle dips and community boreholes.

The question of how interests of occupants of land in good faith will be addressed in assessment of just compensation is not overtly addressed under the Land Act 2012, nor in the Rules. The Land Value (Amendment) Act 2019 has attempted to give statutory guidance by requiring persons to prove that they have been in permanent occupation of the subject land for at least six years continuously⁴². This provision appears to expose those who engage in nomadic pastoralism to losing compensation if their land is unregistered and without title.

The public purposes enumerated under the Land Act tend to address instances where property rights and interests are permanently extinguished or where the purpose purely involves public entities or authorities. The scenarios where economic or physical displacements occur during implementation of projects where private investors in public related projects like wind power generation deal directly with communities is not addressed. Just compensation for displacement that is brought about by such investments need to be addressed in policy and statute.

The assumption that Government statistics and records are complete, up to date and are proof of just values is misplaced. Valuation rolls used for property rating are seldom updated. There are no valuation rolls covering unregistered community land in Kenya. Even in the case of areas where land is registered and under private ownership, valuation rates are based on unimproved site values and do not reflect full capital values.

The requirement that indices be developed solely by the Government, excludes public participation and also locks out contribution from expertise in research institutions, industry practitioners and professional bodies who are often in possession of valid and current relevant information beyond official Government records. The methodology proposed for the indices is not practical in the case of rangelands and other unregistered lands that have multiple values not identifiable by use of market valuation approaches or conventional real estate valuation methods best suited for land administered under modern cadastral systems.

⁴² Government of Kenya, 2019, Land Value (Amendment) Act 2019, Government Printer. Nairobi

12.0 Valuation practice in other Countries

Valuation of land in different countries is influenced by diverse factors such as local laws and policies governing tenure and land use, locational characteristics and the physical characteristics, and social cultural dynamics.

In Ghana, customary land comprises 78 percent of all land and is mostly unregistered. The main valuation methods employed include gross replacement cost and sales comparison to establish market value. Land is valued whether registered or not, provided that the rights can be customarily ascertained. Only property owners are compensated for land, and squatters are only paid for disturbances⁴³

In Indonesia land tenure is characterized by legal pluralism. There is private ownership, customary ownership and squatters. Both private land and communal land are subject to valuation. All properties are subject to compensation if compulsorily acquired, except those held by squatters who don't pay taxes. Compensation comprises physical value on market basis, value for loss of business, injurious and severance effects, solatium for personal losses, including cultural and spiritual losses⁴⁴.

In Peru, the majority of the population lives in informal settlements. Land is either registered or un-registered. Land is held individually, jointly or communally. Valuers do not undertake valuation of un-registered land. Compensation is required for any property compulsorily acquired. Valuation is based on market value, with an additional amount paid for disturbance. Any losses have to be proved by authoritative evidence⁴⁵.

The valuation of unregistered communal lands reflects the challenges of conventional approaches and has resulted in under valuation by official government valuers in many instances. Suggestions have been made to adopt a hybrid approach suited to local contexts that reflect multiple values, local information and perceptions⁴⁶

13.0 Conclusion

Kenya's Constitution recognizes and protects property rights. It categorizes land as public, private and community. Payment for prompt and just compensation upon expropriation of property rights is safeguarded by the Constitution. The determination of the compensation amount is guided by the Land Act 2012 and the Land (Assessment for Just Compensation) Rules 2017. As much as the Constitution offers protection of property rights, the methodology and considerations for assessment of Just Compensation are limited to market value approaches that are not suitable for valuation of community rangelands where no formal property markets exist. The non-recognition of non-static enterprises like nomadic pastoralism risks undervaluation and breaches of the Constitutional protection of property. Insistence on use of only Government records in making of the Land Value Index without input from the public, practitioners, researchers and professional bodies risks the reliance on outdated and incomplete information that can lead to under valuations especially for unregistered community land.

⁴³ Franklin O. and Mike M., 2018, Valuing Unregistered Land, R.I.C.S., London, UK.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Kwanena O., Etal., 2018, Land Valuation in Support of Responsible Consolidation of Ghana's Rural Customary Lands, Survey Review, Taylor and Francis Group, UK

The lengthy process of establishing the Land Value Index which requires the approval of Senate and National Assembly breaches the requirement for prompt payment of compensation. The composition of the Land Acquisition Tribunal whose membership is exclusively determined by the state in a non-competitive or representative manner and without any set qualifications serves to frustrate independent and competent resolution of valuation disputes. It is skewed towards unilateral determination of value of compensation for property rights by the Government and technical frustration of the right to access justice at the Environment and Land Court.

The current valuation practice in Kenya is guided by Kenyan statutes and the International Valuation Standards developed by International Valuation Standards Council. The methods employed in valuation are mainly those applied in conventional real estate and asset valuations with the specific legal adaptations for subjects addressed by the laws of Kenya. These conventional real estate methods are limited for the valuation of rangelands since they disregard indirect and system wide values and focus on productivity and substitution principles that are backed by empirical official information characteristically obtained from static enterprises. Such approaches disregard the livelihood, environmental, cultural and religious values of communal rangelands.

The subjects of valuation vary across different communities and are linked to the customs, practices, physical attributes, livelihoods and economic activities. It comprises legal, economic, social, cultural and environmental dimensions that take varied forms depending on purpose, community(ies) context and timing. The variables that contribute to the value are not just influenced by the host community but also the neighboring communities and their social economic activities. Valuation being both a science and an art should follow a hybrid approach suited to local contexts that reflect multiple values, local information and perceptions ⁴⁷

14.0 Recommendations

To address these gaps and challenges, there is need for the Parliament, the National Land Commission, the Ministry of Land and Physical Planning to revise the legal, policy and practice guidelines for valuation of land for compulsory and voluntary acquisition of community land to incorporate the following recommendations:

- (i) Include other basis for valuation apart from market value such as equitable value⁴⁸, and social value and gross replacement cost value for instances where the affected assets are not traded in the property market or where no formal property market exists.
- (ii) Adopt existing use as a premise of value where planning rules, regulations and controls do not exist and where application of strict and highest and best use principle is not possible.
- (iii) Allow for identification and quantification of rights and interests not recorded under the formal registration and cadastral systems to form the subject of valuation in the cases of unregistered land such as community land.
- (iv) Cater for livelihood system disruptions and exclusions that do not amount to permanent physical displacement.

⁴⁷ Kwanena O., Etal., 2018, Land Valuation in Support of Responsible Consolidation of Ghana's Rural Customary Lands, Survey Review, Taylor and Francis Group, UK

⁴⁸ Estimated price for transfer of an asset between knowledgeable and willing parties that reflect their respective interests

- (v) Include valuation of communal, public and social assets that may not be attributed to a private person.
- (vi) Recognize non static enterprises such as those of nomadic pastoralists and adopt concepts of Total Economic Valuation with requisite adaptations in computing Land Value for rangelands where they are practiced.
- (vii) Explicitly provide for valuation of assets and interests associated with occupants of land in good faith without title, while taking into account nomadic pastoralism (values held by home and non home communities) and at the same time putting caveats to deter speculative occupation and perennial squatting.
- (viii) Repeal the provisions of the Land Value (Amendment) Act, 2019 offending Article 40 of the Constitution of Kenya 2010 and creating undue advantage for the Government at the expense of property owners with regard to land value index and the Land Acquisition Tribunal.
- (ix) Make the process of valuation time bound and free from political approval requirements.
- (x) Address assessment of just compensation for physical, economic and social displacements occasioned by non-public or state authorities such as investors in wind power projects.

The methodology adopted for valuation of community land would therefore consider the multiple attributes presented by a specific context and with community participation. The primary basis would be gross replacement cost value and additional components would comprise social values, cultural values, ecological values, loss of livelihood and a solatium (payment for emotional disturbances that cannot be quantified)⁴⁹ to provide for whatever is not measurable.

⁴⁹ UN Habitat, 2018, Valuation of Unregistered Lands, Nairobi, Kenya

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