

## **ANALYSIS OF THE LAND VALUE (AMENDMENT) ACT, 2019**

**22<sup>nd</sup> November, 2019**

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### **CRITICAL ISSUES**

- The law fails to address valuation of community lands in a relevant manner, thereby undermining communities' rights to property. This raises questions as to the constitutionality of this enactment.
- The approach for valuation presented in the new law is outdated in respect of community lands. It also falls of constitutionally-enshrined of national values and principles of governance in respect of community lands.
- Draft guidance from the National Land Commission on procedures for valuation and compulsory acquisition also lacks appropriate procedures for community land as compared to private land.
- A key requirement of amended law and procedures must be that the acquiring agency is responsible, in cooperation with the Ministry of Lands and Physical Planning and the local county, to assist the affected community to have its land adjudicated and surveyed prior to compulsory acquisition, and additionally, for alternatives to acquisition be provenly explored, including leasing community land on fair terms.

### **INTRODUCTION**

The Land Value (Amendment) Act<sup>1</sup> (hereinafter referred to as the "Act") was assented to on 2nd August 2019 and came into force on 19th August 2019. It amends three pieces of legislation including the Land Act<sup>2</sup>: the Land Registration Act<sup>3</sup> and the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act<sup>4</sup>.

Besides the introduction of key provisions on the assessment of the value of land acquired compulsorily, the Act goes further to outline the forms of compensation. The Act also establishes a Land Acquisition Tribunal to hear and determine issues arising from the land acquisition process. Another commendable provision is amendment to the Land Registration Act which gives the Land Registrar the power to impose restrictions on any transactions on land that is the subject of compulsory acquisition.

Aside from that, it is unfortunate that this Act generally subjects community land to conditions and requirements similar to private land without accounting for the difference in their nature, values and conditions. In this way, the law jeopardizes the Bill of Rights including the requirement that all forms of property are equally protected and not taken from owners unjustly.

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<sup>1</sup> No.15 of 2019

<sup>2</sup> No. 6 of 2012

<sup>3</sup> No. 3 of 2012

<sup>4</sup> No. 56 of 2012

Also concerning is the amendment to the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act to eliminate the requirement to seek the Free Prior Informed Consent (FPIC) of persons to be displaced due to development projects: the only law that expressly provided for FPIC in Kenya. Eliminating this requirement sets back progress towards ensuring that FPIC applies to all disadvantaged people who own land. Below is a detailed discussion of some weaknesses and gaps in the Act.

## ISSUES

### 1. Section 2: The period within which compensation should be paid is lengthy and unreasonable.

The act establishes that “prompt” means not more than one year after the taking of possession of the land by the National Land Commission (hereinafter referred to as the “Commission”). This is unjust for the majority of Kenyans who cannot sustain new accommodation or new livelihoods without reparation. This provision gives too much discretion to the Commission and hence, it may be subject to abuse. From past experience, land acquisition processes are unnecessarily protracted and it is likely that in this instance, government will automatically opt to compensate affected persons only at the end of the one-year period. This will particularly affect communities whose ancestral lands are acquired and therefore need to be resettled immediately after the Government takes possession of their land. There is a risk that the rights of such victims may be threatened. Parliamentarians should also note that provision for prompt rather than prior payment of compensation is one of the less sound elements of Kenya’s Constitution. At least 21 of Africa’s 54 Constitutions now require compensation to be paid prior to eviction of lawful owners and occupiers.<sup>5</sup> Until Kenya’s provision is also amended, the State should be obliged to pay affected persons at least a first installment on compensation due prior to displacement.

### 2. Section 3 (c) of the Act, fails to provide the format in which information should be provided in the notice of intention to acquire land.

From past experience, the provision of particulars on the location and approximate area of the land to be acquired is usually in the form of coordinates that need to be translated onto a map. A good example is the Lamu Port South-Sudan Ethiopian Transport Corridor (LAPSSSET) land acquisition process where a list of coordinates were published in the [Kenya Gazette](#) without giving further interpretation to the affected people. This information cannot be easily understood by citizens. The law or procedures developed under the Act must require the Government to fully describe the boundary of the intended area for acquisition and, should the community require, physically show appointed members of the affected community the location of the boundary on the ground. Failure to provide for this may violate the right to access information.

### 3. Issues arising from Section 4 of the Act.

Section 4 of the Act makes major amendments to the Land Act. It introduces Section 107A into the Land Act, which provides criteria for the valuation of freehold and community land that is the subject of compulsory acquisition. It raises several concerns including the following:

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<sup>5</sup> L. Alden Wily, 2018, *Compulsory Acquisition as a Constitution Matter*, [Journal of African Law](#) Vol 62(1): pp 77-103.

*i. Community Land, like freehold land, shall be valued based on the criteria outlined in Section 107A and the Land Value Index, and which criteria are unsuitable for community lands.*

The Constitution defines public, private and community land as the different categories land legally recognized in Kenya, and specifically provides for the enactment of law that addresses matters concerning community land. Section 37 of the Land Act also provides that community land shall be dealt with according to the Community Land Act. However, the Land Valuation (Amendment) Act fails to sufficiently distinguish between the criteria for valuation of private and community land. It introduces a system of assessing the amount of compensation for compulsorily acquired land, based on the Land Value Index<sup>6</sup>, using the market-value approach, which has the following disadvantages:

- ❖ It will result in undervaluing community land given that the market approach does not take into consideration non-monetary values that communities attach to their lands such as those stemming from loss of historical and socio-cultural use and attachment to the land, the values associated with its diverse biodiversity and specific physical attributes, and the values of livelihood arising from its use.
- ❖ Community land, especially that which is not registered, also risks being undervalued due to the development of the Land Value Index based on outdated information from government records.
- ❖ Compensation may be delayed due to the protracted process of developing the Land Value Index which is subject to approval by the National Assembly and the Senate.

Secondly, under section 5 (4) of the Community Land Act, no interest in or right over community land may be compulsorily acquired by the State except in accordance with the law, for a public purpose and upon prompt payment of just compensation in full or by **negotiated settlement**. A reading of section 5 of the Act reveals that, no provision is made for a negotiated settlement in the case of community land. This can potentially result in conflicts, given the emotive nature of land issues among community members.

Furthermore, the Community Land Act encourages the use of alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where appropriate for purposes of settling disputes and conflicts involving community land. However, the Act does not consider this provision in establishing the Land Acquisition Tribunal whose proceedings are often similar to judicial proceedings. As a result, marginalized communities may be denied access to justice because of the technical nature of such tribunals or the prohibitive cost that may be associated with instituting proceedings before the tribunal.

*ii. The National Land Commission (NLC) has not been included in the development of the Land Value Index.*

The law bestows upon the NLC the power to acquire land compulsorily at the request of national or county governments, for public purposes. It is therefore their responsibility to ensure that just and full compensation is paid to the land owner. According to the Act, the Land Value Index should be developed within six months

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<sup>6</sup> Section 4 of the Land Value (Amendment) Act defines the Land Value Index to mean “an analytical representation showing the spatial distribution of land values in a given geographical area at a specific time.

following its commencement. Given the important role of the Commission in the management of public land, its policy advisory role and technical capacity, excluding the NLC undermines its mandate.

*iii. The degree of urgency, the inconvenience caused to affected persons and the damage likely to be caused to the land after the gazettment of the notice of intention to acquire land shall not be considered when valuing land.*

Excluding the requirement to compensate communities for any significant disturbances resulting from the acquisition process is unconstitutional. That is because often, the amount of compensation given to displaced people is insufficient to reinstate them to their initial position without subjecting them to unbearable conditions of life. It would therefore be unfair to simply limit the amount of compensation for disturbance, due to relocation, to the payment of “reasonable expense” as determined by the Commission. Besides, giving the Commission the discretion to determine what amounts to “reasonable expense” as stated in Section 107A(7)(c), may be subject to abuse.

*iv. Requirement to be in actual occupation of land for an uninterrupted period of six years does not take into consideration pastoralists’ way of life.*

Section 107A (9) requires the payment of compensation to occupants in good faith who may not hold a title to the land being acquired. At this point, this includes all citizens of areas where there are community lands as the Ministry of Lands has thus far failed to enable a single community to register itself and secure prompt adjudication, survey and title to its property. In assessing compensation, section 107A (9) (a) states that the number of persons in actual occupation of the land for an uninterrupted period of six years prior to the notice of intention to acquire the land, must be considered. This does not take into consideration the lifestyle of pastoralists who seasonally or in drought circumstances move to other areas, including outside their core domain for purposes of securing water and pasture. As such, there is a need to give further clarification on the meaning of being in **uninterrupted actual occupation of the land**.

*v. Requirement to prove existing profits through evidence of tax returns as stated in section 107A (8).*

In assessing the value of land, the NLC will consider the diminution of profits provided that the owner of the land provides proof of existing profits including evidence of tax returns. For community members, obtaining evidence of tax returns where they draw profits from their land will be almost impossible.

#### 4. Provision for different forms of compensation without imposing an obligation on the Commission to sensitize the affected individuals.

Section 5 introduces a list of the forms in which compensation can be made. As before, compensation can be made in cash or in kind. It states that compensation can be paid in any of the following forms:

- a. Allocation of alternative parcel of land of equivalent value and comparable geographical location and land use to the land compulsorily acquired
- b. Monetary payment either in lump sum or in instalments spread over a period of not more than one year
- c. Issuance of government bond
- d. Grant or transfer of development rights as may be prescribed.
- e. Equity shares in a government owned entity or
- f. Any other lawful compensation.

Whereas the owner of the affected land has the right to select their preferred form of compensation, the chances of making a suitable choice may be low without the provision of prior sensitization on the pros and cons of the different forms of compensation.

**5. Provision allowing NLC to take possession of acquired land after an award is made, but before the payment of compensation.**

A reading of the definition of the term “*prompt*” as well as the amendments to section 120, 124 and 125 of the Land Act grants the Commission the power to take possession of the affected land once an award is made by the NLC. This is unlike the previous legal position which required the Commission to take possession *after* payment of just and full compensation. This provision poses a threat to the rights of marginalized communities who are often affected negatively by displacement. The negative impacts may be devastating where land is acquired urgently as provided for in section 120 (b) of the Land Act and amended by section 10 of the Land Value (Amendment) Act.

**6. Determination of membership to the Land Acquisition Tribunal will be entirely determined by the State.**

Section 13 of the Act establishes the Land Acquisition Tribunal which shall comprise of three persons appointed by the Cabinet Secretary through a notice in the Gazette. The members include: a nominee of the Judicial Service Commission; one person nominated by the Cabinet Secretary and another person recommended by the Attorney General.

Determination of the Tribunal’s composition by the state only through a non-competitive or representative manner and without set qualifications may interfere with its independence and consequently, the competent resolution of valuation disputes.

**7. There is no provision on the period within which the Tribunal should develop procedures to regulate its own proceedings.**

Section 13 of the Act does not provide a definite period within which the rules regulating proceedings before the Tribunal should be developed. There is a need to get clear guidance on how proceedings will be conducted before the tribunal including issues of stay orders and whether the institution of proceedings before the tribunal shall operate as an automatic stay on the land acquisition process.

**8. Reduction of the determination period on the creation of public right of way.**

Unlike the previous provisions, Section 14 of the Land Value (Amendment) Act requires the NLC to decide on an application for a public right of way within thirty (30) days. Initially, the period allowed for determination was ninety (90) days as was stipulated under section 146 of the Land Act. It is questionable whether reducing the period for decision-making will guarantee a fair process involving effective and satisfactory public participation in line with the requirements of the Constitution.

**9. Deletion of the requirement for Free Prior Informed Consent (FPIC) where internal displacement is occasions by development projects.**

The Land Value (Amendment) Act 2019 amends the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 by deleting the provisions of Section 22 which outlines the procedure for displacement induced by development projects. This amendment could potentially violate constitutionally protected rights including access to information, the right to property, as well as, economic and social rights which are linked to the exercise of the right to FPIC.

### **RECOMMENDATIONS FOR LEGAL CHANGES**

1. In defining 'reasonable time', the circumstances of the persons affected should be taken into consideration; for example, the value of livelihood attached to the property and the need to avoid creating homeless persons.
2. The right to resettlement and negotiation as to the location should in all cases be provided where a community loses its entire land through compulsory acquisition. The area and character of the land, and access to facilities must be as good as, and preferably better, than those existing on the taken land.
3. A separate payment from compensation for the value of the land should be introduced to cover intangible heritage and socio-cultural losses ('solatium').
4. Compensation for communities should include an additional amount for inconveniences resulting from displacement as provided for private landowners.
5. The law should require that the information in the notice of intention to acquire land is disseminated in a simplified format or assistance given to communities to enable them to gain a better understanding of the extent to which the land acquisition process will affect their land.
6. There is a need to separate the valuation of freehold and community land since they are governed by different pieces of legislation.
7. A Land Value Index should specifically be created for community land, particularly rangeland, considering the different but extensive values it holds for livelihoods, culture, identity and ecosystem services.<sup>7</sup>
8. The inclusion of the NLC in the development of the Land Value Index is essential. In addition, the Land Value Index should be developed through a participatory process that includes inputs from the public, practitioners, researchers and professional bodies.
9. Provision should also be made for the constant review of the Land Value Index so as to reflect changes in the value of land over time.
10. There is a need to provide a clear definition of uninterrupted actual possession of land with respect to pastoralist communities. Additionally, valuation must assess the value of rights of seasonal or other access held customarily by specific other communities as these too will be lost at compulsory acquisition. The community holding primary rights to the land can identify these others.
11. Other methods of providing evidence of profits drawn from land should be provided, for instance, proof of profits through farm produce or livestock.
12. Creation of awareness and sensitization on the different forms of compensation before the owner of land selects their preferred method of compensation.

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<sup>7</sup> See Makathimo, M (2019) *The Valuation of Community Rangelands in Kenya*, DLCI.

13. The Commission should take possession of the land only after paying compensation in full or a first installment where the owner accepts payment in installments.
14. Full payment prior to removal from the land should be made available to marginalised communities in line with constitutional commitment to affirmative action.
15. The Act should be amended to provide clear guidelines on the qualifications of persons who should be appointed as members of the Tribunal and provide for a more consultative process of their appointment.
16. The Land Acquisition Tribunal should develop rules governing its proceedings within six months of its constitution.
17. The determination period for the creation of a public right of way should be ninety (90) days.
18. The provision on FPIC should have been retained for the sector referred to.
19. The right to negotiate the terms of acquisition and displacement should be explicit in the law in respect of community lands.
20. The composition of the Land Acquisition Tribunal should be determined through a competitive process that is participatory in nature. Appointments should also be based on certain qualifications that should be provided for in law.

## **PROPOSED ACTIONS**

The following actions are recommended:

- a. Presentation of the above to politicians to raise their awareness and support as well as to the new NLC responsible for both valuation and compensation.
- b. Preparation of a 'best practices' brief for compulsory acquisition to assist politicians and other policy makers to better assess the need for changes. This should both indicate precisely where the 2019 falls short of constitutionally enshrined rights, and of values and principles of good governance, and also draw from new laws in Africa and elsewhere to more easily assess how far this law meets international best practice.
- c. The new National Land Commission needs to be promptly alerted to shortfalls in both the law and in the previous Commission's draft manual of procedures for compulsory acquisition (February 2019) and requested to establish a inclusive approach to addressing these.
- d. This is recommended to take the form of a standing Working Group on Compulsory Acquisition including civil society actors closely involved in supporting community land registration and rights, county representatives (ideally selected County Legal Officers and Land Officers), and representation through the Institute of Surveyors.
- e. Legal consideration as to whether remedies listed above can be satisfactorily achieved through a Regulation to the Act on Compulsory Acquisition of Community Lands or requires amendment to the Land Value Amendment Act/Land Act, most urgently concerning:
  - Valuation of community lands through non-market methods;
  - Provision for resettlement to land of equal type, value, size and facilities to be obligatory where more than one half of the community land is acquired;



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- Stronger options for community to lease the land in preference to acquisition as per the Community Land Act.
- f. As part of the above, determination as to whether there is need to test the constitutionality of the Act in a court of law.