

## Policy and Legislative criteria for acquisition and granting of land for investment purposes in Kenya

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### Summary

Kenya is currently implementing a number of large scale infrastructure and development projects aimed at transforming the country into a newly industrializing, middle-income country. For this, the government has had to compulsorily acquire large tracts of land upon which the infrastructure is set. The law often creates formal mechanisms to guarantee accountability in public systems that drive land acquisitions, but additional mechanisms are necessary to ensure legitimate community interests are addressed, and therefore the acquisition is accepted and supported by the affected local community.

This brief looks into the policy and legal provisions for the acquisition process, providing gaps and opportunities for community safeguards and good governance through legislation.

### Introduction

Policy and legislation are among the instruments applied to ensure protection of land rights in a Kenya. Failure to have consistent laws to safeguard tenure rights is bound to put citizens at a disadvantage when faced with the realities of compulsory land acquisition for investment purposes.

Over the last decade the land sector has been undergoing a reforms implementation process that is heavily anchored in legislative reform. The country adopted a National Land Policy in 2009 and a new Constitution in 2010 that has a chapter on land and environment.

The compulsory land acquisition process in Kenya is governed by: The Land Act (2012); and the National Land Commission Act (2012). The Environmental

Management and Co-ordination Act (Amended in 2015) gives provisions for environmental and conservation issues.

The LAPSSET corridor project has had major implications on Isiolo and Lamu Counties. The government has had to compulsorily acquire land from local communities where the Lamu Port, Garissa-Isiolo Highway, Isiolo Airport and Isiolo Resort City will be situated. In Siaya County (Yala Swamp) a private investor has acquired land from the local community to undertake an agricultural investment under the Dominion Farm Project. The farms have acquired a total of 7000 Ha from the Yala swamp ecosystem.

The Land Development & Governance Institute has since 2013 been conducting a research to look into how land acquisitions for investment purposes are affecting communities in areas where these investments are happening. The research targets promotion of greater community benefit and accountability in large scale land acquisitions for investments in Kenya. A guiding objective of the research was to review the current policy and legislative criteria for acquisition and granting of land for investment purposes in Kenya. The research also sought to examine the formal and procedural guarantees of accountability and legitimacy in the policy and new laws enacted to implement the 2010 constitution.

One of the key issues that emerged during the research is that policy and legislative provisions to ensure protection of community land rights and promote community benefit in land acquisition only work if implementation and enforcement of the law is given equal importance.

## Approach and Findings

### Approach

The research process entailed first undertaking a desk-top research to review past literature on policy and legislation on compulsory land acquisition procedures. This was to capture the developments in law that have guided land administration and management in general, and more specifically land acquisitions, and to identify the salient features, existing gaps and opportunities.

The process also involved making reconnaissance visits, including transect walks and guidance from pre-identified research assistants conversant with the local area and research issues. This was to assist in identification of specific research sites in each of the three county locations (Isiolo, Siaya and Lamu Counties). In Lamu, this approach resulted in selection of research sites along the path of the Lamu-Garissa road, where land acquisition had occurred, or was ongoing in certain parts, in Hindi Magogoni, and in Bargoni. In Isiolo, areas where the local community was previously impacted by land acquisition (Isiolo airport, Kambi ya Gabra) and challenging land tenure (Isiolo town, Ngare Mara) were identified. In Siaya County, Yimbo and Osieko were identified owing to their proximity to Dominion Farms Investment. Focus Group Discussions were carried out with respective communities to further examine the role of legislation and policy in ensuring community benefit from land acquisition, and to determine how communities relate to these laws. Open-ended interview guides were used to engage individual respondents. Expert Group meetings were used to review and validate the results.

### Findings

#### 1. Informal land administration systems

Despite enacting new land laws in 2012 to give effect to constitutional provisions to protect land rights, the lack of formal landholding and weak land registration systems was evident in most of the research sites in Isiolo and Lamu.

This has led to emergence of informal land administration and conveyance systems (Lamu), or the emergence of complex systems of formal land allocation that brings about multiple allocation of land through issuance letters of allotment to different persons but for the same plot, (Isiolo), or non-adjudication and registration of community lands (Isiolo, Lamu).

#### 2. Community land not adjudicated

Aweer (Bargoni) and Turkana communities (Ngare Mara) are anxious over their tenure security in face of land acquisition for LAPSET infrastructure. The land has not been fully adjudicated or registered in favour of the community despite the Land (Group Representatives) Act that preceded the 2016 community land law.

#### 3. Lack of resettlement safeguards principles and practice in Kenyan law of compulsory acquisition of land

The current legal framework in Kenya concerning compulsory acquisition of land provides no safeguards governing interaction with host community, as well as involuntary resettlement safeguards in the event of displacement by land acquisition. The IDP Act does not appear to have been implemented since enactment in 2012, in spite of the fact that it internalizes high value safeguards techniques such as the application of a free prior and informed process that emphasizes the quality and meaningfulness of affected community participation, including the impact that views obtained during consultations have on the final decision.



Fig. 1 - Lamu Port site

#### 4. Lack of policy linking investments flowing from land acquisitions to secure community benefit through contracts and business models

The Investment Promotion Act, while addressing the benefit to Kenya threshold, is not aggressively applied, and as evidenced by the Dominion contracts, critical socio-economic safeguards were not included.

## 5. Lack of regulations to guide assessment for just compensation

Kenya is currently engaged in a number of infrastructure projects that call for the compulsory acquisition and compensation of land. Section 111 of the Land Act requires the National Land Commission to develop rules to regulate the assessment of just compensation where land is compulsorily acquired. At the time of this study, these rules had not yet been developed.

### Conclusion

While the current policy and legislative framework makes an attempt to protect community land rights in the case of land acquisition by providing for fair compensation to be paid to affected communities, gaps exist in cases where land owners don't have formal documents as proof of ownership.

However, there lies an opportunity to improve the implementation of these laws through providing more clarity through developing and enacting stronger regulations to the current set of land laws.

### Recommendations

#### 1. Fast-track land adjudication and registration:

A clear programme of land adjudication and registration is necessary to regularize land holding. The national government should consider partnering with the County government in Isiolo and other areas marked for large scale land acquisition in order to identify the nature and extent, and take steps to resolve the problem of multiple allocations of land. In addition, putting in place a programme for regularization of tenure rights by addressing the challenges of those without title is important as it will enhance the security of tenure of people affected by compulsory acquisition.

#### 2. Enhancing tenure of communities through implementation of the provisions of Community Land Act:

The government should expedite the application of the provisions of the Community Land Act for the Lamu and Isiolo communities faced by these land acquisition projects as a first step to guarantee interests of the community members, by protecting tenure rights, and subsequently providing for equitable community land governance mechanisms.

## 3. Clarification on the practice and methodology of valuation of land and non-land assets for compensation:

The repeal of the Land Acquisition Act, and with that the Schedule that defined the methodology of valuation of land requires to be resolved. Based on the analysis in the research, and findings, there is need to formally resolve the entitlement to compensation for persons without legal title. In addition, it is imperative for Kenya to state in law or regulations the methodology to be applied in valuation of non-land assets, including the loss of livelihoods.

Application of the full replacement cost methodology provides a viable option. In addition to anchoring on the market value of the land, the replacement cost approach extends compensation to non-land assets, using the real cost of full replacement, and not factoring in any depreciation of the non-land assets being replaced. This approach also takes into account all the transaction costs of purchasing (conveyancing fees, etc), or logistical costs of replacing non-land assets.

## 4. Providing for resettlement safeguards principles and practice (e.g. community participation at project planning) into Kenyan law of compulsory acquisition of land:

The IDP Act does not appear to have been implemented since enactment in 2012, in spite of the fact that it internalizes high value safeguards techniques such as the application of a free, prior and informed consent process that emphasizes the quality and meaningfulness of affected community participation, including the impact that views obtained during consultations have on the final decision. The consultation of the affected public should be integrated during project planning.



Fig. 2 - Privately owned land near the Isiolo Airport

Community participation can add value to the process by being involved much earlier on in the process, and contribute to analysis of project sites, and alternatives. Some considerations for resettlement and displacement should be whether the Land Act can adopt the IDP law standard that permits displacement and relocation only in exceptional cases, such as where no other feasible alternatives are found.

A national Resettlement Policy Framework (RPF) can help guide internalization of resettlement safeguards, including participation of communities.

#### **5. Policy linkage of investment promotion rules with investments flowing from land acquisitions to secure community benefit through contracts and business models:**

A clear policy evaluation of business models application, either contracts in the context of farming investments, or other types, should be undertaken and public disclosure of the proposed business model(s) should be undertaken early enough,

to ensure affected project communities do not experience anxiety over their future.

This can be done in context of section 12 of the Land Act, which requires the National Land Commission to make regulations to govern how investments on public land will safeguard community benefits and livelihoods.

#### **6. Regulations on methodology for assessment of just compensation:**

Regulations to operate the entire Land Act have not yet been developed. The development of these regulations, and the rules to govern the assessment for just compensation during compulsory acquisition of land, may have been delayed due to the amendments recently effected to the Land Act. Now that the amendments were concluded, it is recommended that the development of the rules to govern the assessment of just compensation payable to landowners affected by large scale investments on land be expedited.

#### **ABOUT LDGI**

The Land Development and Governance Institute (LDGI) is a not-for-profit organization committed to promoting equitable access and sustainable management of land and natural resources. LDGI tracks implementation of land reforms to provide information on policy and land administration, creates avenues for effective public participation, and builds capacity of different stakeholders to increase their understanding of sectoral issues. The Institute also conducts appropriate research that informs legislation and policy development and improves various aspects of land and natural resource management in Kenya.



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