



## Community Land Action Now

### A Community-Based Network Advocating for Secure Land Tenure Rights

#### SUMMARY POINTS ON COMPULSORY ACQUISITION OF COMMUNITY LANDS

Liz Alden Wily for CLAN! - January 2020

##### GENERAL

1. All governments have the right to take lands for public purposes. Almost no government takes lands without compensation in cash or kind, the latter mostly available as provision of alternative land and services lost through the land taking.
2. *Community lands* in Kenya are equally eligible for compensation as private lands. This includes whether its land is formally registered as its property or not.
3. The National Land Commission (NLC) is the only body legally empowered to acquire private and community lands for public purposes. Ministries and counties must request it to do so. Private investors must approach the relevant ministry or county.
4. NLC's draft and unpublished Manual of Procedures (2019) fail to modernize these or to address Kenyan reality that many lands being taken for public purposes are community lands, not individually registered private parcels or houses.
5. While the Land Act, 2012 improved land acquisition measures, the new Land Value (Amendment) Act, 2019 repeals some of these changes. Additionally, the law fails to provide valuation mechanisms relevant to community lands, as distinct from market values of privately registered farms or houses. In particular, it ignores the high values of pastures, forest/woodlands and swamplands to communities. This backward step and related shortfalls suggest the law is even unconstitutional.
6. CLAN and other CSOs need to join together to –
  - a. challenge the above law, ensure more modern compensation procedures are developed to meet constitutional requirement that compensation be prompt and fair;
  - b. contribute to the above by bringing to notice of parliamentarians and NLC the substance of best practice in other countries;
  - c. work with NLC to develop a procedure for acquisition that is tailored to the different circumstances of community lands; and
  - d. as elemental to changes in procedure require the body seeking the land (county or ministry) to assist the community to identify and secure its land through adjudication, survey and entitlement, and only at that point acquire the land. This will empower the community in ways critical to negotiation with the National Land Commission as to compensation and procedure.

##### PRINCIPLES

1. The Constitution permits community or private lands to be acquired only through fair procedure, for public purposes, and for prompt and fair compensation. It does not require compensation to be paid prior to taking. Nor does it stipulate what constitutes 'fair'. The Constitution also guarantees those affected access to the courts.

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<sup>1</sup> For details especially on the Manual of Procedures refer CLAN BRIEF No. 4 *Taking Community Lands for Public Purposes* (July 2019). That Brief pre-dated enactment of the Land Value (Amendment) Act, August 2019. For review of this law refer Natural Justice, DCLI and Liz Alden Wily, 22 November 2019, *Analysis of the Land Value (Amendment) Act, 2019*; available at: <https://www.dlci-hoa.org/documents/briefs/>. Also refer a power point made available to CLAN on best practices, November 2019 or request from [lizaldenwily@gmail.com](mailto:lizaldenwily@gmail.com)

2. The Land Act lists public purposes. These are handicapped by open-ended addition of "...and any analogous purpose".
3. The chapter in the Land Act on compulsory acquisition was fairly positive, but not cutting edge. A positive provision was that the state could not take possession of the land until at least the first instalment of compensation was paid (sections 120 and 125). Most of the chapter addresses procedure (see later). The act did not specify the basis of compensation.

## PROBLEMS

1. The Land Value (Amendment) Act, 2019 was enacted to provide for valuation. In addition to addressing valuation unsatisfactorily in respect of community lands, this new act repeals several positive aspects of the Land Act. First, it provides an unreasonable and unfair interpretation of "prompt"; this is taken to mean that NLC need not pay compensation for a year. However, to add insult to injury the new Act permits NLC to take possession of the land prior to paying compensation. A court would probably find these two provisions unconstitutional in relations to what is "fair" and what constitutes "prompt".
2. The new Act also offends equitable treatment of community and private lands. It institutes a Land Value Index which is based on a market approach. This may be satisfactory for private lands whose values are active in the market place but is unfair for community lands which have not historically been sold, and whose values cannot be fairly assessed by market value.
3. The Act makes no provision for valuing community lands for their social, cultural, historical value. The Act also fails to advance a valuation approach which considers the economic value of uncultivated and undeveloped lands such as rangelands. Although the law does not say so, it gives the strong impression that such undeveloped lands are of no consequence when it comes to valuation. Yet these off-farm lands are the mainstay of community lands in Kenya. The law also instructs valuation to use evidence of profits from the land in tax returns, impossible for communities, who make no such returns.
4. The Act also fails to open up the right of communities to negotiate compensation as provided in the Community Land Act, 2016 (s. 5 (4)).
5. The Act also fails to provide for alternative methods of dispute resolution in regard to community land, also provided for in the Community Land Act.
6. Compulsory acquisition is a contentious process and arouses many disputes. The Act's provision for a Land Acquisition Tribunal is questionable on several counts. The main count is its declaration that the Tribunal has first instance jurisdiction, previously enjoyed by the Environment and Land Court. Now, the Court can only be accessed by first going through the Tribunal, in the form of appeals. This defeats constitutional provision as to a fair right of access to a Court. In addition, selection of the three members of the Tribunal is left entirely to the State, which could skew the fairness of the hearing.
7. It is further unclear whether once a Tribunal sits, the land acquisition process is halted as there is no indication that the Tribunal even has these powers. It seems clear enough that the objective of the parliamentarians on the advice of Government is to ensure that Court Orders halting action cannot be issued.
8. It is also concerning that the Act stipulates that as soon as the NLC has taken possession of the land, no order stopping any development of the land may be issued by any court if public funds have already been committed to it.
9. The Act also takes the change to amend the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012. It repeals section 22 which lays out the procedure for displaced caused by development projects. Specifically, it removes provision for the Free, Prior and Informed Consent of affected persons/communities. This is doubly problematic as this is the only law in Kenya which so directly considers consent as important. This revision also raises alarm as to its constitutionality given protection of marginalised persons and groups.
10. The Act is accordingly **unconstitutional** on many counts, and surprisingly unsound and backward as a modern development tool.

## AN EXAMPLE OF BEST PRACTICE

Compulsory acquisition laws have generally not kept up with new tenure laws, such as providing for community lands (73% of modern states). However, change is afoot, and a number of African countries are among those reviewing their procedures. Ethiopia and Uganda are main examples in East Africa. Liberia's land rights law of 2018 requires government or an investor to explore the potential for a community to lease its land for developments, to avoid compulsory acquisition wherever possible.

Box 1 provides an example of one well-developed law.

### BOX 1: INDIA'S LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT, 2013

Among many other progressive changes not listed here, the law –

- a. Values rural land as twice that of urban land given its productive role in livelihoods
- b. Provides a lump sum additional payment equal to compensation to cover socio-cultural intangible losses
- c. Provides a generous Rehabilitation and Resettlement Package for those affected; e.g. including a new house if the house is lost; additionally, the law gives each family a choice of a job, or, lump sum payment, or monthly payment for 20 years, to ease difficulties caused by land and livelihood losses; requires 26 facilities (health, school, water, etc.) to be provided in the resettlement area;
- d. Those resettled outside the equivalent of the county, or whose community is broken up get additional benefits to help them restart their lives without the support of community;
- e. Requires 20% of land developed through acquisition (e.g. a housing scheme) to be allocated to those affected;
- f. Requires social impact assessment prior to project;
- g. Disallows taking of irrigated multi-cropped lands, to protect food security; and
- h. Requires the consent to the taking by the majority of community affected, although with exceptions listed.

While the cost of compulsory acquisition has accordingly risen sharply in India, conflicts have been dramatically reduced, which the 29 state governments of India are feeling the benefit of, including dramatic reduction in court hearing. Researchers conclude that the objective of the law to better balance the rights of the state with those of citizens has been met.

## PROCEDURE IN KENYA

The NLC fleshed out procedure as spelt out in the Land Act, 2012 in its draft Manual of Procedures February 2019. Many improvements have been made. However, in respect of community lands, a dedicated procedure is required to be relevant to the special circumstances of communities as groups, not individuals. BOX 2 lists stages in the draft NLC Manual. BOX 3 lists watchpoints for communities, points for which CLAN should lobby for remedy.

### Box 2: PROCEDURE FOR NLC TO ACQUIRE PRIVATE OR COMMUNITY LAND As extracted from Manual of February 2019

#### PRE-INQUIRY

1. REQUEST to NLC from either Cabinet Secretary or County for it to acquire private or community land on its behalf for a public purpose
2. RECONNAISSANCE of the area to confirm its suitability for the stated public purpose and to identify bottlenecks that may influence decision-making
3. DECISION following NLC review
4. REMITTANCE of compensation required to Land Compensation Fund
5. PUBLIC SENSITIZATION through meetings workshops to inform the local public about the approved project, the procedure that will be followed and expected documentation that will be required of them
6. NOTICE OF INTENTION TO ACQUIRE LAND is gazette, also published in national newspapers and at county, sub-country and ward offices nearest to the project site
7. SERVICE OF NOTICE TO ACQUIRE on every registered owner and other person with interests in the land, to be signed on receipt of notice
8. AUTHENTICATION AND GEO-REFERENCING of the land to be acquired by local and national surveyors
9. VALUATION INSPECTION by designated NLC Valuation Team, to be carried out before and in part, during Inquiry

#### INQUIRY

10. NOTICE that all affected persons should attend an Inquiry on the specified date in the locality, gazetted at least 15 days in advance, and delivered to every affected person
11. SUBMISSION OF CLAIMS for compensation by those affected prior to date of Inquiry
12. HEARING including fulfilment of administratively listed tasks, and NLC Team empowered to summon witnesses, documents, and administer oaths
13. SUMMARY OF OUTCOME OF INQUIRY prepared by NLC Valuation Team
14. DISPUTES RECORDED for ADR or court address, and if not in process, to lapse in six months

#### POST-INQUIRY

15. DETERMINATION OF COMPENSATION PAYABLE for market value of the land, loss of income, cost of renting temporary housing or structures for 1-2 years, relocation costs within 5 km radius, loss of profitability of enterprises, or costs of adverse effects on structures where land is physically severed
16. VALUATION REPORT providing the above as linked precisely to each parcel affected
17. COMPENSATION SCHEDULE including notification if more funds will be needed from government or county department for whom land is being acquired
18. OFFER AND ACCEPTANCE OF COMPENSATION to every person affected, with signed acceptance
19. APPEAL by those rejecting offers to the court
20. LAND IN LIEU of money offered where land is available, as per a Resettlement Action Plan prepared ahead of time
21. FUNDS deposited in NLC Land Compensation Account, plus administrative fees if not already paid
22. PAYMENT OF COMPENSATION

#### TAKING OF POSSESSION & VESTING

23. NOTICE of taking of possession on specified date to all affected persons
24. FINAL SURVEY of land, undertaken by the government department or county for whom land is acquired
25. VESTING of land in the Government or County
26. SURRENDER of documents of original owners for cancellation and re-registration of lands left to them if some lands remain.

#### **BOX 3: WATCHPOINTS FOR COMMUNITIES IN REFERENCE TO ABOVE PROCEDURE**

1. The Community Land Act, 2016 requires a County to receive compensation on behalf of a community whose land is not yet registered. What is the accountability mechanism for this? It is critical that compulsory acquisition procedures first assist affected communities to define their respective land areas so that there is no future debate as to which community the compensation will in due course be forwarded.
2. Reconnaissance should be stipulated as required the participation of the community including its right to scrutinize the final reports.
3. Given a high risk of Counties and Ministries mistakenly assuming untitled and undeveloped lands are public property already, reconnaissance must investigate the reality on the ground with the community.
4. The valuation steps are solely focused on valuing *structures* and *cultivated areas*. This ignores the values of rangelands, woodland/forests, salt licks, community-developed services, etc on community lands. This must be remedied with a specific valuation procedure which works with affected communities to identify every element of their landholding requiring valuation.
5. NLC is requested to ensure that Notice of Inquiry is appropriate to communities, not just to private landholders.
6. NLC should be clear in procedure that community representatives appointed by all adult community members for the purpose may prepare, sign, and submit the claim of their behalf, providing this has been agreed by the majority of adult members in a meeting for which Minutes are kept.
7. Communities need to make sure that they officially inform and have recorded any disputes they have as to ownership of the land presented or other disputes relevant to the land, such as definition as to who are members of the owning community.

8. Communities and NLC must ensure that persons or groups with customary access rights to the affected land are NOT forgotten. Their interests and claims for compensation must also be compensated for.
9. There is grave danger for communities who customarily hold lands for which there is no ready market will be underestimated by failing to include the costs of losing long-held lands for socio-cultural uses and social continuity of the society, the value of uncultivated lands to livelihood, etc.
10. Direct payment of compensation to members of communities may be entirely inappropriate. NLC should assist an interested community to establish a Community Fund into which compensation is placed with rigorous requirements for how this money may be expended.
11. For communities, it may be the case that the only reliable means of fairly and justly compensating them where their entire land is to be purchased, is to provide an equivalent or larger land for their resettlement and to assist them to resettle there. Access to services and facilities should be at least as good as those enjoyed in their prior location.
12. In the event of resettlement, the objective should be to **improve** the livelihood opportunities and access to services than held previously by the community. This helps offset intangible losses through compulsory acquisition of the community's land.
13. Note that resettlement is in line with the law. SETTLEMENTS PROGRAMMES are to be provided for persons involuntarily displaced by development projects, conservation, natural disasters among other causes. The NLC is to reserve public land for this purpose. A Land Settlement Fund administered by a Board of Trustees is responsible for the provision of access to land to displaced persons [Land Act, 2016].
14. Special payment for loss of intangible social, cultural and community heritage values must be paid, and at no less value than the value of assessed compensation for loss of resources.