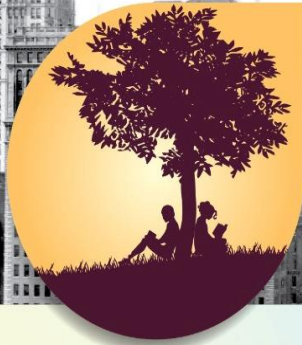


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Effectuating the Doctrine of Eminent Domain: Sustainable Principles for Compulsory Land Acquisition in Kenya

By: **Michael Otieno Okello** *

Abstract

The doctrine defers to the Constitution, such that where there is a lacuna, the courts construe the constitutional provisions and a corpus of judge made law and adjudicate on case by case basis, with unanimous, variance in dissenting or concurring opinions. This paper critically analyzes the doctrine of eminent domain, the controversies that enshroud its prospects and the effect of sustainable principles on right to property. The empirical findings widely show a consensus on the rationale the doctrine, namely; public use, benefit or interest. The same is either broadly or narrowly construed. Secondly, right to property like any other right and fundamental freedom is inherent, though western jurisprudence have exalted economic right conception. It is apparent that in fact, the prospects and validity emanate more from the economic right conception rather than fundamental right in law. Nevertheless, it is submitted that expropriation should follow due process and with prudent balance between the public interest and right to private property.

The limitation on the right to property as a matter of law and in fact, is usually coupled with a case for public interest or use, prompt payment in full of just compensation, fair administrative action, and due to its multidisciplinary nature, requires a stakeholder engagement. On the other hand, where a probative case for public use or interest is not had, the preemptive rights should be effectuated, resulting to lawful revocation of such

* **Michael O. Okello** , *MISK, RV, REA*. He is a law graduate from the University of Nairobi (Faculty of Law). He is a land practitioner and widely published scholar with an interest in corporate governance, policy, law in the context of sustainable development in the 21st Century. He is one of the pioneer Alumni of ESDA Programme (United Nations University in Collaboration with partner universities in Africa). He holds Master of Science in Sustainable Urban Development (renewable energy options) with a background in Land Economics both from the University of Nairobi.

expropriation in favour of immediate owners of expropriated land. It is submitted and recommended that the expropriation process be widely participatory, transparent, well documented and fault proof through analytical, evaluative, with an innovative mechanism for monitoring and evaluation of its efficacy to achieve the public good. Ultimately, any public entity or its acquiring agency should not depart from the public trust principle if it needs to hold on to its legitimacy.

1.0 Introduction

Land acquisition is a result of the present global land rush for emerging trends in development; renewable energy, water and sanitation infrastructure, food and agricultural activities, real estate and transport projects; such as the biofuel industries, oil and gas, geothermal and wind power farms, standard gauge railways, development or expansion of inland and coastal ports, flag ship projects and effect of global trends in urbanization, suburbanization and agglomeration of establishments both in the suburbs and within urban inner cores. The demand for land is therefore almost inelastic while supply remains almost fixed, as competition, the rush and issues emerge. The governments and private entities alike cannot avoid the necessity, on the basis of among others, public interest and profit motif respectively.

The Constitution of Kenya, 2010¹ (and indeed in the Constitutions of other jurisdictions such as, Republic of South Africa², Ghana³, Uganda⁴, Federal Republic of Nigeria⁵ and United States) inter alia, obligates the states to protect, promote and support the right to property. In order to address the mischief of deprivation of this right, the Constitutions have placed

¹ Constitution of Kenya 2010.

² S. Keith, P. McAuslan, R. Knight, J. Lindsay, P. Munro-Faure and D. Palmer. *Compulsory Acquisition of Land and Compensation*. (FAO Land Tenure Series, 2008).

³ *Ashanti Goldfields vs the People of Akrofofum* [2004] Ghana Court of Appeals 191 of 2004.

⁴ UGANDA. (1984). *The Constitution of the Republic of Uganda*. [Kampala].

⁵ *Alhaji Tsoho Dan Amale V Sokoto Local Government & Ors* (In the Supreme Court of Nigeria).

safeguards, and statutes give effect to them. The legal frameworks in Kenya guarantee everyone not only the right to own property of any description, but also in any part of Kenya⁶. The Constitution however qualifies the right to property: such that it can be deprived for public use or purposes with special measures including just prompt compensation and access to court for redress linked to any claims instituted by individuals or associations whose rights are affected⁷.

The right to property (just like any other right under Kenyan Bill of rights)⁸ is has to be justified⁹, to the extent that it is inter alia, reasonable, and justified in an open and democratic Society, and based on human dignity, equality and freedom, among other relevant factors¹⁰ In the context of eminent domain doctrine, the limitation of right to property (for public use or public interest is a relevant and justified. The law lays emphasis on proportionality and nexus between such a limitation and its purposes¹¹.

2.0 Foundational Concepts on Expropriation

According to John Locke¹², state of nature preceded the governments, and where people did not have right to oust or *take* the property of others. The property was acquired, possessed and owned as a natural right. Utilitarian

⁶ Constitution of Kenya ch 2 (Any part of Kenya should be interpreted under article 5 as read with article 6 (1) and article 260.

⁷ Ibid IV (art 40 (1) read together with article 65.

⁸ Ibid see article 24 together with article 40 (3) on justifications for deprivation of right to property for public purpose or in the public interest with prompt payment in full, of just compensation and right of access to courts of law for redress in Kenyan

⁹ Ibid 4 (Bill of Rights).

¹⁰ Ibid.

¹¹ Ibid 4 (under article 24 read entirely, in the context of right to property and its definition under articles 40 and 260 respectively).

¹² Yusuf Kiwanda, *The Exodus of Law and Legal Methods* (First Edition, Law Africa 2016).

theory departs from the idea of property as a natural right¹³. David Hume¹⁴ believed that for a common good, individuals had to concur with the system, through a social convention or ‘social contract’ where they obeyed rules that further a mutual interest and general public utility¹⁵. According to Bentham, property rights is in a system of political and social decisions as opposed to that of morality (as was in natural law). According to Pufendorf¹⁶, right to expropriate private land also known as ‘eminent domain’ was justifiable only when public necessity demands it; such that property of any subject so urgently needed at the time, could be seized and be used for public purposes. Pufendorf noted that where the goods of the subjects who are ousted are more valuable, the allotted share should be relinquished to the state¹⁷.

Scholars like Ellen¹⁸ have questioned why Hugo Grotius theory; while defending the right to ownership, implied that private power over property was antecedent, yet was so easily given the government; a mere creature of human consent, created by human compact.¹⁹ Ellen²⁰ asks whether the

¹³ Samantha Hepburn, *Principles of Property Law* (Second Edition, Cavendish Publishing (Australia) Limited Pty 2001) 9 (In the late 18th Century, this theory was thought to support patronage amongst elitist Government and deemed vulnerable to favour individuals over public policy. In History of America, James Madison and Jefferson considered this conception as unfavorable to American Nationalism, Republicanism. The duo highly criticized Hamilton for projecting the David Hume’s Conception that was thriving in the British Systems of Government).

¹⁴ Jay Cost, *The Price of Greatness : Alexander Hamilton, James Madison and the Creation of American Oligarchy* (First Edition, Basic Books 2018) 21.

¹⁵ Samantha Hepburn, *Principles of Property Law* (Second Edition, Cavendish Publishing (Australia) Limited Pty 2001) 9 (In the late 18th Century, this theory was thought to support patronage amongst elitist Government and deemed vulnerable to favour individuals over public policy. In History of America, James Madison and Jefferson considered this conception as unfavorable to American Nationalism, Republicanism. The duo highly criticized Hamilton for projecting the David Hume’s Conception that was thriving in the British Systems of Government).

¹⁶ Ellen Paul, *Property Rights and Eminent Domain* (First, Transaction Publishers 1986) v Quoted Samuel Pufendorf, *De officio Homines et civis*, Tit. II, CH. 15 1758.

¹⁷ *Ibid.*

¹⁸ Ellen Paul (n 16).

¹⁹ *Ibid.*

²⁰ *Ibid.*

naturalists found eminent domain to be so much part of nature of government that it would be inconceivable without it.²¹ This is answered by Bynkersheek, who declared that the state could not survive without eminent domain, which authority no man of sense questions. The theoretical conceptions, while recognizing right to private property and existence of rules, justify necessity for expropriation under certain grounds, public good, good end and utility. The power of eminent domain was therefore presumed indubitable²²

3.0 Contemporary Principles in Eminent Domain

The term ‘Compulsory acquisition’ simply put refers to the power of the State to deprive or acquire any title or interests in land for a public purpose subject to prompt payment of compensation²³, the lack of which defeats theoretical and legal justification of eminent domain. The following principles guide in execution of the *taking* process:-

3.1 Public use and Public Interest

The states regulation of public use can be viewed in two approaches. Firstly, the *narrow approach*, restricts acquisitions to government initiatives, and limiting public use to use by the public. In this approach, even when private companies delegate power to *condemnation*, the projects when completed would be open to the public who had entitlement to use them by right²⁴. Secondly, a *broad approach* considers public use in a more permissive way to mean, *public benefit*, *public welfare*, *public interest*, *public advantage* in more nebulous way²⁵. This approach has hitherto exalted the economic right theory over right to property rights as a fundamental right.²⁶ According to

²¹ Ibid.

²² Ibid.

²³ S. Keith, P. McAuslan, R. Knight, J. Lindsay, P. Munro-Faure and D. Palmer. *Compulsory Acquisition of Land and Compensation. (FAO Land Tenure Series, 2008)* (n 2).

²⁴ Ellen Paul (n 16).

²⁵ Ibid.

²⁶ ‘Hoopes, Neal (2013) “The Fundamental Flaw of Eminent Domain Jurisprudence,” Brigham Young University PreLaw Review: Vol. 27 , Article 10.’

this broad approach, *Public use* needed not be construed literally for usage by public, but for *public benefit or general welfare*²⁷

It is judicially held by most western jurisdictions to the effect that it has fostered economic rights and washed the distinction between public use and private purpose²⁸ In Kenya, the law regulates the use of any land or any interest in or right over any land, in the interest of defense, public safety, public order, public morality, public health or land use planning.²⁹

3.2 Standard in Assessment of Just Compensation (AJC)

The Land Value (Amendment) Act³⁰ which is in tandem with Land (AJC) Rules³¹ provides for process and context under which assessment of just compensation is done. The basis of assessment (valuation) is Market value as at the date of publication in the Gazette of the notice of intention to acquire the land from persons interested at the time of taking possession of the land. The assessment *inter alia* takes consideration of:-

1. *Injurious Affection* where damage is sustained or likely to be sustained in the acquisition) affecting moveable or immovable or actual earnings.
2. *Severance* where damage sustained or likely to be sustained by persons interested severing the land from his or her other land;
3. Encumbrances and overriding interests where any express or implied condition of title or law restricts the use to which the land concerned maybe put;
4. '*Disturbance*' Allowance equal to fifteen per centum of the total assessed market value is added thereupon to compensate for disturbance

²⁷ *Kelo v New London*, 545 US 469 (2005).

²⁸ Ellen Paul (n 16).

²⁹ Constitution of Kenya Ch 5 (as read in article 66 and the entire chapter purposively).

³⁰ The Land Value (Amendment) Act 2019.

³¹ Land (Assessment of Just Compensation) Rules 2017.

5. *Restitution*, where the loss to the must be completely made up to affected persons, to cover reasonable expenses incidental to the relocation/ change of residence or place of business damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette (notice of intention) and date Commission takes possession of the land.

3.3 Prompt Payment of Compensation in Full

When property is compulsorily acquired by the Government, it vests in the Government. The previous owner merely loses his rights and title to his property; he does not in any sense transfer the property. Sheridan J stated in *Commissioner of Lands v Essaji Jiwaji & Public Trustee* that expropriation is not in any sense a transfer the property as it were in the normal conveyance and assignment process.³² This implies that compensation is payable for the compulsory acquisition of land is not deductible as it does not involve voluntary transfers. This means that, exactions are deleterious to the principle of Prompt payment in full.

It is evident therefore, that “**compensation**” almost of itself carries the corollary that the loss to the land owners, must be completely made up to them, on the ground that unless they receives a price that is equivalent to their pecuniary detriment, the compensation would not be the compulsory sacrifice³³.

3.4 Enhancement in the Value

The compensation must also be understood within the context of change in value of the subject matter versus the Highest Best Use (HBU). The acquiring entity shall ensure that due regard is had to increase in Value subject to certain qualifications, and principles³⁴:-

³² *Commissioner of Lands v Essaji Jiwaji & Public Trustee* [1978] Court Of Appeal at Nairobi Civil Appeals Nos 15 and 16 of 1978, JELR.

³³ *Horn v Sunderland Corporation* [1941] Court of Appeal in England 480, 1 All ER.

³⁴ Land (Assessment of Just Compensation) Rules 2017.

- The mischief of speculative intents is circumscribed where increase results from improvement by the owner or his or her predecessor after the date of publication in the Gazette of the notice of intention to acquire the land;
- The increase shall be disregarded if the use of the land or premises in a manner which could be restrained by a court or is contrary to the law.
- Public Policy Principle dictates that the increase shall be disregarded if the use of the land or premises in a manner which could or is detrimental to the health of the occupiers of the premises or to public health
- Cut of dates ensure that any outlay on additions or improvement to the land, will be avoided if incurred after the date of publication in the Gazette of the notice of intention to acquire land, unless the additions or improvements were necessary for the maintenance of any building in proper state of repair.

3.5 Fair Administrative Action

The relevant statute laws are contemplated in the Constitution to give effect to *fair administrative action*³⁵ when enacting, interpreting and applying legislations³⁶. This is applicable in compulsory acquisitions, a notable and process that limit fundamental, economic and sociocultural aspects attached to the right to property. In the nutshell, the national values and principles of governance requires³⁷ and administrative law and practice, accords every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair such as those connected with eminent domain³⁸. When it is expeditious, we ensure execution with speed and efficiency. Effectiveness measures the degree of success in producing a desired result. Procedural fairness, is ensured through adherence to the set out processes, procedures and compliance requirements at each stage, time and aspects. Due procedures involve consultations, right to access to

³⁵ Fair Administrative Action Act 2015.

³⁶ Constitution of Kenya n see article 10 (1) b.

³⁷ Ibid see article 10 (1) a.

³⁸ Ibid see article 10 (2).

information, and due regard without error of facts or law nor human rights violations. The acquiring entities are expected to be reasonable, in determining facts, issues, timings, claims and remedies.

3.5 Equity as the Basis of Equivalence in Compensation

Land Act provides that expropriation is subject to, prompt payment of just compensation in full to all persons whose interests in the land have been affected.³⁹ This requires strict adherence to procedures and direct engagement of the affected persons⁴⁰, as held in *Patrick Musimba v National Land Commission & 4 others*⁴¹ The National Land Commission further made rules to regulate the assessment of just compensation⁴². It was so cited in *Patrick Musimba's case*⁴³ and *Katra*⁴⁴ (supra) where *just* was imbued within the contexts of one which can be equated to restitution, as an equivalent to the direct loss suffered by the owner of acquired property.

It is now trite practice globally, that compensation is equal to the pecuniary detriment. The affected persons should not receive less or more. The question arise as to whether state should pay highest best use of the land or pay restitution of the actual loss on the current use. What if the land owner claims compensation for both?

3.6 Sustainability Principles

Compulsory acquisition is inherently disruptive. Even when compensation is generous and procedures are generally fair and efficient, the displacement of people from established homes, businesses and communities will still entail significant human costs. The rationale for eminent domain as against

³⁹ Land Act 2012 (6 of 2012) s 111.

⁴⁰ *Ibid* 117–133.

⁴¹ *Patrick Musimba v National Land Commission & 4 others* [2016] High Court of Kenya, Nairobi (Constitutional and Human Rights Division) Petition No. 613 of 2014, eKLR.

⁴² Land (Assessment of Just Compensation) Rules 2017.

⁴³ *Patrick Musimba v National Land Commission & 4 others* (n 41).

⁴⁴ *Katra Jama Issa v Hon Attorney General, Kajiado County Government, The National Land Commission, Kenya National Highways Authority* [2018] Environment and Land Court At Kajiado Petition 14 of 2017, eKLR.

right to property since both further legitimate aims is on proportionality and compensation to restore livelihoods for purposes of sustainability. Therefore, the courts of law and land based administrative bodies should continue to address the *public interest* or *public use* question and any claims deprivation of right to property to ensure due regard to law and fair administrative action.

4.0 Conclusion and Recommendations

It is submitted that expropriation should be viewed holistically by the state, with deference to the constitution, on the basis of public interest or purpose. There is universal consensus on the need for Assessment of just and fair compensation. The procedures and elements vary from state to state as well as whether compensation need to be paid. However, it is generally considered that compensation should be prompt, and paid in full with a forum for adjudication of disputes.

The process should also be viewed from International Human Rights Perspective, characterized by the right of access to information, informed consent, upholding the rights and dignity of all including special categories and minorities. In effect, the activities following the *takings* must be ecosystem management based to further environmental sustainability. The principles of good governance and national values will ensure that the process does not amount to land grabbing, as conceived in Tirana Declaration⁴⁵. Since the rubrics of the process is multifaceted, a multidisciplinary approach and engagement should be considered to cater for diverse expertise and integrated livelihood restoration requirements.

The processes should be widely analytical to ensure proper baseline data on the affected persons and communities, household and property census, entitlement matrix, just and fair compensation and evaluation of the implementation cycle. The need for innovation is apt on the vogue, as it yields integrated digital data base capturing personal geodetic and legal descriptions within an interactive Leger system with back up cloud systems. Ledgers and block-chain should create ledges to overlay aspects of cadasters,

⁴⁵ International Land Coalition (ILC), 'Tirana Declaration' (2011).

persons affected, when they were paid, what amounts, valuation records, any grievances and how they were redressed and livelihood restoration strategies that were put in place.

Finally, any public institution should not depart from the public trust principle if it needs to hold on to its legitimacy. Where a solid case for public use or interest is not built, the pre-emptive rights should enable revocation of such expropriation in favour of immediate owners of condemned private land. On the basis of legitimate expectations of this principle on right of first refusal, the need for expropriation must be achieved or else the land reverts to the owners. There is a gap for reform and need for uniform standards and regulations that cover the processes and procedures of valuation and compensation with respect to acquisitions of wayleaves, which do not result to loss of exclusive rights but only loss of use.

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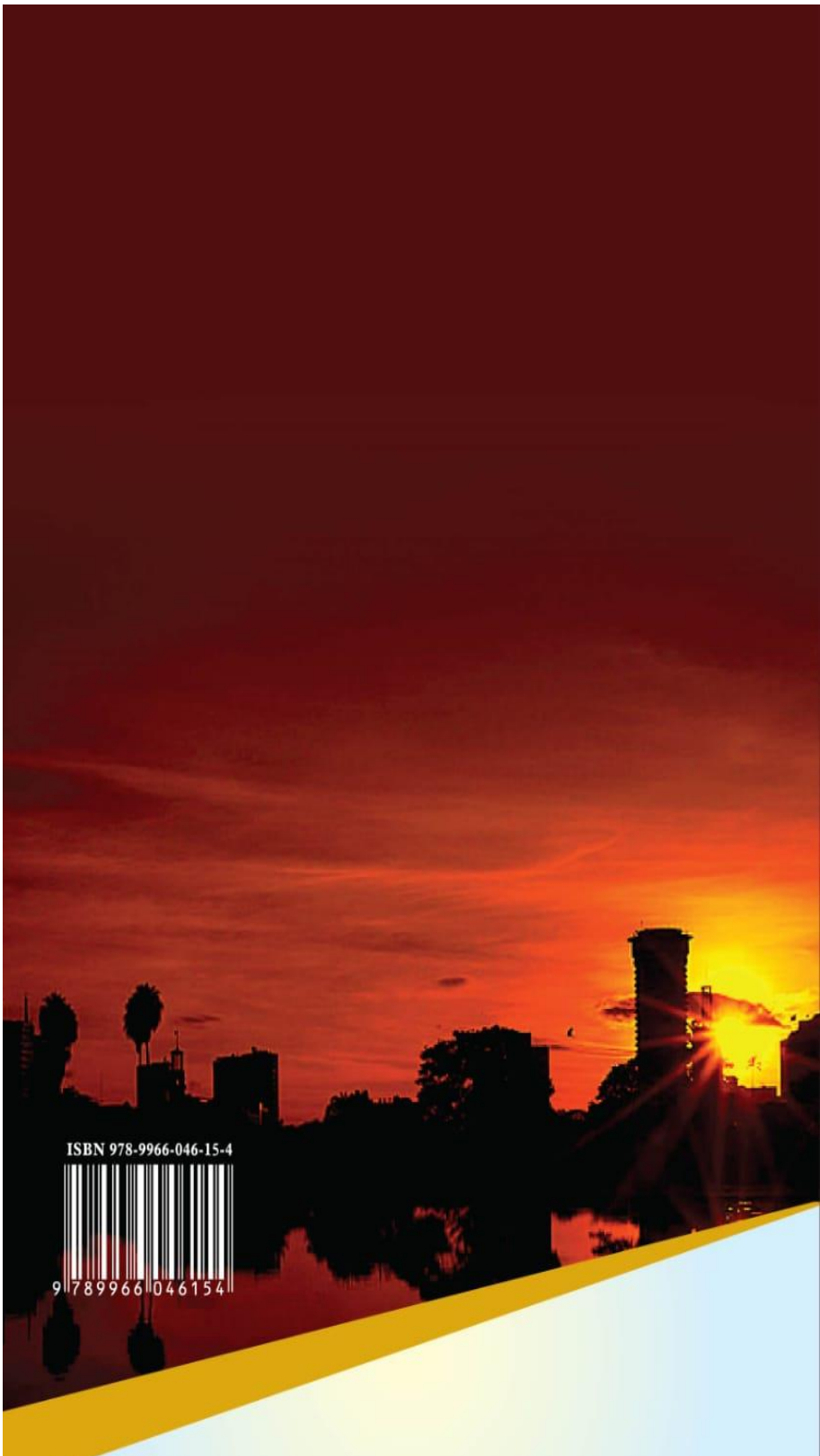
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