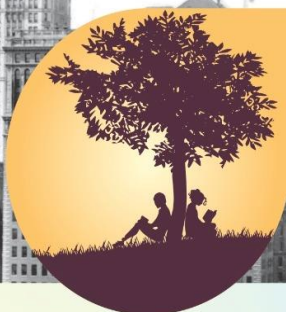


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Mandate and Jurisdiction of the Land Acquisition Tribunal, Kenya

By: *Bernard Kibet Sang**

Abstract

The Land Act, 2012 was amended in 2019 to include Section 133A which provided for the establishment of a tribunal, the Land Acquisition Tribunal (“the LAT”). However, despite this move to attempt to decompress the Environment & Land Court (the ELC), there has not been much out there on the place and role of the LAT.

This paper discusses the mandate and jurisdiction of the LAT. It further seeks to inquire on the procedure applicable to matters before the LAT, identify the remedies available in respect of disputes presented before the LAT, and appeals from the decision of the LAT.

1. Establishment of the Land Acquisition Tribunal (LAT)

The LAT is established under section 133A of the **Part VIII A** of the **Land Act**, No.6 of 2012 (LA), a 2019 amendment to the said LA. The LAT consists of **3 members** appointed by the Cabinet Secretary, consisting of:

- (a) A nominee of the Judicial Service Commission, as chairperson, to serve for a period of 4 years, renewable once;
- (b) A nominee of the Cabinet Secretary to serve to for a period of 3 years, renewable once; and

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- (c) A nominee of the Attorney General, to serve for a period of 3 years, renewable once.

Previously, under the repealed Land Acquisition Act, Cap 295 (LAA), the **Land Acquisition Compensation Tribunal (LACT)** dealt with disputes on compulsory acquisition of land. It comprised of 5 members appointed by the Minister for a term of 3 years, comprising

- (a) An Advocate of not less than 10 years standing, as chair;
- (b) Two registered valuers of not less than 10 years standing;
- (c) One prominent businessman of not less than 10 years standing; and
- (d) One prominent farmer of not less than 10 years standing.

Noting that the **LAA** was **repealed** by the **LA** in **2012**, and that the **LAT** was established in **2019**, was there a **vacuum** between **2012** and **2019**? The role of the **LACT** would have been taken over by the **Environment and Land Court (ELC)** in the **interim**, as section **128** of the **LA** provides for reference of matters under the **LA** to the said **ELC**.

2. The Mandate of the LAT

Article **159(1)** of the Constitution of Kenya 2010, provides that **judicial authority** is derived from the **people**, and vests in, and exercised by the **courts** and **tribunals** established by or under the Constitution. Article **169** goes on to set out the **subordinate courts** to include any other **local tribunal** as may be established by an Act of Parliament. Of course, then the **LA** establishes the **LAT** under section **133A**. Thus, it can be concluded that the **mandate** of the **LAT** is derived from the **People**, the **Constitution** and the **LA**.

3. The Jurisdiction of the LAT

The jurisdiction of the LAT is in respect of **appeals** from the decision of the National Land Commission (NLC) on matters **compulsory acquisition**, as per section **133C(1)** of the LA. Further, section **133C(6)** of the LA grants initial/first instance jurisdiction to the LAT to deal with disputes on creation of **wayleaves, easements, and public right of way**, (and not ELC). Also, as per section **133C(8)** of the LA, the LAT has the powers to uphold and enforce the **Bill of Rights** and review any **administrative action** as to **compulsory acquisition**.

In summary, the LAT has jurisdiction on disputes regarding:

- a) Compulsory acquisition of land
- b) Wayleaves; easements; and public right of way
- c) Upholding and enforcement of the Bill of Rights, as well as review of administrative action, as to compulsory acquisition

a) Disputes on Compulsory Acquisition

(i) The Concept of Dominium Eminentis/Eminent Domain

According to the Black's Law Dictionary, the doctrine of 'dominium eminentis', otherwise known as Eminent Domain is defined as the **inherent power** of a **government** entity to take **privately owned property**, especially land, and convert it for **public use**, subject to **reasonable compensation** for taking.¹

Section 2 of the LA defines **Compulsory Acquisition** as the power of the **State** to **deprive or acquire** any title or other interest in **land** for a **public purpose** subject to **prompt payment of compensation**.

¹ Black's Law Dictionary, p.g. 1585

The theory of eminent domain is said to have originated with the 17th Century, Dutch Legal Scholar, a natural law proponent, and prison escapee, **Hugo Grotius**, also known in Dutch as Huig de Groot.² **Grotius** first coined the phrase "**eminent domain**" in his 1625 masterpiece, *On the Law of War and Peace*.³ He wrote that through the agency of the King even a right gained by subjects can be taken from them in two ways, either as a **penalty**, or by the **force** of eminent domain. But in order that this may be done by the power of eminent domain the first requisite is **public advantage**; then, that **compensation** from the public funds be made.

A theory has also been put forth by a 19th century French Jurist, **Merlin de Douai**, that the earliest known reference to the use of eminent domain is in the **Old Testament** in the **Book of Kings**, which describes the acquisition of the vineyard of **Naboth** by **King Ahab**, to wit, "And Ahab spake unto Naboth, saying, give me thy Vineyard, that I may have it for a garden of herbs, because it is near unto my house: and I will give thee for it a better vineyard than it: or, if it seem good to thee, I will give thee the worth of it in money"⁴

I have not found any documented applicability of the concept of eminent in the pre-colonial Kenya, further noting that land was then held communally, as opposed to privately.

Consequently though, the doctrine of eminent domain was transplanted into Kenyan alongside the reception of the English laws.

² Hugo Grotius, 'plato.sanford.edu/entries/grotius/' accessed on 23rd September 2023.

³ Hugo Grotius, 'On the Law of War and Peace' (Francis W. Kelsey trans., Oxford 1925) p.g. 219.

⁴ D. Rossen, S. Greene, 'Eminent Domain: From Biblical Times to the Present-September 2015, <https://www.pendercoward.com/resources/blog-opinions-and-observations/eminent-domain-from-biblical-times-to-the-present-september-2015/> accessed on 23rd September 2023.

(ii) *Constitutional and Statutory Framework on Compulsory Acquisition*

I. *The Constitution of Kenya, 1963 (the Independence Constitution)*

Section 19(1) of the Independence Constitution provided that **every person** in Kenya had the **right** to protection of the privacy of his home and other **property** and **from deprivation** of property **without compensation**.

Further, **Section 19(2)** provided that every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have access to the **Supreme Court** for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled and for the purpose of obtaining prompt payment of that compensation.

II. *The 1969 Constitution, as revised in 2008 Edition (The Previous Constitution)*

Section 75(1) of the Previous Constitution stated the **conditions** that had to be fulfilled before property was compulsorily acquired by the state. These are:

- a. The taking of possession or acquisition is necessary in interests of defence, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefits; and
- b. The necessity is such as to afford reasonable justification for the causing of any hardship that may

- result to any person having interest in or over property; and
- c. prompt payment of full compensation, as provided by law.

III. *The Constitution of Kenya, 2010*

Article 40(3) prohibits deprivation of private property, unless the same arises from acquisition or conversion in accordance with Chapter 5, which at **Article 66** allows the state to **regulate** the use of any land in the interest of defence, public safety, public morality, public health or land use planning; or the deprivation is a **public purpose** or in the public interest, provided that there is prompt payment in full, of just **compensation** to the person; as well as a right to access **court** by the persons.

Further, the 2010 Constitution provides that compensation be paid to **persons** occupying the land in **good faith** but **do not hold titles** to the land. Unlawfully acquired property is not protected by the provisions on compulsory acquisition. **Public interest** is deemed to include **land reforms** and **equitable access** to natural resources, and that the property is not limited to land.

IV. *The Land Act, 2012.*

The Land Act was enacted pursuant to Article 68 of the Constitution of Kenya, 2010. It repealed the Wayleaves Act and the Land Acquisition Act. **Part VIII** of the Act (Section 107-133) provides **procedure and guidelines** to be followed when acquiring private property as follows:-

The **National** or **County Government** (*or their entities, like KENHA*) must first submit a request to the **NLC** to acquire the land on its behalf. The Commission may **reject** a request of an acquiring authority, to undertake an acquisition if it establishes that the request does not meet the requirements prescribed under **Article 40(3)** of the Constitution.

Acceptance or rejection of the request should be done within **14 days** of the date of request.

On acceptance of the request, the **NLC** is to **map out** and **value** the land and establish that the **acquiring authority** has recorded the **particulars** of the persons in actual occupation of the land and improvements thereon. The **NLC** is also to publish a notice in the **Kenya Gazette** and **County Gazette**, and serve a copy of the relevant notice to the relevant **land registrar** and **interested persons**. The notice shall contain the purpose for which the land is to be compulsorily acquired; and the location, general description and approximate area of the land.

Upon receipt of the notice, the **Registrar** shall: make an order prohibiting or **restricting dealings** with the affected portion of land thereof until it vests in the acquiring authority, and the registrar shall make an entry in the **register** of the intended acquisition.⁵

NLC may authorize, in writing, any person, to enter upon any land specified in a notice published under section 107 and **inspect** the land and to do all things that may be reasonably necessary to ascertain whether the land is **suitable** for the intended purpose. Such an authorization shall **not empower** a person to enter a **building**, or an enclosed court or garden attached to a dwelling house, unless that person has first obtained the **consent** of the occupier; or has served on the occupier a not less than **seven days** written **notice** of the intention to enter. Further, as soon as practicable after entry has been made, the **NLC** shall promptly pay in full, **just compensation** for any **damage** resulting from the **entry**.⁶

Land may be **acquired compulsorily** if the **NLC certifies**, in writing, that the land is required for **public purposes** or in the public interest as related

⁵ Section 107 of the Land Act

⁶ Section 108 & 109 of the Land Act

to and necessary for fulfilment of the stated public purpose. However, if after land has been compulsorily acquired the **public purpose** or interest justifying the compulsory acquisition fails or **ceases**, the NLC may offer the **original owners** or their successors in title **pre-emptive rights** to re-acquire the land, upon restitution to the acquiring authority the full amount paid as compensation.⁷

The acquiring authority shall deposit with the NLC the compensation funds in addition to survey fees, registration fees, and any other costs before the acquisition is undertaken.

At least **thirty days** after publishing the notice of intention to acquire land, the NLC shall appoint a date for an **inquiry** to hear issues of propriety and claims for compensation by persons interested in the land, and shall: cause notice of the inquiry to be published in the **Gazette** or **county Gazette** at least **fifteen days** before the inquiry; and serve a copy of the notice on every person who appears to the NLC to be **interested** or who claims to be interested in the land. Upon the conclusion of the inquiry, the NLC shall prepare a **written award**, in which it shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land.

On making an award, the Commission shall serve on each person whom it has determined to be interested in the land, a **notice of the award** and **offer of compensation**. **After notice of an award** has been served on all the persons determined to be interested in the land, the NLC shall, **promptly pay** compensation in accordance with the award to the persons entitled thereunder.

⁷ Section 110 of the Land Act

After an award has been made, the NLC may take **possession** of the respective land by serving on every person interested in the land a notice that on a specified day possession of the land and the title to the land will vest in the national or county government as the case may be, provided that such taking of possession will not result in persons being rendered homeless. Subsequently, if the documents evidencing title to the land acquired have not been previously delivered, the Commission shall, in writing, require the person having possession of the documents of title to deliver them to the Registrar, and thereupon that person shall forthwith deliver the documents to the Registrar.

However, the notable variations of procedure under the LA from the LAA is as follows: -

- The NLC takes the role of the Commissioner of Lands, and even the Minister; and
- The acquiring authority is to deposit the compensation funds with the NLC in addition to survey fees, registration fees, and other related costs.

-

b) Disputes relating to Easements, Wayleaves & Public Right of Way

(i) Easements (Concept and Rationale)

The LA⁸ defines easements as a non-possessory interest in another's land that allows the holder to use the land to a particular extent, to require the proprietor to undertake an act relating to the land, or to restrict the proprietor's use to a particular extent, and shall not include a profit.

⁸ Section 2 of the Land Act, 2012.

Terminology in easements:

- a) **Dominant land (dominant tenement)**- the land for the **benefit** of which any easement is created. Therefore, an easement is, in relation to the dominant land, referred to as benefiting that land;⁹ and
- b) **Servient land (servient tenement)**- the land of the person by whom an easement is created. Therefore, in relation to the servient land, easement is referred to as **burdening** that land.¹⁰
- c) Easements can be positive or negative, thus:
 - **Positive easements** entail any **rights to do something** over, under or upon the servient land¹¹, and include the right of hanging clothes on a line passing over another person's land, right of water, right of way, right to place a signboard and advertisements in another's land; or any right to graze stock on the servient land.
 - **Negative easements** comprise any right that **something should not be so done**; or any right to **require the owner of servient land to do something over**, under or upon that land.¹² They also include right to light, or air.

Prof. Tom Ojienda¹³ defines an **easement** as common law **rights** enjoyed by a person over the **land of another**. They include the right of way, right of light, right of water, profit among others. He Opines that whereas easements are nowadays recognized as **incorporeal hereditaments**, that is objects of property in themselves, initially easements were construed as rights appurtenant to corporeal hereditaments, that is a privilege which could be obtained for the benefit of the corporeal land.

⁹ Section 136(1) (a) of the Land Act.

¹⁰ Section 136(1)(b) of the Land Act.

¹¹ Section 138(a) of the Land Act.

¹² *Ibid.*

¹³ Prof. Tom Ojienda, 'Land Law and Conveyancing: Principles and Practice' pg. 184-185

He further states that for there to be declared an easement, **four essential elements** must be satisfied:

- a) There must be a **dominant tenement and a servient tenement**. That is an easement does not exist in gross but can only be appurtenant to (related to) a dominant tenement. A dominant tenement may be the adjoining land to which an easement (such as a right of way) is sought across another's land (servient tenement).
- b) An easement must **confer a benefit** on (accommodate) the **dominant tenement**. The benefit conferred to the dominant tenement is not necessarily analogous to personal advantage to the occupier of the land, the concern is how the easement makes the dominant tenement better and more convenient property by increasing its general utility, conferring access among others.
- c) The **dominant** and **servient** tenement must **not be owned** and occupied by the **same person**. In its very nature easement is a right in the soil of another (*in alieno solo*); and
- d) The **easement** must be capable of forming a **grant**. Although in practice easement are established by long user, the presumption always is that a grant was once made."

In **Re Ellenborough Park**¹⁴ the Court set out **4 essential characteristics** of an **easement**; there must be a **dominant and servient tenement**; the right must **benefit the dominant land**; there must be **diversity of ownership** or at least occupation; and the right must be capable of lying **in grant**.

¹⁴ Re Ellenborough Park (1956) Ch 131.

In **Kamau v Kamau**¹⁵ the Court of Appeal held that an **easement** is a **convenience** to be exercised by one land owner over the land of a **neighbour** without participation in the profit of that other land. The tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement. Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the servient tenement to every person into whose occupation these tenements respectively come.

Note: It should be noted that despite the express provision of Section 140 of the LA providing for that the owner of a landlocked land to apply to the ELC for an Access Order, the provision of **Section 133C(6)** of the Land Act overrides as such an application falls under **Section 128** of the LA which provides for any dispute under the Act to be referred to the ELC. Consequently, bearing in mind the provision of **Section 133C(6)**, which overrides the provision of Section 128 of the LA, such an Application for access order should be made to the LAT.

c) Wayleaves and Public Right of Way

(i) Concepts and Rationale

The LA repealed the Wayleaves Act, 1989. Contrary to the **Wayleaves Act** which limited **wayleaves** to the **carrying of** any sewer, drain or pipeline into, through, over or under any private land without the consent of the owner of the land by the Government, under the LA, a wayleave authorizes **executing works**, building and maintain installations and structures and insetting all such works, installations and structures on the servient land.

A **public right of way** may be a right of way created for the benefit of the **national** or **county** government, a **local authority**, a **public authority** or

¹⁵ Kamau v Kamau (1984) eKLR.

any **corporate body** to enable all such institutions, organisations, authorities and bodies to carry out their functions, referred to in this Act as a **wayleave**; or a right of way created for the benefit of the **public (Communal Right of Way)**.¹⁶

A **wayleave** shall authorize persons in the employment to or who are acting as agents of or contractors for any of the organizations, authorities and bodies to **enter** on the **servient land** for the purpose of **executing works**, building and maintain installations and structures and insetting all such works, installations and structures on the servient land and to **pass** and re-pass along **that wayleave** in connection with purposes of those organisations, authorities or bodies.¹⁷

A **public right of way** is made by the **Cabinet Secretary** subject to the **recommendation** of the NLC.¹⁸ Section 148 provides that **compensation** is payable to any person for the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to any compensation for the use of land for any damage suffered in respect of trees crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified valuer.

Section 28(c) of the LRA provides that rights of way, rights of water and profits as **overriding interests** and that they need not be noted on the register of lands.

Section **148(5)** of the Land Act provides that if the person entitled to compensation under the Act and the body under a duty to pay that compensation are unable to agree on the amount or method of payment

¹⁶ Section 143(2) of the Land Act.

¹⁷ Section 143(4) of the Land Act

¹⁸ Section 146 of the Land Act.

of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay compensation, to make, negotiate or process an offer of compensation, that person may apply to the **Court** to determine the amount and method of payment of compensation and the Court in making any award may, make any additional costs and inconvenience incurred by the person entitled to compensation.

It should be noted that due to the amendment of the Land Act, the application under Section 148(5) of the Land Act, should now be made to the LAT as per Section 133C (6) which provides that: “*Despite the provisions of sections [127](#), [128](#) and [148](#) (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal.*” In the **John Peter Mwangi Kagiri vs National Land Commission & Anor**¹⁹ the Court stated:-

“A **public right of way** is a right that is attached and thus with the land on which it has been created and shall be binding on all land owners irrespective of the manner of occupation.

Section 28(c) of the Land Registration Act recognizes right of way as an overriding interest in land, a right that subsists and affects land without being noted on the register. Equally rights of compulsory acquisition are classified as overriding interest so much so that once it is done in accordance with the law, its subsists on the land.

What is the purpose of **wayleave**? It mandates an authorized person to enter into the servient land for purposes of executing such works such as building and maintaining installations and structures on the servient land and to pass and repass along the wayleave in connection with the purposes of the institutions or bodies concerned.” [emphasis the of the author]

¹⁹ John Peter Mwangi Kagiri vs National Land Commission & Anor (2019) eKLR

c. Upholding and Enforcement of the Bill of Rights (BoRS) and Review of Administrative Action (AA) as to Compulsory Acquisition

(i) The Concept of BoRs and AA

The **BoRs** is contained in **Chapter 4** of the Constitution, which at **Part 2** lists the rights and fundamental freedoms, for example: freedom of movement and residence; protection of right to property; right to clean and healthy environment; economic and social rights; fair administrative action; access to justice; and fair hearing.

Article 23(2) of the Constitution obligates **Parliament** to enact legislation to give **original jurisdiction** to **subordinate courts** (including **tribunals**) to hear and determine applications for redress as to violation or a right or fundamental freedom in the **BoRs**.

Further, **article 47(3)(a)** obligates **Parliament** to enact legislation to provide for **review of AA** by an independent and impartial **tribunal**.

AA includes includes- the **powers**, functions and duties exercised by **authorities** or quasi-judicial tribunals; or any act, omission or decision of **any person**, body or authority that affects the **legal rights** or interests of **any person** to whom such action relates²⁰.

So, regarding the upholding and enforcement of the BoRs as well as the review of AA, section **133C(8)** of the LA grants **jurisdiction** to the **LAT** to hear and determine a complaint before it as to the violation of rights and freedoms in the **BoRs** as well as **review any AA**, but only to the extent of matters **compulsory acquisition**, and using the framework in the Fair Administrative Action Act (**FAA**). That means the LAT would hear and determine issues of violation of the right to fair hearing or fair

²⁰ Section 2 of the Fair Administrative Action Act, 2015

administrative action by the NLC, but only as regards the process of compulsory acquisition.

As to **whether** the complaint on the BoRs or AA can be raised **independently**, or within the tribunal proceedings; the answer lies in **section 7(1)** of the FAA, which empowers a person aggrieved by an administrative action to **apply** to a tribunal for review.

4. Procedure of and Remedies from the LAT

Section **133A(4)** of the LA empowers the **LAT** to regulate its **own procedure**. Therefore, it is expected that in due course the LAT will generate rules of procedure for matters before it. It may borrow from other relevant tribunals like the National Environmental Tribunal or Business Premises Rent Tribunal.

Otherwise, on timelines, a person aggrieved by the decision of the **NLC** may **appeal** to the LAT within **30 days** of the NLC decision, and that the **LAT** should make a decision within **60 days** of, unless for sufficient cause extend the period.

Regarding **remedies** that the **LAT** can award, section **133C(7)** of the LA gives power to the tribunal to **confirm, vary or quash** the decision of the NLC.

As to complaints on enforcement of the **BoRs** and review of **AA**, the **FAA**, at **section 11**, lists the **various orders** that may be granted, including: declaratory orders; restraining and prohibitory orders; directing the giving or reasons for the AA; compelling orders; temporary reliefs; and costs.

5. Appeals from the LAT

Appeals from the **LAT** lie on the **ELC**, on questions of law only (section 133D of the **LA**). Though the **LA** is **silent** on further appeals, unlike the repealed **LAA**, further appeals from the **ELC** should lie in the **Court of Appeal** as provided in **article 164** of the Constitution, as read with **section 16** of the **Environment and Land Court Act**, No. 19 of 2011, and **section 3** of the **Appellate Jurisdiction Act**, having in mind that the same would be on **points of law**, noting that initial appeal to the **ELC** are on matters of law only.

Appeals from the **Court of Appeal** are made to the **Supreme Court**, as long as the same meet the criteria in **article 163(4)** of the Constitution being, a **constitutional issue** or as **certified** by the Supreme Court of Court of Appeal as a matter of general **public importance**.

6. Conclusion

In a nutshell, the paper establishes that the **mandate** of the **LAT** is derived from the **People**, the **Constitution** and the **LA**. The **LAT** has **jurisdiction** over disputes on **compulsory acquisition**, and well as creation of **wayleaves**, **easements** and **public right of way**. The **LAT** also has **jurisdiction** over complaints regarding the upholding and enforcement of the **BoRs** as well as review of **AA**, but only as to **compulsory acquisition**.

The **LAT** is to regulate its **own procedure**, that **appeals** to the **LAT** should be made within **30 days** of the decision of the **NLC** (where applicable), and that the **LAT** should make **decision** within **60 days** unless for sufficient cause extend the period.

The **remedies** that the **LAT** can grant include **confirming**, **varying** or **quashing** the decision of the **NLC**; and as to complaints on enforcement of the **BoRs** and review of **AA**, the **FAA**, at **section 11**, lists the **various**

orders that may be granted, including: declaratory orders; restraining and prohibitory orders; directing the giving or reasons for the AA; compelling orders; temporary reliefs; and costs.

Appeals from the LAT lie in the ELC, on matters of law only, and thereafter the Court of Appeal, and finally the Supreme Court.

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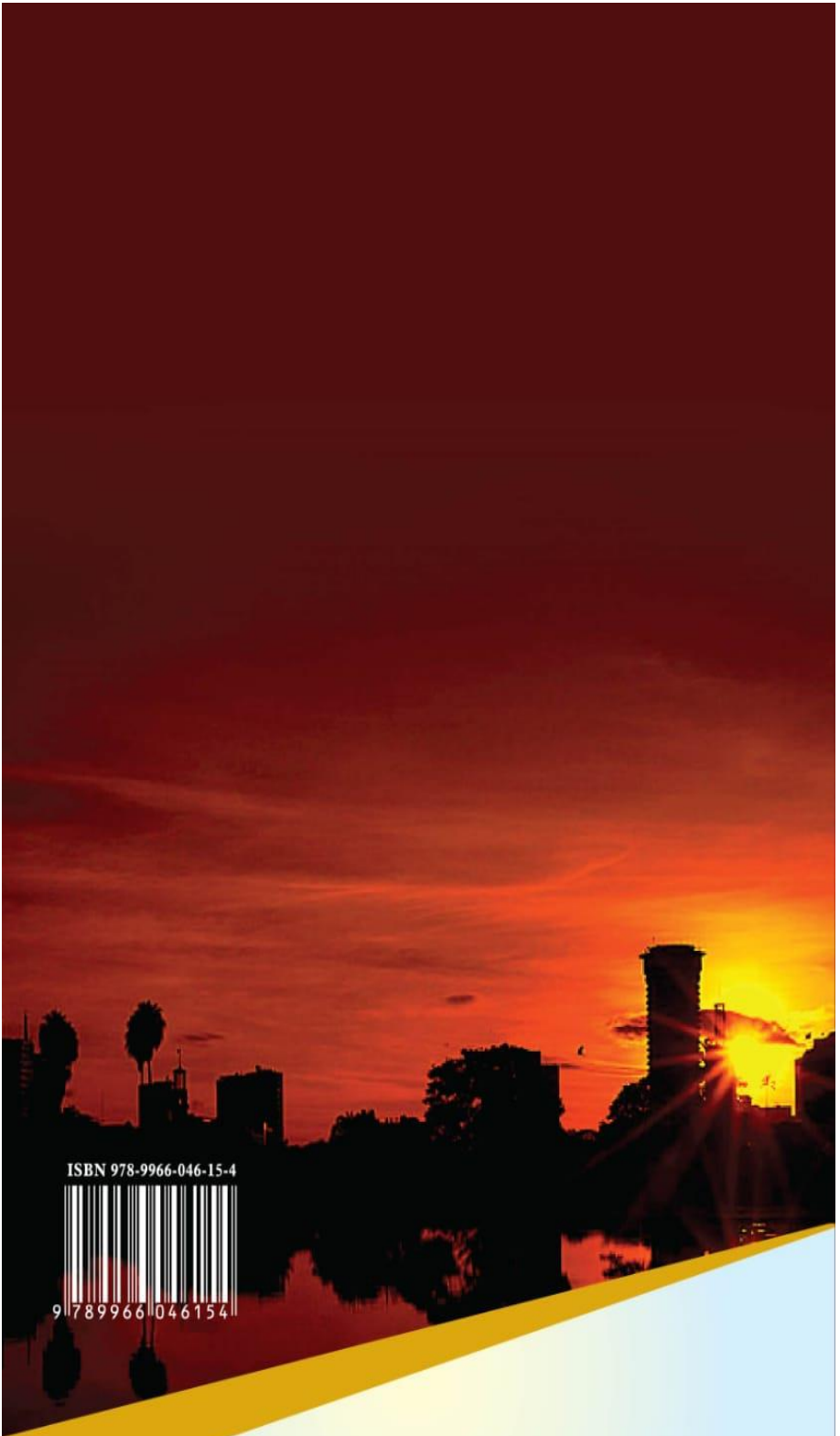
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