

Large Scale Land Acquisitions for Investment in Kenya:

Is the participation, and benefits of affected
local communities meaningful, and equitable?

A case study of the situation in Lamu, Isiolo and Siaya Counties.



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Cover photo: Goats at pasture in the foreground of the Kipsing Gap, the expected location of the Isiolo Resort City, a component of the LAPSSET project.

The views expressed herein represent the findings of research, and interpretation by the research team, and do not necessarily represent those of LDGI or IDRC.

About Land Development and Governance Institute

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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ABOUT THE AUTHORS

Robert Kibugi

Dr. Robert Kibugi is a Land and Environmental Law expert and an Advocate of the High Court of Kenya. He is a lecturer at Centre for Advanced Studies in Environmental Law (CASELAP) and the School of Law, University of Nairobi. He holds a Bachelor of Laws (LL.B) and, a Master of Laws (LL.M) degree from the School of Law, University of Nairobi, and a Doctor of Laws (LL.D) degree from the Faculty of Law, University of Ottawa, Canada. Dr. Kibugi is a legal and policy researcher who focuses on legal, policy and institution aspects of public participation in natural resource governance; climate change adaptation and mitigation; water sector legal and institutional reforms; climate resilience in the water sector; land reforms on the use of law to entrench sustainable land management, including integration of land use planning in economic development through safeguarding community benefits. He possesses vast experience on legislative and policy design and drafting, having worked on climate change, water, land and other legal and policy development tasks.

Ibrahim Mwathane

Mr. Ibrahim Mwathane is a registered surveyor with vast experience in both the public and private sector. He is an accomplished policy expert on land administration, and reforms, and consults extensively in Surveying and Land Information Management. Mr. Mwathane holds a Bachelor of Science degree in Surveying and Photogrammetry from the University of Nairobi and a Masters degree in Cadastre and Land Information Management from the Polytechnic of East London. He has provided advocacy and technical support to Kenya's land policy formulation process and the continental land policy process. He recently served as a member of the Government appointed Task Force for development of community land legislation, which is now part of the laws of Kenya.

Mwenda Makathimo

Mr. Mwenda Makathimo is a registered and practicing land economist, with experience in valuation and property management. He holds a Bachelor of Arts in Land Economics and a Master of Arts in Valuation and Property Management, both from the University of Nairobi. He is pursuing a PhD in Environmental Policy from CASELAP, University of Nairobi. The focus of his doctoral thesis is on the role of stakeholder participation in enhancing integrated water resources management in the Upper Athi Basin. Mr. Makathimo has extensive experience on issues relating to environmental management, policy development, land management and administration, land and urban economics, governance, assets and property valuation, real estate management, investments appraisal and facilities management, boundary delimitation and mapping. He previously served as a Commissioner at the Interim Independent Boundaries Review Commission of Kenya.

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The outputs of this research were, at various stages, subjected to peer review by experts specialized in fields linked to the objectives. These expert reviews provided valuable feedback that shaped the progress of the research to the final stages.

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Acronyms

CBO	Community Based Organization
EIA	Environmental Impact Assessment
EMCA	Environment Management and Coordination Act
FAO	Food and Agricultural Organization
FGD	Focused Group Discussion
FPIC	Free Prior and Informed Consent
IDP	Internally Displaced Person
KAA	Kenya Airports Authority
KENHA	Kenya National Highways Authority
KWSCRIP	Kenya Water Security and Climate Resilience Project
LAPSSET	Lamu Port Southern Sudan- Ethiopia Transport
NEMA	National Environment Management Authority
NLC	National Land Commission
PDP	Part Development Plan
RAP	Resettlement Action Plan
RAP	Resettlement Action Plan
RPF	Resettlement Policy Framework
SEA	Strategic Environmental Assessment
UNDP	United Nations Development Programmes

Executive summary

Land acquisitions, either driven by foreign investments or domestic investment needs have continued to polarize opinions. When this research was proposed, it was premised on arguments by scholars Ruth Meinzen-Dick and Helen Markelova, who had analysed agricultural land deals, and argued that there were potentially two schools of thought about foreign acquisitions over agricultural land. Their school of thought regards them as “beneficial investments” whereby investors are viewed as bringing needed investment, possibly improved technology or farming knowledge, thereby generating employment and increasing food production. Meinzen-Dick and Markelova further argued that because these land acquisitions, foreign and domestic, are ongoing at a very fast rate, it is necessary for host countries to focus on what they can do to seize the opportunities and mitigate the risks associated with the deals.

During implementation of the research project in Kenya, it became clear that although prior illustrations of land deals included foreign acquisitions (e.g. Dominion farms), a government economic policy focusing on mega-infrastructure projects was driving (or expected to drive) a much higher pace of land acquisitions either for primary infrastructure, or for the economic activities that flowed from the primary infrastructure. This is in the context of the Lamu South Sudan Ethiopia Transportation Corridor (LAPSSET) project, which is a flagship means for realization of Vision 2030; Kenya’s current national development plan. Thus, a national conversation is necessary to debate the crucial question of how to provide safeguards to protect the interests of local communities directly affected by these investments, including compensation of land that is taken, and their place in the socio-economic and environmental continuum of investment projects from design to implementation.

The following findings and recommendations have resulted from this research, and it is anticipated they will be valuable in setting the agenda and tone of such a useful national conversation, as well as tangible actions:

A. Lessons, conclusions and findings requiring policy level interventions

1. Regularization of landholding and tenure systems.

The absence or weakness of formal landholding, and land registration systems was evident in most of the research sites, in Isiolo and Lamu. This is despite Kenya having put in place new land laws in 2012 to give effect to constitutional provisions to protect land rights. This has resulted either in emergence of informal land administration and conveyance systems (Lamu), or the emergence of a complex system of formal land allocation that brings about multi-allocation of land through repeated issuance of allotment letters, (Isiolo), or non-adjudication and registration of community lands (Isiolo, Lamu). In either instance this results in undermining security of tenure, and enhances the vulnerability of concerned communities who will face difficulties securing their interests in the land ahead of any large scale land acquisitions, due to the entry of speculators, and persons interested in grabbing the land by being first to obtain formal registration. The Kenyan national government should consider partnering with the County government in Isiolo in order to identify the nature and extent of, and take steps to resolve the problem of multi-allocations of land there. 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 certain communities through implementation of the provisions of Community Land Act.

This conclusion is drawn from findings in research amongst the Aweer (Bargoni), and Turkana communities (Ngare Mara) where residents expressed apprehension over their tenure security in the face of land acquisition for LAPSSSET infrastructure. This is because the land has not been (fully) adjudicated or registered in favour of the community notwithstanding existence of the Land (Group Representatives) Act that preceded the 2016

community land law. It is recommended that the government expedites 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 guaranteeing the beneficial interests of the community members, first 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. In any event, 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, as discussed, provides a viable option because, 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, and takes into account all the transaction costs of purchasing (conveyancing fees, etc), or logistical costs of replacement of non-land assets.

4. Internalization of resettlement safeguards principles and practice into Kenyan law of compulsory acquisition of land

A review of the current legal situation in Kenya concerning compulsory acquisition of land discloses the absence of safeguards governing interaction with host community, as well as involuntary resettlement safeguards in the event of displacement by land acquisition. This includes exploring the possible application of an FPIC process that emphasizes the quality and meaningfulness of affected community participation, including the impact that views obtained during consultations have on the final decision. Equally critical is the decision to vertically integrate the process by requiring the consultation of the affected public during project planning. In the sense

of feasibility studies, and project designs, this suggests that community participation may add value to the process by being conducted much earlier on in the process, and contribute to analysis of project sites, and alternatives.

For practical purposes, Kenya could consider a legal requirement for a national Resettlement Policy Framework (RPF) that would govern internalization of resettlement safeguards, including participation of communities. Key to this is that if a Resettlement Action Plan (RAP) is required, in terms of EMCA, both the RAP and RPF would have undergone a Strategic Environmental Assessment thereby providing a means for risk assessment in advance of major implementation steps being underway.

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

At a policy level, it is important for Kenya to revisit, in a framework sense, how to use investment promotion rules and binding contracts to safeguard socio-economic, environmental benefits and livelihoods of local communities. This is mainly in context of the continuum of an investment, from land acquisition, and during its implementation. 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. 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 could 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. The details of these considerations have been discussed at length earlier in this report.

6. Regulations to regulate methodology for assessment of just compensation

Kenya is currently engaged in a number of infrastructural projects that call for the compulsory acquisition and compensation of land. As noted in the study, 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. As at the time of this report, these rules had not yet been developed. The rules will help to standardize the methodology for the anticipated assessment and make the process more predictable and, in an environment where the government is involved in the development of infrastructure calling for massive compensation of compulsorily acquired land, the development of these rules should have been accorded priority.

It is however noted that regulations to operate the entire Land Act have not yet been developed. Perhaps the development of these regulations, and the rules to govern assessment for just compensation, may have been delayed by 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.

B. Lessons, conclusions and findings requiring direct actions at community level

In this category, the conclusions and findings are drawn to highlight matters that directly affect the voice and equitable benefit or participation of affected local communities, either in land acquisition process, or in the continuum of investments introduced in their midst.

1. A community dissemination manual for transfer of knowledge about land laws, policies and land administration processes

In focus group discussions held in the course of field work, the research team got similar feedback multiple times that the (potentially) affected “had heard” on radio, or through other fora that Kenya had new land laws in place, they did not really know the content of these laws. A similar sentiment was

expressed with regard to knowledge of details about the components of the various LAPSET projects. Communities indicated that they would want to have some form of civic education on this, especially regarding tenure rights, the land administration system (surveying, adjudication and registration), the implications and contents of the new community land law, and legal protection of community rights during land acquisition. One key finding was a preference by community members to have some of their own members trained in order to pass the knowledge to the communities, a sentiment that arose from a desire to receive information from a trustworthy source who was part of the community. Another finding was that community members did not have clear details on available grievance mechanisms on the land administration system, and while some had managed to access the National Land Commission, they lamented that it was based in Nairobi.

This finding suggests there is a need to develop a basic community dissemination manual, that includes a provision for empowerment of community based trainers (through a Training of Trainers concept). In such an approach, the dissemination manual can be published in simple language, including translation to Kiswahili or local languages where preferable.

2. Enhancement of meaningful public participation in the entire continuum through effective consultations and disclosure of relevant information

In order to enhance the voice of the community ahead of any process of land acquisition, it will be helpful to integrate a constructive and meaningful process of consultation with potentially affected communities, from early on during project planning, feasibility studies to on boarding of investments. This would particularly aid in providing value on local circumstances and risks that may not be obvious to technical teams. Occurrences such as in the Isiolo *Kiwanjani* settlement (displaced for the airport) where residents of *Kiwanjani Zone G Squatter* complained that maps generated during the acquisition process continued to record their land as being part of the airport complex despite there being a 75 feet road between the airport boundary, and the plots in question, would be avoided.

Enhanced community participation would further provide a valuable avenue through which the [potentially] affected local community can enhance its voice by having an opinion (which is taken into account) early on in the stages of the project design. However, this approach would also require protection from speculative behavior, that could result in an artificial increase in market value of land, due to market behavior triggered by anticipation of a project, and land acquisition. Access to information requires that this type of information is made available to the public, but in order to control speculative behavior that drives up the cost of land compensation, government can apply the new 2016 Access to Information Act to sieve out aspects that are either confidential or considered deliberative and therefore not to be publicly disclosed. Another helpful approach would be to undertake the feasibility studies focusing on multiple alternative sites, without showing preference for any particular site.

Meaningful community participation requires a legal or policy definition of how to ensure consultations are effective. This could include possibility of requiring consulting (public) agencies to return to the host community and disclose how they considered the various opinions, and provide feedback. The community dissemination manual proposed above would provide a valuable tool through which to structure techniques that affected local communities can apply in order to have meaningful consultations. The manual could also include implications of the procedures set out in the new 2016 Access to Information Act.

3. Promotion of networking by project affected communities in various parts of Kenya to build knowledge and exchange thoughts

There are multiple instances of compulsory acquisition of land in Kenya (e.g. For LAPSSSET projects), or the allocation of land by government for private investments (Siaya – Dominion). The processes are at various stages, either at conceptual point, or having gone through various steps of acquisition and on boarding of investments. Equally, others are complete and the investment has been operational for a number of years. In all these cases, there multiple lessons to be learnt between the various affected local communities. In both Lamu and Isiolo for instance, the research engaged

with multiple focus groups drawn from within the same project locality but in different geographical sections – and there was evidence that there was no integrated system to promote consultations and learning from each other. Further, even where acquisition and investments have been undertaken in separate parts of the country, people from Isiolo or Lamu could learn coping techniques from those in Siaya, or by learning the adverse impacts in Siaya, become more interested in enhancing their voices in the local context to avoid a similar outcome. Therefore, the idea of a network that brings together representatives of the various communities is useful to consider. Such a network would also include policy makers drawn from the national and county governments. Already in most of these local communities, the research observed that chiefs (who are national government administration officers) are an integral part of the community process. Learning forums could be organized, and a feedback process put in place such that when representatives return to their local communities, they can provide details to their neighbours. Such a network would however require that policy makers also commit to provide valuable information and feedback to any questions and problems raised by participating communities.

An alternative to utilization of physical meetings for such a network is application of internet-based technology. In this case, a network can be developed through low cost options, such as through the WhatsApp Platform. Although this requires internet access through a smartphone, the Land Development and Governance Institute has been piloting a WhatsApp based platform that creates a Network aptly named **Community Land Matters**. The experience with this platform is discussed at length in section 8.

4. Involvement of women in community interventions

The study exposes some good lessons in the involvement of women in community interventions and leadership on communal land rights. It was instructive that for instance in the discussion with the Aweer group in Bargoni, Lamu, some women participants in the focus group discussions were very active and made crucial contributions. In addition, the women also made distinguished contributions too during discussions with the Turkana community at Ngare Mara, Isiolo County, where critical leadership positions in the community are held by women.

Yet, the two communities, like many others in Kenya, are largely patriarchal. This experience provides a good benchmarking lesson that, despite the cultural practices that have informed many communities in the past, given opportunity, women may play critical roles in helping communities protect and mitigate their communal land rights where circumstances so demand.

5. Compensation to “occupants in good faith” without title to land

As noted in the study, Article 40(4) of the Constitution of Kenya states that ‘provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land’. While the rules to govern how the discretion implied by this Article are yet to be developed, the study reveals that the State has exercised this discretion positively in the studied Port site in Lamu and the Airport site in Isiolo. Despite land owners not holding title to their land in the two places, cash-for-land and land-for-land compensation was made to the claimants in Lamu and Isiolo respectively.

These are good precedents for other parts of the country where formal processes to register communal land have not been applied or completed. Lessons learnt from these two Counties may be borrowed to inform and improve similar compensation exercises elsewhere.

6. Protection of interests of legitimate beneficiaries during compensation

Incidents were recounted of husbands and fathers pocketing the proceeds of compensation and departing home with the entire compensation sum. This leaves the wives and children vulnerably exposed and without alternative livelihoods. Such people become a problem for the community and State. To avoid such negligence, the government should consider regulating the release of compensation funds. The practice under the Land Control Act Chapter 302 of the Laws of Kenya which regulates transactions of agricultural land could be borrowed. Though not written into the law, Land Control Boards always require the proprietor’s spouse to be in attendance

before approval to any application for approval of a transaction such as subdivision or sale of family property. And where they are in doubt about the facts to any application, they will usually refer to an area elder or the Assistant Chief for pertinent information in an effort to ensure that spouse and children are in agreement. Such a procedure could be enforced in the case of compensation following acquisition.

It is recommended that the Government, in liaison with the National Land Commission, puts in place modalities to explore how a similar social safeguard procedure could be instituted in the proceedings for compensation under the Land Act to protect legitimate beneficiaries in instances where acquisition of land for projects has to be done with requisite compensation to landowners.

7. Preservation of indigenous and local knowledge

Project activities involving large scale land acquisition have the inevitable consequence, in some cases, of interfering or totally defacing available traditional/indigenous knowledge from the affected site. This is the case in some parts of Lamu and Isiolo where invaluable oral and cultural knowledge, including some cultural sites, have been preserved over the years. In any event, if enhanced community participation is adopted, and a threshold placed to examine if the participation is meaningful, the indigenous and local knowledge of the communities will also benefit the project at the point of local risk assessment. In this case, recording of such knowledge can be undertaken for posterity use.

It is therefore recommended that the implementation of such projects be preceded by a quick knowledge mapping to determine and document such knowledge before destruction or adulteration, together with enhanced community participation. Where possible, such knowledge can be proactively preserved in collaboration with the relevant state organs. Such a mapping can still be done for the LAPSSSET Corridor and Isiolo Resort City before implementation takes off.

1 Introduction

Land acquisitions, either driven by foreign investments or domestic investment needs have continued to polarize opinions. When this research was proposed, it was premised on arguments by scholars Ruth Meinzen-Dick and Helen Markelova, who had analysed agricultural land deals, and argued that there were potentially two schools of thought about foreign acquisitions over agricultural land.¹ Their school of thought regards them as “beneficial investments” whereby investors are viewed as bringing needed investment, possibly improved technology or farming knowledge, thereby generating employment and increasing food production. Meinzen-Dick and Markelova further argued that because these land acquisitions, foreign and domestic, are ongoing at a very fast rate, it is necessary for host countries to focus on what they can do to seize the opportunities and mitigate the risks associated with the deals.

During implementation of the research project in Kenya, it became clear that although prior illustrations of land deals included foreign acquisitions (e.g. Dominion farms), a government economic policy focusing on mega-infrastructure projects was driving (or expected to drive) a much higher pace of land acquisitions either for primary infrastructure, or for the economic activities that flowed from the primary infrastructure. This is in the context of the Lamu South Sudan Ethiopia Transportation Corridor (LAPSSET) project, which is a flagship means for realization of Vision 2030;² Kenya’s current national development plan. Thus, a national conversation is necessary to debate the crucial question of how to provide safeguards to protect the interests of local communities directly affected by these investments, including compensation of land that is taken, and their place in the socio-economic and environmental continuum of investment projects from design to implementation.

1 Ruth Meinzen-Dick & Helen Markelova Necessary Nuance: Toward a Code of Conduct in Foreign Land Deals in in Michael Kugelman and Susan L. Levenstein (eds) 2009 LAND GRAB? The Race for the World’s Farmland Woodrow Wilson International Center for Scholars, Washington, D.C. p. 69

2 Sessional Paper No. 10 of 2012 on Vision 2030 (Government Printer, Nairobi, December 2012)

A primary concern in this case is the eligibility, in terms of law or legitimate interest, of local community members to compensation when land they have a claim on, is acquired. This eligibility draws from concern over the validity of land rights, especially due to non-application of formal systems of adjudication and registration in places such as Lamu, or Isiolo, as discussed later in this report. Land tenure is important because it normally defines methods by which individuals or groups acquire, hold, transfer or transmit property rights in land. It has to do with how rights to land and other natural resources are assigned within societies, and just as it determines *who* holds *what* interests in *what* land.³ According to the Food and Agriculture Organization (FAO),⁴ the breadth of tenure rights in land may comprise three elements, mainly (a) use rights (to use the land for grazing, growing subsistence crops, gathering minor forestry products); (b) control rights (to make decisions how the land should be used including deciding what crops should be planted, and to benefit financially from the sale of crops); and (c) transfer rights (right to sell or mortgage the land, to convey the land to others through intra-community reallocations, to transmit the land to heirs through inheritance, and to reallocate use and control rights).

Equally critical are the mechanisms for community participation during the process of land acquisition, flowing from identification of land as project-suitable, feasibility studies, environmental assessments, and the process of verification and valuation for compensation. Participation in this case will lack meaningful impact if the affected people do not have knowledge of the details of the investment at hand, or clarity on the acquisition procedures or valuation methodology.

This research was undertaken in research sites in Isiolo, Lamu and Siaya counties, based on selection criteria that is set out in section 3.1.

3 Patricia Kameri-Mbote, "The Land has its Owners! Gender Issues in Land Tenure under Customary Law" (Paper presented at the UNDP-International Land Coalition Workshop: *Land Rights for African Development: From Knowledge to Action* Nairobi, October 31 – November 3, 2005) at 6. See also, Kameri-Mbote, "Land Tenure and Sustainable Environmental Management," *supra* note 23 at 262.

4 Food and Agriculture Organization (FAO), 2002, *Land Tenure and Rural Development* (FAO Land Tenure Studies 3: Rome, pp. 9-10

The utilization of focus group discussions and key informant interviews proved valuable in generating qualitative data that has been applied for analysis in this report. The line of inquiry focused on the tracking whether legal provisions for compulsory land acquisition and compensation, as well as community benefit from investments provided equitable opportunities in terms of socio-economic (participation, livelihoods) and environmental benefits. In addition, the status of landholding and land administration became apparent, especially the continued non-application of laws on land adjudication and registration in many areas of Kenya that now happen to be a focus for land acquisition and investments.

The research team paid particular attention to the mainstreaming of the roles of women in community processes, whether through formal and informal means, as one mechanism of testing equity. Community participation, on sum assessment, represents another form of equity with respect to giving voice to affected community members, and the research established both positive and negative outcomes. Giving voice to a community is important, and it has multiple facets, such as consultation, representation, access to information, and awareness. Working with consultation and representation, the specific problem of meaningful public contribution to decision making arises. This particularly regards how to ensure the design and outcomes of consultations that have impact on the threshold of decisions eventually made by public officers.⁵ With these considerations as a background, the next parts of the research report explain the methodology, and an analytical discussion of the results. A summary of the conclusions and findings is set out in section 9, in terms of policy level, and community level action recommendations.

5 Robert Kibugi, "Conceptualizing Regulatory Frameworks to Forge Citizen Roles 173 to Deliver Sustainable Natural Resource Management in Kenya" in Wouters, Jan, Alberto Ninio, Teresa Doherty, and Hassane Cissé, eds. 2015. *The World Bank Legal Review, Volume 6. Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability*. Washington, DC: World Bank, p. 172

1 Objectives of the research

Deriving from the research problem, the principal research objective was to explore the legislative and policy options that will entrench accountability of formal processes to protect interests of communities in circumstances of large scale land acquisitions.

The research was guided by the following specific objectives:

- (i) To review the current policy and legislative criteria for acquisition and granting of land for investment purposes in Kenya
- (ii) To examine the formal and procedural guarantees of accountability and legitimacy in the policy and new laws enacted to implement the 2010 constitution
- (iii) To explore and propose mechanisms of implementing social, economic and environmental safeguards for communities during acquisition of land for investment purposes

These objectives provided a basis for inquiry into the legal and policy dimensions that can enhance accountability and legitimacy for large scale land acquisitions especially in application of compulsory acquisition powers of the government, resulting in compensation, and in some cases, involuntary resettlement through displacement. The study also reviews how the livelihoods can be safeguarded, and using the experience of the farming investment on Yala Swamp, evaluates how community socio-economic and environmental benefits have been protected through contractual obligations, and equitable opportunities, and the effects of lack of trust between an investor, and the adjacent (host) local community.

2 Research methodology

The research methodology included defining criteria for research site selection, the sampling approach for respondents and focus group discussions, and the applicable research ethics. In addition, a qualitative research approach was adopted to guide the structure and system of data collection, and analysis.

2.1 Research site selection

This research was undertaken in research sites located in three counties that were selected on the basis of two criteria:

1. There having been a previous or ongoing process of large scale land acquisition for investments.
2. Previous or ongoing experience with community engagement and benefits from a large scale investment.

This approach resulted in the selection of three research sites, as follows –

- (i) **Siaya County**– This was in the area of Siaya County around the Yala Swamp, specifically that section that is subject to the Memorandum of Understanding (MoU) and lease agreement issued to Dominion Farms by the County Councils of Siaya and Bondo, in 2003. Here, the aim of the research was to assess the experience with this large scale land acquisition, including the continuing relationship between the investor and local community in terms of socio-economic benefits (jobs, farming skills transfer, etc) to the community.
- (ii) **Lamu County** –Lamu County is one of the primary counties where infrastructure for the LAPSSSET project will be set up. This involves the development of a new transport corridor from the new port at Lamu, with a road, railway line and pipeline through Garissa, Isiolo, Mararal, Lodwar, and Lokichoggio to branch at Isiolo to Ethiopia and Southern Sudan. This will comprise of a new road network, a railway line, oil refinery at Lamu, oil pipeline, and Lamu Airport. The scope of the proposed infrastructure has resulted in a need for large scale land acquisition. In addition, Lamu county has complex landholding arrangements with low levels of land adjudication and formal registration, thus with this research assessing these circumstances, it would generate valuable information on acquisition in a context without formal ownership. The specific research sites included Hindi

and Bargoni settlements. By the time of the research, the process of land acquisition for the road to Garissa had moved along in various stages, with some residents having received compensation, while others had just concluded the process of parcel identification and verification of claims.

- (iii) **Isiolo County** – In this county, the previous experience with land acquisitions for LAPSSET infrastructure (Isiolo airport), Isiolo-Moyale road, and anticipated arrival of other LAPSSET infrastructure and investments, were the basic selection criteria. Land acquisition for the expansion of the Isiolo airstrip into an international airport, for instance, had resulted in total displacement and involuntary resettlement of residents whose land had been taken but still resulted in questions on suitability of land given to them as compensation. Further, with selection of the area around Kipsing gap, as a suitable location for the Isiolo Resort city, the research provided valuable opportunity to examine how the system of land tenure and (pastoralist, farming, trading) livelihoods would interact with land acquisition and arrival of a different economic model. The specific research sites were Isiolo Town, Kiwanjani (airport area), Kambi ya Garba, Ngare Mara, and the community inhabiting the Kipsing Gap locality.

2.2 Research ethics

In undertaking the interviews, and conducting the focus group discussions, the research team was keen to apply a high standard of research ethics. For this reason, there was a structured ethics protocol to guide how respondents and focus group discussants were requested for their informed consent. This process involved a member of the research team providing an explanation of the project context to the respondent(s) or focus group participants, and illustrating the objectives. Further, there would detailed clarification of the role of the respondent or discussants in the research,

including the disclosure that the participants were under no obligation to take part in the research. Permission to audio-record the proceedings was sought, and this was given in all instances.

In addition, respondents were notified at the start of a session that any and all information they give will be treated confidentially and anonymously such that all reporting will be devoid of identity or immediate context that could lead to identification of the respondent. For this reason, any photography that discloses the identity of respondents or focus group participants has not been utilized in this report, but has been applied to support the observation technique of data analysis.

2.3 Sampling approach

In each of the research sites, the research team had set out to principally carry out qualitative research, guided by application of a combination of sampling approaches -

- a. First, for each of the three county locations, the team applied reconnaissance visits, including transect walks and guidance from pre-identified research assistants conversant with the local area and research issues. The purpose of this step was to assist in identification of specific research sites in each of the three (3) county locations. This activity was undertaken in Year 2 of the research, in 2014. In Siaya county, this resulted in guidance to focus the research inquiry in two localities: Yimbo, and Osieko, in order to speak with residents directly neighbouring the Dominion farms investments, and thus directly affected (Yimbo); and to explore the implications of adverse environmental, social and economic impacts of a community downstream that was totally left out of the investment design and is still struggling to find a solution (Osieko – Busia County). 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 still in process in certain parts, in Hindi Magogoni, and in

Bargoni (in this case the impacts of LAPSSET land acquisition and investments expected to affect a marginalized Kenyan community). In Isiolo, this approach resulted in identification of areas where the local community was previously impacted by land acquisition (Isiolo airport, Kambi ya Garba), challenging land tenure (Isiolo town, Ngare Mara).

- b. The approach in (a) was the basis for application of purposive sampling by selecting respondents and research sites based on their suitability to provide information responsive to the research objectives. The sampling also took into account whether this would provide an opportunity for the research team to interact with the local community, and through conversation and observation, obtain firsthand knowledge of the circumstances under which land acquisitions and investments implementation are undertaken. In this purposive sampling, the team applied an aspect of quota sampling, particularly in selection of focus group discussants. This was deemed important in context of rural and fairly patriarchal settings to ensure the participation of women, and youth in the focus group discussions, in order to provide a more holistic feedback to the research questions. Therefore, every focus group discussion group was selected and structured in a manner that ensure the participation of women, and in conducting the discussion, ensuring a balance to allow members to contribute equitably.

2.3.1 Purposive sampling of focus group discussions

The purposive sampling was further applied in the constitution of Focus group discussions – as follows:

1. Isiolo County – the focus group discussions were selected and structured as follows:
 - i) Isiolo Town – Business people and merchants, to discuss experience with, or anticipation of benefits from LAPSSET projects

- ii) Kiwanjani Settlement – Adjacent to Isiolo International Airport to review experience with land acquisition and displacement
 - iii) Kambi ya Garba community – along the Isiolo Moyale Road, and previously affected by acquisition for this road
 - iv) Ngare Mara community – this is community land along Isiolo Moyale Road, with reliance on water and pasture at the Kipsing Gap
 - v) Mlango-Kipsing community – directly reliant on this ecosystem for pasture and water
2. Lamu County - the focus group discussions were selected and structured as follows:
- i) Hindi Magogoni traders – to discuss their experience with, and anticipation of benefits from LAPSSET projects
 - ii) Hindi-Magogoni community affected directly by the land acquisition for the Lamu-Garissa road
 - iii) Bargoni community to discuss with the Aweer minority (and marginalized) community the implications of LAPSSET to community tenure, and experience or expectation of participation in land acquisition, and in the subsequent investments
 - iv) A prior scheduled focus group discussion with people who had previously received compensation for land acquired for the Lamu-Garissa road did not take off
3. Siaya County - the focus group discussions were selected and structured as follows:
- i) Nyamoney community at Yimbo who directly border the Dominion farms, and shared their experiences with (lack of) direct and meaningful benefits
 - ii) Obare community, at Osieku in Busia County to discuss their experience with direct and adverse socio-economic and environment impacts of the Dominion farm investments due to perennial flooding by water discharged by Dominion

2.3.2 Key informant interviews

In all the three research sites, in addition to the focus group, the research also conducted targeted respondent interviews. The research ethics requirement of anonymity places a constraint on the disclosure of these interviews in order to protect the identities of the respondents.

2.3.3 Supplementary snow-ball effect sampling

From the focus group discussions, and interviews with specific respondents, and as a result of the research team building trust and rapport, there was a snowball effect, with respondents suggest further individuals in the locality that might have valuable information, or ability to clarify certain issues. This snowball sampling was anticipated in the research methodology.

2.4 Research tools and data Collection

2.4.1 Research tools

The research applied two principal types of research tools:

- 1) Open-ended interview guides for purposes guiding discussions with individual respondents. These were designed as open-ended in order to allow room for the respondents to provide as much information, and to provide for the research team to pose the “why” and “how” questions valuable to qualitative research, and which would require the respondent to provide detailed input for analysis
- 2) Focus group discussion guides for purposes of framing the conversation in the focus groups. These were also open-ended, and designed to flow from basic context setting questions, and to include framing questions that required the participants to express opinions, while continuing the debate amongst the discussants. In addition, being open-ended allowed the discussants to also respond to “why” and “how” questions from the research team; and from each other.

2.4.2 Data collection approaches

The research applied a variety of data collection techniques, as demonstrated below –

(i) Qualitative research approach

The research applied a qualitative research approach, in order to undertake an in-depth investigation of the respondents' perception, views, and interpretation – in a specific non-generalized sense. Data was therefore obtained through non-empirical methods, using open-ended interview and focus group discussion guides, and there was no statistical testing of hypothesis.

(ii) Observation methodology

To enhance the qualitative data, and for validation of certain information, the research team applied participant observation skills. This included the passive interaction with the locale through transact walks in the research sites, with keen recording of observations. The research team further engaged in photography (as safely, lawfully and ethically permissible) to record observations. These were subsequently presented for discussion and assessment during team debrief sessions at the end of each field research mission. Some of the photographs have been applied in this report to demonstrate or amplify a specific point.

(iii) Focus group discussions

As explained earlier, the research utilized focus group discussions to allow for collection of qualitative data. The selection of participants was based on a combination of purposive and quota sampling. Table 1 below illustrates the basic structure of how the focus group discussions were conducted.

Table 1 : Basic structure guide for conducting focus group discussions

(i)	Informed Consent and confidentiality guidance for participants
(ii)	Obtain consent before recording proceedings
(iii)	Prepare FGD guide and discuss with note taker beforehand
(iv)	Each session had a facilitator, who in terms of the research ethics and method had to be neutral to any sentiments expressed by participants. In addition, the Facilitator -
	a. Followed the prior agreed upon structure of types of questions to allow smooth flow of discussion: Types of question: Main question (objective, set the tone), Follow-up (one that encourages discussion), probing (seeks to elicit specific outcome (only when sufficient camaraderie has been built in the FGD). No leading questions were allowed (e.g would you know why your neighbor would have hired someone to slash your cows at night?) – to avoid complicating relationships between the discussants
	b. Was required to apply clarity in the introduction of topic – in simple language (consider use of technical terms, and use of an interpreter)
	c. Was required to be -
i.	Accommodative to all discussants - no right or wrong answers
ii.	Firm – to avoid dominance of discussion by some
iii.	Talk less, listen more
iv.	Firm – to control limited time available
v.	Watch out for platitudes and compliant responses (i.e. give the facilitator what they expect, not the actual circumstances)
vi.	Always be nudging and facilitative to responses in a manner to encourages participants to continue speaking
vii.	Each session had a dedicated note taker, as well as audio-recording (the latter was approved in all FGDs). In each case, the Note Taker -
	a. Held a briefing discussion with the facilitator before the session to agree on how to proceed, ground rules (e.g. whether Note Taker can intervene to ask clarifying questions?)

	b. How to use the FGD guide to structure notes but pay attention to any variations during session.
	c. Include conduct or behavior of respondents (albeit anonymously) in the notes – to provide useful context for analysis
(vi)	The research team held mandatory collective debrief session after the FGD in order to collate various thematic issues, and discuss key findings and identify need for immediate follow up questions
(vii)	The discussion facilitator would, when necessary, deploy participant observation methodology during FGD – e.g direct non-verbal behavior of participants
(viii)	The exclusive use of open-ended statements and questions in order to trigger further conversation amongst discussants

(iv) Key informant interviews

On the basis of the sampling procedure described above, the research applied open-ended interview guides. Where permission was granted, the team recorded the interview with the key respondent, with the undertaking to protect confidentiality, and report anonymously. One or more members of the research time was allowed to lead the interview process, with other members joining in with clarification or follow-up questions.

2.5 Data analysis methodology

The data analysis methodology applied qualitative research techniques. This followed the process set out below:

- (i) Detailed listening (several times over) to the audio recordings of the interviews, and focus group discussions; comparative review with the handwritten notes.
- (ii) Identification of the principal and sub-principal thematic issues arising from the recorded (including notes) of interviews, and focus group discussions.

- (iii) Reviewing the research questions with the thematic issues to test responsiveness
- (iv) Identification of a data coding system based on the outcome of (ii) and (iii) above. In this case, the coding approach taken was as follows:
 - a. Landholding and administration
 - b. Practice of land acquisition
 - c. Practice of property valuation during land acquisition
 - d. Framing of community benefits from investments
 - e. Framing of environmental impacts from investments
 - f. Typology and practice of public/local community participation in the continuum (land acquisition to investment participation) of large scale land acquisitions for investments
- (v) Analysis of the data, including application of knowledge from secondary literature, alongside the coding approach.

3 Land tenure: Local community experience with land administration and tenure security

The Constitution of Kenya, through Article 40, provides and protects the right to acquire and own any type of property, including land, in any part of Kenya. This provision is an important link between property rights, and the compulsory acquisition of land by the Kenyan State for public purposes, or in the public interest. According to article 40(3(b)), where lawfully held property such as land is acquired for a public purpose, or in the public interest, the State shall promptly provide payment of just compensation, in full, to the affected person.

Against this background, it is clear that the discourse around large scale acquisition of land, for investment purposes, raises significant questions on how the land tenure rights of the affected communities are protected. This is because entitlement to compensation and/or resettlement depends a lot on existence of legal (and possibly other legitimate) rights to land, although in certain cases, loss of livelihoods is also compensated. Clear land rights that are well defined, properly allocated, and clearly protected through formal or informal systems can enhance the voice of the affected community in the entire process of land acquisition, including the role of that community, in the investments that are being introduced.

Therefore, land rights, and the level of clarity of these rights are important to setting a strong foundation for equity through enhancement of the voice of the local community during the entire process. The prior definition of what amounts to security of tenure is thus important. This tenure security is subsequently very important to the question of compensation and involuntary resettlement of people that have been displaced when land is acquired for large scale investments, particularly through compulsory acquisition by the government.

There are three categories of land in Kenya: public, private and community land. Typically, the acquisition of public land for purposes of investments should be uncomplicated, particularly where the land is unalienated and unoccupied. However, it does happen, as this report will later show, that public land maybe unalienated, but be occupied either by persons otherwise classified as squatters (lacking clear legal rights), or by a community that claims traditional rights over such land, but whose interests over such land have not been adjudicated or determined. In this latter case, the occupying traditional community may have granted secondary rights to third parties from outside that community – who have then staked a claim on the land through many years of development activities (farming, erection of structures, etc) that add to the value of the land. The analysis below demonstrates the challenges that arise where formal land administration systems are either weak or absent.

3.1 Land administration: Absence of formal land adjudication and land registration mechanisms

In this section, the dichotomy of the assessment focuses on experiences obtained from communities’ resident in Lamu and Isiolo counties, along the LAPSSSET corridor.

3.1.1 Landholding, land administration and transactions within Hindi, Lamu County

3.1.1.1 The local context

Hindi division, was selected for the research because it is an area where land has been earmarked for, and surveyed for the new 254 kilometre road running from Lamu to Garissa, as part of the LAPSSSET Corridor.

Image 1 – Photography of a survey beacon marking the boundaries of a portion of the Lamu Garissa road that has already been compulsorily acquired



Land has also been acquired for the new Lamu Port, and according to LAPSET plans, further infrastructure, including an oil refinery are planned there. Plans are also at an advanced stage to build a new 900MW coal power plant within a settlement called *Kwa Sasi*, within the same area.

Much of the land, although occupied and utilized, was technically classified as public land. Many settlements have emerged, such as Roka A and Roka B, the former colloquially referred to as *witemere* – a word, which, in the Kikuyu language literally means “take for yourself”. In other words, it’s a place where unalienated and unoccupied public land has been informally taken up and sub-divided by the local community, and many people have “added value” through planting of trees for timber and fruits, as well as food crops. In this context, the formal land administration mechanisms (such as surveying, and issuance of title deeds) have not been undertaken, and as a result, an informal land administration system has emerged to provide some sense of tenure security, and to allow for local sale and purchase of interests in land.

3.1.1.2 The practical operation of landholding, administration and land market

Focus group discussions disclosed that interests in land are recorded in simple local registration books that are in the custody of local elders, and the validity of a transaction *overwitemere* type of land is evidenced by recording in the local registration book, together with an official stamp by the national government administration officers (e.g the area chief or sub-chief). This validation by the chief is not a formal act required by law, but rather reflective of the position of legitimate authority the chief is deemed to possess, in the local community. It is notable that residents indicated that the notion of who is an elder has evolved contemporaneously to include people not considered native to Lamu but who have lived there for a long period and are considered an integral part of the local society.

In order to determine the size of the parcel, an informal type of surveying is undertaken *through the use of steps*, where 70 steps by 70 steps is deemed to equal one (1) acre of land.

The sale and purchase of land in this informal system is locally referred to as *kurudisha gharama* a Swahili word that literally means “returning the cost”. This amounts to a tacit admission by the local community that absence of formal title documents diminishes “legal ownership” and this act of *kurudisha gharama* is interpreted that the person “purchasing” the land is not actually buying the interest in the land but rather paying back the “seller” the considered full cost of improvements and developments so far undertaken on the land in question. These improvements are demarcated to include trees, (semi)-permanent structures, crops, or the level of clearance of previously virgin forestland. Thus when in the local market, people speak about the value of land being pegged, for instance, at Kshs. 200,000 per acre, they mean that the payment is for the developments and improvements undertaken on that acre of land. In practice though it amounts to an informal attempt at conveyance of interests in land.

In spite of this seemingly advanced informal system of land administration and conveyancing, focus group discussions disclosed that the absence of formal

public law systems does indeed lower the already tenuous security of tenure. This is particularly acute in the period after verification and identification of land affected by the LAPSET Lamu-Garissa road, because of speculative land acquisition tendencies. In this context, residents disclosed that “*kukosa cheti*” (lack of a title deed) was likely to result in a parcel of land “being grabbed” by other people with more economic or political influence, who in turn stand in line to get compensation. The phrase “being grabbed” here means that someone other than the current occupant/claimant acquires a formal title deed for the parcel, and becomes holder of the legal right to compensation. Focus group discussions illustrated cases where residents of many years without title documents had experienced instances where people come and install a fence on their residences or farms, and in certain cases, bring in groups of young men to violently demolish homes and evict the residents.

In such an environment, the notion of voice or equity for the person whose land is grabbed is significantly compromised. This set of circumstances gave rise to another phenomenon where focus group discussants reported their belief that possession of title deed would reinforce the sense of security of tenure. This belief was expressed mainly by focus group discussants that possessed unregistered (and therefore technically public) land, and it persisted despite evidence that even those people allocated land in settlement schemes could have their land grabbed, as evidenced by a specific case of a resident in a settlement scheme in Hindi.⁶ Settlement schemes in Kenya refer to land the government identifies or acquires and subsequently settles people on through a mortgage payment system previously administered by the Settlement Fund Trustees,⁷ and title documents are

6 As a result of anonymity considerations, the details of this case cannot be disclosed to protect the identities of the parties concerned.

7 The Settlement Fund Trustees were established by the Agriculture Act, Cap 318 (now repealed) Laws of Kenya as a tool for resettlement of Kenyans in organized schemes for farming purposes. This has been replaced by transfer of the power to establish settlement schemes to the National Land Commission, which at section 134 of the Land Act 2012 is given powers to establish settlement schemes for provision of access to land to squatters, persons displaced by natural causes, development projects, conservation, internal conflicts or other such causes that may lead to movement and displacement. Section 135 of the Land Act (as amended in 2016) creates a Land Settlement Fund, that is administered by a Board of Trustees, to provide loan capital for those interested in purchasing land in settlement schemes.

only issued once the full cost of the land, plus conveyancing charges are paid by the occupant/beneficiary. Thus, in this case, although the occupant/beneficiary reported having met all the conditions, the title document was issued to a senior public servant who served in the area at the time. This situation remains a conundrum as the occupant retains possession while the title documents and registers reflect that the land belongs to a different person. Nonetheless, and despite this one extreme example, residents involved in focus group discussions demonstrated a belief that government supported formal adjudication and registration of land, with issuance of title documents, will protect people from land grabbing. This suggests that the informal land administration and conveyancing system in Hindi Division, Lamu County, has potentially reached its operational limits and formal systems are required to protect ascertain, and protect property rights in land.

3.1.2 Landholding and administration within Bargoni/Bordhei, Lamu County

3.1.2.1 The local context

Within Hindi division, but further north toward the Kenya- Somali border, is Bargoni, which is situated along the Hindi-Kiunga road. The main town is called Bordhei. This area is occupied by a minority community called the Aweer (or Boni), who are classified as an indigenous community, although in Kenyan legal terms, indigenous communities are part of *marginalized communities*.⁸ The Aweer are a pastoralist community, who also engage in small-scale farming using basic tools (hoes, machetes/pangas) with no sophisticated mechanization. A basic and common economic activity includes the sale of livestock (cattle, goats), and bee keeping. The research held one focus group discussion at a primary school in Bordhei, that brought together local leaders, and ordinary residents drawn from amongst the

8 See the definition of a marginalized community, and a marginalized group, in Article 260 of the Constitution of Kenya, which includes a “an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy.”

Aweer resident in Hindi and Kiunga divisions of Lamu County. This is a very traditional and conservative community, and it was remarkable that two women participants provided very valuable insights of their experiences with landholding within the community. Some context is important. One was a young woman, born locally and quite well educated – and the meeting was told she was part of the community as she was still unmarried. The other female participant was married. This latter woman member of the community was very eloquent and articulate, but at several times, this appeared to agitate some of the more elderly and conservative members during the focus group discussions, including a brief exchange of words. Nonetheless, the larger group of community members in the discussion demonstrated a high level of confidence in this member, and supported her entitlement to express opinions.

3.1.2.2 The practical operation of landholding and administration

Focus group discussants disclosed that, among the Aweer, land is perceived as belonging to the community. There had not been any detailed attempts by the government to adjudicate the land in favour of individuals or the community, and because of nomadic pastoralism whereby much land could be left to lie fallow to grow pasture, the local community were apprehensive that speculators could assume the land had no owners. The one attempt to register part of the land that the community claimed as their own involved the registration of an entity called a “self-help ranch” which basically was the creation of a Community Based Organization (CBO) called the *Bargoni Boni Community Ranch Initiative*. During discussions, it became clear that focus group discussants that were members of this group did not really know the legal meaning or implications of the registration as a CBO.

Two legal challenges arise from this approach. First, the entity referred to as a CBO is an administrative (not legal) creature created by the government to provide a simplified mechanism for self-help groups. The purpose of using a CBO is that it helps to avoid the complex legal requirements, for instance,

of incorporating of a society, or a company. The principal legality of a CBO arises in the form of a Constitution agreed to by all the members to govern their relationship within the CBO, and as a result, the Constitution provides a basic contract amongst the CBO members to pursue their common objectives. Second, by the time of incorporation of that CBO, there was in place a national law, the Land (Group Representatives) Act,⁹ which had been enacted to provide a legal mechanism for registration of land rights claimed by a community on the basis of ancestral rights (community land), and the incorporation of a group ranch. The term group ranch colloquially refers to the entire community that has tenure interests in the particular land but legally, the land is registered in the name of group representatives, who are twelve (12) individuals selected by the community to hold the land in trust, and administer the affairs of the group ranch. In the *Bargoni Boni Community Ranch Initiative*, there are approximately 563 members but the land is actually registered in the names of 12 representatives. Here is the challenge. Under the Land (Group Representatives Act), (now repealed by a new 2016 Community Land Act), although the land is registered to the group representatives, this is done with the group representatives as a corporate (one) entity that enjoys perpetual succession. This means that if one group representative (out of the 12) were to die, because of the legal impact of perpetual succession, the land does not form part of the estate (for inheritance by his family) of the individual group representatives but rather the title automatically transfers to the next group representative(s) elected to replace the deceased one. The same automatic transfer would happen where a new set of group representatives were elected – and as a consequence did not require the fresh registration of the new group representatives as title holders.

With the exception of the community ranch, it was evident that many among the Aweer view failure by government to adjudicate land rights as another form of marginalization. Discussants recorded other instances of marginalization by the Kenyan State to include lack of a hospital, or an all weather (asphalt) road. In their view, the clear ascertainment of land

9 Cap 287, Laws of Kenya (now repealed by the 2016 Community Land Act)

rights through an adjudication and registration process would be necessary before the community could accept any resettlement/compensation for LAPSET projects. The ascertainment of land rights, even in the form of community land, was considered important because it would ensure that any compensation benefits, or resettlement programme would be directed at the correct families or individuals.

3.1.3 Landholding and administration within Isiolo County

3.1.3.1 The local context

Within Isiolo county, the research focused on two principal areas with respect to the question of land administration. This was the area within Isiolo town, including the Airport area, and Ngare Mara. The Isiolo town area field work included focus group discussions, and interviews with select respondents. A key finding was that land within Isiolo county was classified as trust land and as was provided for under the Trust Land Act,¹⁰ before the land reforms brought by the 2010 Constitution, allocation was overseen by the then County Council of Isiolo. Within the town area, focus group discussants, and respondents reported that there had been no title deeds issued, although land was routinely surveyed and allocated to private persons. The procedure involved the issuance of letters of allotment to identified beneficiaries. This would be followed up with survey and the preparation of leases for a term of years or freehold title deeds. However, the research established that Isiolo town faced a serious problem of *multi-allocation* of land where a single parcel of land could be allocated to two or more persons at the same time, or through subsequent allocations. In other cases, the problem was compounded where residents were allocated plots, but were not issued with allotment letters. The use of Part Development Plans (PDPs) to drive the *ad hoc* planning and allocation of pockets of land within Isiolo is said to have compounded this problem – and is addressed further, later in this analysis.

10 Cap 288, Laws of Kenya (now repealed by the 2016 Community Land Act)

3.1.3.2 The practical operation of landholding and administration

Ngare Mara is a community resident within Isiolo County, and although they refer to their land as a group ranch, it had not been adjudicated in the manner required for group ranches, a process that would commence through the Land Adjudication Act¹¹ in order for a freehold title deed to be issued once the land was registered to the community, and the governance arrangements incorporated under the Land (Group Representatives) Act.¹²

Community members indicated that despite absence of formal surveying and registration, they had been implementing localized land administration system, and had elected a *community land committee* that determined how various families and individuals were allocated parcels. They had also identified common areas and set them aside for community use, such as the market centre, school, and an area for a health centre. However, community members lamented that the failure to adjudicate the land formally as community land had previously caused problems, such as during construction of the Isiolo-Moyale road when part of their land was taken by government as a stone quarry to provide road construction material, and after the road works were finalized, there was no rehabilitation to the land, which had now become a problem because of water logging, and injuries to livestock and people. Perhaps jokingly, members of the community participating in focus group discussion intimated that they would not recognize a title deed, even if they saw one lying on the ground. But this perhaps expresses well their frustration and impatience for an adjudication and registration process. Further, they lamented that although they “had heard” on radio, or through other fora that Kenya had new land laws in place, they did not really know the content of these laws, and would want to have some form of civic education on this, especially on community land, and community rights during land acquisition, preferably through members of their community.

11 Land Adjudication Act, Cap 284 Laws of Kenya

12 Cap 287, Laws of Kenya (now repealed by the 2016 Community Land Act)

4 Law, policy, institutional context and practice: Compulsory acquisition, involuntary resettlement and displacement

The process of large scale land acquisitions for investment activities means that people will likely be subjected to involuntary resettlement or displacement, and be entitled to receive prompt and just compensation, payable in full, as required by the Constitution, and the 2012 Land Act. This is so when land acquisitions happen within the framework of compulsory acquisition by the government, either for a public purpose, or in the public interest.

4.1 The legal context of compulsory acquisition

Public purposes, as defined in section 2 of the Land Act,¹³ include activities that may be undertaken by public or private entities, and in the latter case, land maybe taken by the government, and given to a private entity for development.

According to the Constitution (article 40(3)), there must be prompt payment of full and just compensation, whenever property is compulsorily acquired for a public purpose, or in the public interest. In terms of the Land Act, the procedure for compulsory acquisition is undertaken by the National Land Commission (NLC), at the request of an agency of the national, or county governments. In practice, it is the agency that is requesting for compulsory acquisition that undertakes the process of identification of the relevant land,

13 Section 2, Land Act: “public purposes” means the purposes of – (a) transportation including roads, canals, highways, railways, bridges, wharves and airports; (b) public buildings including schools, libraries, hospitals, factories, religious institutions and public housing; (c) public utilities for water, sewage, electricity, gas, communication, irrigation and drainage, dams and reservoirs; (d) public parks, playgrounds, gardens, sports facilities and cemeteries; (e) security and defence installations; (f) settlement of squatters, the poor and landless, and the internally displaced persons; and (g) any other analogous public purpose.

including verification of those people with an interest over the land, public consultations, (including developing a Resettlement Action Plan (RAP), where applicable), and budgeting the money for compensation, for approval by the NLC – which then undertakes a formal inquiry on compensation, as required by section 112 of the Land Act.

The compulsory acquisition of land, especially for large scale investments and development activities, particularly for large projects, may present challenges of involuntary resettlement, and displacement for affected communities. This means that in application of justice and equity, it is necessary to go beyond the mere legal procedures of compulsory acquisition. This requires drawing in safeguard measures to enhance consultations with affected communities, establish eligible legal rights or other claims, address the impacts on livelihoods, and the question of displacement when applicable.

In the Kenyan legal system, a law was enacted by Parliament in December 2012, and came into force in January 2013 to address protection of persons that have been internally displaced by among other reasons, development projects, and internal strife. This law, the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (The IDP Act), is the closest Kenyan legal safeguard on involuntary resettlement caused by development projects. This is in addition to environmental safeguards, including Strategic Environmental Assessments, and Environmental Impact Assessments, that are required for most development projects, by the Environmental Management and Coordination Act (EMCA).

The IDP Act defines an internally displaced person to mean a person or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, large scale development projects, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.¹⁴ According to this law, the displacement and relocation of people

14 Section 2.

due to development projects shall only be lawful if justified by compelling and overriding public interests,¹⁵ and it construes public interest, in context of development projects as, “large-scale development projects for the benefit of, the people of the Republic as whole, including persons displaced by such project.”¹⁶ More significantly, this law provides a much higher threshold for displacement caused by development projects, than that set out in the procedure for compulsory acquisition in Part VIII of the Land Act. The IDP law leaves displacement and relocation due to development projects as permissible only in “exceptional cases” that are lawful, and (a) justified by compelling or overriding public interests, and (b) no feasible alternatives exist.¹⁷ In addition, prior to giving effect to the displacement and relocation of people for a development project, the IDP law requires the government to:

- (i) Obtain the free and informed consent (FPIC) of the affected persons; and
- (ii) Hold public hearings on the project planning¹⁸

The application of an FPIC process is a fairly high threshold, particularly as it emphasizes on the quality and meaningfulness of participation, including the impact that views obtained during consultations have on the final decision. Equally critical is the decision to vertically integrate the process by requiring the consultation of the affected public during project planning. In the sense of feasibility studies, and project designs, this suggests that community participation may add value to the process by being conducted much earlier on in the process, and contribute to analysis of project sites, and alternatives.

The challenge with this legal provisions is twofold. One, there have been no subsidiary legislation enacted to guide the process of undertaking FPIC,

15 Section 6(3)

16 Section 2.

17 Section 21(2)

18 Section 22(1)

or consultations through public hearings. Two, although the IDP law sets the legal threshold rather high by requiring displacement and relocation to be permissible in exceptional cases, such as where no feasible alternatives are set, there are no guidelines on implementation. Third (partly related to two), the IDP law does not have any direct linkages with the institutional mechanisms and structures established under the Land Act to address compulsory acquisition, which is the main mechanism applied by the government to acquire land for development projects serving a public purpose, or in the public interest. Indeed, the IDP law only recognizes “public interest” and places a higher value that public interest must be “compelling” or “overriding.” As such, it appears because of these reasons, the IDP law has not been applied to guide procedure providing safeguards where people are displaced by development projects.

4.2 Reviewing the practice of land acquisition procedures in the research sites

Participation of the communities affected by land acquisition for a large scale development or investment is important. This is not least because in Article 10 of the Constitution, public participation is set out as one of the principles and values of national governance, that are binding, when implementing legislation, or making a public policy decision. Community participation may take the form of consultations about the land acquisition process, or on the nature of the project; it may also take the form of community representation in the decision making process. Equally important to community participation is the provision of awareness on both the project, and the procedure and expected outcomes of the land acquisition process, especially whether it will result in compensation only, or include displacement, with resettlement forming part of the compensation. Further, the community should have access to all pertinent information regarding the development activity in question, including on the land acquisition process that will likely have significant impacts on their livelihoods. In this section, the research reviews how community participation (consultation, representation, awareness and

access to information) manifested itself in the land acquisition process for LAPSET infrastructure.

4.2.1 Evidence of positive community participation in the land acquisition process – the case of Lamu

In Lamu County, the context of inquiry regarding land acquisition focused on the new road to be constructed from Mokowe in Hindi, cutting through Bargoni and on to Garissa County. Based on LAPSET plans, there is anticipation of further land acquisition for purposes of the oil refinery, and the railway line. By the time of the field research in May - July 2015, the process of verification with respect to the road had been undertaken, and it is this context we analyse to provide valuable insight on the practice, and whether the voice of the affected community is heard. Compensation had earlier been paid for acquisition for the road in some parts, but the research did not succeed in speaking to individuals who had been compensated in that phase.

Nonetheless, within Hindi, with the experience concerning land acquisition for the road, many people involved as focus group discussants or respondents reported apprehension that having been asked to give up 100m of land for the road, the possible acquisition of a further 100m for the railway line and pipeline could take up all of the remaining land, and result in displacement, and involuntary resettlement in more unsuitable places. Respondents disclosed that they “had heard” about the components of the LAPSET infrastructure in Lamu, including the refinery, and railway, and had seen evidence of works on the port being undertaken. However, there was no evidence of any concerted or organized effort by concerned government agencies to engage directly with the affected local communities in providing details.

Within Lamu, for purposes of the road to Garissa, the process of land acquisition for the road was undertaken by the Kenya National Highways Authority (KENHA). Consultants engaged to undertake this process were utilizing a policy mechanism commonly referred to as a Resettlement Action

Plan (RAP). Under Kenyan law, both the IDP Act, and the Land Act, there is no provision for utilization of a RAP during compulsory acquisition of land.

The use of a RAP during land acquisition is a global best practice that is widely applied, particularly as a condition where project financing is provided by multilateral banks, such as the African Development Bank, and the World Bank. Otherwise referred to as safeguards, the World Bank for instance applies Operational Policy No. (OP) 4.12 on Involuntary Resettlement, which requires preparation of a RAP to identify specific risks of involuntary displacement, resettlement and compensation. Where the anticipated risks are unclear, a Resettlement Policy Framework (RPF) is first prepared, with a RAP being conducted once the project details are clearer for assessment and analysis.

The process of developing this Resettlement Action Plan intended to identify land for compulsory acquisition to make way for the Lamu-Garissa road, and particularly the 100m required directly for the road and associated infrastructure. Based on interviews and focus group discussions, the RAP process involved the formation of a *local compensation committee* comprising individuals (male and female) representing: Hindi Magogoni scheme; Roka B (Witemere); Roka A; Bogo; and Bargoni. The members of this committee, whose membership included two women, were identified by the chiefs, and selected by the Assistant County Commissioner for Hindi. Research evidence demonstrated that the utility of the committee was in helping in mobilization of the affected community during consultation meetings – at which both the community’s knowledge and understanding of the LAPSSET project was discussed, as well as the process of land acquisition that would be followed, up to actual surrender of land to government, and compensation. Thus, the local committee was instrumental in helping to build trust between the project affected community, and the experts undertaking the RAP processes, thus magnifying the voice given to the local community to equitably participate in the process.

Identification of the land suitable for the road (i.e land abutting the position of the road on the project maps) was undertaken with the assistance of the local committee. This involved a process referred to as “kuandikisha” (recording) of interests over the affected land with the committee before actual verification was done. The verification process was conducted in two steps. Because of the fact discussed earlier that land (except in Hindi Magogoni settlement scheme) has not been formally adjudicated and therefore has no title deeds, the RAP process utilized what they referred to as the “majirani concept”, i.e. relying on the neighbours (*majirani*) to confirm whether the claimant is genuine or not. In this case, they asked everybody that claimed an interest on land affected by the road to physically turn up and stand on their parcels of land. In this case the “majirani” (neighbours) would verify if that was the actual person or an imposter. Where the verification was clear, the interest over the land was recorded for consideration for compensation.

There were instances where no one turned up to lay a claim of their interest on some parcels, and no verification information could be provided by the neighbours. In such cases, there is no option to confirm ownership from formal land registration records because the land has not been formally adjudicated and registered to the individuals in possession, but rather has been traded through the informal mechanisms described above. Thus, where no verification was possible during the RAP process, some claims have been brought later, but since the RAP process is closed, they remain pending, and will need to be resolved prior to payment of compensation. Most likely, the statutory inquiry mandated by section 112 of the Land Act, to be undertaken by the National Land Commission ahead of any compensation payment will be the best mechanism to address such matters. This Lamu example is helpful for two reasons. First, it demonstrates an instance where the local community consulted for this research had a consensus that the consultation process in identifying and verifying interests in land was constructively participatory. Second, this is one clear example where article 40(4) of the Constitution is applied, to allow for compensation to be paid to persons who do not hold legal title to land that is the subject of acquisition.

4.2.2 Evidence manifesting challenges with community participation in the acquisition process

Within Isiolo county, community participation is manifested by reviewing the process and community experience with land acquisition for expansion of the then Isiolo Airstrip to an international airport; and the acquisition of land for expansion of LAPSSET infrastructure (road, railway and pipeline). Focus group discussions, and respondent interviews were undertaken in three sites: Isiolo airport area; Kambi ya Garba; Ngare Mara, and Mlango-Kipsing area.

4.2.2.1 Community experience with land acquisition and displacement, for Isiolo Airport expansion

Isiolo airport is a valuable research location because land acquisition for purposes of the airport has been undertaken, and resettlement been implemented, therefore helpful in evaluating the process of acquisition, and the level of community participation. Lessons can then be applied to anticipated land acquisition elsewhere in Isiolo for the LAPSSET project. The need to acquire land for the airport became apparent in 2004 when the Kenya Airports Authority (KAA) wrote to the then Isiolo County Council, and the then Meru County Council:¹⁹

“In keeping with the Government commitment to the development of air transport infrastructure in the country, it has been proposed that the present airstrip at Isiolo be reconstructed and be upgraded into an airport. As you all know, this airstrip was badly neglected and eventually closed for all flight operations. Consequently, the region was deprived of air transport despite its economic potential particularly for beef and miraa industry. The feasibility study carried out by the task force appointed for this purpose has established that the runway is too short and narrow for heavy commercial aircraft. Therefore, it will require expansion so as to accommodate these types of aircraft and bring it to the standard required by the International Aviation Organization.

19 Copy of letter dated 17 August 2004, by the then Managing Director of the Kenya Airports Authority, Mr. George Muhoho.

The purpose of my writing is to make a formal request for the land shown on the attached plan be set aside for the expansion of the Isiolo airstrip.”

This matter was subsequently discussed by the Isiolo County Council in December 2004, as recorded in official Council meeting minutes, with Councillors arguing that since Isiolo district (as it then was) “is a trust land, the innocent law abiding members of the public should not just be moved out of their land without giving them alternative sites.”²⁰ Presumably, the innocent members of the public referred to by the Council would be those people with legitimate letters of allotment issued by the same Council, and who have paid up all the rates. The problem here lies with how the same Council had been implementing issuance of allotment letters. First is the problem of double or triple allocation, as discussed earlier. Second, as it emerged from focus group discussions, has to do with people who were invited by the Council to ballot for land, and had the plots indicated (shown) to them, but were not issued with allotment letters. Some of these people reported that they continued to pay rates, but others said that without allotment letters, they did not make rate payments.

In Isiolo, the process of allocating parcels of land to various persons or institutions is preceded by the preparation of a Part Development Plan (PDP) over the subject land, which maps out the development aspects (such as infrastructure, land uses, utility needs, etc), and uniquely identifies the subject site, in relation to other existing plots, for allocation. A Part Development Plan can be used to introduce planning detail, hence amend, the Local Physical Development Plans required with respect to urban areas, under the Physical Planning Act.²¹ Thus a PDP is a plan prepared with respect to a small part of a place that had already been planned. With respect to double or triple issuance of allotment letters over the same parcel of land in Isiolo, residents that participated during focus group discussions,

20 County Council of Isiolo (December 2004) Minutes of the Special Full Council Meeting Held on 16 December 2004 in the Council Chamber at 12:58pm, p 6.

21 See the procedure and requirements for Physical Development Plans in Part IV, Section 16-28

or as respondents, reported that PDPs have contributed immensely in undermining security of tenure previously conveyed by the allotment letters. This is because, as the research learnt, where anyone wanted to re-assign, re-allocate (or grab) land in a certain section of Isiolo, they would issue a new PDP, on which basis new letters of allotment would be issued to new people – thus pitting the new allotment letter holders, against those previously issued. In this case, the legal right to the land is so complex and unclear, that in a process of compulsory acquisition, and compensation, it will be complicated to determine who is the correct person entitled to compensation.

Research evidence revealed that for the airport expansion, residents were only given resettlement as the only option, without any cash payments for compensation. For this purpose, three resettlement sites were identified: Kiwanjani, Mwangaza, Chechelesi 1 and 2. Based on a review of the focus group discussions, and minutes of the Isiolo County Council meetings available to the research,²² the process involved identification of the resettlement area noted above, the preparation of a PDP to support the allocation of the plots, and invitation of the community members affected by the project to “ballot” for plots in the identified resettlement area. Community members disclosed that they were not directly represented, as project affected persons, in the process of identifying alternative resettlement areas, or even in preparations for the ballot, which were all undertaken by the Isiolo County Council. The only form of representation was through the Councillors, who were the representatives to the local government. The resettlement commenced in July 2008 in the Mwangaza area. In the Kiwanjani area, 450 plots had been balloted for but 150 of these fell on developed areas, and the persons were shifted to Chechelesi 1. Similarly, in Chechelesi, according to Council minutes, and focus group discussions, there was a significant squatter problem in that some of the plots being balloted for were already occupied. Community members were of the opinion that if they were represented in the committees identifying the resettlement areas, they would have known of the problem.

22 Isiolo County Council, minutes of Full Council Meeting held on 22 October 2008 as from 11.00AM.

The airport resettlement effort is principally closed since, at the time of writing, the airport has been approved for flight operations. However, community members in neighbouring areas expressed apprehension that the disconnect between themselves, the airport authorities and the Isiolo County government (which replaced the County council in 2013) continued to pose risks to their tenure security. Evidence gathered from focus group discussions disclosed that residents neighbouring the airport had a boundary dispute with the airport authorities, and were apprehensive that their land could be targeted for future acquisition, or that their use of the land could be inhibited by the continued reference of the land as being part of the airport complex. To demonstrate the basis of this apprehension, residents provided letters written to the KAA –

Excerpts from Letter to KAA by Plot owners in *Kiwanjani Zone G Squatterin* May 2008 (when the land acquisition process was underway) – Dated

That all the plots are developed ... with the owners and their families living there

That the said plots were not in the area earmarked for the proposed airport ...

That even when the County Council was doing the relocation and allocation of alternative plots for those whose plots were affected by the proposed airport, we were not considered, since as the County Council authorities told us, our plots were not within the affected margin.

That when your people came to do the fencing of the proposed airport they tried to annex the said plots. However when we raised alarm and notified our leaders i.e. the area chief and the Councillors, they informed the Engineer on site where the boundary of the airport ended, and also passed our grievances to the District Commissioner Isiolo and to the County Council. After thorough scrutiny of the map in County Council records, they found our complaints genuine and the District Commissioner notified your (KAA) people on the ground, and your people telephoned you on the same

That despite this, on 2/5/2008, your people seemed to ignore this advise and appear eager to continue fencing the disputed side but our leaders stopped them again.

Therefore this is to request you humbly to give this matter the necessary attention before it is too late in order to save us from further anxiety and unnecessary tussle.

This letter is dated 2 May 2008, and the authors (affected plots owners) refer to consultative meetings they held with their leaders (Councillors), the District Commissioner Isiolo. They further refer to a map that ascertains their position that their homes and properties were not part of the land to be acquired for airport expansion. The “map” in question is a Part Development Plan (PDP), No. 117/96/70 of 1996, which on visual assessment, discloses that the assertion of the residents is accurate. However, residents indicated that a 2006 map of Isiolo town showed plots in *Kiwanjani Zone G Squatter* as partially forming part of the airport land despite the fact that there is a 75 feet road between the airport land, and the plots in question. According to the affected residents, in a 2015 letter addressed to the Chairperson of the National Land Commission:

Despite constant reminders and requests, concerned authorities have remained silent. This is causing unnecessary tension to the plot owners in the referred to section. Therefore we are appealing and petitioning your esteemed office to have the amendment done without further delays to avoid unnecessary conflict.²³

4.2.2.2 Community experience with land acquisition for road expansion in Kambi ya Garba

The foregoing disconnect appears to persist as evidenced by a situation concerning land acquisition for other LAPSET infrastructure within Isiolo County. The research undertook focus group discussions within an area

23 Letter dated 6 July 2015 by Plot Owners from Kiwanjani G Squatter zone in Isiolo to the National Land Commission

called “Kambi ya Garba” which is along the Isiolo-Merille Road. The residents had a lot of positive outlook and remarks regarding the development of infrastructure, since in their experience, construction of the Isiolo Moyale Road had resulted in many positive developments, with enhanced transportation and market access for their livestock and other produce, increased value for their properties, and other opportunities. They happily informed the research that in 2003, members of the community led a large-scale lobbying effort for tarmacking of the Isiolo-Moyale road, including participation in an awareness walk, all the way from Moyale to Nairobi (over 750 kms), and this effort was successful. In the ensuing period where construction of the new road was being undertaken, community members indicated that they happily agreed to resettlement in order to pave way for the new expanded road, and did not seek any form of compensation. However, in the period since commissioning of the new road, people had developed “their” properties, including construction of permanent (mainly stone) structures, and businesses. Nonetheless, at the time of the research mission, residents complained that in late 2014, to early 2015, the Kenya National Highways Authority (KENHA) had commenced a process of land acquisition for expansion of the road reserve on the Isiolo-Moyale road passing through Kambi ya Garba.

According to the residents participating in the research, KENHA surveyors had come in the company of police officers, and had forcefully accessed homes, and proceeded to take surveying dimensions, and install concrete beacons. There had been no prior notification, or any consultations and residents reported that they only learnt from the surveyors that their homes were considered to be part of the road reserve, and since none of the residents’ possess title deeds, this was not classified as land acquisition, but rather was eviction from a road reserve. As such, the beacons were installed insider fenced homes to notify the residents the points from which they should move their structures, or face demolition. Legally, KENHA might be right, but this situation presents the classic example why safeguard mechanisms are useful.

Image 2 – Photography showing a beacon installed in the middle of a fenced compound



Based on observations by the research team (Image 1), the affected plots were those fronting the Isiolo-Moyale road. With the installed beacons, about 50-100% of the affected parcel would be affected by the expansion of the road reserve. The plots behind those fronting the road (2nd, 3rd, 4th row) are all occupied, fenced and developed by different owners. Therefore, continuation of the road reserve expansion by KENHA would result in displacement of the current residents, and since this has been termed by KENHA as being an eviction, not land acquisition, there would neither be compensation nor resettlement. The problem with this approach is that in the years since the road was constructed, residents had been allowed to continue occupying the land, and to develop and add improvements to various standards, while KENHA could have taken the steps earlier to effectively remove the people before they invested both money and livelihoods in the plots and homes.

On 30 January 2015, KENHA issued an eviction notice²⁴ requiring residents to demolish or remove their properties from the encroached land within 30 days. Failure to do so, according to the letter, would result in KENHA undertaking evictions and demolitions without further reference to the affected persons. The 55 affected residents filed a suit against KENHA at the Environment and Land Court (E&L Case No. 11 of 2015) seeking to stop the imminent eviction and demolition of homes and properties, and secured an injunction. By the time of the research mission, the hearing of the suit was still pending, and residents were required to contribute Kshs 3,000 each for the first phase of the legal suit, which they considered expensive and unnecessary.

A significant disconnect was evident between the residents, and the government agency, KENHA. The residents reported that KENHA officials on the ground had told them that the extra land was required for expansion of the reserve in order to make room for the railway and pipeline. In addition, they reported being told by KENHA officials involved in the surveying that since their land was government land, there would be no compensation. However, KENHA, in the eviction notice does not indicate any such reasons – and this research was unable to verify whether this was the case.

24 Kenya National Highways Authority, Notice of Intended Demolition/Removal of Encroachment on Classified Road Reserves on Class A, B and C Road along the Isiolo-Merille Road (A2). Ref: KeNHA/P&E/RRPU/VOL.3/033.

5 Compensation during compulsory land acquisition: The legal entitlement and methodologies of land valuation

Article 40 of the Constitution, which provides the basic right to property ownership, also clearly indicates that if such property was acquired for a public purpose or in the public interest, there should be prompt payment of full, and just compensation. The exception is found in Article 40(6) limiting this protection for “any property that has been found to have been unlawfully acquired.” In its provisions on compulsory acquisition, section 111 of the Land Act provides that “if land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.” The operating phrase here is “... all persons whose interests in the land ...” Section 2 of the same law defines “interest” to mean “a right in or over a land.” Therefore, the question arises whether a right in this context strictly means a legal right, or encompasses any other kind of entitlement that may not require strict legal grounding.

A legal right would technically, in the Kenyan context, mean the registering of the land in the name of the claimant, as can be evidenced in the Land Register. Also, perhaps someone with a legal right in matrimonial property; or a legal right in land arising from inheritance, or perhaps a legal charge (mortgage). Traditional communities, such as the Aweer in Bargoni (Lamu) or the Turkana community in Ngare Mara (Isiolo), who have historically occupied and utilized the same land for generations, have a legal right, despite the lack of adjudication and registration. However, the other category of interests in land discussed earlier, concern persons in occupation of land and either, do not have any formal registration documents (Hindi), or have challenges with the reliability of allotment letters, as was the case in Isiolo.

5.1 The conundrum of compensation in the absence of formally registered legal interests in land subject to compulsory acquisition

The Constitution, in article 40(4) anticipates the existence of instances where people may have possession to land, without holding title, and directs that *provision may be made for compensation to be made to occupants in good faith of land acquired under clause (30, who may not hold title to the land.* This clause is innovative and important because as seen in both Lamu, and Isiolo, the formal adjudication and registration of land has been slow, despite Kenya have legislation for land consolidation,²⁵ land adjudication²⁶ and registration²⁷ in place for several decades since independence in 1963. Jon Lindsay, a World Bank Senior Counsel specializing in acquisitions and resettlement argues that such a provision (as in article 40(4)) is important because quite often compulsory acquisition presumes a level of documentation of land rights that may, in fact, not exist.²⁸ Thus some laws, as seen of the Land Act above, may tie eligibility to compensation narrowly to whether the land is formally registered, which could be problematic given that only a fraction of land in a country could actually be registered, principally attributed to existence of formal land registration laws but no full implementation caused by socio-political, capacity and financial and other constraints.²⁹ Thus, too strict application of a “registered-interests only” rule to compensation could result in many interests going uncompensated

25 Land Consolidation Act, Cap 283 Laws of Kenya.

26 Land Adjudication Act, Cap 284 Laws of Kenya.

27 Land Registration Act, Cap 300 (now repealed), Registered Titles Act, Cap 281 (now repealed), Land Titles Act, Cap 282 (now repealed). All these statutes were replaced in 2012 by the Land Registration Act.

28 John Mills Lindsay, “Compulsory Acquisition of Land and Compensation in Infrastructure Projects” PPP Insights, An Explanatory Note on Issues Relevant to Public-Private Partnerships Vol. 1, Issue 3, August 2012, p. 5

29 John Mills Lindsay, “Compulsory Acquisition of Land and Compensation in Infrastructure Projects” PPP Insights, An Explanatory Note on Issues Relevant to Public-Private Partnerships Vol. 1, Issue 3, August 2012, p. 5

or under-compensated,³⁰ which is an absurd outcome that could result in hardships and suffering for affected persons.

From the foregoing review, documenting the status of land tenure rights, and adjudication of tenure rights in Kenya, it emerges that there are many instances in Kenya where people have possession over land but without holding registered legal title to land. This maybe on account of failure or delay in adjudication and formal registration, or as in the case of Lamu, a situation of extensive self-allocation of land, and the emergence of an informal land market. Lindsay, reviewing such scenarios, argues that “informal occupation of land in many settings is not a matter of choice but of necessity, induced by poverty, exacerbated by inaccessible land markets and poorly functioning planning regimes, and in some cases condoned and encouraged by authorities.”³¹ He further notes that while a full legislative embrace of the notion that squatters should be compensated is perhaps unlikely to occur in most countries, there is a growing trend on the part of governments to adjust law and practice to deal with the individual and societal consequences associated with the displacement of informal occupants.³²

Perhaps dealing with individual and societal consequences of displacement or loss of livelihoods was the intention of the framers of article 40(4) of the Constitution. An interpretation of the Constitution suggests that the operative phrase here is “... occupants in good faith ...”This of course represents a broader legal interpretation than that taken by the Land Act which limits itself to those persons with an interest/right over land. It is

30 John Mills Lindsay, “Compulsory Acquisition of Land and Compensation in Infrastructure Projects” PPP Insights, An Explanatory Note on Issues Relevant to Public-Private Partnerships Vol. 1, Issue 3, August 2012, p. 5

31 John Mills Lindsay, “Compulsory Acquisition of Land and Compensation in Infrastructure Projects” PPP Insights, An Explanatory Note on Issues Relevant to Public-Private Partnerships Vol. 1, Issue 3, August 2012, p. 6

32 John Mills Lindsay, “Compulsory Acquisition of Land and Compensation in Infrastructure Projects” PPP Insights, An Explanatory Note on Issues Relevant to Public-Private Partnerships Vol. 1, Issue 3, August 2012, p. 6.

however important to note that the possible inclusion of persons without title is a discretionary provision in the Constitution as clear with the use of the phrase “provision may be made”. The scope of how this provision is implemented presents difficulties, and it is important to provide a normative context by reviewing how application of resettlement safeguards systems has been undertaken.

5.2 Comparative review of entitlement to compensation approach by Kenyan law and World Bank resettlement safeguards

World Bank OP 4.12, the Safeguard policy on involuntary resettlement provides room for compensation to be provided for persons that do not hold a direct legal title. A review of the text does not indicate any requirement for good faith, although a reading of good faith could be useful to avoid payment of compensation to persons who occupy land for speculative purposes with knowledge of anticipated land acquisition. OP 4.12 can provide a helpful reference point to implement article 40(4) of the Constitution in context of non-registration of land due to government fault or delay; as well as occupation of land by squatters in a situation of government apparent tacit acceptance of the situation. The eligibility for compensation under OP 4.12 extends to three categories –

- a) those who have formal legal rights to land (including customary and traditional rights recognized under the laws of the country)
- b) those who do not have formal legal rights to land at the time the census begins but have a claim to such land or assets—provided that such claims are recognized under the laws of the country or become recognized through a process identified in the resettlement plan
- c) those who have no recognizable legal right or claim to the land they are occupying.

Persons covered under para (a) and (b) are provided compensation for the land they lose; while persons covered under para (c) are provided resettlement assistance in lieu of the land they occupy, which may consist of land, other assets, cash, or employment. Eligibility for this resettlement assistance depends of whether persons in (c) above occupy the project area prior to an established cut-off date and persons encroaching after the cut-off date are not entitled to compensation or resettlement assistance. Persons who encroach on the area after the cut-off date are not entitled to compensation or any other form of resettlement assistance. All persons included in para (a), (b), or (c) are provided compensation for loss of assets other than land.

The question of the “cut-off” date is important here. In the now repealed Land Acquisition Act,³³ which preceded the 2012 Land Act, the question of the cut-off date was addressed as the “before the date of publication in the Gazette of the notice of intention to acquire the land.”³⁴ The Land Act makes a similar provision that “upon approval of a request ... the [National Land] Commission shall publish a notice to that effect in the Gazette and the county Gazette, and shall deliver a copy of the notice to the Registrar and every person who appears to the Commission to be interested in the land.³⁵ Upon service of the notice, the registrar shall make an entry in the register of the intended acquisition.”³⁶ This provision is important in order to establish a hard-marked line for fixing the value of the land, once the intention to acquire has been made public. This, especially in Kenya, is important to address the question of speculative acquisition or occupation of land, whether by persons that acquire legal title (in speculating a profit from acquisition) or squatters. The cut-off date can be applied even where no legal title exists, with application of a good faith system, that may use legal and community participatory means (such as seen in Hindi, Lamu) to verify who has a valid interest over the land in question.

33 Cap 295, Laws of Kenya (now repealed).

34 Section 3, schedule to the Act

35 Section 107(5)

36 section 107(6)

Thus from the foregoing, the interpretation of eligibility for compensation in terms of article 40(4) of the Constitution could be taken to extend to para. (b) and (c) of OP 4.12, so long as the good faith clause is fulfilled. One way of framing the good faith clause is through setting up of a cut-off date, thus ensuring that speculative occupants of land are locked out of the compensation process. Another way is through the process anticipated in para (b), which involves commencing a process of recognizing existing non-legal rights, and providing a mechanism of converting these into formal legal rights. This is a method that is particularly helpful for the circumstances reviewed above in Hindi, Lamu county, particularly the settlements around Roka A and Roka B (*witemere*). Para. (b) of the World Bank Safeguards Policy above provides a “regularization path” through which the government can apply the same system that the RAP process used to ascertain the interests (including the holder) and provide a system for recognition of legal rights.

5.3 Compensation: The valuation methodologies and community perception of value

This question on the methodology of valuation to guide compensation is important, and arose several times during field research, especially in Lamu and Isiolo. In the absence of clarity on how the valuation is being done, community perceptions and expectations of how their land and assets will be valued could present challenges to the actual process. Relevant to this context is the debate on the methodology that should be applied to value land identified for acquisition; versus the standard of compensation: whether land-for-land, land-for-cash, part land and part cash, and the complex question of livelihood compensation in addition to the value of the land and developments on it.

5.3.1 Community perception of the value of land that is subject to compulsory acquisition

In the case of expansion of the Isiolo airport, as previously noted, land acquisition was undertaken in settlements such as Kiwanjani G (light

industries), and people were resettled in other settlements: Mwangaza, Chechelesi 1, and Chechelesi 2. In this case, the government opted to apply land for land compensation which involved total displacement of people and their resettlement in new areas. A common complaint by those affected was that the selected settlements for resettlement, particularly Chechelesi 2, were distant from Isiolo town, did not have supporting infrastructure or utilities and they considered it unsuitable for a trade-off with their land that was taken over by the airport. In one case, there was a family whose home was still standing inside the Isiolo airport perimeter fence as they had declined to relocate to the assigned plot in Chechelesi 2, because in their opinion, it was not adequate or commensurate to their pre-displacement circumstances.

In one focus group discussion in Hindi, Lamu County, a discussion ensued among the participants on the value of the land and assets, and how much cash compensation they expected from land acquisition for the Lamu-Isiolo road. Many discussants argued that valuation should be at Kshs 1,000,000 per acre of land in Roka B (*Witemere*). The key question here, posed to the discussants, is the method they had applied to arrive at that valuation. This was an important question considering the market rate for land (bearing in mind the informal land market here) in *Witemere* was in the range of Kshs 100 - 200,000 per acre (in terms of *kurudisha gharama* i.e. paying compensation for developments). Three important findings arose from the discussion. First was that the higher valuation (Kshs 1,000,000) given by community members was pegged on local market the appreciation of the value of the land that resulted from knowledge that government was about to undertake acquisition, and as such there were more third parties willing to purchase the land ahead of the acquisition – i.e. land speculation. This raises the question about how to communicate details to the community, without providing compromising information that allows certain people to purchase land and speculatively push the prices up. In addition, the question of an appropriate cut-off date for valuation arises. Secondly, the community was of the view that despite not having formal title documents

to the land, they were entitled to compensation for value added to the land, especially developments such as trees, houses and other investments. They particularly pegged a high level of importance to the fact that over the years, they had built a fairly mature and advanced farm-based socio-economic livelihood system that would be disrupted once the land was taken, and farm sizes reduced. Third, despite being a community directly affected by compulsory acquisition of land, the affected people did not have any knowledge or details of how the valuation is undertaken in order for the compensation amounts to be determined.

The notion of valuation in Bargoni, among the Aweer community had an important addition to it, further to cost of the land, and compensation for lost land-based livelihoods. Focus group discussions made reference to the notion of value in two unique senses. The first had to do with value of customary traditions, particularly the treatment of sacred burial grounds that would be affected by the LAPSET infrastructure such as the road. In their opinion, in order to fully accept the possibility of giving up land/resettlement, they would want to have a ceremonial process for removal and relocation of burial grounds incorporated into the land acquisition process, presumably as a safeguard. As it was put to the research team this would ensure that the ancestors (past generations) received their share of compensation. Second, the Aweer indicated a preference for the land acquisition process to consult them on safeguard mechanisms to protect livelihoods from destruction, and securing better quality of life from the pre-project days, in order to secure better circumstances for future generations. In the context of future generations, the Aweer argued that in adjudication and surveying of their land for compulsory acquisition, they would prefer that a significant portion of the land in question was set aside for use by future generations, in order to maintain an ancestral home, and linkage to the land-based economy and socio-cultural practices.

5.3.2 Applicable technical methodologies for valuation of land during compulsory acquisition

As stated earlier, compensation for compulsory acquisition of land may take various forms: land-for-land, land-for-cash, part land and part cash. Cash payment is a method preferred where only a portion of the land belonging to project affected persons is acquired, and therefore total displacement does not occur. Exchange of land with land is a method applied where the acquisition of land is total, or where the remaining portion is no longer economically viable. In this case, the outcome is involuntary resettlement causing displacement, and thus the compensation involves resettlement of the displaced person in a place where value of land is commensurate, including replacement of infrastructure and livelihood systems. Cash for land is preferred where there is no displacement resulting from the acquisition, such as the illustration in Lamu where only a breadth of 100m of land was taken, as opposed to the Isiolo airport which involved displacement and resettlement.

A particular concern arises because of the applicable methodology of valuation in order to arrive at the monetary quantum of compensation. First, there is the common application of a cut-off date, which under Kenyan law is placed on the effective date of publication of the intention to acquire land in the Kenya Gazette. Second is the contrast between two conventionally used methods of valuation: (i) Fair market approach, and (ii) The Full Replacement Cost Approach

5.3.2.1 The fair market price approach

The legal baseline for compensation under compulsory acquisition schemes, as set by the Constitution, is the “prompt payment of just compensation.” Lindsay argues that “a common legislative approach is to define market value as the amount a willing buyer would pay a willing seller on the open market

where some choice exists.” The current Land Act in Kenya is silent about the applicable valuation method, and requires the National Land Commission to put in place regulations to guide the process of compensation.³⁷ However, the Land Acquisition Act, repealed by the Land Act in 2012, in its Schedule set out detailed “principles on which compensation is to be determined.” Those principles were part of the principal legislation, and got repealed at the same time. However, in the absence of an explicit declaration that Kenya has adopted an alternative valuation methodology, these principles are explored here as guidance on application of the fair market value approach to determining compensation.

Section 1 of the principles sets the definition of “market value” in relation to land to mean “market value of the land at the date of publication in the Gazette of the notice of intention to acquire the land.” Key here is the linkage of the market value to the cut-off date, and applying the prevailing “willing buyer to willing seller” rates as of the appointed cut-off date. Lindsay argues that this approach to calculating market value might not work in a given setting because of an absent/weak formal market, and even where the informal market discloses a market price, the government maybe unwilling to follow this.³⁸ The discussion recorded above, from a focus group discussion in Hindi, Lamu, where the community argued the going market rate of Kshs 1,000,000 while the resettlement team viewed the market value at between Kshs 100,000 to 200,000, is illustrative of this dilemma.

Section 2 of the schedule to the repealed Land Acquisition Act spells out matters to be considered in determining the amount of compensation, in addition to the market value. The repealed acquisition statute applied a totality approach, indicating only those listed considerations, and no others, would be eligible for consideration. These matters included:

37

38 John Mills Lindsay, “Compulsory Acquisition of Land and Compensation in Infrastructure Projects” PPP Insights, An Explanatory Note on Issues Relevant to Public-Private Partnerships Vol. 1, Issue 3, August 2012, p. 7.

- (i) Damage sustained or likely to be sustained by persons interested at the time of the Commissioner³⁹ taking possession of the land by reason of severing the land from his other land (*such as loss of income or livelihood from the part of the land identified for compulsory acquisition in the period since acquisition and formal possession by government*).
- (ii) Damage sustained or likely to be sustained by persons interested at the time of the Commissioner taking possession of the land by reason of the acquisition injuriously affecting his other property, whether movable or immovable or in any other manner or his actual earnings (*such as adverse impacts on the socio-economic interests of the landholder in the remaining land, arising from circumstances caused by acquisition of the land*)
- (iii) If in consequence of the acquisition, any of the persons interested is or will be compelled to change his residence or place of business, reasonable expenses incidental to the change (*such as the costs arising from involuntary resettlement caused by displacement*)
- (iv) Damage genuinely resulting from diminution of the profit of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the commissioner takes possession of the land.

Section 111 of the Land Act requires the National Land Commission to make rules, in the form of subsidiary legislation, to regulate the methodology for assessment of just compensation. With the Schedule to the Land Acquisition Act now repealed, and with the Commission not having yet put in place the regulations, it is not clear, at least in the law, which methodology should

39 The term Commissioner refers to the Commissioner for Lands, an senior administrative position established by the now repealed Government Lands Act, and now replaced by the National Land Commission.

be applied, as the Land Act does not make reference to the Market value approach.

The Land Act nonetheless provides that a final award by the Commission (after the holding of an Inquiry where affected persons are heard), shall be considered to be conclusive of:⁴⁰

- (i) The size of the land acquired,
- (ii) The value, in the opinion of the Commission, of the land; and
- (iii) The amount of compensation payable, whether persons interested in the land have or have not appeared at the inquiry.

In (ii) above, reference to the “value, in the opinion of the Commission,” suggests presence of discretion for the Commission to determine the value, but without clear reference to the Market value or other methodology, there is still a gap in the law. The same conundrum arises, where the Commission may elect, with the consent of the affected landowner, to apply the land-for-land approach. According to section 115(2) of the Land Act “... may agree with the person who owned that land that instead of receiving an [presumably cash] award, the person shall receive a grant of land, not exceeding in value the amount of compensation which the Commission considers would have been awarded.” In this instance that agreement would be considered final. The challenge here arises because in this case, only land-for-land is given, without any consideration for other losses, such as to livelihood, or business or others tangible or intangible interests that are not land. In the case of Tanzania, the Village Land Act, and the 2001 Village Land Regulations⁴¹ made thereunder, provide for consideration of “unexhausted improvements” to land. These unexhausted improvements are defined to mean:

40 Section 113.

41 Village Land Regulations (Tanzania) 2001, made under section 65 of the Village Land Act, Chapter 114.

“... any thing or any quality permanently attached to the land directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf and increasing the productive capacity, the utility, the sustainability or the environmental quality thereof and includes trees, standing crops and growing produce whether of an agricultural or horticultural nature but does not include the results of ordinary cultivation.”⁴²

These Tanzanian definition is quite similar in scope to the principles set out for consideration in determining the compensation under the Schedule to the repealed Land Acquisition Act. In terms of the methodology of valuation for compensation, the 2001 Tanzanian Village Land Regulations adopt the market value approach as the basis for assessment of the value of any land, and unexhausted improvements. The regulations (made pursuant to the Tanzania Village Land Act) then provide a fairly unique methodology on how to arrive at the market value, making explicit provision that the market value of any land and unexhausted improvements shall be arrived at by:

- (i) The use of comparative methods evidenced by actual recent sales of similar properties; or
- (ii) The use of income approach, or replacement cost method where the property is of special nature and not saleable.

The key difference here is the Tanzanian law has sought to bypass one challenge occasioned by the comparative methods preferred in the typical market value approach, by providing means to overcome barriers that arise in cases where for instance, the land market is not strong or developed, or perhaps an informal market (as seen in the Kenyan case in Lamu) that lacks a formal reference point on willing seller to willing buyer prices. The replacement cost approach is an alternative valuation method, which has in fact been applied by the World Bank for land acquisition and valuation for projects being executed in Kenya under World Bank financing, and is analysed in the next section.

42 Section 2, Tanzania Village Land Act, Chapter 114.

5.3.2.2 The full replacement cost approach

The analysis of the Full Replacement Cost approach in this section, as an alternative or hybrid option to the Market Value approach, is primarily premised on the World Bank OP 4.12, and its application to Kenya. Under this Operational Policy, displaced persons should be provided with prompt and effective compensation at full replacement cost for losses of assets attributable directly to the project. Further, if the impacts include physical relocation, the resettlement plan or resettlement policy framework, required by OP 4.12, should include measures to ensure that the displaced persons are:

1. Provided assistance (such as moving allowances) during relocation; and
2. Provided with residential housing, or housing sites, or, as required, agricultural sites for which a combination of productive potential, locational advantages, and other factors is at least equivalent to the advantages of the old site.
3. Where necessary, displaced persons could be offered support after displacement, for a transition period, based on a reasonable estimate of the time likely to be needed to restore their livelihood and standards of living. Such support includes short-term jobs, subsistence support, salary maintenance, as appropriate.

Table 2 below illustrates a comparative analysis of the application of OP 4.12 together with Kenyan law in the process of compulsory acquisition and compensation.

Table 2: Comparative analysis of the application of OP 4.12 together with Kenyan law

COMPARATIVE ANALYSIS OF WORLD BANK OP 4.12 AND KENYA'S REQUIREMENTS RELEVANT TO THE PROCESS

Table 3: Comparative Analysis of World Bank OP 4.12 and Kenya's requirements Relevant to the Process

Category of PAPs and Type of Lost Assets	Kenyan Law	World Bank OP4.12
Land Owners	Fair and just compensation which could be in form of cash compensation or Land for Land	Recommends land-for-land compensation. Other compensation is at replacement cost
Land Tenants	Constitution says that 'occupants of land' entitled to some level of pay in good faith. Land Act stipulates that they are entitled to some compensation based on the amount of rights they hold upon land under relevant laws. However, those who acquired land illegally not entitled to any.	PAPs are entitled to some form of compensation whatever the legal/illegal recognition of their occupancy.
Land Users	Land Act not clear on Land Users although in some cases they can receive some form of compensation depending on the determination by NLC	Entitled to compensation for crops and investments made on the land; livelihood must be restored to at least pre-project levels.
Owners of Temporary Buildings	The constitution of Kenyan respects the right to private property and in case of compulsory acquisition, just compensation must be granted to the owner for the loss temporary buildings.	Entitled to in-kind compensation or cash compensation at full replacement cost including labor and relocation expenses, prior to displacement.
Owners of Permanent buildings	The constitution of Kenyan respects the right to private property and in case of compulsory acquisition, just compensation must be granted to the owner for the permanent building	Entitled to in-kind compensation or cash compensation at full replacement cost including labor and relocation expenses, prior to displacement.
Perennial Crops	Just and fair compensation for the loss of crops	As per specifications of this RPF, once approved by the Bank and disclosed at the Bank info shop,

Source: Resettlement Policy Framework, Kenya Water Security and Climate Resilience Project, March 2015.

It is important to note the provision in the World Bank Safeguard policy requiring that prompt and effective compensation should be paid at full replacement cost. This, although in different legal terms, has the same legal effect as the constitutional use of the phrase *prompt payment in full, of just compensation*. Although the word *compensation* is used extensive in the Land Act provisions on compulsory acquisitions, the statute does not provide an operating definition in its interpretation section. Indeed, section 111 provides for implementation of article 40(3)(b) of the Constitution and provides that -

(1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

(2) The Commission shall make rules to regulate the assessment of just compensation.

As observed earlier, at the time of writing, the National Land Commission (NLC) is yet to make rules to regulate the assessment of just compensation.

The operative question here revolves around whether adoption of the full replacement cost approach would be helpful in Kenya, as an alternative to the Market Value approach, or in conjunction with it?

According to Lindsay, the replacement cost, in ideal conditions, would shift attention usefully to the calculation of what it would really take in a given market to replace assets; and in the event of non-land assets such as housing and other improvements, the replacement cost approach would ensure that the depreciation of lost assets are not taken into account in the calculation of compensation, and the transaction costs associated with purchase of new (replacement) assets, are also taken into account.⁴³

A practical interpretation of the “replacement cost” approach to valuation, in context of its application in Kenya, is for illustration purposes drawn from a March 2015 Resettlement Policy Framework (RPF)⁴⁴ prepared by the Ministry of Water and Irrigation for implementation of a World Bank funded infrastructure project, Kenya Water Security and Climate Resilience Project (KWSCR).⁴⁵ Being a project implemented with World Bank financing means that implementation of land acquisition, compensation and resettlement must apply a hybrid of OP 4.12, and Kenyan laws, with the balance falling on World Bank safeguards where Kenyan law is deemed insufficient. It therefore provides a current illustration of how the “replacement cost” methodology of valuation has been applied in Kenya for land acquisition under the Land Act 2012, and under the authority of the NLC.

In this concept, the Market value approach is applied in hybrid with replacement cost considerations. Thus, according to the RPF, where the replacement cost approach is applied for agricultural land, it is the pre-project or pre-displacement, whichever is higher, market value of land of equal productive potential or use located in the vicinity of the affected land,

43 John Mills Lindsay, “Compulsory Acquisition of Land and Compensation in Infrastructure Projects” PPP Insights, An Explanatory Note on Issues Relevant to Public-Private Partnerships Vol. 1, Issue 3, August 2012, p. 8.

44 See detailed KWSCR RPF: http://www.environment.go.ke/wp-content/uploads/2015/03/KWSCR_PPF_REVISED-DRAFT-RESETTLEMENT-POLICY-FRAMEWORK-RPF-MARCH-2015.pdf

45 See KWSCR project details: <http://www.worldbank.org/projects/P117635?lang=en&tab=overview>

plus the cost of preparing the land to levels similar to those of the affected land, plus the cost of any registration and transfer taxes. In the case of houses and other structures, it is the market cost of the materials to build a replacement structure with an area and quality similar to or better than those of the affected structure, or to repair a partially affected structure, plus the cost of transporting building materials to the construction site, plus the cost of any labor and contractors' fees, plus the cost of any registration and transfer taxes. Thus 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. In addition, the replacement cost takes into account all the transaction costs of purchasing (conveyancing fees, etc), or logistical costs of replacement non-land assets.

In absence of compensation assessment regulations, as required by the Land Act, and with the Land Acquisition Act (including the instrumental Schedule setting out applicable compensation principles) having been repealed, there is need for publicly available clarity on the applicable methodology. From an assessment, it appears that the non-land asset replacement methodology described above is more favourable to project affected communities. The market value approach set out in the Replacement Cost is not very different to the approach in the repealed Land Acquisition Act, and the Tanzania Village Land Regulations, base the market value approach on an assessment of "recent" comparable market price, whereas the repealed Kenyan law relied on a cut-off point, which in essence could amount to "recent." The principal difference of the World Bank OP 4.12 from the Kenya context, in placing market value, is where in context of agricultural land, it applies the pre-project or pre-displacement comparative price, and adds "the cost of preparing the land to levels similar to those of the affected land ..." Thus, even where informal or weak markets may complicate valuation of land due to lack of a clear reference point, adding the cost of improving the new land to the level of the taken land, to the market value, will theoretically ensure that the affected community gets a higher and equitable valuation of their property.

5.3.3 The legal implications non-compliance with the requirement for just compensation in a prompt manner

The question of prompt payment is addressed by the statutory requirement in the Land Act for the National Land Commission to make payment of interest on the amount awarded as compensation.”⁴⁶ In 2016, the Land Laws (Amendment) Act, has modified the applicable interest rate from from prevailing commercial bank rates to “the prevailing base lending rate set by the Central Bank of Kenya.”⁴⁷ This clause is intended to encourage the National Land Commission to expedite the payment of compensation promptly or risk payment of interest, which in the terms of section 117 of the Land Act, should be deposited in a special escrow account. However, the modification of the applicable rate from prevailing commercial bank rates to the Central Bank base lending rate is presumably intended to control the cost of the interest, since Central Bank Rate (CBR) is lower than commercial bank rates, as the 2016 Banking (Amendment) Act,⁴⁸ sets the commercial bank rates at 4% above the CBR.

46 Land Act, 2012, Section 117

47 Land (Amendment) Act (2016), section 79, amending section 117 of the Land Act 2012.

48 Section 33.

6 Exploring alternatives to compulsory acquisition by creating a continuum between economic planning and physical planning

A principal challenge to the process of compulsory acquisition from respondents to this research concerned the presentation of investment project sites as a *fait accompli*; a finality of site selection that cannot be changed. Indeed, during field research, the team experienced phrases such as “we have heard” of the project; “we have not seen the details”; “we have no information on the route or actual location of the project.” Thus, the affected community only gets wind of the process if a RAP is being conducted, and in other cases, upon publication of a Gazette notice declaring intention to acquire specific land. Part of the problem in this context relates to government desire to control speculative acquisition of land that results from disclosure of the actual location of the project before setting a cut-off date, which escalates market value. However, this desire while in the public interest, is contrasted against the need for ensuring there is equity and a meaningful voice given to the affected community in the project preparation, ahead of the start of land acquisition.

There are two possible approaches:

6.1 Examining the utility of potentially affected communities participating in preparation of feasibility plans

The structuring of the LAPSSET project, as an illustration of investments megaprojects that result in compulsory acquisition of land, is derived from Sessional Paper No. 10 of 2012 on Kenya Vision 2030, and further structured through the various Medium Term Plans for Vision 2030 implementation. Thus, in essence, this megaproject and its derivative components, are the outcome of economic planning. However, subsequent to the economic plans, it is typically necessary to undertake first a pre-feasibility study, and then a feasibility study. A pre-feasibility study usually includes a range of options for the technical and economic aspects of a project, and is used to justify continued exploration, or attract financing.⁴⁹ The overriding aim of

49 <http://investingnews.com/daily/resource-investing/prefeasibility-feasibility-studies/>

a pre-feasibility study is to select the preferred option, the base scenario, for the project development, and this base scenario is developed further to attract financing, and justify a full feasibility study.⁵⁰ A feasibility study on the other hand, is intended to evaluate whether a project is possible, both technically and financially.⁵¹ Additionally, feasibility studies are used to help determine whether a project will be profitable.⁵² Considerations during a feasibility study may include outlining alternatives; and identifying risks and establishing if they can be mitigated, and how to mitigate.⁵³ The technical and economic considerations of a feasibility assessment also identify risks that could inhibit successful implementation, or that can be mitigated.

In order to enhance the voice of the community ahead of any process of land acquisition, it may be helpful to integrate a constructive and meaningful process of consultation with potentially affected communities, when undertaking feasibility studies. This would particularly aid in providing value on local circumstances and risks that may not be obvious to technical teams. Further, it would provide a valuable avenue through which the [potentially] affected local community can enhance its voice by having an opinion (which is taken into account) early on in the stages of the project design. However, this approach would also require protection from speculative behavior, that could result in an artificial increase in market value of land, due to market behavior triggered by anticipation of a project, and land acquisition. A helpful approach would be to undertake the feasibility studies focusing on multiple alternative sites, without showing preference for any particular site. An additional value of enhancing the role of the feasibility studies through community participation is that the final study could form the basis of conducting a Strategic Environmental Assessment (SEA) early on in the project concept, and at that point, address a variety of concerns around environmental and social impacts, including those of compulsory acquisition, such as involuntary resettlement causing displacement, or disruption of the local economy

50 <https://www.caseyresearch.com/resource-dictionary/definition/preliminary-feasibility-study-pre-feasibility-study>

51 <http://investingnews.com/daily/resource-investing/prefeasibility-feasibility-studies/>

52 <https://www.extension.iastate.edu/agdm/wholefarm/html/c5-65.html>

53 <https://www.extension.iastate.edu/agdm/wholefarm/html/c5-65.html>

and livelihoods. The legal scope of an SEA includes "... plans, programmes and policies that are subject to preparation or adoption by an authority at regional, national, county or local level",⁵⁴ which suggest that economic plans that conceive this complex projects could be subject to review. It may also be necessary to expand the scope of the law since feasibility studies maybe undertaken by a non-government entity.

6.1.3.1 A medium term to long term strategy to enhance the utility of spatial planning to locate investment spaces into physical development plans

The second approach proposed here involves enhancing the connectivity between economic planning and spatial planning in Kenya in order to have a prior determination of how space will be used. While this may not entirely eliminate the need for acquisition of occupied land, some predictability could be introduced, or investment activities could be directed to the less occupied but suitable parts of Kenya, thus reducing the human impact of compulsory acquisition, including through displacement. Under the Physical Planning Act, there is provision to develop both regional physical development plans (rural areas),⁵⁵ and local physical development plans (urban areas).⁵⁶ The purposes of these two types of plans are instructive:

[Excerpts from the Physical Planning Act]

Regional Physical Development Plan -

[Section 16] - (1) A regional physical development plan may be prepared by the Director with reference to any Government land, trust land or private land within the area of authority of a county council for the purpose of improving the land and providing for the proper physical development of such land, and securing suitable provision for transportation, public purposes, utilities and services, commercial, industrial, residential and recreational areas, including parks, open spaces and reserves and also the making of suitable provision for the use of land for building or other purposes. (underline emphasis added)

54 Section 57A, Environmental Management and Coordination Act, as amended 2015.

55 Section 16-23, Physical Planning Act Cap 286 Laws of Kenya

56 Section 24-28, Physical Planning Act, Cap 286 Laws of Kenya.

(2) For the purposes of subsection (1), a regional physical development plan may provide for planning, replanning, or reconstructing the whole or part of the area comprised in the plan, and for controlling the order, nature and direction of development in such area.

Local physical development plan –

[Section 24] - (2) A local physical development plan may be a long-term or short-term physical development or for a renewal or redevelopment

(3) The Director may prepare a local physical development plan for the general purpose of guiding and coordinating development of infrastructural facilities and services ... and for the specific control of the use and development of land or for the provision of any land in such area for public purposes.

In addition, under the 2015 Physical Planning Bill, modifications are proposed to spatial planning, with introduction of a National Physical Development Plan, in addition to various regional, joint regional, and county development plans. While the scope of this report is not to review the proposed physical planning law, it is important to note that within the current, and anticipated physical planning system, it is possible to ease the anxiety caused by lack of information about forthcoming infrastructure and other mega-investment projects, by providing investment land, as part of the higher-level physical planning, such that this spatial provision of land for investment activities would be the initial point of consideration for investment plans. In order to minimize land acquisitions, or to conduct them earlier, while managing the risk of speculation, Kenya could integrate the concept of land banking into physical planning, such that spatial planning process incorporates identification of land suitable for various types of investments, and the land is transferred to a land bank, thus providing alternatives, while attempting to minimize direct impacts on people. The powers of the National Land Commission, under section 12 of the Land Act, to set aside land for investment purposes, in advance, can be applied to create the linkage with physical planning and creation of an investment land bank. Indeed, as further discussed in the next section, this provision requires the Commission to take into account the benefits to local communities and the local economies, when making decisions of this nature.

7 Community benefits in context of land acquisition and implementation of investments

The objectives of the research, as indicated in the introduction, were premised on a positive outlook of large scale land acquisitions for investments. This premise was informed by scholarly arguments that these investments (and the resulting land acquisition), can become “beneficial investments” whereby investors are viewed as bringing needed investment, possibly improved technology or farming knowledge, thereby generating employment and increasing food production. The foregoing discussion on the implications of compulsory acquisition, including community participation in the process, and how valuation for compensation is done, raises questions on how truly beneficial these investments are, in terms of the local or host community. This question was indeed a focus in Kenya when the Land Act was enacted in 2012. Section 12 of this law addresses itself to the question of community benefit as follows:

(3) [Subject to Article 65 of the Constitution],⁵⁷ the Commission shall set aside land for investment purposes.

(4) In fulfilling the requirements of subsection (3), the Commission shall ensure that the investments in the land benefit local communities and their economies.

(12) The [National Land] Commission shall make regulations prescribing the criteria for allocation of public land and ... such regulations may prescribe-

(b) the procedure and manner of setting aside land for investments;

(e) mechanisms of benefit sharing with local communities whose land have been set aside for investment.

The provisions highlighted here, particularly subsection (4), apply the mandatory word “shall” and thus require that as a basic minimum, investments in the land should benefit local communities and their economies. Although the law requires the making of regulations to provide further guidance on how this can be realized, at the time of writing, the National Land Commission is yet to make these regulations.

⁵⁷ Article 65 of the Constitution is a mandatory provision that prohibits the ownership of freehold interests in land by non-citizens, and further reduces the length of leases to 99 years or below.

The scope of benefit to the local community, and economy, should ideally extend to the socio-economic and environment circumstances, by taking into account how livelihoods are impacted, and taking into consideration how the community can/will link with the investment in question. The socio-economic benefit element begins from the point land acquisition, and compensation, including the methodology of valuation (as discussed earlier) and whether it leaves the affected people worse off, or at the pre-project level. Incidents were recounted of husbands and fathers pocketing the proceeds of compensation and departing home with the entire compensation sum. This leaves the wives and children vulnerably exposed and without alternative livelihoods. Such people become a problem for the community and State, and it raises the question whether the National Land Commission can be deemed to have complied with requirements for compensation, since families here are left worse-off than prior to the project phase.

The argument made for application of the full replacement cost valuation methodology is that it combines both market value of the land, and the full cost of non-land assets, including livelihoods. Assuming that the compensation is undertaken with a positive outcome that does not disadvantage the community, the question of post-project/investment livelihood standards or opportunities arise. Even where a community is not subjected to involuntary resettlement on account of displacement, their integration into the investment arises, especially where the investment is a business venture such as a port, resort city (e.g LAPSSET components), or a farm (e.g Dominion farms).

This raises the question of the community participation in the investment in question, a situation that section 12 of the Land Act anticipates, when it requires allocation of public land for investments to, in mandatory terms, take into account how the investments in land will benefit the local community, and economy.

Although negotiated and concluded in 2003, years prior to enactment of the 2012 Land Act, analysis of the relationship between Dominion farms (granted a lease over part of Yala Swamp), with the local community, demonstrates,

in practical terms why it is imperative to mainstream community benefit into investor obligations, when initiating such complex investments.

7.1 Reviewing the legal basis of the Yala Swamp Investment: Is the Memorandum of Understanding (MoU) over Yala Swamp a binding contract?

Yala swamp was selected as a research site because land acquisition had previously been undertaken, and a long-term lease issued to an American business, Dominion farms, to undertake agricultural activities. The lease, signed on 25 May 2004, was between Dominion Farms, and the then County Councils of Siaya, and Bondo (this authority now held by the County Government of Siaya). The issuance of this lease was preceded by a Memorandum of Understanding (MoU) between the same parties signed on 20 May 2003.

It is important to review the contract documentation in place. In this case, there are two documents instrumental to understanding the purpose of the engagement. First is the Memorandum of Understanding (MoU), a tripartite document signed on 20 May 2003 by Dominion Farms, Siaya County Council, and Bondo County Council. Second, there is a lease agreement signed on 25 May 2004, on behalf of the two county councils by the Commissioner of Lands, as their agent. The latter, the lease agreement, is a legally binding document, contractually setting the parameters of Dominion's new rights over the land in question, and through this lease, Dominion farms acquired an interest over portions of the Yala Swamp referred to in the lease as "the Gazetted Area." From the language of both documents, Dominion farms was interested in developing a large scale irrigated farm on an area of the swamp approximately 6,900ha, which was 3,200ha larger than the size of the Gazetted area (land set apart under the Trust Lands Act, through Gazette Notice No. 2570 of 1970). Thus the 2004 lease agreement only conferred interest to Dominion over the Gazetted area, with the option to expand the size of the farm.

The other document to consider is the MoU, and whether it could be the contract document through which community benefits were set out. In common practice, MoUs are not deemed as binding, unless the parties desire that outcome. In order to determine whether an MoU is binding, it is important to review the intents of the parties. In the text of the MoU, the two county councils (Siaya and Bondo) “confirm that they have authority and are willing and able to deal with and lease the Gazetted Area immediately, and the Additional area once it has been set apart ...” The MoU, in mandatory terms further provides that “the Councils shall permit Dominion immediate access to the Farm for purposes of implementing Phase 1 of the project ... whether or not the Lease of the Gazetted Area has been executed ...”

Reviewing the language drawn from parts of the MoU as highlighted above, it is clear that the parties to the MoU had the intent for it to be binding, hence for instance, the inclusion of the latter clause which in mandatory terms “shall” requires Dominion to be granted *immediate access* to the swamp to commence implementation even if the lease agreement has not been executed.

Further, the amount of rent payable to the two Councils is set out clearly, with the sums defined, including the schedule of payments. The details of the farming undertakings by Dominion farms, in Phase 1 (to be completed in three years) and Phase 2 (to be completed in ten years) are set out. In addition to the detailed agriculture and irrigation activity, in phase 1 and 2 activities, the MoU sets out activities to be carried out by Dominion farms, as a benefit to the local community, and using the operative mandatory word “shall”.

7.1.1 Analysis of the practical context of community benefits in the Yala Swamp context

It is clear, as explained above, that the MoU between Dominion farms and the two councils was legally binding. Below (Table 3) is a rapid assessment of the MoU clauses, which discloses the various community benefit type of commitments made by Dominion farms, and which for analytical value, are juxtaposed with results drawn from interviews and focus group discussions.

Table 3. Illustrative review of some of the MoU commitments in context of community reaction

<p>1. <u>Dominion Commitment:</u> Initial clearing and ploughing of at least 150 acres of the Swamp situated within the boundaries of each of the Councils for local community use</p> <p><i>What the community said: In Yimbo location, neighbouring Yala swamp and the Dominion farms operation, focus group discussants reported that while this portion of 150 acres had been identified but that Dominion did not undertake the initial clearing and ploughing. Instead, community members reported that they cleared and ploughed other sections of the swamp at their own cost. However, they reported that after this was done, the investor decided to expand the farm in that direction and introduce soya beans, eventually evicting farmers and causing destruction of crops.</i></p> <p>2. <u>Dominion Commitment:</u> Rehabilitation of at least one public primary schools and at least one public health facility for each of the Councils, to government standards</p> <p><i>What the community said: In the same locale, just inside the gate in the Dominion farms compound, the investor has built a primary school. The investor told this research that they intended to build a model private school with high quality infrastructure and education. The local community reported that while this was so, the school was too expensive beyond their means, and point out that even most of the local community members employed by Dominion were employed as casual staff, and could not afford the tuition fees.</i></p> <p><i>A Task Force was appointed by the County Government of Siaya on 28 April 2014, with among other Terms of Reference (to be discussed later), to establish the extent of compliance with the agreements entered into with Dominion farms. In its report the Task Force recorded complaints by the community that the commitments by Dominion farms were not being honoured, and that “Dominion only pumps Kshs 10,000 a Year to the Ratuoro Health Centre.”¹</i></p>
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Table 4 below, derived from a Report of the Joint Committee on Agriculture, Tourism, Water and Delegated Legislation on Yala Swamp, provides further analysis, in real terms, of the community benefit activities undertaken by Dominion farms, relative to the contractual obligation in the MoU.

Table 4 – Analysis of community benefit activities by dominion farms and Siaya County Assembly opinion

Community Benefit MoU Obligation	Stated Cost by Dominion Farms (Kshs)	Siaya County Assembly Joint Committee Findings
Maintaining and repairing Dominion to Nyamonye and Dominion to Siaya roads for the last 6 years	6.9M	Only the ring road within the farm has been repaired by Dominion Farms.
Reclaiming 1000 acres of the swamp for community, which is 700 acres over and above that which was agreed on and upon which they even pay the rates.		The residents informed the committee that this is not true. They are the areas the community reclaims and then taken over by Dominion by force claiming that they have encroached.
Construction of two new classrooms (Form 3 & 4) at St. Joseph Nyalula sec school	1M	Dominion donated construction materials for the school and the committee could not establish the cost involved.
Construction of two new classrooms at Magungu primary school	1M	Dominion donated construction materials for the school the committee could not establish the cost involved.
Ratuoro Health Centre:		
Provision of orthopedic equipment and hospital beds	400,000	The equipment are now old and kept in the store
Providing a maximum of Kshs.240,000 per year for the purchase of drugs		This money paid specially for the medical bills incurred by Dominion farm employees and is not a grant
Installation of electricity, wiring materials & underground cables	500,000	Supports the payment of electricity bills and pumps water to the facility
Putting up one new school on Yimbo side called Prime Harvest Academy	11M	This a private school owned by Dominion and set up due to piling pressure that they had not fulfilled the MOU by putting up a school in Yimbo side

Source: County Assembly of Siaya, (December 2015) Report of the Joint Committee on Agriculture, Tourism, Water and Delegated Legislation on Yala Swamp, pp 28-29.

In addition, the focus group discussants at Yimbo reported that earlier on, Dominion farms had agreed to rice to the communities in lieu of the 300 acres of land the MoU required them to give to the community. This is confirmed by Hansard records from the County Assembly of Siaya, capturing debate on the report of the Joint committee on Agriculture, Tourism, Water and Delegated Legislation on Yala Swamp, appointed to review the Task Force Report. In that Hansard record, the Joint Committee notes on 8 October 2007, as an alternative to Dominion farms providing 300 acres of land, they got into a community agreement with the Yala Swamp Group of Farmers Committee (YSGF) signed by -

“... Calvin R, Burgess, President/Director representing Dominion Farms on one hand and the chairman, Gilbert Obare and secretary, Caleb O. Obonyo representing YSGF on the other hand. The agreement state in part that Dominion agrees to give 1500 bags (50kg) of rice per year to the communities (750 bags to Bondo and 750 bags to Siaya) for payment for use of a total of 300 acres of land, otherwise to be utilized by the community. An addition of 100 bags (50 Siaya and 50 Bondo) will be added each year for 15 years. This undertaking took place just for a few years and not in the proportions stated thus a major cause of conflict.”⁵⁸

When this question was put by the research team to the investor, they indicated that this agreement had been entered into in good faith, but that it had proven difficult to implement due to high cost of production, and difficult economic times. Nonetheless, the company indicated they had set up a shop within their premises, as a more realistic benefit, where they sold high quality rice at affordable prices to the local community, who in turn reported that the cost was too high for them to afford.

7.1.2 Shortcomings of the MoU in firming up community benefits

In this category, it is important to examine structural aspects of contracts for land deals. Thus, the discussion below identifies the structural challenges, such as absence of meaningful participation of, or engagement with the

58 County Assembly of Siaya, (December 2015) Report of the Joint Committee on Agriculture, Tourism, Water and Delegated Legislation on Yala Swamp, p. 25.

local community, and the omission of equitable safeguards, such as job guarantees, or transfer of technology.

7.1.2.1 The lack of employment guarantees

It is notable that in setting out conditions of benefit to the local community, the MoU did not specifically or implicitly, the entitlements of the community to gainful employment by Dominion farms. This is a significant failure that demonstrates how [local] government agencies can miss an opportunity to enhance socio-economic equity, for present and future generations. Focus group discussants reported that the jobs principally available to the local community were casual tasks, available as unskilled labour, such as scaring birds in the rice fields for shifts running up to 12 hours. It was notable that while Dominion farms argued it was beneficial to local families that they preferred to employ women (and mothers), community members participating in focus group discussions argued it was exploitation to hire people for difficult manual tasks at Kshs 200 per day on 12 hour shifts, resulting in separation from families for long durations. According to the Task Force report, the local community raised complaints on the poor working conditions they get exposed to in the farms, and “they cited lack of protective gloves, safety boots, sanitary facilities,” but when speaking to the Task Force, Dominion is reported that since their model of employment was casual labour, it was not economical for them to purchase these equipment for workers who have no legal obligation to return to work the next day.⁵⁹

7.1.2.2 Weak standard and level of community participation in the investment continuum

One common thread reported by the Task Force report, the Joint County Assembly Committee, and established by this research relates to the levels of public participation during the process of onboarding the investment, and subsequently, during the life of the investment project by Dominion. In this context the Task Force reported that the residents they spoke to

59 County Government of Siaya (2015) Report of the Task Force on Yala Swamp, p. 7.

complained about lack of consultations when the MoU was being signed in 2003, or any lack of consultative mechanisms between them and Dominion. The breakdown of relations or trust between Dominion farms and the local community is troubling, particularly because the MoU created an Advisory Board for the project. The two County Councils (Siaya and Bondo) became members of the Technical Committee of the Advisory Board, each of them nominating "... the Chairman, Clerk and one Councillors," for appointment by Dominion to the Technical Committee. Although the mandate of the both the Advisory Board and the Technical Committee are not set out in the MoU, participation of the local government (as Siaya County government succeeded both Councils in 2013) implies the committee should play a role in representing community interests to uphold the equitable benefit.

It was established by the Joint Committee of the County Assembly that the duration of the MoU was extended in 2009, to subsist for 50 years instead of the original 25 years as noted below from the County Assembly Hansard –

"Mr. Abir showed the committee a revised MoU, by both the county councils which read in part: The land to be held by Dominion as tenant for a period of 50 years from 26, May 2009. The MoU is a revised one from the first agreement where the company had been given a 25-year lease but with equal acreage of land. According to the Joint committee the second MOU is null and void because the relevant authorities did not officially sign it."

This concern is valid, and this research found significant levels of local community concern with inadequate public participation in the negotiation of first MoU, as well as its revised version, as well as the absence of clauses in the MoU that guaranteed local community benefits. In fact, to aggravate the bad relations between Dominion farms and the local community, it was reported that Dominion had blocked an access road that passed through the swamp and historically used by the community to link Yimbo to Alego, without providing an alternative. People then needed to use a much longer and costlier route.

7.1.3 Contract farming as a normative business model that could integrate community benefits into the business model of the investment

Lorenzo Cotula⁶⁰ writing about these types of contracts, which grant investment rights to a business over land taken from a community, argues that host country benefits are integral to making investments profitable. These benefits are beyond the land rents payable to government, but include compensation for land rights. Most important the normative standard of benefits here include giving priority consideration to community participation in the investment (from design and through implementation), for instance through employment quotas, embedding through local content obligations, or mandating support in technology transfer.

In the case of Yala swamp, the questions of compensation for loss of land rights and livelihoods discussed earlier did not arise in 2003/2004, as the land in question had already been set apart and gazetted. Setting apart was a legal construct in the now repealed Trust Land Act, which meant the land was converted to other uses by government, and upon compensation, customary claims over the land were extinguished.⁶¹ As a direct benefit, the expected to receive support in the 300 acres that were converted to provision of food (rice), which was abandoned. Thus only the annual rent payable to government subsists. The contract does not contain provisions on employment quotas (skilled and unskilled), training provisions, support with agriculture transfer of technology, etc. This is a glaring omission, especially within the scope of the 2004 Investment Promotion Act which provides mechanisms for approval of investments by setting up a threshold to test “whether an investment and the activity related to the investment are beneficial to Kenya” by considering the extent to which the investment contributes to, among others: (a) creation of employment for Kenyans,

60 See Cotula, L., 2011, *Land Deals in Africa: What is in the Contracts?* IIED, London.

61 See section 7-8 of the Trust Lands Act (now repealed) Cap 288. This law has now been replaced by the 2016 Community Land Act.

(b) acquisition of new skills or technology for Kenyans; and (c) a transfer of technology to Kenya.

While these statutory provisions are general and do not explicitly require preferential treatment for local communities, application of equitable principles suggests this interpretation is plausible. Participation of a community in an investment continuum implies the community has a continued and meaningfully beneficial role from the planning and onboarding (such as feasibility studies, land acquisition, environmental assessments etc), as well as during execution and implementation of the investments. Where the investment in question is a farming concern, set up within a farming community, application of the beneficial test criteria could be helpful, especially the socio-economic benefit. Certainly a distinction here must be made between a local community (some of who may not participate in farming) and smallholder farmers that are part of the local community. This can be reviewed through the lens of (i) skilled and unskilled employment quotas and priority (ii) skills transfer through training for employment, and (iii) skills transfer to enable the community undertake similar farming activities to the same high standard as the commercial farm, either for an independent market, or through some form of contract farming, such as the outgrower model. Cotula and Vermeulen provide a typology business models in farming, and define contract farming as:

“Pre-arranged supply agreements between farmers and buyers. The agreements usually specify the purchase price, or how it will relate to prevailing market prices, and may also include terms of delivery dates, volumes and quality. In many cases the buyer, which is generally an agri-processing company, commits to supply upfront inputs, such as credit, seed, fertilizers, pesticides and technical advice (extension), all of which may be charged against the final purchase price. In summary, there is a wide range of contract farming deals, from informal verbal purchase agreements to highly specialized outgrower schemes around large states.”⁶²

62 Vermeulen, S. and Cotula, L., 2010, Making the Most of Agricultural Investment: A Survey of Business Models that Provide Opportunities for Smallholders, IIED/FAO/IFAD/SDC, London/Rome/Bern, p. 29

The two authors further argue that vertical integration of the chosen business model is important. Thus, smallholder land can be arranged along the continuum according to the degree of control that buyers (the farming investors) exert over farming methods. In contract farming arrangements vary from fairly loose terms through to highly specific designation of which seed, fertilisers, pesticides and techniques must be used, and when. In certain cases, the agribusiness will use their own staff to spray the crops on smallholdersland.⁶³The problem with vertical integration is that an agri-business may want to achieve this internally, by moving towards upstream direct production, without needing to purchase from the market,⁶⁴ including from smallholder farmers in order to offset various possible risks, particularly around quality of produce.

Thus in a contract farming (such as outgrower) model in Siaya, Dominion farms, for instance (if the MoU had set this as a binding obligation) would have become the nucleus operation, and provided technical support (agriculture, irrigation extension, high quality inputs, irrigation water) to participating farmers. In return, the nucleus farm would require a high standard of farming to meet their market produce quality, and recovered their costs (and possibly make a profit too) from the sales of the outgrower farmers produce. However, it appears that absence of this kind of intent in the MoU, and the lack of any visible intent to move away from direct internal production only suggests that Dominion farms is keen to pursue internal vertical integration of its business model. In such a context, only a policy decision by government may change this situation by seeking to review the contract, and insert new rules. For future such operations, the provisions of section 12(4) of the Land Act, which require the National Land Commission to require community benefits when allocating land for investments could streamlined through appropriate regulations, and apply lessons from current examples.

63 Vermeulen, S. and Cotula, L., 2010, Making the Most of Agricultural Investment: A Survey of Business Models that Provide Opportunities for Smallholders, IIED/FAO/IFAD/SDC, London/Rome/Bern, pp. 32-33.

64 Cotula, L., Vermeulen, S., Leonard, R. and Keeley, J., 2009, Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa, IIED/FAO/IFAD, London/Rome. P. 57

Such an approach could, for instance, avoid a similar situation occurring in Lamu or Isiolo, in the context of the various business components of LAPSET. This include the transport infrastructure (road, railway, port), refinery, power generation, resort city or abattoir in Isiolo. This would require seeking vertical integration of business models by emphasizing an outwardly looking community benefit model, rather than internal business integration. The abattoir in Isiolo is a helpful example. During focus group discussions, residents who were principally pastoralist livestock holders expressed their anticipation of the benefit that could be brought by the abattoir. However, and although the abattoir was not yet operational, views from the focus group pointed to lack of a plan towards vertical integration between the livestock keepers, and the abattoir. In ideal terms, this would require a market arrangement that is underpinned by quality and standards for the livestock keeping such as accurate vaccination and veterinary treatment records, and possibly type of feed.

During a focus group discussion with a group of business people drawn from Hindi and Mokowe towns in Lamu County, this research got to hear of the basic scope of anticipated benefits by the various merchants while noting that the community did not have any direct knowledge of any structure to vertically integrate their businesses with the anticipated economic activities. This category of business people were drawn from a diversity of activities/trades in the towns: grocers; real estate; building contractor; drinking water supply; general merchant (retail shopkeeper). In context of their business activities, the discussants indicated they were not directly affected by the land acquisition as their business premises were all in town centres away from the LAPSET infrastructure.

The issue of benefits from the LAPSET activities was presented in terms of currently visible benefits versus anticipated future benefits. The real estate business person reported enhanced real businesses as more people were interested in acquiring interests in land either in the town, or along the path of land acquisitions. The drinking water suppliers reported that the new

works projects, such as preparations for the 900MW Amu Coal power plant project (at *Kwa Sasi*), had been purchasing significant amounts of water – although no actual figures in volumes or revenues was provided. In addition, the research learnt that the coal plant developers had sent word out that they were interested in hiring mini-sized trucks (approx. 30No.) that they would use for general haulage within the construction site. While these benefits appeared clear, they were not in any way organized nor set up in any equitable manner to benefit a higher distribution of local community members. In terms of anticipated benefits, the grocers, shop keepers, and contractors expressed their expectation that as LAPSET infrastructure was rolled out, there would be higher immigration of workers and investors into Lamu from other parts of Kenya, thus raising demand for foodstuff, household goods, and housing.

In the absence of a structural approach, benefit to these local communities affected by large scale land acquisitions, while important, may remain elusive. The equity continuum is not completed unless the affected community can obtain socio-economic voice in the period after an investment has been implemented, and is not left worse off. A subsequent role of the community in the investment, or linked to the investment, can have the effect of supplementing the benefit drawn from a properly undertaken land acquisition and compensation process.

Access to information is one of the basic human rights in Kenya, which is key to public awareness and effective participation in governance. The lack of clear details about the design and implementation of LAPSET components created high levels of anxiety, as was evident amongst Isiolo communities participating in this research, in Ngare Mara, Kambi ya Garba, etc. People reported they “had heard” that the Isiolo Resort City would be located in the *Kipsing Gap*, a picturesque mountain pass located between *Mlima ya Mlango* and *Lenkushu hills*. According to focus group discussants and respondents, this area was valuable to pastoralist livelihood due to abundance of water and pasture, and the location of a resort city would affect pastoralists livelihood adversely. Residents expressed frustration that while the Resort City would

diminish rangeland model cattle keeping, the government had invested public funds to build an abattoir in Isiolo, and they were not aware of plans to provide economic safeguards to protect this way of life.

7.1.4 Assessing the [lack of] environment benefits from investment projects

In addition to the economic concerns discussed above, the environmental impacts of investment projects are significant. This is because negative impacts could undo the benefits, or skew the benefits in favour of the investor, but leave the host community worse off than they were prior to arrival of the investment project. The 1999 Environmental Management and Coordination Act requires that environmental assessments (whether strategic or project level) should be undertaken for most types of projects. Upon the issuance of an Environmental Impact Assessment Licence an investor is required to comply with an Environmental Management Plan (EMP), and through Environmental Audits (EA),⁶⁵ the National Environmental Management Authority (NEMA) should be able to check the levels of compliance and take actions to enforce compliance, where necessary. Presumably, the concerns about water and pasture by the local communities in Isiolo, revolving around the planned construction of a resort city in the Kipsing gap will be addressed when an environmental assessment is undertaken. This is key because, in terms of Kenyan law, public participation is mandatory during consultations for a Strategic Environmental Assessment (SEA), or a project based Environmental Impact Assessment (EIA). In this case, NEMA can preempt the problems that the local community is anticipating, by addressing the concerns during the public consultations – and either requiring project modifications, or inserting mitigation measures in the EMP. In an ideal context, having a system of meaningful consultations with the local community during the feasibility studies could enhance the capability of project designers to appreciate these environment (and other) challenges well ahead of time, and provide technical assessments that would benefit either a SEA or an EIA.

⁶⁵ See generally, Environment Management (Impact Assessment and Audit) Regulations 2003.

Reviewing this in the context of the Dominion farms project, the environmental challenges that result from flood waters originating from the Dominion farm, to neighbouring communities reinforce the concern on efficacy in enforcement of EMP, or the utility of environmental audits. Two scenarios were reported to this research, and are reinforced by the Task Force, and the Joint Committee, reports.

First within Siaya County, the Task Force reported that “floods are one of the major sources of conflict between Dominion and the people ...” While the local community attributed the floods to the height of the weir constructed by Dominion, the Task Force acknowledged it could not independently verify this, and recommended engagement of experts to investigate this. While this engagement of an independent expert represents the county government’s concern for its people, it should be NEMA that undertakes an investigation into this, within the context of carrying out an environmental audit. This is important, as reported, people who used to live in a village called Abidha abandoned some parts of it due to the uncertainty of the flooding period, and the constant displacement that resulted from these floods.⁶⁶

Flooding, caused by water released from the Dominion farms, presents an even more complex problem in the neighbouring Busia county (Bunyala, Budalangi constituency) – which also covers parts of Yala swamp, but is not covered by the MoU or lease agreement. In a focus group discussion at Osieko Beach village, the research learnt about challenges the local community face from water pollution that inundated homes and farmland. This resulted in unprecedented challenges: need to use (costly) boats to adapt to transportation due to perennial floods; having to introduce some boarding schools to ease the burden of children (including children having to carry each other across risky waters to school); increased public health challenges due to mosquitoes; drinking water scarcity; challenges continuing with crop farming. All this is a consequence of the land in this area of the Yala swamp falling within Busia County being submerged by flood waters released by Dominion.

66 County Government of Siaya (2015) Report of the Task Force on Yala Swamp, p. 9.

In an interview with this research, Dominion acknowledged this problem, including the clear need for a dyke and canal to chart a clear channel for the water to get to Lake Victoria, but no indications were given that the investor would undertake this. In fact, it is clear that Dominion does not consider this to be their problem since in their words, those lands are not part of either the MoU or the lease agreements. Yet, this situation has continued for many years despite the facts that, as indicated above, Kenyan law has provided both institutional and legal tools to enforce compliance with environmental standards, through environmental audits, that could result in modification of the EMP, to compel Dominion to take corrective measures. It is important to note that legally, the business operating licences that Dominion farms holds in Kenya are contingent on the validity of the EIA licence continuing. Thus, a withdrawal of the EIA licence could adversely affect the entire business model. Further, these business activities and the resultant downstream flooding and continued inundation of land by water from the farm, adversely affecting the socio-economic and environmental circumstances of the local community through flooding, is a continuing violation of the human right to a clean and healthy environment enshrined in article 42 of the Constitution. For this, both government agencies (county, national, and the investor) should be held accountable. An environmental audit can be undertaken on the request of the local community, the Busia county government, or by NEMA on its own motion – and can result in prescription of remedial actions to be undertaken by Dominion farms. Legal action in the High Court, to enforce the right to a clean environment by stopping this discharge of water, and compelling clean-up activities is also plausible as a public interest action.

8 Lessons, conclusions and summary of findings

The foregoing research has disclosed valuable findings on the policy and practice issues that impact large scale land acquisitions for investments, especially where the mode of taking is through compulsory acquisition by the State.

8.1 Lessons, conclusions and findings requiring policy level interventions

8.1.1 Regularization of landholding and tenure systems.

The absence or weakness of formal landholding, and land registration systems was evident in most of the research sites, in Isiolo and Lamu. This is despite Kenya having put in place new land laws in 2012 to give effect to constitutional provisions to protect land rights. This has resulted either in emergence of informal land administration and conveyance systems (Lamu), or the emergence of a complex system of formal land allocation that brings about multi-allocation of land through repeated issuance of allotment letters, (Isiolo), or non-adjudication and registration of community lands (Isiolo, Lamu). In either instance this results in undermining security of tenure, and enhances the vulnerability of concerned communities who will face difficulties securing their interests in the land ahead of any large scale land acquisitions, due to the entry of speculators, and persons interesting in grabbing the land by being first to obtain formal registration. In some instances such as Lamu, the government has tacitly allowed people to inhabit erstwhile public lands, and residents in settlements around Hindi (Roka A, B) have developed an expectation that since their occupation is in good faith (to develop livelihoods), the government will honour their interests through formal registration. A clear programme of land adjudication and registration in these areas is necessary.

The national government should consider partnering with the County government in Isiolo in order to identify the nature and extent of, and take steps to resolve the problem of multi-allocations of land there. 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.

8.1.2 Enhancing tenure of certain communities through implementation of the provisions of Community Land Act.

This conclusion is drawn from findings in research amongst the Aweer (Bargoni), and Turkana communities (Ngare Mara) where residents expressed apprehension over their tenure security in face of land acquisition for LAPSET infrastructure. This is because the land has not been (full) adjudicated or registered in favour of the community notwithstanding existence of the Land (Group Representatives) Act that preceded the 2016 community land law. It is recommended that the government expedites 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 guaranteeing the beneficial interests of the community members, first by protecting tenure rights, and subsequently providing for equitable community land governance mechanisms.

8.1.3 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. In any event, 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, as discussed, provides a viable option because, 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, and takes into account all the transaction costs of purchasing (conveyancing fees, etc), or logistical costs of replacement non-land assets.

8.1.4 Internalization of resettlement safeguards principles and practice into Kenyan law of compulsory acquisition of land

A review of the current legal situation in Kenya concerning compulsory acquisition of land discloses the absence of safeguards governing interaction with host community, as well as involuntary resettlement safeguards in the event of displacement by land acquisition. The IDP Act discussed earlier 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 an FPIC process that emphasizes the quality and meaningfulness of affected community participation, including the impact that views obtained during consultations have on the final decision. Equally critical is the decision to vertically integrate the process by requiring the consultation of the affected public during project planning. In the sense of feasibility studies, and project designs, this suggests that community participation may add value to the process by being conducted much earlier on in the process, and contribute to analysis of project sites, and alternatives.

The failure to integrate provisions of the IDP Act with the land acquisitions process for development projects should be resolved. This may require the making of amendments to either the IDP law, or the Land Act, and the subsequent making of subsidiary legislation to guide the process of undertaking FPIC, or consultations through public hearings. 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.

For practical purposes, Kenya could consider a legal requirement for a national Resettlement Policy Framework (RPF) would be helpful that would govern internalization of resettlement safeguards, including participation of communities. Key to this is that if a Resettlement Action Plan is required, in terms of EMCA, both the RAP and RPF would have undergone a Strategic Environmental Assessment thereby providing a means for risk assessment in advance of major implementation steps being underway.

8.1.5 Policy linkage of investment promotion rules with investments flowing from land acquisitions to secure community benefit through contracts and business models

At a policy level, it is important for Kenya to revisit, in a framework sense, how to use investment promotion rules and binding contracts to safeguard socio-economic, environmental benefits and livelihoods of local communities. This is mainly in context of the continuum of an investment, from land acquisition, and during its implementation. 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. 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 could 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. The details of these considerations have been discussed at length earlier in this report.

8.1.6 Regulations on methodology for assessment of just compensation

Kenya is currently engaged in a number of infrastructural projects that call for the compulsory acquisition and compensation of land. As noted in the study, 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. As at the time of this study, these rules had not yet been developed. The rules will help to standardize the methodology for the anticipated assessment and make the process more predictable and, in an environment where the government is involved in the development of infrastructure calling for massive compensation of compulsorily acquired land, the development of these rules should have been accorded priority.

It is however noted that regulations to operate the entire Land Act have not yet been developed. Perhaps the development of these regulations, and the rules to govern assessment for just compensation, may have been delayed by 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.

8.2 Lessons, conclusions and findings requiring direct actions at community level

In this category, the conclusions and findings are drawn to highlight matters that directly affect the voice and equitable benefit or participation of affected local communities, either in land acquisition process, or in the continuum of investments introduced in their midst.

8.2.1 A community dissemination manual for transfer of knowledge about land laws, policies and land administration processes

In focus group discussions held in the course of field work, the research team got similar feedback multiple times that the (potentially) affected “had heard” on radio, or through other fora that Kenya had new land laws in place, they did not really know the content of these laws. A similar sentiment was expressed with regard to knowledge of details about the components of the various LAPSSSET projects. Communities indicated that they would want to have some form of civic education on this, especially regarding tenure rights, the land administration system (surveying, adjudication and registration), the implications and contents of the new community land law, and legal protection of community rights during land acquisition. One key finding was a preference by community members to have their own members trained in order to pass the knowledge to the communities, a sentiment that arose from a desire to receive information from a trustworthy source who was part of the community. Another finding was that community members did not have clear details on available grievance mechanisms on the land administration system, and while some had managed to access the National Land Commission, they lamented that it was based in Nairobi.

This finding suggests there is a need to develop a basic community dissemination manual, that includes a provision for empowerment of community based trainers (through a Training of Trainers concept). In such an approach, the dissemination manual can be published in simple language, including translation to Kiswahili or local languages where preferable.

8.2.2 Enhancement of meaningful public participation in the entire continuum through effective consultations and disclosure of relevant information

In order to enhance the voice of the community ahead of any process of land acquisition, it will be helpful to integrate a constructive and meaningful

process of consultation with potentially affected communities, from early on during project planning, feasibility studies to onboarding of investments. This would particularly aid in providing value on local circumstances and risks that may not be obvious to technical teams. Occurrences such as in the Isiolo *Kiwanjani* settlement (displaced for the airport) where residents of *Kiwanjani Zone G Squatter* complained that maps generated during the acquisition process continued to record their land as being part of the airport complex despite there being a 75 feet road between the airport boundary, and the plots in question would be avoided.

Enhanced community participation would further provide a valuable avenue through which the [potentially] affected local community can enhance its voice by having an opinion (which is taken into account) early on in the stages of the project design. However, this approach would also require protection from speculative behavior, that could result in an artificial increase in market value of land, due to market behavior triggered by anticipation of a project, and land acquisition. Access to information requires that this type of information is made available to the public, but in order to control speculative behaviour that drives up the cost of land compensation, government can apply the new 2016 Access to Information Act to sieve out aspects that are either confidential or considered deliberative and therefore not to publicly disclosed. Another helpful approach would be to undertake the feasibility studies focusing on multiple alternative sites, without showing preference for any particular site.

Meaningful community participation requires a legal or policy definition of how to ensure consultations are effective. This could include possibility of requiring consulting (public) agencies to return to the host community and disclose how they considered the various opinions, and provide feedback. The community dissemination manual proposed above would provide a valuable tool through which to structure techniques that affected local communities can apply in order to have meaningful consultations. The manual could also include implication of the procedures set out in the new 2016 Access to Information Act.

8.2.3 Promotion of networking by project affected communities in various parts of Kenya to build knowledge and exchange thoughts

There are multiple instances of compulsory acquisition of land in Kenya (e.g. For LAPSET projects), or the allocation of land by government for private investments (Siaya – Dominion). The processes are at various stages, either at conceptual point, or having gone through various steps of acquisition and onboarding of investments. Equally, others are complete and the investment has been operational for a number of years. In all these cases, there multiple lessons to be learnt between the various affected local communities. In both Lamu and Isiolo for instance, the research engaged with multiple focus groups drawn from within the same project locality but in different geographical sections – and there was evidence there was no integrated system to promote consultations and learning from each other. Further, even where acquisition and investments have been undertaken in separate parts of the country, people from Isiolo or Lamu could learn coping techniques from those in Siaya, or by learning of the adverse impacts in Siaya, become more interested in enhancing their voices in the local context to avoid a similar outcome. Therefore, the idea of a network that brings together representatives of the various communities is useful to consider. Such a network would also include policy makers drawn from the national and county governments. Already in most of these local communities, the research observed that chiefs (who are national government administration officers) are an integral part of the community process. Learning forums could be organized, and a feedback process put in place such that when representatives return to their local communities, they can provide details to their neighbours. Such a network would however require that policy makers also commit to provide valuable information and feedback to any questions and problems raised by participating communities.

An alternative to utilization of physical meetings for such a network is application of internet-based technology. In this case, a network can

be developed through low cost options, such as through the WhatsApp Platform. Although this requires internet access through a smartphone, the Land Development and Governance Institute has been piloting a WhatsApp based platform that creates a Network aptly named **Community Land Matters**. The Platform, since inception in mid-August 2016, has had diverse experience, with active engagement by some community members that regularly update the group on actual relevant happenings in their local communities, including photographic images. Members have adhered to the rules requiring focus on community land matters. However, some members have remained inactive, or non-responsive despite having experienced enthusiasm at the beginning. One probable reason is that a virtual platform may appear rather distant to community members that have tangible problems at home – and as such may need to be integrated with the physical network proposed above. In addition, in certain instances, community members present acute challenges that require immediate attention from policy makers not in the online group, and the process of obtaining feedback can be slow. This could explain the frustration of some members, and perhaps coupling the online platform with a physical network could mitigate some of these outcomes.

8.2.4 Involvement of women in community interventions

The study exposes some good lessons in the involvement of women in community interventions and leadership on communal land rights. It was instructive that for instance in the discussion with the Aweer group in Bargoni, Lamu, some women participants in the focus group discussions were very active and made crucial contributions. In addition, the women also made distinguished contributions too during discussions with the Turkana community at Ngare Mara, Isiolo County. Here, women hold very critical leadership positions within the community.

Yet, the two communities, like many others in Kenya, are largely patriarchal. This experience provides a good benchmarking lesson that, despite the cultural practices that have informed many communities in the past, given

opportunity, women may play critical roles in helping communities protect and mitigate their communal land rights where circumstances so demand.

8.2.5 Compensation to “occupants in good faith” without title to land

As noted in the study, Article 40(4) of the Constitution of Kenya states that ‘provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land’. While the rules to govern how the discretion implied by this Article are yet to be developed, the study reveals that the State has exercised this discretion positively in the studied Port site in Lamu and the Airport site in Isiolo. Despite land owners not holding title to their land in the two places, cash-for-land and land-for-land compensation was made to the claimants in Lamu and Isiolo respectively.

8.2.6 Protection of interests of legitimate beneficiaries during compensation

Incidents were recounted of husbands and fathers pocketing the proceeds of compensation and departing home with the entire compensation sum. This leaves the wives and children vulnerably exposed and without alternative livelihoods. Such people become a problem for the community and State. To avoid such negligence, the government should consider regulating the release of compensation funds. The practice under the Land Control Act Chapter 302 of the Laws of Kenya which regulates transactions of agricultural land could be borrowed. Though not written into the law, Land Control Boards always require the proprietor’s spouse to be in attendance before approval to any application for approval of a transaction such as subdivision or sale of family property. And where they are in doubt about the facts to any application, they will usually refer to an area elder or the Assistant Chief for pertinent information in an effort to ensure that spouse and children are in agreement. Such a procedure could be enforced in the case of compensation following acquisition.

It is recommended that the Government, in liaison with the National Land Commission, puts in place modalities to explore how a similar social safeguard procedure could be instituted in the proceedings for compensation under the Land Act to protect legitimate beneficiaries in instances where acquisition of land for projects has to be done with requisite compensation to landowners.

8.2.7 Preservation of indigenous and local knowledge

Project activities involving large scale land acquisition have the inevitable consequence, in some cases, of interfering or totally defacing available traditional/indigenous knowledge from the affected site. This is the case in some parts of Lamu and Isiolo where invaluable oral and cultural knowledge, including some cultural sites, have been preserved over the years. In any event, if enhanced community participation is adopted, and a threshold placed to examine if the participation is meaningful, the indigenous and local knowledge of the communities will also benefit the project at the point of local risk assessment. In this case, recording of such knowledge can be undertaken for posterity use.

It is therefore recommended that the implementation of such projects be preceded by a quick knowledge mapping to determine and document such knowledge before destruction or adulteration, together with enhanced community participation. Where possible, such knowledge can be proactively preserved in collaboration with the relevant state organs. Such a mapping can still be done for the LAPSET Corridor and Isiolo Resort City before implementation takes off.

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Prof. Nelson Awori Centre

P.O Box 8222 – 00100, Nairobi Kenya.

Tel: +254 – 20 2714574, +254 706623636

www.ldgi.co.ke / www.ldgi.org



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@ldgi_kenya

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