

**AN ANALYSIS OF THE  
CAUSES OF VARIATIONS IN  
VALUATION FOR LAND  
COMPENSATION //**

**A THESIS SUBMITTED IN  
PARTIAL FULFILLMENT FOR  
THE DEGREE OF MASTER  
OF ARTS IN VALUATION  
AND PROPERTY MANAGEMENT**

**BY**

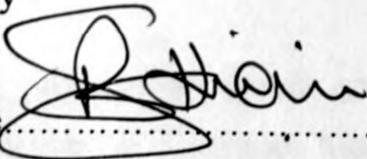
**KIMUTAI BARNABAS JONES  
REG. NO. B/50/P/8114/99  
B.A. (LAND ECONOMICS) NBI. 1995**

**DEPARTMENT OF LAND  
DEVELOPMENT, FACULTY OF  
ARCHITECTURE, DESIGN AND  
DEVELOPMENT.**

**UNIVERSITY OF NAIROBI**

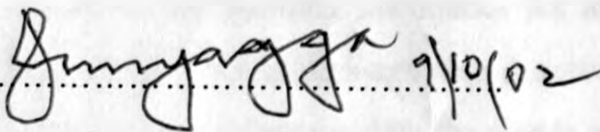
**DECLARATION**

I, KIMUTAI BARNABAS JONES, hereby declare that this research is my original work and has not been presented for a degree in any other University

Signature  ..... 9/10/2002.

This research has been submitted with my approval as a University Supervisor:-

Professor P.M. SYAGGA

Signed  ..... 9/10/02

## ACKNOWLEDGEMENT

First, my special thanks go to the Government of Kenya through the Directorate of Personnel Management for awarding me a scholarship that enabled me to undertake this Post Graduate Study. Secondly, I am most grateful to my University Supervisors, Prof. P. M. Syagga and Vincent Kiptoo whose continuous guidance and encouragement enabled me accomplish this study.

I also wish to pass my sincere appreciation to all members of both Land Development and Building Economics for ideas and thoughts exchanged at various forums. My classmates also deserve a special mention for the role they played in providing me with the words of hope and encouragement even where things seemed unbearable for me. I also wish to remember the contribution made by my immediate family, especially my wife, Rose for the hassle she went through during the whole period of my Post Graduate Study.

Finally my thanks go to Cecilia Wanjiru Mwangi and Solomon Mbuguah for the invaluable time they spent in typing this project. For all those not mentioned here but played a role towards the success of this project, I say a big "THANK YOU".

# **DEDICATION**

**TO**

*My daughter Britney whose  
cries provided me with the  
impetus to accomplish this  
project.*

## ABSTRACT

The purpose of this investigation is to analyze the causes of variations in valuation for land compensation. The project looks at the differences in land compensation values as derived by the various interested groups with the aim of examining how the Land Acquisition Act, Cap 295 of the laws of Kenya contributes to these variations.

Where land is under public ownership it would be very easy to arrange with the government for it to be availed for specified purpose. In this case compulsory acquisition is not necessary. However public lands are continually dwindling and may not be found at the proposed site of the project (Muoka, 1994). Compulsory acquisition therefore remains a major source of land for the implementation of large-scale projects. The purpose of this study is to examine the various acts that govern compulsory Land Acquisition in Kenya with the aim of relating it to the valuation practice which in the context of this study refers to the valuation process. In doing so, the study aims at examining the differences in land compensation values as explained above and finally making appropriate recommendations towards harmonizing these differences.

# **TABLE OF CONTENTS**

**Pages**

## **PRELIMINARIES**

Title .....	i)
Declaration .....	ii)
Acknowledgment .....	iii)
Dedication .....	iv)
Abstract .....	v)
Table of contents .....	vi)
List of tables .....	ix)

## **CHAPTER ONE**

### **1. INTRODUCTIONS AND PROBLEM IDENTIFICATION.**

1.1	Introduction .....	1
1.2	Problem Statement .....	2
1.3	Research Hypothesis.....	3
1.4	Objectives of the Study.....	4
1.5	Significance of the Study.....	4
1.6	Scope of the Study. ....	5
1.7	Research Methodology.....	6
1.7.1	Comparative Study. ....	6
1.7.2	Data Collection . ....	6
1.7.3	Data Analysis .....	7
1.7.4	Data Presentation.....	7

## **CHAPTER TWO**

2.	LITERATURE REVIEW	
2.1	Introduction .....	8
2.2	History of Compulsory Acquisition .....	9
2.3	The process of Compulsory Acquisition .....	12
2.3.1	Case of Registered Land .....	12
2.3.2	Case of Trust Land (Unregistered land) .....	14
2.4	Compensation and Valuation	17
2.4.1	Compensation .....	17
2.4.2	Valuation .....	20
2.4.3	Valuation Approaches .....	23
2.4.3.1	Market Comparison Approach.....	23
2.4.3.2	Income Capitalization Approach.....	24
2.4.3.3	Replacement Cost Approach. ....	27
2.5	Valuation approaches versus provisions. ....	29
2.6	Questions .....	31

## **CHAPTER THREE**

3.0	DATA ANALYSIS.....	34
3.1	Comparison of Compensation Values and Appellants' Valuation Figures .....	34
3.1.1	Inferences from Table 3.1.....	38
3.1.2	Causes of Variations in Valuation for land compensation	38
3.1.3	Common Grounds of Appeal.....	43
3.1.4	Conclusion .....	48
3.2	General Causes of Inconsistencies in Land Acquisition Values ...	50

**CHAPTER FOUR**

4. CONCLUSION AND RECOMMENDATIONS ..... 57

    4.1 Conclusion ..... 57

    4.2 Recommendations ..... 60

BIBLIOGRAPHY ..... 65

APPENDIX I ..... 67



## LIST OF TABLES

Table 3.1	Land Acquisition Appeal Cases .....	35
Table 3.2	Deviation Classes .....	38
Table 3.3	Deviations caused by different dates of inspection	39
Table 3.4	Variations in areas considered by public sector valuers versus those considered by private valuers ...	42
Table 3.5	Appeal Cases Versus Grounds of Appeal.....	49
Table 3.6	Percentage of Occurrence of Grounds of Appeal .....	50
Table 3.7	Appeal Cases Versus Causes of Inconsistencies in Land Acquisition Values .....	56

# CHAPTER ONE

## 1. INTRODUCTIONS AND PROBLEM STATEMENT

### 1.1 INTRODUCTION

Real property valuation is one of the branches of surveying profession, that date from pre-Christian times through the Roman era and the middle ages until the present day. Valuation is about translating the rationally assessed requirements of the average property buyer into a value estimate. It is determination of the value of buildings at some point in time for some purpose, under some specific circumstances (Syagga, 1994)

In the context of this study, valuation practice refers to the valuation process. This valuation process is a praxeology, that is to say, a method of deductive reasoning that starts from first principles of a *priori logic* and builds analytic means from them to achieve valid deductive inferences (Syagga, 1999).

Praxiologies require principles that fundamentally base their analytic means (Valuation methods); otherwise their conclusions are invalid. Basic principles in a praxiology method allow prediction of gross tendencies, not accurate precise certainties, or statistical probabilities (Cunning 1991; Rosenthal *et al*, 1967; Nymeyer, 1958). However, praxeological tendencies and statistical probabilities may coincide approximately in cases where both are feasible to estimate. It is this praxeological approach that will determine the discipline upon which valuation rests.

Compulsory acquisition of land is a statutory measure provided for by the Land Acquisition Act Cap. 295 Laws of Kenya. This Act is designed within the framework of the Republic of Kenya. It enables the government to acquire private land compulsorily provided that adequate compensation is paid to the landowners.

Private land in this case refers to land, which has been alienated or adjudicated and registered in the name of a private owner, that is, individual tenure. Land which has not been registered in the name of a private owner (when the land is not under public ownership) falls under "communal" tenure. This land is referred to in Kenya as Trust land.

The constitution also provides for the acquisition of Trust Lands under section 118 and the acquisition process in this case is governed by Trust Land Act Cap 288 of the Laws of Kenya. Other statutes, which govern compulsory acquisition of private land in one way or another, include the Way Leaves Act cap 292, Electric Power Act Cap 314 and Water Act Cap 372 of the Laws of Kenya.

## **1.2 STATEMENT OF THE PROBLEM**

The main question to be addressed in this study is how has the process of compulsory acquisition affected the valuation practice in so far as the determination of compensation payable to displaced persons is concerned? In other words some of the provisions contained in statutes governing compulsory land acquisition pose problems in the valuation practice when determining compulsory land acquisition values payable to the affected landowners.

In Kenya, the state is empowered to acquire land compulsorily from its owners for public use and pay a fair compensation for such land. The principle legislation that confers power of acquisition to public bodies includes Land Acquisition Act of (1972) and the Electric Power Act (Syagga and Olima, 1996). In gazetting the intention to compulsorily acquire land, the minister for lands should be satisfied that there is reasonable justification in public interest for causing any hardship that may result to any person interested in the land. The practice of compensation for compulsory acquisition in Kenya is based on physical assets owned, which according to the Land Acquisition Act includes the following: -

- 1) Market value of the land taken.
- 2) Any damage sustained or likely to be sustained by any person for severing such land from owner's other land.
- 3) Any damage from loss of profits over the land.

According to the Land Acquisition Act, after any land has been compulsorily acquired, the Commissioner of Lands is supposed to determine the value of the said land in accordance with principles as set out in the schedule. As per this schedule, the "market value" in relation to land means the market value of the land as at the date of publication in the gazette of the notice of intention to acquire the land. This implies that if the gazette notice was placed three years ago, the market value will be based on that period, irrespective of the current changes.

This possibility is even more reinforced by a provision within the Act, which gives the Commissioner authority to postpone an inquiry from time to time for any sufficient reason or cause. This causes delays that are not compensated to reflect a true market value. Another limiting principle according to this schedule is that if the market value of land has been increased or is currently increased, such increase shall be disregarded if the increase is by reason of improvements made by the owner or by his predecessor in the title within two years before the date of publication in the gazette of the notice of intention to acquire the land unless it can be proved that the improvement was made *bona fide* and not in contemplation of proceedings for the acquisition of the land. Again this raises the question as to how the proof is to be derived especially as most of the affected areas are rural in nature where the residents carry out small projects from time to time. This principle also assumes that the interested landowners are able to foresee or predict the acquisition, which is not possible under the normal circumstances.

The other factor that the acquiring authority usually assumes is the unwillingness of the affected landowners to part with the land through direct purchase by the said authority without necessarily invoking the powers of compulsory acquisition. In most cases it is assumed that the landowners will be unwilling and thus the statutes governing compulsory land acquisition are applied without first negotiating with the landowners whether they would be willing to accept a given price in exchange for their pieces of land. The above situations have affected valuation practice in terms of process and basis to the extent that some valuation figures given for compulsory land acquisition projects do not qualify to be called valuation estimates in the true sense of the word. The above limitations plus others that will be considered will be examined in depth to analyze the causes of variations in valuation for land compensation.

### **1.3 RESEARCH HYPOTHESIS**

The basis of compensation under compulsory land acquisition in Kenya does not enable assessment of actual market values.

#### **1.4 OBJECTIVES OF THE STUDY**

1. To identify the rationale behind compulsory land acquisition.
2. To determine the specific causes of variations in valuation of land compensation values.
3. To determine the causes of inconsistencies of the compulsory land acquisition values.
4. To identify those provisions imposed by compulsory Land Acquisition Act, which cause deviations from normal valuation approaches.

#### **1.5 SIGNIFICANCE OF THE STUDY**

The study is aimed at investigating the limitations associated with different statutes governing compulsory land acquisition and which limitations affect the valuation practice as dictated by the three traditional methods of valuation. These limitations result in compensation figures for the displaced persons that do not reflect actual market values of the parcels of land acquired. The findings of this study will enable proper assessment of compensation values to the displaced persons who will be affected by future compulsory land acquisition project. This is necessary because government land is becoming increasingly scarce as we move to the future and the only source of land for public utility projects will be to acquire from private land owners and thus the need to streamline the process of assessing the compensation awards payable to the affected persons as to reflect the prevailing market values at any point in time.

It is also to be noted that human population is on the increase and hence such projects will be required to meet the needs of the rising population. This study is also aimed at reducing legal costs in terms of court appeals against the amounts of compensation awards to the dissatisfied displaced persons and also in terms of delays associated with such appeals.

It is therefore hoped that the results of the study will lead to a smooth compulsory land acquisition process with less complains and which will leave all the parties involved happy and to lead the same lifestyles as before the acquisition. In doing so, the study aims at harmonizing the provisions of those Acts governing compulsory land acquisition and which

are the source(s) of limitations with the actual valuation practice such that the resulting compensation awards represent the market value(s) at any one time. Last but not least, the study will provide information for further research in the same field or related fields.

## **1.6 SCOPE OF THE STUDY**

This study is limited to the effects of compulsory land acquisition as laid out in the relevant Acts of parliament on the valuation practice as the basis of determining values of compensation awards to the displaced persons. The study, therefore, confines itself to the analysis of the causes of variations in valuation for land compensation with special reference to the provisions of the Land Acquisition Act, Cap 295 of the Laws of Kenya.

To achieve this objective the study will examine a sample of real property, which have in the past been targeted for compulsory acquisition and in which upon the determination of compensation awards payable to the respective landowners by the Commissioner of Lands through the Chief Valuer were later appealed by the affected persons (Appellants) on the grounds that the awards did not reflect the true market values of the parcels.

The study will examine the compensation awards as determined by the Commissioner of Lands on one hand and the appeal values claimed by the appellants on the other hand with the aim of analyzing the deviations between the two and also to find out the extend to which some of the provisions of the Land Acquisition Act have contributed to these variations.

The study therefore limits itself to those provisions or sections of the Land Acquisition Act which affect the valuation practice in as far as the assessment of actual market values for compensation purposes is concerned. This will be made possible because the Commissioner of Lands through his assistants (Valuers) determine the compensation awards in accordance with the valuation practice the same way as the appeal values are determined by private valuers on behalf of the appellants (affected land owners appealing against the awards) and both of these categories are subject to the provisions of Land Acquisition Act. This study will therefore largely involve a comparative study between the two categories of values as mentioned above to identify those causes of variations in the assessment of land compensation values by all interested groups.

Because this research is based on sample technique and that the cases will be selected from different geographical areas within the republic of Kenya, the geographical extent will not be confined to one locality and hence will not be uniform. Only a small sample of those compensation awards that were appealed against by the affected landowners and lends credence to this study will be taken to enable a detailed study and in depth analysis of the problem under investigation.

## **1.7 RESEARCH METHODOLOGY**

The study is based on sampled Compulsory Land Acquisition Valuations finalized over the last 20 years and of which valuations have forced the affected landowners to appeal against the resulting values for compensation purposes. According to the records available in the Agricultural valuation registry it is estimated that about 80 compulsory Land Acquisition Valuations have had their figures appealed against by the affected landowners. Out of these eighty cases, the author found that 40 cases lend credence to this study. Out of the 40 cases, the author picked a sample of 20 cases that represents 50% of the total population. The study had the following approaches: -

### **1.7.1 Comparative Study**

As earlier mentioned, this study was based on a sample of compulsory land acquisition cases where the awards determined by the Commissioner of Lands were appealed against by the landowners. This study will therefore involve a comparative study between the awards determined by the Commissioner of Lands on one hand and the values determined by private valuers on behalf of the appellants on the other hand with the aim of analyzing the deviations between the two. These comparisons will be analyzed in terms of percentages.

### **1.7.2 Data Collection**

Secondary data was gathered through library research, including textbooks, journals, Acts of parliament, reports, dailies etcetera. Other source of secondary data including the Finance Bills and information from the Website was also used. The primary data was obtained by carrying out oral interviews with public sector valuers who were involved in the assessment of compensation awards to the displaced persons affected by the selected projects. Other

valuers who were involved in the related projects either in the past or presently were also interviewed. The private valuers who had valued some of these parcels for appeal purpose were also interviewed for purposes of comparison.

In addition to oral interviews, written questionnaires were administered to these groups of persons. Other primary data were obtained through physical inspection of the valuation reports in both the public and private sectors for the selected compulsory acquisition cases. The researcher's observation skills and personal experience as a government valuer played a major role in the gathering of primary data.

### **1.7.3 Data Analysis**

#### **Qualitative data: -**

This is done using content analysis method. The researcher used objective judgement of facts in order to form learned opinions as to what may determine the true market value of properties affected by compulsory land Acquisition.

#### **Quantitative Data: -**

Quantitative data is analyzed principally using descriptive statistics in terms of mainly percentages and tabulations.

### **1.7.4 Data Presentation**

Data is presented in written text and tables depending on type of data under consideration and the intended output to be relayed. The nature of the data available is the primary influence on presentation techniques.



# CHAPTER TWO

## 2.1 INTRODUCTION

*“Land is a fundamental necessity of life. It is the very foundation, a framework on and within which social, political and economic activities of a Nation function. Human life and society as we know them cannot exist without land. It is therefore the most valuable asset of the individual citizen and the nation. The loss of its ownership in many cases cannot be fully redressed by cash payment”*  
(Umeh J. A, 1973).

The above quotation aptly describes the importance of land ownership from a universal point of view. But what is the meaning of land *per se*? In layman’s language land may tend to mean the physical surface of the earth but in English law the word land has a wider meaning so as to include interests in land such as easements, buildings and other fixtures on the land. In this case the term land is used to include the physical appearance of an area including the soil, all the developments undertaken, what lies beneath as well as institutional rights that go with it. Thus land is a complex of physical features and institutional rights referred to as real estate or real property.

Improvements on land could be agricultural crops, buildings, recreational facilities, and infrastructure and equally important is the entire environment in which the site is located as this has implications on its use. According to the Land Acquisition Act Cap. 295 of the Laws of Kenya, land includes all the physical land whether covered with water or not, and things attached to land, or permanently attached to anything attached to the land, and (where the meaning may be inferred) any estate, term, easement, right or interest in or arising out of land.

Compulsory land Acquisition is a process through which the government buys private land unilaterally, that is, without due regard to negotiations with the respective landowners (Muoka, 1994). The justification is that the land is needed to carry out public works for the benefit of the community as opposed to the benefit the individual derives from the ownership of private land. The terminology “Compulsory acquisition” is dominantly used in Kenya to

refer to private land only. "Setting apart" on the other hand is the terminology used in the case of acquisition of Trust Land. This is land, which is still under the communal tenure and is said to be held in trust by the respective local authority for the benefit of its inhabitants.

The handbook on land use planning, Administration and Development procedures published by the ministry of lands and housing explains that; "setting apart of land is in a way a process of compulsory acquisition of Trust land for public purpose". There is therefore no substantive difference in the meaning of the two terminologies.

As will be outlined later in this chapter the process of compulsory Acquisition of registered land is different from that of unregistered land.

## 2.2 HISTORY OF COMPULSORY ACQUISITION

The theory of compulsory acquisition of land or the doctrine of "eminent domain" as is popularly known in the American Jurisprudence, can be traced to the feudal state, during the Norman conquest of England and the subsequent establishment of a "feudal state" whose hey day was seen during the middle Ages. The Norman conquest of England precipitates two doctrines in land law, that is "the doctrine of tenure" and the "doctrine of estates".

During this stage the serfs got land in consideration for the services that they rendered to the lords. According to the doctrine of dominium directum land tenure meant that the state or crown held either directly or indirectly all the land whereas the doctrine of estates meant that a subject could own land based on conditional holding. The above depicts that the subject could own an estate in the land by virtue of the fact that he had been authorized to do so for a certain period under certain conditions. With the passage of time this tenure was modified to suit the prevailing socioeconomic realities. Such a doctrine or tenural theory fitted the feudal society in carrying out its political and military organizations. From a sociological point of view, it means that an individual holds the property for the state and that when the state exercises its "eminent domain" power it is simply resuming its original grant. This is what the political - sociological theorists call the social contract between the subject and the state in reference to land.

Dunning (1968) notes that the word “eminent domain” is not widely used in Anglo-phonetic Africa. In Kenya there is widespread use of the term “ Compulsory Acquisition”. Even though property rights are protected these are not absolute as the state can extinguish these rights. The same applied to serfs during the middle ages who held land conditionally. The power of the state to compulsorily acquire property draws its strength from the doctrine of eminent domain.

The other term that is commonly used for acquisition of land in Kenya is “Setting apart or Set apart” and is restrictively used for trust lands only. This term is part of the eminent domain powers as exemplified by section 118 of the Kenya’s constitution which provides for “setting apart” subject to public purpose utility projects. However, subsection (3) of section 118 of the constitution shows that setting apart is analogous or is synonymous with eminent domain. It is apparent that in Kenya eminent domain is exercised through compulsory acquisition and in line with the above named provisions. Kenya seems to have followed the view held in United Kingdom that Compulsory acquisition of land is inherent in sovereign power. These powers have increased in importance due to the widely held view that the state has a greater role to play in providing for the infrastructure. The law of compulsory acquisition of land like most of the Kenyan laws was imported from U.K. via India. The first legislation on compulsory acquisition in Kenya was the “ Land Acquisition Act of 1894” of India. Though this Act Originated from India, It borrowed largely from the English law and made some modest modifications. By article 11(D) of E.A order in council of 1897, the Indian Act was extended to Kenya. After a passage of time, this was replaced by the present legislation viz the Land Acquisition Act of 1968 (Cap 295) Laws of Kenya.

When the Land Acquisition Act of 1894 of India was applied in Kenya, It was intended to serve a colonial role just like every law that was in existence. A research carried out by Apondi (1978) of this Act reveals that land was acquired all over the country and various reasons were given to justify the acquisition. In 1911 land was acquired at Miritini in order to enable the colonial government to construct railway works. Later in the year land was acquired at Rongai for establishment of a township. The list goes on and on.

The above examples establish that the government was concerned with the improvement of communication in the country. This was not because they had the interest of the resources of

this country. Kenya was not only supposed to serve as a source of raw materials but also as a market for finished manufactured goods. Hence it was necessary that the infrastructure be improved to facilitate the above roles. The establishment of townships was necessary for administrative purposes in the country. Things were not changed when Kenya gained independence. The new independent government continued acquiring land for public purposes. This was mainly done to improve communications, build schools, hospitals, factories and other public utility projects. Examples include Mumias Sugar and Eldoret Airport.

In 1968, a local version of the Land Acquisition Act of India of 1894 was introduced in Kenya. The local version is a mere reproduction of the former Act. Although the Assistant minister for lands and settlement then argued that the bill was supposed to reflect local conditions it was apparent that Kenya just wanted to have a local Act instead of using a foreign one as there were only few minor changes in the file, for example, instead of having appeals to go to the collector, they would hence forth go to the minister.

The fears that had been expressed in National Assembly over certain key clauses like compensation and "Market Value" have since taken place, as this project will reveal. The History of Trust lands dates back to the period before Kenya gained its independence. It started when the colonial government appointed a land commission under the Chairmanship of Morris Carter to investigate inter alia: - into the way the 1930 ordinance was operating; the present and future land needs of the natives and the nature of the claims that the natives had to land alienated to non-natives. The commission recommended inter alia, that the boundaries of the native reserves be entrenched in an order in council. This was done in a new Native lands Trust ordinance that vested the reserves in a Trust Land Board. The Board was charged with the responsibility of representing African interests therein. In all cases where the Governor wanted to exclude land from the reserves for a public purpose he had to be satisfied that the idea was consented to by the majority of the Africans in the area and specifically that the Local Native council had passed a resolution in its favour. Further, the Trust Land Board, had to be consulted and consent to the exercise. Thus, for the first time elaborate legislative provisions for setting apart of Trust lands appeared, covering such matters as compensation (in cash or land), notifications and gazettelements. In addition, the Governor still retained the power to exclude land from the native reserves for certain purposes.

The next stage of the development of the law of Trust lands was the independence constitution which by section 208, all lands in the former African reserves were converted into Trust Lands vested in the county councils to be held in trust for their occupants. The way in which the trustees are to administer the lands is set out in the Trust Land Act. It is this Act that also sets out the law for setting apart of Trust land both by the council itself and by the government. The position remains the same to date. The development of the law of Trust lands was completed in 1968 by the Trust Land Amendment Act of the same year. This amendment brought out the law as it is today with all that elaborate section on the topic of setting apart.

### 2.3 **THE PROCESS OF COMPULSORY LAND ACQUISITION**

As mentioned earlier the process of compulsory acquisition is different for both registered land and Trust Land. The processes followed for each of these cases are as outlined below: -

#### 2.3.1 **CASE OF REGISTERED LAND**

As indicated earlier, before any land is compulsorily acquired, the relevant authorities must satisfy themselves that the purpose for which the land is to be compulsorily acquired is "Public purpose". Unless this requirement has been fulfilled it cannot be said that the acquiring authorities had taken the land legally. Therefore, land in Kenya is only compulsorily acquired where that land is required for a public purpose and nothing more.

The detailed procedure to be followed during compulsory acquisition of land is to be found in the Land Acquisition Act Cap 295 laws of Kenya.

Section .6(1) of the Land Acquisition Act provides that whenever the minister is satisfied that any land is required for a public purpose he may in writing direct the Commissioner to acquire the land. In that event, the Commissioner of Lands is expected to adhere with the following formalities: -

- a) The preliminary notice;
- b) The notice in the Kenya Gazette (other than the preliminary notice) and;
- c) The procedure of compensation.

Under the preliminary notice is the discretionary power of the Commissioner to serve notice upon the people interested in the land to be acquired to the effect that the said land is to be

acquired without specifying any details. This notice entitles the Commissioner to enter the land affected in pursuance of any of the purpose of this Act. This includes the Surveying of the land to ascertain whether it is suitable for the purpose which it may be required. This is provided for under section 4 (i) of the Act. However, this is subject to the consent of the occupier, but where the consent is withheld, then the Commissioner must serve seven days notice that he and his workmen are entering into the building or enclosure or both in question on the expiry of the notice.

When the surveyors have finished marking and measuring the land, the valuers come in to assess the compensation to be paid out to the affected people. Section 9(i) provides that the Commissioner shall appoint a date, not earlier than thirty days and not later than twelve months after the publication of the notice of intention to acquire, for the holding of an inquiry for the hearing of the claims for the compensation by persons interested in the land and shall cause a notice of the inquiry to be published in the gazette at least fifteen days before the inquiry, and serve a copy of the notice on every person who appears to him to be interested or who claims to be interested in the land. Section 9(ii) of this Act provides that the notice of inquiry shall call upon the persons interested in the land to deliver to the Commissioner not later than the date of the inquiry a written claim to compensation. It seems implicit from the foregoing provision that one can engage a professional valuer to assist him in making "a written claim to compensation".

The date of inquiry must not be earlier than 21 days of the publication of the notice of intention to acquire the land in question. However, if the date of inquiry has not been published in the gazette along with the notice of intention it must be published in the same at least 14 days before the inquiry is held. At the same time, or at least 14 days before the inquiry, every person whose land is acquired must be served with the notice to the effect that an inquiry is to be held. The reasons for an inquiry are laid down by section

9(iii) and include: -

- (a) To make full inquiry into and determine whom are the persons interested in the land.
- (b) To make full inquiry into the value of the land and determine that value in accordance with the principles set out in the schedule.

- (c) To determine, in accordance with the principles set out in the schedule, what compensation is payable to each of the persons whom he has determined to be interested in the land.

When the inquiry is completed, the Commissioner is required to make a written award to each of the persons interested in the award. As compensation is an offer it may be accepted or rejected.

### **2.3.2 CASE OF TRUST LAND (UNREGISTERED LAND)**

It has been mentioned earlier in this study that the terms “Compulsory acquisition” and “Setting apart” may be used interchangeably in the context of this project. “Compulsory Acquisition” is dominantly used in Kenya to refer to private land only, whereas “setting apart” is the terminology used in the case of Acquisition of Trust land. Today there are two distinct but overlapping sets of law for setting apart of trust land in Kenya. One is for setting apart by the Government and the other is for setting apart by the county council.

The constitutional basis for setting apart by the County Council is section 117 of the Kenya constitution, which provides that an act of parliament may empower a county council to set apart any area of land vested in it. Land under that section may be set apart for public purpose, for purposes of prospecting or extracting minerals or for private purposes which in the council’s opinion are beneficial to the occupants of the trust land, either by reasons of the use to which that land is to be put or by reason of the revenue to be derived there from. Section 118 is the constitutional basis for setting apart of land by the Government. Under subsection (2) where the President is satisfied that there is need to set apart land, he may give a written notice to the county council to the effect that land is required for the specified purpose and the land shall then be set apart for the purpose specified in that notice.

The purpose for which land may be so set apart are:- The purpose of the Government of Kenya; the purpose of a body corporate established by an Act of parliament; the purpose of a registered Company; the purpose of the East Africa Community and the purpose of prospecting or extracting minerals. The term public purpose, which is the justification of any

form of alienation of private property by the state, is defined neither by the constitution nor by the Act. However a diagnosis of this concept has been left for a later stage in this essay.

(a) **Setting apart by the county council.**

As regards setting apart by the council S.13 of the Trust Land Act is exhaustive, although that has been achieved partly by subsection (4) which extends other sections dealing with setting apart by the government to this type of setting apart as well. Subsection (1) merely provides that in pursuance of S.117 (4) of the Constitution a Council may set apart an area of trust for public purpose as specified in Subsection (a) of that constitutional section. Subsection (2) of Section 13 provides the steps to be followed. The first step is notification of the divisional land board of the proposal to set apart the land which notification must be provided by the County Council. The County Council must also publish in the Gazette a notice of intention to set apart. This notice must specify the specific purpose of setting apart the land proposed to be set apart and the date before which applications may be lodged with the District Commissioner.

Having received the necessary notification, the Chairman of the Board is obliged to inform the Council of the day and time he has fixed for the Boards deliberations on the matter. That day must not be less than one or more than three months from his receipt of the notice. Then it becomes the council's obligation after learning of that date, to inform the people of the area concerned of the proposal to set land apart, and of the date and time of projected Board meeting. On the appointed day, the Board hears and records in writing the representations of claimants.

The District Commissioner after consultations with the Board determines which of the claimants have genuine interests and then assesses in like manner the award payable to each successful applicant as compensation for the deprivation of that interest. The Board then submits such records together with its own written recommendations to the Council. The council after consideration of such representations and recommendation may set apart the relevant land. Where the setting apart has been recommended by the board the council needs a majority of all the members of the Council to set apart, and a three quarters majority where the Board has recommended against the setting apart.



The District Commissioner having determined the awards is required to inform each applicant of the outcome of his application where an award is made; he has also to inform the council of that award by a written notice. The Council must then deposit that sum with him for onward transmission to the person or persons entitled to receive it. After depositing the awards with the District Commissioner the Council can then request the Commissioner of Lands to gazette on its behalf the setting apart.

Where an applicant is dissatisfied with the District Commissioner's adjudication of his interest he may appeal in writing through the same District Commissioner to the Provincial agricultural Board. Should he still be dissatisfied with the outcome of such an appeal he may further appeal to the resident Magistrate and thereafter to the High Court whose decision is final. Under Section 12 every person has a right of access to the High Court for the determination of the legality of setting apart or for the prompt payment of the compensation awarded.

(b) **Setting apart by the Government**

Where written notice is given to the County Council under Section 118(3) of the Constitution that an area of trust land is required for any of the purpose specified thereunder that council has to give notice of such requirement by publication in the Gazette.

This is the notice of intention to set apart. Such notice must specify the purpose of setting apart, the boundaries of the land, and the deadline for submission of compensation claims to the District Commissioner. The council may require the Government or the institution for whom the land is to be set apart to demarcate the land and put boundary marks and should the relevant body fail to do so then the council may carry out the necessary work itself and demand reimbursement for the expenses incurred.

As in the case of setting apart by the council, the District Commissioner then consults the Board to determine the interests of all applicants and to assess the compensation payable. Once the compensation is deposited with the District Commissioner the council is obliged to publish the setting apart in the Gazette. The law as regards appeals is the same as that of setting apart by the council.

## 2.4 COMPENSATION AND VALUATION

### 2.4.1 COMPENSATION

This is an important element in the procedure of compulsory acquisition as when it is fair, it may reduce the hardships, which have been caused by acquisition of land which one is very much attached to economically or culturally. Compensation in most cases will determine the deviation of one's position after resettlement as compared to his position before the acquisition.

A cursory glance of the cases on compulsory acquisition depict that compensation is the most litigated factor rather than the legality of the acquisition. This could be explained by the fact that the chances of getting an increase in compensation seem to be slightly higher than that of defeating the legality of acquisition. Another reason is that litigation on the legality of the acquisition could easily be viewed as hostility to government policy.

The legal basis of granting compensation in Kenya is found in statutes and to a limited extent the judicial decisions. These statutory sources are the Constitution, the Land Acquisition Act (1968) and the Trust Land Act. It is apparent that Kenyan Case law on compensation has faithfully looked for guidance in English decisions. The mode of compensation in the English law, Land Acquisition Act of India and the local Land Acquisition Act are substantively the same. This can be explained by the fact that the last two Acts were mainly derived from English Law.

According to the Constitution, when property is acquired compulsory then " prompt payment of full compensation" should be given to the affected party. The section talks about 'property' in general and it is obvious that land is property. However, that is all that the constitution provides for as it does not go further to define what it means by the terms "prompt" and "full" compensation. Nsereko's (1976) discussion on the Nationalization laws of Tanzania is very useful as the latter's law also uses the same terms as the Kenyan law. Care should, however, be taken not to interpret this as binding but only as of persuasive value. Nsereko asserts that "prompt" means "immediate" or "adequate and effective compensation". He defines "full" compensation to mean that price which could be

determined hypothetically by the willing seller and the willing buyer at the time of acquisition. It is my contention that the intention of the legislature in using the words “full and prompt” compensation was that a fair compensation based on the market value should be given within a reasonable time. Apparently, we are dealing with relative terms that should be construed in light of the given circumstances. In practice the views of the administrative officers on the words “full and prompt” compensation always seem to prevail to the detriment of the aggrieved parties.

Apart from the constitutional provisions discussed above, the Trust Land Act (Cap.288) and the Land Acquisition Act both use the above terminologies and hence the above discussion also applies to them.

The principle under which compensation is determined in the Land Acquisition Act is provided for in the schedule to the Act. The following are the principles:

- a) That in assessing the value of land, the “market value” of the same as it stood at the publication of intention to acquire it in the Gazette should be the basis of compensation.
- b) That in assessing the market value the effect of any express or implied condition of title or law that restricts the use of the land should be considered.
- c) And that if the market value of land is increasing because of improvements made by the owner upon that land within two years before the publication of intention in the Gazette should be ignored if the same improvements were carried out in contemplation of acquisition. An increase in market value if that increase is due to reasons that could be restricted by the court should be ignored too.

Apart from the above, the schedule further enumerates other matters that have to be considered in determining compensation. These are: -

- i) Any damage sustained or likely to be sustained by severing the land acquired from his other lands;
- ii) Any damage sustained or likely to be sustained by reason of acquisition of land and thus injuring the other property or where the acquisition affects the actual earnings of the injured person.

- iii) Any reasonable expenses incidental to the change of residence or business as precipitated by acquisition.
- iv) Diminution of profits between the publication of intention and the taking possession of land by the Commissioner.

In determining the compensation, certain matters are to be ignored like the following:

- a) The degree of urgency that has led to the acquisition.
- b) Any disinclination of the interested persons to part with the land.
- c) Any damage sustained which cannot be a good legal cause of action.
- d) Any damage sustained which is likely to be caused to the land after the date of publication in the Gazette of notice of intention or in consequence of the use of which the land will be put.
- e) Any increase in value of the land likely to accrue from the use to which it will be put when acquired.
- f) Any outlay on additions or improvements to the land incurred after the date of publication in the Gazette of the notice of intention unless the improvements were necessary for the maintenance of the property in the proper state of repair.

According to S. 4 of the Act (4) apart from the compensation discussed above, the aggrieved party is entitled to an additional 15% of the market value of the land for the disturbance and expenses incurred in moving out. The Land Acquisition Act does not anywhere define the word "market value" of the land acquired. Both the English and Indian law of acquisition recognize the concept of market value. The term was aptly defined in a famous case viz, Manv v. The Collector (1957 E: A 125) where it was stated:

"The market value of land as the basis on which compensation must be assessed is the price which a willing vendor might be expected to obtain from a willing purchaser and a willing purchaser is one who although he may be a speculator is not a wild or unreasonable speculator".

It seems reasonable that the statement should be construed in view of the free market economy in Kenya where the value of land would be determined by market forces like supply and demand.

Unlike the Land Acquisition Act, the Trust Land Act does not lay down exhaustive principles on determination of compensation. According to S.8 (1) of the Trust Land Act “Where land has been set apart full compensation shall be promptly paid by the Government to any resident of the area of land set apart who .....

- a) Under African Customary Law for the time being in force and applicable to the land has any right to occupy any part thereof; or
- b) is, otherwise than in common with all other residents of the land in some other way prejudicially affected by the setting apart”

The Act further goes on to provide that the compensation would be awarded to the affected parties by the District Commissioner after consultation with the divisional board. The District Commissioner is supposed to take into account the loss of right to occupation and the fact that the applicant may have been prejudicially affected.

#### 2.4.2 VALUATION

The term value is a word of varied meanings and thus its use without qualification is meaningless. Perhaps, the most usual context in which the term is used is that of Market Value, which has been defined as “the most likely price that can be obtained for an interest in property at a particular time from persons able and willing to carry out the transaction”.

This definition closely approximates to the idea of what is known in economic theory as value in exchange. The idea of exchange value and the related concept of opportunity cost are fundamental to most of current valuation methodology. Apart from the central notion of market value, there are a number of other concepts of value that are important from the point of view of investment, for example, personal investment value and vacant value. Both these concepts are related and derive from the economic concept of value in use. Market value, in one respect at least, represents the value of a property for investment purpose in the sense that

the usual investment test of value for money which is laid out in anticipation of future economic returns can be applied to market transactions.

In spite of the long history of development in the theory of value there has not so far been a precise definition of this concept. This can be seen from the varied definitions given in valuation books and journals. This indicates that there is inadequate understanding of the concept that may lead to errors in assessment of value.

The most popular definition of market value, however, is found in Real Estate Appraisal Terminology Handbook and it states that market value is the highest price in terms of money which a property will bring in a competitive and open market under conditions requisite to a fair sale, the buyer and seller each acting prudently, knowledgeably and assuming that the price is unaffected by undue stimulus.

An important point to note in the above definition is the consummation of a fair sale as of a specified date and the passing of title from seller to buyer under conditions where: -

- a) Buyer and seller are typically motivated;
- b) Both parties are well informed or well advised, and each acting prudently.
- c) A reasonable time is allowed for exposure in the open market.
- d) Payment is made in cash or its equivalent
- e) Financing if any is on terms generally available in the community at the specified date and typically for the property in his locality.
- f) The price represents a normal consideration for a property sold unaffected by special financing amounts and/or terms, services, fees, costs or credits incurred in the transactions.

The task of the valuer therefore is to identify forces at work in the given property market, ensure their operation and evaluate the present and future impact because value is created and modified by economic, social and political factors outside the property. Determination of market value involves understanding the circumstances of the case and the principle of valuation applicable under such circumstances. Resolving of the circumstances of the case is the foundation of assessment of value.

Valuation is the art or science of estimating value for a special purpose of a particular interest in time, taking into account all the facts of the property and also considering the underlying economic factors of the market including the range of alternative investments.

It is about translating the rationally assessed requirements of the average property buyer into a value estimate. It is principally concerned with the determination of the value of immovable assets in land and buildings at some point in time, for some purpose, under some specific circumstances (Syagga, 1994).

The evolution of valuation theory is traced to a closer relationship between economists and valuers. During the last century much emphasis was placed on the concepts and techniques which practicing valuers applied to market information and on the interpretation given to them by the courts. This gave rise to a body of principles divorced from the economics of real property.

Alfred Marshall (1956) writing at the turn of this century outlined three popular methods of valuation that are in the current use, viz. The comparative method, the contractors test and the investment method. He was not primarily interested in the techniques of valuing property but in expounding a theory of value. However, he summarised the investment method in the words! “..The capitalized value of any plot of land is the actual discounted value of all the net incomes which it is likely to afford...” and again referring to land with improvements; “for the value of the capital already invested in improving land or erecting a building... is the aggregate discounted value of it’s estimated future net incomes; and if it’s prospective income fielding power should diminish, its value would fall accordingly and would be the capitalised value of that smaller income after allowing for depreciation”.

Irving Fisher (1966), writing shortly after him went into greater detail regarding risk, capitalisation rates and the discounting process and expressed the view that market values are “dependent solely on the same two factors; the benefits returns expected by the investor and the market rates of interest by which those benefits are discounted”.

The principles governing the three methods of valuation mentioned above became fairly well developed in the writings of the neo-classical economists by 1910. Whereas earlier valuers in

practice had worked without a background of theory they had now arrived at a position from which they could evolve a definite discipline of valuation based on theory and practice. This was done mainly in America where the doctrine of the “three approaches” gained support. There were attempts even at correlating or reconciling the three approaches on the ground that they represented different facets of the same approach. This was based on the classical economic doctrine of the equivalence of cost, market value and capitalised income under conditions of stable equilibrium.

This appraisal theory took a new turn with the emphasis given to the income approach by F.M Babcock (1932), who was strongly influenced by the writings of Irving Fisher. He held that this method was the theoretically correct approach especially in a dynamic economy and rejected the idea of the equivalence of the three approaches. Babcock’s ideas dominated American appraisals for a long time until, in the late 1930’s, practicing appraiser members of the American Institute of Real Estate Appraisers advocated a return to the three approaches but without the forcing of equivalence between them. In practice this means that the collection and Interpretation of data by all three methods is carried out before a particular method is chosen as the most appropriate in the circumstances.

### **2.4.3 VALUATION APPROACHES**

This refers to the different means used to arrive at value of property. They are as a matter of fact methods of valuation. They are briefly described as follows:-

#### **2.4.3.1 Market Comparison Approach**

With this approach a valuer determines the Market value of a property by comparing it with other similar properties that have been sold in the recent past and situated in the same locality. This approach is based on the principle of substitution that states that when similar or commensurate commodities, goods or services are available the one with lowest price attracts the greatest demand and widest distribution. This follows that; a buyer will not pay more for one property than for another that is equally desirable. The above principle was an extension by the revealed preference theory which states that one can merely observe empirically the actual behaviour of consumers to demonstrate the general properties of demand curves (Bell and Todaro 1969).



If assuming that tastes remain unchanged, one can analyse consumer behaviour just by observing how purchasing patterns vary as income and prices change. It is from such reasoning that valuers can look to the current real property market for indications of actual going market values of the properties they value.

In using this approach a thorough examination of all underlying factors in the market must be made to enable for a proper adjustment that will portray true market values. This method is the mostly widely used and the simplest if adequate sales data is available and the most accurate. Though the method is widely used it has its own limitations and include: -

- (i) Buyers and Sellers frequently operate with incomplete knowledge of their market opportunities. This goes against the assumption that the consumer is in a “chosen position”
- (ii) Properties have a wide variety of characteristics for example, location, improvements, accessibility, size, etcetera. This heterogeneity makes comparability difficult as the levels of satisfaction or utility being measured may be different.
- (iii) Some properties sell for more than they probably should while others sell for less. Naturally transactions take place at particular points in time and under circumstances some of which may never be revealed.
- (iv) Because Depreciation affects the value of properties, it makes it difficult to compare the depreciation of two identical buildings whose construction materials may depreciate at different rates.
- (v) Sales data for comparable properties may be very scarce or non-existent when local real property markets are either relatively inactive or small or the property being valued is of the type that is rarely sold.

Despite the above limitations of the approach, valuers still tend to look to the past rather than the future because the past provides comparables for the valuation technique.

#### **2.4.3.2 Income Capitalization Approach**

The income capitalisation approach is also referred to as the investment or years purchase (YP) method. It is based on the principal of anticipation or productivity, which states that the value of a property is a function of the future benefits the property will produce. This

approach assumes that real property can produce predictable future flows of rental income, and that investors typically have a strong preference for receiving income now rather than waiting for its receipts at some future date.

The approach encompasses a process by which the net income is converted into an estimate of value, that is, capital value. Once the income is known the valuer determines the relationship of annual income to capital value by the use of "yp" more appropriately described as the present value of \$ 1 per annum. Y.P is derived from the rate of interest that an investor decides to require from a property. Usually, the procedure used in this approach is as follows:-

- i) Ascertain or determine a net annual income which is equal to the gross income less the annual operating expenditures which include repairs and maintenance, management costs, insurance rates, vacancies and voids.
- ii) Determine the rate of capitalization or "yp"
- iii) Multiply the net income by the "yp" and this is referred to as the capitalisation process.

This process is applied on properties which produce income flows for investment purposes. The discounting process that derives the present value of an asset from its future income flows, in the first instance assumes a uniform size flow of annual land rents that are expected to continue indefinitely into the future and can be expressed by the formula  $V=A/R$ , where V represents present value, A represents the stream of annual income and R represents the expected rate of return or capitalisation rate (Syagga, 1999).

This approach is however is not without limitations. The above formula is, for example, designed for use with productive properties that are expected to produce an even flow of income year after year into the future. In such circumstances, valuers are concerned with only two variables namely; the average annual rent attributable to the property, and an appropriate capitalisation rate. But what happens when the property being valued will not provide an even flow of expected income in the future.

In such cases modifications are required and it will be necessary to adjust the estimated average annual rent to take into account the expected changes, if known, or by use of a modified capitalisation formula:  $V = A/R + I/R^2$ , where A represents the average rent received by the property and I represents the expected average increment or decreased rent whether due to property improvements or deterioration, and "R" represents capitalization rate. The computation of "A" or average annual rent poses problems with the use of income capitalisation approach. Even if valuers in estimating future income flows of properties use well-defined procedures the process is fraught with hazards. Small errors can have magnified effects on final value determination. Minor errors in the assumptions regarding future contract rental rates, vacancy rates, or the effective economic life of a building can inflate or deflate the values of the property derived.

Where a property is not earning income the estimation of rent is again based on comparable properties using the principle of substitution as previously discussed. Instead of comparing the price, the valuer will compare the rents. Use of this comparative market method will need to take into account such aspects as: - income quality of the property, Risk associated with receipt of future incomes, likelihood of serious competition arising from the development of comparable properties, marketability of the property, Stability of its value and the burden of management.

The capitalization rate or expected rate of return R is the second important variable in the capitalisation formula. Valuers often use discretion and judgement in their determination of the appropriate Capitalisation rates applied to individual properties. While risk free investments can be capitalised at low rates of interest, property investments involve several risks that include; illiquidity of tied up capital, considerable burdens of management, stability of the value capital, uncertainty of return and irregularity of return. Each of these factors justifies the use of capitalisation rates that are higher than the relatively safe, non-risk rates used with government bonds in periods of relatively plentiful money supplies.

### 2.4.3.3 Replacement Cost Approach.

This is the third approach to property valuation and is rooted in the early classical assumption of a close relationship between production cost and value. It is premised on the principle that a property is worth the cost of producing an alternative property of similar utility. If well-informed rational buyers could refuse to pay more for properties than for comparable substitutes, so also would they refuse to pay more than it would cost to replace them with other properties capable of providing comparable utilities and satisfaction. (Syagga, 1999).

Replacement cost approach assumes that the land component can be valued as vacant, and then added to the value of the building so as to arrive at the value of the whole. This method is used to value types of properties that seldom change hands, usually non-profit making properties and which have a few comparables. These are properties designed for a special purpose to meet specific requirements that have little market demand. The total market value of the land plus the total value of the property is equivalent to the cost of improvements less the value of land obtainable from comparables and the value of the improvements which involves estimation of the current cost of production or replacements

As mentioned above, the approach is mostly used when dealing with non-marketable properties like churches, institutional buildings or those properties found in remote localities. This is mainly because of the following reasons: -

- i) Difficulties encountered in the use of income-capitalization approach.
- ii) Difficulties encountered in the use of market- comparison approach.
- iii) Need for standardized technique that can be applied to mass valuations.
- iv) Relative simplicity of this approach and ease with which it may be applied.

This approach however, has some limitations that comprise the following: -

- i) Valuers must determine the cost of providing sites of comparable values using the market approach and there may be no active land markets.
- ii) Valuers must determine the cost of replacing present improvements or providing a suitable substitute and yet there may not be exact replicas for comparison.

- iii) Valuers must make appropriate allowances for accrued depreciation and obsolescence of present improvements.

The above three methods of estimating the value of real estate are used for the assessment purpose in a more or less pure form. In many walks of life and in many activities of man, the end justifies the means. In such cases it is natural that the means should seldom receive much attention for their own sake. What does the method matter if the result is satisfactory? In valuation of real property the result is the market price and the valuation method is the means. Would market value be the same for different methods, particularly when the *priori logic* and the data used are different? Prof. P. M Syagga (1999) when launching his inaugural lecture explains: -

“ Some valuers find it desirable to use two and sometimes all three valuation methods in their work. This practice often results in more than one answer. Questions then arise as to which value estimate should be accepted in the final determination of value. When valuers find themselves in this position they should recheck their calculations and try to narrow the differences between their high and low estimates. They should re-examine the purpose of the appraisal, the adequacy of the data used, and the applicability of their valuation assumptions. In this correlation process they ordinarily give maximum weight to the valuation approach they consider as most reliable while treating the other methods as checks to guide them in the determination of reasonable value figures. This why it will be increasingly important to state explicitly the logic presumed in the analysis and to provide an alternative opinion for a different scenario”

He goes further to explain that valuers naturally differ in the emphasis they give to different valuation methods. He says that some Valuers feel that the market comparison approach provides the only sound basis for estimating market values, yet others reject this approach because of its acceptance of fluctuating values. He adds some valuers argue that income capitalization provides the only sound basis for estimating values; Others reject the approach because of difficulties that complicate the calculation of average expected net returns and the selection of capitalisation rate. He also says that some Valuers prefer the apparent sense of certainty they get with the replacement -cost approach yet others agree that this approach has little practical use until its depreciation allowances are adjusted to bring its value

determination in line with those found by market-comparisons which is speculative. He concludes that the bottom line is therefore not which method has been used but the *priori logic* in the method used and that circumstances will determine the logic and hence the appropriate method.

## **2.5 VALUATION APPROACHES VERSUS PROVISIONS**

Having looked at the provisions governing compulsory land acquisition and the valuation approaches normally used in the assessment of market value; this section will attempt to identify those provisions in the Land Acquisition Act which seem to deviate from the general principles of valuation as determined by the valuation approaches and vice versa. The section will also discuss in brief those compulsory land acquisition provisions that appear to cast some doubt as to the application of valuation principles in the assessment of market values for compensation purposes.

In Britain, the appropriate date for assessing the value of the land is either; the date when compensation is agreed or assessed; or the date when possession is taken (if this is earlier); or the date when “equivalent reinstatement” can reasonably be started, if that mode of compensation is to be applied. In Kenya the assessment is based on the date when the intention to acquire was published in the Kenya Gazette as provided for in Section 1(i) under the schedule of Land Acquisition Act, Cap 295. As will be revealed in the next chapter, the assessment of market value for compensation purposes for most projects is carried out much later after the date of publication in the gazette of the notice of intention to acquire the land that does not give the current market values of the properties affected.

Compensation must be based on the value of the land in the hands of the owner, not its value to the acquiring authority. It is the former that is the market value because it is the vendor and not the purchaser who is at liberty to market the land or not. This rule is often contradicted because it is the government who usually control the valuation procedure as the Land Acquisition Act vests the authority to the Commissioner of Lands and the landowners have a lesser say in the determination of the market values of their properties.

According to section 4(i) of the Land Acquisition Act, the Commissioner may in writing authorize any person together with servants and workmen to enter upon any land specified in a notice published under section 3 and to survey the land and to do all things which may be reasonably necessary to ascertain whether the land is suitable for the purpose for which it may be required. The section further provides under sub-section (2) that an authorization under sub-section (i) shall not empower a person to enter a building, or an enclosed court or garden attached to a dwelling house unless he has first obtained the consent of the occupier, or failing consent, has served on the occupier not less than seven days notice in writing of his intention so to enter. In this case the problem arises when there is urgency in acquisition as provided by section 19(2) of the Land Acquisition Act. Here the government valuer may be forced to assess the structures where applicable by inspecting only the outward appearance of the property resulting in to loss of accuracy as to the market value of the subject property. Although market value has been recognized as the basis of assessing compensation nobody has attempted to coin a legal definition for it.

The Trust Land Act is silent on the majority of the principles as stated in the schedule to the Land Acquisition Act Section 8(i) of the Act provides thus: -

“where land has been set apart, full compensation shall be promptly paid by the government to any resident of the area of land set apart who .....

- a) Under African customary law for the time being in force and applicable to the land has any right to occupy any part thereof or;
- b) Is otherwise than in common with other residents of the land in some other way prejudicially affected by the setting apart.

In furtherance of the above provisions it is provided in Section 9(3) of the same Act that:

“The compensation to be awarded shall be assessed by the District Commissioner after consulting with the divisional board, and shall be assessed in respect of the applicant having been prejudicially affected .....

This assessment seems to imply that the affected person should be compensated fully for the loss sustained which is sufficient to reinstate him elsewhere.

## 2.6 QUESTIONS

Arising from the general principles of compensation as outlined earlier in this chapter, the biggest problem has been created by the idea of an open market. The value of the property is assessed using the imaginary market that would have ruled had the property been exposed for sale before the prospect of acquisition. This is based on assumptions that take for granted that demand for the property exists. Whether in the open market there would be a willing seller at a price acceptable to a willing buyer is a question that is hard to answer.

An estimate of market value will take into account all the potentialities of the property not only its present use, but also any more profitable use to which it might be put in future. The valuer should be able to assess the capacity of demand because it is not planning permission alone that increases value, but it is planning permission coupled with demand. The assessment of demand is based on many assumptions and therefore requires special understanding of the projected economic performance over a long period of time. Such projections are usually a source of misunderstanding among appraisers because of different conceptions about the future of an economy.

When valuing a property, consideration should be given to special adaptabilities of a property as this gives it a special value in certain limited market because there's no limitation on the number of purchasers that constitute a market. Value increased by special suitability or adaptability of the land itself does not extend to purposes connected with the product of the land. To determine and value the worth of special suitability is difficult.

There are certain kinds of properties which are not normally transacted in the market and whose values cannot be readily assessed by ordinary methods of valuation, such as estimating the income or annual value and capitalising it. Such properties include churches, schools, public buildings, etc. The basis of valuation here is the cost of providing the owner so far as reasonably possible, with an equally suitable site and buildings elsewhere. If claimants are using an old building that has been adapted to their purposes the term "equivalent reinstatement" is the basis of assessment. This covers the cost of acquiring a similar property if that is possible, together with the expenses of any necessary adaptations. A property is unique in its own way and it is therefore not simple to determine what constitutes a suitable



site or building. Old buildings suitable enough to be compared with the acquired property may be non-existent.

Valuers must use their professional imagination to eliminate any influence that the public works might have had in increasing or decreasing the value of the property. Professional imagination implies personal opinion. When it comes to matters of personal opinion people are likely to be quite divergent irrespective of their professional qualifications.

The effects of public works should also be considered when analyzing sales evidence, because any sales involved in a designated area are not likely to portray true open market transactions of the criteria of a willing seller, willing buyer type. It is therefore necessary to thoroughly investigate the circumstances of sale of comparables to be used in assessing value. In most cases this is not properly done or even ignored altogether.

The date of valuation is very important. It is necessary to take great care to adequately relate sales evidence to the actual date of valuation. In valuing property at a particular date, the facts existing on that date are the only relevant facts and therefore one should disregard any unexpected boom or depression which no man would have anticipated. The all important point at the date of valuation is the opinion regarding the price of the property which an hypothetical prudent purchaser would have had if he desired to purchase the property for the most advantageous purpose to which it would have been adapted.

Compulsory purchase compensation should include compensation for injurious affection and disturbance. In addition to the value of the land, the owner is entitled to compensation for the loss of any buildings or fixtures or timber on the land, whether or not these items are included in the overall purchase price or are a subject to separate valuation. The tenant or owner-occupier is entitled to a claim for tenant right. The property owner should also get compensation for the depreciation in value of the remaining portion of his property due to severance.

The valuer should consider injury likely to occur to the rest of the property as a result of the authorized user of the works. Assessment for injurious affection is usually complicated and involves a lot of subjective judgement. For example, assessment of depreciation in value due to the effects of a nearby road which causes noise, fumes and lack of privacy. Though this is

valued in “a before and after” method of valuation where the value of the property is determined before the effects of acquisition and after, it is not as easy as it seems because in some cases the value of the severed piece of land is equivalent or even higher than that of the original plot.

Disturbance compensation is not payable in respect of land retained by a claimant and it is therefore a totally separate type of compensation from severance and injurious affection. In certain cases disturbance compensation is not payable because although a compulsory acquisition has taken place, the claimant himself has not had any interest compulsorily acquired from him but has merely been dispossessed e.g. licensees cannot claim this payment as of right.

Any loss sustained by a dispossessed owner that flows from a compulsory acquisition may properly be regarded as the subject of compensation for disturbance provided it is not too remote and that it is the natural and reasonable consequence of dispossession of the owner.

A businessman is entitled to compensation for injury to goodwill in what is referred to as trade disturbance. The method of assessing the loss of goodwill is by multiplying the average annual net profits by a figure of year's purchase that should vary according to the extent of damage or injury suffered. Where the taking of the premise means extinction of trade, the full value of the goodwill may be allowed as compensation. Where the land is valued at a higher use value than the existing, compensation for disturbance may not be justified.

Compensation for disturbance may therefore be on an existing use value plus disturbance or a higher use value less disturbance, whichever is higher. In Kenya 15% of the value of the property is awarded as disturbance compensation.

## **CHAPTER THREE**

### **3.0 DATA ANALYSIS**

This chapter provides an analysis of research findings on the differences in the compulsory acquisition values as estimated by interested groups namely; the acquiring authorities and the claimants (Affected landowners). This is done in two sections. Section 3.1 consists of an examination of the 20 compulsory land appeal cases that were sampled by the researcher based on the research methodology to form the sample for this study. These appeal cases were selected from a span of about 20 years and all have almost similar grounds of appeal as will be outlined later in this chapter. This section also consists of inferences made from table 3.1 and finally the causes of variations in valuation for land compensation.

Section 3.2 on the other hand consists of the causes of inconsistencies of the compulsory land acquisition values. The data for section 3.1 was collected through personal inspection of the files by the author containing several compulsory land acquisition appeal cases affecting various public purpose projects that have been carried out by the government of Kenya. It was also collected by examining various valuation reports returned by both public sector valuers and private valuers.

The data for section 3.2 were gathered through the administration of questionnaires to government Valuers who have participated in compulsory land acquisition valuations with some of them having attended the hearing of compulsory land acquisition appeal cases in the high court.

Some of the information used in this section was also gathered through oral interviews with government officials and some of the landowners that were once affected by compulsory land acquisition procedure.

### **3.1 COMPARISON OF COMPENSATION VALUES AND APPELLANTS' VALUATION FIGURES**

The author randomly picked about 20 compulsory land acquisition appeal cases.

These appeal cases were in respect of different public purpose projects carried out by the republic of Kenya across the country. Every appeal case was thoroughly examined and related data extracted resulting in the table below: -

**TABLE 3.1 – APPEAL CASES**

	NAME OF PROJECT	APPEAL CASE	PARCEL NO./L.R. NO	COMPENSATION AWARD KSHS	APPELLANTS' SUBMITTED CLAIM KSHS	DEVIATIONS KSHS	PERCENTAGE DEVIATION
1	Kitale – Kapenguria road	Simon Maina Nyaga Vs. Commissioner of Lands (1981)	SIYOI “A” 3”	6,600	57,000	50,500	760
2	Bungoma-Chwele Kimilili road	Stephen Waswa Vs. Commissioner of Lands	350/Kanduyi/E Bukusu	47,000	98,000	51,000	108
3	Jomo Kenyatta College of Agriculture & Technology	Kanini Farm Ltd Vs. Commissioner of Lands (1981)	9461/4	16,000	58,000	42,000	262.5
4	Isibania Border post	John Mangera Maranga Vs. Commissioner of Lands	Bukira/ Buhirimono / 394	48,000	113,000	65,000	135.4
5	Isibania Border Post	Oisebe Omwega Vs. Commissioner of Lands		37,000	80,000	43,000	116.2
6	Weigh-Bridge Station (Webuye-Malabard)	William Nakhisa Amutala Vs. Commissioner of Lands	Ndivisi/Khalumuli	67,000	250,000	183,000	273.1
7	Weigh-Bridge Station (Webuye-Malabard)	Reuben Etyang Vs. Commissioner of Lands (1991)	Ndivisi/ Khalumuli 1160	90,000	550,000	460,000	511.1
8	Kabete – Limuru Road	Fred Kagia Muigu Vs. Commissioner of Lands	Dagoretti Kinoo/844-Kiambu	53,000	506,000	453,000	854.7

9	Kabete-Limuru Road	Esther W. Muriakiara Vs. - Commissioner of Lands (1987)	Dagoretti / 952	15,000	25,000	10,000	66.7
	<b>NAME OF PROJECT</b>	<b>APPEAL CASE</b>	<b>PARCEL NO./ L.R. NO</b>	<b>COMPENSATION AWARD KSHS</b>	<b>APPELLANTS' SUBMITTED CLAIM KSHS</b>	<b>DEVIATIONS KSHS</b>	<b>PERCENTAGE DEVIATION</b>
10.	South Nyanza Sugar roads	Simeon Owuor Odede Vs. Commissioner of Lands (1981)	South Sakwa/ Wawere/426	25,000	100,000	75,000	300
11.	Sagana-Makutano road	Kakuzi Ltd Vs. Commissioner of Lands	L.R. No. 11674	92,000	162,000	70,000	76
12.	Narok-Mau Narok road	James Naeku Vs. Commissioner of Lands	Narok/CIS mara Eorr-Enkitok/2	377,000	750,000	373,000	98.9
13.	Turesh Pipeline Water project	Daniel Mbithuka Mbinda Vs. Commissioner of Lands	Muputi/Kiima / 2310	41,000	81,000	40,000	97.6
14.	Kabete Limuru road	J. J Gitu Vs. Commissioner of Lands	Dagoretti Kinoo/949	416,000	684,000	268,000	64.42
15.	Moi University Development Project	Kibor Arap Talai Vs. Commissioner of Lands	L.R. No. 7991	26,000,000	43,000,000	17,000,000	65.4
16.	Amala River Narok Road	The Republic of Kenya Vs. Commissioner of Lands & Minister of Lands (1997)	Narok/CIS/MARA Olololunga 350 & 351 (Mr. Ole Sankei)	1,800,000	3,500,000	1,700,000	94.4

	NAME OF PROJECT	APPEAL CASE	PARCEL NO./ L.R. NO	COMPENSATION AWARD KSHS	APPELLANTS' SUBMITTED CLAIM KSHS	DEVIATIONS KSHS	PERCENTAGE DEVIATION
17	Gambogi-Serem road	Nashon Ilavonga Vs. Commissioner of Lands	Kapsotik/51	62,000	157,000	95,000	153.2
18	Gambogi-Serem Road	Jackson S. Igadwa Vs. Commissioner of Lands	Kapsotik/440 (Part)	28,000	152,000	124,000	442.9
19	Kabete-Limuru Road	Joseph Ngwachi Vs. Commissioner of Lands (1988)	Muguga Gitaru/477 (Part)	178,000	440,000	262,000	148
20	South Nyanza Sugar roads	Stephen Othoo Vs. Commissioner of Lands	Waware/544	8,500	16,000	7,500	88.2

### 3.1.1 INFERENCES FROM TABLE 3.1

From table 3.1, out of a sample of 20 compulsory land acquisition cases, the results can be summarised in table 3.2 below.

**TABLE 3.2 DEVIATION CLASSES**

CLASS OF % DEVIATION	0-50	51-100	OVER 100
NUMBER OF APPEAL CASES PER CLASS	0	8	12

From the above table the following points can be deduced.

- a) There is no single appeal case that indicated a percentage deviation of less than 50%.
- b) A total of eight appeal cases showed a percentage deviation of between 51% and 100%; and;
- c) Twelve appeal cases had a percentage deviation of over 100 percent.

It is also to be noted from the above results that out of the 20 compulsory land acquisition appeal cases, not a single case showed a small variance, meaning that both the government valuers and private valuers apart from using the same Act (Land Acquisition Act, Cap 295) arrive at a totally different compulsory land acquisition values.

### 3.1.2 CAUSES OF VARIATIONS IN VALUATION FOR LAND COMPENSATION

It is clear from table 3.2 that out of the twenty compulsory land acquisition cases, not a single case showed a small variance which implies that both the government and private valuers, notwithstanding that fact that they use the same Act (Land Acquisition Act, Cap 295) arrive at very different compulsory land acquisition values. How then do these two categories of valuers arrive at their different assessments?. From the analysis of the valuation reports returned by both private and public sector valuers, the following causes were identified: -

## 1. Different dates of assessments.

Most of the valuation reports returned by both the private and public sector valuers showed different dates of inspections. Some of these inspections were carried out after the project had been completed. The following table will serve to explain this point further.

**TABLE 3.3 – DEVIATIONS CAUSED BY DIFFERENT DATES OF INSPECTION**

NAME OF PROJECT	PARCEL No./ L.R. No.	YEAR INSPECTED BY PRIVATE VALUERS	YEAR INSPECTED BY PUBLIC VALUERS	PERCENTAGE DEVIATION OF ASSESSMENT
Moi University Development Project	7991	1992	1990	64%
South Nyanza Sugar Roads (No. 10 Table 3.1)	South Sakwa /Waware/426	1981	1980	300%
Amala River- Narok Road. (No 16- Table 3.1)	Narok/CIS/Mar a Olololunga 350 & 351	1997	1996	94.4%
Kitale / Kapenguria Road	Siyoi "A" 3	1982	1981	760%
Weigh Bridge Station (Webuye- Malaba Rd	Ndivisi / Khalumuli	1992	1990	273.1%
Gambogi – Serem Road.	Kapsotik 51	1997	1996	153.2%

The above table comprising five projects serves to illustrate the fact that different dates of assessment is one of the causes of variations in the valuation for land compensation values. It is important to note that different conditions prevailing during the different times of assessment is a strong source of this variation in land compensation values.

## 2. Additional incidental costs included in some valuation reports returned by private valuers.

Some valuation reports returned by private valuers had some additional costs incurred by the affected landowners seeking compensation for the land compulsorily acquired. Some of these incidental costs as exemplified in these reports included the following:



- (a) Transport costs – These are costs incurred in transporting ones belongings to another site. These include costs of transporting livestock, household goods, building materials, etcetera
- (b) Transfer charges – These include costs associated with the purchase of an alternative land. For example stamp duty charges, registration fees, conveyancing fees, agency fees, etcetera.

Examples of the projects whose private valuation contains the above incidental costs in the assessment of compensation values are Turesh pipeline water project, Kabete – Limuru Road project, South Nyanza Sugar roads, Gambogi- Serem road project, Narok- Mai Mahiu- Narok road, among others. The arguments that came up after interviewing the concerned valuers for the inclusion of above costs was that compensation on 15% of market value is too little and can not cover even 10% of the aforementioned costs.

### **3. Differing views on subdivision as a viable project.**

Some private valuers had to consider land already sub-divided at the time of acquisition as a viable project and went ahead in valuing them as plots differing with the public sector valuers who held the view that the project already accomplished was not viable and valued the parcels as one whole. This factor was most exemplified in the Moi University project. In this case the sub-divisions scheme was accorded final approval on 10<sup>th</sup> January 1990 by the Commissioner of Lands. In his remarks, the Public Sector Valuer argued that before the “developer” was able to sell the plots, either vacant or developed he had to fulfill some of the basic conditions which include: -

- (a) Surrender of the main title in exchange of individual agricultural title under the same lease terms and enhanced rents.
- (b) Surrender land for public use free to the government.
- (c) Have the commercial, industrial and residential plots’ rents assessed and their leases changed to 99 years.
- (d) Provide the basic infrastructure such as water, road, electricity, etcetera

At the time of acquisition, none of the above conditions had been fulfilled and thus according to the Public Sector Valuer, the resulting plots were not readily marketable. He

further argued that for the landowner (here referred to as “developer”) to realize his “dream” of a “University town” he had to weather the competitive environment around him. Under the circumstances, the Public Sector Valuer assumed a minimum period of eight years during which the landowner was likely to advance his development plan. In the Public Sector Valuer’s view, therefore, the project’s viability was highly speculative without the backing of a comprehensive feasibility study and a time scale development period. He added that it was obvious the landowner while required by economies of scale to immediately meet the entire infrastructure and other development costs, he could only dispose off the plots over a period of time which period was in turn going to be dependent on the prevailing demand. Having considered the above, therefore, the Public Sector Valuer employed the present value method based on the assumed projected time of sale of individual plots to arrive at the present market value with the overall effect of reducing the final value.

On the other hand, the Private Valuer argued in his remarks that the proximity of the subject land to Moi University and Kesses centre to the east gave it an enhanced value because of improved demand for landed property. He further argued that for the Commissioner of Lands to have approved the sub-division scheme in the first place, his office must have been satisfied beyond reasonable doubt that there was need to do so. He therefore held the view that considering the above, the viability of the scheme could not be over emphasized. The Private Valuer, thus, valued the sub-divided plots as so sub-divided without the necessity for cost subtraction (face value). This is because according to his view, costs had already been incurred in planning and sub-dividing them and land had been set aside for road and other infrastructure. They were, therefore, plots indeed in their own right. This had the overall effect of increasing the final compensation value and hence this was another clear cause of variation in valuation for land compensation values.

#### **4. Differences in measurements of land to be acquired**

On examining some of the valuation reports from both sides (private and public sector) it was found out that the valuers differed on the extent of the physical area of the land to be compulsorily acquired from the affected landowners and thus causing variation in the final compensation values. The following table serves to illustrate this point.

**TABLE 3.4 - VARIATIONS IN AREAS CONSIDERED BY PUBLIC SECTOR VALUERS VERSUS THOSE CONSIDERED BY PRIVATE VALUERS**

NAME OF PROJECT	AREA CONSIDERED (ACRES)		VARIATION
	PUBLIC SECTOR VALUER	PRIVATE SECTOR VALUER	
MOI UNIVERSITY PROJECT	380	447.45	67.45
WEIGH BRIDGE STATION (WEBUYE- MALABA ROAD)	3.64	3.94	0.3
KITALE – KAPENGURIA ROAD	0.8	1.4	0.6
KABETE – LIMURU ROAD	0.078	0.082	0.004
SOUTH NYANZA SUGAR ROADS	2.76	3.184	0.424

From the above table, it can be seen that of the five projects picked to express this point, valuers from the private sector considered larger areas than their counterparts in the public sector in their respective valuation reports. Although this was not the case for each and every project considered in this study, the position was as above for all of them. This, therefore, explains in part the disparity or variation in land compensation values as determined by the two categories of valuers.

### **5. Use of different comparables**

This was also an area identified as a source of disparity between the two categories of land compensation values as returned by both the public and private valuers. In the Moi University project, for example, the Private Sector Valuer constructed his body of comparable sales from small parcels or plots either already sold or still in the market. Some of these plots were situated at the neighboring Kessess center. To achieve the price per acre, the Private Valuer in this case consolidated a number of plots that could be derived from an acre of land and assessing their collective worth based on the prevailing market rate per plot and finally subtracting their associated costs including sub-division costs, marketing costs, etcetera.

The Public Sector Valuer on the other hand constructed his comparable sales base through physical market survey within the environs of the subject property to be acquired

and conducting oral interviews with the owners to be able to establish the prevailing market rates at the time. The Public Sector Valuer also reinforced his comparable sales base through the use of co-operative land shares that were mostly in terms of five-acre portions and by making reasonable adjustments based on personal judgment were able to compute the price per acre of land at the time.

It is important to note that on examining the respective valuation reports, the rates used per acre of land differed to some extent. This again was the source of variation in land compensation values as determined by the two categories of valuers.

### **3.1.3 COMMON GROUNDS OF APPEALS**

Because the landowners are usually the appellants in most of the appeal cases (if not all), their grounds of appeal represent their grievances to the acquiring authority. Some of these grievances are similar for most of these compulsory land acquisition appeal cases and are briefly explained as follows: -

#### **1. The compensation awards do not represent the market values of the land at the time of acquisition.**

Out of the 20 appeal cases sampled, 90% of the cases raised this ground in their appeals. The appellants (claimants) in these cases argued that their property was worth more than what they were being compensated for. For example in the case of Republic Vs Commissioner of Lands and the Minister of Lands and Settlement (respondents), the Republic argued that the compensation which was offered was markedly low and was calculated at rates which were discriminatory as compared to other landowners. The republic could not give evidence contrary to this allegation. In this case, the appellant had been awarded a sum of Kshs. 1,800,000 by the respondent (Commissioner of Lands) but the appellant on behalf of the landowner (Mr. Ole Sankei) submitted an appellant's claim of Kshs. 3,500,000/- arguing that the compensation award determined by the Commissioner of Lands did not reflect the true market value of the property.

What this calls upon is the definition of market value in the context of the Land Acquisition Act; Cap 295. Section 1 (i) of the schedule provides that for the purpose of this schedule, "market value" in relation to land means the market value of the land as at the date of publication in the gazette of the notice of intention acquire the land. In most real estate books, Market value has been defined as the highest price in terms of

money which a property will bring in a competitive and open market under conditions requisite to a fair sale, the buyer and seller each acting prudently, knowledgeably and assuming that the price is unaffected by undue stimulus.

This ground of appeal will hold some water if the subject matter is the free market situation. However, in the compulsory acquisition cases, free market situation does not arise. This is mostly because the affected landowner is not interested in selling and the Commissioner of Lands must have the land for the required public purpose project. Given the unwillingness of the land owner to agree to the sale the “market value” according to the land Acquisition Act will be lacking whatever the prevailing conditions during the time of Acquisition.

## **2. The pain of leaving behind an ancestral land to an unknown destination.**

This was also a common ground of appeal that was raised in most of these compulsory land acquisition appeal cases. 60% of appeal cases stated this factor as one of their grievances. The concerned appellants argued that they had been living in the affected parcels since they were born and that the property had been passed on to them by their forefathers. They therefore argued that the attachment they had developed could not be compensated in monetary terms or alternative pieces of land. It is from this basis that questions arose as to how can an ancestral land be compensated, as this could not have any comparable. They further argued that all their great ancestors had been buried in the land and many rites had been performed in the affected grounds hence creating a major dilemma to the affected landowners.

It was further argued that the parcels had some improvements that had taken many years to develop especially the trees and other related developments. Most appellants were worried that whatever compensation they were receiving could not access them to similar developments leave alone the fact that it would be next to impossible to find similar developments. From the above, therefore, the critical question that the claimants were posing to the acquiring authorities is ‘how best can ancestral land be compensated?’

This ground of appeal featured prominently in the cases affected by Kabete – Limuru Road project where the Appellants comprising of F.K. Muigu, E.W. Muriakiara, J.J.

Gitu and J. Ngwachi raised among other things the question regarding the graves on the acquired parcels. Although the issue was not much about compensation, it was more about the special attachment they had to their land. The puzzle was that how could this attachment be treated and finally be assessed in monetary terms. Though the other appeal cases had this ground of appeal in their memorandum, they were not as pronounced as the above cases already mentioned.

### **3. Vesting the authority of assessment of trust lands to the District Commissioner.**

This was again one of the main bones of contention in these appeals. This ground of appeal was very clear in the case of Simon Maina Nyaga Vs the Commissioner of Lands of 1981. In this case the affected parcel of land was trust land held in trust on behalf of the appellant by West Pokot County Council. This parcel of land plus others was acquired for the purposes of developing Kitale - Kapenguria road project. The respondent (District Commissioner) acting on behalf of the Commissioner of Lands legally appointed a team of experts to carry out the assessment of the affected property for compensation purpose. The said team of experts comprised, the District agricultural officer, the District land adjudication officer and the Divisional District officer plus other technical officers. These officers went ahead and carried out the exercise and came up with compensation awards payable to the affected landowners including the appellant. These awards were approved by the District Commissioner and the same were passed on in written form to the claimants.

When the list of compensation awards was sent to the Commissioner of Lands, he subsequently disapproved of the whole exercise and ordered a fresh assessment that was carried out by a team of valuers from Nairobi. The initial figures were drastically reduced. The affected landowners including the appellant wondered how the government could take them for a ride by sending two different teams allegedly termed as "experts" and consequently awarding them each two different awards of which one was thrown away. They called for compensation for this disappointment and accused the government of playing games to its citizens. The main cause of this variation in value is that the first group was not composed of a valuation officer.

### **4 Assessment of land after the project has been developed.**

This was also a common ground of appeal. Most of these appeals are heard after the

project has already been completed. Most appellants raised this as an anomaly arguing that it was impossible for the valuers to go back to the ground and reassess what has already been removed or altered. The appellants complained that the government cannot send valuers to the sites affected by compulsory land acquisition for reassessment when whatever was visible before the project could no longer be seen. It was therefore the consideration of most appellants that because the government could not first of all finish up with addressing their appeals before embarking on its projects should disqualify itself from challenging their claims and should not resort to reassessment after the project has already been completed.

This particular ground of appeal was more exemplified in the case of Simon Maina Nyaga Vs Commissioner of Lands associated with Kitale – Kapenguria Road Project. In this case the government valuers went to assess the acquired land long after the project had been completed. In this case the appellant wondered how the Valuers from the Ministry of Lands and Settlement were to assess what bulldozers and other big construction machinery employed in the road project had already destroyed. This particular ground of appeal was also raised by a number of other appeal cases, (See Table 3.5).

## **5 Acquisition of land already sub-divided**

This is also another issue raised by a number of these appellants in their appeals. This was more so in the case of Kanini Farm Vs Commissioner of Lands (1981). In this case, Kanini Farm owned a parcel of land L.R. No. 9461/4 which was compulsorily acquired by the respondent (Commissioner of Lands) for the purposes of developing Jomo Kenyatta College of Agriculture and Technology. In this case, Kanini Farm had been awarded a sum of Kshs. 16,000/- by the Commissioner of Lands. Kanini Farm refused to accept this award on the grounds that the property had already been sub-divided and a change of user had been granted from agricultural to residential user.

In the above case, Kanini Farm through its representatives argued that the land should be considered as sub-divided and hence should be assessed as individual plots and not as a whole. It was because of this that they came up with a claim of Kshs. 58,000/=.

## **6. Delays in payment of compensation awards.**

This ground of appeal was raised in all the cases considered. The main issue in this

considered a claim of 6 percentage of the sub-total (value of land acquired plus improvements on it) to be reasonable. Likewise in this case, the Government Valuer never took this factor into consideration.

### **3.1.4 CONCLUSION**

The above has been a brief outline of the common grounds of appeals encountered on examination of the twenty (20) compulsory land acquisitions earlier. These appeals were presented by the appellants' lawyers during the hearing of their cases in the courts. It should be borne in mind that the above were not the only grounds of appeals but were the most prevalent for all the appeal cases considered in this study.

The following are the tabulated results of the appeal cases versus the grounds of appeal as discussed above. The column representing the grounds of appeal in table 3.5 has been filled using the number codes which follows the numbering of the grounds of appeal as stated earlier in section 3.1.3. Table 3.6 shows the individual grounds of appeal with a corresponding column containing the percentage of occurrence of the total number of appeal cases considered (20). This table has been extracted from table 3.5.



**TABLE 3.5 - APPEAL CASES VERSUS GROUNDS OF APPEAL**

	<b>APPEAL CASES</b>	<b>GROUNDS OF APPEAL</b>
1.	Simon Maina Nyaga <i>Vs.</i> Commissioner of Lands (1981)	1,2,3,4,6
2.	Stephen Waswa <i>Vs.</i> Commissioner of Lands	1,2,3,4,5,6
3.	Kanini Farm Ltd <i>Vs.</i> Commissioner of Lands (1981)	1,4,5,6,7
4.	John Magera Maranga <i>Vs.</i> Commissioner of Lands	1,3,4,6,7
5.	Oisebe Omwega <i>Vs.</i> Commissioner of Lands	1,2,4,5,6
6.	William Nakhisa Amutala <i>Vs.</i> Commissioner of Lands	1,2,3,6,7
7.	Reuben Etyang <i>Vs.</i> Commissioner of Lands (1991)	1,2,3,4,5,6,
8.	Fred Kagia Muigu <i>Vs.</i> Commissioner of Lands	1,3,5,6,7
9.	Esther W. Muriakiara <i>Vs.</i> Commissioner of Lands (1987)	1,4,5,6,7
10.	Simeon Owuor Odede <i>Vs.</i> Commissioner of Lands (1981)	1,2,3,4,6
11.	Kakuzi Ltd <i>Vs.</i> Commissioner of Lands	1,4,5,6
12.	James Naeku <i>Vs.</i> Commissioner of Lands	1,2,3,5,6
13.	Daniel Mbithuka Mbinda <i>Vs.</i> Commissioner of Lands	1,2,3,5,6
14.	J. J Gitu <i>Vs.</i> Commissioner of Lands	4,5,6,7
15.	Kibor Arap Talai <i>Vs.</i> Commissioner of Lands	1,3,6,7
16.	The Republic of Kenya <i>Vs.</i> Commissioner of Lands & Minister of Lands (1997)	6,7
17.	Nashon Ilavonga <i>Vs.</i> Commissioner of Lands	1,2,6,7
18.	Jackson S. Igadwa <i>Vs.</i> Commissioner of Lands	1,2,6,7
19.	Joseph Ngwachi <i>Vs.</i> Commissioner of Lands (1988)	1,2,6,7
20.	Stephen Othoo <i>Vs.</i> Commissioner of Lands	1,2,6,7

**TABLE 3.6 PERCENTAGE OF OCCURRENCE OF GROUNDS OF APPEAL**

<b>Ground of Appeal</b>	<b>Reference No.</b>	<b>Percentage of Occurrence</b>
The compensation awards do not represent the market values of the land at the time of Acquisition	1	90%
Pain of leaving behind an ancestral land to an unknown destination	2	60%
Vesting the authority of assessment of trust lands to the District Commissioner	3	50%
Assessment of land after the project has been developed	4	50%
Acquisition of land already sub-divided	5	50%
Delays in payment of compensation awards	6	100%
Non Compensation for injurious affection	7	60%

### **3.2 GENERAL CAUSES OF INCONSISTENCIES IN COMPULSORY LAND ACQUISITION VALUES**

In Section 3.1 this chapter has provided analysis of the deviations of compulsory land acquisition values as estimated by both appellants' (claimants) representatives (private valuers/appraisers) on one hand and government valuers on behalf of the acquiring authority) on the other hand. Section 3.1 also gives analysis of the specific causes of variations in valuation for land compensation and outlines some common grounds of appeal as put forward by the appellants in support of their submitted claims.

Section 3.2 explains some of the general inconsistencies that cause differences in compulsory land acquisition values as clearly exemplified in all the compulsory land acquisition appeal cases considered in the sample forming the research for this study.

These inconsistencies were mostly derived from the administration of questionnaires and oral interviews with the target groups. They are briefly explained as follows:

**1 Lack of prompt compensation.**

According to section 8 of the Land Acquisition Act, Cap 295 it is provided that where land is acquired compulsorily, full compensation shall be paid promptly to all persons interested in the land. Of all the valuers interviewed, 90% concurred that this is not always the position because of a number of reasons. One of the reasons they mentioned was that the Commissioner of Lands is only supposed to assess compensation awards after which the project implementers take the responsibility of paying the affected landowners. Most of these project implementers channel their payments through the ministry of public works who are supposed to monitor most of these public purpose projects. These Valuers explained that the assessment is usually carried out on time but because the Ministry of Lands and Settlement through the Commissioner of Lands is not the one in charge of producing the funds for compensation, hence cannot determine the promptness of compensation.

Again, sometimes after assessment for compensation purposes is finalized by the Commissioner of Lands, the implementers of public purpose projects are not able for one reason or another to produce the payments on time. These valuers went on to explain that because this anomaly has affected many other past projects, the land owners have been made to think that this is always the case and hence almost immediately once the government publishes a notice of an intention to acquire an identified property for compulsory acquisition, the affected land owners rush and prepare their written claims, some of which are supported by private valuation.

It should be noted here that it was not possible for the author to establish the exact dates as to when the appellants considered in this study received their payments after the court's ruling due to poor record keeping in the Lands Agricultural Valuation Registry. It is to be stressed therefore, that whatever information the author has gathered as far as prompt compensation is concerned has been achieved through the administration of questionnaires and oral interviews with the respective valuers and the affected landowners.

It is therefore out of this mentality of lack of prompt compensation that has been occasioned on the minds of the land owners that makes them to seek for a different

opinion from private valuers as to the market values of their properties where in most cases such values are at a wide variance from the values determined by the Commissioner of Lands.

## **2 Lack of exhaustive definition of ‘market values’ as explained by the Land Acquisition Act, Cap 295.**

This is another cause of inconsistency in the compulsory land acquisition values agreed by 70% of the valuers interviewed. These groups of valuers explained that the Land Acquisition Act, Cap 295 which is the principal act governing land acquisition in Kenya, does not exhaustively define the ‘market value’ hence causing confusion among the valuers. The term ‘market value’ as explained by the Land Acquisition Act under the schedule 1(i) means the market value of the land at the date of publication in the gazette of the notice of intention to acquire the land. One of the most important ingredients of ‘market value’ as known in the real estate valuation cycles is that it has to be determined on a willing buyer, willing seller basis. Most valuers argue that the market price has to be accepted by the seller and if the seller disagrees then it ceases to be market value. Because the Land Acquisition Act does not give the landowners the option of withholding their property from being acquired then the “market value” as contained in the Act should be expounded. It is because of this, therefore, that this group of valuers say that unless this definition of “market value” is amended in the Act differences in compulsory land acquisition values will always exist.

In all the appeal cases considered in this study, not a single case failed to seek a third opinion regarding the acquisition of their property. Most appellants were accusing the acquiring authorities of not first of all seeking their views before gazetting the notice of intention to acquire the parcels. It is therefore to be noted that most victims of land acquisition projects are always unwilling to sell their land hence the question as to what conditions should define the “market value” to conform to compulsory land acquisition situations.

## **3 Lack of sales comparables in some remote rural parts affected by public purpose projects.**

A number of valuers interviewed mentioned that some public purpose projects affect very remote areas where sales comparables are non-existent making valuers to resort to residual method of valuation as the only alternative. Residual method of valuation has

been regarded as very unreliable because its cumulative effect of error is very high. 85% of the Valuers supported the fact that the residual method of valuation was problematic because of differences that were usually brought about by assumptions of cost per unit area, construction period, and the capitalisation rate. The cost would depend on the material used, design, professional fees, and cost of finance, labour charge etcetera. There was very little likelihood that two valuers could, in their assessments, adapt similar design, materials, rates for professional fees, cost for finance, risk and developer's profits. The capitalisation factors in most cases depend on the projective judgment of the valuer and not calculation of the expected internal rate of returns.

They further explained that land in rural areas is rarely sold and when sold it is done secretly to a relative or a close friend. Such sales do not portray bonafide transactions. Therefore, use of this kind of data without prior knowledge would lead to misjudgment of value especially where the valuer did not know the general price level of similar properties in that neighbourhood.

Of all the twenty appeal cases considered in this study, the government Valuers were able to use comparables in only eight cases resulting in 60 percent non-availability of sales comparables. The private Valuers on the other hand could only use sales comparables in six cases resulting in 70 percent non-availability of sales comparables.

#### **4. Assessment of severance and injurious affection.**

About 50% of valuers interviewed mentioned this factor as one of the causes of inconsistencies in compulsory land acquisition values. Most government projects especially the road projects affects the landowners' parcels by dividing them into two or more parts. Some of these parts are too small for any economic use and also these divisions may cause management problems. Most of these valuers concurred that during the assessment for compensation purposes, some valuers do not take this into consideration and when they do, the figures attached to both severance and injurious affection by both private and government valuers are very different causing differences in the overall values for land compensation.

As mentioned earlier, most public sector valuation reports touching on this topic do not take this factor into consideration. None of the twenty appeal cases studied in this project considered assessment for severance and injurious affection. At least about a half of the

private sector valuation reports had this component. In these cases the private valuers were considering an average figure of 5 percent claim on the total value of land acquired plus all other improvements on it.

**5. Developments or improvements considered by the acquiring authority as made in the land in the contemplation of proceedings for the acquisition of the land within two years before the date of publication in the gazette of the intention to acquire the land.**

40% of the valuers interviewed mentioned the above factor as one of the causes of inconsistencies in compulsorily land acquisition values. They particularly concurred that it is very difficult to prove that a property owner erected a building, for example, in the contemplation of the proceedings for the acquisition of the land. This is because as explained, two years is a long time especially for developments in rural areas where most of these projects are carried out. It was also contended by these valuers, that estimating the age of a building in the rural area was very difficult especially where the building is a temporary one. This is because after one year some temporary building looks as old as a 10-year-old building of a similar nature.

Although this point was not mentioned under the remarks in all the valuation reports that were examined affecting the twenty appeal cases considered in this study, it was nevertheless responded positively by a half of the valuers interviewed.

Because the discretion lies on the valuer, two valuers may not concur and thus resulting in differences in terms of estimation of the market values for compensation purposes.

**6. Reluctance on the part of the acquiring authority to initially apply private treaty negotiations with the affected landowners before resorting to compulsory land acquisition as a last alternative.**

Half of the valuers interviewed or 50% were of the opinion that if the government would promote private treaty negotiations with the affected landowners, the differences that would arise in compulsory land acquisition values would reduce. This group of valuers supported the view that the government should always start with private negotiations with the landowners before resorting to the provisions of Land Acquisition Act as a way of attracting their willingness to sell the land. They also hold the view that compulsorily

acquiring the land from the landowners always has a negative effect because it creates an unfriendly atmosphere between the acquiring authority and the landowners, with the latter resorting to private consultants' resulting in numerous appeals against the acquisition of their lands.

The appellants affected by Gambogi – Serem Road, for example, raised this issue in their memorandum of appeals. The appellants in these cases included Nashon Ilavonga and Jackson S. Igadwa and the common respondent was the Commissioner of Lands. Their representative had raised the issue to the effect that initially an understanding should have been made by the acquiring authority on the basis that his clients (appellants) were rural folks who found it difficult in engaging his legal services and especially that they had cooperated very well in allowing their land to be utilized for the road development even without receiving their prompt compensation. Reading between the lines, the above statement could be construed to mean that the Commissioner of Lands should have prioritized private treaty negotiations before compulsorily acquiring the parcels.

#### **7. Differences in times of assessments.**

This was a factor that was supported by 40% of those interviewed. They explained that in most cases, the private valuers representing their respective clients (affected landowners) inspect the properties usually much later after the government valuers have completed their assessments. When this happens, the two valuers usually operate under very different economic circumstances and in most cases use different sales comparables hence coming up with different compensation values.

In some instances the valuers are forced to re-inspect the properties especially as ordered by the high court and this may happen after the project has already been undertaken on the affected parcels. The problem here as explained by those interviewed is that what may have initially been seen physically may no longer be there and also due to the completion of the project, the neighbourhood will have changed completely and thus with these changes, it is usually not surprising to come up with different compulsory land acquisition values.

From the results of table 3.1, 20 valuers (Respondents) were interviewed as to the causes of inconsistencies in land acquisition values of which the results have just been discussed above. The following is a summary table showing the causes of inconsistencies versus the Number of respondents with a corresponding column containing the percentage response.

**Table 3.7 Appeal cases versus causes of inconsistencies in land acquisition values.**

<b>Causes of inconsistencies</b>	<b>No. of respondents out of 20</b>	<b>Percentage response</b>
Lack of prompt Compensation	18	90%
Lack of exhaustive definition of "Market Values" as explained by the Land Acquisition Act, Cap 295	14	70%
Lack of Sales comparables in some remote rural parts	17	85%
Assessment of severance and injurious affection	10	50%
Developments made in contemplation of proceedings	8	40%
Non-Prioritization of private treaty negotiations	10	50%
Differences in times of assessments	8	40%



## **CHAPTER FOUR**

### **4. CONCLUSION AND RECOMMENDATIONS**

#### **4.1 CONCLUSION**

Arising from data analysis in the previous chapter, it is clear that there exists a wide variation between appellants' submitted claims and the compensation awards determined by the Commissioner of Lands. This indicates that there are causes of variations in valuation for land compensation. As discussed in the previous chapter, this causes can be listed as follows: -

- Different dates of assessment
- Additional incidental costs included in some valuation reports returned by private valuers
- Differing views on sub-divisions as a viable project
- Differences in measurements of land to be acquired
- Use of different comparables

The above causes of variations in valuation for land compensation have been analysed principally by examining the valuation reports as returned by public sector valuers on one hand and private sector valuers on the other. These valuation reports, though inadequate in their output due to poor record keeping, an attempt has been made by the author to utilize the available information as much as possible to come up with these findings. It should be said that the above five causes of variations in valuation for land compensation are the only ones that surfaced from the examination but they were the most outstanding with the backing of strong data evidence under the circumstances.

Apart from the specific causes of variations in valuation for land compensation, the author also examined some general causes of inconsistencies in compulsory acquisition values. These general causes were mostly derived from the administration of questionnaires to the target groups as explained earlier at the onset of this study. These general causes were also analyzed from the results of the oral interviews again with target groups. These general causes as found out by the author comprised the following: -

- Lack of prompt compensation.

- Lack of an exhaustive definition of “market value” as explained by Land Acquisition Act
- Lack of sales comparables in some rural areas affected by public purpose projects.
- Assessment of severance and injurious affection
- Reluctance on the part of acquiring authority to initially apply private treaty negotiations before resorting to compulsory land acquisition as a last alternative.
- Differences in times of assessment.

The two categories of causes of differences in land compensation values may seem related in one way or another but as stressed earlier, their results have been analyzed from two different perspectives hence the need to separate the findings. It is also significant to note that the first category (causes of variations in valuation for land compensation) are more specific in nature as they have been analyzed from the physical examination of the valuation reports returned by both private valuers and public sector valuers. The second category (General causes of inconsistencies in compulsory land acquisition values) is more general in nature. They have been analyzed from the results gathered through the administration of questionnaires and also through carrying out oral interviews with the target groups.

It is worthwhile to mention as a conclusive remark that the study has made an attempt to discuss some common grounds of appeal as picked up from various memoranda of appeals associated with the case study. This grounds of appeal have been analyzed by the author on the basis of their prevalence in most of the appeal cases considered in this study. As discussed in the previous chapter, these grounds of appeal are listed as follows: -

- The compensation awards do not represent the market values of the land at the time of acquisition
- The pain of leaving behind an ancestral land to unknown destination
- Vesting the authority of assessment of trust lands to the District Commissioner
- Assessment of land after the projected has been developed
- Acquisition of land already sub-divided
- Delays in payment of compensation awards
- None compensation for injurious affection

Finally, it is equally important to put it as a conclusive remark that the rulings by the High Court have been omitted in this study. This is mainly because of two reasons. Firstly most of these ruling are very lengthy in nature. It is easier to pick out the points that aided in the rulings than picking out the rulings themselves. This is exactly what this study has attempted to achieve. The author has picked out the relevant points as expressed in various memoranda of appeals that were significant in addressing oneself to the context of this study. Secondly the rulings by the High Court could have done very little if not nil to change the results of this study. This is because the topic of this study is “An analysis of the causes of variation in valuation for land compensation”. Therefore, a critical analysis of this topic requires the author to only address oneself to the causes of variations between the valuation reports for land acquisition projects returned by both the private valuers and the public sector valuers and reinforcing this important points from the various memoranda of appeals affecting these projects.

The recommendations which will be outlined later in this chapter are aimed at achieving the following among other things: -

- (i) Redefining or amending some of the provisions of the Land Acquisition Act with the long-term objective of minimizing the variations in valuation for land compensation values.
- (ii) Harmonization of Compulsory Acquisition values as determined by both Private and Public sector’s point of view.
- (iii) Minimizing costs of appeal in terms of professional fees and time.
- (iv) A clear understanding of the rationale behind Compulsory Land Acquisition.
- (v) Engaging other appropriate alternatives to compulsory Land Acquisition, for example, private treaty negotiations.
- (vi) Ensuring that compensation for compulsory land Acquisition is always prompt by first establishing the availability of funds before any process is initiated.

## 4.2 RECOMMENDATIONS

1. It was found out in the previous chapter that one of the prime causes of variations in valuation for Land Compensation is different dates of assessment by the two categories of valuers (Private Sector and Public Sector). Referring to table 3.3 in the previous chapter, it can be noted that even a difference of one year leads to wide variance in terms of percentage deviation of the two assessments as determined by both the private Valuer and public sector Valuer.

There is, therefore, the need for the interested parties especially the acquiring authorities to seek for ways and means of avoiding this problem. Towards achieving this goal, the acquiring authorities should always understand their assessment before the required project is initiated. The affected landowners should also be sensitized that in case they disagree with the compensation value determined by the Commissioner of Lands, they should engage the services of a private Valuer (where it applies) as soon as possible before the prevailing market conditions change. This will assist in reducing the variations in valuation for land compensation values as explained earlier.

2. There is need to reconsider some sections of the Land Acquisitions Act with the view of making appropriate amendments. For example, according to the schedule section 4 it is provided that the amount of compensation so determined there shall be added a sum equal to fifteen per cent of the market value as determined in accordance with paragraph 1, by way of compensation for disturbance.

In the previous chapter under the specific causes for variations in valuation for land compensation, it was found out that some private valuers added in their valuation reports other additional incidental costs that included transport costs and transfer charges which comprise stamp duty charges, registration fees, conveyancing fees, agency fees etcetera. In their remarks, the valuers argued that the statutory allowance of 15 percent disturbance compensation was not adequate in compensating for the above mentioned additional costs. There is therefore the need to re-examine this section of the act with the aim of making appropriate adjustments.

3. Section 9 (b) of L.A.A Cap 295 provides that on the date appointed under subsection (1) of this section, the commissioner shall make full inquiry into the value, and determine that value in accordance with the principles set out in the schedule.

Section 1 (i) of the schedule provides that for the purposes of this schedule, “market value” in relation to land means the market value of the land at the date of publication in the gazette of the notice of intention to acquire the land.

In several real estate valuation texts, market value is defined as the highest price in terms of money which a property will bring in competitive and open market under conditions requisite to a fair sale, the buyer and seller each acting prudently, knowledgeably and assuming that the price is unaffected by undue stimulus. An important point to note in this definition is the consummation of a fair sale as at a specified date and the passing of title from seller to buyer under conditions where:

- i) Buyer and seller are typically motivated
- ii) Both parties are well informed or well advised, and each acting prudently
- iii) A reasonable time is allowed for exposure in the open market.
- iv) Payment is made in cash or its equivalent.

As seen in earlier in this study, compulsory land acquisition does not give the landowners the chance to either accept or refuse to be part of the transaction. In other words, it is mostly likely that the seller (affected landowner) will not be willing to accept the condition of a forced sale. In this case, therefore, the free market situation does not apply and thus the “market value” as defined within the Act does not comply with the real market situation. There is thus, the need to re-define “Market value” in the land acquisition act so as it can be in conformity with the “market value” as defined by the several real estate valuation books and this will assist valuers engaged in compulsory land acquisition valuations to be more convergent in their figures.

4. One problem that came out very clearly during data analysis in the previous chapter is the fact that the acquiring authorities in most cases take possession of the acquired land before compensation is made even where no appeal is made.

This came out very clearly in the appeal case of John Magera Maranga Vs

Commissioner of Lands that was

associated with Isibania border

post project. In this case, John Magera Maranga and others even after accepting the awards after appeal, the compensation took more than 3 years to be released. Although the statutory interest was paid based on 6 percent, per annum, it was still inadequate considering the changes that had taken place.

The acquiring authority should first establish whether the funds meant to settle compensation awards once assessed are available before publishing in the Kenya gazette the notice of intention to acquire the land. Therefore, before the minister invokes section 6 of the land acquisition act, he should make sure that the funds meant for compensation have been set aside by the concerned agency or the government. This will ensure that once the compensation awards to the affected landowners have been assessed, the payment will be prompt and once the affected landowners know this in advance, land acquisition appeal cases will reduce.

If the above recommendation is met, most of the appellants involved in the 90% of the appeal cases considered in this study will have made their point right as far as prompt compensation is concerned

5. The study has exposed cases where some appellants have had their land severed from other parcels and thus being eligible for compensation for injurious affection. As explained earlier, severance occurs where the land acquired from the claimant contributes to the value of the retained land, so that when severed from it the retained land loses value. Injurious affection is the depreciation in value of land as a result of the compulsory acquisition and the proposed use of all the land acquired by the acquiring authority. A good example from the study can be seen in the case of Simon Maina Nyaga Vs Commissioner of Lands which is related to Kitale - Kapenguria Road Project.

In the above case, when the appellant's land was compulsorily acquired for the purposes of road development, his permanent house came as close as 9 meters from the tarmac road hence falling within unacceptable limits both for health reasons and also the danger of possibilities of big vehicles losing control and ploughing into the building.

In addition to the above, it was also found out from the previous chapter that most public sector valuation reports examined in the course of this study never had this

component in their calculations while about half (10 appeal cases) of the private sector valuations considered this factor.

There is therefore, the need for the acquiring authorities to first of all establish in detail whether the affected landowners have a ground for these claims in order to avoid appeals based on the weaknesses associated with it's omission altogether.

6. In all the twenty appeal cases studied in this project, the government never made any attempt to introduce private treaty negotiations in any single case. It was mentioned earlier in the previous chapter that one of the conditions necessary for a free market situation is the willingness of the seller to agree to the sale. In most compulsory land acquisition projects if not all, this condition is not always met because the government usually invokes the provisions of the Land Acquisition Act without even notifying the owners. This is in itself is a weakness because the conditions requisite for a fair sale are not followed. The appellants affected by Gambogi - Serem road project provides a good illustration to this point. In these cases the appellants comprising, Nashon I. Lavonga and Jackson S. Igadwa through their representatives had raised the argument that an attempt should have been made by the acquiring authorities to firstly, introduce negotiations across the table before invoking the provisions of the Land Acquisition Act.

To avoid many appeals, the government or the acquiring authority should prioritize private treaty negotiations with the affected landowners towards establishing the true market values of their property. This way, a friendly atmosphere will be developed and a willing seller-willing buyer attitude can be encouraged. This will change the mentality held by landowners that the government usually uses force in acquiring their property which makes them very unwilling to any offer the government gives them because of the repulsive attitude already developed. The government or acquiring authority should only resort to compulsory land acquisition as a last alternative or where there is a high degree of urgency of acquisition.

7. Proper market survey should always be undertaken by both the public sector valuers and private valuers engaged in compulsory acquisition valuation projects in order for them to understand the real estate property market more clearly and also to be more convergent in the collection of the respective sale comparables. It

had earlier been pointed out in the previous chapter that one of the causes of variations in valuation for land compensation is the use of different and divergent comparables by the two categories of valuers.

It is therefore advisable for these two groups of valuers to spend some considerable amount of time to do a proper market survey so as to have a clear understanding of the general area in terms of level of demand and the general price levels including the past trends. This will assist in making sales comparables more uniform and thus this will bridge the variations in land compensation values after assessment.

8. There is also the need to amend section 9 (i) of the Land Acquisition Act which provides that the Commissioner of Lands shall appoint a date not earlier than 21 days after the publication of the notice of intention to acquire, for the holding of an inquiry for the hearing of claims to compensation by persons interested in the land.

Under subsection (4) it provides that the Commissioner may for sufficient cause postpone an inquiry or adjourn any hearing of an inquiry from time to time.

It can be noted from the previous chapter that one of the issues discussed was the delay in payments of awards already determined due to numerous postponements of inquiries coupled with several adjournments of hearing by the Commissioner of Lands. This repercussion was mostly felt in the cases of John Magera Maranga and Oisebe Omwega as appellants and Commissioner of Lands as the common respondent. In these cases the Commissioner of Lands had made several postponements of inquiries and also adjourned several hearings with the overall effect of delaying payments for over three years.

To avoid this situation, the above clause should be amended so that the Commissioner of Lands can have a maximum time limit to which an inquiry can be postponed and to at least have some stated reasons or circumstances under which such inquiries can be postponed.



## **BIBLIOGRAPHY**

- Boynton, J.K. (1964), Compulsory Purchase and Compensation, Oyez publications, London
- Card, R. (1981), Law for Land Management Students, Butterworths, London.
- Cornfield, F. V (1978): Compulsory Acquisition and Compensation, Cox & Wyman Ltd, London.
- Davies, R. (1978): Law of Compulsory purchase and Compensation, Butler & Tanner Ltd, Frome and London.
- Deyner - Green, B. (1980), An outline of the Law of Compulsory Purchase and Compensation, The Estates Gazette Limited, London.
- Gitonga L.M (1988), "Valuation of vacant plots in urban area. A case study of Nairobi". Third year Research project, Department of Land development, University of Nairobi.
- Harrison, A.J (1977), Economics and land use planning, Croom Helm, London.
- K'akumu O.A (1996), 'The impacts of Land Acquisition problems on Plan/Project Implementation,' M.A Thesis, University of Nairobi.
- Lawrence, D.M (1967), Compulsory Purchase and Compensation, Walker & Co. (Printers) Ltd, Twickenham, Great Britain.
- Leach, W.A (1955), Planning and Compensation Law: an exposition of the town and country planning acts, 1947 to 1954, The Estates Gazette Limited, London.
- Murray, F. (1958), Principles and Practice of Valuation: Commonwealth institute of valuers, Sydney.
- Murray, W. G. (1969): Farm Appraisal and Valuation, The Iowa State University Press.
- Shomon, J.J (1971), Open land for urban America: Acquisition, safekeeping and use, John Hopkins Press, Baltimore.
- Steward - Brown, R.D (1962), A guide to Compulsory Purchase and Compensation, Sweet & Maxwell Limited, London.
- Strathon, E.C (1943), Compensation (Defence), Sweet & Maxwell Ltd, London.
- Syagga, P.M (1999), "Real property valuation: A profession in search of a discipline"

Inaugural Lecturer, Department of Land development, University of Nairobi.

Syagga, P.M and E.M Aligula (1999), Management and Agency in Urban Property market in Kenya: Shaker Verlag, Aachen, Germany.

Umeh, J.A (1973), Compulsory Acquisition of Land and Compensation in Nigeria, Sweet & Maxwell, London.

Wontner, J.J (1958), A guide to land registry practice, Law Stationery Society London

Yahya, S.S. (1976), “Urban Land policy in Kenya” PH.D Thesis, University of Nairobi.

### **Laws of Kenya:-**

- Government of Kenya (1987), The Constitution of Kenya, Government Printer, Nairobi.
- Government of Kenya (1983), The Land Acquisition Act, Government Printer, Nairobi.
- Government of Kenya (1970), The Trust Land Act, Government Printer, Nairobi.

QUESTIONNAIRE

- 1) (i) It is a requirement that before a property is compulsorily acquired for a public purpose, the Commissioner of Lands should determine the market value of the property. Is this the practice normally?  
  
(ii) If not, could you state under which circumstances is this so.
- 2) Have you ever been involved in any valuation exercise for compulsory acquisition purposes? If yes, did you face any challenges in carrying out your valuation exercise. Please state some of these challenges if your response is positive.
- 3) What are the usual methods used in compulsory land acquisition valuations?
- 4) Are there instances where the methods mentioned above do not apply? If your answer is yes, please mention these instances.
- 5) Have you ever carried out a compulsory land Acquisition Valuation under the instances mentioned in (4) above. If yes, how did you estimate the compulsory land Acquisition Value(s)
- 7) In your opinion, are the statutes governing land Acquisition in Kenya exhaustive as to the meaning of "market value" for compulsory Acquisition purposes? Give reasons for your answer.
- 8) From your own experience, can you state some of the inconsistencies existing in the Land Acquisition Act as far as the estimation of compensation values is concerned. Please give reasons for your answer. (Refer to table 3.7)
- 9) Can you suggest ways in which the above inconsistencies can be harmonized/rectified?
- 10) Have you ever carried out a compulsory valuation exercise for which an appeal was made against your figure(s)? If yes, please briefly state the grounds of the appeal(s).
- 11) In your opinion, do you think the appeal(s) mentioned in (9) above were justified? Please give reason(s) for your answer.
- 12) After an assessment for compulsory land acquisition purposes has been made and the landowners have agreed to the values, is the compensation usually prompt? If your answer is no, please give reasons. (Refer to table 3.5 & 3.7)