

// THE IMPACTS OF LAND ACQUISITION PROBLEMS
ON PLAN/PROJECT IMPLEMENTATION //

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A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENT OF MASTER OF ARTS IN PLANNING.

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DECLARATION

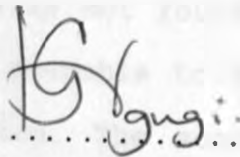
CANDIDATE

This thesis is my original work and has not been presented for a degree in any other University.

.....
Signature

SUPERVISOR

This thesis has been submitted for examination with my approval as the University Supervisor

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Signature

ABSTRACT

The study set out to investigate the problems faced in the process of acquiring land and the effects of these problems on the project implementation plan. The study found out the problems to include: computation errors especially for unregistered land, payment of compensation, inadequate compensation leading to complaints and resistance, litigation, and non-availability of compensation funds where the government is the payer. The overall effect of the problems was found out to be delays in project implementation especially where registered land is concerned. Delay had further effects on project implementation plan in terms of increased contract time (11.5%) and increased contract sum (7.7%) in the case of Thika Dam.

The Methodology involved comparative study of two cases: the Kiambere H.E.P. Project (representing unregistered land) and Thika Dam Project (representing registered land). However the case study methodology which relied on records as principal source of data had a certain limitation in that it was difficult to regenerate data which is not found in records. Secondly the data available was only amenable to descriptive statistics and not inferential statistics. The scope of the study was only limited to large scale projects required large tracts of land to be acquired compulsorily by the Government.

The recommendations are that the legal mechanism used for compulsory acquisition of land in the country should be overhauled so as to weed out the problem areas that have been identified by the study. Secondly, project implementors should also be wary so as not to sign contracts unless the site is

already available and no conflict is envisaged over land.

The study is significant for Kenya as developing country where projects should be implemented successfully to foster development. The findings and recommendations will help both land policy makers and project managers in their work.

DEDICATION

This work is dedicated
To my father Nehemiah Akumu
Whose death marked the beginning of my
postgraduate studies
And to Abito
For Her Curse

ACKNOWLEDGEMENT

In undertaking this work I have received help from various sources.

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Fifthly, I must thank Professor Syagga who has pioneered research in this field for his help.

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Seventhly, I must thank Mrs. Jane Awuor Oluoch of HABRI for typing the work with patience.

Lastly, I must thank my Supervisor Dr. Ngugi whose latitudinarian approach to supervision gave me the scholarly freedom and spirit to complete this work.

LIST OF ABBREVIATIONS

- CL Commissioner of Lands
- DC District Commissioner
- GM General Manager
- H.E.P Hydroelectric Power
- MD Managing Director
- NCC Nairobi City Commission (Council)
- PC Provincial Commissioner
- PS Permanent Secretary
- TARDA Tana and Athi Rivers Development Authority
- TC Town Clerk
- WSD Water and Sewerage Department.

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CHAPTER ONE

BACKGROUND TO THE STUDY

1.1 INTRODUCTION

Planning is a systematic process (Mcloughlin 1969). It starts with the identification of problem issue. This is followed by the setting up of goals and objectives to define the target of planning in trying to solve the said problem. It is then followed by the generation and appraisal of alternative solutions to the problem. These solutions are similar to the different ways in which the objectives can be met. The appraisal leads to the selection of the best alternative to be adopted in the resolution of the problem issues. Finally follows the implementation phase. The Implementation phase is the most crucial because it marks the transfiguration of mere imagination on paper into physical or tangible reality.

However all physical plans are implemented on land. This makes land the prime factor in physical and socio-economic development. Without land no plan proposals can be implemented no matter how good they are hence no development can take place.

Availability of land is therefore a prerequisite for plan implementation. Sizes of land required for projects largely differ. Some projects are small scale and may require a small parcel of developed or undeveloped land for purposes of plan implementation. Such land can be easily obtained through private sale or lease agreement with the registered owner. That is, if the implementor does not own the said land already.

Large scale projects like dams on the other hand, require large tracts of land. Here land is more often than not owned by several and diverse people with whom it would be impossible for the developer/implementor to reach a common understanding. In such cases if the project is meant for public benefit the Government may be called upon to acquire the land within constitutional and statutory provisions.

Compulsory acquisition of land is a statutory measure provided for by the Land Acquisition Act CAP 295 of the Laws of Kenya. This Act is designed within the framework of section 75 of the Constitution of the Republic of Kenya. It enables the Government to acquire private land compulsorily provided prompt and adequate compensation is paid to the owners.

Private land here refers to land which has been alienated or adjudicated and registered in the name of private owner i.e individual tenure. Land which has not been registered in the name of a private owner (where 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 is governed by Trust Lands Act CAP 288 of the Laws of Kenya.

Where land is under public ownership, it would be very easy to arrange with the Government for it to be availed for specified purpose. Here compulsory acquisition is not called for. 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.

1.2 STATEMENT OF THE PROBLEM

As has been noted in the preceding argument compulsory acquisition is very important in availing land for implementation of large scale projects. However, despite the fact that there are laid down procedures meant to facilitate land acquisition for plan implementation, certain bottlenecks exist creating difficulties in the acquisition processes. The difficulties and problems that arise here usually cause delays and wastage of time in project/plan implementation. Such delays may have far reaching consequences.

The delays in finalising acquisition issues may lead to undue delays in commencement of work. Delays in commencement of work on the other hand may lead to legal suits being preferred against the developer/implementor by the contractors. Excerpt from correspondence between the Nairobi City Commission (the implementor of the Third Nairobi Water Project which will be our case study) and the Commissioner of Lands (charged with the acquisition of land for project implementation) below illustrates the above point.

The General manager, Water and Sewerage Department wrote that:

We are getting concerned about this delay as the contractor's Programme will require these parcels within the next two months and failure to hand over the site will no doubt, generate claims for delay of work.

We therefore urge your office to act urgently so as to avoid such a situation¹.

Note the anxiety building up in the developer/implementor concerning the delays in plan implementation and the probable consequences of financial loss through payment of damages. In the letter, the words "no doubt" (my own underlining) are emphatic in expressing the general consequence of delays arising from lack of land to work on.

In terms of cost therefore, the implementor may have to pay damages but this is not the only loss incidental on delays to commence work. Another very significant loss the developer/implementor may suffer is the escalating costs which may be worse during inflationary periods. In such cases if land is not acquired in time the project cost, may well rise to unaffordable limits.

Delays may get serious and where this seriousness is not abated it may lead to the eventual abandonment of the whole project. Projects are however very vital in development (Rondinelli 1976); that the abandonment of one project means one step backwards in the road of development.

Abandonment is also possible in some cases where the financier of a project gives a condition that he would commit his finance to the project only if land free for development is available for the implementation of the project. Such was the case with African Development Bank, one of the financiers of the Third Nairobi water Project. On October 9, 1989 the Town Clerk wrote to the Commissioner that:

The African Development Bank/Fund has required that confirmation be given that the land area required for the timely execution of the Thika Dam Project as one of the conditions of loan effectiveness.

Since you have the land area required for the Thika Dam, it is requested that you give a confirmation--²

The financier and the land issue may sometimes take a serious dimension. In cases of daily occurrence, the land owners have petitioned the financiers leading to total abandonment of the projects. The process of acquisition therefore should always be swift and effective so as to avoid such situations.

Generally, it takes a lot of resources both professional and financial to plan large scale projects, abandoning them at the time of implementation therefore represents a great loss to the society.

The success of project implementation will depend right at the beginning, ("foundation level") timely acquisition of land. This fact is well demonstrated by sentiment of the Ps Ministry of Local Government in a letter he wrote to the Commissioner on July 11, 1989:

During the last meeting of the Project Taskforce in which you are well represented, this matter of land acquisition and compensation was noted as of major concern in terms of the project implementation programme³.

Land (acquisition) therefore, no doubt, holds the key to the success of such projects and hence should be given due consideration for the smooth implementation of a plan/project.

In order to avoid the cost of loss of resources through unrealized investment potential and the opportunity cost of investment foregone due to land, acquisition problems, it is necessary to examine the problems facing the acquisition process with a view to providing solutions to them so as to obviate the frustrations experienced by developers and plan implementors in their course of work.

In order to stimulate and foster development the land acquisition process should be smooth running and efficient in availing land for purposes of development.

1.3 LITERATURE REVIEW

Compulsory acquisition has been studied in Kenya at three main levels involving mainly two disciplines. Studies have been done by professional students who seek to be awarded the professional diploma of the Institution of Surveyors of Kenya. One of the requirements is that the students write topical papers and some have been writing on compulsory acquisition. Students of the University have also written their LLB dissertation or BA project papers on Compulsory Acquisition. At graduate level compulsory acquisition study has contributed a chapter in a PhD thesis. A research paper has also been published on the same issue. The above bibliographical survey demonstrates that the disciplines most concerned with compulsory acquisition in this country are mainly two namely; Law and Land Economics.

The professional diploma studies have very little to contribute as individual studies because of limited scope. For example Kagai(1994) in his paper writes on "Injurious Affection"

and "Severance" which are minor aspects of compensation in compulsory acquisition and for this purpose he dedicates only 3 pages for what is assumed to be a detailed discussion. However some of these papers have endeavoured to be exhaustive in their subject matters as evidenced by Muoka (1994) and Munyiri (1994). But these two papers as do others of their standard are lacking in theoretical base. This is by no means a mistake since the studies are aimed to illustrate the candidates proficiency or experience in valuation for compulsory acquisition. A diploma certificate in essence is meant for specific practice rather than supporting theory.

In one instance, for example, Munyiri in recommendation states that "the government through its administrative machinery should educate the people on their rights and its authority in relation to the issues to avoid unnecessary controversies". This statement is contradictory because in her analysis of the field experience she had asserted that lack of awareness made people suspect foul play despite being informed of the Government's right to acquire land compulsorily. She has written:

Section 6(1) of the land acquisition act empowers the government with the commissioner of lands as its agent to acquire land anywhere in the republic. Some of the people affected by the Ndaka-ini project would appear not to have been aware of this law. If they were, they chose to ignore it because even after being served with notices of intention to acquire and also being explained to that the land acquisition was as per the law, they still alleged that the government was taking their land illegally

Similarly Muoka gives his recommendation for the same problem as follows:

The Act should incorporate a section on allowing for the holding of Baraza's by the valuers and the affected people before inspection---- The baraza's should be held with the Provincial Administration ----- During the baraza, the people will be educated on the law governing land acquisition, the ground on which they can appeal to the High Court upon and the requirement of them to co - operate with the officer's implementing the acquisition process⁵

The argument remains that the government is already a protagonist in the matter and there is no way one can convince the people to play by rules "set forth" by their opponent. If the people en masse are not aware or do not approve of these laws then they see them as instruments of government bullying and this goes deep down into the origins of acquisition laws and their relevance in the local or national conception of land and development.

The essence of these topical papers is to bring to light the problems the valuers face in their work - i.e valuation for compulsory acquisition - and suggest solutions in each particular case. It is important to note that none of these papers have looked at the issue from a point of view other than valuation. For that matter the case being built up here for the planning point of view is in itself needful.

Students of Bachelors degree have examined compulsory acquisition both from law and Land Economics disciplines. The students of Law are largely concerned with aspects of justice and

legality of acquisition. Apondi (1978) examined compulsory acquisition at the Coast and came up with conclusion that acquisition mechanism favours the rich against the poor. The poor lack resources both intellectual and financial to assert their rights against the acquiring authorities who, to some extent, use duress to make sure acquisition goes through. Owinyi (1977) also came with similar conclusions. He noted that although the law itself sounds fair, in practice the compensation awarded is inadequate hence unjust. He also noted that the administrative machinery which the government employs to effect the decision to acquire land appeared to treat people unfairly without much opposition. Again it comes out that the law students have not ventured into a study that would tie acquisition to planning.

On the side of Land Economics, Cheruiyot (1988) has dealt with acquisition in a way that is related to valuation only. His study examines the causative aspects of valuation that leads to a big difference between the private valuers value and the Government valuers value in the course of compulsory acquisition.

There are two leading studies which have been done at high levels on compulsory acquisition. Yahya (1976) has examined one case of compulsory acquisition which he has used in his PhD thesis to demonstrate the role of compulsory acquisition as one aspect of land policy in Kenya. The thesis is on land policy and not compulsory acquisition. The latter only comes in as an aspect of the former. Also, this case deals with compulsory acquisition in general being a mere chapter within a study of five cases makes it far from being comprehensive. However the most important

point to note is that the study is general and does not specifically relate compulsory acquisition to planning.

Syagga and Olima (1996) have done a very pointing study on compulsory acquisition in Kenya. Their study however is principally focused on the socio-economic effects of compulsory acquisition. The study deals with the aftermath of acquisition. On the other hand the problems that affect planning implementation occur before or during acquisition. However it is important to note that in its recommendations the study touches on matters of policy particularly concerning the issue of resettlement which is one of the problem issues in the acquisition process. Literature review therefore reveals the following.

1. Compulsory acquisition is widely unstudied in Kenya
2. Some studies that have been done are weak in theoretical background
3. One of the studies is less comprehensive and therefore do not effectively cover the subject matter of acquisition
4. The rest of the studies tackle the case so well but they are specifically focused on particular issues in acquisition
5. There are many gaps to be filled in this field of study
5. One of the most important gaps to be filled here is the effect of compulsory acquisition problems on plan implementation

The sixth issue revealed above is the subject matter of this study

1.4 HYPOTHESIS

Land acquisition is a problematic exercise that results into time wastage and delays in project implementation and therefore requires a thorough examination in order to weed out the problem issues and improve its operations for quicker and greater development.

1.5 OBJECTIVES

The objective is to review the mechanism of compulsory acquisition and suggest ways in which its performance can be improved. Specific objectives are:

1. To identify the problems facing land acquisition in Kenya
2. To analyse the effects of the problems of land acquisition on project or plan implementation.
3. To compare acquisition issues between high potential and low potential agricultural land
4. To suggest solutions to the problems and effects of land acquisition in the project or plan implementation.

1.6 METHODOLOGY

The study methodology is based on case studies. The case studies approach makes it possible to study and evaluate specific acquisition problems in greater depth than would be possible with other types of survey methods such as the survey interview.

Yahya (1976) who has emphasised the use of case study method cites successful use the world over.

In order to get a comprehensive coverage of the subject two different cases of acquisition have been selected for study. Both are cases of actual acquisitions that have been effected namely:

- i) The Third Nairobi Water Supply Project - Thika Dam
- ii) The Kiambere (Dam) Hydroelectric Power Project

1.6.1 *Comparative study*

Thika Dam is under high potential agricultural land. Land in high potential areas also fall under individual tenure. The main reasons are:

- i) Policy - it was the Government policy to start adjudication with high and finish with low potential areas
- ii) Colonial history - most of the high potential land was previously under the occupation of colonial settlers to whom individual titles had been granted
- iii) Economic - owing to high potential nature of land, there is need and affordability of land registration services.
- iv) Population pressure - high potential areas are densely populated creating greater need for land security compared to low potential areas which are sparsely populated with no serious pressure on land resource

Conversely, therefore, low potential land is generally under Customary/communal tenure under which Kiambere Dam falls. Fig. 1.1 puts the study areas in the context of their agricultural Potential.

LEGEND

- BELT OF A.E. ZONES ————
- A.E. ZONES - - - - -
- SUB ZONES ······

BELTS OF ZONES BY TEMPERATURE

- TA.....TROPICAL ALPINE ZONES
- UH.....UPPER HIGHLAND ZONES
- LH.....LOWER HIGHLAND ZONES
- UM.....UPPER MIDLAND ZONES
- LM.....LOWER MIDLAND ZONES



Comparative study of the two cases therefore gives a complete picture of what can be expected at the national level. Conclusions derived from such a study therefore is comprehensive and generalisable.

1.6.2 Data Collection

Secondary data has been collected through library research including reports, text books, documents etc.

Primary data on the other hand has been collected from files and official documents. Information from these sources have been modified and adopted into analyzable data for purpose of the study.

1.6.3 Data Analysis

Qualitative data: this has been handled using content analysis method. The researcher has attempted to use objective judgement of facts in order to form certain learned opinion on policy issues.

Quantitative data: this has been analysed principally using descriptive statistics in terms of percentages, tabulations, mean and standard deviation.

1.6.4 Data Presentation

Data is presented in terms of written text, maps, tables and charts depending on type of data under consideration and the intended message. The nature of the data available has been the primary influence on presentation techniques.

1.7 SCOPE OF THE STUDY

In order to conclusively discuss the problem issues of the study, it limits itself to the problems of compulsory acquisition in relation to project/plan implementation. This means that the study does not discuss problems in general but limit itself only to specific problems which may disrupt the programme of project/plan implementation.

The study also looks at the magnitude of the spiralling effect i.e the delay affect leads to other effects like litigation, increasing cost, further loss of time etc.

Apart from this conceptual definition, scope also entails spatial. In the latter, the study will only consider the geographical extent of the land affected by dam construction i.e projects facets that have lead to mass and absolute acquisition of land. For example the Third Nairobi Water supply Project was executed under several contracts. However what is of interest to this study is the construction of Thika Dam executed under Contract C208. The rest of the contract involved acquisition of land in different places, in different quantity for different purposes and of different nature thereby falling beyond the scope of this study. In Kiambere for example, the study excludes electricity and road wayleaves which fall outside the boundary of the project area.

1.8 LIMITATION OF THE STUDY

The study is limited by the fact that the case studies were in projects which have been implemented. This ruled out the use of household questionnaire. The opinion of the affected people

therefore could not be registered for statistical analysis since they had long vacated their homes and resettled elsewhere. However there was no better way.

The overall effect has been that the data obtained from official documents can to the very best only be descriptive.

Also in this kind of survey, once certain information was missing from the official records it was not possible to find it elsewhere. It was therefore impossible to generate data except to make do with what is available.

However the data that was collected, analysed and presented in this study is enough and reliable to give a representative picture of the impacts of the problems of land acquisition on project/plan implementation.

1.9 SIGNIFICANCE OF THE STUDY

The study tackles a very important issue in the economy. Kenya is a developing country. Development projects are vital in this process but require land for their implementation. More often than not the land is not available and the process of acquiring it is long and frustrating. This study has identified the problems (and their possible solution) in land acquisition so as to hew out a smooth path for the development of this country.

The study will also be an important in-put in the field of project management. It discusses the contribution of availability of land to the realization of project planning objectives. The project planner will find this study useful in the successful planning of project implementation.

The findings of this study also provide useful insights into policy matters. Land policy makers will find in it a handy instrument to manipulate land into a leading in-put in national development.

The study will also be of significant importance in the academic realm as it opens a new panorama of research linking land to project performance.

NOTES

1. *N W S / 3 / 05 / DO / mnk, 30th March 1990. General Manager, water and sewerage Department to Commissioner of Land.*
2. *N W S / 3 / 52 / 59 / W J O / E N N 9th October 1989. Town Clerk to Commissioner of Lands.*
3. *D P D/101/ A/ X/ X / (28) 11 th July 1989. Permanent Secretary Ministry of Local Government to Commissioner Lands.*
4. *Munyiri M. W. (1994) Problems related to Compulsory Acquisition of Land. The Institute of Surveyors of Kenya Project Paper.*

CHAPTER TWO

CONCEPTUAL BACKGROUND

2.1 INTRODUCTION

2.1.1 Land and Development

Land has been defined by a triangle of disciplines that are mainly: Physical Science, Law, Political Economy.

The FAO (1993) defines land as:

An area of earth's surface, including all elements of the physical and biological environment that influence land use. Thus land refers not only to soil but also landforms, climate, hydrology, vegetation and fauna, together with land improvements such as terraces and drainage works¹.

This definition is limited to the physical properties of land and have no explicit connection with essential attribute of land i.e its value in the economy. However it serves an important purposes of putting land in its virgin perspective.

Abbott Damien (1986) in the *Encyclopedia of Real Estate Terms* takes the care of the gap identified above in the following discussion:

In economics, land is more than the surface of the earth; it is a natural resource, a commodity, and a primary source of wealth; it is one of the factors of production (the other being labour and capital) without which there can be no economic activity. It is regarded as the one economic resource that is provided by nature, as distinguished from the other resources which are provided by man.

However, the definition of land is not complete by simply considering its physical entity and benefits derivable from it.

In law, land comprehends any ground, soil or earth whatsoever including fields, meadows, pastures, woods, moors, waters, marshes¹. In a limited sense land denotes the quantity and character of the interest or estate which a person may own in land², Land may include any estate or interest in land either legal or equitable as well as easements and incorporeal hereditaments. Incorporeal-intangible interests e.g restrictive covenants, right of action to sue. Hereditaments—can be inherited by the next owners of land.

In conclusion law defines the distribution (ownership) of wealth that accrue from land. Economics concerns itself with the generation of wealth from land as a physical entity. This wealth result from the interaction of man with the physical entity of land. Through the interaction and cross-interaction between man and the environment (or physical entity of land) the economic mechanism is able to allocate land resource to specific uses depending on how the society values the wealth generated by each use. Physical sciences like Agriculture take land as an entity whose physical attributes influence its resource potential for the generation of wealth. The whole spectrum of the meaning of land therefore encompasses its context as a natural resource, its potential as a factor of production and how this potentiality is utilized and shared out within a particular society.

In the context of the above definition, land is a prime factor of production in the economy. In which case, we cannot think of economic development without thinking of the land as a

factor. Development does not take place in the air. Development in whatever sector entails a spatial dimension. Kenya as a developing country will continually require more and more land for the implementation of development projects. Where land is not available for project implementation, it has to be compulsorily acquired.

2.1.2 *Compulsory Acquisition*

Compulsory acquisition of land is a process through which the Government buys private land unilaterally i.e without due regard to negotiations and agreements 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.

In Kenya, private land in strict tenural meaning refers to freehold land or land registered under Registered Land Act or Land Titles Act; in essence land under individual ownership. The acquisition of such land is governed by Land Acquisition Act.

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 communal tenure and is said to be held in trust by the respective local authority for the benefit of its inhabitants. *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 purposes". In essence, there is no substantive

difference in the meaning of the two terminologies. For that matter in this discussion, the term "compulsory acquisition" will be used even where "setting apart" is the intended meaning.

It is important to note that the two categories of tenure distinguished here refer to meaning of land in different perspective. Individual tenure is largely a Eurocentric concept of land while communal tenure is an Afrocentric perspective. Acquiring land under the two diametrically different perspectives may pose different problems and consequences.

2.1.3 *Land in the Afrocentric perspective*

In Africa, it is said that man feels very much attached to land. This is because of social, political, economic and cultural reasons (Apondi 1978). The cultural aspect is more difficult to deal with where land is considered as "ancestral land". Traditional beliefs and practices such as those relating to death and burial consecrates land further complicating the issue of ancestral land within the context of modern realities.

Most African communities believe that land is a gift from God and the present generation is merely holding that land for future generations. Nyerere (1963) is very explicit in this. He writes that: "Land is God's gift to man - it is always there --" In an attempt to find roots to his political ideology in the traditional African setting, he singles out land as an illustration of a natural resource that the African used in a "socialist" manner. He writes:

Each individual within our society had a right to the use of land,
because otherwise he could not earn his living and one cannot have

the life without also having the right to some means of maintaining
life.

The use of land according to Nyerere was a way of life and means of livelihood that life itself wholly depended upon. Thus land to some extent gained divine connotations. Denying one land, therefore, was tantamount to denying him life. It was like killing.

As a reaction to the individual tenure which was introduced by the British and which his ideology was against he hastens to add: "African's right to land was simply the right to use it; he has no other right to it nor did it occur to him to claim one".

Nyerere is not an authority in land matters. But his statement cannot be taken lightly in this context. He was an opinion leader of immense following when he was making these statements which stood out then as the actual views and vision of his people.

The acquisition of land especially from areas that are still under communal tenure (where land is also held for non economic reasons) is therefore likely to face and raise more problems.

2.1.4 Land and Ownership in the Eurocentric Perspective

The Eurocentric perspective of land as a legacy of colonialism is simply capitalistic. In this view land is only important for the fulfilment of its economic purpose in production. Political and cultural issues are irrelevant. For this purpose the Eurocentric perspective emphasises individual tenure. The assumption is that an exclusive owner has more incentive to develop his land as he stands out to reap all the benefits for himself. The converse is that the user of land will

ve no incentive to improve it as the benefits resulting from individual efforts may be lost to "grabbers", where security of tenure is lacking or shared with others under communal tenure.

which case mismanagement is fostered leading to loss of productive capacity.

The above perspective is summarised by Arthur Young in his aim that:

--- the magic of property turns sand into gold --- Give a man the secure title of a bleak rock and he will turn it into a garden. Give him a nine year lease of a garden and he will convert it into a desert⁵.

the same vein, Swynnerton was not ashamed to add insult to injury when in his so called plan he wrote:

If recommendations are accepted, former government policies will be reversed and able, energetic or rich Africans will be able to acquire more land and bad or poor farmers less, creating a landed and a landless class⁶

Doubts have been expressed regarding the validity of this perspective. In Kenya programmes have been put into place to substitute individual tenure in order to raise the productivity of land. The results are less indicative. Bondi Ogolla observes that: "law merely reflects the relations of production in a given social formation and therefore its influence on the economic structure of society is perhaps very limited". The contention here is that land law as an institutional need should arise from the dictates of economic development and not vice versa. The initial argument seems to confuse the horse and rider.

However the argument remains that land is owned only for economic purpose. But we find that the Kenyan realtor does not conform to this. Syagga (1993) points out that the Kenyan realtor is not a shrewed investor and invests in real estate not because of its rate of return which is comparatively low but primarily because it vests in them personal pride and political power. A very strong relationship exists between land and politics following the Mau Mau revolution.

In terms of land ownership, the Eurocentric perspective exhibit unique conditions. Salmond (1920) stresses that ownership denotes the relation between a person and any right that is vested in him. That which a man owns in all cases is a right. To own a piece of land means to own particular kind of right in the land, namely the fee simple.

The Eurocentric idea that no man can own land is going to form the basis for further discussion of issues pertaining to compulsory acquisition.

The English legal theory also contends that he who owns land exclusively owns from the centre of the earth and up to the sky. This is however subject to statutory qualifications like the Mining Act which stipulates that all minerals belong to the government. The air space rights also limit the ownership claims.

This theory was introduced in the Kenyan scene and is the driving force behind land reform.

2.1.5 Conclusion

In the end we find a mixup of ideas and practices in the Kenyan land market. It is not possible therefore to satisfy the needs of various interest groups with uniform law for all. Where

Land is held as part of cultural heritage it is impossible to view it simply as a factor of production in the economy. In theory we have two statutory laws which make such distinctions. These are: The Land control Act CAP 301 and the Trust land Act CAP 288.

2.2. ORIGIN OF LAND RIGHTS IN KENYA

2.2.1 *Introduction*

The physical presence of land at a suitable location with suitable developmental attributes does not mean that the land is available to satisfy development needs. This paradox lies in the complex functions of land. The complexity derives from the physical nature of land itself. Land is both virtually indestructible and locationally fixed. The result of this is that various persons can have different interest in it and rights over it. In order to release land for development, therefore, various rights and interests have to be ascertained, determined, transferred, conveyanced acquired or compensated where necessary. This sub-chapter will look at the origins of these rights and interests from the time of colonialism to their current status on development issues in order to put compulsory acquisition in its legal context.

2.2.2 *African Land Rights*

African land rights existed in the pristine time before the colonialist intervened to establish a radically different legal order. In areas like Buganda and Ethiopia, feudal system had evolved that attributed the ownership of land to a central authority or monarch. In Kenya however, the existing political

systems were largely acephalous and their tenural stati were typically different from the English system of land tenure.

The tenural arrangement of the African then has been dominantly referred to as "communal" or "customary" tenure. Under customary tenure property was held communally. Land was regarded as family or clan property. A person had access to land by merely belonging to that family clan or community. Okoth-Ogendo has referred to such rights as "trans generational rights" in contrast to individual rights to land in the current setting.

The African land tenure is still a very important concept in discussing land issues in Kenya. As this discussion progress, we realize that the establishment of the English property law concepts to land in Kenya did not extinguish the customary land rights. We have noted the Land control Act CAP 301 and Trust Lands Act CAP 288 as two important statutes that ascertain the customary rights to date.

2.2.3 English Property Law

Under the English feudal system land belonged to the few. The only form of wealth was land and its produce. Land in the English society then was the central economic commodity which was used in exchange for services. An owner who desired to call upon the services of another person could do so by grant of the right to possession of land other than by making payment. This led to the tenant-land lord relationship where the grantor became the landlord and the grantee the tenant.

From the Norman Conquest onwards, absolute ownership of land was done away with. William the conqueror considered himself owner of land in England and parcelled it out to his barons who

became his tenants. In return for this the barons had to render to the Crown certain services, either of military or other public nature.

The English society over the years evolved land tenure system that accept the state as the ultimate owner of all land. Through statutory developments in the later centuries this principle gained legal status.

2.2.4 Application of English Property Law During Protectorate Days

2.2.4.1 Legal Dilemma

Kenya was taken over from the IBEAC by the imperial administrative system as part of the British East African Protectorate following the partition of East Africa between Britain and Germany in 1888 and 1890. The imperial administration immediately started thinking of investing in the land in order to make it a viable imperial establishment. However they faced a major dilemma on how to acquire land for the purposes of their investment. The resolution of this dilemma resulted into a series of application of English law or property principles that eventually left a truck of erratic and irresolute land laws that were to be inherited by the independent government.

As has been indicated, in the British set-up, the Crown was the source of all title to land. This situation was the consequence of sovereignty. Since the Protectorate was regarded as a foreign territory, there was no legal basis on which the Crown could assert title to land or grant title to British subjects.

2.2.4.2 *East Africa (Lands) Order in Council 1901*

The order contained clear declaration that all waste land and unappropriated lands belong to His Majesty who had authority to make conveyances and leases subject to any directions of the secretary of state. The order defined "Crown Land" as "all public land within the East African Protectorate which for the time being are subject to the control of His Majesty by virtue of any Treaty, convention or agreement, or of His Majesty's protectorate and all lands which have or may henceforth be acquired by His Majesty under the Lands Acquisition Act, 1894, or otherwise howsoever. The order empowered the Commissioner to sell or lease Crown land on such terms and conditions as he may think fit, subject to any directions of the secretary of state.

2.2.4.3 *Crown Lands Ordinance 1902*

The powers of the commissioner were later to be spelt out in greater detail by the Crown Lands Ordinance of 1902.

This marked a decisive step in usurpation of title in the Protectorate. Okoth-Ogendo (1978) observes that " a new and essentially alien perspective in state land relationships began to emerge". It was now being asserted that the protectorate state, as a political entity owned land and the land users merely held of the former certain rights constituting property in the land. This was not limited to the settlers alone but applicable to Africans as well. According to Okoth-Ogendo (1978) the Crown Land Ordinance No 12 of 1915 identified Africans as mere "tenants- at-will" of the state. As we can see, the provisions of this Ordinance on African occupied land, pronounced the Protectorate authority as sovereign and owner of virtually all

land within its jurisdiction. Okoth-Ogendo (1978) notes that "an important application of these actions was that protectorate authorities had in fact extended the notion of political jurisdiction to include claims to ownership of the original title of land".

Arguably the Protectorate having been anything less than dominion of the British imperial power, its authority could not assert ownership to the original title to land according to the British legal system. However such arguments had now been dismissed as only legalistic, impracticable and at worst "pedantic distinctions"¹. Yash Ghai and McAuslan clearly point out that in East Africa Protectorate "such complete sovereign rights were asserted over land that when title to the country was finally claimed in 1920, it made no difference at all to indigenous rights to land or lack of them".

By using the powers of 1902 Ordinance, the Commissioner of the protectorate administration was able to grant land to settlers first for a 99 years lease later changed to 999 years lease for agricultural land. This Act not only established the Government as the ultimate owner of title but brought certain lands under direct administration of the Government. These are now known as Government land following the adoption of this Ordinance by the Independent legislature. The ordinance was renamed Government Lands Act CAP 280 that vests the administration of the said lands in the President. The President in turn can delegate certain administrative duties to the Commissioner of Lands.

2.2.5 *African Land Rights*

The colonial administration knew better that the success of European capitalism depended on the exploitation of abundant African labour. For this reason, they reserved lands they did not require for the occupation and upkeep of Africans. This reservation of land for Africans eventually turned out to be known as the reserve policy.

2.2.5.1 *African Reserves*

In 1902 Crown Lands Ordinance provided a futile guarantee of African rights to land by specifying that whenever African lands fall vacant (which was a temporary case because they practised shifting cultivation or nomadic pastoralism) it would revert to the state which would thereafter lease it to the settlers. In any case African lands as a matter of practice were expropriated even where they did not fall vacant (Sorrenson, 1967). By claiming African land whenever it fell vacant it meant that European settlements were intermixed with African. The settlers were against this scenario. They advocated for natives to be bunched together so as to create exclusive white settlements. This resulted in the reserve policy which established African Reserves. The Reserves were established through treaties, for example the Maasai and Nandi case or simply by administrative order.

The policy was legitimized by the Crown Lands Ordinance of 1915. Section 54 empowered the governor to reserve any land for "the use or benefit of native tribes". The governor used this power in 1926 to gazette 24 African Reserves. However the African security of tenure could still not be ensured.

2.2.5.2 *Trust land*

The Hilton Young Commission of 1927 recommended that a law be passed to provide some security. This resulted in the Native Lands (Trust) Ordinance of 1930. The 1933 Lands Commission reviewed this Ordinance and made recommendations for improvement. This resulted into the Native Land Trust Ordinance No. 29 of 1938. It is this Ordinance that the Independent legislature turned into the Trust Land Act in 1968. The Independent Constitution converted all "native" lands into Trust land and vested the same in their respective county councils to hold in trust for the inhabitants.

Title to Trust land is registered in the name of a local county council. The inhabitants have right of use. Their rights depend on the African customary law in force for the time being. In theory where the customary law is contrary to any written law, the right is not enforceable. These rights are extinguishable with effect of compulsory acquisition or registration of title under the provisions of Registered Lands Act. Before registration of title individual rights have to be ascertained through Land Adjudication Act or Land Consolidation Act. Upon registration the individual obtains a freehold title with exclusive rights subject only to overriding interests.

2.2.6 *Conclusion*

A review of development of land rights in Kenya reveals a complex legal web. This complexity is the feat of borrowed legislations that were introduced to solve specific issues of power or policy by the colonial administration. Legislation was used to cover up the ugly heads of political oppression and

economic exploitation. Where law did not directly benefit the colonial interests it may not have been followed but they ensured it was there. The results were distortions of substance and a contradiction in the application of laws.

The complexity has also left the Africans in a quandary. Initially the African had simple systems of land rights that were natural i.e born of culture and well understood by everyone. These systems were devoid of individual disputes. The present system being foreign is less understood by ordinary people who are largely ignorant or illiterate. In order to ascertain their rights they have to engage advocates which in most cases they cannot afford. This condition essentially robs them of their rights. The current national development plan notes that: "the complexity of (land) cases is depicted by the fact that out of 4,201 appeal cases brought forward from 1991 and 841 filed in 1992 only 16 were heard while the rest were carried forward to 1993".

The implication is that where compulsory acquisition is effected, usually not all interests are exactly determined owing to the fast nature of the acquisition.

The magnitude of the complexity may also be seen in the fact that about 20 statutes, chapters 280 - 303 are dedicated to land law.

In terms of land rights, the colonial intervention left Kenya with three tenural positions.

- i) The state tenure; refers to the Government lands in which are created leaseholds granted to individuals or

legal persons for period of 99 years (urban land) or 999 years (agricultural land)

- ii) Individual tenure; which are freehold interests vested in individual or legal persons; individuals can also create leasehold but this is very rare
- iii) Customary tenure; in this case land is held under customary law.

The first two cases conform to the western sense of land ownership. They are surveyed lands with titles governed by the principles of English property law. The latter is under customary rights. The land is not surveyed but is held in trust by the county council. They are governed by African customary laws regarding land ownership or use. The resulting situation is duality in the legal system.

The duality still reflects the racist ideologies of its creation. For example land under African Reserve was regarded as inferior. Section 52 of Trust Land Act gives any officer of the Government or persons authorized by him powers to enter trust land or any premise there-on to carry out inspection or investigations. Anybody who hinders such officer or refuses to divulge information is liable to jail.

In contrast, under section 4, of the Land Acquisition Act the Commissioner after issuing preliminary notice may in writing authorise any officer to enter into the land to determine its suitability for the purpose the acquisition is intended. However this does not empower the officer to enter a building, or an enclosed court/garden attached to a dwelling house. For this to happen he must obtain consent from the occupier. If consent is

denied the occupier must be served with not less than 7 days notice in writing.

In case of appeals against decisions under compulsory acquisition, the claimant under trust land must go through the provincial Agricultural Board which is constituted by civil servants. From there to the Magistrate's Court and ends at High Court. The claimant under registered land on the other hand previously had direct entry to the High Court and then to Court of Appeal.

In the end it is justifiable to conclude that the claimant under trust land is given a raw deal for reasons which were colonial and racist.

2.3.0 SOURCES OF POWER OF ACQUISITION IN KENYA

2.3.1 *Introduction*

This sub-chapter examines the source of powers that rationalises compulsory acquisition of private property in Kenya. The powers derive both from conceptual issues of political economy and legal theory and application. In the case of political economy, compulsory acquisition is justified by the doctrine of eminent domain (dominium eminent). This doctrine was introduced in Kenya from Britain through colonial connection. It remained in place with the independent government as a matter of colonial heritage. This doctrine gives the government ultimate powers over the property of its subjects.

Legal theory on the other hand is concerned with civil liberties as checks and balances of the power of eminent domain. Chapter V of the constitution of Kenya is reserved for this

purpose. Section 75 of the constitution specifically aims to protect the individual rights to property as a fundamental right.

In terms of legal application a balance between eminent domain and individual liberties must be struck. This has been achieved by making special conditions under which compulsory purchase of private property can be effected. The constitution provides for a statute to oversee the application of its provisions. This statute is the Land Acquisition Act.

The Constitution has also taken care of Trust Lands. A whole chapter IX of the constitution is dedicated to the Administration of Trust Land. Trust lands can also be acquired compulsorily (common term is setting apart) within statutory provisions i.e. Trust Lands Act.

Apart from the two main statutes named above several other statutes also make provisions for compulsory acquisition where land is involved.

2.3.2 *Eminent Domain*

Eminent domain is the power of the nation or a sovereign state to take, or to authorise the taking of private property for public use without the owner's consent conditioned upon the payment of just compensation.

2.3.2.1 *Origin*

Eminent domain has western history. In Biblical times, King Ahab of Samaria, who sought the vineyard of Naboth, offered Naboth as his choice of compensation either a better vineyard (under the substitution or replacement theory of damages) or the vineyard's worth in money (under the indemnification theory)⁸.

Naboth asserted a right of refusal, which has never existed in the law, and paid for his refusal with his life.

Evidence of compulsory acquisition also exist for the Greek and Roman civilisations. For the Greeks, a dispute between Athens and Eleusis was settled by providing for arbitration of the value of certain properties sought to be acquired by the Athenians, "with three valuers on either side⁹". *The Annals of Tacitus* on the other hand tells us that the Roman government exercised this power to acquire the materials with which it built and repaired aqueducts¹⁰.

In ancient times however the exercise of the right of eminent domain was infrequent, and the procedures irregular in the light of modern developments. During the feudal period, the prevailing idea of property was that all land belonged to the sovereign and was held by lesser lords under tenure and personal obligation. What was the sovereign's he could take when needed as in Naboth's case.

However during the Renaissance period the concept of individual ownership of property was revived and a new concept of eminent domain began to form with a recognition of individual rights to property.

During all this time the doctrine of eminent domain existed in principle and practice but not in name. It was first defined by Dutch philosopher, Hugo Grotius, in his publication, *Law of war and peace* where he held eminent domain as a right of a state over the property such that the state "may use even alienate and destroy such property, not only in the case of extreme necessity [war] --- but for ends of public utility, to which ends, those

who founded the civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done, the state is bound to make good the loss to those who lose their property ---"¹¹. There has never been any better definition.

2.3.2.2 *Sovereignty*

The power of eminent domain is inherent in the theory of sovereignty. The theory of sovereignty is more understandable in the meaning of war. By the state guarding its sovereignty, it is able to protect the individual right to its citizens both from internal and external violations. Thus all the rights including the right to property are enjoyed by the individual citizen under the auspices of the state. By mere fact of its guardianship the state becomes the ultimate right holder over individual property.

In countries like Kenya where economies are centrally run, the whole compass of landed property is ultimately vested in the state. Individuals can only acquire a right of occupancy which right can be compulsorily acquired. The theory is that the radical or the ultimate title is vested in the state. An individual has immediate title or dominium of use.

2.3.2.3 *Escheat and Bona Vacantia*

Eminent domain is supported by the principles of escheat and bona vacantia (vacant interest). The principles of escheat states that in the event that the line of heirs to a property is complete, the state becomes the final inheritor. The Government Lands Act CAP 280 takes this up at section 8A and provides that where a person dies intestate and without heirs, his estate, interest or right to a specific land escheats to the Government.

In case of a company being dissolved its landed property escheat to the Government as above except in so far as the Company Act provides for it to invest in some other persons or authority. Subsection (3) under this section exempts Trust land from these provisions.

The principle of bona vacantia on the other hand holds that any time any piece of land is vacant, it reverts back to the state. This was the main basis of Crown Lands Ordinance of 1902 which was notoriously used by the colonial regime to expropriate African lands "once they fell vacant".

2.3.3 *The constitution of Kenya*

The Constitution entrenches the powers of eminent domain in two instances. Section 75 applies for registered land. Subsection (1) provides that no property of any description and no interest in any such property may be acquired compulsorily by the state unless

- i) the taking of possession is necessary in the interest of defence, public security, public morality etc or the development and utilization of property so as to promote the public benefit
- ii) the necessity is such as to afford justification for any hardship caused to any person's
- iii) provision is made by law for prompt payment of full compensation.

The state is then given *carte blanche* to acquire any property. The section however does not tell us who decides whether a particular acquisition is necessary for the stated necessity. If there is necessity, the state must go further to

show that the necessity is such as justified to the hardship caused to individuals. The third condition is that in addition to necessity there must be a law applicable that provides for a prompt and full compensation. This third condition is now satisfied by the enactment of Land Acquisition Act

Subsection (2) provides safeguards for the property owner by granting him direct access to the High Court for

- i) the legality of the taking of possession or acquisition of the property interest or right
- ii) the purpose of obtaining prompt payment of that compensation.

In the case of unregistered land , otherwise known as Trust land sections 117 and 118 apply. Section 117 empowers the county council in which ownership of the land vests in trust for the inhabitants to acquire it, if:

- i) either it is required by a public body or authority for public purposes
- ii) or it is required by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area
- iii) and the provision is made by the law under which the acquisition takes place for the prompt payment of full compensation to any individuals whose rights are thereby affected.

Section 118 on the other hand makes provisions for the acquisition effected at the instance of the state. It gives the President power to authorise acquisition of land for:

- i) the purposes of the government itself
- ii) the purposes of a statutory body
- iii) the purposes of registered company in which the Government holds shares
- iv) the purpose of prospecting for mineral or mineral oil.

Here also prompt payment of full compensation is given as additional conditionality for acquisition to have effect.

Subsection 117(1) and 118(5) provides for Parliament to enact law prescribing the manner in which and conditions subject to which such acquisition is to be effected. In response Parliament endorsed the Trust Land Act which has detailed the procedures to be followed in the acquisition of Trust lands.

2.3.4 *The Trust Land Act CAP 288.*

Subsection 114(1) (b) of the constitution defines Trust land as areas of land that were known before 1st June, 1963 as Special Reserves, Temporary Special Reserves, Special Leasehold Areas.

The unique characteristics of Trust land are

- i) it is held by local authority council in trust for the inhabitants
- ii) rights interests or benefits available for the occupants derive from African customary law.
- iii) the rights or interests held by occupants are not registered hence legally in-existent in the realm of conventional property law.

2.3.4.1 *Acquisition by the Government*

Section 8(1) provides that "full" compensation shall be promptly paid by the Government to any resident of the area who -

- i) has any right to occupy any part of the land acquired

ii) is prejudicially affected by setting apart.

Section 9 identifies the District commissioner as the administrator of compensation issues. In consultation with the Divisional Land Board he decides the amount to be awarded as compensation. This section provides that compensation "shall be assessed in respect of the loss of the right of occupation --- or in respect of the applicant having been otherwise prejudicially affected". This statement is made in the light of subsection 8(1) discussed above. No provision is made here or elsewhere in the act for the manner in which compensation is arrived at. The Act leaves it open for us to interpret what is "right of occupation" vis-a-vis other rights which for that matter are not compensable. The Act is also silent on the basis of valuation for compensation. It leaves us to read it in the meanings of "full compensation" which is another unqualified term.

The Act as it is now is inadequate and misleading as it fails to grasp the modern principles of compensation assessment. It remains a written condemnation of the colonial administration's valuation of African's land.

Section 12 provides statutory safeguards for the people whose land is to be taken. They have direct access to the High Court for

- i) the determination of the legality of acquisition
- ii) the purpose of obtaining prompt payment of any compensation awarded.

For those who are dissatisfied with the compensation, however, life is not easy. Subsections 100(4) and (5) detail the

process of appeal. It starts with appeal by claimant to the Provincial Agricultural Board through the DC who earlier on had made the decision in question. If the claimant is not satisfied with the decision of the said board he may appeal to the Resident Magistrate's Court. From here he can go a step further to pursue his rights on appeal to the High Court. The decision of the High Court is final.

The procedure discussed above also applies in the case of acquisition by county council. Section 13(4) provides that "section 7(3) and (4), 8(1), 9, 10, and 11 of this act shall apply in respect of land set apart under this section *mutatis mutandis* and subject to the modification that compensation shall be paid by the council (without prejudice to the council obtaining reimbursement thereof from any other person)".

2.3.5 *The Land Acquisition Act CAP 295*

This Act is applicable for titles registered under Registered Lands Act or Land Titles Act and leases under GLA. It came into place as a result of the 1969 amendment to the Indian Land Acquisition Act 1894 then applicable in Kenya. The Indian Act in turn came from Britain. Apondi (1978) concluded that there was no fundamental difference in the substance and application of acquisition statutes in these three countries.

It is important to note here that the Kenyan legislation is foreign and ideally conventional based on internationally recognised civil rights.

2.3.5.1 *Justification and Notice*

Section 6(1) provides that the Minister for the time being in charge of Lands is satisfied that land is required for public

interest or benefit he may direct the Commissioner of Lands to acquire it compulsorily.

The latter then publishes a gazette notice to that effect and directly informs all the interested persons in the land by copy of notice.

2.3.5.2 Compensation

After publication of notice the Commissioner fixes date of inquiry. During the inquiry the Commissioner is expected to determine the nature of interests in each parcel of land, the interested persons, the physical attributes of the property i. e area of land or improvements and many other factors which may influence its value; and the amount of compensation to be paid to the interested persons. The interested persons are also expected to present their claims in writing.

The schedule provides that the compensation for land is to be paid at market value. The schedule also makes provision for compensation for severance and injurious affection. Compensation is also given for expenses incidental to change brought about by the acquisition and the loss of profits resulting from the notice of intention to acquire. To this is added 15% of the market value of the land as compensation for disturbance.

Section 13(1) provides that the Commissioner is to pay compensation "as soon as practicable". This condition compromises the meaning of "prompt" payment provided in the Constitution and section 8 of the Act. Muoka (1994) reads the phrase to mean that "there is no time limit as to when compensation is to be paid". He argues further that the Government bureaucracy can not allow prompt payment. He also notes that compensation can take as long

as a decade with the example of Kisii - Chemosit Road where compensation to heirs to the deceased land owners was paid to the DC in 1986 so that the latter could identify the rightful claimants. Upto the time he was writing in 1994, no compensation had been paid to any such claimant.

Where compensation is rejected by the claimant the Commissioner is supposed to deposit it in Court. The 1990 amendment to section 16 provides that where compensation is not paid to claimant or deposited in court, or before taking of possession of land, the Commissioner is to pay interest on the amount awarded at "such rates as may be prescribed which shall not be less than six per cent per annum". Previously it meant that the interest rates charged was nominal and therefore resulted into huge losses to claimants in a country which for a long time had been experiencing rates of inflation beyond single digit. The amendment has come in belatedly to correct this by setting a floor level for interest rates. However this raises difficulty of interpretation and does not help the claimant much. What the amendment should have done was to peg the interest rate at market rate.

After award has been made the Commissioner serves notice to the occupants that he will take possession of the land on a specified day. The 1990 amendment has limited this to a day "not later than sixty days after the award has been made".

2.3.5.3 *Resettlement*

Section 12(1) states that a person dispossessed of his land under the provision of the Act can be granted another land in exchange for the land taken. If this is to be done government

land shall be granted to the claimant without regard to the provisions of the Government Lands Act as relates to transactions of public land like the payment of premium and other fees. This section however emphasizes that the land shall not exceed in value the amount of compensation which the Commissioner considers would have been awarded. This provision is rarely applied.

Yahya (1976) reports that resettlement programme was put in place in the acquisition of land for the extension of the airport at Mombasa. He writes that in this case "people were to be resettled at Mariakani and Miritini where land had been acquired and planned into a resettlement scheme to absorb the displaced families".

2.3.5.4 *Tribunal*

The major contribution of the 1990 amendment to the Act is the provision of the Land Acquisition Compensation Tribunal to deal with cases against the Commissioner's decision under section 19. Under this new arrangement, claimants will now not have direct access to the High Court for the following as previously provided by the Act:

- i) the determination of his interest or right in or over land
- ii) the amount of compensation paid or offered subsection (8) will now provide for the public body benefiting from the from the acquisition to contest compensation awarded to claimants .

A party dissatisfied with the decision of the tribunal is given chance to appeal to the High Court on any of the following grounds

- i) if the decision of the Tribunal is contrary to law or to some usage having the force of law
- ii) if the decision failed to determine some material issue of law or usage having the force of law
- iii) if a substantial error or defect in the procedure provided in the Act has produced error or defect in the decision of the case upon its merits.

The third provision makes it possible for claimants to appeal over a wide range of issues.

The amendment allows for appeal against the High Court's decision to the Court of Appeal only on a point of law.

The creation of the Tribunal is within the Constitutional provisions. Similar tribunal exist in Britain. However so far it has not been tested. The tribunal may be of some help because it will be constituted by experts, a triumvirate of one advocate and two valuers. Hence technical cases regarding compensation matters would be listened to by specialists not judges who do not understand them. Only matters akin to interpretation of law would be referred to the latter. However the performance of the Tribunal is yet to be seen.

2.3.6 *Other Statutory Provisions*

Several other statutes also deal with acquisition but not exclusively in so far as they make special provisions in their respective areas of concern.

The Agriculture Act CAP 318 makes provision for acquisition of land. Section 186 A(2) gives the Minister (for Agriculture) powers to acquire land compulsorily for the production of a particular crop. The conditions attached are that the production

of that crop shall result to public benefit; and without acquisition the land would not be utilized for that purpose. In this case the Minister must first try to purchase the land on a willing buyer willing seller basis. If the interested parties are not willing to relinquish their rights and interests out of their own volition then the compulsory acquisition mechanism is applied. Under this Act it is also stated that the necessity for obtaining the land is such as to afford reasonable justification for the causing of any hardship that may result to the owner or interested persons. Section 188 asserts that the land must be acquired under the Land Acquisition Act.

The Electric Power Act CAP 314 also makes provision for acquisition of land for public bodies for purpose of generating electricity under section 134. Here the acquisition is first authorised by the Minister for the time being in charge of energy before it can be carried forward under relevant laws of acquisition. The Act provides that before application is made for the Minister's approval the applicant must give notice by public advertisement not more than ninety days and not less than sixty days before the date of the intended application. Advertisement must be published in each of the two successive weeks in the Gazette and once at least in each for two successive weeks in some one and the same newspaper circulating in the affected areas. Apart from this the intending applicant must serve notice in writing upon the owners or lessees and occupants of all lands to be acquired as shown on the plan to be deposited with the notice describing in each case the particular lands proposed to be so acquired. Every such notice must state that any aggrieved

or interested party who wants to make representations or objections to the application could do so by letter addressed to the Minister. After expiration of sixty days upon submission of the plan the Minister is to consider the application together with all representation or objections which have been made and decide on the matter accordingly. By licensing the application the Minister in effect authorizes the compulsory acquisition of land according to subsection (7). Subsection (8) provides that acquisition will not be lawful unless application is made in accordance with this section.

The Registered Lands Act CAP 300 provides that upon registration of land, the title holder will hold the land with exclusive freedom subject to compulsory acquisition as one of the overriding interest (section 30). Section 77 of the Mining Act CAP 306 adds that "compensation shall be payable on respect of any disturbance of prospecting or mining rights, in addition to any other compensation".

2.3.7 Conclusion

From the analyses of the provisions for compulsory acquisition the fact of inadequacy in some parts become apparent. The Trust Land Act leaves so many issues without mention as far as acquisition is concerned. Specifically it does not even talk of what is to be considered for compensation in terms of land, improvement etc. It does not specify market value as the basis of valuation or if not any other value. This is quite important taking into account that Trust lands are not commodified in most cases. There are also other several items which may form part of the land owing to the customary law whereas they may not fit into

the conventional markets. These may include sacred trees, graves and other cultural items. In which case Trust Land Act should have said much more.

The Land Acquisition Act also looks fairly inadequate to meet the challenges of the day. Comparatively the Electricity Power Act and the Agriculture Act come stronger in their approach to compulsory acquisition. The latter at least give the option of voluntary sale to the landowners. This may be cumbersome in large scale acquisition. Nevertheless it duly recognises the fact that at least the land owner should have a say. The former on the other hand is very emphatic in involving the opinion of the people in a decision concerning compulsory acquisition. They both frame out the Land Acquisition Act as a nonconformist in an era that emphasises community participation in planning and development.

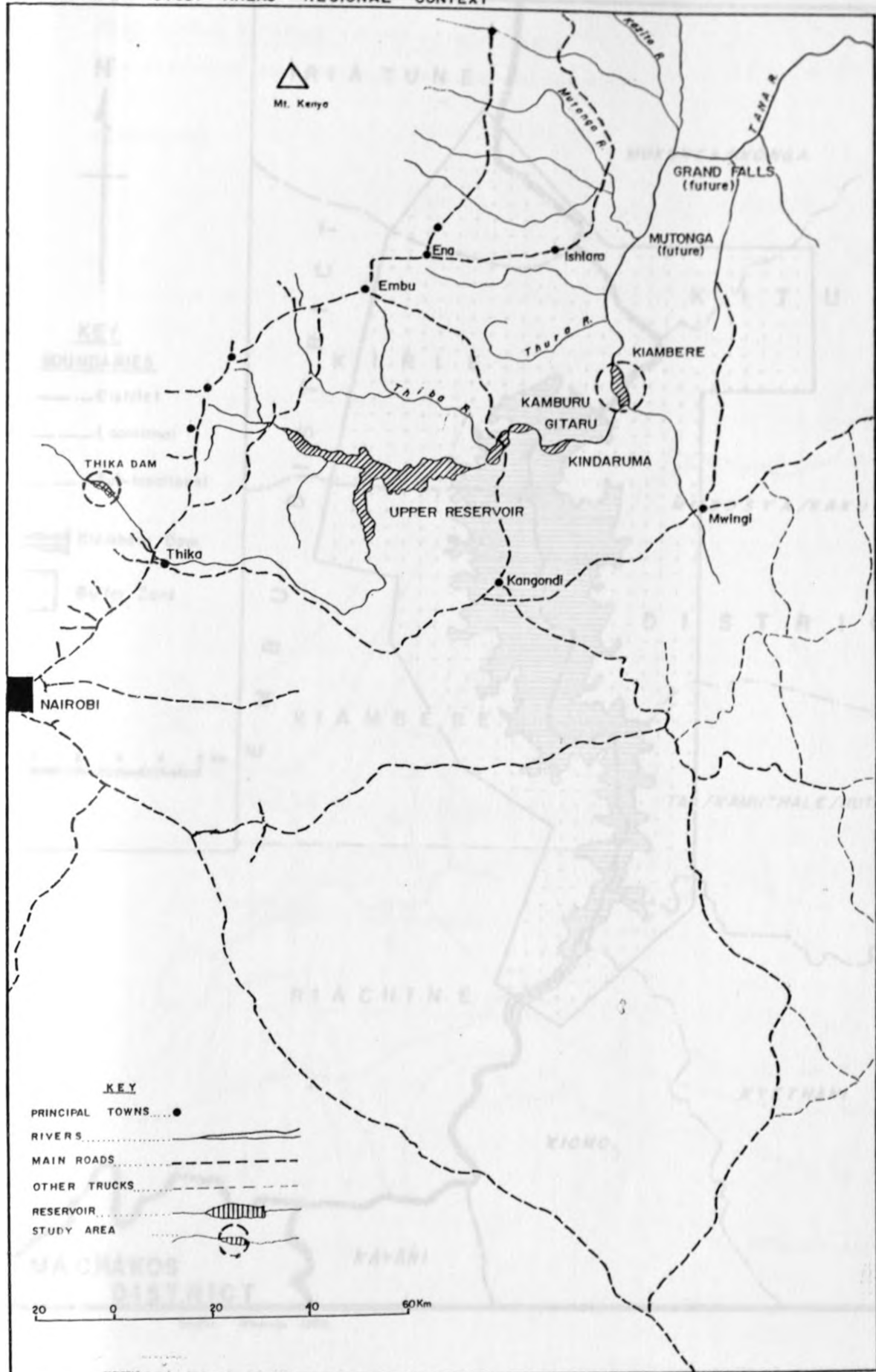
Thirdly both the constitution, and the statutes are not clear on what constitute public purpose or benefit and how it is arrived at. Therefore there is no objectivity in the "justification" of acquisition. It seems public purpose exists simply because the Minister is satisfied that it does.

Fourthly there are terms which are used throughout the statutes and the constitution which ought to have been clarified. Prompt and full compensation seems to have been used here only as a clarion without any technical or objective meaning. "Full" and "prompt" are both relative terms and so the law should have gone further to tell us what they mean in these contexts.

NOTES

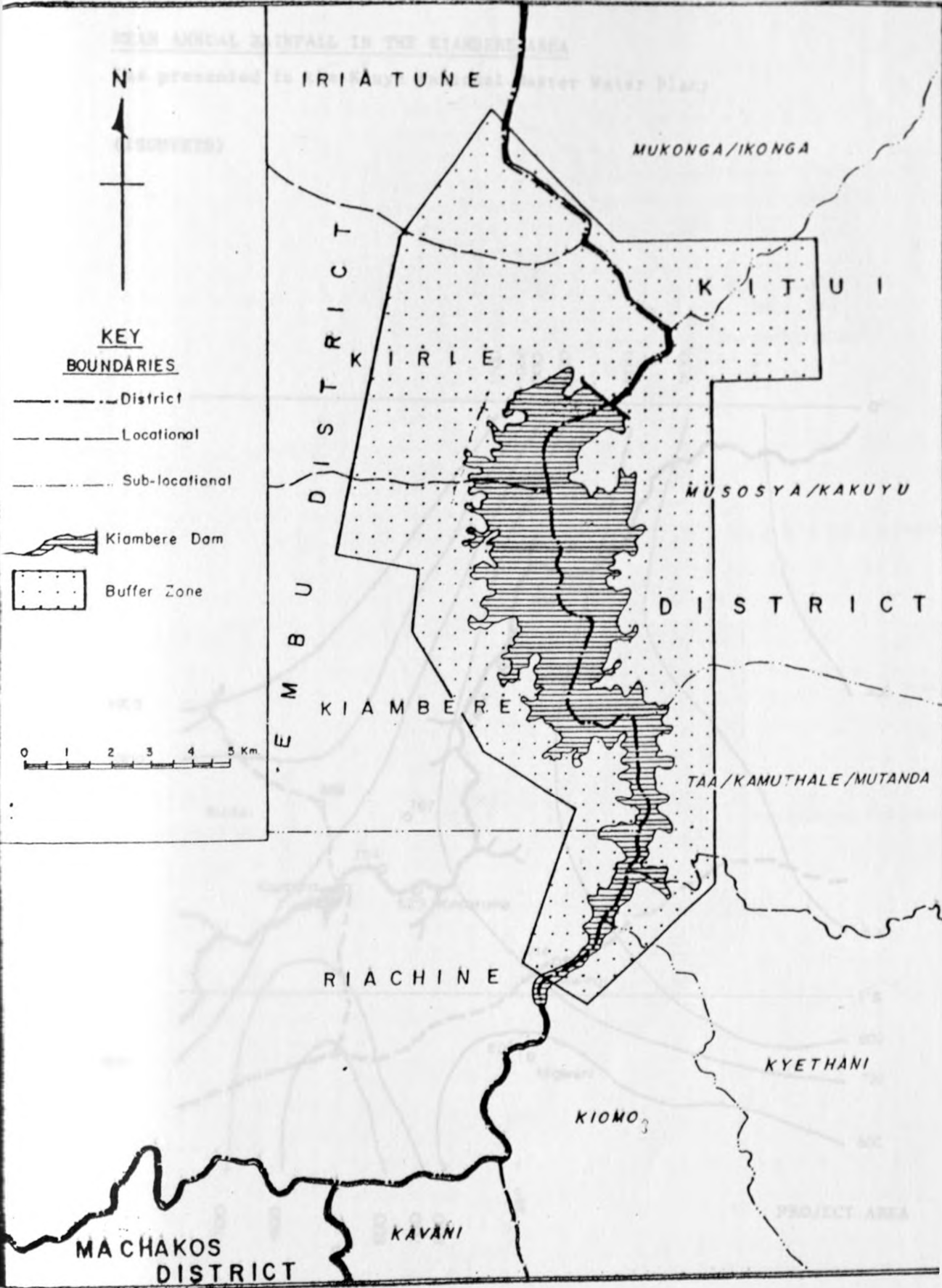
1. *FAO (1993) Guidelines for Land-Use Planning. FAO-UN Development Series. Rome*
2. *Reynard V. City of Caldwell 55 Idaho 342*
3. *Holmes V. U.S. 53 F 2d p.960*
4. *Nyerere J. (1963)*
5. *Young Arthur Nicholas (1971) China's Nation Building Effort 1927 - 1937. Stanford University. California*
6. *Swynnerton R. J. M. (1954) A Plan To Intensify the Development of African Agriculture in Kenya. Government Printer.*
7. *Sorrenson M. P. K. (1968) The origins of European Settlements in Kenya. Oxford University Press. Nairobi*
8. *1 Kings 21: 1 - 16*
9. *Searles, Sidney Z. (1974) Eminent Domain: A Kaleidoscopic View in Appraisal Journal Volume XLII Number 4 October 1974*
10. *Ibid*
11. *Ibid*

FIG 3-2 STUDY AREAS REGIONAL CONTEXT



Source: Engineering Power Development Consultants

FIG 3-3 KIAMBERE H.E.P. PROJECT AREA

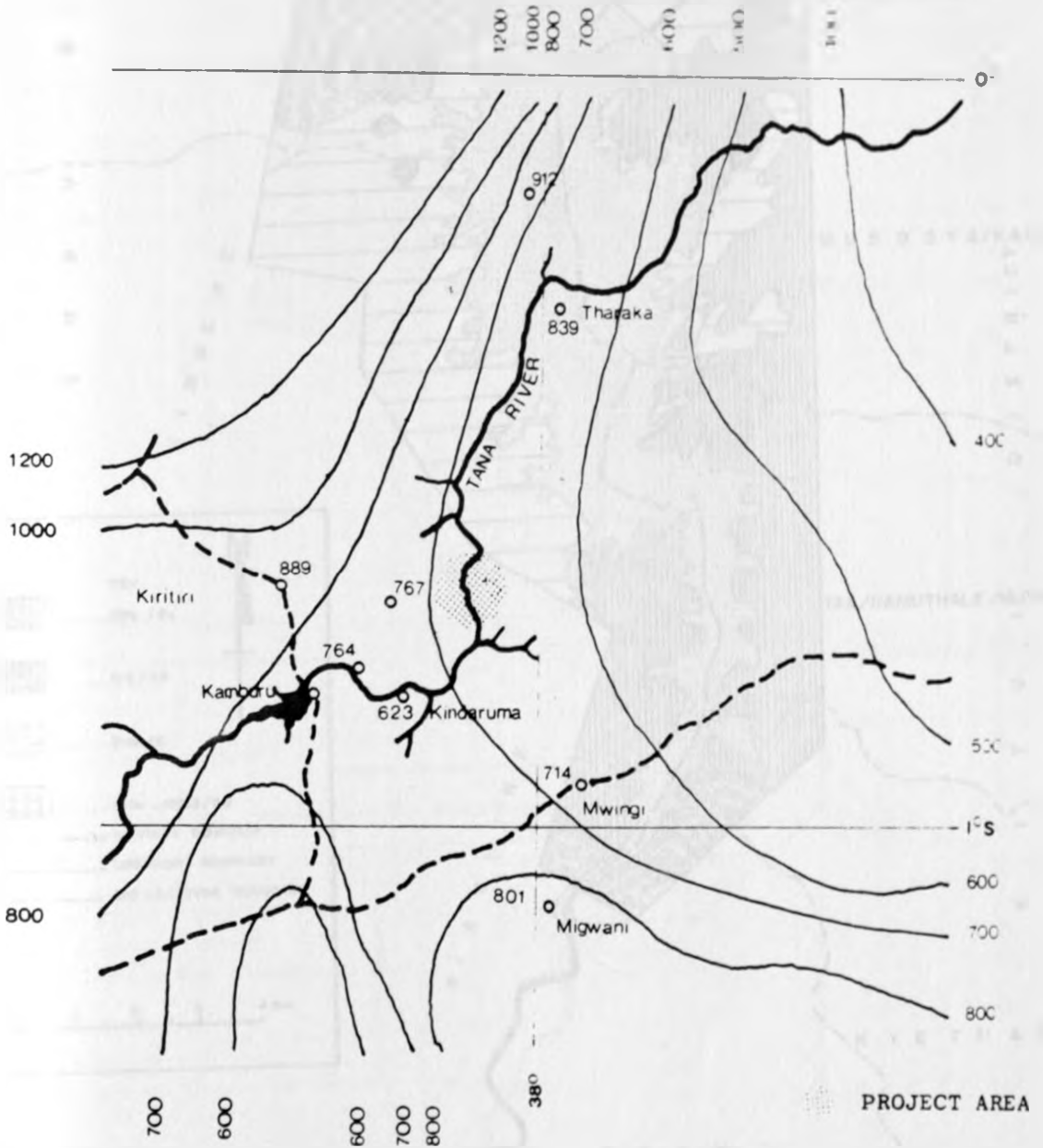


Source Mburugu 1988

MEAN ANNUAL RAINFALL IN THE KIAMBERE AREA

(as presented in the Kenya National Master Water Plan)

(ISOHYETS)



Source: National Master Water Plan, Volume II (1980)

Scale: 1:1,000,000

FIG 3-5 KIAMBERE H.E.P. PROJECT AREA: SOIL.

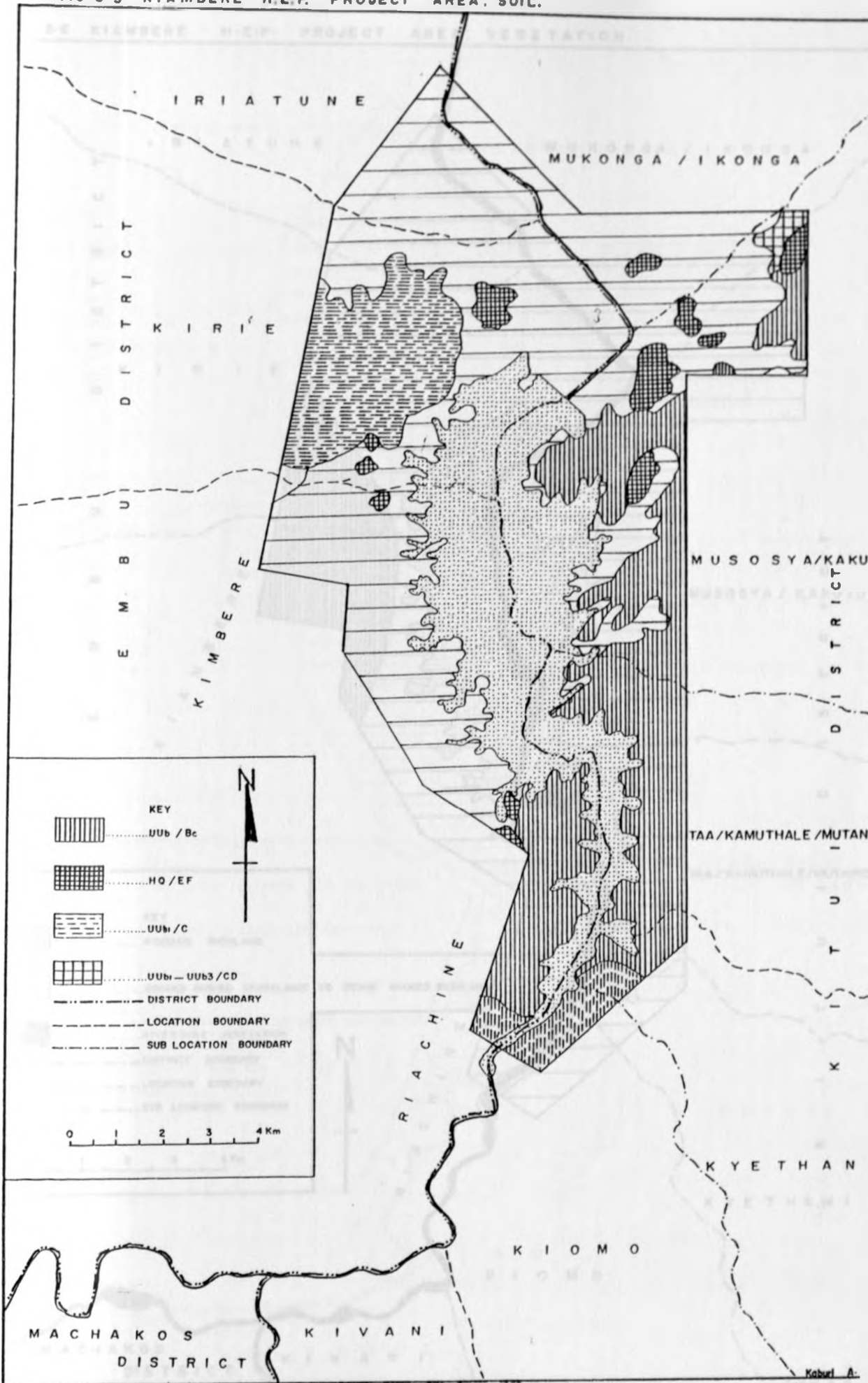
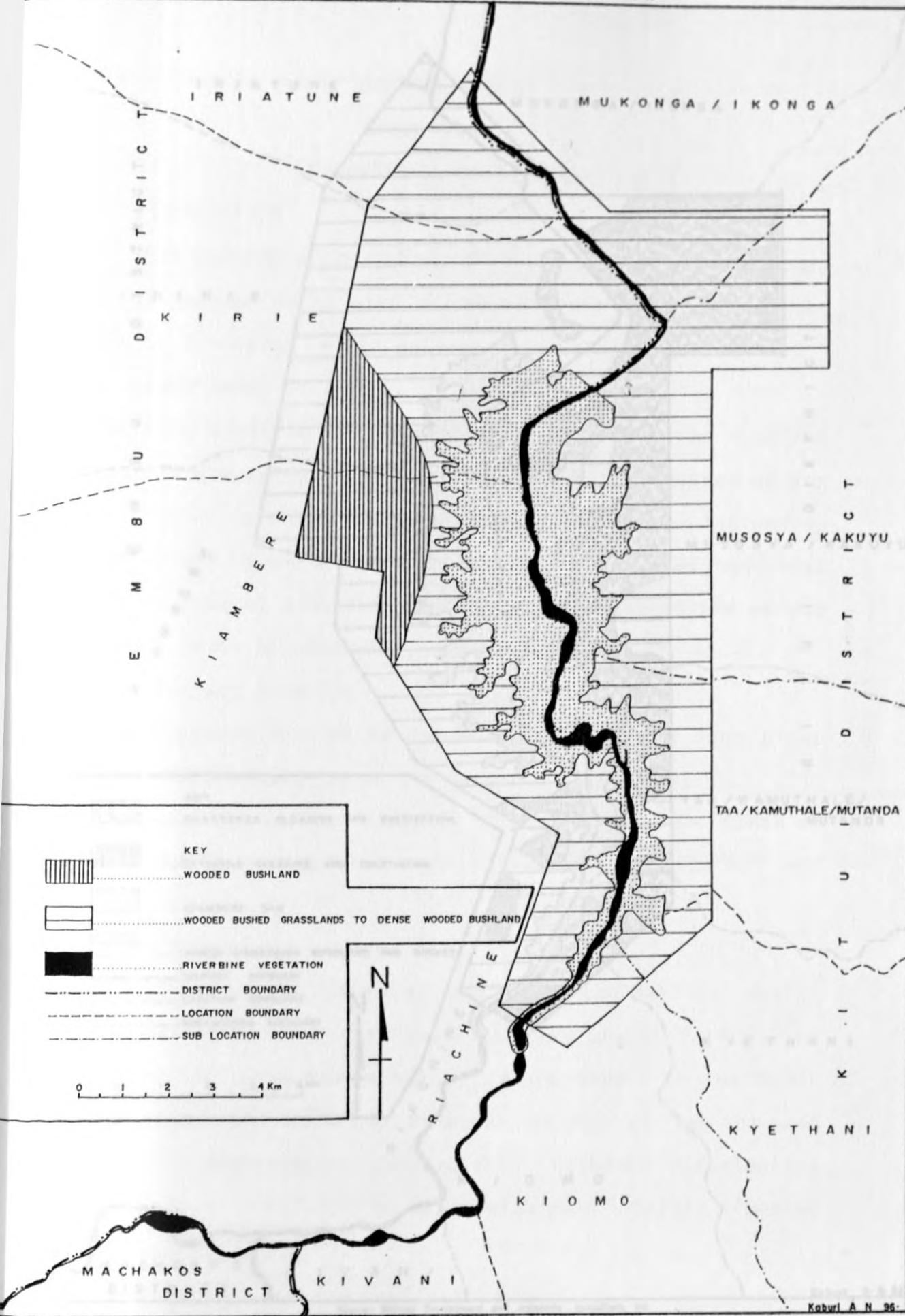
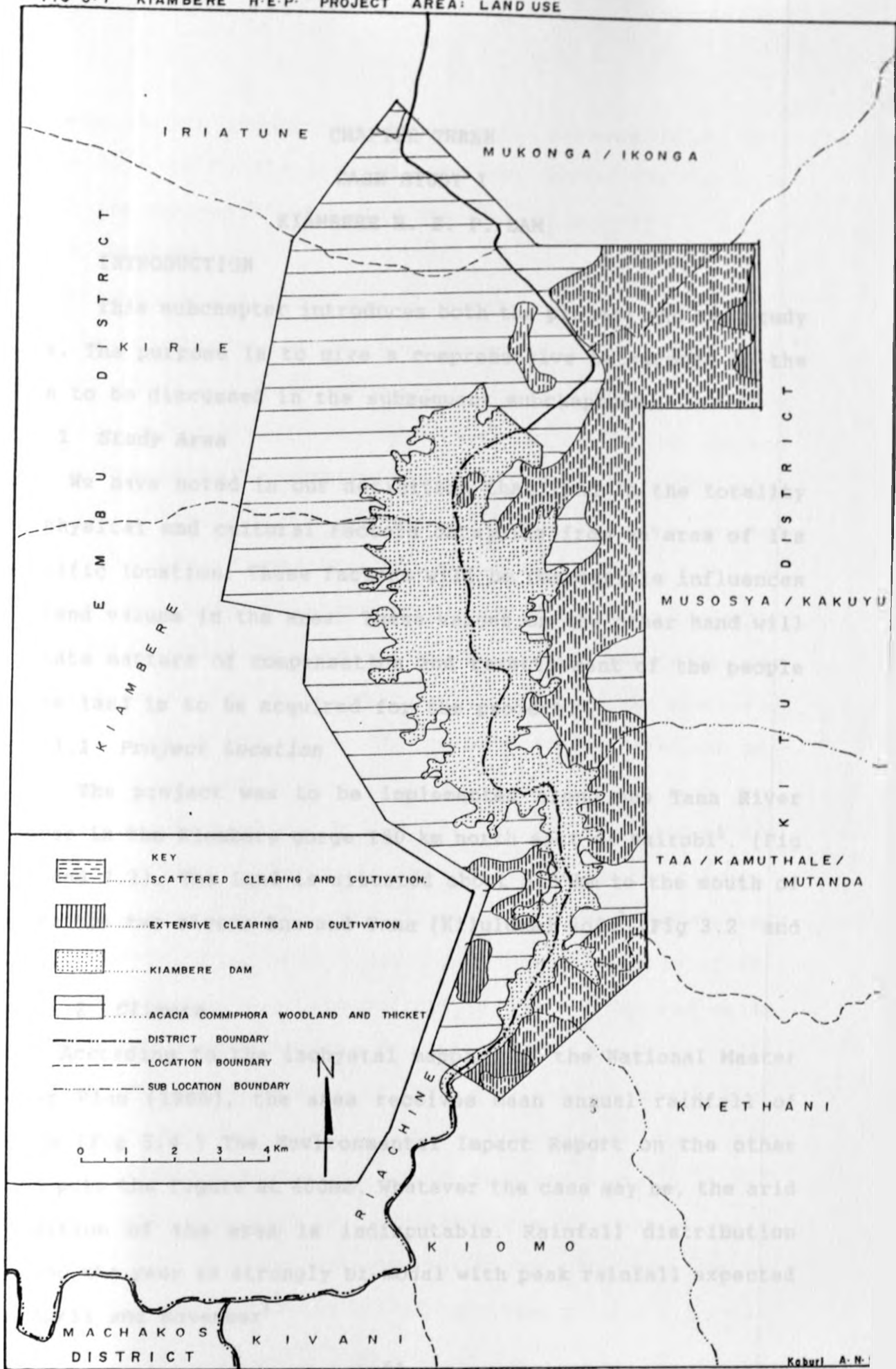









FIG 3-6 KIAMBERE H.E.P. PROJECT AREA: VEGETATION



Source: African Development and Economic Consultants Ltd.

FIG 3-7 KIAMBERE H-E-P PROJECT AREA: LAND USE



- KEY
-  SCATTERED CLEARING AND CULTIVATION.
 -  EXTENSIVE CLEARING AND CULTIVATION
 -  KIAMBERE DAM
 -  ACACIA COMMIPHORA WOODLAND AND THICKET
 -  DISTRICT BOUNDARY
 -  LOCATION BOUNDARY
 -  SUB LOCATION BOUNDARY

0 1 2 3 4 Km



CHAPTER THREE

CASE STUDY I

KIAMBERE H. E. P. DAM

3.1 INTRODUCTION

This subchapter introduces both the project and the study area. The purpose is to give a comprehensive background to the data to be discussed in the subsequent subchapters.

3.1.1 *Study Area*

We have noted in our definition that land is the totality of physical and cultural factors obtaining from an area of its specific location. These factors will be responsible influences on land values in the area. These values on the other hand will dictate matters of compensation and resettlement of the people whose land is to be acquired for the project.

3.1.1.1 *Project Location*

The project was to be implemented along the Tana River course in the Kiambere gorge 150 km north east of Nairobi¹. (Fig 3.1 and 3.2). The land is situated about 3.8 km to the south of where the two rivers Ena and Tana (Kiluluma) join² (Fig 3.2 and 3.3)

3.1.1.2 *Climate*

According to the isohyetal mapping of the National Master Water Plan (1980), the area receives mean annual rainfall of 700mm (Fig 3.4.) The Environmental Impact Report on the other hand puts the figure at 600mm. Whatever the case may be, the arid condition of the area is indisputable. Rainfall distribution during the year is strongly bi-modal with peak rainfall expected in April and November³

Mean annual temperature ranges are: maximum 30 - 38°C; minimum 18 - 21°C⁴. The high temperatures during the greater part of the year also underscore the fact of aridity.

3.1.1.3 *Geology*

The whole of the study area is underlain by Basement system, generally considered to be Low Precambrian. The granitoid gneisses, which are more resistant to erosion than the banded gneisses, form the hills and mountains. It consist of ancient rocks, metamorphically formed of Precambrian Age. Soils developed from such rock and climatic regimes but typically have more sand in them than soils formed from volcanic rocks⁵.

3.1.1.4 *Geomorphology*. Mountains, hills and uplands are the major physiographic units in the study area. The mountains are concentrated in the north east, while hills are scattered throughout the project area. The uplands predominate and are undulating to rolling⁶.

3.1.1.5 *Soils*. The general pattern of the soils is determined chiefly by the kind of bedrock (parent material) and the climate. On the undifferentiated basement rocks (mainly banded gneisses) quite a variety of soils have developed, partly because of the variety in composition of the bedrock (Fig 3.5). The red soils that develop on these rocks are in general clay; the brown soils are less clay, probably because they developed on rocks that contain more quartzs. The soil in a substantial area over undifferentiated Basement rocks are shallow and stony⁷.

In the soil map, each soil unit consists of areas of soils that are similar in such characteristics as drainage, depth, colour, consistency and texture. Soil complexes occur where soils

intermingle that identification of one dominant soils is impossible. Symbols used reflect essential soil and site characteristics of each map unit (APPENDIX 3A)

3.1.1.6 Vegetation

Natural vegetation in the area can be subdivided into the following^b (Fig 3.6)

Woodland	20%
Bushland	30%
Shrubland	50%

Woodland. Due to the semi-arid nature of the climate in the study area, woody vegetation is not very productive. The greater part of the plant community and associations here is acacia. In terms of productivity the stocking rate is approximately 60 m³/ha where sustained yield can be expected at 0.80 - 1.20 m³/ha

Bushland. Essentially composed of low vegetation which has many branching trees and some small shrubs in cluster or continuity. Vegetation is less productive than woodland. Stocking in the Kiambere area was estimated at 18 - 51 m³/ha. On sustained basis, each hectare can yield between 0.30 - 0.85M³ p.a. This stocking density varies considerably from site to site and is essentially a function of previous exploitation and frequency of bushfires. Vegetation is useful mainly for livestock grazing and to some extent the utility value of woodland is also higher in connection with building poles and other products such as beehives.

Shrubland. Found on poorer shallow soils. Vegetation has evolved from bushland. Tends to take longer time to reconstitute after some disturbance such as fire. On account of low growth on

shallow soils, degradation seems to be a much faster process and overgrazing ultimately reduces most vegetation types to scrub or shrubland formation in this semi-arid area. Shrubland is not very useful for poles but to some extent it provides firewood. The production in the Kiambere area was estimated to be 0.1 - 0.3 m³/ha. p.a. On clearing an area one would get wood amounting to 6 - 18 m³/ha. Shrubland has a much higher proportion of grass and hence it is favoured for grazing. The types of grass found in the area interspaced with woody vegetation include heteropogon, aristida and chloris species.

Economic exploitation. Plants in the area are put to the following uses

- i) harvesting of poles for building and cattle bomas
- ii) woodfuel
- iii) charcoal
- iv) construction of beehives
- v) browse and grazing of livestock
- vi) thatching and fibres
- vii) medicinal use (for treatment of malaria, diarrhoea, wounds etc)
- viii) fencing materials

Wood. The minimum fuelwood need for the area per capita was estimated at 0.7m³ p.a. The need for poles and other household items accounted for about 0.3m³ per capita amounting to a total of 1.0m³ per capita p.a for overall need.

Note that the value of wood product of the land could also form a basis for land valuation.

3.1.1.7 Landuse

Land use is influenced by the following factors.

- i) Limited extent of soils suitable for cultivation
- ii) adverse climatic conditions limiting crop types and yields

Therefore the area has very/low potential in terms of agricultural production.

There are only two land use types (Fig 3. 7):

- i) extensive acacia woodland or bushland
- ii) scattered clearing and cultivation

3.1.2 Cultural Factors

3.1.2.1 Significance of Tana River

The Tana River has special significance to the Mbere. According to Njeru (1976, 1979), the major dispersal of the Mbere out of Ithanga was north-east and several groups crossed the Tana River at various "Mavuki" (fords) e.g. "iriuko ria Mbandi" (the ford of the Mbandi people). These names given to various groups which crossed at various fords, were later used to identify Mbere clans. According to migration maps, the significant fords are found from up river of Riakunau in Makuyu - Ithinga area. The Kiambere project was to affect at least seven of these historic fords which have also been extremely useful in facilitating trade and movement of people between Kitui, Machakos, Mbere, Embu and Kirinyaga.

A linguistic study reveals that Kiambere would have been the "parting of ways" of the Kamba and Mbere. Further significance of the Tana to the Kamba owes to a long history of movement to Kikuyu land, Embu and Mbere especially during food shortages.

This gives the Kamba a long association with the river as evidenced in their war and folk tales and songs.

The construction of the dam therefore interfered with the intrinsic values the local community place on the river. This value however can not be quantified and compensated. It is such values which are likely to cause resistance to acquisition.

3.1.2.2 *Land Tenure*

Land in this area falls under customary tenure or Trustland. Under this set up individuals and nuclear families control the right of the use of land such as growing crops, grazing, cutting of wood and timber etcetera. Extended family subdivide land and support individual rights. The clan on behalf of the tribe control certain geographical areas and monitors parcelling of land among lineages, protects clan land against other clans and sustain land use customs in consultation with other clans. In Mbere the clans specifically own the land.

3.1.3 *Study Project*

3.1.3.1 *Project Purpose*

In this project land was required for the construction of hydro electric power generating plant. Land was required for the construction of a dam, power station, and access roads, collection of construction materials (i.e sand and stones) and for overhead power transmission wayleave. The project area covered two districts namely Embu and part of Kitui (now Mwingi District). However the wayleave extended land acquisition to cover parts of Machakos District.

3.1.3.2 Project Capacity

The following were identified as the principal characteristics of the project¹

Table 3.1 Project capacity

Catchment area	12,000 Km ²
Reservoir gross volume	33 millionM ³
Kiambere dam, spillway design	5,000 M ³ /s
full supply level	693 M
maximum dam height	30 M
Tunnel, equivalent diameter	8 M
length	13 km
Power station, tailwater level	550 M
gross head	143 M
installed capacity	132 (140)MW
average annual	
energy production	750 GWh

3.1.3.3 Project Implementor

The project was being implemented by TARDA a statutory/body. This gives the Commissioner of Lands power to acquire land on their behalf under sections 6(1) CAP 295 and 7(1) CAP 288. Initially project implementation was under Tana River Development Corporation until late July 1982 when it was taken over by TARDA.

3.1.3.4 Project Sponsor

Financing of the project was undertaken by the World Bank. The Bank usually requires environmental impact assessment to be carried out as a precondition to loan effectiveness. However one of its reports on settlement issues noted that no specific covenants of Bank loan agreements applied to resettlement⁵.

Resettlement issues were therefore not considered at the preconstruction stage.

3.1.4 *Justification of the Project*

The justification of Kiambere H.E.P was based on development policies and strategies.

3.1.4.1 *Policy on Generation of Electricity*

Government policy on generation of electricity has been consistent right from the colonial days. In Sessional paper No. 1 of 1963 the Government agreed in principle that Kenya should develop its own source of hydroelectric power at Seven Forks. Since then more power generation plants have been commissioned to meet the growing power demand.

3.1.4.2 *Role of Electricity in Development*

The Government adopted Rural Trade and Production Centres approach to development round the country. Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth pointed out that the success of this strategy required a broader national electricity grid.

Whereas widespread urbanization was to place greater demands on transportation and thus imported petroleum, electricity could to some extent substitute petroleum in non-transport sectors hence save foreign exchange that could be released for development in the non-energy sectors.

3.1.4.3 *Demand and Supply of Electricity*

The shortfall in supply was feared to occur as early as 1984. If Uganda supply was not to be available shortfall capacity would increase from 25 MW in 1984 to 116 MW in 1986. However if Uganda supply was to be available there would be no shortfall in

1984, but there would be deficits from 1985 onwards. This shortfall had to be obviated through various H.E.P. projects including the Kiambere.

3.1.4.4 *Individual suffering*

The individual suffering occasioned by the construction of Kiambere H. E. P. was therefore justified by the overall benefit of the national economy.

3.1.5 *Land Requisition*

Land to be acquired for the implementation of the project (dam area was 13,241 Hectares as indicated in the following table.

Table 3.2 Land Requisition

DISTRICT	NO. OF PLOTS	AREA (HA)	COMPENSATION (KSH)
Embu	82	7,573	15,000,000
Kitui	1,871	5,668	12,600,000
TOTAL	2,353	13,241	27,600,000

Source: Research Findings 1996

3.1.6 *Procedure*

Land was acquired by CL following the procedure laid down under CAP 295. However before inspection, land had to be adjudicated where this had not been done which is the only step not provided for under CAP 295. Before instituting the acquisition process the President's office had to inform the various County Councils of the need to acquire land in their areas of jurisdiction. Work then proceeded after the Councils' consents had been obtained.

3.2.0 PROBLEMS EXPERIENCED IN THE KIAMBERE PROJECT

3.2.1 *Introduction*

This sub-chapter sets out to examine the problems that arose in the process of land acquisition for the Kiambere Project. The whole exercise in this study is to discuss the economics of land acquisition. But as we have seen before, the importance of land in the economy is enhanced by the fact that individuals can only own rights in land and not the land itself. Talking of rights imply that no discussion of land, economics or not, can be complete without touching on matters of law. The rights are what influence compensation to be paid to land owners. When rights are not given adequate attention, several problems arise that will interfere with the acquisition process e.g litigation and petition.

Compensation in turn influence resettlement. Apondi (1978) writes that: compensation in many cases determines how well or badly one is going to start resettling. He observes that when compensation is fair it may reduce the hardship which have been caused by acquisition of land.

In the case of Kiambere many problems that hindered the smooth proceedings of land acquisition are linked to the issues of land tenure. The problems include computation errors, marked value and fair compensation, delays in release of compensation awards, and resettlement problems.

3.2.2 *Problems of Land Tenure*

Problems of acquisition can generally be linked to existing land tenure. However there are problems which directly fall under land tenure.

The land on Embu side had been adjudicated however it was treated as Trustland. This is because registration had not been done. Consequently the people were not able to effectively assert their rights. As has been noted, in Trust land, rights are less defined. This is confirmed by the Provincial Land Adjudication officer who he wrote that:

Actually Riachina and Mutitu Adjudication section are not registered, subsequently, they both fall within the jurisdiction of Land Adjudication Department and not the Department of Lands. You should therefore regard your 3 pieces of land as your own property and it is you who should make every endeavour to check their existence and do all you can to have them assessed by whoever is acquiring them.

This treatment of Trust land or "African" land as inferior is a reflection of the colonial hangover that besets land rights in Kenya. The fact that Trust land falls within the definition of "lesser rights" means that compensation could not be adequate. People on the other hand are deeply aware of their innate rights on land and this sets the ground for protests which may result into litigation.

On the Kitui side where no adjudication had been done, the adjudication machinery had to be put in place to accomplish its mission before the valuers set in to determine compensation.

The procedure therefore stands out that Compulsory Acquisition Act compensation schedule applies for both Trust and registered lands. Setting apart of Trust land and compulsory acquisition of registered land therefore follow the same procedure. In case of Trust land rights have to be ascertained through adjudication and the only stage that remains is just

registration before acquisition is effected. This stage is however only procedural.

The problem with this process is that the work is quite demanding in terms of time and man power that it can not be accomplished within the short time duration pending acquisition. The result is a host of mistakes/errors in the computation of areas and quantum of compensation. This again is a potential ground for complaints and litigation. In the case of Kiambere however the claimants never resorted to the latter.

3.2.3 Computation Errors

As has been noted above Trust land is more prone to survey and adjudication errors. The errors may not be technical e.g typographical, omissions, and other mistakes. The Finance Manager of TARDA excused the errors by saying:

it is however fitting, though pertinently, to mention that this error occurred as a result of the speed the previous calculations were done without proper verification by this department¹¹

In Mutitu Adjudication Area of Embu District 85 "deserving" cases were investigated and revealed anomalies in the manner illustrated below.

Table 3.3 Distribution of cases by Number of Plots

CASES	No. of Plots	Percentage
Undermeasured in (Ha)	17	20.0
Overmeasured in (Ha)	9	10.6
Omitted in compensation list	22	25.9
Wrongly typed plot number	1	1.2
Lying outside boundary	3	3.5
Payment missing	5	5.9
Correct area in (Ha)	28	32.9
TOTAL	85	100.0

source: Research Findings 1996

Correct cases	32.9%
Flawed cases	63.6%
Irrelevant cases	3.5%
Total	100.0%

The implication of the above figures is that many cases could have been flawed but the area was inhabited by poor and ignorant people who did not seek any legal redress when their rights are violated; otherwise the exercise would have been a disaster.

Table 3.4 Distribution of cases by Land Area

CASES	Area affected in (Ha)	Percentage
Undermeasured plot area	1661.13	83.6
Overmeasured plot area	199.99	10.1
Omitted in compensation list	97.57	4.9
Wrongly typed plot number	18.36	0.9
Payment missing	8.78	0.4
TOTAL	1985.83	99.9*

* does not add up to 100% due to rounding up.

Source: Research Findings 1996

Note that 83.6% of land area is unaccounted for. A total of 1661.13 Hectares were left out in this case contributing to 21.9% of total land acquired in Embu District. The problem with undermeasurement is that it leads to undervaluation resulting into inadequate compensation.

In a few cases, however, errors were technical. By investigating the cases of undermeasurement the Director of Survey office noted that:

In order to compensate everybody fairly, the P.I.D. areas need to be multiplied by an enlargement factor of 1.1917577 (1.192) arrived by dividing the cadastral by the P.I.D. area. This is viewed as a practical and realistic approach to the problem, assuming of course that much of the area in question may be already under water and a ground check would therefore be out of question, not to mention the unnecessary cost that would be involved¹²

This means there was undermeasurement of all plots due to the use of crude survey method. In fact the advice was too late. Given in 1989 when the dam had been commissioned, people had accepted the inadequate compensation and vacated site.

3.2.4 *Inadequate Compensation*

Although the constitution and Land Acquisition Act stipulates adequate compensation as a condition for acquisition, compensation here seemed far from adequate.

3.2.4.1 *Adequate Compensation*

Adequate compensation means amount of compensation that will put the expropres in the same position before and after acquisition. The people themselves seemed to understand this as expressed by Nthawa Mutitu Lands Committee:

We the undersigned on behalf of the above committee kindly request you to consider in your compensation to us award a value which will enable us to buy alternative land within the district equivalent to the land taken by the above project. This is to avoid creating landlessness to those of us who are affected by the project¹³

The implication of the above statement is that adequate compensation must be based on market value.

3.2.4.2 Market Value

Market value is defined as that value a property is expected to realize in the open market under three main assumptions:

- i) the transaction is between willing buyer and willing seller
- ii) both are perfectly aware of the market/price situation concerning similar properties
- iii) reasonable time is given to expose the property in the market to as many buyers as possible¹⁴.

All these conditions are hypothetical. Note that the expropree is not a willing seller but this does not negate the concept of market value as far as compulsory acquisition is concerned. Since the Government's intention is not to negotiate with the "unwilling seller" the expropree is well shadowed by the "willing seller" in the open market.

In Kiambere, the determination of market value, which is stipulated as the base value for compensation in the schedule of Land Acquisition Act, did not conform with the above principles. There was difficulty in determining the value of land per acre because:

- i) there was no established land market in the area
- ii) land was sold in block in exchange for goats, cows etc.

In one of the preacquisition meetings attended by the District Officer (member of the local Land Control Board), Clerk to County Council (also represented in Land Control Board), Government Valuers and representatives of TARDA (beneficiary of

acquisition) land value was determined reportedly through balloting:

--- all present obtained a paper slip on which they wrote down what they thought was the fair price of land per acre in the area¹⁵.

It was reported that the suggested prices ranged from shs.400 to shs.700. The meeting agreed that shs.600 be taken as average and to this shs 100 was added "to cater for items not quantifiable for compensation which nevertheless were financially beneficial to land owners". The final figure therefore rested at shs. 700 per acre. About the same year environmental impact assessment study group had placed it at shs.300 per acre which was argued to be "the value of other ranches in the country"¹⁶

The value was disputed by local MPs for some time. The P.C of the area wrote that:

--- I understand that the local members of parliament have not yet accepted the figure of ksh. 700 and this has been made known to the land owners¹⁷.

The letter is written to indicate that they were to accept sooner or later. Indeed they "accepted" because the figure was never changed.

The former land owners disputed the market value in a Memorandum of Complaint. One of the grounds was that:

There was a committee which deliberated the nature and mode of compensation. We were not represented in this committee and neither were our view sought¹⁸.

We have noted that those present in this meeting were only Government officials (not accountable to the public) and official "buyer" (TARDA). There was no market value in effect; what the meeting did was to negotiate the price on the table. Whereas the "buyer" was represented in the negotiations the "seller" was out. The result was an unrealistic value. The claimants complaint was therefore genuine. The Managing Director (TARDA) wrote a rejoinder to this memorandum (APPENDIX 3B) but virtually failed to address the gist of the argument.

3.2.4.3 *Determinants of Market Value*

One of the greatest determinant of land value in an area is its use. In the project area land was either under the natural vegetation or cultivation. However no values were given to indigenous trees contrary to the expectation of the claimants. We have noted that trees were useful to the claimants for fuelwood, building, beekeeping and medicinal value.

In the memorandum of complaints the landowners pointed out that:

Trees which rightfully belonged to us were also felled in the process of cleaning the ground. These items that normally go into determining the value of a piece of land were not addressed to¹⁹.

However, earlier, the commissioner of lands officers had written to one of the claimant who had expected compensation for "land and trees therein" that:

The Government is not to pay for the indigenous bush although the value of well tended trees shall be reflected in the assessment²⁰.

It becomes apparent that the Ksh 700 per acre was a flat rate awarded to any piece of land regardless of whether it is cultivated, vegetated or barren which is wrong.

In the Maribwe and Masaa Valleys, land was temporarily acquired for harvesting of sand to be used in dam construction as indicated in the following table

Table 3.5 Land Acquired for Sand harvesting

DISTRICT	PLACE	NO. OF PLOTS	AREA IN HA
EMBU	Maribwe Valley	100	328.00
KITUI	Masaa Valley	80	251.02
TOTAL		180	579.02

Source: Research Findings 1996

Again compensation was not paid for the indigenous tree²¹. However compensation for land was awarded at Ksh 1,000 per acre in contrast to Ksh 700 per acre awarded for land in the dam area. The reason is that it was thought sand had greater economic value. This, nevertheless is only one instance of land value differentiation in the entire acquisition spectrum.

3.2.4.4 *Methods of Valuation*

The claimants were left in a quandary as to what method was used to arrive at the quantum of compensation. Indeed no method was used. One of the claimants put it very clear in his letter in which he pointed out the reasons of his dissatisfaction to be²².

- i) that his plot gives more yield than the amount given.
- ii) that he had tried to buy other plots of the same size but was charged more.

Another dissatisfied claimant asked the valuers to. "Kindly revalue those items bearing in mind that replacing them is going to cost me more than double their original value"²¹.

The two letters above cover the main methods of valuation which should have been used: The investment value of land in i) of first letter; the comparable sale value of land in ii) of first letter; and the replacement cost value of property in second letter. The latter might have been used throughout the valuation exercise for valuing improvements while the first two were largely ignored. The result is that market value was not reflected in the values returned by the Commissioner of Lands. The effect of this was a plethora of complaints.

3.2.4.5 *Complaints/Dissent*

As has been noted, because of inadequacy of compensation there were so many complaints. One of the claimants' letters for example read as follows

I have been paid very little money and my land was too big, I had been paid Ksh 3, 564.00. My land's particulars are as follows plot no. is 1197 hectares 2.06. I want the Officers concerned to this problem come on my land and recompensate it ²⁴.

All letters echoed the fact that the claimants were underpaid and they were asking for more. Unfortunately none of the claimants said how much they wanted to be "recompensated" or by how much they were undercompensated. They merely mentioned that money was not enough to buy a similar piece of land without mentioning by how much it fell short.

As a matter of verification using the particulars given in the letter above certain omissions seems to have been made regarding the final quantum of compensation.

If the plot size is 2.06 ha

Plot size in acres = 2.06×2.471

Value of land = $2.06 \times 2.471 \times 700 = 3,563.182$

say Ksh 3,563.20

Amount awarded = Ksh. 3,564.00

It means that the statutory 15% award to the claimant for disturbance was omitted. The claimant should have been awarded Ksh 4,097.70

The claimants ignorance and passiveness however played them foul. They did not know the procedure of dealing with inadequate compensation. They accepted the award then asked for more whereas the procedure is that they should have rejected the award and contested it in court. Mburugu (1988) found out that 34% of the claimants were still in the project area five months to deadline because they believed that additional compensation would be forthcoming "because we complained a lot about the little money we were given as compensation"²⁵.

Meanwhile the commissioner of Lands valuer had dismissed their claims vide a letter.

I regret that no revaluation of land already paid for can be entertained at this stage as I believe that the amounts paid were fair and reasonable considering all factors relating to those affected parcels²⁶.

This view was echoed by the Managing Director's communication to another claimant.

Regarding your request to consider the compensation,
I regret that no revaluation of the land already paid
out can be entertained as I believe that the amounts were
fair and reasonable considering all the factors relating
to those affected parcels²⁷.

The claimants had therefore sealed their own fate by
accepting the awards. In the entire exercise there was no case
of a rejected award.

Also noteworthy is the passivity of the claimants in pursuing
their rights. This is summarised in the Memorandum of Landowners
already referred to. They write:

Sir we are appealing to your office to intervene on our
behalf and seek for a fair compensation of our land from
TARDA. We are requesting you to set up an inquiry into this
matter, and hereby pledge - if called upon to cooperate and
assist in such an inquiry. Finally we wish to pledge our
commitment in assisting you and the government in
developing our district²⁸.

The above statements prove how weak the claimants were, both
in mind and spirit, in asserting their rights. They could not
speak out strongly and assertively for themselves. Instead they
were pleading with the same officers who had fixed the value of
their land through balloting and averaging for help.

3.2.4.6 *Effect*

The World Bank mission of September 1986 which sought for
the opinions of the District Officers, a chief and a displaced
land owner found out that the estimated market value for land
ranged from Ksh 1,500 to Ksh 15,000 per acre²⁹. This meant that

the people were not compensated adequately and in effect they were made landless through the process of compulsory acquisition.

3.2.5 *Payment of Prompt Compensation*

Prompt compensation is another constitutional and statutory precondition for compulsory acquisition to take place. Compensation may be adequate but so long as it is not effected promptly, it is bound to be overtaken by events thus being rendered inadequate.

3.2.5.1 *Prompt Compensation*

Commodity prices are in constant change. It would therefore be inconceivable to expect the value of land to remain static. Under normal circumstances it keeps on appreciating. Prompt Compensation therefore is a quantum of compensation determined and paid at a particular time of market equilibrium. Compensation no longer remains the same once the equilibrium is altered. Under normal circumstances, time is one of the major factors affecting market equilibrium. Lapse of long time is therefore likely to affect prompt payment.

3.2.5.2 *Disregard of People's Rights*

Disregard of people's rights by the company which was earlier running the Project - Tana River Development company was one of the major causes of non-payment of prompt compensation. The company had started the project without compensating the landowners first. In one of the pre-acquisition letter in response to the peoples inquiry about their dues TARDA wrote that:

--- there was a slight oversight as far as land issue was concerned. Compensation to your clients would be effected soon thereafter³⁰.

The land owners had foregone their properties for the sake of the dam construction. But although their land had been taken first it had to be compensated last. Three years later, when valuation for the gazetted acquisition was complete TARDA wrote that:

Before we took over the above project from Tana River Development Company the latter had constructed a road to the project area --- some people were apparently left unpaid and they have been writing to us in this behalf.

--- We think that these claims of unpaid compensation need to be investigated³¹.

It is important to note that compensation took too long such that by the time these claimants were to be compensated, they had been overtaken by events. After compensation had been paid for the gazetted areas, the equilibrium land market in the surrounding area had been violently disturbed. Compensation for the affected claimants would therefore be far from prompt.

3.2.5.3 *Elaborate and Slow Process*

The process involved in arriving at and paying the compensation was also quite elaborate. Moreover the compensation took long. Note that the people had known about the project by 1980. Demarcation of project Area was done in July 1983. Publication of intention to Acquire came in October 1983. Adjudication and valuation was done from January to July 1984.

First lumpsum cheque was released by TARDA to DC Embu for payment to claimants in October 1984. First claimant paid in February 1985 and payment continued to 1986. The duration between notice of intention to acquire and payment of compensation is therefore a minimum period of 17 months (months). This is not a long period to wait, considering the process involved. However in some respect the the process of payment proved to be slow. TARDA was to write in 1989 to DC Embu that:

--- most claimants now turning up in our offices with all sorts of complaints and informing us that your office has said they are not entitled to any payment whilst our lump cheques already referred to in the said letter would indicate these were the actual payee³².

In reply the DC wrote that:

In most cases the claimants were demanding compensation on behalf of clan members. There is need therefore to strictly scrutinise the identity of claimants to ensure that we do not leave some people with outstanding claims³³

The problem was that among the Mbeere, land was owned by the clan and so compensation for land had to be paid to clan representatives especially in Riachina Adjudication Area. The actual clan representatives had to be carefully identified.

The other people who had it rough are those who were still being sorted out as late as 1990.

3.2.5.4 *Effects*

Due to lack of prompt payment two basic problems were bound to arise. The PC had been concerned about the matters at the very beginning:

--- I would request the Chief Valuer to give this matter his personal attention so that the amount agreed upon by both parties can be released to the DC Embu for payment of the compensation without further delay. This will enable us to control the influx of people to the project area as is also becoming difficult to remove people from the area before they are paid their compensation³⁴.

Delay in payment meant that the site could not be vacated as early as possible and where land was urgently needed this could lead to delays in project implementation. This is a disadvantage to the project implementor. However the disadvantage also exists for the claimants because they can not obtain funds in good time for purposes of resettlement.

3.2.5.5 Legal Provisions

As noted earlier, the Trust Land Act section 12(b) provides for direct entry into the High Court for purposes of getting prompt payment of compensation awarded. In this case compensation was greatly delayed but not even a threat of such an action was issued. This is mainly due to the ignorance of the people which is partly due to high illiteracy levels and characteristic passiveness.

3.2.6 Resettlement Issues

In the foregoing discussion we have seen how inadequate and lack of prompt compensation contribute to problems of resettlement. The most severe problem of resettlement is landlessness. This contention is illustrated by the following claimant's letters:

(1) I am a person aged 30 years, married with one son only and fatherless. I am a landless person and always worried of my future life. I had a piece of land at Kiambere in Embu district 51 MURIBA C.R.D BROKO which was occupied by my clan NGAI NJOGU. I was given two thousand shillings which can't do anything for betterment of my future life. Therefore i asked my loved Government to find me a piece of land one acre e.g or addition of those little Money which can enable me to do something good for the betterment of my future life³⁵.

(2) --- we would also like to mention for information blocks and parcels were compensated inadequately thus people who were left landless cannot even afford to purchase another piece of land to accommodate their families for the rest of their lifes on this earth. Please we should also like to draw your attention to the fact that the present value of land in this area is far much higher than the rete which was used to compensate the parcels involved in this case³⁶.

Resettlement issues can be quite serious depending on the character of the people. If they are militant then it is bound to affect the implementation of the project since they may refuse to vacate the site. We have noted earlier that five months to the deadline 34% of the people were still in the site awaiting more compensation. This was a potentially difficult situation.

The people affected, however, were not so difficult. Some of them had even migrated to give way for the implementation of the project without having been paid or promised to be paid anything. One of them writes that:

I am the owner of the said plot but I left the plot for the power construction and bought another one at Siakago where I live ----- I want to know when it's to be valued so as to be compensated³⁷.

It is this meek spirit of the people that saved the situation at Kiambere otherwise the whole undertaking would have been disastrous.

3.3 IMPACTS OF THE PROBLEMS ON PROJECT IMPLEMENTATION.

Acquisition of land for implementation of the Kiambere H.E.P was marred by several irregularities which could reasonably be expected to interfere with the implementation of the project. For example when TARDA wrote their letter of instructions requesting the Commissioner of Lands to acquire the land on their behalf, dam preconstruction arrangements were long in place and four constructors were already on site³⁸. A site camp, water supply works staff quarters, an access road, air strip among other works were at an advanced stage of completion.

Citing trespass as an offence under Trespass Act Cap they feared that:

a great loss may be incurred by removal or disposal of the construction works already in hand, if the land is not acquired

or set aside or your office has gazetted its intention to acquire
such piece of land³⁹.

Anyway, there were several issues which called for litigation including trespass, prompt payment of compensation, adequate compensation etc. Others also could have involved civil action e.g the case of landlessness and resettlement. However none of such action was taken in the case of Kiambere.

NOTES

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3. A.D.E. Consultants (1983) *Kiambere Hydroelectric Power Preconstruction Environmental Impact Study*
4. *I bid*
5. *I bid*
6. *I bid*
7. *I bid*
8. *I bid*
9. E.P.D Consultants Limited (1980) *Kiambere Hydroelectric Development Feasibility Study*
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15. Tana and Athi River Development Authority. *Minutes of a Meeting Held at Kiambere Project Site onn 23rd February, 1984.*
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17. DW. 8/55/(Vol.I/c100) *PC Eastern Province to MD TARDA 23rd May 1984*

Memorandum of Complaint From Former Land Owners of site
presently occupied by Kiambere Hydroelectric Dam-Embu
District. Land owners to DC Embu.

bid

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1984

Moshua Maluki Mwinzi to Chief Valuer 28th September 1985

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See 18.

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Mburugu, Edward K. (1988) A Resettlement Survey of Kiambere
Hydroelectric Power Project. A report commissioned by Tana and
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Njeru. 7th March 1990.

See 18

See 3

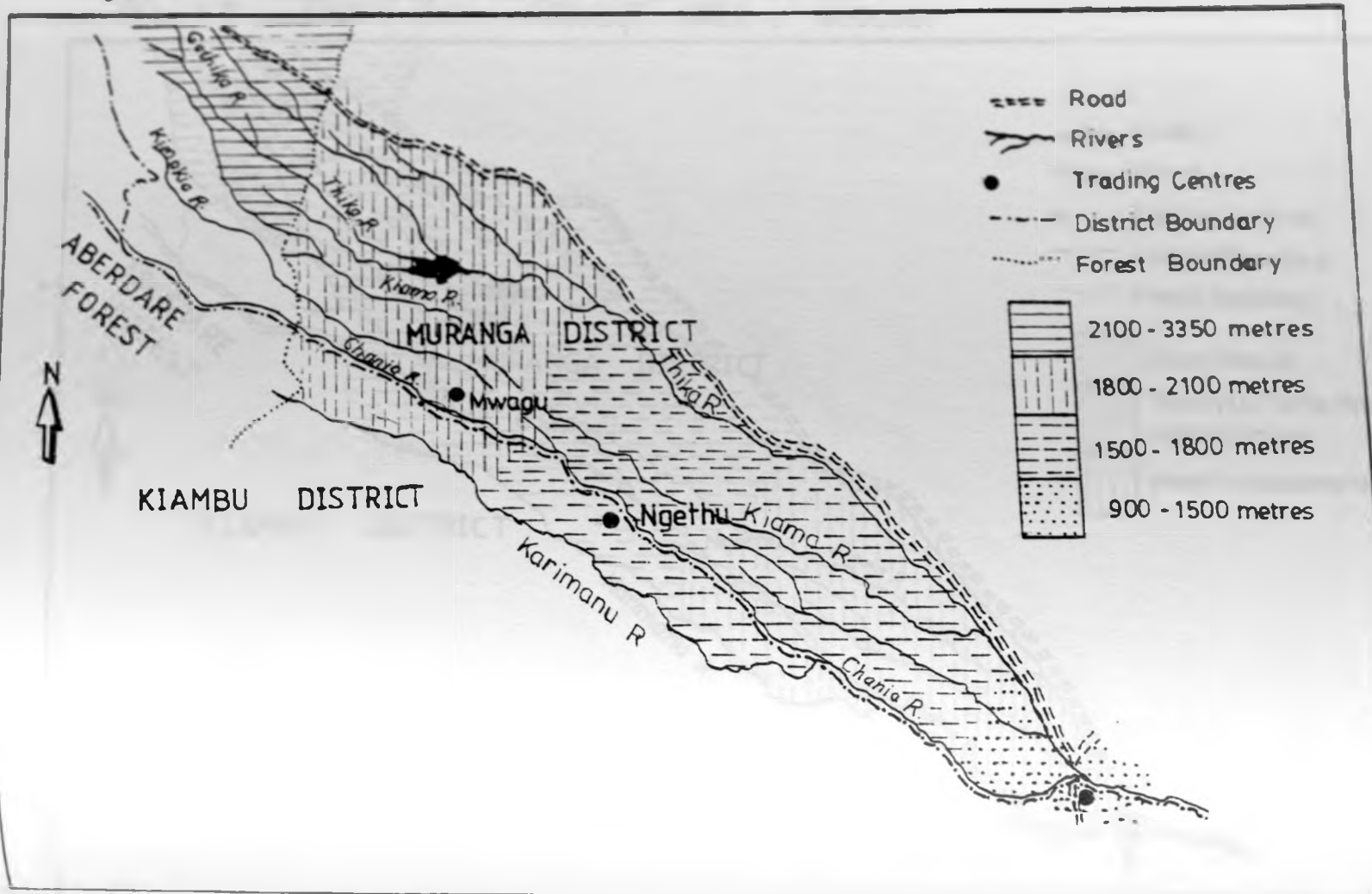
TRDA/20-0015 TARDA to Ruguita & Co. Advocates 16th November
1982

20.0015 Company Secretary to Commissioner of Lands 5th
September 1985

TRDA/20-0015 Vol. iv (99) Managing Director to DC Embu. 25th
August 1989.

3. DC Embu to MD TARDA
4. See 17
5. Gichobu Njogu to Commissioner of Lands 11th May 1986
6. Julius Njuki & Johana Njagi Shiriba to Chief Valuer 8th April 1987
37. Simba Muturi Rukinyi to Valuer
38. See 15
39. TRDA/20-0015. TARDA to Commissioner of Lands 16th November 1983

Fig 4-1 THIKA DAM PROJECT AREA : TOPOGRAPHY



Source: Aquasystems Consultants

Fig. 4.2 THIKA DAM PROJECT AREA : GEOLOGY

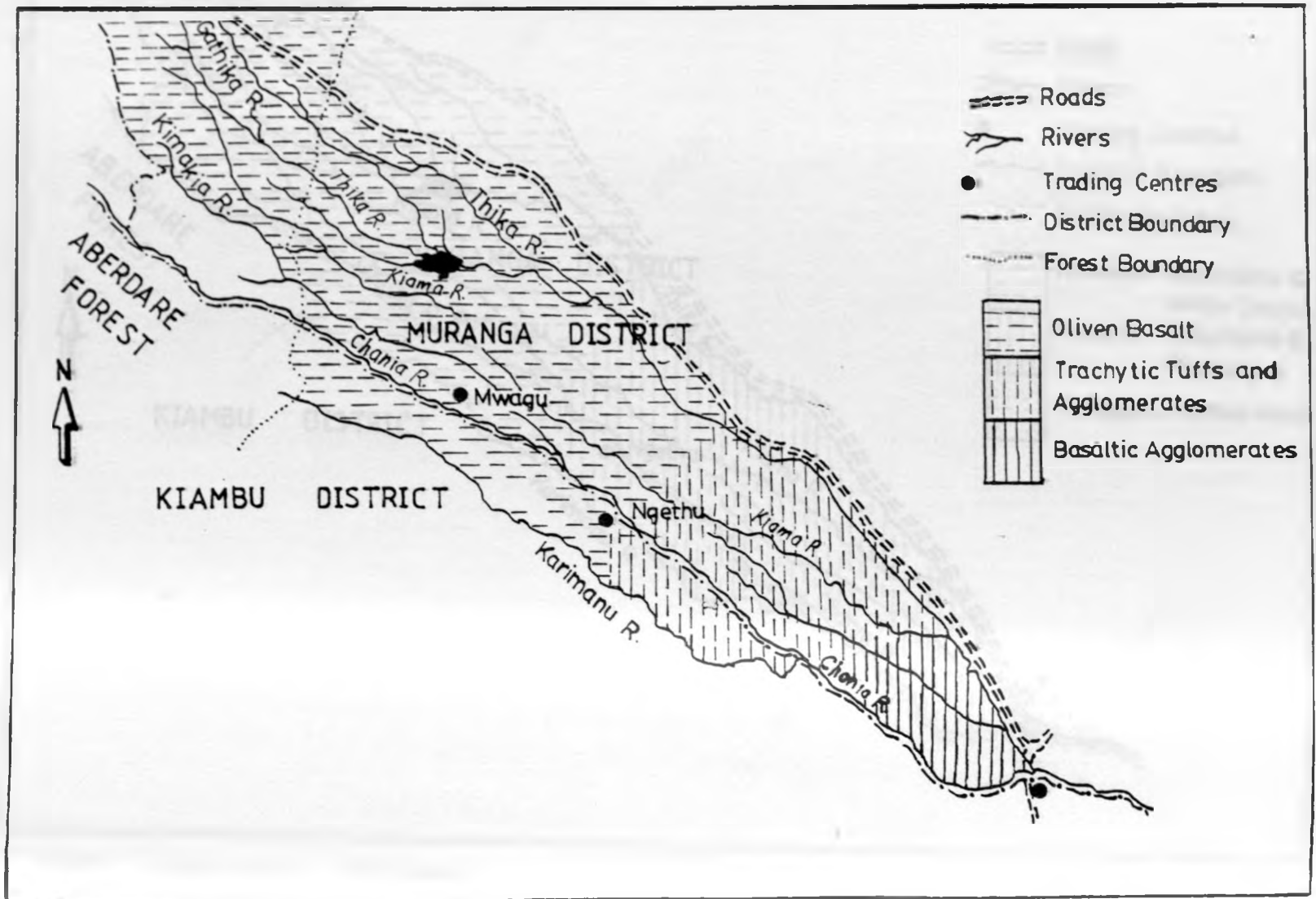
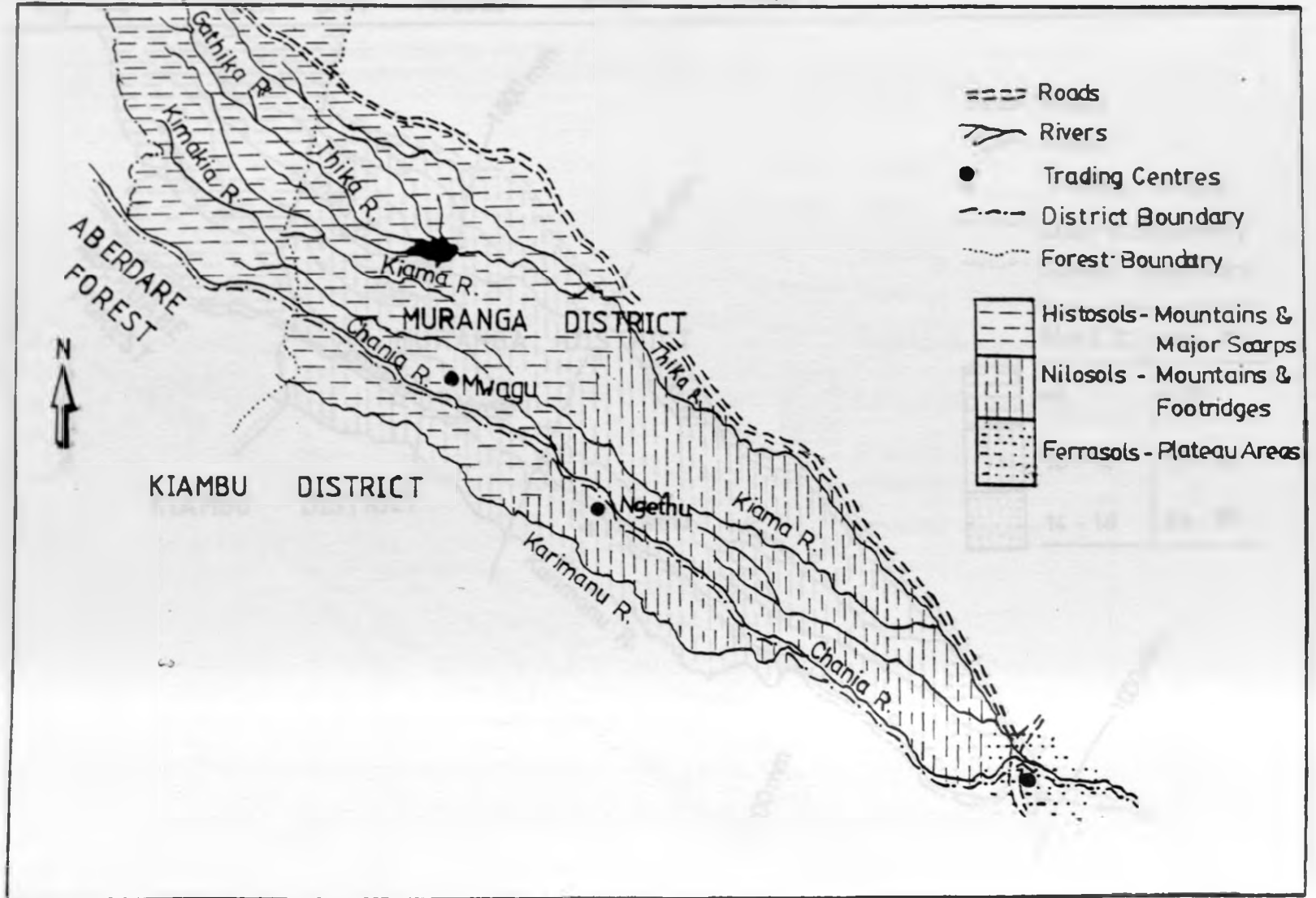
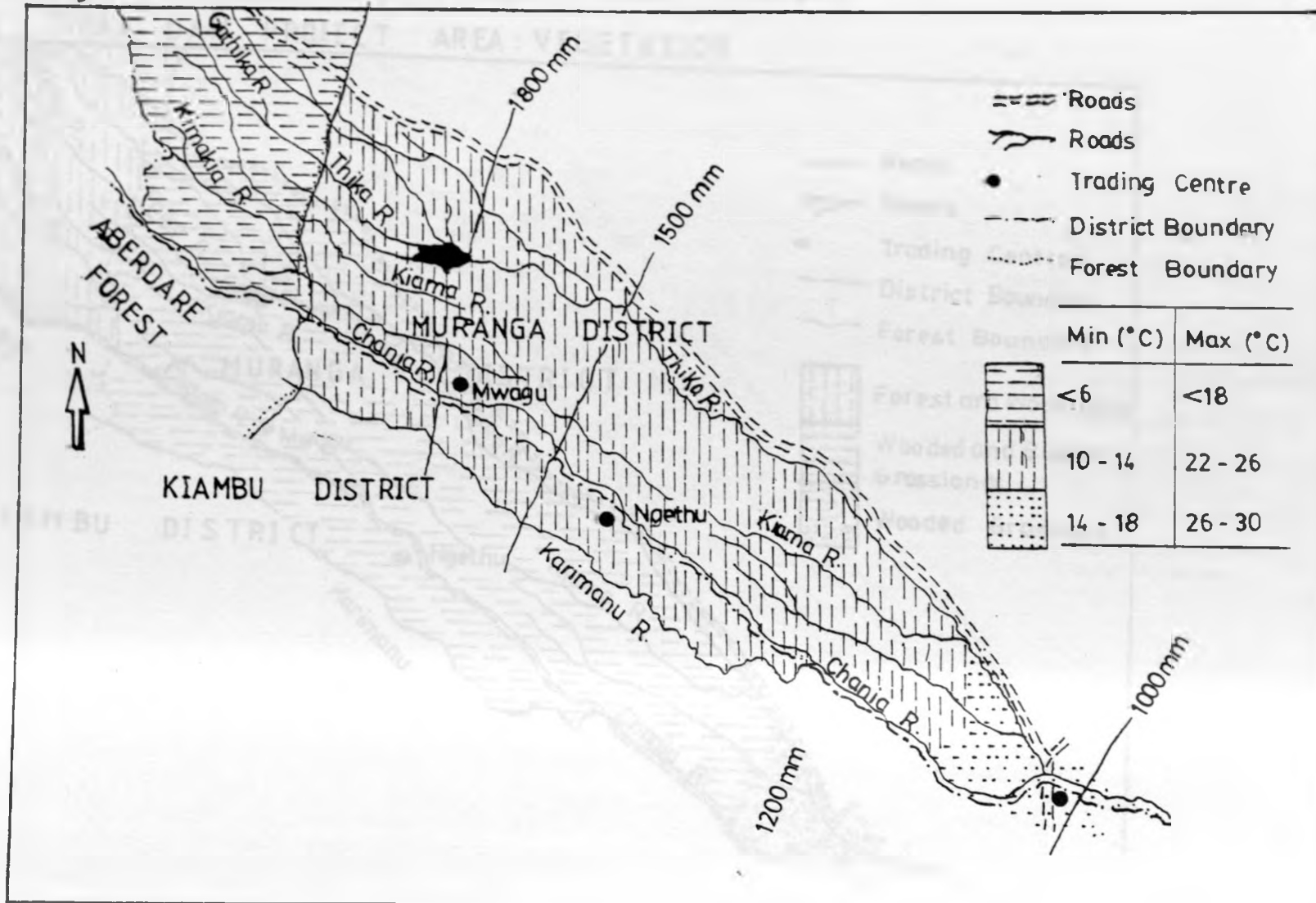


Fig. 4.3 THIKA DAM PROJECT AREA : SOILS



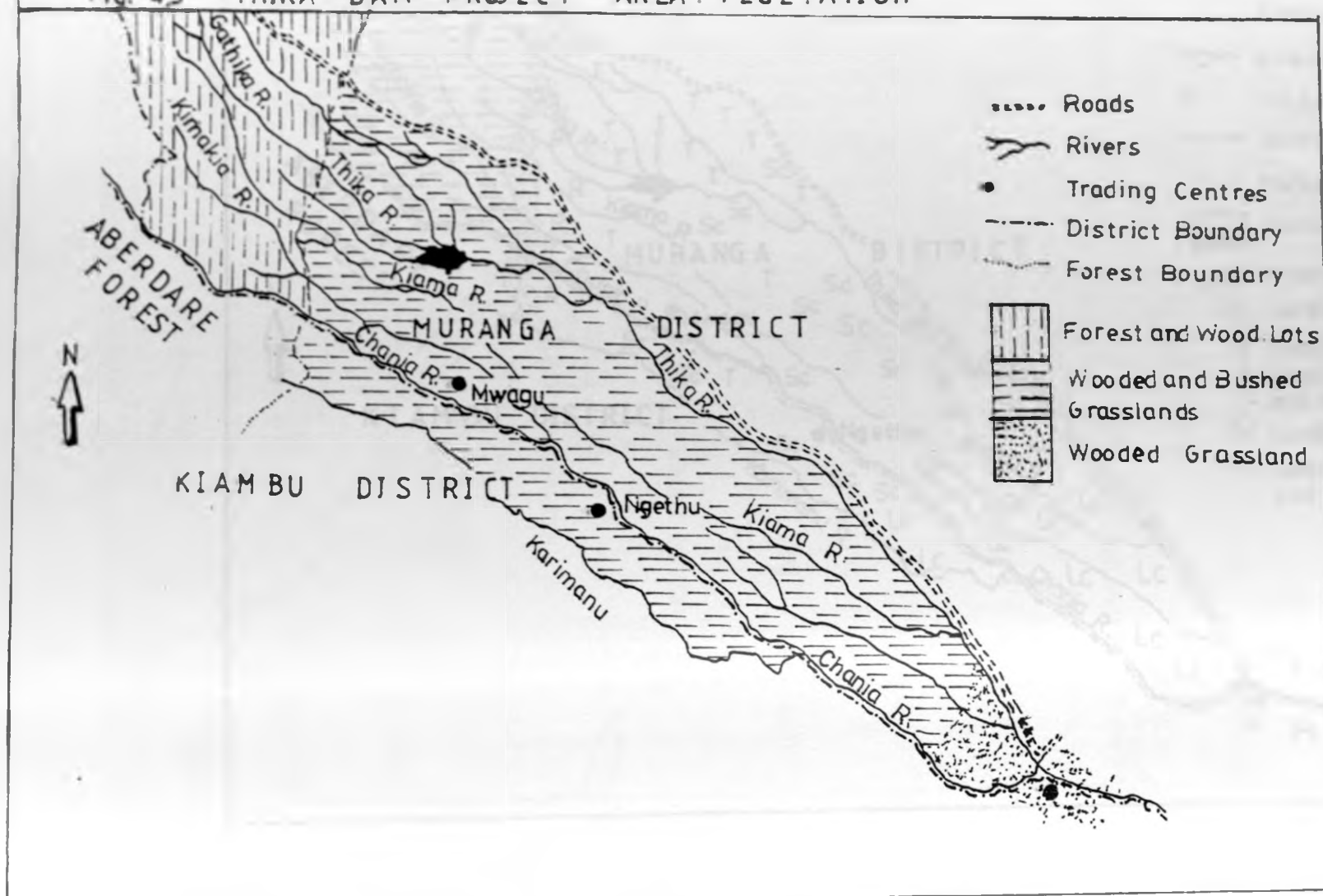
Source : Aquasystems Consultants

Fig. 4 THIKA DAM PROJECT AREA : CLIMATE



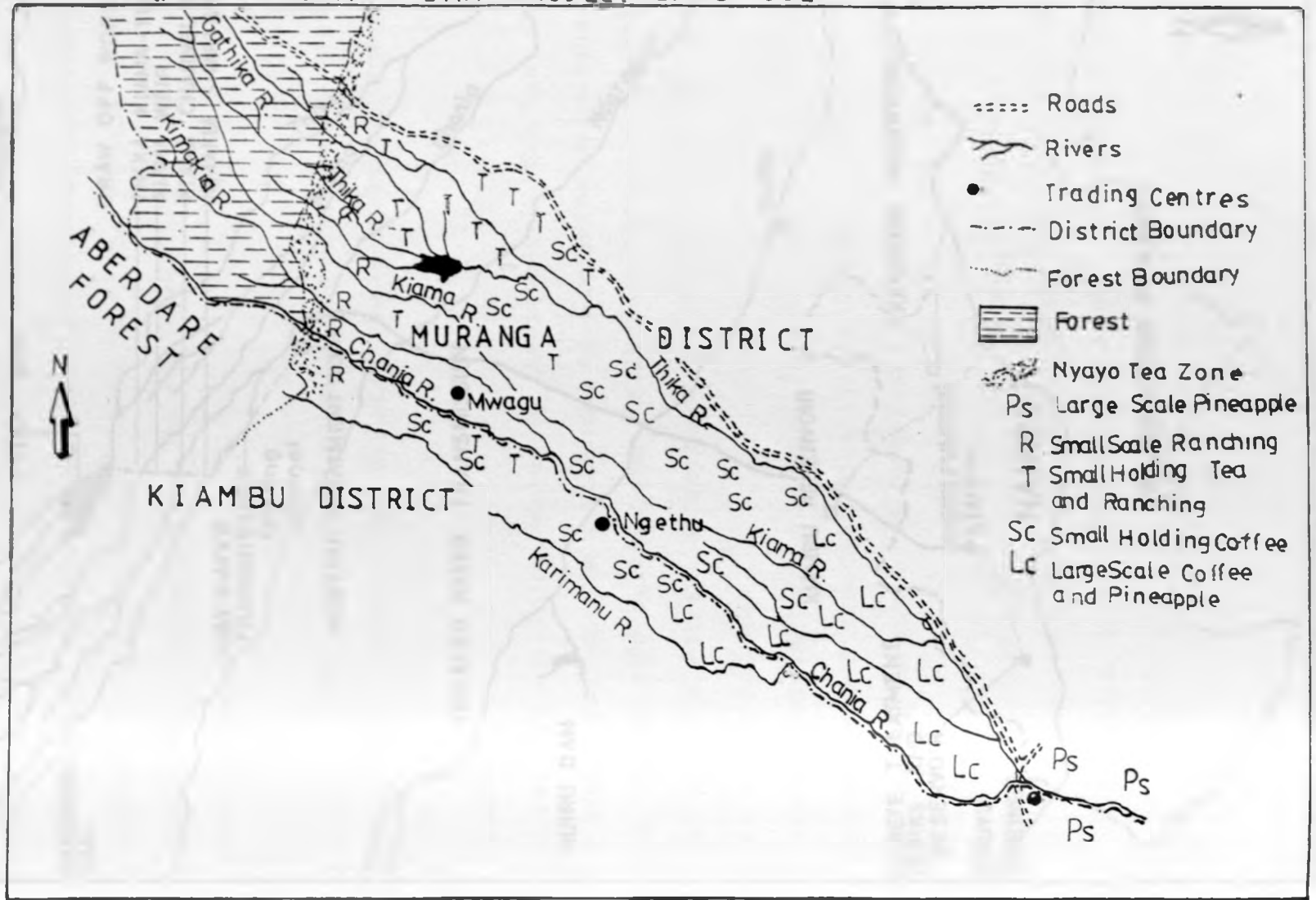
Source : Aquaticsystems Consultants

Fig. 45 THIKA DAM PROJECT AREA: VEGETATION



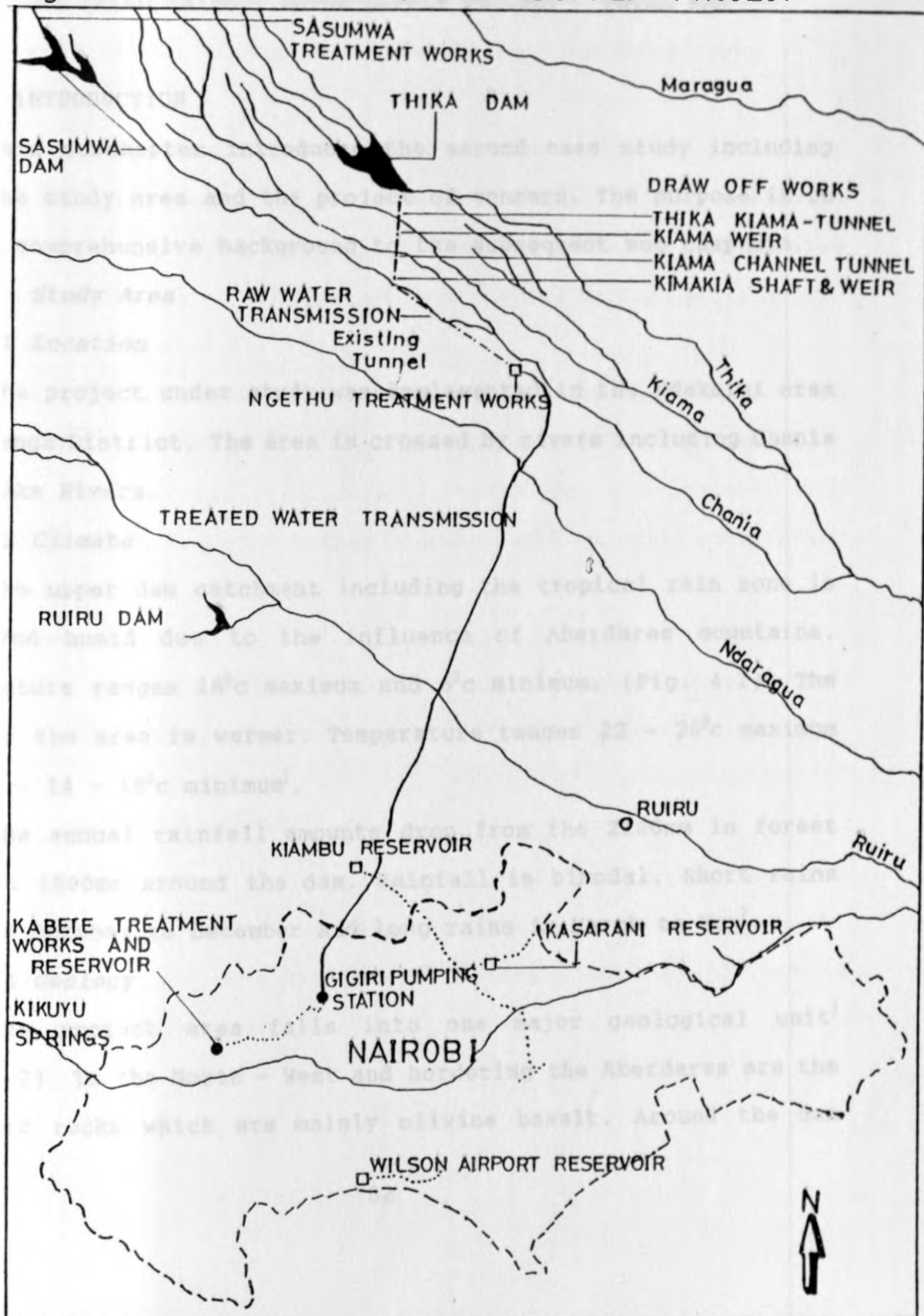
Source: Aquasystems Consultants

Fig. 4.6 THIKA DAM PROJECT: LAND USE



Source: Aquasystems Consultants

Fig. 4.7 THIRD NAIROBI WATER SUPPLY PROJECT



Source : Howard Humphreys [Kenya] Ltd

0 1 2 3 4 5 6 7 8 9 10 Km

CHAPTER FOUR

CASE STUDY II

THE THIRD NAIROBI WATER SUPPLY PROJECT - THIKA DAM

4.1 INTRODUCTION

This subchapter introduces the second case study including both the study area and the project of concern. The purpose is to give a comprehensive background to the subsequent sub chapters.

4.1.1 *Study Area*

4.1.1.1 *Location*

The project under study was implemented in the Ndakaini area in Muranga District. The area is crossed by rivers including Chania and Thika Rivers.

4.1.1.2 *Climate*

The upper dam catchment including the tropical rain zone is cold and humid due to the influence of Aberdares mountains. Temperature ranges 18⁰c maximum and 6⁰c minimum. (Fig. 4.1). The rest of the area is warmer. Temperature ranges 22 - 26⁰c maximum and 10 - 14 - 18⁰c minimum¹.

The annual rainfall amounts drop from the 2100mm in forest area to 1800mm around the dam. Rainfall is bimodal. Short rains fall in October to December and long rains in March to May².

4.1.1.3 *Geology*

The project area falls into one major geological unit¹ (Fig.4.2) To the North - West and bordering the Aberdares are the volcanic rocks which are mainly olivine basalt. Around the dam

site, there are Pyroclastic rocks which consist of material laid down as flow deposits.

4.1.1.4 Soils

There are two major soil types histols and nitosols⁴ (Fig. 4.3)

Histols are found in the mountainous and major scarp regions to the northwest covering the eastern slopes of the Aberdares range, the dam site and its environs. These soils have comparatively high organic matter content and are slightly acidic making them suitable for tea growing.

Nitosols are found in the foot ridges of the mountains which constitute the major part of the project area below the dam site. The soils are dark red friable clays, which are well drained, with moderately high organic matter content and of uniform profile differentiation.

4.1.1.5 Physiography

The study area falls into three major physiographic regions which coincide with distinct agro - climatic zones I, II, III⁵ (Fig. 4.4).

Zone I

Lies between 2100 - 3400M above sea level and covers the upper Thika dam catchment. The Aberdares area is deeply dissected by V - shaped valleys. The slopes are greater than 30% and land is susceptible to soil erosion.

Zone II

Lies between 2100 - 1800M above sea level and covers three quarters of the Project area above Thika dam. The area is hilly and consists of dissected lower slopes of the Aberdares. Slopes go up to 26% and land is susceptible to soil erosion.

Zone III

Lies between 1800 - 1500M above sea level and covers mainly the coffee zone. The slopes are gentler at 16% and the ridges are broader giving way to the development of wet lands partly in sections where drainage is impeded.

4.1.1.6 *Vegetation*

The vegetation types correspond to the agro - ecological zones of the study area⁶ (Fig 4.5). The forest covers the eastern slopes of the Aberdares Range and comprised of closed stands of trees of various heights between 7.5 - 40M and the usual tropical canopy. Climbers and other herbs and shrubs are found on the ground level.

Small patches of woodlots, bushes and shrubs exist all over the farmed catchment. Grass covers here includes bracken, sedges and Kikuyu grass. The original vegetation has been cleared and replaced by the above land cover.

4.1.1.7 *Land - use*

The project area could be divided into five land - use zones based on the predominant agricultural activities in each zone⁷ (Fig. 4.6). The Western mountainous zone was actually non agricultural as it is occupied by Aberdares forest. Next to the forest was the thin belt (100M wide) of the Nyayo tea zone in which

only tea was grown. East of the tea zone a few kilometres below the dam site were the small scale tea farms, and small scale dairy cattle ranches with some sheep and goats and subsistence crops.

Tea was grown as the major cash crop while maize, peas, potatoes, bananas and beans were grown for subsistence. Open pastures for grazing existed. The predominant tree species were wattle interspersed with Eucalyptus and several types of fruit trees and other woodlot trees.

4.1.2 Land Tenure

Land in the project area was under private ownership. All was surveyed and registered under individual names. Individual tenure is nothing new in the Kikuyu community. Anthropology has proved that there was no form of tribal tenure despite frequent European assertions that land was owned communally by the tribe⁶. However the Kikuyu claims to individual tenure was dismissed by the Land Commission as a fraudulent replication of the European tenurial concepts to justify their claims for compensation for land lost to the white settlers⁷.

Land values in the Kikuyu country had also existed since the beginning of their time. Early accounts state how the pioneer Kikuyus acquired land for cultivation from autochthonous holders known as Aathi (Kikuyu word for hunters) or Dorobo (Maasai word for bush) in exchange for goats.

Given this background acquisition of land was not going to be easy especially when it comes to issues of compensation.

4.1.3 Study Project

The Third Nairobi Water supply project (Fig. 4.7).

4.1.3.1 Project Purpose

In this project land was required mainly for the construction of a dam among other incidental purposes like construction of roads, pipelines, tunnels etc. The main objective was to supply potable water to the residents of Nairobi City.

4.1.3.2 Project Capacity

The dam was to consist of a rolled earthfill embankment of¹⁰.

Maximum height	63 M
Volume	2.34 million M ³
Reservoir volume	70 million M ³
Maximum discharge of bellmouth spill way	390 M ³ /s
Emergency spill way	120 M ³ /s

4.1.3.3 Project Implementation

The project was implemented by the Nairobi City Council under the supervision of Water and Sewerage Department (WSD). The department's Project Implementation Unit (P.I.U) was directly involved while much of the management was done by Howard Humphreys (K) LTD as consulting engineers.

4.1.3.4 Project Sponsor

The project as a whole was financed by several institutions. However the part of interest here i.e dam construction executed under contract C208 was financed by the African Development Bank (ADB), the NCC and the Government of Kenya. (APPENDIX 4F). The latter was to finance land acquisition costs.

4.1.4 *Project Justification*

The law requires that for land acquisition to be justified the public benefit must prove to be more important than the suffering occasioned to the individual landowners. Justification of the project is therefore quite imperative.

4.1.4.1 *Importance of Nairobi City*

Nairobi is Capital City. It is both the administrative and commercial capital of Kenya - thereby being the spine and the heart of the Nation. Nairobi is also the most important centre in the country for tourism and light industry.

It is also important regional and international centre and accommodates several international agencies including the headquarters for United Nations Programmes i.e UNEP and UNCHS/habitat.

It was therefore hard to imagine such important centre not to have adequate water supply.

4.1.4.2 *Population*

The 1969 and 1979 censi put the population growth rate of Nairobi at 5.3% per annum. Projections could be wrought from this tendency (Table 4.1)

Table 4.1 Population Censi Results and Projections

Year	Population
1969	509,000*
1979	859,000*
1980	897,000
1985	1,162,000

1995 1,715,000

2010 2,710,000

* Based upon census results

Source: Water and Sewerage Department

4.1.4.3 *Water Demand*

Tendency in population growth put the water demand growth rate at 4.9% per annum. This resulted into the following projections:

Table 4.2 Water Demand Projection

Year	Projected Demand (1000 M ³ /day)
1985	190
1990	218
1995	297
2000	363
2005	449
2010	556

Source: Water and Sewerage Department

4.1.4.4 *Existing Supplies*

The following table identifies sources existing then and their capacities.

Table 4.3 Existing water sources and Capacities

Source	Period of Adequacy	Capacity (M ³ /day)	Capacity (M ³ /sec)
Kikuyu springs	1900 - 1934	4,000	0.05
Ruiru Dam	1934 - 1956	21,000	0.25
Sasuma Dam	1956 - 1974	45,000	0.53
Chania River	1974 - 1988	134,000	1.56
	TOTAL	206,000	2.39

Source: water and sewerage Department

4.1.4.5 Water shortage

The above table revealed that by 1990, water demand would have surpassed water supply leading to shortages. The shortages could cause untold suffering to the city residents and therefore there was an urgent need to develop supplementary sources (APPENDIX 4A)

4.1.4.6 Feasibility Studies

The feasibility study had revealed that out of the five possible dam sites, the present Thika Dam was the most viable in terms of costs (APPENDIX 4B).

Thika Dam was therefore a necessary undertaking in the light of public interest. Compulsory land acquisition was therefore justified.

4.2 PROBLEMS FACED IN LAND ACQUISITION

4.2.1 Introduction

This sub - chapter deals with the problems encountered in the acquisition process which led to delays in project implementation. The problems are centered around two key issues - compensation and resettlement. Here no link is established between compensation and

resettlement since resettlement issues took precedence and did not come subsequent to compensation.

As has been noted, water shortage was likely to befall the City of Nairobi any time prior to project implementation. The project was therefore treated with utmost priority and delays in its implementation was to be avoided at all costs. According to the DS (Local Government) and Chairman of Project Task Force Committee.

--- this project is being given high priority by the Government
in order to ensure that there will be no water shortage in Nairobi
in the next few years.

Unfortunately, problems of land acquisition had to crop in that were hard to overcome.

4.2.2 *Use of Private Professionals*

The project implementors were wary of delays. For that matter NCC had arranged to undertake compulsory acquisition by use of private valuers. The argument was that¹²:

- i) Under Chania I Water Project land acquisition was carried out by NCC valuers
- ii) under Chania II Water Project (immediately preceding the project of study) land acquisition services were provided by private firms.

By the time this arrangement was reversed so much progress had been made. Advertisements for invitation to tender had been placed in the local dailies and certain valuation firms had been shortlisted for the job. Tender documents for procurement of these services were also ready. The only step remaining was to set the

acquisition process in motion. At this point the General Manager WSD was advised in the Government Task Force Meeting to contact the Commissioner of Lands for advice on how to institute land acquisition process¹³. This single event led to a U - turn in the proceedings and everything was to be reconsidered a new. The Commissioner's response was negative. He was unwilling to entrust this exercise to private valuation firms for reasons¹⁴ that:

- i) acquisition of land is a very sensitive issue which in his view could not be satisfactorily accomplished by a private firm (according to previous experience)
- ii) the land area to be acquired was so large (350 - 700 Ha) and involved a highly populated area, further complicating the issue
- iii) he anticipated difficulties in the landowners freely parting with their lands through private negotiations unless the prices paid are inflated to induce them to surrender their land
- iv) the Lands Department had adequate personnel and a wealth of experience in undertaking land acquisition

Land therefore was to be acquired by Commissioner. The amount of time and financial resources committed to the previous arrangement was lost.

4.2.3 *Resettlement*

Resettlement issues arose earlier than actual acquisition in this project.

4.2.3.1 *Publicity*

According to the News Editor of Nation Newspapers:

The projects affects about 300 families and over 3,000 individuals.

They would be happier to be allocated with a single piece of land

equal to what you are taking rather than being asked to look for

alternative land individually¹⁵

The Interim Committee Thika Dam Affected Families in a letter copied to the PC, DC and OP, wrote to Commissioner of lands in conjunction with NCC that:

We are --- beseeching you because you hold our future and --- lives in

your hands, to consider giving alternative settlement in form of land

even if it means at least 2 acres per family in a potentially good

area¹⁶.

According to the Interim Committee this was necessary because:

- a) any compensation in form of money only would not be of much benefit due to the difficulties in finding, acquiring, and developing alternative piece of land
- b) some heads of families might misuse all the cash given as compensation.

The highlights given to resettlement in the two instances above moved certain Government positions into action. The issue of resettlement was considered as purely administrative and was left to the PS (Local Government) and the Provincial Administration. They managed to identify a suitable land i.e the portion of Samar Farm in Murang'a District which had been sold to Mbo - i - Kamiti and Murang'a County Council¹⁷.

4.2.3.2 Policy

Initially, the Government expressed its willingness to purchase the land for purposes of resettlement¹⁸. However the advice from Land Department was that the Government should not be directly involved in resettlement issues as this would create a serious precedence whereby a landowner would expect to be compensated in kind for land acquired¹⁹. The advice was agreeable to all concerned.

Resettlement was to be dealt with as a policy issue. The PS (Local Government) had noted that:

I have addressed the question of resettlement --- to the Head of Civil service since this matter requires policy decision by the Government²⁰.

Since the Ministry of Lands was the technical arm of the Government well versed with issues of land its advice and guidance was to be followed in this case. It was settled that the Government would only facilitate resettlement by ensuring that land was available for purchase by the expropriated landowners. The landowners were on the other hand expected to pay for land at market price. However, it was upto the relevant Government Institutions to pay prompt compensation to the land owners so that they do not lose the chance of buying the land for resettlement²¹. In the end however compensation was not paid promptly and the chance was lost.

4.2.3.3 Acute Problem

Resettlement as a problem was acute in the very beginning when the CL first attempted to obtain the Minister's approval in order to go ahead with acquisition. CL noted that:

I had prepared a draft of the Minister's instructions but the then
Minister had some reservations regarding the people who were to be
displaced²²

This proves the conflicting treatment of resettlement issues by different facets of the Government and in the process of ironing this conflict time was lost - to the disadvantage of the project implementation programme.

4.2.4 *Litigation*

Litigation as a problem besetting land acquisition appeared in different facets. Some of them were mere threats while others were later withdrawn from the Courts yet others were finally determined.

4.2.4.1 *Threats*

Threats were issued to the consulting Engineers and the NCC. There are records of three serious threats which involved law firms during the pre - acquisition period.

<u>Reasons</u>	<u>threatened suits</u>
Damage of crops	1
Trespass	2

These cases were solved before reaching the courts.

The people insisted that they were aware of the intention to acquire their land. However before the land was technically acquired it remained theirs in full right. Any dealing with their land therefore entitled them to compensation. Consequently they were paid for the boreholes, beacons, bench marks (which the consulting engineers had placed on their land) and the use of

private roads across their lands. This was to be done before the Date of Inquiry.

4.2.4.2 *Appeal of the Eighty Landowners.*

This is the classic case of this study. About eighty landowners contested the awards in High Court (APPENDIX 4C). The bone of contention was the quantum of compensation.

• Amount awarded by CL	Ksh 52,595,299.00
Amount claimed by landowners	Ksh 158,606,031.00
Amount awarded by High Court	Ksh 64,203,747.00

The gap between the amount claimed and the amount awarded was clearly over 100 million thereby making it very difficult to reconcile the parties. The stalemate lasted for some time thereby causing delays in project implementation.

Unfortunately, the landowners in question were in the very centre of the land required for dam construction therefore work could not continue before the settlement of their case.

4.2.4.3 *Court Injunction*

There was an attempt to take possession of the site before compensation was paid. However this move was quashed by the landowners who applied for and were granted court injunction to maintain the status quo until when the case was determined. The attempt also resulted into more problems of litigation. The people also brought action of contempt of court for those involved in the attempt to take possession of the site.

4.2.4.4 *Court Decision*

In the end the court awarded the contestants a flat rate of 22% on top of the CL's award regardless of whether the claims were on land or improvements (APPENDIX 4C). The claimants accepted this and agreed to vacate the site for construction to start.

The most important cause of litigation here therefore stands out to concern adequate compensation. The landowners felt that compensation was inadequate.

4.2.5 *Prompt Compensation*

The inability of CL to pay prompt compensation to the claimants was another principal issue.

4.2.5.1 *Contribution of the Government*

The contribution of the Government was to avail land for implementation of the project. According to the initial estimates the Government had to provide Ksh 86 million for purpose of land acquisition. Normally CL does not start the acquisition unless there is written assurance that compensation cash is available. Since there was no money forthcoming from the Treasury NCC decided to chip in Ksh 50 million to avoid delays in the acquisition with the understanding that the Treasury was to provide the remaining amount and also reimburse NCC. At a time of critical shortage the Treasury was only able to release Ksh 20 million. At this time the cost had increased to Ksh 120 million due to increased acreage.

4.2.5.2 *Litigation Interlude*

Fortunately, the litigation temporarily stalled the critical need for compensation funds. Towards the end of the interlude CL requested that:

Now that the Court cases are to be determined soon I fear that there will be no money to effect the determined compensation. Could you please take action towards provision of the required funds to avoid further litigation and possible delays in execution of the project²³

Unfortunately in the end there was no money available to pay the court determined compensation. Out of the total of 70 million so far provided CL had paid out Ksh 56,156,477/= to landowners who had accepted the awards leaving out only Ksh 11,843,523/= against a compensation sum of Ksh 63 million to be paid to the 80 landowners²⁴. The question is, supposed there was no litigation how could the problem of inadequacy of funds have been solved?

4.2.5.3 *Compensation to Priority Land*

By this time NCC was losing million of shillings in contractual claim due to non-availability of site. W S D the consulting Engineers and CL's office tried to save the situation by sorting out and paying for the land necessary for the start of work. Total amount required for this purpose was Ksh 18,844,968. NCC provided a further Ksh 6,844,968/= on top of the balance with CL. However the claimants marched on Ardhi House and vowed not to accept piecemeal compensation (APPENDIX 4K).

Later the Treasury managed to release Ksh 30 million to add to those already deposited with CL but this still left a shortfall of

Ksh 10.7 million which again was provided by NCC to help settle the claims.

Table 4.4 Schedule of the release of compensation

Date of release of cheque	payer	Amount in Ksh
June 30, 1988	NCC	50,000,000
August 9, 1989	GOK	20,000,000
August 23, 1990	NCC	4,436,869
September 3, 1990	NCC	2,408,099
September 19, 1990	GOK	30,000,000
September 14, 1990	NCC	10,700,000
TOTAL		127,544,968

Source: Research Finding 1996

Note that the release of funds spanned a period of 27 months. This was so long a time for compensation to be prompt.

4.2.5.4 Section 19

CL's office tried to invoke section 19 CAP 295 so that the construction could commence. The valuation office had asserted that: "Payment of compensation is not a precondition for the taking of possession"²⁵. However this did not work out because of the assertive nature of the claimants who even refused piecemeal settlement of compensation.

4.3 IMPACT OF PROBLEMS ON PROJECT IMPLEMENTATION

4.3.1 Introduction

The problems of land acquisition had one overall effect of delay in project implementation. This delay in some specific cases set back the project implementation schedule. In the specific case delay eventually led to contractual claims with implications of

increased cost of project implementation. The two main problem issues in this case are: litigation and prompt compensation. It is however not possible to assign specific cost to a specific problem here because both took effect simultaneously.

4.3.2 General Delay

All the problems discussed caused delay in project implementation.

Table 4. 5: Impacts of Acquisition Problems

Problem Issue	Approximate Time loss (Months)
Use of private/public professionals	12
Resettlement issues	6
Litigation	12
Non - payment of prompt compensation	6
TOTAL	36

Source: Research Findings 1996

The above table explains why it took about four years to settle acquisition issues. While the NCC started with land acquisition in 1986, it was not until the end of 1990 that all these issues were resolved.

4.3.3 Effects of General Delay

The effect of general delay is that it dragged the project to the 1992/93 period of financial instability and galloping inflation thereby leading to cost overruns due to price variations. During this period there was liberalisation of foreign exchange. Much of the project costs was to be paid in German currency (APPENDIX 4F). The loan from ADB was therefore not enough to finance the foreign component of the project costs and so NCC had to purchase Deutsche Marks to pay the contractor. However there were cashflow problems

and payment could not be made in time. This led to suspension of work (APPENDIX 4D & 4E) for a total of 147 days. Suspension of work was in turn to be claimed by the contractor thereby further complicating the costs.

It is not easy to determine the exact sum of money lost through general delays. However the point is that if land acquisition issues were to be resolved earlier without dragging the contract period to the 1992/93 period, project cost would have been reasonably low.

The technical Audit Report observed that:

Coupled with the substantial cost increase, the foreign currency requirement was also doubled from 591 million Ksh (55 million DM) to 1,205 million Ksh (112 million DM)²⁶

The audit carried out in 1995 revealed the following

Table 4.6: Technical Audit of Contract C208 June 1995

FIGURES IN MILLION OF KSHS

	Total as at		
	<u>Contract</u>	<u>Feb. 1995</u>	<u>Increase</u>
Technical items	691.0	751.1	
Physical contingency	63.2		
Variation Orders & claims		468.5	
Sub total (Technical)	754.2	1,219.6	465.4 (61.7%)
Financial items (Financial contingency, taxes variation of Prices, interest)	74.9	451.0	376.1 (517.8%)
TOTAL	829.1	1,670.6	841.5 (101.5%)

Source: Technical Audit Report 1995

Note that the contract sum increased from Ksh 829.1 million to Ksh 1,670.6 million. Part of this increment is explained by financial items amounting to Ksh 387.3 million (representing 517.8% increase in Financial Items) which is partly the result of dragging the project to the 1992/93-onwards period of economic instability.

4.3.4 Contract Specific delay

The problem of litigation and difficulties in prompt payment of compensation led to delays in commencement of construction. In this case the relevant length of delays is the lapse of time when construction is due to commence according to the contract document. The lapse was due to non-availability of site brought about by problem of land acquisition. The following table contains all instances of extension of time through out the project implementation period and comparatively shows the contribution of delay (resulting from land acquisition) to the general failure to meet the project time table.

Table 4.7: Extension of Time

Causes of Extension of Time	No. of Days	Percentage
Delayed possession of site	126	36.4
Inauguration ceremony	3	0.9
Suspension No.1 (5/9/92 - 27/9/92)	23	6.6
Suspension No.2 (4/11/92 -15/11/92)	12	3.5
Variations to Draw - off Tower & Diversion tunnel	47	13.6
Variations to Foundation Treatment Works	23	6.6
Suspension of works in spillway Tunnel	14	4.0
Suspension of work No.3	98	28.3
TOTAL	346	99.9¹

*Does not add up to 100% due to rounding - off

Source: Research Findings 1996

Note that contract was originally scheduled to cover a period of 1092 days and completion was due mid-93. However delayed possession of site resulting from land acquisition problems pushed it further by 126 days representing 11.5% loss in contract time.

4.3.5 *Effect of Delayed possession of Site*

4.3.5.1 *Loss of Time*

Loss of time refers to a period when the contractor remains idle due to suspension of work. Loss of time in the entire contract period was not only due to delay in possession of site. In order to get a comparative picture, we shall consider other causes of loss of time as revealed in the following table.

Table 4.8: Causes of suspension of work

Causes of suspension of work	No. of Days	Percentage
Delayed possession of site	126	45.6
Inauguration ceremony	3	1.0
Delay in payment.	147	53.4
TOTAL	276	100.0

Source: Research Findings 1996

From the table we learn that delayed possession of site contributed to 45.6% of idle time. Delayed possession of site therefore is a major contributing factor to loss of time.

4.3.5.2 *Financial Loss*

Delayed possession of site led to loss of time which the contractor had to claim for (APPENDIX 4G). The following table provides Financial Claims over the contract period and comparatively shows

the contribution of delayed possession of site to overall financial loss.

Table 4.9: Financial claims

Causes of Claims	No of Days	Amount	Claimed
		Ksh	%
Delayed possession of site	126	55,571,868.00	56.7
Late instruction to commence work		7,601,142.40	7.7
Suspension No. 1	23	23,796,089.86	24.2
Suspension No. 2	12	11,061,051.33	11.3
TOTAL	161	98,030,150.79	100.0

Source: Research Findings 1996

Note that late instruction to commence work is the result of delayed possession of site. Delayed possession of site therefore contributed 64.4% of financial claims. It therefore stands out as the main contributor to financial loss. Also note that the implementor lost Ksh 63 million due to difficulties in land acquisition which is no mean amount.

4.3.6 Cost of Litigation

NCC paid nothing to meet legal costs of litigation because the case was handled by Attorney General's Chambers. However they met the cost of hiring private valuers to help argue their case. The cost amounted to Ksh 402,685/-. In addition to legal services although they were unpaid for the actual cost comes to about Ksh 1 million.

NOTES

1. *Aquasystems*
2. 1 bid
3. 1 bid
4. 1 bid
5. 1 bid
6. 1 bid
7. *Sorrenson M.P.K (1967) Land reform in the Kikuyu Country. Oxford University Press. Nairobi.*
8. *The Kenya Land Commission Report*
9. See 7 P.6.
10. *W S D. Project Implementation - Executive Summary P.9*
11. 1 bid pp. 6 - 8
12. *Cont. 44/Vol.I/3/PKK/MWK 14th July, 1986 Land Acquisition File Folio 5*
13. *Cont. 17/Vol. Vii/9/PKK/ZM GM to Commissioner of Lands 22nd May, 1986. Land Acquisition file volume I folio 9*
14. *116895/7 Commissioner of Lands to GM 25th June, 1986 and Acquisition File volume II folio 2*
15. *News Editor, Nation Newspapers to TC 6th January, 1987*
16. *Interim Committee, Thika Dam Affected Families to The Commissioner of Lands and Nairobi City Commission 25th September, 1988.*
17. *92681/ (224) PS Ministry of Local Government and Physical Planning to PS Office of the President and Secretary the Cabinet 17th June, 1988*

18. 92001/ (231) PS (Provincial Administration) to PS (Local Government) 1st July, 1988
19. 116895/92 CL to PS (Lands) 18th July, 1988
20. C/41101. III/(35) PS (Local Government) to PS (Lands) 23rd June, 1988
21. D67N/61 PC (Central) to PS (Provincial Administration) 1st November, 1988 and LS /15/29/(96) PS (Lands) to CL 21st March, 1989.
22. 116895/II/86 CL to PS (Lands) 27th April, 1988
23. 116895/III/14 CL to PS (Local Government) 22nd February, 1990. Volume II Folio 108.
24. 116895/III/110 CL to PS (Treasury) 2nd August, 1990 Volume II Folio 141
25. 116895/II/89 CL's office to TC 12th October, 1989
26. Technical Audit of Contract C 208 - Construction of Thika Dam June, 1995 summary Report.
27. VAL/2239/1/89 E.K. Gatheru to CL, 29th June 1990. Volume III folio 44 and 3433/SNW/mnk S.N. Waruhiu to CL. 17th July 1990.

CHAPTER FIVE

CONCLUSIONS

5.1 INTRODUCTION

This chapter draws conclusions from the discussions of earlier chapters. The aim is to tie the findings both from literature review and data analysis and establish a basis for policy recommendations. A number of issues are to be considered here ranging from land tenure to acquisition. Land tenure is the central point of reference in order to effect comparison between high potential areas and low potential areas which accordingly differ in tenural conditions. High potential areas exhibit the following characteristics:

- i) Individual tenure-land is registered as private property
- ii) High level of incomes enabling the people to access a variety of services including education and justice
- iii) High levels of education, literacy and awareness
- iv) Enabling legislation under land acquisition which safeguards individual rights - CAP 295
- v) High land values as a result of registration and resource endowment.

Low potential areas on the contrary exhibit the following characteristics:

- i) Customary tenure - land ownership is not certain
- ii) Low levels of income, high poverty levels that inhibit access to basic services including education and justice
- iii) High levels of illiteracy and ignorance

- iv) Prejudicial legislation which does not safeguard rights to property - CAP 288
- v) Low land values due to lack of security of tenure and poor resource-endowment.

It is against this mosaic backdrop of legal, economic, environmental and cultural factors that the study will attempt a comparison in order to bring to light the whole compass of issues under compulsory acquisition with specific reference to project implementation.

5.2 DIFFICULTIES IN LAND ACQUISITION

There is an established tendency that problems that occur under compulsory acquisition will depend on the tenural position of the land's occupants. Under customary tenure the problems that are likely to occur include computation errors, and immense volume of work since a crash programme of rights adjudication has to be carried out as was found out for Kiambere.

Registered land on the other hand poses slightly different difficulties. The problems are mainly related to assertion of rights. Dealing with land rights poses a number of difficulties to the acquisition process where people are quite assertive of their rights. This is the case with occupants of registered land whose rights are well defined as evidenced in Thika Dam area.

The occupants' rights have to be respected and this means elaborate procedures to be followed which are time consuming and frustrating to the acquisition process. It is characteristic of

these people to engage the acquisition authorities in legal tussles and threats. There is also potential for civil action.

5.3 EFFECTS OF ACQUISITION PROBLEMS

Problems exist both for land under customary tenure and that under individual tenure. A stark contrast however exist to the extent that no impact is occasioned on the project implementation programme under customary tenure while considerable interruption of the project time table is occasioned by land acquisition problems in the case of individual tenure. It is interesting to note that land acquisition in the Kiambere case was marred with a lot of irregularities. The irregularities however had no impact at all on the construction work that went on without interruption. In the case of Thika Dam however the project implementation programme was interrupted for 126 days which cost the implementor a total of Ksh 63 million due to problems of land acquisition.

The explanation lies in the nature of rights and the literacy levels of the right holders. Under customary tenure what exist are "lesser rights" which can be easily violated by the project implementor's agents with "impunity". In Kiambere, the people's rights under trespass laws were disregarded and their rights of possession violated without due redress yet without occasioning any legal suits.

In Thika Dam, however peoples' rights were completely respected. It was not easy to disregard them and go a head with the project and this led to delay.

5.4 ADEQUATE COMPENSATION

Generally speaking compensation in the Kiambere case seemed to be totally inadequate bearing in mind that it was determined in absolute discretion and not paid in good time.

The Kiambere case proves that under mass acquisition even if the landowner is awarded compensation at market value the payment would still not be adequate. This is because the landowner is not reinstated to his original position because demand for land is definitely going to increase against limited and fixed supply. The Land prices are definitely going to shoot up in the affected area immediately compensation is paid. To make matters worse, compensation in Kiambere was not paid at market price.

In Thika however compensation seemed to be adequate. More than half of the claimants accepted their awards. Eighty landowners contested the award in Court. However there was no evidence of blatant error of valuation that could have ruled out adequate compensation. There was a stalemate which was resolved just by adding 22% to all claimants awards whether they were land owners or not

Nevertheless by studying the aftermath of the Thika case it becomes clear that compensation is never adequate because it does not take into consideration the loss the landowner is going to incur by purchasing land of similar value. The loss is implicit in land transfer taxes among other conveyancing costs. Compensation is therefore explicitly adequate in high potential areas

(individual tenure) and explicitly inadequate in low potential areas

(customary tenure).

In implicit terms however compensation seems to be inadequate in both cases.

5.5 PROMPT PAYMENT OF COMPENSATION

In both cases compensation was not prompt. The reasons underlying this similarity, however, are diverse. For Kiambere compensation was not paid promptly because of the volume of work involved and also simply because the claimants were considered to have "lesser rights" which could be violated. For that matter construction went ahead even before publication of notice to treat. The volume of work involved on the other hand was so immense leading to delay in processing and paying compensation.

For Thika Dam compensation could not be paid promptly due to lack of funds. The Government was supposed to provide the funds for compensation which was not forthcoming. Taking into account that this was the Government's most favoured project yet it had problems of making funds available for compensation, expectation under non - priority projects is worse. No wonder in certain instances compensation may take as long as a decade where it is to be paid by the Government. It therefore goes in record that the Government is a poor payer of compensation and where it is involved payment can never be prompt. Unfortunately it is Government law that

acquisition is only justified by payment of prompt and adequate compensation.

Compensation for Kiambere was to be paid by TARDA. Although funds were available, compensation could not be paid in time due to problems related to the tenural situation. Either way, compensation was never paid promptly.

5.6 RESISTANCE/CHALLENGE

In both cases the acquisition process met with resistance or challenge. However in Kiambere the challenge was so mild as to pose no problems in the process of land acquisition. The claimants were so meek and docile that they posed no challenge to the agents of the project implementor.

The claimants under Thika Dam on the other hand were sharp, litigant and almost militant. They therefore placed difficulties on the path of land acquisition. It is for this matter that the loss was great for Thika Dam compared to none at all in case of Kiambere.

Under high potential or (individual tenure) areas, therefore, much resistance and challenges should be expected.

5.7 PROCEDURE

The procedure followed for compulsory acquisition is the same for both cases. The procedure laid down in CAP 288 for the acquisition of Trust Lands was not followed for Kiambere. Instead the procedure laid down under CAP 295 for the acquisition of

private land was followed. CAP 295 lays statutory power of compulsory acquisition on the hands of CL. It is not clear how CL comes in to acquire land and award compensation to landowners under CAP 288. Section 53 provides that "Commissioner of Lands shall administer the Trust land of each council as agent of the council". However there is no evidence that this is what he used as entry point to determine matters of compulsory acquisition which are left in the hands of DC under CAP 288.

Also there is no evidence that the procedure laid down under Electric Power Act CAP 314 was followed in the acquisition of land under Kiambere H. E. P. Project.

It is welcome for CL to apply provisions of CAP 295 on acquisition of Trust lands. This is a giant step in the recognition of Trust land or "African land" as land of equal importance to land under modern tenural setting. Nevertheless a contradiction exists in the process of valuation since no market value could be established for purposes of compensation. The process also involved immense work of crash adjudication programme which led to delays in payment of compensation and brought about landlessness as compensation was rendered inadequate due to inability to pay it promptly.

Trust land will therefore continue to pose more problems although these problems may not specifically lead to delays in project implementation. Areas under customary tenure have more or greater problems of land acquisition thereby presenting greater potential for disrupting project implementation. As people gain

more knowledge with time and land values continue to rise these areas will present more difficulties to project implementation in future.

5.8 RESETTLEMENT

Resettlement is another problem which was common in both cases. It comes out clearly in both cases that people who are dispossessed of their land through compulsory acquisition expect the Government as the benevolent super-structure and the taker of their lands to be also the giver of alternative land for resettlement. It also comes clear that the Government's policy is to discourage this kind of exchange so as to avoid future problems where it may be expected to give land to people who have been dispossessed of their land whereas the availability of that land is not guaranteed in the future.

People's expectations and policy will therefore remain at variance making it contentious an issue for a long time to come.

5.9 VALUERS

For Thika Dam NCC had intended to use private professionals in order to acquire land expeditiously. However CL objected to this arrangement and claimed responsibility for the work. CL's officers then went ahead and did their work efficiently. In deed CL's own convictions that the people were militant and impossible to deal with by private professionals was proved right by the people's

reaction during the process of acquisition. In this case CL's office deserves credit for commendable job.

The situation is however directly opposite when it comes to Kiambere. In this case the CL's officers failed to establish market value for the land. The reason was that land here being unregistered has no records of transaction which can be relied upon officially to establish land values. It is characteristic of Government valuers to rely upon official records of transactions which can be used as evidence. Anything else would be treated as hearsay. Since such records were not expected for Kiambere where land could not be transacted in the official channels due to non-registration it was conveniently assumed that there was no market value. Which to some extent was a wrong assumption. This gives the claimants the benefit of doubt when they say that their land was undervalued although they could not prove by how much.

5.10 MAGNITUDE OF IMPACTS

We have noted that in Kiambere, the problems' impact on the project implementation plan was zero both for time table and costs.

For Thika Dam, on the other hand, the impact both in terms of time and monetary losses were greater. Total length of delay directly resulting from land acquisition problems stood at 126 days or 11.5% of the original contract period. This delay translated into Ksh 55.6 million in terms of contractual claims. Other incidental losses brings the overall cost to about Ksh 64 million which is 7.7 % of original contract sum. Therefore problems of land

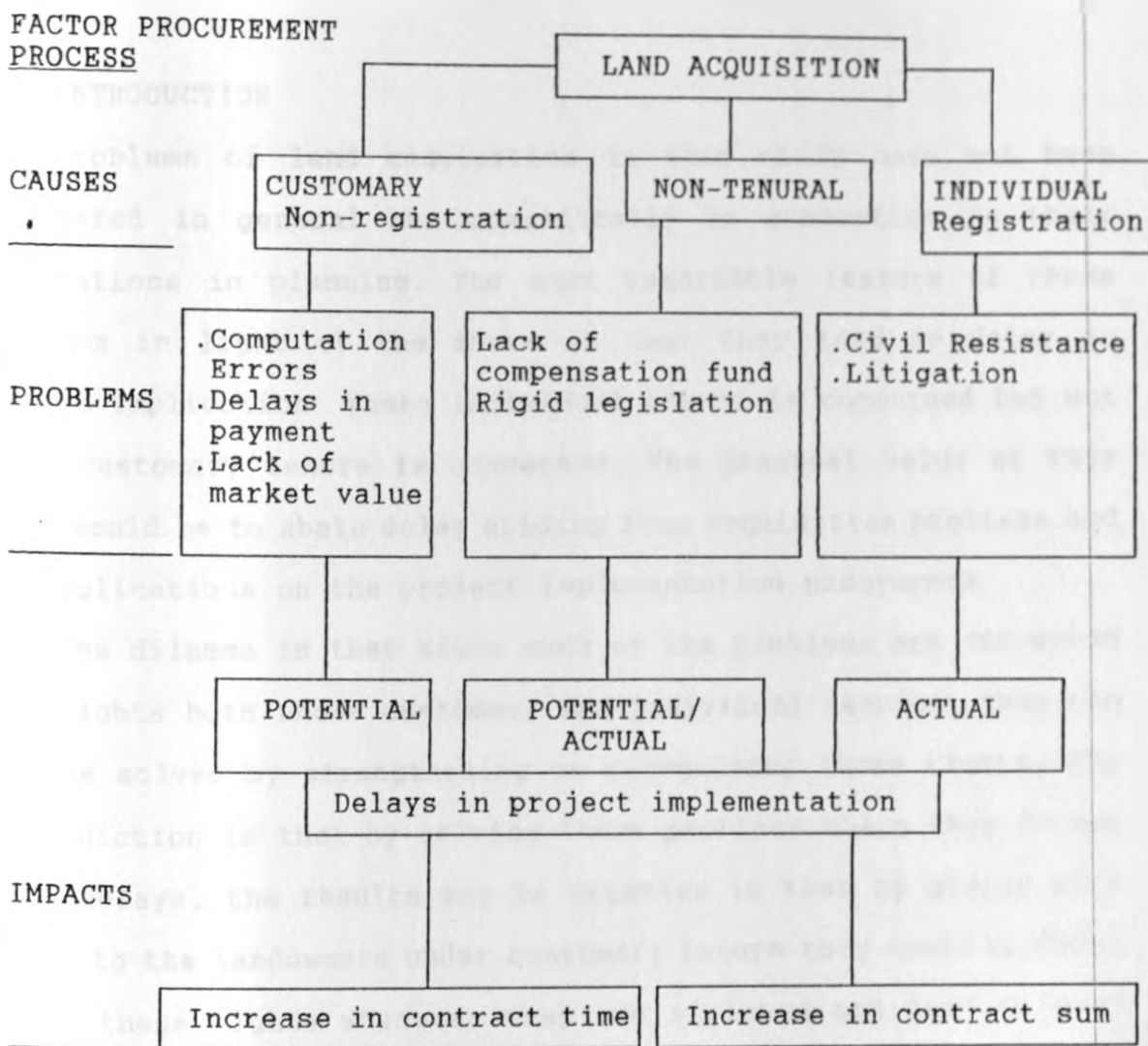
Acquisition have significant impacts on project planning in high potential areas or where individual tenure is concerned.

11 SUMMARY

It has come out clearly that land acquisition process in Kenya is beset by several problems. These problems arise from both tenural and non-tenural influences. The overall effect of the problems is potential delay in project implementation (in case of customary tenure) if not actual delay (in case of individual tenure). The delay caused in turn leads to contractual claims which increases the cost of project implementation. The following chart summarises this process.



Fig. 5.1 Conceptual Model of Compulsory Land Acquisition Problems.



Note that problems arising from non-tenural causes occur both in land under customary tenure and land under individual tenure. For that matter their impacts are both potential and actual in that where individual tenure is concerned owing to the strength of litigation, they cause delay. But where customary tenure is concerned their effects are only potential in nature.

CHAPTER SIX

RECOMMENDATIONS

6.1 INTRODUCTION

Problems of land acquisition in this study have not been considered in general but specifically in connection to their implications in planning. The most remarkable feature of these problems in light of the above is that they lead to delay in project implication where individual tenure is concerned but not where customary tenure is concerned. The greatest value of this study would be to abate delay arising from acquisition problems and its implications on the project implementation programmes.

The dilemma is that since much of the problems are concerned with rights both under customary and individual tenures, they can only be solved by strengthening or recognising those rights. The contradiction is that by solving these problems where they do not cause delays, the results may be negative in that by giving more rights to the landowners under customary tenure they would no doubt assert these rights whenever they are violated and lead to more problems which easily translates into delays in project implementation.

Where problems abound without disrupting the project implementation plan as in the case of customary tenure it would be tempting to recommend maintaining the status quo and look for solutions where problems actually bite and bite painfully i.e under

individual tenure. However this is not acceptable because the solution is not long term and can be upset anytime by a slight change of events. For that matter we shall proceed confidently to find lasting solutions to the problems. Note further that the playground should be fair for all. Only this way can it remain stable and benefit all.

6.2 EFFECTIVE PROBLEMS

This refers to problems which actually cause delay in project implementation. As we have noted, there are greater problems of acquisition of land under customary tenure than for land under individual tenure. Currently the problems have no effect on project planning in the former because of socio-cultural conditions of the landowners. This however is only a temporary situation and more attention need to be focused in this respect so as to obviate a potential crisis.

As people continue to gain more knowledge and land values keep on soaring, landowners under customary tenure will present more effective problems in the future. This means that in future we expect to have more disruption of project implementation under customary tenure than is now experienced under individual tenure or than will be experienced under individual tenure if the status quo were to be maintained. This therefore means that we have to address the problems of land acquisition indiscriminately once and for all. In which case it would not be contradictory to suggest entrenchment

standard rights for landowners under customary tenure. This can be done through land registration process.

3 LAND ADJUDICATION AND REGISTRATION

There is an indication of a diminishing trend of Trust lands in Kenya. This trend however seems deceptive because as of now everything seems to be at standstill and nobody is adjudicating any land any more. Adjudication is the undertaking of the Department of Settlements under Ministry of Lands and Settlement. Unfortunately it does not seem that the department is doing its work effectively. Otherwise for over 40 years that adjudication has been in place, it is quite surprising that much of Kenya's land is still under customary tenure. This is also partly because adjudication does not mean automatic registration yet until registration is actualised does land cease to be customary. Such was the case in Embu side of Kiambere where adjudication was complete yet no registration had been effected. Consequently land was considered as communal property.

It therefore behoves the adjudication and registration authorities to hasten their steps so as to ensure that all land in Kenya is adjudicated and registered by the year 2000. This would hence forth stop treatment of landowners under customary tenure as claimants of "lesser" rights. Recognition of the landowners full rights would effectively eliminate a plethora of claims against acquisition authority which otherwise would paralyse the process.

Registration will also ensure a stock of accurate land information like name of right holder, size of parcel etc which are required for compensation purposes during acquisition. This will inturn reduce time and human resources required to establish these facts under crash programmes during acquisition. The disadvantage of this programme is that it is prone to errors especially of miscalculations which subsequently will be eliminated where registration has been effected.

6.4 ADEQUATE COMPENSATION

Under the customary tenure the Government land valuers could not award compensation at market rate because they considered the land market at Kiambere to lie outside the monetary economy. Secondly, as the land was not registered there were no records of sales which they could rely upon as price comparables in the land market. In which case the greatest let down was lack of official documentation. The Government valuers insist on this because it is something they can show as proof or evidence of valuation if challenged.

It is however advisable that the valuers should not necessarily depend on such records because buyers and sellers usually underdeclare the value so as to reduce the amount of stamp duty payable as land transfer tax. This is the reason why Government valuers usually return lower values in their valuations. The valuers should therefore get in touch with the market

personally when seeking value comparables for purposes of valuation.

Where no records exist, the valuers should give the people benefit of doubt and obtain the value through unofficial survey i.e getting to know the value from the mouths of recent or potential buyers and sellers. Alternatively, the valuers can translate the units of exchange used into monetary values. For example in Kiambere where, according to the Government valuers, market value did not exist because land was traded through barter system in exchange for cattle, it would be possible to find out how many heads of cattle were exchanged for a unit size of land and how many shillings are these cattle worth because at least the people sell their cattle.

All these approaches would place the value returned closer to market value than where the value is determined using absolute discretion as was the case with Kiambere.

There are also other methods of valuation apart from value comparison. It is accepted that comparable value is more popular where rights are concerned because it is more understandable to judges and the people. However there are other more scientific methods of valuation which could be tried in the absence of comparable land price. One of them is the investment method.

In the investment method, the annual yield of land is discounted for the period of time the land would be available to the right holder to arrive at the value of land. As we have seen, land in the area had some economic purpose no matter what use it

as put to. Where land was cultivated, its value would depend on the returns accruing from annual crop yields. Where it was not cultivated, it was either grazeland or woodland. We have seen in the background information the annual woodyield expected from an area with specific type of vegetation which could be costed to arrive at the net investment value of land.

6.5 PROMPT PAYMENT OF COMPENSATION

We have seen that compensation was not paid promptly both in the case of customary and individual tenure. Prompt compensation under customary tenure is effectively addressed under registration which will provide stock of accurate information for compensation and save on time and eliminate mistakes. Registration will also ensure the recognition of landowners rights which will result into prompt payment of compensation to avoid litigation.

However where the Government is the payer concerned, as in the case for Thika Dam, a greater problem is entailed. The current practice to ensure prompt payment is inadequate. All acquisition beneficiaries, under the present arrangement, are expected to give the CL a written notice that money is available for settling compensation before the latter can start up the process of compulsory acquisition. However it has been proved that a written notice is not enough where the Government is concerned. For that matter it should be a requirement that the CL (or whoever will be responsible to acquire land in the future) where the Government is expected to pay, should receive the estimated amount of money to be

paid as compensation before starting up the process of compulsory acquisition. Only this way would prompt payment be guaranteed.

6.6 RESETTLEMENT

Resettlement will remain a burning issue for long. In reality, it would be difficult for the Government to meet the expectation of providing alternative land. The Government is unlikely to have the land at hand where it would be suitable to resettle the claimants. This means that for the Government, to meet this expectation, has to acquire another land compulsorily to settle the people. However the land being acquired for purposes of resettlement also has its occupants and it would be, so to speak, "digging a hole to fill another hole": a process which in theory would provoke a chain reaction of endless acquisitions.

The law is adequate as it is: that Government would offer alternative land in place of money compensation should it have it. The law is only indicative and not restrictive. It does not give the claimants the rights to demand resettlement in exchange for the land taken.

To some extent, the issue of resettlement will be effectively contended with by ensuring adequate compensation. Secondly the Government should always explore the possibilities of facilitating resettlement by identifying and securing appropriate land for that purpose. For example, in Thika Dam case, the Government identified the Samar Farm but due to delays in payment of compensation, the

opportunity slipped away. Again, compensation should be paid promptly to improve the resettlement position of claimants.

6.7 LEGISLATIVE FRAMEWORK

The current law is inadequate in so far as it is applied to many and varying situations in the Kenyan scene. CAP 295 seems to be the only law applicable while CAP 288 is not followed. The latter indeed is inapplicable due to its sheer inadequacy for all practical purposes identified earlier. Other legislations provide for rules of compulsory acquisition and then refer all cases to CAP 295 whose provisions do not consider those other legislations hence there is no coordination. For example, Electric power Act CAP 314 stipulates that no compulsory acquisition will be valid unless the project under consideration is licensed by the Ministry in charge. The process of licensing leads to societal evaluation of the project. However the Act is not self - sufficient in effecting land acquisition and refers the rest of the matters to CAP 295. Unfortunately, CAP 295 does not have provisions to ensure that the rules under CAP 314 have been strictly observed before starting up the acquisition. Which means compulsory acquisition may be effected under CAP 295 without regards to provisions under CAP 314. In future claimants may take advantage of such loopholes and to challenge acquisition and frustrate project.

For smooth operation different legislations should pursue acquisition matters in a manner that would better serve their sectors of application instead of leaving it all to CAP 295. The

letter is suitable for acquiring land for the central Government. It should therefore be used to acquire land for purposes of the central Government only. Other public and statutory bodies should use other laws which they fall under as appropriate legislation for compulsory acquisition. In this case the Agriculture Act, Electric power Act, Local Government Act etc should be amended to give full provisions concerning compulsory acquisition in order to undertake acquisition in a manner which is relevant to particular circumstances or place.

However such differences should only occur in procedure. In the case of quantum of compensation one legislation should apply. For that matter, the schedule under CAP 295 should be separated and turned into an independent legislation known as Land Compensation Act. However under the new legislation, the contents should be revised to take into account land whose market value cannot be easily determined. Presently, the approach is purely capitalistic owing to the fact that it was meant only for land in the sense of modern economic realities. In this recommendation it would include the African's expectations in value of land and avoid complaints over issues which are expressly ruled out by the present legislation. The present legislation as such does not serve African interests which remain in their mind even after registration because value is a cultural and not legal attribute.

With this kind of set up for example, the amendment of CAP 265 therefore may allow local authorities to acquire land compulsorily using their own machinery whether hired or inhouse as the RCC had

attempted under Thika Dam. CL and the Government valuers will therefore remain only to work under CAP 295 to acquire land for the Central Government purposes. The rest including statutory bodies should make their own arrangements in accordance with legislations which guide their operations. This would ensure effective and efficient disposal of land acquisition matters.

6.8 PROJECT PLANNING

In order to avoid huge losses project planning should always take into account possibilities of not getting the land in time. No commitments should therefore be made to the contractor unless all land acquisition issues have been settled and there are no possibilities of restraining the Contractor from taking possession of site. Unless it would be possible to alter the standard contract document to absolve the implementor from liabilities arising from problems of land acquisition, the above advice should be strictly heeded.

6.9 SUMMARY

Solutions to the problems of land acquisition and their effects on project implementation are varied but interrelated. Most of the problems arising under customary tenure could be solved by registration of titles. The rest of the problems in common occurrence would be solved by ensuring prompt payment of adequate compensation and by legislation to suit varied circumstances that acquisition may have to deal with.

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KEY TO SOIL MAP

First symbol denote physiography

M = mountains and major scarps

H = hills and minor scarps

U = uplands

Second letter denotes the dominant kind of parent rock.

q = quartz - rich gneisses (granitoid Basement System rocks)

u = undifferentiated gneisses

Third letter denotes dominant colour of the subsoil

b = brown

The letter C indicates complex

In some cases a number is used in the map unit symbol to indicate a difference in the depth or stoniness class among soils that formed on the same kind of parent rock and are in the same physiographic category.

the slope classes used to describe relief are:

<u>Slope class</u>	<u>parent</u>	<u>Name of macrorelief</u>
A	0 - 2	Level or nearly level
B	2 - 5	Gentle undulating
C	5 - 8	Undulating
D	8 - 16	Rolling
E	16 - 30	Hilly
F	30 - 50	Mountainous

TARDA/20-0115/Vol. IV. (149)

13th March, 1991

The District Commissioner,
Embu District,
P.O. Box 3,
EMBU.

Tana and
Athi Rivers
Development
Authority



P O Box 47309
Nairobi, Kenya
Telephone 332455/6/7
Telegrams "TANARIVER"
TELEX: 22691
Fax: 337805
Co-operative House

Dear Sir,

**RE: KIAMBERE H.E.P. COMPENSATION - MEMORANDUM OF
COMPLAINT FROM FORMER LAND OWNERS - EMBU DISTRICT**

My attention has been drawn to a letter purporting to be written by the former land owners of Kiambere H.E.P. site on 6th April 1988, addressed to you and copied to this Authority, Commissioner of Lands, Nairobi, and the Provincial Administration.

The author of the letter has listed points which I feel taken as given thereon, may distort the facts. To correct the wrong image given and draw your attention to the actual facts obtaining from the points raised by the author of the letter, I shall endeavour to address myself to you point by point as complained therein.

At the time, the Commissioner of Lands published the Gazette Notice in 1983, for the setting apart of the land at Kiambere for the Hydro-Electric Power Project, the area affected on the Embu District side had already been covered by the Land Adjudication Act and individual/block land holdings mapped, although the final registration had not been completed. A cadastral survey of the project area had been completed and the boundaries demarcated. The total land area affected by the project on Embu District side was 7573 hectares and Kitui District side was 5668 hectares.

While TARDA was to liaise with the Director of Land Adjudication and the Director of Surveys in establishing the land ownership and acreage per individual holdings affected by the project, the Commissioner of Lands who was to approve and award compensation rates, was to send his experts to assess all the land improvements therein.

In a pre-construction environment feasibility study commissioned and carried on in 1983 by an independent firm of consultants it had been observed that the area in question lacked any consistent land market value per acre as land transactions tended to be widely on bating basis.

In a meeting held at Kiambere Project site on 23rd February 1984, and attended by Provincial Administration from Embu and Kitui Districts, Representatives from Commissioner of Lands, Director of Lands Adjudication, Director of Surveys, TARDA, and the County Councils, the above observation from Feasibility Study Consultant's report was considered and in the meeting, it was resolved that a compensation rate of Kshs. 700/= per acre for unimproved land be adapted and thereafter, the rate was approved by the Commissioner of Lands.

To clarify the point raised by the author of the claimant's letter, it therefore becomes evident that the land owners were compensated on per acre basis at the rate approved through consultation with the local administration and the Commissioner of Lands, i.e. Kshs. 700/= per acre for Kshs. 1,730/= per hectare. The acreage was computed from the Land Adjudication Department's maps.

In 1985/86, two material sites, one along Maribwe River Valley, Embu District and the other along Masaa River Valley in Kitui District were acquired by the Commissioner of Lands temporarily for collecting sand by the construction companies at Kiambere. Access roads leading to these sites and passing through and affecting private property were also compensated for. The land so temporarily acquired was to revert back to the original owners after the completion of the dam construction.

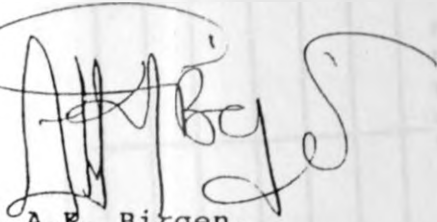
After the initial compensation, payments to the displaced persons were made through the District Commissioners, those who were dissatisfied including names of the committee members listed in the memorandum letter submitted their claims through their local administration. All the claims received from the area were scrutinised for verification by TARDA again in consultation with the District Land Adjudication office and the office of the Commissioner of Lands and where a claim merited any additional payment, it was so effected immediately. All these payment correction were paid through the respective District Commissioner. At the time of effecting the correction, the Commissioner of Lands recommended payments including the accrued interest on the initial Kshs. 700/= per acre rate paid earlier.

All the claims arising from land and improvement compensations received from the former owners of the land acquired have been submitted on individual basis and at present, none is outstanding. All have been verified and finalised through the District Commissioner.

TARDA has never considered and does not consider increasing the amount of money of compensation rate.

From the above, I hope you will now be in a better position in handling effectively such claims as the one in issue.

Yours faithfully,



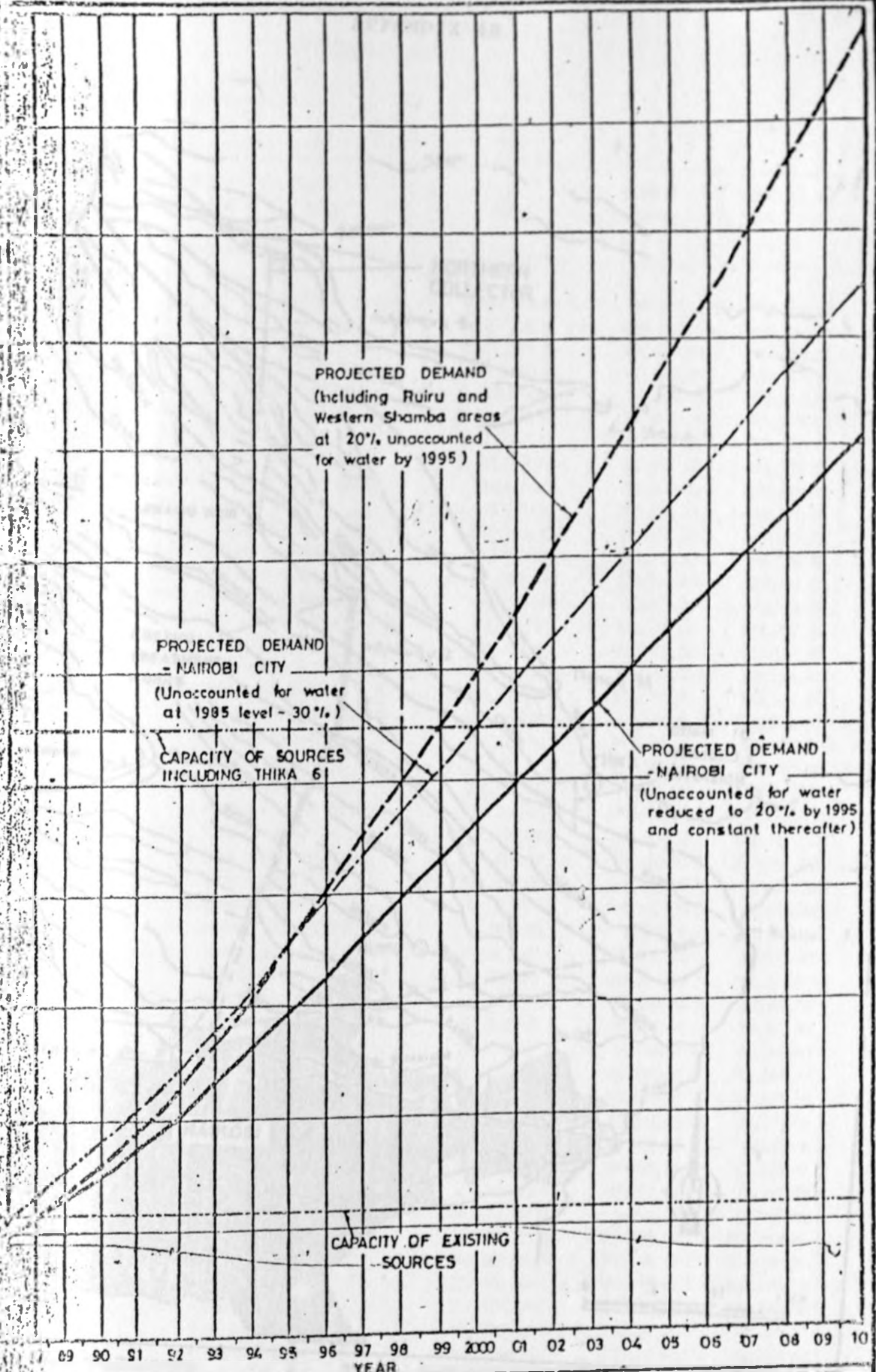
A.R. Birgen,
MANAGING DIRECTOR

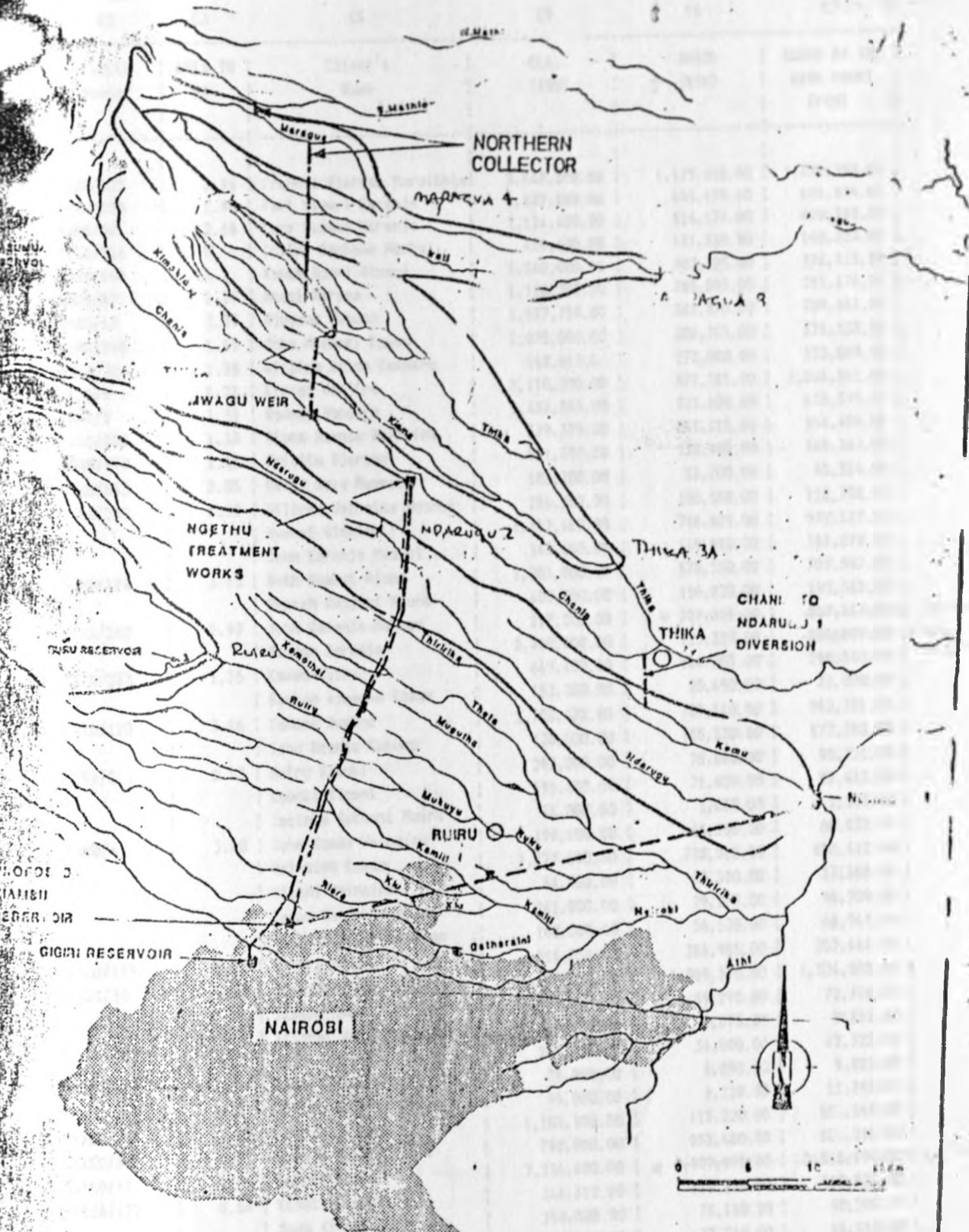
cc: Commissioner of Lands,
P.O. Box 30089,
NAIROBI.

Provincial Commissioner,
Eastern Province,
P.O. Box 455,
EMBU.

District Commissioner,
Kitui District,
P.O. Box 1,
KITUI.

Hon. Kamwithi Munyi, EBS, MP,
P.O. Box 45958,
NAIROBI.





CONSULTING ENGINEERS
 HOWARD HUMPHREYS & PARTNERS HOWARD HUMPHREYS (KENYA) LTD
 BRUCE HOUSE
 P.O. BOX 30134
 NAIROBI
 KENYA

THIRD NAIROBI WATER SUPPLY PROJECT		
LOCATION OF ALTERNATIVE DAMSITES		
Date	Job No	FIGURE 1.12

APPENDIX 4C

C1 High Court Case No. 11 of 2017 C2 C3 C4 C5 C6 C7

SLA NO	PARCEL Huber	AREA IN HA	Client's Name	CLM (KSH)	AUDD (KSH)	AAMRO BY THE HIGH COURT (KSH)
2	INDAK/403	3.96	Francis Mjorogo Murrithile	3,645,800.00	1,175,210.00	1,433,793.00
4	KIWA/258	1.95	Paul Kiemi Karanja	1,637,100.00	493,175.00	601,672.00
5	MAKO/28	2.65	Lucy Wambui Karanja	2,124,100.00	516,174.00	629,732.00
6	KIWA/326	0.	Julius Gechebo Kariuki	434,400.00	131,330.00	160,233.00
7	KUD/401	1.11	Rahab Kari Kiemi	1,360,000.00	307,225.00	374,815.00
8	INDAK/87	1.11	Rugai Kirwa	1,116,705.00	288,095.00	351,676.00
9	KARD/13	3.07	Mjuguna Mubvu	1,527,750.00	581,870.00	709,881.00
10	KAKO/215	1.69	John Mwachiki Kasau	1,075,000.00	306,765.00	374,253.00
11	KAKO/263	1.28	William Haina Kaveru	668,645.00	273,000.00	333,060.00
12	KAKO/9	4.21	Kibwai Wanjiru	2,110,000.00	872,345.00	1,064,261.00
13	KARD/3	1.81	Mwanga Mwangi	1,457,543.00	513,600.00	626,992.00
14	KARD/283	1.33	Simon Mwangi Wainaina	639,379.00	241,315.00	296,404.00
15	INDAK/192	1.58	Wafitu Mgoroge	641,300.00	278,985.00	340,362.00
16	KAKO/542	0.05	David Ruva Mwanjoi	185,200.00	53,700.00	65,514.00
17	KIWA/263	3.99	Ulfrid Wainaina Mwangi	286,200.00	100,580.00	122,708.00
			Kwangi Gichibiri	3,397,400.00	796,825.00	972,127.00
			John Karanja Mwangi	345,000.00	149,080.00	181,878.00
18	MAKO/174	3.15	Beth Wambui Mjuna	1,703,000.00	578,330.00	705,587.00
19	KAKA/262	2.97	Hemah Wamari Mjuna	405,300.00	156,220.00	190,588.00
20	KIWA/233	1.35	John Karanja Mwangi	2,440,000.00	725,325.00	884,097.00
			Mwangu Karanja	647,400.00	244,705.00	298,503.00
21	KIWA/120	3.96	Benson Mwangi Kasau	153,300.00	25,490.00	31,098.00
			Kahore Mwangi	2,700,638.00	789,140.00	962,751.00
22	KIWA/213	0.53	John Mwangi Kahora	176,600.00	145,330.00	177,303.00
			Mulru Kabuki	297,000.00	78,660.00	95,721.00
			Kabuki Kiemi	198,530.00	71,650.00	87,413.00
23	KIWA/4	3.40	Jacinta Gatroni Mulru	48,000.00	1,035.00	1,263.00
			Wainaina Kasau	1,877,600.00	730,010.00	890,612.00
			Kiendi Wainaina	64,300.00	30,580.00	37,308.00
			Jares Haina Wainaina	241,000.00	79,270.00	96,709.00
			Simon Mwangi Wainaina	162,000.00	56,530.00	68,967.00
24	KAKO/119	1.22	Kabuki Kiemi	916,058.00	288,905.00	352,664.00
25	KIWA/50	7.02	Joseph Gatroni Wainaina	4,500,000.00	1,069,510.00	1,304,802.00
			Joseph Mwangi Kariuki	572,000.00	59,295.00	72,310.00
			Aifihal Wanjik Kariuki	90,500.00	8,075.00	9,852.00
			Jares Mwangi Kariuki	248,400.00	34,690.00	42,322.00
			Rochel Wamari Kariuki	31,000.00	8,050.00	9,821.00
26	MAKO/229	2.10	Mikhe Wanjiku Kariuki	95,000.00	9,220.00	11,248.00
27	MAKO/375	1.01	Saasa Waki Kiemi	1,105,300.00	415,220.00	500,568.00
28	KIWA/14	9.66	Kahoro Mwangi	798,000.00	253,480.00	300,246.00
29	KIWA/172	0.56	Kariuki Kiemi	7,336,400.00	4,399,995.00	2,816,194.00
			Mwanga Kiemi	348,312.00	135,265.00	165,023.00
30	KIWA/159	2.09	Mjuguna Mubvu	260,000.00	75,580.00	92,208.00
			Muhia Mwangi	267,400.00	77,310.00	94,318.00
31	MAKO/374	1.26	Elton Mwangi Kiemi	1,533,000.00	591,980.00	722,216.00
			Elton Mwangi Kiemi	1,524,600.00	517,035.00	606,007.00

75,067
298,503
51,098
962,751
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87,413
1,263
1,304,802
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9,852
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9,821
11,248
500,568
300,246
2,816,194
165,023
92,208
94,318
722,216
606,007

For Approval (5)
of the
date

1/22

Approved

Approved by the High Court

APPENDIX 4C

C1	C2	C3	C4	C5	C6	C7
LAA NO	PARCEL Number	AREA IN HA	Client's Name	CLAIM (KSH)	AWARD (KSH)	AWARD BY THE HIGH COURT (KSH)
32	KAND/240	4.05	Muthoni Kariuki	1,920,000.00	767,260.00	936,057.00
33	MAKO/193	3.59	Joyce Wanja Mwangi Mira Wakabi Muceke	1,679,400.00 1,200,600.00	393,218.00 484,572.00	479,726.00 591,178.00
34	KAND/160/ 202/204/329	9.59	Joseph Muchai Nganga	8,050,000.00	2,941,000.00	3,588,020.00
35	KAND/17	4.37	Phyllis Njeri Mugo	2,455,300.00	902,180.00	1,100,660.00
36	KAND/42	6.03	Munene Njoroge Gerald Gakuya Njoroge	552,200.00 3,774,500.00	180,930.00 1,337,680.00	220,735.00 1,631,970.00
37	KAND/33/223	0.70	Gitonga Mwangi and Wangui Mwangi	502,286.00	112,690.00	137,482.00
38	KAND/321/	0.40	Mwaniki Karanja	264,100.00	92,515.00	112,868.00
40	KAND/331	3.97	Gerald Gakuya Njoroge	2,027,400.00	669,170.00	816,387.00
42	KAND/5	9.55	Mwangi Mweru Peter Kariuki Simon Thuku James Karanja Daniel Nganga Samuel E. Ndirangu Mweru	5,648,000.00 80,200.00 26,900.00 93,887.00 97,500.00 460,350.00	1,966,075.00 26,490.00 9,450.00 39,555.00 14,410.00 141,955.00	2,398,612.00 32,318.00 11,529.00 48,257.00 17,580.00 173,163.00
43	KAND/27	1.90	Kezia Wambui Karanja Tabitha Muthoni Kiiani Kiiani Mucheru Mucheru Kiruhi Karanja Mwaniki	620,200.00 106,200.00 63,600.00 773,000.00 32,292.00	46,470.00 21,370.00 17,560.00 283,765.00 11,700.00	56,693.00 26,071.00 21,423.00 346,193.00 14276.00
44	MAKO/30	0.75	Gichini Njuguna	482,481.00	117,645.00	141,527.00
45	MDAK/141	0.37	David Gitau Kariuki	409,499.00	102,120.00	124,586.00
46	KAND/6	0.27	Mucheru Kiiani Mucheru Kaundi	236,300.00 100,300.00	57,620.00 38,355.00	70,296.00 46,793.00
47	KAND/250	0.77	John Kamau Nganga Kwanga Kamau(B)	126,300.00 423,100.00	36,525.00 116,495.00	44,561.00 142,124.00
48	KIWA/156	1.41	Rhoda Wanjiru Kamau Kamau Muira Jacinta Gathoni Muiru	47,700.00 837,400.00 32,600.00	5,560.00 218,500.00 1,060.00	6,783.00 266,570.00 1,293.00
49	MAKO/61	2.38	Joseph Njuguna Kagwai	981,292.00	664,860.00	774,440.00 774,440
50	KAND/118	3.68	Wairi Kiiani	2,289,579.00	826,135.00	1,007,885.00
51	MDAK/188	1.96	Samuel Mwangi Kariuki	1,067,278.00	277,490.00	338,538.00
	MDAK/172	0.38	Samuel Mwangi Kariuki	338,405.00	125,270.00	152,829.00
52	MDAK/117	2.95	Kefa Klausa Daniel Gitau Kariuki	1,170,807.00 1,147,295.00	636,000.00 168,000.00	775,920.00 204,960.00
54	KAND/149	8.69	Githigia Kamau	8,500,000.00	2,915,765.00	3,557,233.00
55	KAND/110	1.47	Gitonga Mwangi and Wangui Mwangi	1,356,913.00	406,755.00	496,241.00
56	KIWA/17	3.48	John Mwangi Karanja Haron Kihara Karanja Karanja Chege Wairimu	650,500.00 431,200.00 2,739,294.00	128,185.00 119,449.00 795,885.00	156,386.00 145,728.00 970,980.00
57	KAND/8	3.19	John Mwangi Kibugi	2,618,400.00	816,840.00	994,105.00
58	KIWA/403/404	2.10	Rosemary Wamucii Kamanja	1,259,500.00	362,258.00	441,955.00
59	KAND/7/ 730	3.15 1.59	Gakuya Weringi	1,532,000.00 792,000.00	572,800.00 297,605.00	698,816.00 363,070.00
60	MAKO/231	3.39	Mungaru Muriu Muchai Muriu	2,249,596.00	809,360.00 11,500.00	987,444.00 14,030.00

APPENDIX 4C

C1	C2	C3	C4	C5	C6	C7	
L.A. NO	PARCEL Number	AREA IN HA	Client's Name	CLAIM (KSH)	AWARD (KSH)	AWARD BY THE HIGH COURT (KSH)	
61	NA /206	1.18	Ann Wanjiku Mwaniki	500,000.00	190,645.00	242,347.00	
62	KA RU/298 /299	0.35	Sauvel Mwangi Kamau	397,650.00	110,305.00	144,332.00	
63	MAKO/326 /12	1.73 2.88	Waveru Gachie	366,900.00 1,346,000.00	106,085.00 476,365.00	126,984.00 581,165.00	
64	KIUA/205	4.25	Mary Wambui Githee Joseph Karanja Daniel Munga Githee Julius Ngure Muhia Gilbert Njoroge Muhia	2,051,550.00 55,000.00 - 284,024.00 432,500.00	790,620.00 99,145.00 9,825.00 63,420.00 91,235.00	974,510.00 35,520.00 11,987.00 77,372.00 111,307.00	713,316 2,1420
65	NDAK/404	3.64	Humphrey Chrispus Mwangi	2,937,497.00	1,002,280.00	1,222,782.00	
66	KAND/543	4.24	David Muya Mwangi	2,442,000.00	857,855.00	1,046,583.00	
67	KIUA/421	1.61	Karanja Chege Daniel Chege Karanja	1,171,740.00 244,396.00	329,815.00 31,429.00	402,374.00 38,343.00	
68	KIUA/66	1.24	Mwangi Njoroge	1,117,018.00	337,220.00	411,408.00	
69	MAKO/23	3.25	Danson Karanja Njihia Njihia Nyinyi Benson Mwangi Njihia	476,550.00 1,168,300.00 388,200.00	104,215.00 438,680.00 125,355.00	127,142.00 535,190.00 152,933.00	
70	MAKO/376	0.75	Johnson Ndugu Kiwani	980,000.00	135,070.00	167,785.00	
71	NDAK/209	5.88	Gerishon Karuki Wairia	2,810,000.00	1,111,600.00	1,356,152.00	
72	KAND/197	15.68	Wilfred Thiongo Fredrick Chege Ivan Muchiri Joseph Irungu Nancy Muthoni Inda Wangui Patrick Chege Esphen Nganga Kamau	422,000.00 456,000.00 319,600.00 501,400.00 170,300.00 163,200.00 329,650.00 6,743,000.00	190,700.00 156,410.00 170,430.00 236,740.00 87,310.00 78,870.00 155,875.00 2,716,085.00	232,654.00 190,820.00 207,925.00 288,823.00 106,518.00 96,221.00 190,168.00 3,313,624.00	
73	KIUA/13	3.20	Mary Wambui Githee Joseph Karanja	2,308,200.00 446,250.00	657,025.00 46,220.00	801,571.00 56,388.00	
74	MAKO/227	3.76	Kiero Marenye	1,570,000.00	517,640.00	631,521.00	
75	MAKO/225	2.21	Kanini Kamau Sauvel Kamau James Waveru James Gakuya Kariuki	800,115.00 554,849.00 335,300.00 366,042.00	298,303.00 151,517.00 91,910.00 88,713.00	363,932.00 184,851.00 112,130.00 108,230.00	
76	KIUA/248	2.06	Chege Njeri Mwangi Muhoro	1,187,500.00 224,500.00	480,485.00 53,145.00	586,192.00 64,837.00	
77	MAKO/8	1.85	Gitthiaka Karanja	942,965.00	298,560.00	364,243.00	
78	KIUA/121	0.78	Francis Wainama Mwaniki Fredrick Mwauro Joel	317,550.00 461,560.00	1,045,700.00 150,504.00	182,338.00 183,615.00	
79	KIUA/194	1.20	Geoffrey Kihonge Magana Antony Magana Kangethe Magana Kangethe	46,000.00 119,011.00 1,748,000.00	16,560.00 7,650.00 200,925.00	20,203.00 9,333.00 245,129.00	
80	NDAK/335	5.02	Stanley Kisani Kiwanyi	2,659,000.00	967,240.00	1,180,033.00	
TOTAL				222.60	158,606,031.00	52,595,299.00	64,203,747.00 11,608,448.00

ANTICIPATED PROGRAMME TO COMPLETION

TNWSP PROGRAMME	1991				1992				1993				1994				1995			
	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4
C207 TUNNELS	[Gantt chart bars for C207]																			
C208 THIKA DAM	[Gantt chart bars for C208]																			
S209 NGETHU E & M	[Gantt chart bars for S209]																			
C210 NGETHU CIVIL	[Gantt chart bars for C210]																			
SC211 PIPELINES	[Gantt chart bars for SC211]																			
C212 RESERVOIRS	[Gantt chart bars for C212]																			
C213/1 DISTRIBUTION CIVIL	[Gantt chart bars for C213/1]																			
S214 GIGIRI E & M	[Gantt chart bars for S214]																			
S214/A IIV EQUIPMENT	[Gantt chart bars for S214/A]																			
C215 GIGIRI CIVIL	[Gantt chart bars for C215]																			
S216 INSTRUMENTATION	[Gantt chart bars for S216]																			
C217 HOUSING	[Gantt chart bars for C217]																			
S218 DISTRIBUTION SUPPLY	[Gantt chart bars for S218]																			
=====	INDICATES ORIGINAL CONTRACT PROGRAMME																			
-----	INDICATES ANTICIPATED PROGRAMME OVERRUN																			
*	INDICATES ANTICIPATED COMPLETION DATE																			
+	INDICATES ACTUAL COMPLETION DATE																			

CONTRACT C201 - SUMMARY OF EXTENSIONS OF TIME

ORIGINAL CONTRACT COMPLETION DATE = 17-Jul-93

Date of HH Letter	Ref No. of HH Letter	Cause of Extension of Time	No of days ext	Revised Completion
		Commencement date		22-Jul-90
		Contract period	1092	17-Jul-93
31-Jan-92	750	Delayed Possession of Site	126	20-Nov-93
27-Mar-92	849	Inauguration Ceremony	3	23-Nov-93
15-Mar-93	1587	Suspension No.1 (5/9/92 - 27/9/92) Claim No.30	23	16-Dec-93
16-Aug-93	322	Suspension No.2 (4/11/92 - 15/11/92) Claim No.31	12	28-Dec-93
22-Nov-93	1901	Variations to Drawoff tower & Diversion tunnel	47	13-Feb-94
24-Mar-95	17	Variations to Foundation Treatment Works	23	08-Mar-94
24-Mar-95	17	Suspension of Work in Spillway Tunnel	14	22-Mar-94
24-Mar-95	17	Maximum available due to Suspension No.3	98	28-Jun-94

**NAIROBI CITY COMMISSION
THIRD NAIROBI WATER SUPPLY PROJECT
CONTRACT C208-CONSTRUCTION THIKA DAM
FEBRUARY 1994**

4.1. SUMMARY SHEET

a) PROJECT DATA

Employer : Nairobi City Commission

Technical Representative of the Employer : General Manager
Water & Sewerage Department

Financier : African Development Bank and the
Government of Kenya through
Nairobi City Commission - Water &
Sewerage Department

Engineer : Howard Humphreys (Kenya) Limited
in association with Howard
Humphreys and Partners, UK

Contractor : Strabag Bau-Ag-Lima Joint Venture

Original Contract Value : KShs.829,149,272.95

Currencies of Payments : KShs.248,744,781.90 (DM 54,016,239.28)

Starting Date : 22nd July 1990

Contract Period : 1092 days (extended by 219 days to
1311 days)

Completion Date : 17th July 1993

Revised Completion Date : 24th February 1994

Contract Time Elapsed : 1318 days (100.5% of Contract Period)

b) LAST CERTIFICATION

Certificate No. 37 for December 1993

1. Contract Value Executed	KShs.	882,527,751.67
2. Materials on Site	KShs.	5,426,116.80
3. Variation Orders	KShs.	Paid in D.O.Q
4. Subtotal	KShs.	<u>887,952,868.47</u>
5. Less 10% Retention Money	KShs.	-88,795,386.85
6. Claims	KShs.	90,429,008.39
7. Variation in Prices	KShs.	300,751,102.38
8. Taxes & Duties	KShs.	11,722,451.93
9. Interest	KShs.	39,424,438.21
10. Instrumentation	KShs.	4,712,239.11
11. Subtotal (4+5+6+7+8+9+10)	KShs.	<u>1,246,197,721.62</u>
12. Advance Mobilisation Loan	KShs.	82,914,927.30
13. Less repayment	KShs.	-82,914,927.30
14. Subtotal (12 - 13)	KShs.	<u>0.00</u>
15. Total amount certified now(11+14)	KShs.	1,246,197,721.62
16. Payable - local component	KShs.	(16,680,702.05)
- foreign component	DM	635,600.01
		=====

3

SCHEDULE OF CLAIMS

Claim No. 1	Late Access to Site	126 days extension of time awarded; Final assessment of KShs. 55,571,868 certified.
Claim No. 2	Public Disturbance in 7 - 12 July 1990	Withdrawn.
Claim No. 3	Late Order to Commence Works	Submitted.
Claim No. 4	Late Payment of Advance Mobilisation Loan	Notification only.
Claim No. 5	Interruption of Quarry Operations	Notification only.
Claim No. 30	Suspension of Works No.1	KShs. 23,796,089.06 certified.
Claim No. 31	Suspension of Works No.2	KShs. 11,061,051.33

THIRD NAIROBI WATER SUPPLY PROJECT—PROGRESS REPORT

Contract Description	Total Contract (Estimates) KShs.	Payment Total KShs.	Local Payment KShs.	Foreign Payment	Remarks and Description
C207 (Tunnels)	506,801,028/-	496,794,716.35	226,020,528.50	DM. 25,856,969.81	The Commission took over the work on 2/9/92 Minor items to be completed during maintenance period.
C208 (Thika Dam)	1,289,989,085/-	753,102,920/47	273,522,339/54	DM. 55,448,595.89	Work done } Foundation Treatment about completed } Draw off Tower completed. } Earth works 75% done.
C212 (Reservoir)	120,000,000/-	93,073,038/-	83,904,272/-	Stg. £ 365,798.33	Work done } Earth work completed. } Concrete work completed. } Pipe installation underway.
WSD/M/01—Phase III SEURECA	3,374,800/-	5,155,750/0	2,577,865/45	FF. 322,315.00	Work has commenced.
SC211 Raw & Treated (Water pipeline)	937,119,746/-	909,282,452/-	371,977,546/-	FF. 172,254,419.00	Substantial completion attained and works handed over on 17/11/92.
WSD/3/85 (Dandora Civil Works)	290,820,442/-	252,360,998/-	100,122,804/-	US\$ 7,572,520.00	Work done—Substantial completion attained and works handed over on 29/10/92.
C215 Gigiri Civils	10,051,712/-	5,211,826/94	5,211,826/54		Work done } Earth works 100% completed. } Concrete 95% completed.
C217 Staff Housing	74,595,549/-	72,454,916/-	72,454,916/-		Progress 96% completed. Some work has been com- missioned.
WSD/5/85 Dandora Staff Housing	32,367,775/-	39,750,675/47	39,750,675/47		100% complete Council has taken over.
S209 Ngethu E & M	133,566,429/-	29,432,203/13	2,255,106/29	FF. 8,541,474/50	Equipment being prepared to be shipped to Nairobi. Awarded to Sierco.
C210 Ngethu (Civil)	143,894,767/-	—	—	—	Equipment installation has commenced and continues.
WSD/4/85 Dandora E & M	32,573,577/-	57,819,547/-	8,094,736/-	£Stg. 755,644.63 US\$ 1,174,025.25	Work has commenced.
C213 Distribution System	139,604,724/-	13,960,472/40	13,960,472/40	—	Design underway. Inspection of design carried out. Tender opened on 29/3/93 and under evaluation.
S214—Gigiri Pumping Station (E & M)	27,776,406/60	25,826,977/1817	20,585,538/-	US\$ 237,366.56	Supervision continues.
S214—Gigiri (Power Supply)					Supervision continues.
Howard Humphreys WSD/19/88	Stg. £ 2,922,085.00	KShs. 99,046,000/-	99,650,756/-	Stg. £ 2,913,442.50	Survey work for SC213 civil works and valuation for use to acquire land is in progress.
Sir Alexander Gibbs WSD/4/90	Stg. £ 652,169.00	KShs. 38,999,020/-	36,651,723/79	Stg. £ 568,006.87	
Land Acquisition	121,520,648/50				
S218/1—Supply and Delivery of Pipes	122,172,740/-		9,085,637/69	DM. 1,637,351.51 Stg. £ 197,356.10	Manufacture of pipes to start soon. Instruction to commence work has been given.
C210—Ngethu Treatment works (civil)	143,894,767/20				

Position for other contracts:

- (i) SC216 Engineer has been instructed to re-define scope of the works.
- (ii) *—Denote advanced payment.
- (iii) Environmental Action Programme—Team is operational.
- (iv) Technical Assistance.
 - (a) Sewer master plan—Proposals under evaluation.
 - (b) WSD computerisation—Proposals opened on 22/10/91 and are under evaluation.

(C) STATUS OF PAYMENT - C208

Cert no.	Month	Total in KShs	AMOUNT CERTIFIED		DATE CERTIFIED	AMOUNTS OUTSTANDING AT END FEBRUARY	
			KSHS	DM		KSHS	DM
1-27	Upto Feb 93	960 423 484.59	411 918 154.62	51 046 800.98	-	25 351 531.96	NIL
28	MAR 93	61 810 816.05	24 991 532.86	3 426 643.39	28.05.93	24 991 532.86	1 235 515.82
29	APR 93	18 924 744.89	9 525 509.60	874 754.33	11.06.93	9 525 509.60	456 621.76
30	MAY 93	36 639 750.14	33 398 647.60	301 638.21	16.07.93	33 398 647.60	NIL
31	JUN 93*	(0.03)	(198 085 211.71)	18 435 105.79	12.08.93	(198 085 211.71)	18 435 105.79
32	JULY 93	38 797 789.55	24 343 256.95	1 345 233.37	16.09.93	24 343 256.95	1 345 233.37
33	AUG 93	25 853 554.48	10 246 858.45	1 452 461.24	06.10.93	10 246 858.45	1 452 461.24
34	SEP 93	35 615 019.32	22 051 014.39	1 262 355.04	18.11.93	22 051 014.39	1 262 355.04
35	OCT 93	20 615 555.68	8 380 674.37	1 138 658.10	10.12.93	8 380 674.37	1 138 658.10
36	DEC 93	24 007 532.36	7 748 085.29	1 513 210.52	7.01.94	7 748 085.29	1 513 210.52
37	JAN 94	23 510 224.17	16 680 702.05	635 600.01	28.01.94	16 680 702.05	635 600.01
TOTAL AMOUNT OUTSTANDING AT END FEBRUARY 1994						(15,367,398.17)	27,474,761.65
TOTAL AMOUNT OVERDUE AT END FEBRUARY 1994**						(39 796 185.52)	25 325 951.12

* Adjustment for currency split in accordance with the "Supplementary Agreement"

** amount not paid within 56 days after the date of the Engineer's Certificate

WEDNESDAY, SEPTEMBER 12, 1990

DAILY **NATION****Drug Bill coming**

stage and would be tabled in Parliament soon".

Mr Too was speaking at the opening of a drug law enforcement training course at the CID Training School in Nairobi South "C". He declared war on drug-trafficking and said that it was necessary for the Government to mete out stiffer sentences to traffickers.

He said the fight against drug trafficking was hampered by mistrust and suspicion between police officers and Customs and Excise officials.

The three-week course was organised by the British Government at a cost of more than Sh2 million. Seventeen police and customs officers attended the course.

Mr Too was concerned that the two departments did not fully co-operate "because the officers suspected one another" to the extent that some police and customs officers were not communicating vital information.

He warned that the Government would take stern action against any officer who "did not

do his job".

"If someone's integrity is questionable, we will not hesitate to take action," he declared.

He cited a recent incident in which an official "insider" provided information to a drug trafficker.

He said that Kenya was being used as an important transit point for illicit drugs from the Far East to Europe and America. He called on the two departments to co-operate and "iron out their misunderstanding".

The Director cautioned drug

law enforcement officers against the temptation of bribery by traffickers and said officers should keep abreast of the methods of drug smuggling.

Mr Too said the Government was training more officials to deal with the drug problem more effectively.

He said the Government would in the future train officials from the departments of health, the judiciary and education in a bid to "rid society of the crime".

Mr Too thanked the British Government for funding the

**MP: Aid
ya a must**

He described his impressions of Kenya as "very good indeed". He said the team had visited Icipe (International Centre for Insect Physiology and Ecology) and was impressed with Kenya's research programmes. He said that what came out loud during the visit was the lack of resources, which Kenyans should address themselves to.

The legislator conveyed to Mr Keino greetings from the Speaker of the House of Commons, the Right Honourable Bernard Weatherill.

Mr Keino hoped the Middle East crisis would come to a peaceful solution soon.

He said the admission of Namibia to the Commonwealth Parliamentary Association (CPA) was a good sign and gave the people of South Africa great hope in the future. He said it would be a moment of joy when South Africa joined the CPA after the dismantling of apartheid.

Mr Keino noted President Moi had stressed that no race in South Africa was abhorred but the inhuman system of apartheid was detested.

The luncheon was attended by the British Acting High Commissioner to Kenya, Mr Tom Bryant, and the Minister for Public Works, Mr Timothy Mibel.



Police officers guard a Nairobi City Commission van whose occupants fled the wrath of stone-throwing street hawkers along Temple Road, near the Central Bus Station, yesterday. See Story on Page 1.

Farmers in demo over land

By TONI SITTONI

More than 80 farmers, who have been displaced by the construction of the Water Supply Dam at Ndakaini Village in Murang'a District, yesterday staged a peaceful demonstration in Nairobi, demanding immediate compensation of Sh63 million.

The farmers marched from the City centre to Ardhi House, demanded an audience with the Commissioner of Lands, Mr W. Gacanja.

A spokesman for the delegation, Mr Joseph Muchai Ng'ang'a, told the Nation that

since August last year, they had been waiting for the compensation for the 1,800 acres, which were taken by the Ministry of Lands and Housing for the water project.

He said that some families had already been evicted "while we have not received any compensation or been given alternative land to move to."

Mr Ng'ang'a said the group, which represented families of an estimated 800 people, "have been subjected to untold suffering mentally, psychologically and financially."

He also said life had become hard for the farmers who could not grow food crops because they could be thrown out any time.

He also said that a High Court order in July awarded them Sh63 million as compensation, but the City Commission "refused to give us the money and proposed piecemeal payments of Sh19 million only".

Mr Gacanja later assured the farmers that they would receive all their money on September 18.