UNIVERSITY OF NAIROBI

SCHOOL OF THE BUILT ENVIRONMENT

DEPARTMENT OF REAL ESTATE AND CONSTRUCTION MANAGEMENT

ECONOMIC DEVELOPMENT AS A PUBLIC PURPOSE IN COMPULSORY LAND ACQUISITION: AN INVESTIGATION

BY

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B04/0344/05

A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT FOR THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF ARTS LAND ECONOMICS

JUNE 2009

DECLARATION

CANDIDATE'S DECLARATION:

I, MUTHAMA DENNIS MBUGUA, do hereby declare that this is my original work and has not been presented in any other University for the award of a degree.

Signature..... Date 19/06/09

SUPERVISOR'S DECLARATION:

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

Signature..... Date 22/06/2009

Mr. Lawrence Muchiri

ACKNOWLEDGEMENTS

The success of this project would not have been possible were it not for certain people to whom mention is indispensable.

I thank my supervisor, Mr. Lawrence Muchiri whose guidance, encouragement, critique and support is of unquantifiable measure.

To all lecturers of the School of the Built Environment, Department of Real Estate and Construction Management, I say thank you. Special thanks to Professor W.H.A Olima for his invaluable assistance. Professor P. M Syagga and Dr. Winnie Mwangi thank you for your encouragement over the period of our interaction.

Many thanks to my colleagues and friends in fourth year B.A Land Economics, and particularly Karanja J., Waronja W., and Kabiru R. for your time and ideas. Ageng'a G. Odhiambo and Bridget Makena special thanks to you both.

To everybody else who made this possible it was all you could do and it was enough. Thank you

DEDICATION

I would like to thank the Almighty without whose blessings and supplication this research project would not have been possible. To my Mother for her sacrifices and the rest of the family for your undying love, support and encouragement.

APPENDICES

1. Interview Schedule to all Valuers
2. Introduction Letter
3. High Court Civil Division access letter

ABBREVIATIONS AND ACRONYMS

B.A - Bachelor of Arts Degree

LLB – Bachelor of Law Degree

P.H.D – Doctor of Philosophy

M.A - Master of Arts Degree

i.e. - this is

e.g. - for example

U.S, U.S.A - United States of America

Co. - Company, Corporation

vs. – Versus

£ - British Pound

E.A. – East Africa

CCN – City Council of Nairobi

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ABSTRACT

Compulsory acquisition is the power of the state to extinguish or acquire any title or other interest in land for a public purpose, subject to prompt payment of compensation. It is thus used to acquire private properties from individuals who are in return justly compensated. The right to acquire an interest in land compulsorily has been recognized since very early times to the sovereign power.

Public use has traditionally meant structures open to public but the increasing demand for land for development has led to public use mutating to public purpose which means any measure that conceivably benefits the public. Economic development as a use for compulsory acquisition is relatively new and challenges the public use requirement and thus it faces numerous recurring issues among many unresolved issues. These issues are important in the context of the benefits to 3rd parties.

The study's main goal was to determine to what extent compulsory acquisition may be used in order to facilitate economic development promoted by private entrepreneurs. It had therefore hypothesized that the current definition in Kenya's constitutional and legal framework would render such acquisitions invalid. The study's population included Government valuers, City Council of Nairobi valuers and Private sector valuers all within Nairobi. Data obtained from these and other augmenting sources was statistically analyzed.

The main finding of the study is that although in other countries economic development as a public purpose had been accepted, in Kenya the constitutional and legal definition has not recognized it deeming it null and void as a use.

The study therefore recommends among others a new economic development compulsory acquisition model premised on the Singapore enbloc process. This model will encompass the various modifications and improvements to the current law.

Of all tyrannies, a tyranny exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end, for they do so with the approval of their own conscience.

C.S. Lewis

CHAPTER ONE

1.0 Introduction

The function of government in society is the distribution of the material rewards of production to the people in form of social amenities and welfare services (Nnoli, 1986:159-160).This is regardless of the political system that a country subscribes to. This role is paramount due to the widely held view that the state has a greater role to play in the provision of public services and amenities in addition to regulating the economy.

In providing for these goods and services the government will require land on which to base its production. Land therefore comprises the subject matter of acquisition for the state.

There are three categories of land in Kenya namely; **government land, trust land** and **private land**. In the provision of goods and services the government may use un-alienated or un-utilized government land but where the land is privately owned or under the Trust Land Act jurisdiction it may acquire the land through private negotiations or compulsorily.

Compulsory acquisition is the power of the state to extinguish or acquire any title or other interest in land for a public purpose, subject to prompt payment of compensation (Draft National Land Policy, Ministry of Lands and Housing, 2006). What this implies is that private property can be compulsorily acquired under two pretenses: The property will be taken for a public use and the owner will be justly compensated.

The right to acquire an interest in land compulsorily has been recognized since very early times as inherent to the sovereign power. This right draws its strength from the doctrine of eminent domain reaffirming the fact that even though property rights are protected in the constitution they are not absolute as the state can extinguish them.

In our modern times the right to compulsorily acquire land has assumed an increasing importance as a result of the acceptance by the state of its growing responsibility for the provision of public services and amenities that enhance the welfare of the citizens. Thus the intention of this right is usually to reduce the costs to the public for obtaining these government services through regulation of the economy by the state.

In Kenya, the government views compulsory acquisition as an essential tool of development as it provides land for government needs and helps it fulfill its obligations to the public. The government argues that for provision of services such as water, roads, electricity and sewerage undertakings which all involve both the acquisition of land for exclusive use for the erection of main installations, and, the acquisition of lesser rights over other people's land, for the laying of pipes and cables; the powers of compulsion are required.

The main reason for sanctioning compulsory acquisition is therefore the governments' need for certain specified areas of land and the apparent risk of its having to pay a higher price than it would if there were more potential sellers and also of the cost of negotiations being unnecessarily high.

Similarly duties laid by parliament upon local authorities, government ministries and other statutory bodies in respect of public services such as housing, education, communication services all necessitate the power to acquire the requisite land without laying the authorities concerned open to extortion and un-necessary frustrations.

The principal legislations that confer powers of acquisition on public bodies include the Kenya Constitution, Land Acquisition Act of 1968 (amended in 1990), Water Act, the Electric Power Act, Trust Land Act, Agriculture Act and the recently enacted Roads Authority Act.

Section 75 of the Kenyan Constitution provides for the compulsory acquisition of property for some government department, public authority or public utility company while section 118 provides for the setting apart of the Trust Lands by government. However subsection 3 of section 118 of the Constitution shows that setting apart is analogous or is synonymous with eminent domain. In both instances the reason for acquisition should be for public benefit.

The dominant law under compulsory acquisition is the Land Acquisition Act of 1968, cap 295 of the laws of Kenya. The Act was amended in 1990 though the amendments were more to do with procedures of acquisition rather than the substance (Syagga, 1994) and provides that before any acquisition is undertaken the Minister should be satisfied that there is reasonable justification in public interest for the causing of any hardship that may result to any person interested in the land. What the Act envisaged as a public interest were primarily public works and basic infrastructure development such as transportation e.g. roads, energy, water, housing projects and schools.

With regard to the exercise of the powers of compulsory acquisition the law addresses four principal aspects of compulsory acquisition which are;

a) the use for which the land is being acquired
b) the prior requirements to be fulfilled before the land is acquired
c) the procedure to be followed for the acquisition
d) the safeguards necessary to prevent excesses by the authorities

This study however is on the first aspect i.e. public use, with regard to which the following questions can be asked of our laws.

i. Should the use of compulsory acquisition be limited to only takings for public ownership e.g. roads?

ii. Should use of compulsory acquisition for private to private transfers be limited to when the private party receiving the property is required to make the property available for the public's use e.g. Stadiums, Rift-Valley Railways?
iii. Should the use of compulsory acquisition for private to private transfers never be allowed when it is for economic development purposes?
iv. Should the use of compulsory acquisition only be allowed only where there is a finding of "blight" or where the property in its pre-condemnation use causes harm to the public?
v. Should the measure of value of private property taken by compulsory acquisition include not only the fair market value of the property, but also all other reasonable and necessary costs generated by the condemnation e.g. cost of legal counsel?
vi. In the case of compulsory acquisitions for economic development, should the private property owner whose property is condemned receive the fair market value based on the ultimate use of his or her property as redeveloped?

The concept of "public use" has steadily undergone semantic mutation conflated with notions of 'public usefulness' and 'public benefit' leading to the original "public use" requirement evolving into a test of public purpose. The nominal test for making determinations on whether a use truly constitutes a public use is the three factor analysis set forth in Penn Central v City of New York 48 U.S 104 (1978), in which the court instructed one must balance;

i. the character of the Government action
ii. the economic impact of the use
iii. the reasonable investment – backed expectations of the property owner

As a term public use is considered elastic as it keeps on changing with conditions hence the inability to have one precise definition. This problem is further compounded by the fact that the terms' use is susceptible to two different meanings.

- employment – may mean using compulsory powers only for projects where the public may use the land acquired e.g. roads, hospitals.
- advantage – which may mean using the compulsory powers for any project serving the public good or welfare

The inconsistent application of the public use test and an unclear standard for judicial review has not made matters easy and has meant that the term public purpose continues to be a contentious and narrowly viewed issue in Kenya. As seen from the different cases such as The Re-Kisima Farm Ltd (1978) and New-Munyu Sisal Estate (1972), where the courts gave contradicting views on what constitutes a public purpose and repeatedly stated that one person's property may not be taken for the benefit of another private person without a justifying purpose.

The separation of compulsory land acquisition and compensation from law is illusory as any wrongful application of valuation principles is not merely a valuation issue but an issue of law too.

1.1 Problem Statement

A States' treatment of the right to private property is one of the most telling indicators of its social-economic character and political nature of its government. However the growth of government and the need to provide public goods has greatly eroded the once powerful protection for private property through the use of the power of eminent domain.

Traditionally, public use has meant structures open to the public such as highways, government buildings, and parks. Public purpose has been more comprehensive and less public in the strict sense of the word. A public purpose is any measure that conceivably benefits the public even if that means transferring private property from one individual to another. The evolution of public use to public purpose may seem trivial but the consequences are not as has been experienced in the United States.

The challenge for developing countries like Kenya has been how to adapt the systems of expropriation created to achieve the very different objective of destroying private property rights to the achievement of the aim of provision of collective goods. Under the Kenyan law once the responsible Minister certifies that the land is acquired, that acquisition can only be withdrawn as a matter of Ministerial discretion, and a court of law cannot direct the Minister to withdraw the acquisition.

The common types of uses observed under Kenya's compulsory land acquisition and compensation domain can be classified into;

a. Government Facility – public projects such as highways, schools and hospitals;
b. Public Utility – water projects, generation and distribution of power;
c. Urban Redevelopment.

Developments in the property market and law have ushered in a new controversial public use known as economic development.

Economic development is the process by which the governments (central and local) seek private investment and business activity in the achievement of their goals. When used for land acquisition the primary players are;

- the Government
- the Developer
- the Landowner

As a use for compulsory acquisition it is relatively new and challenges the public use requirement and thus it faces numerous recurring issues among many unresolved issues. These issues are important in the context of the benefits to 3rd parties. The 3rd party is not expected to operate like common carriers that make their services available to all comers.

In this type of compulsory acquisition the coercive power of the state is used to force an unconsented transfer from A to B where the operation of the open market has failed to generate the required bargain by means of normal arm's length dealing. Thus in the use for economic development the literal use of public purpose is negated i.e. the condemned property is not put into use for the general public.

In Prentice v Brisbane City Council, the Supreme Court of Queensland refused to allow a city council to compulsorily acquire land from a private owner merely for the purpose of facilitating a developmental plan submitted to the council by a private property developer. Mansfield CJ saw no reason why a private individual should 'compulsorily, and against his will, be deprived of his property' in order to assist the carrying out of the developer's project.

Ethically speaking, the taking of that which is not yours is a serious moral problem. By taking private property, the moral fortitude of Kenya is called into question. From an economics perspective, the institution of private property is an essential element in strong economies. Solid private property rights give owners incentive to take care of what they own. This contributes to economic growth, trade, and efficient production.

In Kenya despite the positive impacts of land acquisition and public land leasing for local government financing, an examination of land acquisition reveals institutional flaws that lead to socio-economic and administrative problems. Institutional flaws stem from contradictions and inconsistencies in the law that governs land acquisition.

The Land Acquisition Act (cap 295) poorly defines the conditions under which land may be acquired for development purposes. The Act stipulates that land acquisition shall be carried out only when the purpose of the acquisition is to serve public interests. However in the Destro's 1980 case (Nyari, Gigiri) development was accepted as a public purpose.

In the coastal aquaculture case the judge insisted on the need to justify a public purpose, Judge Ringera J. stated that. "....that that notice....must accordingly include the identity of the public for whom the land is acquired and the public interest in respect of which it is required. It is only when such a notice contains such information that a person affected thereby can fairly be expected to seize his right to challenge the legality of the acquisition. That is because the test of legality of the acquisition is whether the land is required for a public body for a public benefit and such purpose is so necessary that it justifies the hardships to the owner....." On appealing the above position was upheld by Justice Tunoi who pointed out that the acquisitions have to be shown to be necessary in the interest of the public purpose as enumerated in Section 75 (1) (a) of the constitution.

However any individual who would like to build a development on non-urban land regardless of whether it will serve the public interest must use state owned land. This implies that land users, if their need cannot be met by existing urban land have to seek land acquisition hence inevitably expanding the legal scope of land acquisition but a question begs is our legal framework expansive enough to entertain acquisitions for economic developments?

In the Susette Kelo v City of New London, the Supreme Court ruled that an economic development purpose may meet the public use criteria even if the property acquired is not in blighted area or in poor condition. This has led to the question, whether there is actually anything left in the concept of property? being posed.

As seen the term public use has continued to have an expanded scope and challenges to it are difficult and seldom successful because great deference is usually given to the findings and conclusions of the condemning authority whilst questions of public purpose are deemed to be questions of law and thus are to be decided by the court and as has been experienced in the U.S and Australia may include any conceivable purpose by acquiring authority.

The assertion of a private form of eminent domain i.e. the 'one-to-one transfer of property', for private rather than public benefit remains anathema in most legal traditions and Kenya is not an exception. This is so even though the taking is coupled with an offer of full monetary compensation

This new concept i.e. economic development as a public purpose, has led to that most difficult divide in modern law the boundary between the public and the private. It has also led to the question; are privately owned assets a mush of social and economic resource to be reallocated at will by the state?

Compulsory acquisition will surely not go away and in certain instances, it may even prove to be a legitimate tool for economic growth and development. This research therefore seeks to question the application of economic development within our legal framework, by answering the question, can the state really demand to purchase absolutely anything it wants from any citizen-owner and then hand it over to some other person or corporation who may make better use of it?

1.2 Objectives

The main objective of this study is to determine to what extent (if at all) compulsory acquisition may be used in order to facilitate economic development promoted by private entrepreneurs. The specific objectives are;

a) To identify the problems that would face the application of economic development as a public use within the Kenyan public use definition.
b) To make recommendations and mitigation measures based on the findings on what can be done to ensure the proper use of economic development as a public use.

1.3 Hypotheses

This study hypothesizes that the specific definition of public use in Kenya's constitutional and legal framework would render acquisitions for economic development purposes null and void.

1.4 Methodology

This study is explanatory in nature based on literature review.

In order to get a comprehensive coverage of the subject different cases will be used for the study. The selection of these cases is based on the need to present a variety of representative situations which reflect as accurately as possible the range and gravity of problems of economic development as a public purpose.

1.4.1 Data Collection

Data collection was done using multi-methods but included mainly secondary data collected from official public documents, books, journals, internet, published and unpublished research works, magazines and newspapers, papers presented in conferences and statutes.

Primary data for the study was sourced through interviews with valuers based in Nairobi. Interview questions aimed at establishing;

- the valuers view of economic development as a public use;
- the valuers' views on compulsory acquisition for economic development purposes;
- the valuers view on the Kelo case in the United States; and
- challenges in the process and possible strategies that could be employed in this type of compulsory land acquisition.

1.4.2 Data Analysis

Qualitative data- An attempt was made to use objective judgment on facts in order to form certain learned opinion on the different issues.

Quantitative data- This was analyzed principally using descriptive statistics in terms of percentages, tabulations, mean and standard deviation.

1.4.3 Data Presentation

The data was presented depending on type of data under consideration and the intended message. The nature of the data was thus the primary influence on presentation techniques.

1.5 Scope of the Study

1.5.1 Conceptual Scope

The study deals with situations where land is acquired compulsorily or set apart for economic development as a public purpose. The provisions for the acquisition or setting apart of land are contained in the Constitution of Kenya, 1963, the Land Acquisition Act (cap 295), the Trust Lands Act (cap 288).

In order to conclusively discuss the problem issues of the study, the research focuses on the problems of compulsory land acquisition in relation to economic development as a public use.

1.5.2 Physical Scope/Study Area

The study covered two countries i.e. United States of America and Australia, where the process was undertaken for economic development purposes.

Interviews were conducted within Nairobi. Nairobi was chosen because this researcher felt that the valuers' population within the city was representative of the valuation professionals in the country. It was also chosen because its where the Headquarters of the Lands Ministry are based in and many major private firms have their head offices in the City.

1.6 Hypothesis Testing Approach

The hypothesis testing method adopted by this study is scenario analysis. Scenario analysis is process of analyzing possible future events by considering alternative possible outcomes. It has been used as a tool to explore the "what if" and "what could be" rather than to focus on the narrow consideration of a single certain future i.e. what will be). The analysis is designed to allow improved decision making by allowing more complete conservation of outcomes and their implications (Mwangi, 2009).

According to (Mwangi, 2009), scenarios are not predictions of the future but instead present a reasonable range of potential outcomes. (Duinker and Greig, 2007; Mwangi, 2009) argue that the purpose of conducting scenario analysis is not to make predictions but rather to allow the opportunity to challenge assumptions and to broaden perspectives.

This study uses scenario analysis to test the hypothesis of the study. This is because compulsory land acquisition is a process whose changes can only result in cumulative effects that may not necessarily be quantified. Besides these processes are administered by the public sector whose main motivation may be that of a socio-economic and/or political motive.

1.7 Justification of the Study

Compulsory acquisition studies in Kenya have been done at three main levels involving mainly two disciplines i.e. Law and Land Economics.

Studies have been done by students who seek to be awarded the professional diploma of the Institution of Surveyors of Kenya, as one of the requirements is that a student writes a topical paper. This professional diploma studies have very little to contribute as individual studies because of their limited scope. The essence of these topical papers is to bring to light the problems that the valuers face in their work and suggest solutions in each particular case.

Students at the University have also written their LLB dissertations or B.A in Land Economics project papers on compulsory acquisition. The students of Law are largely concerned with aspects of justice and legality of acquisition. Owinyi (1977), observed that though the law sounds fair in practice the compensation awarded is inadequate hence unjust. He also noted the poor manner in which the administration treated the people. Apondi (1978) concluded that the acquisition favours the rich against the poor. The poor lack resources both intellectual and financial to assert their wishes to the acquiring authority.

The students of Land Economics are more concerned with the whole process of acquisition and the valuation aspects in the process. Cheruiyot (1988) examined the causative aspects of valuation leading to a big difference between the private valuers' value and the government valuers in the course of compulsory acquisition. Omengo (1996) evaluated the whole process highlighting the various problems encountered in compulsory acquisition of land.

At the post graduate level Kakumu (1996), studied the effect of compulsory acquisition problems on plan implementation while Yahya (1976) examined compulsory acquisition as one of the aspects of land policy (the main focus of his study). Other notable works include Olima and Syagga (1996), research on the impact of Compulsory Land Acquisition on displaced households using the case of the Third Nairobi Water Supply Project.

In Kenya, literature on compulsory land acquisition is limited. No local standard text has been identified on the subject matter of study. A lot of literature for this chapter concerning compulsory acquisition has drawn from the legislations governing compulsory land acquisition. Among the most important being the Constitution of Kenya, 1963; the Land Acquisition Act, Cap 295 and the Trust Lands Act Cap 288. Where the Acts of parliament are silent reference has been made to previously decided court cases to highlight on the intention of parliament regarding the matter it is silent on.

1.8 Significance of the Study

Compulsory Acquisition has recently become a hot-button issue. This is largely due to the June 2005 U.S. Supreme Court decision in Kelo v. New London. In a tight 5-4 decision, the Court instigated a public policy controversy in the timeless debate over private property rights (Dearth and Hardin, 2006; Brock, 2008). The ruling upheld the decision of the Connecticut Supreme Court in a case that allowed the taking of 15 private properties for an economic development project (Garrett and Rothstein, 2007; Brock, 2008).

The Kelo decision is an extremely testing case for all especially the property industry stakeholders all over the world. This is so as the purchase of a "bundle of rights" necessarily includes the acquisition of a bundle of limitations. On the other hand community-oriented takings are largely based on the footing that social obligation is an intrinsic component of private entitlement and in the long run, the community oriented perspective is conducive to a sort of civic equity.

Traditionally, public use has meant structures open to the public such as highways, government buildings, and parks. Public purpose has been more comprehensive and less public in the strict sense of the word. A public purpose is any measure that conceivably benefits the public even if that means transferring private property from one individual to another. The evolution from a public use to a public purpose has raised questions whether there remains any content at all in the concept of property. Indeed, the High Court of Australia is already on record as mooting that 'the ultimate fact about property is that it does not really exist: it is mere illusion."

The consequences of economic development as a public purpose are surely not trivial thus this research.

This study aims at investigating the various challenges in the compulsory land acquisition domain in relation to economic development as a public purpose The findings of this study will therefore help the central government and local governments to improve on the implementation of the existing procedures and processes of compulsory land acquisition for economic development purposes thus improving their service delivery to the public.

This study also emphasizes the fact that the exercise of the sovereign power of compulsory acquisition should always be accomplished in the collective name of the citizenry.

The Kelo-type of taking creates limitless scope for cronyism and corruption in local government which if not checked may open loopholes for grand corruption. This study is therefore important as it tries to address the potential loopholes for corruption and cronyism within the central and local governments.

These types of acquisitions are directed at the home, a category of place which has long been regarded as deserving of special protection in the law. Kenyan case law has consistently deferred to 'the sanctity of a man's home and the privacies of life', a theme echoed almost verbatim in

Article 8 of the European Convention on Human Rights. The demoralization costs of one's dislocation from home are incalculable as home for many is the single most valuable and cherished asset thus the importance of this study to the many households.

This type of compulsory acquisition results, courtesy of the state, in the transfer of a privately held asset to another private actor who holds on exclusionary terms. Unlike the common compulsory acquisition of land, the persons expropriated in this have no guarantee of fair and equal access to the supposedly beneficial land uses made possible by the acquisition. In Kelo, for example, there was to be no public accountability, no public control, as the price of access to the public power of eminent domain. No "common carrier" regulations were going to apply here. The state would have 'no voice in the manner in which the public may avail itself' of the confiscated land resource. It was for this reason that Justice Clarence Thomas, advocated a return to the 'original meaning' of the Public Use Clause, i.e. 'that a government may take property only if it actually uses, or gives the public a legal right to use, the property', should Kenya heed the justice's call and impose stricter measures on public use?

The fundamental feature of these acquisitions is that somebody is being compulsorily acquired just so some other people can get a lot more money. The expropriated person and the land he or she owns are treated simply as a means to a desired fiscal end. The exercise is therefore predatory in nature. Kelo-type evictions are quite deliberately intended to generate money (very substantial amounts of money for somebody else). This study is thus important as there is a deep moral question in exploiting the private assets of others as a vehicle to a capital accumulation in which those others have absolutely no equity share – an immorality which is merely intensified by the fact that the enabling transaction is a forced confiscation of a cherished domestic residence.

The study also tackles a very important issue in Kenya's development agenda the cherished 'security of property' or, as Justice O'Connor expressed it, the need to 'ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's compulsory acquisition power – particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.' The study deems it important, that even though the Government may compel the individual to forfeit her/his property for the public's use, it must not be for the pure benefit of another private person.' This requirement promotes fairness as well as security afforded on all and their property by the constitution.

Development in whatever sector entails a spatial dimension. Kenya as a developing country requires land for the implementation of development projects that are vital in its quest of attaining its ambitious vision 2030. The need for compulsory acquisition arises due to the fact that more often than not the required land is not available. This study is therefore important as it will identify the problems facing the compulsory land acquisition domain in Kenya offering

possible solutions to them, which will be of utmost importance to the various government development agencies.

The study will also be important in the field of project planning and management where land is a prerequisite for the implementation of the physical plans, it will be useful for the successful planning and implementation of a project by the project manager/ planner especially where the land will be acquired compulsorily.

The findings of this study will also provide useful insights into policy matters. The policy makers will find the study a useful instrument for further manipulation of land into a leading input in national development.

In the academic realm it will provide additional important knowledge in a relatively under-studied area in Kenya as it seeks to establish a conclusive linkage between the acquisition domain and the expanding scope of the public purpose by answering the question; should private corporations be allowed to harness eminent domain for the predominating purpose of corporate profit?

1.9 Limitation of the Study

The study was limited as it was based on cases of acquisitions that have taken place in the U.S and Australia and this ruled out the use of household questionnaires. The opinion of the affected persons was therefore not available for statistical analysis because of the distance constraint. However there was no better way.

Data obtained from official documents was to the very best descriptive over-rally. In this kind of study when certain information was missing from official records it was not possible to find it elsewhere. Thus it was impossible to generate data except to do with what was available. The study was also dependent to a large extent on the cooperation of the officials who were privy to the relevant public documents.

The time period offered for the study did not allow for an extensive study of the study area. The finance was also inadequate to allow for an in-depth study.

However the data collected, analyzed and presented in this study was enough and reliable to give a representative picture of the problems of the study.

CHAPTER TWO

LITERATURE REVIEW

2.0 Land

In the ordinary usage of the term, land is taken to refer to that part of the earth's structure not covered with water. "…..land is the habitation of man, the store from which he must draw for all his needs, the material to which his labour must be applied for the supply of all his desires…..on the land we are born, from it we live, to it we return again…..Take away from man all that belongs to land, and he is but a disembodied spirit" Henry George.

Land is the physical thing that encompasses the surface of the earth and all things attached to it (Dale & McLaughlin, 1988). Legally it includes the physical and abstract attributes such as rights and interests embedded on it i.e. law defines the distribution (ownership) of wealth that accrues from land whereas economically it's any portion of the earth over which rights of ownership, stewardship or use may be exercised including the earth's surface, water covered lands, water and mineral resources as well as fixtures and resource to earth naturally or artificially i.e. the generation of wealth from land as a physical entity.

Through the interaction and cross-interaction between man and the environment (or the physical entity of land) the economic mechanism is able to allocate land resource to specific uses depending on how the society values 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.

Land provides the formulation for the social and economic activities of people and is both a commodity and a source of wealth. As land is essential to life and society it is important to many disciplines including; **Law**- which deals with ownership and use of land, **Economics**- where land is taken as one of the agents of production, **Sociology**- which deals with the dual nature of land as a resource to be shared by all and as a commodity that can be owned, traded and used by individuals and **Geography**- this describes the physical element of land and the activities of the people who use it.

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.

The four main concepts of land are;

a) Geographical and Environmental
b) Governmental and Legal
c) Social concept
d) Economic concept

In Kenya land is the basic resource available for food and economic development. All land is to be used for the benefit of the people of Kenya and is not supposed to be used as a commodity for economic speculation. The state thus endeavours to ensure that land is used productively and efficiently.

The nature and scope of our land resource is as per the 1994-1996, Development Plan; Kenya covers an area approximately 587, 900sq.km of which 567,750 sq. km is land surface while the rest is inland water covering 20, 150sq.km. About 80% of the land surface (461, 400sq. km) is arid and semi-arid. The remaining 20% (115,300sq.km) of total area, land in water areas include, is of high and medium potential. In addition, there are Indian Ocean Territorial Waters covering 14, 300sq.km and an Exclusive Economic Zone covering an area of 143, 100 sq. km as stipulated in the Maritime Zone Act of 1989. The EEZ is where Kenya has exclusive economic rights with respect to the exploration, conservation and management natural resources of the zone.

2.1 Rights and Interests In or On Land

A right or interest in or on land means a claim to land to enjoy, use or restrict the use of land and for each right there will be an owner. Land rights today are a complex issue and a major concern. Land rights have manifestations in terms of;

- Land resources and management
- Environmental conservation and protection
- Human rights
- Minority rights
- Establishment of the broad-zone of interaction between the individual interest and public interest.

The existing land rights in Kenya are the child of both foreign colonial occupation and the legacy that was bequeathed to Kenya at independence.

2.1.1 What constitutes Rights?

This is more of a theoretical discussion on the genealogy of rights. According to Robert V. Andelson; a right is a relationship between value and obligations. It is the claim that value be respected. This claim has an *objective pole* and a *subjective pole*. The former is the demand that value be respected in things external to us. The latter is the demand made upon our total being by potentialities that lie within us. The internal potentiality for fulfillment of a destined and rightly demands nurture, and renders doubly grave obligation for positive response towards realization of that end. This is teleological meaning of noblesse oblige.

Though seemingly abstract the above lays ground for the understanding of land rights. Rights do not exist in a vacuum. They have to be contextualized within a framework or order within which they are recognized and given force. In this framework rights are indivisible and not hierarchical. Rights do not admit hierarchical arrangements since at the bottom they are one. Neither for the

same reason can they conflict with one another. Only freedoms which are reciprocal require for their realization the violation of other freedoms. Where there is a conflict between apparent particularizations of reciprocal freedoms close analysis will reveal that one or more of the competing particularizations is non-reciprocal and therefore false.

The framework in which rights are contextualized is therefore very important. It must be general to the whole human situation in order to ensure that no person is treated arbitrarily. The framework should provide a terrain or what has been called "level playing field" in which all men and women are capable of standing in permanent and voluntary relations with one another guided by the principle of reciprocity.

Land rights are usually expressed as a relationship between a person and an object of ownership; the obstruction or interference with that relationship would constitute a taking and compensation would be required for direct losses flowing from the taking. The right to land or property rights is therefore one of the fundamental human rights. It is the right of a human being to have access to rational and to own land/property anywhere in this country. But this right is justified "if and to the extent that it conditions to the general welfare of the society".

The argument in this project is that land/property rights must be properly balanced with equity and basic human needs thus the need for establishing a balance or equilibrium in the broad zone of interaction between the individual interest and public interest and reconciliation of different rights in the domain of land acquisition and compensation in Kenya.

There is nowhere in the land domain where this conflicting interaction between individual rights and interests and public interest is more pronounced than in area of compulsory acquisition of land and compensation for land in Kenya. It is also the domain where human rights and trusteeship are violated with impunity.

Although the term land ownership is in common use, it is not possible in a strict sense to own land itself. It is the right to use that one can own, such rights may be held through custom or through the more formal processes of the law.

Interests recognized under our laws are;

a. Estates

b. Servitudes

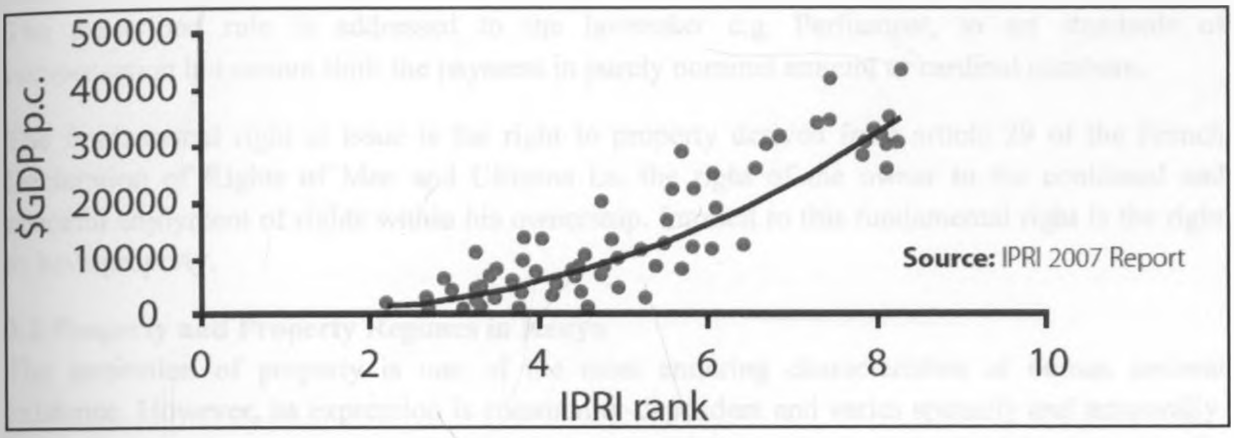
c. Encumbrance

Table 2.1.1: Strength of Property Rights & Relationship to GDP

IPRI quartile	Ave. GDP per capita
Top 25 per cent	$32,994
2nd quartile	$15,679
3rd quartile	$7,665
Bottom 25 per cent	$4,294

Source: Louise Staley, 2007

Figure 2.1.1: International Property Index and Gross Domestic Product per Capita



Source: Louise Staley, 2007

2.1.2 Constitutional and Statutory balance between Private and Public Interests in Land Acquisition and Compensation Domain

The modern age is one in which valuation in democracies determines the balance between interest of the individual and that of the state in taxation, rating, acquisition, economic controls, planning and conflicts which arise from legislation (Aritho, 2000). Article 17 of the Declaration of Rights of Man and Citizens prescribes a just indemnity.

What the constitution and the legislature give is the basis of the compensation law and the basis of the statutory judicial valuation in Kenya in matters of compulsorily acquired lands. In my opinion a declaration or recognition of principles on which full compensation is to be determined is one thing, their practical application is something different altogether.

It has been the experience of many practicing valuers in the country that where valuations are carried out for the purposes of determining the constitutionally and statutorily prescribed full and prompt compensation for lands that are compulsorily acquired in Kenya, genuine dilemmas in defining terms for valuing the land acquired has led to the problems of ascribing value to land and property in a clear cut and unequivocal way (Aritho, 2000). The consequences of these dilemmas and misconceptions have characterized the history of compulsory acquisitions of lands

in Kenya rendering it socially vexing, incoherent and lacking in social sensitivity towards and consideration of the people who are expropriated in Kenya.

Various issues have emerged which are related to the establishment of the broad zone between the individual interest and public interest. In the context of human rights the concern for balancing these competing rights has led the international community to pass the resolutions (such as those of the Rio Summit) and adopt covenants.

2.1.3 Constitutional Principles and Guarantees

These principles prescribe the balance between interests of the community and persons affected. The prescribed rule is addressed to the lawmaker e.g. Parliament, to set standards of compensation but cannot limit the payment in purely nominal amount or cardinal numbers.

The fundamental right at issue is the right to property derived from article 29 of the French Declaration of Rights of Man and Citizens i.e. the right of the owner to the continued and peaceful enjoyment of rights within his ownership. Implicit to this fundamental right is the right to have property.

2.2 Property and Property Regimes in Kenya

The institution of property is one of the most enduring characteristics of human societal existence. However, its expression is community-dependent and varies spatially and temporally. Each phase of human society – from the primitive societies, through the feudal systems to the modern industrial and commercial societies – has given its own content to the notion of property. Indeed, property relations and other elements of social order such as political groups and economic policies largely constitute the substructure on which social order of any community rests.

Historically property was seen as the right to a thing. Property has evolved from the early conceptions as a "thing" to being seen as a social relation between people. The term property is normally traced to the description in the 18th Century by William Blackstone as a right over a thing. Blackstone conceived of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."

By the beginning of the 20th century, Blackstone's postulation was challenged. Subsequently property came to be viewed as a bundle of rights. Indeed, the traditional conception of property as thing ownership has been replaced with the new conception of property as an abstract bundle of legal relations. In a series of writings, Hohfield saw the crux of a property not as a relationship between a person and an object as suggested by Blackstone but rather a nexus of relationships among people regarding an object. Hohfeld is credited with creating the postulation of property as a "bundle of rights", which conception is popular to date. The bundle of rights metaphor de-emphasizes the importance of the thing with regard to which the rights are claimed. Instead each right, power, privilege or duty is but one stick in the aggregate bundle that constitutes the

property relationship. Proceeding from this standpoint, A.M. Honore catalogued a generally accepted list of the incidents of property or ownership. He stated that: "ownership comprises the right to possess, right to use, the right to manage, the right to income of the thing, the right to the capital, the right to security, the right or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity." However, it must be added to list the right to exclude, which although considered core, was missing from Honore's list above.

Despite the above developments, the term property still eludes precise definition. There is a lot of resort to descriptive as opposed to definitive approaches to discussing the term property. In Kenya, the Constitution Section 75 states that, "No property of any description shall be compulsorily taken possession of, and no interest or right over property of any description shall be compulsorily acquired." This provision refers to all the different representations of property – movable or immovable, corporeal or incorporeal – that can be enjoyed, and represents the well-accepted notion of property as a bundle of rights.

The range of interests represented in this constitutional order stood out in the case of Haridas Chagan Lal v. Kericho Urban District council. The case concerned sanctity of interests conferred by a lease granted to the plaintiff in 1928, subject only to the conditions that the land was to be used solely for residential and business purposes. In 1960, the plaintiff sought to erect a petrol pump on the land. But the relevant land board refused to grant permission on ground that to operate a petrol pump would be contrary to recently-enacted by-laws passed under the Local Government ordinance of 1960. The court held that the provision of the by-laws that takes away the property interest without compensation is in conflict with section 75 of the Constitution. The court further opined that a person could not be deprived of his or her property without compensation even if there is a clearly expressed intention in an enactment.

The property rights regime in Kenya is a product of both pre-colonial and colonial legacies. While the pre-colonial period was dominated by customary law of native communities for purposes of land ownership, access and use of natural resources, the colonial era imposed the English law of property by asserting radical title to all land in the protectorate and granting Her Majesty's commissioner the power to grant private title to land. Settlers were granted either freehold or leasehold interests in land for 99 years to pave way for the economic exploitation of the colony through agriculture.

Customary tenure of native communities was considered inferior to English property law and could not provide ownership and disposal rights over the land as the settlers wanted. The systems of land tenure existing in the colonial period were carried over into the independent Kenya resulting in three general systems of land ownership in the country.

The land tenure systems operative in Kenya has been characterized as private/individual/modern, communal/customary and public/state/trust/government. Compulsory land acquisition occurs in

these types of land. It is therefore important to understand how property rights are regulated under each tenure regime as it is has implications on how compulsory acquisitions carried out in that tenure system.

2.2.1 Community/Customary Tenure

Under this regime of tenure holding, rights over land and land-based resources are held by a clearly defined group of users. They hold a clearly defined set of rights and obligations. Rights to use the resources are distributed equitably amongst members of the group and regulated through use of guidelines which traditionally were handed over from generation to generation.

This regime embodies the concept of common property that was wrongly referred to as the tragedy of the commons by Hardin. In Hardin's postulation, common property regime is inimical to sustainable management of resources as it leads to overuse of the resource.

In Kenya customary tenure continues to govern the management and use of land and land-based resources even despite spirited attempts to convert it to other tenure regimes. Trust lands are administered under the Trust Lands Act cap 288 where section 53 states that the Commissioner of Lands is empowered to administer the land as an agent of the county councils.

2.2.2 Public/Government Land Tenure

This refers to the situation in which land is owned by the public as a collective entity. In Kenya, however, this tenure regime is equated to the situation where the government owns property in land as a private entity. The land referred to as government lands originates from the Crown Lands ordinance of 1902 which declared all "waste and unoccupied land" in the protectorate "Crown Land". By an amendment to the Crown Lands Ordinance in 1915, Crown Land was expanded to include land in actual occupation of "natives." In 1938, a further amendment removed native reserves from Crown Land. Land in Native reserves became trust lands at independence governed by the Constitution and the Trust Lands Act.

The Crown Lands Ordinance as amended became the Government Lands Act and consequently all land that had been defined as Crowns Lands became government land. These lands became vested in the President, who had powers to make grants and dispositions over unalienated government lands either by himself or in certain circumstances through the Commissioner of Lands acting on his behalf. The land is administered under the Government Lands Act cap 280.

2.2.3 Private Land Tenure

This refers to a tenure regime under which land and land-based resources are owned by individuals. Individual ownership of land and land-based resources is justified on the basis of the incentives said to be engendered by such ownership. It is argued that the possibility of personal gain fosters sound management of resources. That is, individual ownership is said to be the most rational, efficient, and productive way of managing resources.

In Kenya, the process of land reform and conversion has focused on converting all forms of tenure to individual tenure. Despite the perceived benefits of private tenure the reality has been huge shortcomings in environmental and natural resource conservation within individual tenure regimes. This is because individual tenure ignores wider societal interests.

2.3 Compensation Models

A compulsory acquisition can be equated with a free transaction only in respect of compensation not compulsion. So adequate compensation balances acquisition and only the public good can balance the compulsion. (Keith Davies, Law of Compulsory Purchase and Compensation).

2.3.1 *Purchase Model*

This is a model based on the notions of contract in property transactions i.e. an agreement as to price is reached after some bargaining process. Once the deal is over the process of transfer commences. The acquisition entitles the owner to a price for his property.

If pretium is to be determined then market is not only of evidential value but is the main objective of compensation.

2.3.2 *The Rights Model*

This model proceeds on the basis that acquisition of private property occurs in public interest which deprives "the expropriate of his bundle of legal rights and compensation is necessary to even out the inequalities produced over and above the burden shared by all within the legal system" . The entitlement would therefore "not depend on proving the expropriation of marketable interest in private property".

The expropriate is normally looking for distributive justice in determination of his unique position. The assessment of compensation follows the same principles which are applicable to the amount of damages in tort". The purpose of compensation therefore is indemnification and the rule is that of equivalence, applying in respect of interference with rights. The objective is to restore the financial position which he would have been in had he not suffered that interference.

In Kenya, our constitutional and statutory provisions on compulsory acquisition straddle both models.

2.4 Doctrines underlying Compulsory Acquisition

This is an examination of the source of powers that rationalize compulsory acquisition of private property in Kenya. The powers derive both from conceptual issues of political economy and legal theory and its application.

In the case of political economy compulsory acquisition is justified by the doctrine of eminent domain (dominium eminent). The doctrine was introduced in Kenya by the colonial administration and remained as a matter of colonial heritage.

Legal theory on the other hand is concerned with civil liberties as checks and balances of the power of eminent domain i.e. chapter 5 of the Constitution section 75 specifically aims at protecting the individual right to property as a free land 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.

These doctrines tend to give the government the ultimate right of land ownership in a country.

2.4.1 Doctrine of Eminent Domain

"The right of parliament, as part of its legislature omnipotence to authorize the compulsory acquisition of land by some government department, public authority or public utility company" (Hayton 1982: 563; Omengo, 1996).

Its history dates back to the biblical times of King Ahab of Samaria who sought the vineyard of Naboth. Naboth was offered a better vineyard (under the substitution or replacement theory of damages) or the vineyards worth in money (under the indemnification theory). He asserted a right of refusal which has never existed in law and paid for his refusal with his life.

The annals of Tacitus show that the Roman government exercised this power to acquire the materials with which it built and repaired aqueducts. The Greeks on the other hand solved a dispute between Athens and Eleusis by providing for arbitration of value of certain properties sought to be acquired by the Athenians with their values on either side.

In those ancient times the exercise of the rights of eminent domain was infrequent and the procedures irregular in the light of modern developments. During all that time the doctrine of eminent domain existed in principle and practice but not in name.

The first case of eminent domain in English law is called the "Dobbie Process" or "the King's prerogative in Saltpeter case". The English King needed saltpeter for munitions and took a saltpeter mine from a private individual. The private party sued the king and the court established the right of the sovereign to take "private property for public use" without liability for trespass but requiring payment of compensation for the taken saltpeter.

The doctrine was first defined by a Dutch philosopher, Hugo Grotius in his publication, "Law of War and Peace" where he held that eminent domain as a right of a state over, the property such that the state "may use, own, 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....."

Samuel von Pufendorf criticized the usage of the term "eminent domain" in his analysis of the control of property and made the following assertions;

- Control, in the proprietary sense, as of that which is one's own, he termed "dominium"
- Control, in the Government or Sovereign sense, as of that which belongs to others, he termed "Imperium"

It was his conclusion that a more accurate term for the power to take property for public use would be "Imperium eminens" i.e. imperial eminence.

However eminent domain continues to be used and is held to be the power of the nation or a sovereign state to take or to authorize the taking of private property for public use without the owner's consent conditioned upon payment of just compensation.

Eminent domain provides the base upon which the laws are enacted providing for the compulsory acquisition of land.

2.4.1.1 *Inverse Condemnation*

Due to the increase in environmental problems a new type of eminent domain known as inverse condemnation has emerged. In this proceeding, the property owner, rather than the acquiring body initiates the action.

An inverse condemnation proceeding is often brought by a property owner when it appears that the taker of the property does not intend to bring eminent domain proceedings. The owner alleges that the government has acquired an interest in his or her property without giving compensation such as when the government pollutes a stream crossing private land.

2.4.1.2 *Private Compulsory Acquisition*

Compulsory acquisition has for long been carried out by "the public", meaning national or local government and the involvement of public interests in this process means it need not be challenged. This means without saying that when public authorities have had to acquire land it is usually a matter of public interest.

A more complicated scenario has been evolving in the last two decades however due to the privatization of traditionally public undertakings e.g. former state bodies with monopolies being transferred into limited companies for private consortia purposes whose main goals are profit making.

As a result of this transfer from public bodies to private sector entities and with the need of land for various purposes still persisting the question of private compulsory acquisition has arisen. The point of contention is how the public interest requirement is to be met in order for compulsory acquisition to be possible?

2.4.2 Doctrine of Sovereignty

The power of eminent domain is inherent in the theory of sovereignty which is more relevant in times of war. The legal principle is that all property is "owned' by the state and that authority to make laws for that property is ultimate ownership.

It is premised on the assumption that by the state guarding its sovereignty it is able to protect the individual right of its citizen both from internal to external violations thus all the rights including the right to property are enjoyed by the individual citizen under the auspices of the state. Through its guardianship the state becomes the ultimate right holder over individual property.

In a democratic nation like ours, sovereignty is the people, collectively, over all the territory of that nation. What private parties can "own" is not the land itself, but an equitable interest in title to an estate in the land or property and it is that equitable interest that one is entitled to compensation if title to the estate is taken.

In Kenya the whole compass of landed property is ultimately vested in the state through the radical title concept. Individuals can only acquire a right of occupancy or use i.e. dominium of use, which can be extinguished by the state.

2.4.3 Doctrine of Escheat and Bona Vacantia

Eminent domain is supported by the principles of escheat and bona vacantia (vacant interest).

The principle 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 in section 8A provides that where a person dies intestate and without heirs his estate, interest or right to a specific land escheat to the government.

The principle of bona vacantia holds that when any piece of land is vacant; it reverts back to the state (main basis of the Crown Lands Ordinance, 1902). The state is the final heir of land or an estate under this doctrine.

2.5 Legislations governing Compulsory Acquisition of Land

Compulsory acquisition is a statutory process hence the requirement to understand the relevant laws that govern it. The acquisition of land without prior private treaty may take place in two forms which are governed by different Acts of Parliament.

First is the acquisition of surveyed, adjudicated and registered land commonly referred to as compulsory acquisition of land and secondly is the acquisition of land where no survey, adjudication or registration has taken place in the process known as setting apart.

Chanan Singh J. in the case of New Munyu Sisal Estate Ltd. Vs. Attorney General, 1969 identified the relevant legislations governing compulsory acquisition as;

- Section 75 of the Constitution of Kenya, 1963.
- The Land Acquisition Act cap 295, Laws of Kenya.

In the case of setting apart; The Trust Land Act (cap 288) and Chapter IX of the Constitution apply.

2.5.1 The Constitution of Kenya

It is the supreme legal document such that subject to its section 47 if any law is inconsistent with it, the constitution shall prevail, and the other law, to the extent of the inconsistency shall be deemed void.

The current Kenya Constitution is supposed to guarantee individual land rights. Questions however arise;

- Why has the spirit of application annulled "the intentions of the text"?
- What is the nature of the terrain in which these land rights are exercised?
- What is the nature of the enforceable land rights which have been found wanting?

The constitution entrenches the power of eminent domain in two instances.

Section 75; which 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 or the development and utilization of property so as to promote the public benefit;
ii. the necessity is such as afford justification for any hardship caused to any persons;
iii. provision is made by law for prompt payment of full compensation.

The section gives the state the authority to acquire any property but it does not tell us who decides whether a particular acquisition is necessary for the stated necessity (a role usually played by the Minister in charge of Lands).

If there is a necessity, the state must go further to show that the necessity is such as justified to the hardship caused to the individuals.

The third condition is that in addition to necessity there must be a law applicable that provides for prompt and full compensation (satisfied by the enactment of Land Acquisition Act cap 295).

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

i. the determination of his interest or right, the legality of the taking of possession or the acquisition of property interest or right and the amount of any compensation to which he is entitled; and
ii. the purpose of obtaining prompt payment of that compensation

The constitution further provides that the appeal doesn't have to be direct to the High Court but could be an appeal from an authority or tribunal as specified by Parliament i.e. the applicable law.

In the case of un-registered lands known as Trust Lands sections 117 and 118 apply.

Section 117 empowers the county council in which ownership of the land vests in trust for the inhabitant 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 person's 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 individual whose rights are thereby affected

Section 118 on the other hand makes provision for the acquisition effected at the insistence of state. It gives the president power to authorize acquisition of land for;

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

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 laws prescribing the manner in which and conditions subject to which such acquisitions is to be effected.

2.5.2 The Trust Land Act cap 288

Subsection 114 (I) b of the constitution defines Trust land as areas of land that were known before 1st June, 1963 as special reserves, temporary special reserves or special leasehold areas. The unique characteristics of Trust lands are;

i. It is held by the 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 inexistent in the realm of property law.

Trust land may be set apart at the insistence of either the government (section 7) or the county council under whose jurisdiction the law falls.

Where the county council sets apart the land an elaborate procedure is followed;

i. A notice is published in the Gazette by the county council specifying the boundaries of the land required
ii. The county council notifies the divisional land board of the proposal to set apart
iii. The chairman of the Board then fixes day not less than one month and not more than three months when the board shall meet to consider the proposal
iv. The people of the area are served with a notice about the meeting
v. The board hears the presentations from all the people who are present in the meeting and then submits a written recommendation.
vi. A majority or three quarter vote of all members of the council would be required for the land to be set apart where the recommendation by the board is positive or negative respectively (section 13 d)

In setting apart by the Government, section 8 (1) provides that 'full' compensation shall be promptly paid by the government to any resident 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 occupation..... Or in respect of the applicant having been otherwise prejudicially affected". This statement is made in 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 one to interpret what is "right of occupation" visa-v-vis other rights which 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 a rather 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 administrations valuation of Africans' land (Kakumu, 1996).

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 dissatisfied with the award the appeal is not that friendly;

Subsection 100 (4) and (5) detail the process of appeal. It starts with appeal to the Provincial Agricultural Board through the District Commissioner 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 Court. From here, he can go a step further to pressure his rights of appeal to the High Court whose decision is final.

The procedure discussed above also applies in the 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 party)".

2.5.3 The Land Acquisition Act cap 295

This Act is applicable for titles registered under Registered Lands Act or Land Titles Act and leases under Government Lands Act (Kakumu, 1996). The Act was introduced after the 1969 amendment of the Indian Land Acquisition Act, 1894 then applicable in Kenya, Apondi (1978) concluded that there was no fundamental difference in the substance and application of the acquisition statutes.

The Act was amended in 1990 by the Land Acquisition amendment Bill, so as to incorporate among others, the Land Acquisition Compensation Tribunal and the new treatment of plant and machinery.

2.5.3.1 The Compulsory Acquisition Procedure under the Act

a) Preliminary to the Acquisition

Under section 3, the minister causes a preliminary notice of acquisition to be published in the Gazette and copies of the same are sent to the interested persons, (wherever the minister is satisfied that the need for such acquisition is likely to arise).

The commissioner then authorizes the survey of the land to determine its suitability for the intended purpose. Section 32, imposes a penalty in the form of imprisonment for a term not exceeding one month or a fine not exceeding one thousand shillings or both on those who willfully hinder or obstruct or interfere with the authorized survey.

After the survey, any resultant damages are compensated for fully (section 5).

b) The Minister Satisfaction

According to section 6 (1), before any acquisition of land is made compulsorily, the Minister must be satisfied;

i. that the land is required for the purpose of a public body;
ii. that the acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote public benefit;
iii. that any hardship caused to the interested person or persons is reasonably justified.

The Minister then directs the commissioner to acquire the land. It was held by the Court of Appeal in Commissioner for Lands Vs Coastal Aquaculture Ltd that the notice must state the public purpose for which the land is being acquired and if it is for a public body state the name of that body. In this case the notice had neither indicated the purpose nor the name of the public body. The court declared the notice defective and by an order of certiorari quashed the acquisition. Pall JJ, observed that for compulsory acquisition to be lawful it must strictly comply with the provisions of the Constitution and the Land acquisition Act.

c) Notice of Intention to Acquire

The Commissioner upon receipt of the directive from the Minister causes a notice to be published in the Gazette that the Government intends to acquire the specified land and again copies of the same served on every person appearing to be interested in the land section 6 (2). Notice of intention to acquire the land includes the following (Muoka 1994:6); Plot number, registration area, registered owner and approximate area to be acquired in hectares.

Notices are served as specified under section 33 which says they are to be served by;

I. Delivery to the person personally
II. Sending it by registered mail
III. Leaving it with the occupier of the land where the whereabouts of the person is not known or where the occupier is no occupier, by affixing it upon some prominent part of the land or
IV. If it is a body corporate, society or association of persons, by serving it personally on the secretary, director or other officers, or leaving it or sending it by registered post, where there is no registered post at any place where it carries on business or by method c above.

d) The Acquisition of Plant and Machinery

A person interested in plant and machinery may with permission from the Commissioner severe and remove the plant and machinery if they are not required for the purpose for which the land is being acquired (Section 6A).

He is expected to notify the commissioner not later than fifteen days before the inquiry date set by the commissioner for hearing of claims as to compensation, of his desire to severe and remove the plant and machinery. The commissioners' response whether he can remove the plant and machinery or not is made within fifteen days of the notice.

e) Valuation and Inspection

The inspection and valuation of land under compulsory acquisition is carried out by the Department of Lands' (Ministry of Land), Valuers. The department is also responsible for setting apart of Trust Land.

The valuation is usually done before the date of inquiry as to compensation and after the notice of intention to acquire the land has been published.

f) Inquiry as to Compensation

The inquiry for hearing of claims to compensation by the persons interested in the land is held on a date, appointed by the commissioner, not earlier than thirty days and not later than twelve months after the publication of the notice of intention to acquire the land in the Gazette section 9(1).

The notice of inquiry is published at least fifteen days before the inquiry and copies served on all persons appearing to the commissioner to be interested in the land (Section 9-1 (a) and (b). All interested persons are, according to section 9 (2), required to make a written claim to compensation not later than the date of the inquiry.

The commissioner, on the inquiry, investigates into and determines the person interested in the land, the value of the land and the compensation payable to each person (Section 9-3 (a), (b) and (c).

In Re Kisima Farm Ltd, the High Court of Kenya held that the Commissioner for Lands in determining claims to compensation under the Land Acquisition Act should act judicially, and accordingly issued an order of prohibition restraining him from continuing to hold an inquiry into compensation. The Judge further observed that the existence of a right of appeal from the Commissioner's decision does not preclude judicial review.

The Commissioner is also empowered to postpone an inquiry or adjourn the hearing of an inquiry from time to time with sufficient cause. This however should not extend the inquiry beyond twenty four months from the date appointed earlier for holding of the inquiry (Section (4)).

At the inquiry, the commissioner wields all the powers of the court to summon and examine witnesses, to administer oaths and affirmations and to compel the production and delivery to him of documents of title to the land (Section 9 (5)).

g) Award of Compensation

At the end of the inquiry the Commissioner prepares a written award of compensation to each person whom he has determined to be interested in the land (Section 10 (1)). The compensation must be full (Section 8).

Every award is a final and conclusive evidence of;

- the area of the land to be acquired,
- the value in the opinion of the Commissioner
- the amount of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry (Section 10 (2))

Section 12 (1) allows the commissioner of lands to agree with the landowner, that instead of receiving an award he can receive a grant of land provided its value does not exceed the amount of compensation which the commissioner feels would have been amended.

Discrepancy found to exist between the specified area in the award and the actual area does not invalidate the award (Section 10 (3)); However if the area of the land acquired is found to be greater than the area in respect of which an award has been made then compensation shall be paid in respect of the right area of land (Section 18).

h) Payment of compensation

Compensation is paid according to the awards determined by the Commissioner as soon as practical. This is made by way of cheques channeled to the persons interested through the District commissioner of the District of the interested persons (Muoka, 1994).

Payment may be made to the court and the interested persons notified of the same where;

- there is no person competent to receive the payment, or
- the person entitled does not consent to receive the amount awarded, or
- there is a dispute as to the right of the persons entitled to receive the compensation or as to the shares in which it is to be paid (Section 13)

The Commissioner under section 15 of the Act is empowered to recover compensation made where a person receives payment either in error or before it has been established that some other person is rightfully entitled to the payment.

i) Taking of Possession and Vesting

The Commissioner is expected to serve a notice to any persons interested in the land informing them that on a specified date in the notice, possession of the land will be taken and the title to the land vest in the government. The date of possession should not be later than sixty days after the awards have been made (Section 19 (1)).

Where land is required urgently e.g. for purposes of defence, the Minister may direct the commissioner to take possession of uncultivated or pasture or arable land thirty days after the date of publication of the notice of intention to acquire whether compensation has been paid or not.

j) Matters referred to Court

Under section 28 (1), the Commissioner is empowered to refer the following matters to court;

a) the construction, validity or effect of any instrument
b) the persons interested in land
c) the extent and nature of the interest
d) the person to whom compensation is payable
e) the share in which compensation is to be paid to tenants in common
f) the question whether or not any part of the building is reasonably required for the full and impaired use of the building; or
g) the condition of any land at the expiration of the term for which it is acquired

k) Appeals on the Acquisition

A person dissatisfied with the award of the Commissioner may apply to the Land Acquisition Compensation Tribunal (Section 29 (7));

a) the determination of his interest or right in or over the land; or
b) the amount of compensation awarded to him for the land acquired under Section 10; or
c) to amount of compensation paid or offered to him under Section 5, 9, 4(A), 23, 25 or 26.

The public body for whose purpose the land is acquired may apply to the Tribunal against;

a) the amount of compensation awarded under section 10; or
b) the amount of compensation paid or offered under section 5, 9, 4(A), 23, 25 or 26.

Where the compensation according to the opinion of the tribunal, ought to have been greater, interest is paid on the excess amount at a prescribed rate not less than six percent per annum from the date on which the possession of land was taken to the date of payment of the excess amount into court.

The tribunal consists of one advocate and two valuers hence the technical cases regarding compensation matters would be listened to by specialists not judges who do not understand their intricacies clearly whilst the legal matters are referred to the latter.

Appeals against the Tribunal are directed to the court as required by Section 72 (3) of the constitution of Kenya, 1963.

Appeals made on the ground that;

i. the decision of the tribunal was contrary to law or to some usage having the force of law (Section 29- 10 (a))
ii. the decision failed to determine the material issue of law having the force of law (Section 29- 10 (b))
iii. a substantial error or effect or defect in the procedure provided by or under this Act has produced error or defect in the decision of the case upon the merits (Section 29- 10l

An interested person dissatisfied with the decision of the court can appeal further to the Court of Appeal (Section 29- 11)

2.5.3.2 Determination of Compensation

The determination of compensation payable to a person interested in land being acquired compulsorily under section 75, 117 and 118 of the constitution of Kenya, 1963 is a highly specialized discipline of the valuation profession. It requires a thorough understanding of both the legal provision as to the determination of compensation and the valuation technique necessary in such determination.

Section 75 (1) I, 117 (4) and 118 (4) (b) of the Constitution of Kenya, 1963; Section 8 and 25 of the Land Acquisition Act (cap 295) and Section 8 and 13 (4) of the Trust Land Act (cap 288), all laws of Kenya, require full compensation to be paid to all persons interested in the land being acquired. The Constitution of Kenya, 1963 and the Trust Land Act (cap 288) do not describe how the full compensation is to be determined.

The Land Acquisition Act cap 295, laws of Kenya which is the dominant Act of Parliament in compulsory acquisition contains a schedule that outlines the principles upon which full compensation is to be based.

The schedule contains those matters to be considered and those to be ignored in the determination of the compensation. The schedule also allows for the additional 15% of market value consideration in the market value of land.

2.5.3.2.1 Matters to be considered

As per paragraph 2 of the schedule to the Land Acquisition Act cap 295 the following are the matters to be considered in the determination of compensation and not any other;

i. The market value of land;
ii. Damage sustained or likely to be sustained by persons interested at the time of the Commissioner taking possession of the land by reason of severing the land from his other land;;
iii. Damage sustained or likely to be sustained by persons interested at the time of the Commissioner taking possession of the land by reasons of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner or his actual earnings;
iv. If in consequence of the acquisition, any of the persons interested is or will be compelled to change his residence or place of business, reasonable expenses incidental to the change;
v. Damage genuinely resulting from diminution of the profit of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the commissioner takes possession of the land.

2.5.3.2.2 Matters to be ignored

Paragraph 3 of the same schedule outlines the following as matters to be ignored in the determination of compensation:

i. The degree of urgency which has led to the acquisition
ii. Any disinclination of the person interested, to part with the land
iii. Damage sustained by the person interested which if caused by a private person, would not be a good cause of action
iv. Damage which is likely to be caused to the land after the date of publication in the Gazette, of the notice of intention to acquire the land or in consequence of the use to which the land will be put
v. Any increase in the actual value of the land as at the date of publication of the notice of intention to acquire likely to accrue from the use to which the land will be put when required

DISREGARDING THE SCHEME

The "Pointe Gourde" rule

One established principle of compensation law is the so-called Pointe-Gourde rule, that compensation "cannot include an increase in value which is entirely due to the scheme underlying the acquisition." The rule applies to decreases as well as increases in value.

Other recent formulations include:

(1) Value must be assessed "upon a consideration of the state of affairs which would have existed, if there had been no scheme of acquisition".

(2) "The principle is that any effect on the value of the land acquired arising from the public purpose or public purposes prompting the acquisition, whether from their adoption by the authority or from their implementation, is to be disregarded".

The basic idea is simple. A railway project may cause blight and reduced land values while it is being planned and constructed; but once its completion is imminent, it may result in higher land values in residential areas close to the new stations. The Pointe-Gourde rule says that land acquired by the authority for the project should be bought at prices which reflect neither the blight nor the enhancement.

A related issue is that of "betterment". If someone whose land is acquired for the railway retains other land which is benefited by it, should that benefit be offset against the compensation?

The Point Gourde Case

Land in Trinidad used as a quarry was acquired in connection with the establishment of a U.S. naval base. As the stated case showed, the land had "a special suitability or adaptability" for producing quarry products, and had a market value as quarry land before the acquisition. The quarry business of the owners was totally extinguished by the acquisition and in assessing compensation the tribunal "was largely guided by the estimate it formed of the prospective profits". Of the total award of $101,000, the sum of $86,000, which was not challenged, included the value of the quarry as a going concern, and made allowance for its "special suitability or adaptability" for that purpose.

The issue concerned an additional sum of $15,000, explained in the Case as follows:

The tribunal considered that the market value of the quarry land and business would be increased if the United States needs were supplied from this quarry land on a commercial basis as greater prospective profits might be expected. As it was put in the "facts taken from the judgment of the Judicial Committee", the sum of $15,000 was "evidently awarded as the measure of the loss of that element of prospective extra profit".

The issue raised by the local court was whether this item was excluded by the rule which disregards underlying schemes. The Privy Council ruled that the rule was concerned with the use of the land itself, not of the products of the land. The use of the quarried stone in construction of the naval base, though of particular importance to the United States on account of their special needs, did not constitute a special adaptability of the land for any purpose.

However, in the Privy Council it was argued, in the alternative, that the $15,000 should be disallowed under the common law rule. The Privy Council stated that "it was an increase in value which is entirely due to the scheme underlying the acquisition. The Privy Council termed the disallowed amount as an increase in value which was not the case as it was an increase in claim which is a totally different thing.

Lord Mac Dermott stated the rule as follows:

> It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.

He rejected the argument that the relevant scheme was the acquisition of the quarry land, not the construction of the naval base, given the finding in the case that the land was "required by the United States for the establishment of a naval base in Trinidad."

Lord McDermott's statement of the principle has formed the starting point for subsequent discussions, and the case has given its name to the rule i.e. **the Point-Gourde Principle**.

An important aspect of this case is that the development issue was not on the land subject to acquisition. Previous cases had been concerned principally with the development potential of the subject land itself. This was the first reported case where the same principle was used in terms to exclude the enhanced value of the subject land attributable to use in connection with development on other land within the same scheme.

As Denyer-Green notes, the proximity of the naval base would have given the quarry added value, even if it had not been compulsorily acquired. He comments:

> The latter value was betterment and for the first time it was excluded from the compensation. Hence the significance of the case to present day acquisitions where market value may well be enhanced by acquiring authority schemes.

The facts of the case had with them the difficulty of understanding how the disputed items could have been justified and how the amount could have been assessed. The true justification of the case is that all compensatable items had already been accounted for in the sums agreed by the parties and that the particular benefit accruing to the Government over building materials was of no concern to the claimant owners whatever.

This principle distracts valuers and lawyers from "the willing seller" rule which is the true rule of market value. Where it produces results at variance with those of the "willing seller" rule, the point gourde rule is seen to be dubious and where the results are the same it seems ridiculous.

The leading cases in compulsory acquisition which illustrate the problem show that the point gourde rule works irrationally and unpredictably.

In Wilson v Liverpool Corporation, it deprived the claimant of some of the development value which on the facts clearly accrued to his land. Conversely in Jelson ltd v Blably District Council, it gave the claimant development value which on the facts his land did not possess (this happened because the "rule" requires valuers to "disregard decrease", as well as an increase if it is "entirely due to the scheme underlying the scheme").

A modern restatement

In ***Bolton MBC v Tudor Properties*, 2000,** an authoritative summary of the common-law rule as it has now developed was given by Mummery LJ:

(1) The Pointe Gourde principle is not a principle of valuation. It is a principle of law. If the principle was not applied by the Tribunal or was misinterpreted or if the Tribunal reached a conclusion which no reasonable tribunal could reach (e.g. because there was no evidence to support it), the decision is erroneous in law. But a decision is not legally wrong simply because this court, if it had been the decision making body (which it is not), would have taken a different view of the evidence and arrived at a different conclusion on the scope of the underlying scheme.

(2) The purpose of the principle is to prevent the compensation for the value of the land on compulsory acquisition from being inflated by the very scheme which gives rise to the acquisition (Widgery LJ, Wilson v Liverpool Corporation, 1971) an enhancement in value resulting entirely from the underlying scheme has to be ignored. The principle does not, however, require the valuer to ignore an increase in value attributable to factors other than the underlying scheme, such as the pre-scheme value of the land for development.

(3) In order to ascertain what is to be ignored by the valuer it is first necessary to delimit the scope of the scheme. The compulsory acquisition itself cannot be the scheme which underlies it: JA Pye (Oxford) Limited v Kingswood BC, 1998). The compulsory acquisition of the relevant land presupposes that there was an underlying scheme of development, in consequence of which the Compulsory acquisition was made.

(4) The underlying scheme need not, as a matter of law, be confined to the area of land compulsorily acquired or to the specific purposes of the Compulsory acquisition. The acquisition may be only a small part of the underlying scheme: Bird and Bird v Wakefield MBC, 1978. Nor is it necessary for the underlying scheme to provide for the compulsory acquisition of land for the purpose for which the compulsory acquisition ultimately made.

(5) A "scheme" (also referred to in some authorities as a "project" or "undertaking") is neither a technical term nor a legally precise concept. A scheme may take shape over a number of years. It may be regarded as a scheme even before it is fully fledged. Its impact on land values may therefore increase as it passes through various stages from vague beginnings to a final form.

(6) The Tribunal must ascertain the existence and extent of the underlying scheme from a consideration of all the relevant evidence about the past, present and future activities. It must then determine, as a matter of fact, whether those activities are properly to be regarded as part of the underlying scheme: Wilson v Liverpool Corporation, [1971]. Only when that factual question has been decided is it possible to answer the next question which is one of valuation: what part of the market value of the land acquired is entirely attributable to the enhancing effect of the scheme underlying the acquisition? Answering that question involves imagining a state of affairs antedating the scheme – a "no scheme world" (as it was described in Wards Construction (Medway) Limited v Barclays Bank plc (1994) and ascertaining what "bargain ... would have been made between the claimant and a prospective developer-purchaser had the acquiring authority not intervened."

vi. Any outlay or additions or improvement to the land, incurred after the date of publication in the Gazette of the notice of intention to acquire the land, unless the additions or improvements were necessary for the maintenance of any building in a proper state of repair.

2.6 Other Acts of Parliament

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

2.6.1 Agriculture Act cap 318: It makes provision for acquisition of land in section 186(A) which 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 interest out of their own volition then 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.

2.6.2 Electric Power Act cap 314: It makes provision for acquisition of land for public bodies for purpose of generating electricity under Section 134. The acquisition is first authorized by the Minister for the time being is in charge of energy before it can be carried forward under the relevant laws of acquisition.

The Act provides that before application is made for the Minister's approval, the 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 at least for two successive in some 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 land proposed to be so acquired.

Every such notice must state that any aggrieved party or interested party who wants to make representations or objections to the applications could do so by letter addressed to the Minister.

After expiration of the 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.

2.6.3 Water Act cap 372: Section 8 (1) states if that the Minister may purchase or acquire land on recommendation that in public interest that, that land is needed for the conservation, improvement or use of water.

Subsection 2 further states that the acquisition shall be deemed to be for a public purpose under the law relating to the compulsory acquisition of land i.e. Land Acquisition Act cap 295.

2.6.4 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 in respect of any disturbance of prospecting or mining rights, in addition to any other compensation."

2.6.5 Irrigation Act cap 347: Section 14, Subsections 1 and 2, provide that the Minister on designating an area of land as a national irrigation scheme shall in accordance with the law relating to compulsory acquisition of land take such steps as may be necessary to acquire the right, title or interest in such land and to vest it in the Board for the irrigation Act purposes.

Subsections 3 and 4, states that in the case of Trust Land forming part of the national irrigation scheme the Minister may take the land on lease agreed on with the County Council concerned. In default of the agreement between the Minister and the County council as to the terms of a lease under subsection 3, the provisions of section 118 of the Constitution of Kenya shall have effect.

2.7 ECONOMIC DEVELOPMENT

Economic development is a process in which an economy not only experiences an increase in its real output per head but also undergoes major structural changes such as infrastructure development and a reallocation of resources between the various sectors. Economic growth on the other hand may be defined as an increase in a country's productive capacity identifiable by a sustained rise in real national income over time. It is therefore obvious that economic growth and economic development are closely related.

2.7.1 Nature of Development

Over time the demand for land resources changes brought about by changes in the size, income and tastes of population, the rate of growth of economic activity, methods of transport, techniques of production and distribution. On the supply side existing buildings wear out or become less suitable to present uses and the cost of constructing new buildings or adapting old buildings changes. Development is the response to such changes.

As a result of these changes in the conditions of demand and supply changes occur. These changes may take different forms;

a) Modification of the existing building through conversion e.g. houses divided into flats
b) Redevelopment – where existing buildings are demolished and replaced by new ones
c) New development – through outward expansion or undeveloped land e.g. suburban housing

This paper will be concerned with (b) and (c) and how compulsory land acquisition can facilitate these developments.

2.7.2 Approaches to Development in the Private and Public Sectors

In the private sector development is carried out by; (i) occupiers (ii) specialist developers or (iii) by financial institutions, property companies or construction firms working through the price system. Irrespective of whom carries out the development the same basic decisions and calculations have to be made for each has to pay the full opportunity cost in order to secure a site.

Public sector developments are usually taken on a mixture of political, social and economic grounds. Public development therefore tends to fluctuate both with the politics of the government in power and the current overall requirements of its stabilization policy.

Public and private partnership- The private sector market decisions in this case are influenced by public sector interventions. The public sector is usually responsible for creating an economic and social climate conduscive to private investment whilst it guides private investment decisions so that they generate desired economic development outcomes.

2.7.3 Public Sector Developments

The objective of an economic system is to allocate scarce resources in such a way that society's' welfare is maximized however welfare is subjective to the individual person thus it cannot be quantified in absolute terms.

In Pareto's sense welfare improvement is achieved where one person is made better off without anyone being made worse off. This requirement is however too restrictive as securing benefits for some people almost invariably incurs costs to others thus we can assert that welfare improvement occurs when those who gain from a change can fully compensate those who lose. This improvement is not definite as welfare may be affected by the inherent income redistribution underlying the change when compensation is not actually paid.

Property development represents a reallocation of resources to increase welfare. In the private sector it takes place through the market system and in the public sector the decisions have a political content and apply the use of Cost and Benefits Analysis to impart objectivity. Whichever method is used it must be evaluated on the welfare test i.e. does it allocate resources in an optimal way? Or is it possible to increase welfare by a further reshuffling of resources?

2.8 Compulsory Acquisition for Economic Growth

2.8.1 The Economics of Kelo

Economist Patricia Munch provides an analysis of the economics of eminent domain. In her analysis, a land developer needs to assemble contiguous parcels of property. All parcels have identical characteristics, and there is nothing special about any particular location. The lowest price i.e. reservation price, a property owner will accept for his property differs across property owners. Munch assumes that each developer offers all owners the same price for their properties and that this price is the expected maximum reservation price of all property owners. Munch then argues that the full additional cost of adding a parcel to a development is likely to be larger than just the cost of that parcel. The reason is that, if the developer only needs a few parcels, then he can easily find a cluster in which the maximum reservation price is low. Since the developer (by assumption) pays the maximum reservation price to each owner, it follows that the cost of each parcel is relatively low.

The larger the number of parcels the developer needs to assemble, however, the more difficult it is to find a cluster with a low maximum reservation price. The general result is that, as long as the developer can do a little searching, the per-parcel cost will be strictly increasing with the number of parcels.

The most likely result is inefficient little land assembly. As in the standard single buyer story (what economists term a monopsony), assembling more parcels requires the developer to offer each homeowner the same (high) price. Assembly stops when the cost to the developer of adding

a parcel equals the benefit to him from adding it. In other words, assembly stops when there is no additional profit from adding parcels. The problem, however, is that if the developer could offer different sellers different amounts of money i.e., he could price discriminate, he could probably offer them prices at which they willingly sell and at which he makes a larger profit. One could argue that the sellers and the buyer should figure this out, but it is expensive for the developer to deal individually with homeowners, and homeowners are reluctant to sell at prices below recent offers. As long as all parcels must sell for the same price, there are likely to be willing sellers whose homes are not purchased.

Now suppose the developer has the power of eminent domain. This makes the reservation prices irrelevant: Every homeowner is paid the market price for his home. Now, land assembly stops when the market price equals the benefit to the developer from adding the parcel. The problem in this case is that the market price is below the reservation price for some of these sellers. In other words, they are unwilling sellers. The result is too much land assembly under eminent domain.

Munch notes that the assumption that the developer is a single buyer is central to the analysis. If there is competition among developers, then some will develop better techniques for determining seller reservation prices. If communities choose these developers, then more-efficient land assembly will result. Munch also briefly discusses the "holdout" problem. She notes that there is no inefficiency when the owner of a parcel that has some unique value perhaps as a location tries to benefit financially from its uniqueness. The only genuine holdout problem she considers occurs if some sellers believe that other sellers did not capture all the rents that were possible to them in their transactions with the developer. Misinformation and speculation along these lines could, once again, prevent willing buyers and willing sellers from reaching a transaction.

2.8.2 The Private Good vs. Public Goods

The work by Munch suggests eminent domain can improve upon market outcomes under certain conditions, however, her analysis fails to address several economic issues involving eminent domain that have broader implications for economic development and growth. Specifically, any economic analysis of eminent domain as it relates to the *Kelo* decision must recognize the tradeoffs inherent in giving local governments this kind of power over local economic development. Those who approve of eminent domain as it was used in *Kelo* fail to recognize the difference between what economists call "private goods" and "public goods." They also fail to see the inefficiencies often generated from government intervention in private markets.

An understanding of the differences between a public good and a private good and the ineffectiveness of governments in providing a private good reveals the incorrect premise behind the *Kelo* decision. Private goods are both "rival in consumption" and excludable. Rival in consumption means that one person's consumption of a private good denies others the opportunity to enjoy the good. The price of a private good is essentially a result of the good's scarcity— as additional resources are employed to produce more of the good, the opportunity cost and, thus, the marginal costs, of producing the private good rises. This increasing

opportunity cost increases the price and, as a result, some individuals will be excluded from consuming the good because they are not willing to pay the higher price.

Unlike a private good, a public good is both non-rival in consumption and non-excludable. The textbook example of a pure public good is national defense; other examples of similar goods include parks and highways. One person's consumption of a public good does not deny others from consuming the good, and people can use the public good without paying for it. As a result, the marginal cost of an additional user of a public good is zero, and this suggests a market price of zero. Economists justify public (government) provision of public goods because too little of the good would be available (given a market price of zero) if production of the good was left to the private market.

Government provision of public goods and, thus, the taking of private property to provide these goods, can be justified under the narrow definition of public use, i.e., used by the community as a whole. However, the taking of private property from one person and giving it to another for economic development, even if one considers the holdout problem and payment of just compensation, is unlikely to create a net benefit to society. It is more likely to create economic inefficiencies and to reduce economic growth.

Historical anecdotal information and formal academic research show that, in general, countries with less government involvement in private markets experience greater levels of economic growth. The only possible exceptions in recent times are the Asian Tigers (e.g., South Korea, Taiwan and now China), but even there, markets are used extensively, and the strategies used by those governments have been difficult to replicate elsewhere.

When governments interfere in the private market, whether it is a market for apples, cars or property, the likely result is greater economic inefficiency and less economic growth. The reason is that even the most well-intentioned policymaker cannot comprehend or replicate the complex interactions of buyers and sellers that occur in free markets.

Of course, there will be certain groups that do benefit from the taking of private property, such as developers, property managers and local politicians. Developers and property managers will gain income from developing the property. Many local politicians favor targeted economic development because of what they see as the immediate benefits from development, such as increased employment and tax revenue. These economic benefits also translate into political benefits for those politicians who pledge to improve local economic development. Not realized, however, is that the supposed immediate and tangible benefits from taking private property for economic development are outweighed by the greater economic costs of government intervention in private markets.

In *The Taking of Prosperity* by Garrett and Rothstein, the authors assert that compulsory acquisition for development has a negative economic effect. As illustrated by the following simple example:

Suppose a local government takes kshs.100, 000 from Otieno and gives it to Kamau, who plans to open a business. Kamau then uses the kshs.100, 000 to open his business, which creates tax revenue and jobs. From a social welfare point of view, Otieno loses kshs.100, 000 and the savings or consumption benefits of his kshs.100, 000. Kamau gains kshs.100, 000 to open a business and jobs are created. By taking the kshs.100, 000 from Otieno and giving it to Kamau, the local government is essentially saying that Kamau can create greater societal wealth with Otieno's kshs.100, 000 than Otieno can. The same would be true if local governments paid Otieno for his house and then gave the property to Kamau for development purposes.

Garrett and Rothstein argue that replicating this scenario thousands or millions of times will result in a zero-sum gain. Furthermore, they claim that given additional expenditures inherent in compulsory acquisition proceedings, the net result will be negative (Brock, 2008). Unfortunately, their argument is inherently flawed due to its simplicity. They simply assume that Kamau's venture will not create greater societal wealth. There is no basis for this assumption, yet they replicate it a million times to conclude that compulsory acquisition is a zero-sum endeavor. If compulsory acquisition is available to private/public enterprises, they have gained kshs.100, 000 in property while Otieno has been reimbursed at least kshs.100, 000. Since many areas targeted by development projects are dilapidated, it is difficult to understand how new capital will not be a positive net gain. The resulting loss or gain on the project is shouldered by the development enterprise. The financial scrutiny by the private development company will not allow negative growth projects to go forward. When the private developer is obligated contractually, this will most certainly be true.

Compulsory acquisition may not be the cause of economic growth, but it can help ensure positive growth projects are not derailed. "Compulsory acquisition is essential...to proceed with redevelopment in an open and transparent fashion and to achieve efficient and effective redevelopment" (Echeverria, 2005; Brock, 2008). However, the Castle Coalition cites evidence to the contrary. In a Scottsdale, Arizona case, the Castle Coalition claims the threat of compulsory acquisition "stonewalled $2 billion of successful redevelopment for years" with money flowing in "only after Scottsdale removed the threat of compulsory acquisition" (2007). This point is very plausible. However, it paints a dire picture of American property rights that simply is not true.

Practically speaking, new developments need not worry about the use of compulsory acquisition. These developments are the reason for compulsory acquisition if land assembly problems occur. Subsequently, they will not be targeted in the future by compulsory acquisition unless the property or area becomes obsolete or if a necessary public use is identified. This could happen anywhere, and the occurrence does not signal weak or irrational property rights.

2.8.3 Is compulsory acquisition required for development?

Case studies have shown the importance of eminent domain in helping government assemble small parcels of land, promoting economic development and revitalizing failing or depressed communities.

2.8.3.1 Lakewood, Colorado: Belmar: Villa Italia Mall –1.4 million square feet of gross leasable area in the City of Lakewood, Colorado. Began to decline in the early 1990s. The city initiated eminent domain proceedings to acquire the land, following the town center plan proposed by Continuum, and created Belmar anticipated sales tax revenues of $100 million over the next 20 years. Belmar is becoming Lakewood's thriving new downtown

2.8.3.2 Richfield, Minnesota: Best Buy: Best Buy decided to build a headquarters complex in the 43-acre tax-increment financing (TIF) district of Richfield, Minnesota in 2000. After the condemnation proceedings in 2000 and court-ordered meditation in 2003, Best Buy acquired the land and officially relocated to the 1.5 million square-foot site in March 2003. It is expected that the redeveloped site will generate between $7 million to $8.4 million in annual property taxes, about 10 times of what the area previously created ($768,000).

2.8.3.3 New York City: Times Square: In 1980, New York City collaborated with the Empire State Development Corporation (ESDC) on the 42ndSt. Development Project (42 DP). Development of new office towers, entertainment/retail facilities, hotels, and other improvements. Turn Times Square into a safe, lively center for entertainment, shopping and business. ESDC acquired parcels of land through condemnation or regulation or outright public development. Through 20-year development with constant public controversy and litigation, the Times Square has been revitalized. Its redevelopment has now become a model for other cities.

Property rights activists in the U.S cite successful ventures such as Disney World and an entirely new city created in Howard County, Maryland as examples of development without compulsory acquisition [Castle Coalition, 2006, 9; Brock, 2008]. In fact, the majority of development is completed without compulsory acquisition in Kenya. In Nairobi, redevelopment agencies have not been able to use compulsory acquisition since for some time now, but construction has been ongoing. However, this assertion does not account for inflation nor does it satisfactorily link the value of construction with the absence of compulsory acquisition.

The real issue for development in relation to compulsory acquisition is the refusal power of property owners to sell their property. This can cause serious problems in land assembly for development, especially when ideal tracts are identified. Real estate is a distinctive commodity in that every parcel is absolutely finite and geographically unique. The use of compulsory acquisition spawns from the bundle of rights inherent in every property. In turn, the rights secured through private property leads to the holdout problem.

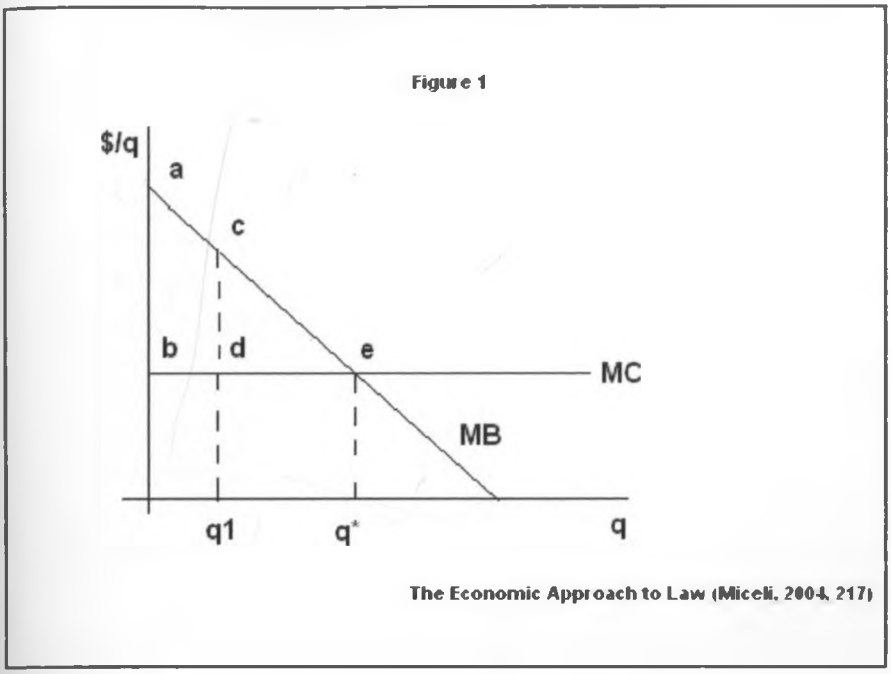
2.8.4 The Holdout Problem

The holdout problem is a term used to describe a property owner who refuses to sell his property. The economics of the holdout or assembly problem can be best explained using a model derived by Thomas J. Miceli in his book, ***The Economic Approach to Law***

In figure 1, Miceli explores the economic advantage gained by property owners who choose to hold out. By examining the graph closely, the optimum number of parcels to be acquired can be found at q* where the marginal cost and marginal benefit curves intersect. If the project is successfully completed, the surplus realized by the project can be found in the triangle *abe*. If any individual property owner chooses to holdout, the model is thrown out of equilibrium to q_1. The holdout owner can then demand the true reservation price, represented by height d, plus any amount of the additional surplus represented by triangle *cde*. If other properties are required for the development to succeed, the project is essentially vetoed by one holdout owner. The triangle *cde* would then represent a deadweight loss to the development company. In practice, while holdout owners are usually in the minority, there tends to be more than one. Consequently, development projects face the holdout problem repeatedly. Obviously, "this problem poses a serious impediment to the completion of the project" (Miceli, 2004; Brock 2008).

In holdout scenarios, the property owner can disrupt a development project not only by holding out, but also by requiring an irrational amount of compensation. Miceli characterizes this advantage as granting a "significant monopoly power on individual owners, who can hold out for prices well in excess of their true valuations" (2004, 216; Brock 2008). In doing so, there is an economic market failure on the supply side caused by irrational expectations (Miceli, 2004; Brock 2008).

Figure 2.8.4: The Holdout Problem



Source: Brock, 2008

q^* = Equilibrium quantity of parcels

q_1 = Holdout point

MC = Reservation price of an individual parcel

MB = Marginal Benefit of project as a function of q

Miceli further explains the economics of the holdout problem in relation to public and private use in four distinct categories:

1. Private ventures without an assembly problem.

2. Private ventures with an assembly problem.

3. Public ventures without an assembly problem.

4. Public ventures with an assembly problem.

In situation 1, a private entity with no assembly problem has no need for compulsory acquisition. In situation 4, a public entity can lawfully use the power of compulsory acquisition for a public good such as a park. However, situations 2 and 3 have conflicting values.

In situation 3, the public good being provided could justify compulsory acquisition, but there is no assembly problem. If there is no holdout problem, "the transaction costs of using the market are typically less than that of using compulsory acquisition" which minimizes the risk of government abuse (Miceli, 2004; Brock 2008).

Situation 2 represents the issue at hand in the Kelo case. A private entity cannot exercise the power of compulsory acquisition, but the holdout problem calls for its use. In practice, the Courts have upheld numerous private/public development enterprises given a holdout problem. In economic evaluations, the "takings power should be extended to any party, public or private" that is facing a holdout problem (Miceli, 2004; Brock 2008).

By allowing compulsory acquisition in privately driven ventures, value is not destroyed by the irrational reservation prices of holdout owners. Additionally, the mere threat of compulsory acquisition will distinguish the holdout problem in most situations. This will ultimately save the extra expenses associated with litigation (Miceli and Segerson, 2006; Brock 2008). In the end, the best economic solution for the whole is realized when compulsory acquisition can be utilized in holdout situations. In cause-effect terms, the holdout problem represents the economic basis for the use of compulsory acquisition. However, many compulsory acquisition cases regarding private development are adjudicated in terms of public benefits. To address this misguided practice, Miceli and Segerson proposed a two-pronged test.

The use of compulsory acquisition is justifiable if the project will concurrently create a social benefit and is hindered by a holdout problem. In an ideal world, the first restraint will ensure that all parties involved will be considered. Unfortunately, the test does not address whether or not the compensation will be just. The authors suggest that if the two-pronged test is met, "the fairness issue stemming from under-compensation is more appropriately addressed by an adjustment in the amount of compensation" (Miceli and Segerson, 2006; Brock 2008). By considering the level of compensation, the gap between the equilibrium quantity of a development project and the inefficiency created by a holdout can be lessened.

2.8.5 Compensation

The compensation schedule of the Land acquisition Act requires a fair market value reimbursed to the owner of the acquired property. The total compensation in forced acquisitions can be split into two parts, the fair market value portion and a personal portion. The fair market value does not include the personal portion which includes a variety of less tangible factors such as economic loss, subjective loss, and dignitary harms. To determine fair market value in forced sales is difficult. There is no true market to dictate the price. This is an essential concept of real estate appraisal. It is assumed under fair market evaluations that the "buyer and seller are typically motivated" (The Appraisal Institute, 2001). In projects threatening compulsory acquisition, the buyer and sometimes even the seller are not typically motivated. For this reason, the personal portion is compensated individually to account for uncertainty in transactions affected by compulsory acquisition.

Economic losses include relocation and replacement expenses above and beyond the market value of the condemned property. Compared to other costs, economic losses are much easier to quantify. The cost of boxes, a moving van, or a replacement home can be determined without much hassle. In reality, economic losses can be easily compensated in compulsory acquisition cases.

An exceedingly difficult parameter to measure is subjective loss. Subjective value on a home, land or business can vary greatly between owners even if the parcels are similar. Sentimental connection can force an owner's reservation price well above fair market value. These feelings can even lead to emotional trauma in the wake of condemnation, and must be considered if compulsory acquisition is utilized (Garnett, 2006; Brock 2008). Empirical research in the fields of cognitive psychology and behavioral economics has shown widespread tendencies among all sorts of property owners to hold on to their entitlements. Studies have explored both the negative physiological and psychological effects of the sudden loss of home and community due to acquisition. The sudden removal from one's neighborhood is seen as "a threat to the community member's sense of self" and personal "emotional ecosystem."

Lastly, dignitary harms encompass a wide variety of problems. Owners may feel offended by the insinuation that their property could be put to better use. They can also feel targeted if other properties close to them were not condemned. Condemned owners who stay in the area may feel disenfranchised if the proposed benefits do not directly affect them (Garnett, 2006; Brock 2008). Dignitary harms usually represent the most intangible factors. Therefore, they are the most difficult to compensate.

In many situations, the personal portion can be accounted for with more than fair market compensation. When dealing with properties not on the market, prices usually exceed market values by 20-25 percent (Garnett, 2006; Brock 2008). The developers of a new General Motors plant in South Bend, Indiana utilized this concept. Under time constraints, General Motors paid well over market values to be fair to the condemned landowners. On average, the property owners received 157 percent of the average appraised value of their property (Garnett, 2006; Brock 2008). Some owners received more in replacement expenses than they did for the value of their house. While this project may be an outlier under the pressure of time, it shows that respecting the existing property owners can benefit all parties.

Given the unique nature of this venture, the majority of development projects still need to be checked, and states have begin to balance compulsory acquisition with full force.

2.8.6 Public Choice Theory: A Criticism of Economic Development Compulsory Acquisition

This criticism of compulsory acquisition for economic development rests upon public choice theory. According to public choice theory, a mobilized well connected minority can exert more political influence than a numerically superior but unorganized or apathetic majority. This breakdown of the democratic process is among the most potent criticisms of economic development acquisitions. The use of compulsory acquisition to acquire land for development is highly beneficial to private developers because it dispenses with the need to negotiate with land owners thus lowering transaction costs. There is also an incentive for the legislative body to seek favor from organized interest groups in order to raise money and gain votes. The government also obtains the right to brag about redevelopment and renewal while redevelopment officials benefit from projects through increased funding and the opportunity to be involved in future projects. All this comes, unfortunately, at the expense of the owners of the acquired property and the general public.

The economically rational taxpayer will have little incentive to combat any one piece of legislation or Government expenditure. Even if a private property owner is directly affected, the existence of compensation decreases his incentive to invest in fighting the acquisition. In any case, the private property owner is inevitably dwarfed by the more politically influential and powerful special interests.

Interest groups are also quite effective at controlling the flow of information thereby encouraging positive reaction and deterring opposition. Given that the compensation paid for an acquisition is usually borne by the taxpayers generally, the special interest groups' influence is actually increased. Moreover, the concentrated nature of the benefit to the private developer means that the interest group has a much higher incentive to lobby the government for the benefit in comparison to the private property owner's incentive to fight it. This incentive is exacerbated by the fact that the interest groups often bear little or none of the cost of the acquisition, which can lead to overreliance on such measures. The redistributive nature of this rent seeking behavior may be regarded as immoral, but it is also unproductive and inefficient.

CHAPTER THREE

THE STUDY CASES

3.0 Introduction

This chapter presents the study cases starting with the Susette Kelo case in the United States of America. This case forms the core foundation of the study. The other case presented is the Griffith case in Australia. The matters arising in both cases have also been discussed in an attempt to show the extent to which economic development may be used as a public purpose. The chapter concludes with testing the hypothesis using the scenario analysis.

Plate 3.1: Susette Kelo's home

Source: Louise Staley, 2007

3.1 The Susette Kelo Case in U.S.A

3.1.1 Background to the Case

In 1996, Susette Kelo, a nurse and recently divorced mother of five, moved back to the town she grew up in. Ms Kelo bought and renovated an 1893 cottage on East Street, Fort Trumball. The daughter of factory workers, Ms Kelo describes herself as 'about as ordinary as you can get'. However, she has ended up as the public face of eminent domain—the name used in the US for compulsory acquisition of property.

Her pink house (shown above) became the centre of a string of law suits, which went all the way to the US Supreme Court, arguing over whether the city council could compulsorily acquire her property to sell to a private developer as part of a plan to revitalize the area.

The City of New London, Connecticut, is an historic whaling port bordering Long Island Sound. Like many similar locations, the City retained a certain charm but there was also a faded or run-down air about the place.

In 1990 the city was designated by state agency as a "distressed municipality" after decades of economic decline and in 1996 the Federal Government closed the Naval Undersea Warfare

Centre (Fort Trumbull Area) that had employed over 1,500. In 1998 Pfizer announced it would build a $300 million research facility on a site adjacent to Fort Trumbull at that time the City's unemployment rate was double that of the state and in that same year the State authorized a $5.35 million bond issue to support economic development planning by the New London Development Corporation (NLDC) – a private nonprofit organization and for the creation of Fort Trumbull State Park. In 2000 the City approved the NLDC's development plan and designated it as its development agent and per statute delegated to the New London Development Corporation, power of eminent domain which authorized the compulsory purchase of land required for the revitalization of the waterfront area. The city approved the plan on the theory that the development would bring economic rejuvenation – the plan was projected to create over 1000 jobs, increase tax and other revenues, and generally revitalize the economically distressed city.

Susette Kelo owned a pleasant house overlooking the waterfront. However, her home came to be coveted as a suitable location for the construction of residential and commercial facilities aimed at complementing a new Pfizer Company research facility which had been recently built on adjacent land at a cost of $300 million. Kelo's land, like that of her immediate neighbours, was therefore earmarked to be compulsorily transferred to the New London Development Corporation and then leased for 99 years to a private developer at a rent of $1 per year.

The area was to be bulldozed by this developer and converted into a waterfront hotel and conference centre, retail outlets, high quality office space, parking facilities and, most significantly, a number of newly constructed luxury condominiums of the kind that Pfizer Company executives were likely to want to own or occupy. The rental and other profits to be drawn from the redevelopment of the waterfront were plainly destined to accrue exclusively to the private developer.

Susette Kelo was one of a small number (9) of owners who refused to be bought out, at any price, for the purpose of the planned development. Her neighbour-hood was in no sense an area of urban blight or appropriate for slum clearance. She loved the view which her home afforded and its proximity to the waterfront. She declared herself wholly uninterested in money.

3.1.2 The Susette Kelo Arguments

The Susette Kelo team argued that the three takings that comply with public use requirement were;

a) For public ownership e.g. a road
b) Private party to private party when common carriers that make the property available for public's use e.g. public utility, stadium
c) Private party to private party even if property destined for private use but only in certain circumstances guided by precedent; where "pre-condemnation use of property afflicted affirmative harm on society....and eliminating the existing property use was necessary to remedy the harm"

The team also argued that in economic development takings private benefit and incidental public benefit are, by definition merged and mutually reinforcing thus the benefits to the developer are difficult to disaggregate from the promised public gains in taxes and jobs and where incidental public benefits were sufficient to satisfy the 'public purpose test' then it wouldn't matter what had inspired the taking in the first place.

According to Kelo the public use clause as originally thought out had a meaningful limit on the government's eminent domain power as the takings clause prohibited government from taking property except "for public use" as at that time i.e. adoption of constitution time, the term public use meant that either the government or its citizens as a whole would actually 'employ' the property which is more than receive the incidental benefits.

In addition they also argued that a court applying the Supreme's Court's deferential standard review (taking rationally related to a conceivable public purpose) can still strike down an eminent domain taking that confers benefits on particular, favored private entities with only incidental or pretexitual public benefits.

Thus in conclusion a court must review the record where there is an allegation of impermissible favouritism to private parties.

3.1.3 The Berman and Midkiff Cases

Kelo was the first major case the U.S. Supreme court heard involving the taking of real property by eminent domain since 1984, and only the second since 1954. Therefore, only two cases from the past fifty years helped guide the court in confronting a case that fell somewhere between the two bedrock principles mentioned above. In order to understand Kelo, it is important to understand these two decisions.

In 1954, the Supreme Court upheld a redevelopment plan as being a public use in Berman v. Parker. Berman involved a blighted area of Washington, D.C. in which over half of the housing for the area's 5,000 inhabitants was beyond repair, and was a threat to public health and safety. The government's response to the area was to pass the 1945 District of Columbia Redevelopment Act. Under Section 2 of that Act, Congress declared it the policy of the United States to eliminate all substandard housing in Washington, D.C. because such areas were injurious to the public health, safety, morals and welfare. Under Congress's plan, the area would be condemned and property taken through the use of eminent domain in order that part of it could be utilized for the construction of streets, schools and other public facilities. An owner of a department store located in the blighted area challenged the condemnation as an invalid public use on two grounds: first, his property was commercial and not residential or slum housing, and second, his property was being condemned for sale to a private agency for redevelopment.

Ultimately the Berman case concerned the constitutionality of the Act, and the use of eminent domain by Congress. A unanimous Court upheld the Act. It held that once the legislature had

determined that the use of eminent domain was for a public use, the role of the courts in reviewing the legislature's judgment was extremely narrow.

Thirty years later, in 1984, the Court upheld another eminent domain case involving the taking of private property in Hawaii Housing Authority v. Midkiff. Again, deference to the legislature was involved in the Court's reasoning. The Midkiff case involved a scheme arranged by the Hawaii legislature whereby Hawaii used its eminent domain power to acquire lots owned by large landowners, and then transferred the lots to the tenants living on them, or to other landowners. The facts of the Midkiff case were unusual because of the tremendous inequality in land ownership in Hawaii at the time – a consequence of Hawaii's plantation past. For instance, on the island of Oahu, 22 land owners owned 75.5% of the privately-owned land, forcing thousands of homeowners to lease rather than to buy the land under their homes.

Importantly, since the scheme was a rational attempt to remedy a social evil, or correct a public harm, the Court held that it qualified as a public use. In explaining its decision, the Midkiff Court mentioned the need to give legislatures broad latitude to determine what public needs justify the use of the takings power.

3.1.4 The Landmark Decision of Kelo

Relying heavily on the Berman and Midkiff cases, the Connecticut Supreme Court concluded that the economic development involved in the Kelo case constituted a public use under both the Connecticut State constitution and the U.S. Constitution (under the Takings Clause of the Fifth Amendment) despite the seemingly persuasive arguments of Kelo.

The Supreme Court voted 5 to 4 in favour of the City's redevelopment plan because;

a) The plan was comprehensive
b) The plan was thoroughly thought-out and deliberated prior to its adoption
c) The private developers were required by contract to carry out the redevelopment plan
d) The court had limited the scope of review

The court stated that it had two polar propositions to consider; On one hand: where it has long come to be accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation and on the other hand: where it is equally clear that a state may transfer one private property to another if future 'use by the public' is the purpose of the taking.

"As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private property……The taking before us however would be executed pursuant to a 'carefully considered' plan.

The Supreme Court stated there was no evidence of an illegitimate purpose in this case as the city intended to transfer the parcels to a private developer in a long term lease and the developer

in turn was expected to lease to other private entities-unknown when the plan was adopted-petitioners could therefore not accuse the government of taking A's property to give it to B when the identity of B was unknown.

The court further stated that the plan was not intended to serve the interests of Pfizer or any other private entity as it intended to revitalize the local economy by;

- creating temporary and permanent jobs
- generating a significant increase in tax revenue
- encouraging spin off economic activities
- maximizing public access to the waterfront

The Court also rejected the literal use by the public by stating that "This is not a case in which the City is planning to open condemned land....to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers...thus the court rejected the literal requirement that condemned property must be put into use for the general public"

The Court in stating that the definition of "public purpose" is broad and economic development satisfies the "public use" requirement in the case Kelo v. City of New London shows the liberality of the American concept of eminent domain and the breadth of the idea of "public use." The court also stated that a city's determination that a program of economic rejuvenation was justified was entitled to deference, and did not require reasonable certainty that the expected public benefits would actually accrue; even if no economic rejuvenation ever occurs, this development project still qualifies as a public use, consistent with and affirming the Midkiff decision.

This concept can be upsetting in that theoretically a person's home could be taken by the government simply for the vain purpose of a developer wanting to build a hotel

3.1.5 Discussion of the case

Like Kenya, where property has always been able to be compulsorily acquired by the state (including local government) for a public purpose, in the US, governments were limited to only compulsorily acquiring property for public purposes. The argument in the Kelo case was over whether compulsory acquisition for private purposes that would result in higher economic activity and taxes paid was legitimate.

In an attempt to save her home, Susette Kelo and the other eight land owners, whose land was not defined as blighted, brought a suit against the City of New London and the New London Development Corporation when it attempted to exercise the power of eminent domain to acquire their property. The landowners and Kelo argued that the condemnation violated the Fifth Amendment because the underlying purposes of the proposed development did not constitute a public use.

In the American context the critical element in the debate comprised the constitutional reference to public use. Was Susette Kelo's home being taken "for public use"? She of course denied that it was, but the City of New London prevailed in Connecticut's Supreme Court and the matter then found its way to the Supreme Court of the United States.

In the *Kelo* hearing as Justice Antonin Scalia observed during oral argument before the Supreme Court, New London's proposal was to take property 'from someone who doesn't want to sell' and 'no amount of money is going to satisfy her.' Or as Susette Kelo remarked: 'How come someone else can live here and we can't?'

The City argued that the "public use" requirement was satisfied by the sheer fact that its development plan would ***rejuvenate the area***, ***create thousands of new jobs*** and, most importantly, ***generate enormously more tax revenue for public coffers***. Put bluntly, the more affluent users of the revitalized area would be able to pay higher taxes. On this analysis "public use" can be construed as meaning simply *public benefit* – an expansion or improvement of the tax base.

Justice Scalia aptly vocalized the sentiments of Ms Kelo, "I'll move if it's being taken for a public use, but by God, you are just giving it to some other private individual because that individual is going to pay more taxes". Indeed, in the Supreme Court in Washington counsel for the City of New London openly agreed with the proposition that, on payment of due compensation, property may legitimately be taken from people who are paying less taxes and allocated to people who are likely to pay significantly more. On this basis, as counsel for Susette Kelo rejoined, "any city can take property anywhere within its borders for any private use that might make more money than what is there now". In other words, nowhere is safe – any property which might be made more economically productive is 'up for grabs.'

As another American judge observed two centuries ago, such a 'monster in legislation' would differ not at all from 'the mandate of an Asiatic prince', for on this basis 'we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our property at the mere pleasure of the Legislature.

The Kelo case brought together many of the features of the enduring legal paradox as.

- It concerned the limits of coercive state power in the land of the free.
- It exposed an unresolved tension between the sanctity of private property and the power of the mighty shilling.
- It highlighted a confrontation between little people and big business, between individual claims of personal privacy and the collective American dream of wealth and prosperity.
- It marked a point at which the democratic ideal slides arguably into majoritarian tyranny.

The threat to private property implicit in *Kelo* also contrasted vividly with the Supreme Court's concern a decade or so ago to defend landowners against uncompensated regulatory interference with land use.

The Kelo case made for some very strange bedfellows i.e. ideologists. Social welfare activists who would once have applauded the new deal and (later) the era of Charles Reich's "new property" found themselves aligned alongside the most die-hard of libertarian property rights advocates. The welfarist values which might have endorsed eminent domain for broad purposes of socio-economic betterment now stood firm against the utilization of eminent domain for private or corporate profit. And ultra-conservatives who could normally have been expected to back big business to the hilt suddenly remembered that their credo is ultimately the defence of private ownership.

Moreover, if coercive taking can be justified wherever it maximizes tax revenue, the land most likely to be taken is that of the poor, the black, the elderly and the disenfranchised, whose use of the land resource is, inevitably, relatively unprofitable. One of the supreme ironies of the *Kelo* case was that the amicus briefs filed in support of Susette Kelo included powerful submissions not only from extreme right-wing think tanks such as the Cato and Goldwater Institutes, but also from bodies such as the National Association for the Advancement of Colored People, which condemned *Kelo*-type takings as placing 'the burden of economic development most heavily on those who are least able to bear it.'

This case led to President George W. Bush on June 23,2006 (on the one year anniversary of the decision Kelo) to issue an executive order stating that the Federal government must limit its use of taking private property for "public use". He limited the usage of this term by stating that it may not be used "for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken".

3.2 The Timber Creek Appeal

Griffiths v Minister for Lands, Planning and Environment, 2008

3.2.1 Background to the case

In the Griffiths case a private citizen, Fogarty, applied to purchase several lots of un-alienated Crown land in and around Timber Creek. His proposal was that he (or his company) be granted Crown leases under which he would develop the land as a cattle husbandry facility and for such purposes as goat breeding, hay production and market gardening. On completion of the development, it was envisaged that the Crown leases would be surrendered in exchange for freehold titles. The government of the Northern Territory warmed to this proposal, also taking the view that other adjacent areas of un-alienated Crown land should be offered for sale by public auction or leased for purposes of tourism and private commercial development.

The question which was placed before the High Court related to the proper limits of the power of eminent domain i.e. do the native title rights exist over the land concerned and could the owners of these rights be expropriated simply in order to confer an estate or interest on a private person for private benefit?

As earlier stated this case concerned seven lots in the town of Timber Creek in the Northern Territory. All of the lots were 'Crown lands' as defined in s. 3 of the Crown Lands Act (CLA), which provides that:

- Crown lands cannot be alienated otherwise than in accordance with the CLA;
- The minister, in the name of the territory, may grant an estate in fee simple or a lease of vacant Crown land (ss. 5 and 9 of the CLA respectively).

A number of notices of proposed acquisition were issued over the seven lots in question. The purpose for which the land was being acquired (as identified in the notices) was, essentially, in order to grant term leases or freehold pursuant to s. 9 of the CLA for pastoral, agricultural or commercial use i.e. the land was being acquired to enable it to be leased or sold for private use. At that time of the issue of the acquisition notices, there was no native title claim to the areas concerned.

The territory relied on s. 43(1) of the Lands Acquisition Act (LAA), which empowers the responsible minister, subject to the LAA, to compulsorily acquire land 'for any purpose whatsoever'. The LAA provides that:

- 'land' includes an 'interest' which, in turn, includes 'native title rights and interests' as defined in s. 223 of the Native Title Act (NTA);
- upon gazettement of a notice of acquisition, the 'land' acquired vests in the territory freed and discharged from all interests and restrictions of any kind;
- the statute applies in relation to an acquisition of an interest in land comprising native title rights and interests where the acquisition is a future act to which ss. 24MD(6A) or 24MD(6B) of the NTA apply (ss. 4 and 5A(1) of the LAA).

Shortly after the issue of the acquisition notices, two claimant applications were filed on behalf of the Ngaliwurru and Nungali People over the lots subject to those notices. Both were 'protective responses' i.e. made (among others) for the purpose of securing future act rights under s. 24MD of the NTA in relation to the proposed acquisitions. Both claimant applications were subsequently registered on the Register of Native Title Claims. (A third claimant application was also made but it is not relevant to these proceedings.)

The minister, as required by the LAA pre-acquisition procedures, gave the registered native title claimants notice of the proposals to acquire all interests (including native title, if any) in relation to the lots in question. The claimants then lodged objections to the acquisitions pursuant to s. 34 of the LAA. The objections were heard by the territory's Lands and Mining Tribunal which

recommended that the acquisitions take place, subject to conditions relating to compensation. The minister decided to act on that recommendation.

The registered native title claimants successfully applied to the territory's Supreme Court to have those decisions set aside. The minister then successfully appealed against that judgment. The claimants then applied for special leave to appeal to the High Court.

On the initial hearing of that application, Justices Hayne and Callinan noted that the intersection between the LAA and the NTA was 'affected by' proceedings pending in the Federal Court (i.e. did native title exist in the areas subject to the purported acquisitions) and decided to 'await the fate' of the claimant applications (Griffiths v Minister for Lands, Planning and Environment, 2005 HCA Trans 223). The Federal Court later made a determination recognizing the Ngaliwurru and Nungali People as native title holders (Griffith's v Northern Territory (No. 2) 2006, FCA 1155).

Special leave to appeal was granted in June 2007, at which time the fact that the Ngaliwurru and Nungali People held native title (subject to the purported acquisitions) was no longer in dispute in the Federal Court proceedings (Griffiths v Minister for Lands, Planning & Environment, 2007 HCA Trans 320).

The question in this case was whether or not the Ngaliwurru and Nungali People's native title to the seven lots in question had been extinguished as a result of being acquired pursuant to s. 43(1) of the LAA.

3.2.2 Scope of the power under the LAA

The first issue raised by the appellants was the proper construction of s. 43(1) (b) of the LAA, which states that:

> Subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever...if the pre-acquisition procedures in Parts IV and IVA as applicable have been complied with – by compulsory acquisition by causing a notice declaring land to be acquired to be published in the Gazette.

The appellants submitted that, notwithstanding the use of the phrase 'any purpose whatsoever', the minister was not empowered to acquire land from one person solely to enable it to be sold or leased by the territory for the private use of another person.

In a joint judgment, Justices Gummow, Hayne and Heydon examined the provenance of s. 43(1), noting (among other things) that:

- before self-government, acquisition of land in the territory was controlled by the Lands Acquisition Act 1955 (Commonwealth LAA), which empowered the Commonwealth to acquire land 'for a public purpose', relevantly defined as 'any purpose in relation to' the territory;

- after the Northern Territory (Self-Government) Act 1978 (Commonwealth) commenced, the LAA was enacted;
- at that time, s. 43 provided that the minister 'may acquire land for public purposes' (subject to the LAA), defined as a purpose in relation to the territory;
- section 43 was amended in 1982 to simply state that 'the Minister may, under this Act [and subject to it] acquire land' i.e. the LAA was amended to remove any reference to 'public purpose';
- when the LAA was further, and extensively, amended in 1998 after the Native Title Amendment Act 1998 (Commonwealth) commenced, s. 43 was repealed and replaced with the version that was before the court in this case.

Their Honours noted that it was not merely the NTA that had 'supervened' between the 1982 amendments to the LAA and those made in 1998. There was also the High Court's decision in **Clunies-Ross v The Commonwealth (1984) 155 CLR 193** where, in considering the power conferred by s. 6 of the Commonwealth LAA to 'acquire land for a public purpose', the High Court found that:

> The power did not extend to purposes "quite unconnected with any need for or future use of the land"...and did not extend to the taking of land merely in order to deprive the owner of the land and thereby advance or achieve some purpose in respect of which the Parliament had power to make laws.

In the light of this:

> The absence from s. 43 in its post-1998 form of any reference to "public purpose" and the presence of the expression "for any purpose whatsoever" may readily be understood as a removal by the Territory legislature of any ground for the limitation of the statutory power by reference to considerations which had prevailed in **Clunies-Ross**.

Cases relied upon by the appellants dealing with local government bodies were distinguished on the basis that the territory was, via the Legislative Assembly, empowered to make laws for the peace, order and good government of the territory and so:

> The statement...that municipal councils had not been empowered to interfere with the private title of A for the private benefit of B...is inapt to describe...the interrelation between the powers conferred by the LAA and the CLA, referring to **Werribee Council v Kerr (1928) 42 CLR 1.**

Nor was there anything to indicate that the territory was 'seeking to acquire the land in question for an ulterior purpose there would have been an ostensible but not a real exercise of the power granted by its statute', ***Samrein Pty Ltd v Metropolitan Water Sewerage & Drainage Board*** **(1982) 56 ALJR 678.**

In the event, their Honours did not need to determine any limits there may be to the scope of the power conferred by the 'broad words' of s. 43(1) because:

> The expression "for any purpose whatsoever"...must at least include for the purpose of enabling the exercise of powers conferred upon the executive by another statute of the Territory...[including] the exercise of the power conferred by s. 9 of the CLA.

Therefore, their Honours found that appeal on the ground of the construction of s. 43 of the LAA failed. Gleeson CJ and Crennan J agreed. Kirby and Kiefel JJ dissented on this point.

While Kirby J accepted that, if 'a purely literal approach' was taken, 'a conclusion favourable to the minister can be persuasively explained', his Honour was of the view that the notices were invalid, chiefly because:

- 'specific and unambiguous provisions' authorizing 'private to private' acquisitions, such as those 'purportedly effected in this case', were required; and
- the 'general language' of s. 43(1) was ambiguous and did not support the acquisitions

His Honour commented that:

> Against the background of the history of previous non-recognition [of native title]; the subsequent respect accorded to native title by this Court and by the Federal Parliament; and the incontestable importance of native title to the cultural and economic advancement of indigenous people in Australia, it is not unreasonable or legally unusual to expect that any deprivations and extinguishment of native title, so hard won, will not occur under legislation of any Australian legislature in the absence of provisions that are unambiguously clear and such as to demonstrate plainly that the law in question has been enacted by the lawmakers who have turned their particular attention to the type of deprivation and extinguishment that is propounded.

Kiefel J was of the view that the exercise of the power given by s. 43(1) was, in this case, invalid for (among others) the following reasons:

- the earlier use of the word 'public' in s. 43 did not qualify 'purpose' in 'any meaningful way, such that its removal...might imply the opposite';
- nothing in the LAA suggested it was 'intended to operate such that one person's interest in land might be taken in order that others might put it to some use agreed upon' by the minister;
- it was 'abundantly clear' in this case that no use by the minister or the territory was proposed, 'even in the most passive sense';
- in the absence of a 'governmental purpose', the exercise of the power 'stands as no more than a clearing of native title interests in order to effect leases and grants of the land for private purposes';

- the Lands and Mining Tribunal found that the proposed leases and grants of land had little economic or other significance to the region, no benefit to the native title holders and that there was 'little or no public benefit in the acquisition'.

3.2.3 Conditions governing extinguishment of native title via compulsory acquisition

Section 24MD of the NTA (part of the future act regime) allows for the extinguishment of native title via a valid future act that is the compulsory acquisition of native title rights and interests, subject to three conditions being met.

First, the acquisition must be done under a law (in this case) of the territory that permits the compulsory acquisition of both native title rights and interests and non-native title rights and interests in relation to the area concerned. The LAA was found to fulfill this condition.

Second:

> The whole, or the equivalent part, of all non-native title rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily acquired relate, is also acquired (whether compulsorily or by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of the native title rights and interests (s. 24MD (2) (b).

It was the proper construction of '*all* non-native title rights and interests' that was at issue in this case.

Third:

> The practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired... in connection with the compulsory acquisition of the native title rights and interests (s. 24MD (2) (b a).

If these three conditions are met, then the future act (i.e. the acquisition) is valid, it extinguishes the whole or the part of the native title rights and interests acquired and compensation is payable (ss. 24MD (1), 24MD (2) I to 24MD (2) (e).

Gummow, Hayne and Heydon JJ referred to the background to s. 24MD (2), noting (among other things) that, when the NTA was amended in 1998, future acts involving the compulsory acquisition of native title were included in the new Subdivision (M) Comments made in Explanatory Memorandum to the Native Title Amendment Bill 1997 in relation to Subdivision M (which includes s. 24MD) were set out in their Honours' reasons, as were the following comments found in the Supplementary Explanatory Memorandum:

This amendment to proposed subsection 24MD(2) makes it clear that when native title rights are subject to a non-discriminatory compulsory acquisition process, the non-native title rights in the area concerned, if any, must be acquired...through a compulsory acquisition or by surrender, cancellation, resumption, or otherwise.

Their Honours saw these 'Parliamentary materials' as indicating:

> A legislative proposal to proceed on the basis provided by the previous s. 23, permitting future compulsory acquisition of native title rights, but also to ensure that where, as it now appeared to be feasible, native title rights subsisted concurrently with non-native title rights, any power of acquisition was exercised in a non-discriminatory fashion by acquiring and extinguishing both species of rights.

Gummow, Hayne and Heydon JJ noted (among other things) that:

- the 'critical provision' is s. 24MD(2), which provides that a compulsory acquisition will extinguish the whole or part of the relevant native title rights and interests;
- the 'critical condition' for the operation of the extinguishment permitted by s. 24MD(2)I is s. 24MD(2)(b);
- the appellants argued that the word 'all' in that subsection required 'the presence of at least some non-native title rights' but the word 'all' has 'various meanings and shades of meaning';
- the court's task was to give effect to Parliament's purpose, controversial provisions should be read in the context of the NTA as a whole and the NTA as a whole should be read in the historical context that led to its enactment.

Their Honours were of the view that it would be an 'odd construction' which read s. 24MD (2) (b) as:

> Denying, contrary to what had been the case under the previous s 23(3), the possibility of compulsory acquisition where all that existed for that acquisition were native title rights and interests'.

It was found that:

> The better construction of the paragraph treats "all" as identifying such non-native title rights and interests as may exist in relation to the land or waters in question. Put shortly, "all" may be read as "any".

Given this finding, Gummow, Hayne and Heydon JJ held that the appeal on the issue of the proper construction of s. 24MD (2) (b) failed.

In agreeing, Gleeson CJ commented (among other things) that:

- making the presence or absence of a non-native title right or interest determinative of the application of s. 24MD(2)(b) did not advance the legislative purpose, which was 'against...discriminatory acquisition';
- adopting the appellants' construction appeared to produce 'a curious, in fact inexplicable, new form of discrimination' i.e. native title rights and interests that co-exist with non-native title rights could be extinguished by acquisition whereas those that did not, could not;
- paragraphs 24MD(2) (a), (b) and (b-a) are all directed to 'whether, in the compulsory acquisition of native title rights and interests, there is equality of treatment between native title and non-native title rights and interests';
- that question could be answered by 'postulating the existence of non-native title rights and interests and asking how they would be affected' and did not require 'the identification of actual rights or interests and demonstration of how they are affected'

Kirby J acknowledged 'the force of the construction argument offered' by Gleeson CJ and Gummow, Hayne and Heydon JJ in relation to s. 24MD (2) (b) and so was 'not inclined to disagree with' their resolution of that issue. Crennan and Kiefel JJ agreed that the appeal on this ground failed.

3.2.4 Conclusion

In this case, the High Court had considered two main issues:

- the scope of the power to acquire land 'for any purpose whatsoever' found in s. 43(1) of the **Lands Acquisition Act** (NT) (LAA) e.g. did it empower an acquisition to enable the sale or lease of the area acquired for private use pursuant to s. 9 of the **Crown Lands Act** (NT)(CLA)?
- did s. 24MD of the **Native Title Act,** *1993* (Commonwealth) (NTA) provide for the extinguishment of native title by compulsory acquisition where no other rights and interests, other than those of the Crown, existed in relation to the area concerned?

On the first issue, Chief Justice Gleeson and their Honours Justices Gummow, Hayne, Heydon and Crennan all found that the expression 'for any purpose whatsoever' in s. 43(1) of the LAA must, at least, include for the purpose of exercising the power conferred by s. 9 of the CLA. Their Honours Justices Kirby and Kiefel dissented.

On the second, all seven judges were of the view that s. 24MD allowed for a compulsory acquisition that had the effect of extinguishing native title, even where the only interests existing in the area concerned (other than those of the Crown) are native title rights and interests, provided all of the conditions found in s. 24MD (2) are met.

3.2.5 Decision

As the appellants failed on all grounds, the appeal was dismissed and they were ordered to pay the territory's costs.

3.3 Issues and challenges of economic development compulsory acquisition

3.3.1 *Meeting Legislative Standards*

There exist different notions of this type of compulsory acquisition. In the U.S many states such as Colorado, Florida, Illinois, California and Nebraska have tightened their legal criteria through legislative processes rather than relaxing them as a result of the Kelo case.

Tightening of the legal criteria makes it harder to initiate the acquisition procedure for economic development purposes.

3.3.2 *Serving the Public Good*

Traditionally, governments have used their acquisition powers to acquire land for roads, streets, schools, parks or governmental buildings. The purpose of economic development effort is to save a failing community, make urban areas more vital, and increase the economic welfare of cities.

Redevelopment effort is ultimately for the public good .However, the breadth of the "public use" phase has been debated. Whether the benefit of urban revitalization constitutes a public use involves many legal, political and planning issues as this study has explained.

3.3.3 *Finding Qualified Developers*

Land assembly is essential in project development. Compulsory land acquisition can be costly, contentious and time consuming especially within our legal framework.

Business developers tend to avoid the process of acquiring a large number of small parcels of land and assembling them. This adds to the difficulty of local redevelopment authorities in finding a qualified developer to undertake the project.

3.3.4 *Avoiding Negative Publicity*

Invoking compulsory acquisition in a project may create publicity for redevelopment authorities that could lead to negative coverage in the local media and public demonstrations.

Thus many authorities hesitate to utilize compulsory acquisition under any circumstances.

3.4 Extent of the use of compulsory acquisition for economic development purposes

This section highlights the issues that were of concern in both case laws. It concludes by meeting the main objective of the study which was to find out to what extent the use of compulsory acquisition for economic development purpose should be applied.

3.4.1 *Public Use Definition*

As the two cases suggest, the evolution of public use has brought with it very serious questions about the public use definitions used by government in the domain of compulsory land acquisition. In both cases it was argued that what our forefathers had in mind when they came up with the public use requirement were acquisitions for;

a) Public ownership e.g. a road
b) Private party to private party when common carriers that make the property available for public's use e.g. public utility, stadium
c) Private party to private party even if property destined for private use but only in certain circumstances guided by precedent; where "pre-condemnation use of property afflicted affirmative harm on society....and eliminating the existing property use was necessary to remedy the harm"

Therefore as shown above public use meant structures open to the public such as highways, government buildings, and parks. However, in both instances the courts did not stick to this definition further expanding the public use concept to mean public purpose which is less public in the strict sense of the word.

3.4.2 *Economic Development as a Public Use*

In both cases economic development as a public use was fiercely contested. The issue was that in this type of use the literal use of public purpose is negated i.e. the condemned property is not put into use for the general public.

The Courts in stating that the definition of "public purpose" is broad and economic development satisfies the "public use" requirement in both cases showed that if compulsory acquisition ever meant the transfer of private property to the government for public goods, it is no longer just that.

In practice, private development for the greater good and the government power of compulsory acquisition go hand in hand. The courts in both cases sided with the overall economic progress of the whole rather than the individual creating precedence where economic development may be cited as a public use in compulsory land acquisition.

3.4.2 *Extent of compulsory acquisition powers?*

Property rights activists argue that the two courts' decisions expanded the power of eminent domain into the realm of development.

The Courts held that any development project must be publicly heard and approved by city officials in order to emphasize comprehensive consideration. The majority opinion also made clear it would not blindly uphold "a one-to-one transfer of property, executed outside the confines of an integrated development plan" (Echeverria, 2005; Brock2008). The Courts decision strongly suggested "the developer chosen to implement the development be bound to carry out the redevelopment and serve as the public's agent" (Echeverria, 2005; Brock 2008).

By contractually binding the developer, citizens would have legal backing thus increasing the probability of project success. Comprehensive consideration of each project would force municipalities to explore all possibilities in their development plan. By giving all these conditions the courts were trying in essence to limit the power of compulsory acquisition when it came to economic development as a public purpose i.e. establishing the extent to which compulsory acquisition may be used for economic development.

3.5.1 Problems facing the use of economic development as a public use in Kenya

In an effort to meet the first specific objective of the study this section describes the problems that would face economic development as a public purpose in Kenya. It is based on interviews carried out by the researcher with Nairobi based valuers. A total of 30 valuers were interviewed. The valuers were selected randomly within the city under the following groupings;

Table 3.5: Grouping of Valuers Interviewed

Grouping	No. of Interviewees
• Government valuers	10
• Local Authority valuers i.e. Nairobi City Council valuers	3
• Private sector valuers	17
Total	30

Source: Author, 2009

All the valuers interviewed for the purposes of this research had had experience in compulsory land acquisition valuations and on average had a working experience of seven years which this researcher found satisfactory for the aims of the study.

The problems identified by the valuers as facing the use of economic development as a public use in Kenya are;

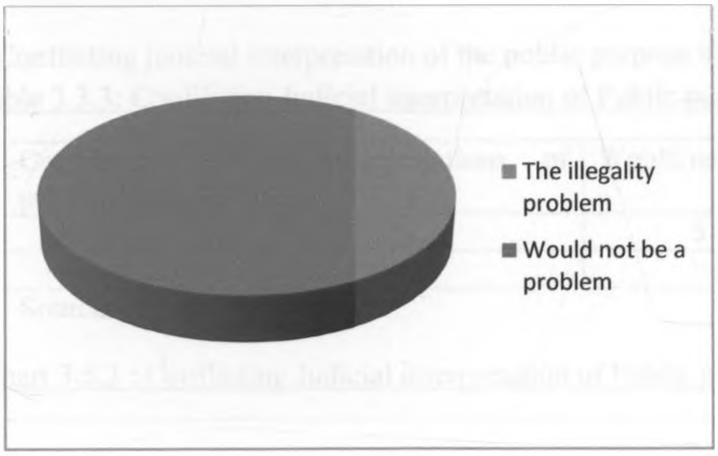
3.5.2 Illegality problem: The Constitutional and Statutory definitions of a public use in Kenya do not recognize economic development as a reason that would prompt compulsory acquisition.

Table 2.5.1: The Illegality Problem

The illegality problem	Would not be a problem
30	0
=100%	=0%

Source: Author, 2009

Chart 3.5.1: The Illegality Problem



Source: Author, 2009

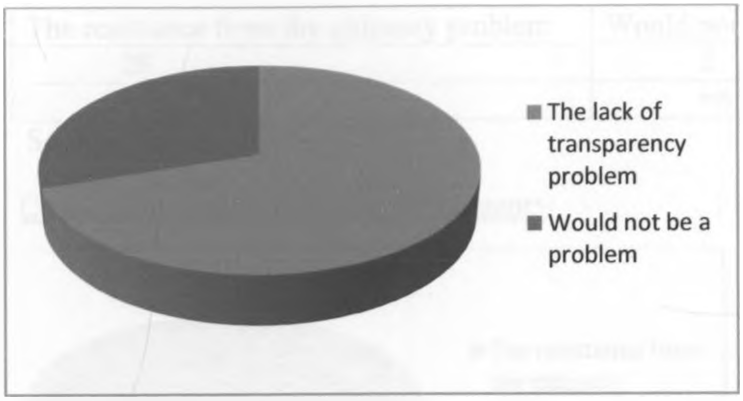
3.5.2 Transparency problem: Lack of transparency in the process (as it is with compulsory acquisitions in the country) would hinder economic development as a compulsory land acquisition purpose opening room for corruption loopholes as one interviewee aptly put it, "without proper legislative framework this use would open a Pandora's box".

Table 3.5.2: Lack of Transparency

The lack of transparency problem	Would not be a problem
21	9
=70%	=30%

Source: Author, 2009

Chart 3.5.1: Lack of Transparency



Source: Author, 2009

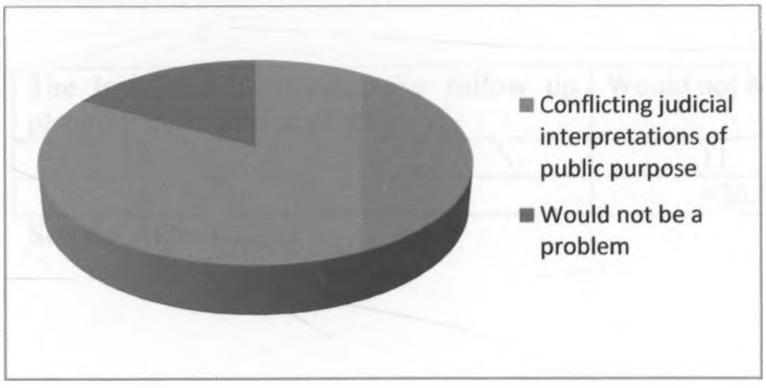
3.5.3 Conflicting judicial interpretation of the public purpose within our legal structure.

Table 3.3.3: Conflicting Judicial interpretation of Public purpose

Conflicting judicial interpretations of public purpose problem	Would not be a problem
25	5
=83.33%	=16.67%

Source: Author, 2009

Chart 3.5.2 : Conflicting Judicial interpretation of Public purpose



Source: Author, 2009

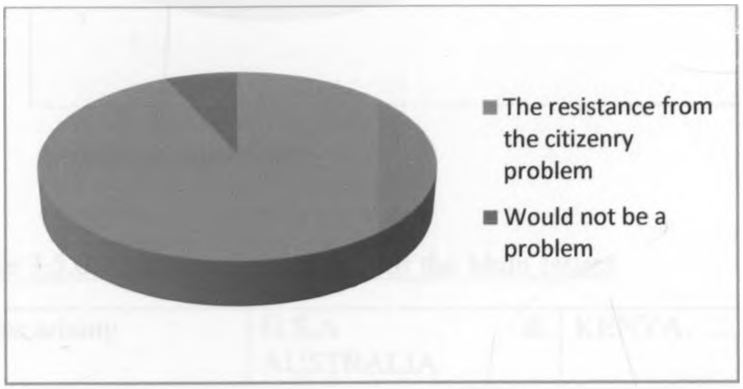
3.5.4 Resistance: This would come from the citizenry since Kenyan's hold land so dear and therefore the idea that we take from them and give to another who would supposedly make better use of it would surely be a bitter pill to swallow. This was emphasized by the respondents on the fact that public based projects get objections yet the benefits are clear.

Table 3.5.4: Resistance from the citizenry

The resistance from the citizenry problem	Would not be a problem
28	2
=93.33%	=6.67%

Source: Author, 2009

Chart 3.5.3 : Resistance from the citizenry



Source: Author, 2009

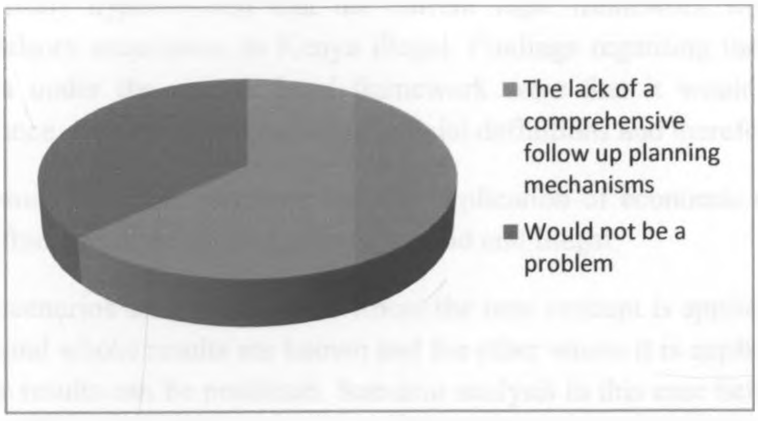
3.5.5 Lack of comprehensive follow-up planning mechanisms and capacity that would ensure the projects are within the confines of an integrated development plan.

Table 3.5.5: Lack of a comprehensive follow up planning mechanism

The lack of a comprehensive follow up planning mechanisms problem	Would not be a problem
19	11
=63.33%	=36.67%

Source: Author, 2009

Chart 3.5.4: Lack of a comprehensive follow up planning mechanism



Source: Author, 2009

Table 3.5.6: Comparative analysis of the Main Issues

Issues arising	U.S.A & AUSTRALIA	KENYA	Finding from the field i.e. Valuers
a) Public Use Definition	Means anything resulting in public benefit i.e. not strictly public use	Strictly public use as per the legislature	Should remain strict as per the Constitution and the Land acquisition Act
b) Economic Development as a Use	Allowed under conditions	Not allowed	Should not be allowed
c) Powers of compulsory acquisition	To the extent it allows private to private transfers of property under comprehensive planning considerations	To the extent that it does not allow for private to private transfers under any circumstances	Should be extended to the private to private transfers only under legal and institutional frameworks

Source: Author, 2009

3.6 Hypothesis Testing

This study hypothesized that the current legal framework would render the application of compulsory acquisition in Kenya illegal. Findings regarding the application of this concept in Kenya under the current legal framework were that it would be illegal, would face fierce resistance, encounter contradicting judicial definitions and therefore not applicable.

The study therefore observes that the application of economic development under the current legal framework would be rendered invalid and illegal.

Two scenarios are available one where the new concept is applied under the current legal frame work and whose results are known and the other where it is applied under a reviewed framework whose results can be predicted. Scenario analysis in this case helps the researcher to make a fair guess of the cumulative assessment of facts after the legislation is reviewed.

Table 3.6.1 Scenario analysis

Scenario A: same legal framework	Effects	Scenario B: Reviewed legal framework	Effects
• Same Public use definition • Application of economic development as a public use	Public use vs. Public purpose conflicts, contradicting judicial definitions. Application of economic development would be rendered illegal	• Change in Public use definition • Economic development allowed as a public purpose under conditions	Reduced public use definitions conflicts and judicial contradictions. Development of comprehensive plans to guide the application of economic development as a public use rendering it legal under conditions

Source: Author, 2009

3.7 Summary

This chapter has presented the study cases that formed the core foundation of the study. The matters arising in both cases have also been discussed in an attempt to show the extent to which economic development may be used as a public purpose.

One might postulate that the compulsory acquisition legislation as it is would lead to more or less the same problems discussed in both study cases. It is therefore of essence that the Kenyan compulsory land acquisition legislation is reformed.

The chapter has concluded by testing the hypothesis which has been proved true that the application of economic development as a public purpose in Kenya under the current legal framework would be rendered invalid or illegal. The study has used scenario analysis to show that if review of the legal framework is adopted then the scenarios observed in the U.S and Australia would be avoided.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

4.0 Introduction

This chapter synthesizes the data obtained into research findings that inform the research study objectives. The main study objective is:

To investigate to what extent (if at all) compulsory acquisition may be used in order to facilitate economic development promoted by private entrepreneurs. The specific objectives are;

c) To identify the problems that would face the application of economic development as a public use within the Kenyan public use definition.
d) To make recommendations and mitigation measures based on the findings on what can be done to ensure the proper use of economic development as a public use.

This chapter also considers what the Draft National Land Policy has proposed on compulsory land acquisition. Conclusions derived from research findings also inform recommendations made towards reforming the acquisition legislations.

4.1 The Draft National Land Policy

Land in Kenya is the most important source of wealth and at the same time the greatest source of conflict. Since Independence, Kenya has lacked a comprehensive land policy. The existing situation is one mired in confusion as Kenya still lacks a single legal instrument to govern land as there are over 50 statutes in Kenya that directly deal with land or constantly make reference *to* land. The result has been a complex land management and administration system resulting in among other things abuse of the power of compulsory land acquisition.

The National Land Policy Formulation Process was therefore commenced in 2003 and spearheaded by the Ministry of Lands in partnership with Kenya Land Alliance. Workshops were organized in all eight provinces in the country to collect views from stakeholders representing various groups culminating in a National Stakeholders symposium held on 26th and 27th, April 2007.

Section 3.1.1.1.45: defines what is meant by compulsory land acquisition and setting apart. It also states that it is provided for in the Constitution and exercised by the Commissioner of Lands.

46: highlights the situation as it is at the moment whereby the Compulsory acquisition powers are abused through irregular acquisitions. It also states that the powers of the President and Local Authorities (L.A's) overlap when it concerns setting apart.

47: States that the law on compulsory acquisition shall be reviewed in order to harmonize the institutional framework and avoid overlapping mandates as regards Trust Land. The revised law is envisaged as one that will make the acquisition process and procedure efficient, transparent and accountable. The proposal is one where the compulsory powers will be exercised by the state and Local Authorities through the proposed National Land Commission (NLC).

48: Where the purpose justifying the acquisition fails or ceases the draft national land policy proposes that the previous owner or his successor be conferred with pre-emptive rights.

4.2 Conclusion

The Kelo vs. New London case in the U.S revived a heated debate over property rights. The decision handed down better intentions for the use of compulsory acquisition than judgments of the past. The two cases analyzed in this study should lead to the Kenyan authorities taking a closer look at the issue, which should effectively set the discussion for our continuing wide-scale land reforms.

In terms of the lawful use of compulsory acquisition, the holdout problem provides the economic justification for compulsory acquisition. Going forward, Kenya's national land and legal reforms can eliminate the inefficiencies of developments using compulsory acquisition. In doing so, the benefits will be realized with much greater scope and significance in every project undertaken in Kenya.

In many developments there are only a handful of individuals delaying project success. The positive benefits incurred by the majority of affected property owners are rarely reported. If both sides are weighed fairly, should economic progress be thwarted because of a small minority's objections? At any rate, compulsory acquisition will continue to be a tool used by governments to provide public essentials, and it will forever remain a debatable issue in private development. To bring both sides closer together, legislation drafted to install minimum standards will more efficiently allocate the economic and societal rewards. Most importantly, reform should effectively strike a balance between the power of compulsory acquisition and the supreme freedom/status associated with property rights in Kenya.

The legislation reform in Kenya should aim at;

4.2.1 Differentiating between State Regulatory Power and State Land Acquisition Power

As a legislative response the Kenyan legislature can compensate for the Kelo decision by drafting legislation that makes a clear distinction between the state's regulatory power and its land acquisition power. This will create a balanced provision as it keeps individual property owner's rights intact while still allowing public bodies to fight problems that create public harms

The purpose of the police power should be to secure rights by prohibiting harm i.e. state will take property under police power when it is harmful. The power of compulsory land acquisition

should be used only when it is used for provision of public goods. Circumstances that do not fit into neither should be firmly protected for the individual.

Legislators and activists should engage in a debate that sets up practical and working dichotomy between economic development and strong property rights.

4.2.2 A Clear definition of what qualifies as a Public use

There are only two constitutional requirements for the exercise of Land Acquisition power in Kenya: that the use is public and that the owner receives just compensation. To avoid Kelo-type controversies the draft legislation should clearly explain to what extent economic development constitute a public use in Kenya.

4.3 Policy Recommendations: the future of compulsory acquisition in Kenya

To protect property rights, a national land law must be invoked to reconcile the power of compulsory acquisition with private property rights. Public bodies should be allowed to use compulsory acquisition as they see fit. However, the national legislature must set clear, minimum standards in order to shelter property rights and the freedom derived there from. In doing so, property rights will be solidified yet tempered with the government necessity to use compulsory acquisition (Brock, 2008).

The legal issues of compulsory acquisition in Kenya have been largely left up to precedent of court judgments. However, when defining property rights in relation to the needs of all citizens, the responsibility must now fall on the "democratically elected representatives of the people rather than the judiciary" [Gostin, 2006; Brock, 2008]. In Kenya we should not wait till a Kelo-type of acquisition happens so as to reform our laws instead changes must be implemented on a wide scale so as not to allow judges to pass decisions which will empower the state to exploit property rights by the conscionable standards of local officials as it is happening in the United States.

4.3.1 The Public Role

As stated earlier, to consider compulsory acquisition under perceived public benefits may be a misplaced notion. However, no development project should go forward unless concrete gains are present in the comprehensive plan. If private entities demonstrate public profit, public support will be garnered. In turn, broad public appeal will lead to decreased need for compulsory acquisition. If the demand for a project increases, the supply of properties in question will also increase. This creates a fair market value situation in which all parties can benefit.

On a smaller scale, it is essential to allow individual community members initiate development project hearings democratically. Projects must be made public from the beginning so that accountability can be administered by the community (Zax and Malcolm, 2005; Brock 2007). The developer must be present during town meetings, and referendums with a majority vote should veto bad projects. These measures will put the onus on development companies and local governments to work with the community as a whole. If the public is given more of a say in the

project, the ultimate power will move closer to equilibrium to create a more symbiotic relationship.

Lastly, an internal check and balance must be implemented. Local compulsory land acquisition review bodies could rule on the use of compulsory acquisition in a certain locality. These bodies would modify the use of compulsory acquisition to fit the economic concerns of that locality. It would also be prudent to utilize the expertise of unbiased real estate professionals. These positions could be appointed by the community and both the local and central government officials. Establishing compulsory acquisition review boards would entrust the process with professionals and elected officials who understand the situation more completely.

4.3.2 Private Responsibility

If private entities are included in development projects, the private developer must be selected fairly and held to task throughout the project (Zax and Malcolm, 2005; Brock 2008). To avoid government collusion with private entities, development plans must be formed before a private developer is brought into the process. After a comprehensive plan is in place, city planners can search for the best development agency to carry out their plan. If the developer is chosen from a pool of candidates, the public can rest assured that market forces chose the developer, not secret, back-handed agreements.

After a development agency is selected, assurances must be made by the developer to the local authority. The phony promises of profit driven businessmen and corruption will not suffice. The developer must be obligated to fulfill the promises set forth in the comprehensive plan. This can be done in a variety of ways. Perhaps the most stringent is contractual obligation. To a lesser extent, the developer could forge dual ownership with the city to ensure a check and balance partnership. In cases of complete failure, the developer will be forced to hand over ownership back to the city. With the city in control of the property, local officials can then attempt the development again with a new agency.

4.3.3 Procedural Possibilities

Since local governments are intertwined with any publicly planned development project, they must remain involved throughout the life of the venture. Zax and Malcolm suggest a governmental role in a project "would provide additional evidence of the continuing public purposes served by condemnation for economic development".

In addition to expanded public/private partnerships, prescriptive guidelines must be implemented to guide projects. Local officials should be the initiators of development, not the authority on how the development should be carried out. Minimum procedural guidelines will ensure a standard level of expectations, thus decreasing the incidence of bad projects and poor management due to lack of guidance.

On top of statutory guidelines, improvements must be made to the land assembly process. Developers must attempt to negotiate with property owners before compulsory acquisition is

threatened. This procedure will ensure fair conditions are present before compulsory acquisition is used. During negotiations, developers must be required to attain at least two separate appraisals to establish a minimum value. This value will be used to determine a fair above market value price given intangible factors. While it may be difficult to set a national standard, an arranged premium for any condemned property can be established.

4.3.4 The establishment of an ombudsman office

In response to Kelo a property rights ombudsman office should be established in Kenya. This office could be available to individuals who are confronting a condemnation by the government and trying to assess whether the government's proposed use fits the definition of a public use. The ombudsman could also encourage state and local government agencies to regulate and acquire land in a manner that is consistent with applicable statutes and laws.

The office should be available to all individuals as some countries already do and would help in giving the way forward due to the many conflicting judicial interpretations on public purpose.

4.3.5 A new economic development compulsory acquisition model

A new model based on the Singapore en bloc process, incorporating the necessary improvements and modifications as discussed in the previous sections would provide a more equitable and efficient compulsory acquisition tool for Kenya as it strives to achieve economic development. This model is given below i.e. table 4.1

The new model premised on the Singapore enbloc process is still a departure from the absolute private property rights. However, Kenya with its developing economy has a case for not defining private property rights with such absoluteness so as to exclude economic development compulsory acquisition.

In any case, the evolutionary history of property rights suggests that the current objections against economic development compulsory acquisition in Kenya are unlikely to be based on some sacred notion of absolute property rights. Indeed, the main objections to economic development compulsory acquisition are the injustice and inefficiency arising from its illegality and under-compensation. If that is the case, then the proposed new model, which is demonstrated to effectively tackle these issues, is applicable to Kenya's compulsory acquisition domain as well.

Table 4.3.5: Step by Step Guide of the model

Identification of the plot of land for Economic Development purposes

↓

Assessment of the uniqueness of the property to determine the level of consent required
- the more pressing, the lower the level of consent
- minimum level of consent should be 2/3

↓

Appointment of negotiating committee from various stakeholders
- accomplished through voting by owners

↓

Negotiation by negotiating committee
- receive funds from acquiring party
- engage necessary professional services (lawyers and valuers)
- gather feedback from owners

↓

Compensation package proposed by acquiring party
- can include replacing housing

↓

Voting by owners
- preferably unanimous
- number of votes based on area and value of property

(*Process halted if level of consent not obtained*)

↓

Appeal by minority owners
- for higher compensation or complaints on the process

(*Process halted if bad faith or prejudice found*)

↓

Acquiring party distributes compensation package and exercises compulsory acquisition powers on any dissenting owners

Source: Author, 2009

4.4 AREAS OF FURTHER RESEARCH

Although this study was mainly concerned with the application of economic development compulsory acquisition in Kenya, it became apparent in the course of the study that there are areas that need further discussion. The areas evident from the study that should be explored more include among others;

i. An investigation of economic development compulsory acquisition from a givings perspective
ii. An investigation of economic development compulsory acquisition from a developers perspective
iii. The contradicting public use definition in the Kenyan judicial system

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APPENDIX I
UNIVERSITY OF NAIROBI

DEPARTMENT OF REAL ESTATE AND CONSTRUCTION MANAGEMENT

INTERVIEW SCHEDULE

Research project: Use of Economic Development as a Public Purpose in Kenya

Declaration: this information is confidential and will be used for academic purposes only.

Date of interview: .....

Name of respondent: .....

Sex of the respondent: Male..... Female.....

Place of work: .....

Duration worked as a valuer: .....

1) Have you ever been involved in a compulsory acquisition project? Yes or No

.....
.....

2) If yes, name the project/s

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.....

3) Where was the acquisition undertaken?

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.....

4) What was the purpose of the acquisition?

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.....

5) Was there any objection raised concerning the purpose? Yes or No

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.....

6) If yes, what was the nature of the objection?

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.....
.....

7) Was the objection upheld? Yes or No

.....
.....

If yes, by whom:

a) The High Court..... b) The Acquisition Tribunal.....

8) Are you aware of the Susette Kelo case in the United States? Yes or No

.....

9) If yes, what are your views on the case?

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.....

10) What are your views on the use of economic development as a public purpose in Kenya?

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.....

11) Should the use of compulsory acquisition be limited to only takings for public ownership e.g. roads? Yes or No

.....
.....

12) Should use of compulsory acquisition for private to private transfers be limited to when the private party receiving the property is required to make the property available for the public's use e.g. Stadiums, Rift-Valley Railways? Yes or No

.....
.....

13) Should the use of compulsory acquisition for private to private transfers never be allowed when it is for economic development purposes? Yes or No

.....
.....

14) Should the use of compulsory acquisition only be allowed only where there is a finding of "blight" or where the property in its pre-condemnation use causes harm to the public? Yes or No

.....
.....

15) Should the measure of value of private property taken by compulsory acquisition include not only the fair market value of the property, but also all other reasonable and necessary costs generated by the condemnation e.g. cost of legal counsel? Yes or No

.....
.....

16) In the case of compulsory acquisitions for economic development, should the private property owner whose property is condemned receive the fair market value based on the ultimate use of his or her property as redeveloped? Yes or No

.....
.....

THANK YOU AND GOD BLESS

APPENDIX II

UNIVERSITY OF NAIROBI

DEPARTMENT OF REAL ESTATE AND CONSTRUCTION MANAGEMENT

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E-mail: dept-recm@uonbi.ac.ke

7 April 2009

TO WHOM IT MAY CONCERN

RE: MUTHAMA DENNIS MBUGUA – B04/0344/05

This is to confirm that Mr. Muthama is a student in this Department undertaking a Bachelor of Arts Degree in Land Economics.

Any assistance given to him will be highly appreciated.

CHAIRMAN
DEPARTMENT OF REAL ESTATE
AND CONSTRUCTION MANAGEMENT
UNIVERSITY OF NAIROBI

Dr. M.A. Swazuri, Ph.D. OGW.
Ag. Chairman
Department of Real Estate and Construction Management

APPENDIX III

Telegrams : "COURT", NAIROBI
Telephone: Nairobi 221221

When replying please quote

REPUBLIC OF KENYA

THE REGISTRAR'S CHAMBERS
HIGH COURT OF KENYA
LAW COURTS
P.O. Box 30041-00100
NAIROBI

48/18

3rd March, 2009

Dr. H. Gichunge,
Chairman,
Department of Real Estate &
Construction Management,
University of Nairobi,
P.O. Box 30197-00100,
NAIROBI.

RE: MUTHAMA DENNIS MBUGUA – B04/0344/2005

Reference is made to your letter dated 22nd December, 2008.

Authority is hereby granted for Mr. Mbugua to access the material that he may require from our High Court Registry to enable him complete his project paper. He may contact the Senior Principal Deputy Registrar, High Court Civil Division, for necessary assistance and guidance.

S. M. KIBUNJA
AG. CHIEF COURT ADMINISTRATOR
For: REGISTRAR

Copy to: The Senior Principal Deputy Registrar,
High Court Civil Division,
NAIROBI.