

A GUIDE ON PUBLIC LAND ACQUISITION WITHIN COMMUNITY LAND



Kenya Land Alliance



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1.0

INTRODUCTION

Untitled customary/community land in Africa is a known target for local and international large-scale commercial investment. The African Union has been concerned enough to issue (non-binding) guidelines as they affect communities. Kenya is in the midst of a surge in economic transformation, with oil, water, coal, port and infrastructural developments flourishing alongside private sector developments.

Land access, acquisition and compensation on community land remains a complex issue that needs deeper interrogation and discussion. With the most recent quest for land for investments in areas of unregistered community land, there is need to have a guide that every community can refer to whenever they are approached to provide land for investments so as to maximize the benefits by engaging with the investors or acquiring bodies at arm's length.



Community Land Kenya

- Acquisition and compensation on community land is a complex issue in Kenya
- Community members need guidance when acquiring land

Kenya has enacted a number of relevant legislation that include the Land Act 2012, the Land Registration Act, 2012, the National Land Commission Act, 2012 the Community Land Act 2016, and the Land Index Act 2019 that facilitate the Acquisition process. However, there are concerns that acquisition and compensation within unregistered community land has proceeded without clear legal framework governing displacement, resettlement and compensation due to lack of legal instruments such as certificate of land registration and community registration.



1.1 Definition of Community and community land

1.1.1 Community

Community has been defined as a consciously distinct and organized group of users of community land who are citizens of Kenya and share attributes such as; Common ancestry; Similar culture or unique mode of livelihood; Socioeconomic or other similar common interest; Geographical space; Ecological space; or Ethnicity.

1.1.2 Community land

Article 63 of CoK defines community lands as including those:

- Registered in the name of group representatives (i.e., group ranches);
- Lawfully transferred to a specific community or declared to be community land by an Act of Parliament;
- Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
- Ancestral lands and lands traditionally occupied by hunter-gatherer communities; and
- Lawfully held as trust land by the county governments (trust lands).

Community land in Kenya can be categorized into two; registered or unregistered community land. Registered community land is land to which a particular community has a certificate of title and therefore private to that community and the process of land acquisition is similar to acquisition of private land. However unregistered community land is land that is not officially assigned to a particular community but ordinarily the claimant community is known.

Community lands are regulated by communities, using their own rules, defined as customary or community law. The Constitution acknowledges customary laws, only requiring these to be consistent with the Constitution.



1.2 Landholdings in community land

Principal title under community land is vested in communities at registration (CON Art. 63 (1), CLA, s. 4). Title may be held as a customary, freehold, leasehold or other legal entitlement. Certificate of Title issued by the Registrar will serve as prima facie evidence of the community as the absolute and indefeasible owner, except where the title has been obtained fraudulently (CLA s. 18).

The procedures for securing freehold, customary or leasehold title are the same; first, registration of the applicant community, and then application by it for formal survey and adjudication of its land, the results to be registered as a collective title in a Community Land Register set up for this purpose in each county.

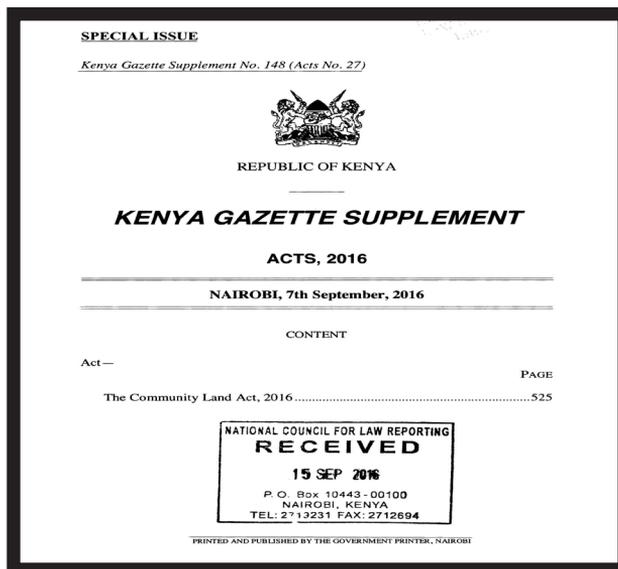
CLA makes provision for individuals, families, and other customary groups or new groups formed by community members, such as a cooperative or association, to be acknowledged as the owners of rights to particular parts of the community's domain (CLA s. 14).

The law also places obligations to the registered Communities in the pastoral areas to ensure;

- They avail land to their members for the purpose of grazing;
- Reserve special areas for farming areas, settlement areas, community conservation areas, access and rights of way, cultural and religious sites, urban development, or any other purpose as may be determined by the community, county government or national government for the promotion of public interest.
- Ensure every member of the community has the right to equal benefit from community land, full and equal enjoyment of right of use and access with no discrimination based on gender, minority, and disability or marginalized groups.

1.3 Acquisition of community land by investors

Acquisition of land by the state for public purposes is an entrenched feature of national constitutions. CLA makes specific provision on land requirements for investment, including that each request is subject to consultation and agreement with the community, and with payment of compensation and royalties, should an agreement be reached (CLA s. 36). A community may also determine terms of any leases, and establish requirements for the investor to conserve and rehabilitate lands (CLA s. 37).



CLA presumes that communities will not absolutely alienate their land to investors but lease land to them. The Regulations go further, requiring notice of all consultation meetings to be placed in two national newspapers and one local newspaper, and posted in all local government offices as well as in affected communities, and to allow 30 days for written submissions to be made.

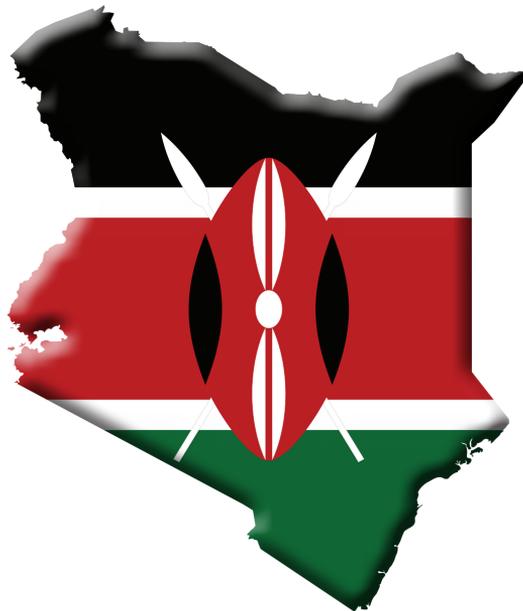
Deficiencies in the Community Land Act place communities at risk of their lands not being as secure as promised ahead of formalization, and at risk of losing some of their most valuable lands during the formalization process. This is mainly due to overlapping claims by the national and local government authorities. Political will to apply the law is also weak. The truism that the law is never enough on its own to secure social change.

COMPENSATION FOR COMPULSORILY ACQUIRED COMMUNITY LANDS

The Community Land Act provides for compulsory acquisition of land from community land subject to Article 40 (3) of the Constitution and the Land Act 2012. Under section 5 (4), no interest in, or right over community land may be compulsorily acquired by the State except in accordance with the law, for a public purpose, and upon prompt payment of just compensation to the person or persons, in full or by negotiated settlement.

The Constitution being the supreme law protects communities from being arbitrarily deprived of their land except under the specific conditions spelt out in the Constitution while the Land Act of 2012 becomes the operational law that guides how such land can be acquired including procedure, rights and obligations of both the communities and the state.

THE CONSTITUTION OF KENYA



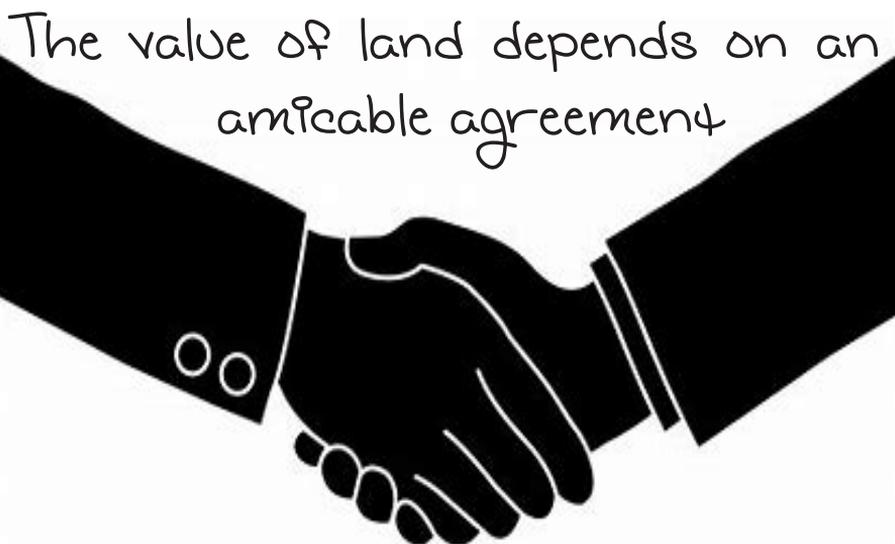
The law, therefore, accords recognition to community land and equal right to compensation inherent in private land; whether such land is registered or not. However, the provision for a negotiated settlement in community land is a strong buy in for Government at both levels to negotiate for access to land, especially for community development projects. This is a god proviso considering the reality that large swathes of community land are deficient of most basic services and amenities and land, therefore, presents communities with an asset to leverage on to attract development of both public goods.



Whereas the Constitution recognizes possible right of non-title holders being compensated on the basis of occupation in good faith, the CLA does not envisage compensation for community land that is already in use for public purpose. Section 8 (6) provides for exclusion during adjudication and survey by the Cabinet Secretary in charge of Lands of any land already in use for public purpose

The procedure for land acquisition can therefore be derived from the Land Act No. 6 of 2012, the Land value amendment Act 2019, the Land (assessment of just compensation) rules 2017 among other legal provisions. The applicable procedure is as highlighted under Part VIII of the Land Act up to identifying who is to be paid. In addition, the CLA makes provision for instances where a community and/or their land are not registered; in such cases, the compensation determined will be held by the County government and kept in a special interest-earning account but should be released to the community as soon as it is a registered owner (CLA, s. 6). Where the community is registered, compensation for the land should be disbursed to the community and managed as per the structures set forth in the CLA.

The Land value amendment Act of 2019 affirms that compensation for community land for purposes of compensation shall be based on the provisions of this Part and the land value index developed for that purpose by the Cabinet Secretary for Lands. The development of a land value index; which is an analytical representation showing the spatial distribution of land values in a given geographical area at a specific time is meant to be participatory and the product is for multiple use. The application of the land value index in the assessment of compensation of community land is however constrained by the lack of adequate open market transactions on land. This deficiency can however be cured by considering other aspects of value other than value in exchange (market value) and consider value in use (from an entrepreneurial perspective). The application of value in use however does not derive the same level of objectivity as value in exchange and may be viewed as being more subjective or dependent on individual valuers' bias and largely personal orientation.



2.1 State powers over community lands

Article 40 (3) of the Constitution of Kenya 2010 protects the citizenry from deprivation of property unless the deprivation is for a public purpose or in the public interest and in such a case, the Constitution requires that the affected proprietor is promptly compensated in full and his or her right to seek legal redress is unfettered

2.2 Purpose of Compulsory land acquisition

This is the acquisition of private/community land by the government for public use or public purposes but subject to prompt payment of just compensation.

It can occur in situations where the state intends to use the land in question for a public purpose or in the public interest which is limited to matters of regulating rights and land use in:-

- a) The interest of defense
- b) Public safety
- c) Public order
- d) Public morality
- e) Public health

2.3 Legal Framework for Compulsory land acquisition

Compulsory land acquisition is entrenched in the Constitution by dint of Article 40 (3) of the Constitution. In addition, the elaborate process is detailed in Part VIII (Sections 107 to 133) of the Land Act 2012.

The detailing of assessment of compensation is found in the land value amendment Act and the land (assessment of just compensation) rules 2017.

2.4 The process of compulsory land acquisition

Compulsory acquisition process is stipulated in the Land Act 2012 and can be broken down into pre-inquiry stage, inquiry and payment stage.

Section 107-133) details the following steps to be followed when undertaking compulsory land acquisition. The elaborate process is as follows (Figure 1):

Step 1: Formal request to the Commission by Competent office indicating the purpose for which land is to be acquired. The request should prove that the land is needed for public purpose

Step 2: Consideration by the Commission and Approval if it meets the Constitutional and Statutory threshold (public purpose).

Step 3: Publication of Notice of Intention to acquire land is published in the Kenya Gazette. The Commission will undertake public sensitization and participation by holding meetings, workshops and any other appropriate fora to inform the public about the proposed project and matters pertaining to procedure, expectations and responsibilities of stakeholders in the land acquisition process.

Step 4: Ground inspections and valuation to record any improvements affected by the proposed project.

Step 5: Publication of Notice of Inquiry in Kenya Gazette, service of notice and holding of inquiry: This allows persons interested in the subject land to submit their claims.

Step 6: Issuance of an award of compensation to every person determined to have an interest in the land; Land Lord, Leaseholder (building) or Sublease Holder (Loss of profit).

Step 7: Payment upon receipt of funds.

Step 8: Issuance of Notice of Taking Possession

Step 9: Final Survey and vesting of the acquired land

STATUTORY PROCEDURES AND PROCESSES OF COMPULSORY LAND ACQUISITION PROGRAMME

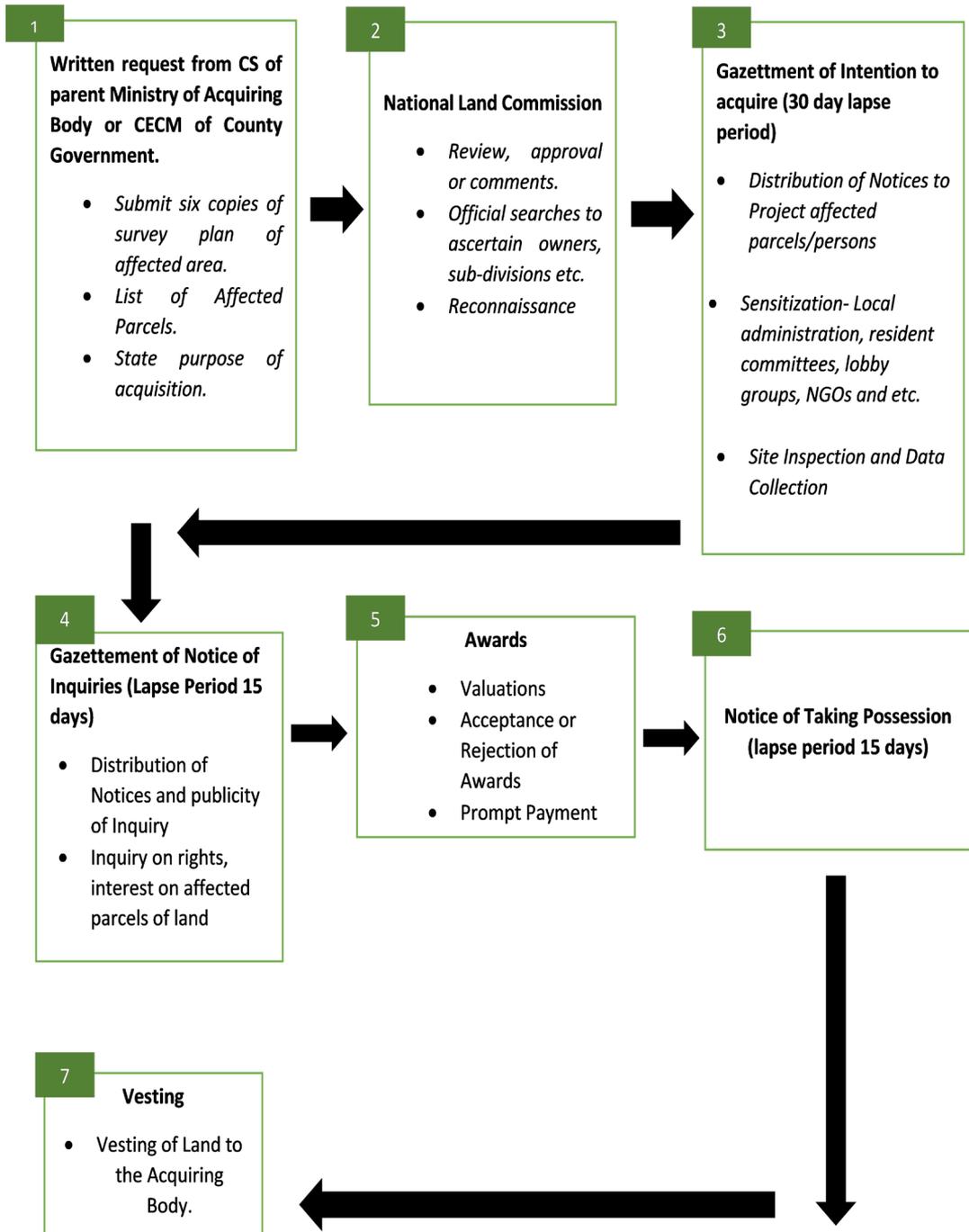


Figure 1

2.5 Assessment of compensation payable

2.5.1 What is compensated for during compulsory acquisition?

The Land (Assessment of Just Compensation) Rules, 2017 were developed by the Commission in exercise of the powers conferred under section 111 (2) of the Act and gazetted vide Legal Notice No. 283 of 2017. The Land Compensation Rules focus on the assessment of compensation payable to persons determined by the Commission to have a compensatable interest in land, at the time which the Commission takes possession of such land.

The Land Compensation Rules provide that in assessing the appropriate compensation for compulsory acquisition of land, the Commission will consider the following factors:

- a) The market value of the land (as per the Constitutional definition).
- b) Damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of the acquisition injuriously affecting his or her other property, whether moveable or immovable, in any other manner or his or her actual earnings;
- c) Reasonable expenses incidental to the relocation any of the persons interested or who will be compelled to change residence or place of business as a consequence of the acquisition; and
- d) Damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the Commission takes possession of the land.
- e) 15% statutory disturbance allowance
- f) Other expenses incurred as a result of the acquisition e.g. profession fees etc.

2.5.2 Issues that are not considered when assessing compensation

- The degree of the urgency which has led to the acquisition
- Any disinclination of the person interested to part with the land
- Damage sustained by the person interested which, if caused by a private person would not be a good cause of action
- An increase in the actual value of the land as at the date of the publication in the gazette, of the notice of intention to acquire likely to accrue from the use to which land will be put when acquired
- An outlay on additions or improvement to the land, incurred after the date of publication in the Gazette of the notice of intention to acquire land, unless the additions or improvements were necessary for the maintenance of any building in proper state of repair

2.6 Grievance redress mechanism

Redress options are available if one is dissatisfied with the award given.

- One can seek clarification from the Commission as to what has been factored in the compensation in keeping with the right to information and also in conformity to the principle of fair administrative action prior to either accepting or rejecting an award. This accords the affected person an opportunity to verify that the details of affected improvements captured are correct and well captured, that the size of land acquired in tallies with the Kenya gazette. Where any omission may be found, rectification is done upon verification. If all the details are correct and an award to that effect has been issued, then one is given a statement form on which one signifies by signing their acceptance or rejection of the award within 14 days.

- 
- Formulation of grievance redress committees by acquiring bodies that deal with a wider ray of grievances especially family disputes that may have an impact on the process of land acquisition. Such committees present a crucial plank for addressing social matters.
 - The other redress which is the last resort is to prefer a Court case in the Land compensation tribunal/Environment and Land Court once an affected rejects the determined award as per Section 128 of the Land Act.

3.0

FREQUENTLY ASKED QUESTIONS

3.1

Cut off time to take into account in determining whether recent improvements done on land are eligible for compensation

The value increase occasioned by any development or improvement to the land within two years prior to the date of publication in the Gazette of the notice of intention to acquire the land, unless it is proved that the improvement was made bona fide and not in contemplation of proceedings for the acquisition of the land.

3.2

Expenses incurred due to change of residence or business.

Reasonable expenses are allowed for reimbursement where an affected person is compelled to change residence or relocate a business. Such costs are based on relocation to the neighbouring area, not distant locations away from the acquired land.

3.3

Commission determine compensation for diminution or loss of business.

In determining the compensation due for diminution of the profits of the land, the Commission shall require proof of existence of the profits including evidence of tax returns for the affected enterprise. Where such evidence is not provided, loss of profit is only given a nominal amount.

3.4 Who is legally mandated to compulsorily acquire land?

The National Land Commission (the “Commission”) is legally mandated to compulsorily acquire land on behalf of the National or County government. The Commission can only act upon request by the National or County government, by order in the government gazette, to acquire land in question. It is also mandated to set aside land for investment purposes which may include land for oil, gas and mining projects (*Article 65; Land Act 2012, Articles 12 (3) & 15(1)*)

3.5 What are some of the rights of spouses concerning matrimonial property?

Matrimonial Property Act of (2013) provides that a married woman has the same rights as a married man to acquire, administer, hold, control, use and dispose of property whether movable or immovable; enter into contract and sue and be sued in her own name.

3.6 If land is unregistered who holds the interest?

County governments shall hold in trust all unregistered community land on behalf of the communities for which it is held. Any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of the Community Land Act.

3.7 How do I raise complain with Commission?

Every dispute raised against ownership of land shall be in writing.

The Commission shall advise disputants and will endeavour to have alternative dispute resolution (ADR) mechanisms applied including negotiation, conciliation, mediation and arbitration. Any ownership dispute that is not escalated to any of the ADR shall lapse after 6 months from the date of inquiry. Any dispute on titled land that is not escalated either to arbitration or to the Environment and Land Court (ELC) shall lapse after 6 months from the date of inquiry.

4.0

CONCLUSION

Land acquisition and compensation for community land should be seen in the context of the legal framework allowing and guiding the acquisition of private land which is largely guided by the Land Act, 2012 and the land value amendment Act.

In the interim before all communities and their land is registered, there needs to be cordial and open dialogue on land acquisition and compensation of unregistered community land between the county government and members of the unregistered community for the members of that unregistered community to understand the fiduciary responsibility of the county government to represent them in such instances.

There is need for communities to request the cabinet secretary Ministry of Lands and Physical Planning to prioritize registration of community land in areas where compulsory land acquisition is intended so as to allow the community to engage directly with the acquiring body for compensation and crucially investors who may subsequently be attracted to the area especially upon the development of social infrastructure like roads, railways, ports etc.

The land value index is an important tool to guide compensation of community land where property markets are either or largely dormant or have heavy influence of local trading.

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