

CHALLENGES OF LAND ISSUES TO INVESTMENT IN KENYA

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Abstract

The last decade has witnessed a raft of political and legal reforms in Kenya and the efforts have paid dividends. Kenya is experiencing an unprecedented surge in foreign direct investments in varied infrastructure projects. In most cases the projects are situated in rural areas creating a buzz of excitement and igniting opportunities for poverty reduction initiatives directly or indirectly. Indeed, transformative projects in a developing country should elicit positive stories of growth and poverty reduction with vistas of lit up villages and local initiatives catalysed by the infrastructure and ancillary opportunities.

For a growing number of projects however, what has hogged the limelight are *firstly*, challenges of setting up and dealing with restrictions imposed on foreign ownership of land in Kenya which often have a negative impact on the structure and funding of investments. *Secondly*, and certainly more vociferous are challenges of implementation which have witnessed disputes pitting proponents of projects and by extension the private equity funders and financiers against the community or small scale land holders where the projects are situated asserting contrary rights.

Land is at the centre of these challenges. This paper highlights these challenges faced by foreign investors and offers solutions to the problems.

Key Words:

1. Constitution of Kenya- the new constitution of the Republic of Kenya enacted in 2010
2. FDI- Foreign Direct Investment
3. National Land Policy- The policy that spearheaded the land reforms and the basis of the provisions on land in the constitution, and the land Acts enacted in 2012.
4. New land regime –Reference to the legislation enacted in 2012 repealing land Acts enacted before and after independence

CHALLENGES OF LAND ISSUES TO INVESTMENTS IN KENYA.

INTRODUCTION

1.1 INTRODUCTION GENERALLY

Kenya is arguably the top investment destination in East and Central Africa. Apart from a very strong private sector, this growth can be credited to a rise in foreign investment flow into the country year by year. The last decade has witnessed a raft of political and legal reforms in Kenya and the efforts have paid dividends. Kenya is experiencing an unprecedented surge in local and foreign investments in infrastructure projects, mainly oil and gas, power generation especially clean renewable electricity both off grid and on grid, transportation, and healthcare. In most cases the projects are situated in rural areas creating a buzz of excitement and igniting opportunities for poverty reduction initiatives directly or indirectly. Indeed, transformative projects in a developing country should elicit positive stories of growth and poverty reduction with vistas of lit up villages and local initiatives catalysed by the infrastructure and ancillary opportunities.

The Kenyan storyline has largely followed the script and there are many happy stories to tell. For a growing number of projects however, what has hogged the limelight are *firstly*, challenges of setting up and dealing with restrictions imposed on foreign ownership of certain land tenures in Kenya which often have a negative impact on the structure and funding of investments. *Secondly*, and certainly more vociferous are challenges of implementation which have witnessed disputes pitting proponents of some of the projects and by extension the private equity funders and financiers against the community where the projects are situated or small scale land holders asserting contrary rights.

Land is at the centre of these challenges. This paper highlights the challenges faced by foreigners undertaking investment with regard to land and offers solutions to the problems.

1.2 INTRODUCTION: THE SPECIAL PLACE OF LAND IN KENYAN POLITICS

Land has always occupied a special place in the history and politics of the nation. Every election cycle the country witnesses incidences of tensions, skirmishes and terrible backlashes between communities centered on land and land rights. The land reform process started before the country attained its independence and is still ongoing. Sessional Paper 3 of 2009, which became the National Land Policy of 2009, identified the issues marring land and the administration of land in Kenya. The National Land Policy proposed a new dispensation in land administration with the establishment of a National Land Commission to manage public land and the consequential abolishment of the office of the Commissioner of Lands, thereby wresting the function of land administration from one person to a group of persons acting together.

Chapter 5 of the Constitution of Kenya 2010, which deals with land and environment borrowed heavily from the National Land Policy. This chapter is the anchor of land reform in Kenya and has given rise a new land law regime

comprising substantive and procedural land laws which include the Land Act No. 6 of 2012, the Land Registration Act No. 3 of 2012, the Community Land Act, and the National Land Commission Act No. 5 of 2012.

Under the Constitution of Kenya, land is categorized as public, community and private.ⁱ The constitution further defines what public, private and community land entail. Public land vests in and is to be held by either the county government in trust for people resident in that county or the national government. Private land is enumerated to be registered land held by any person under any freehold or lease hold tenure and any other land declared private land under an Act of Parliament. Community land includes: land lawfully registered in the name of group representatives under the provisions of any law; land lawfully transferred to a specific community by any process of law and any other land declared to be community land by an Act of Parliament. It also includes land that is: 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; or lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under.

Tremendous gains have been achieved flowing from the Constitution to the new land laws. That said and as indicated above, there are gaps in the law and this has brought new challenges. These gaps and challenges are particularly manifest when considering foreign investors with projects anchored in land. This paper will highlight the various challenges posed by the land issues to investment in Kenya by foreigners.

1.3 INTRODUCTION: THE LEVEL OF DIRECT FOREIGN INVESTMENT IN KENYA

According to the U.S. Investment Climate Statement of 2015, Kenya has been lauded to have a generally positive investment climate that has made it attractive to international firms seeking a location for their regional or African operations.ⁱⁱ The UNCTAD world investment report of 2016 stated that Foreign Direct Investment (“FDI”) flows to Kenya reached a record level of \$1.4 billion in 2015, resulting from renewed investor interest and confidence in the country’s business climate and booming domestic consumer market.ⁱⁱⁱ The report stated that Kenya is becoming a favored business hub, not only for oil and gas exploration but also for manufacturing exports, as well as consumer goods and services. Arguably the renewable energy sector in Kenya is the most vibrant in the region with active projects in wind, geothermal, small-scale hydro and biofuels. Some recognisable projects in renewables include The Lake Turkana Wind Project (LTWP), Kipeto Wind Project, and Kinangop wind project.

The increased inflow in FDI to Kenya can be credited to the investor friendly policies being enacted by the government. An example is Kenya’s move to abolish restrictions on foreign shareholding in listed companies as competition for capital heats up among Africa’s top capital markets.^{iv}

The auto industries, as well as the agriculture, logistics, infrastructure, and ICT sectors are the top recipients of FDI in Kenya.^v Investment in agriculture and agribusiness is paramount to the economy of Kenya and this is evidenced by the large scale exporting of cash crops and horticultural produce. As of 2016, Kenya exported 133,658 metric tons of horticultural produce^{vi} and according to Horticultural Crop Directorate (HCD) provisional statistics in 2016, the floriculture industry earned Kenya Shillings 70.8 billion. About 38% of all cut flower imports into the EU comes

from Kenya.^{vii} The horticultural sub-sector is mainly large-scale and private sector-dominated, with a small percentage of small-scale farmers. It employs about 2 million people, and accounts for up to 21% of all agricultural exports.^{viii}

The extractive industry is also gaining momentum in Kenya. Flagship projects like Base Titanium's Kwale Mineral Sands project, and recent oil discoveries announced by Tullow Oil and Africa Oil, signal the strong potential for sector growth.^{ix} According to government estimates, extractives currently contribute just one percent to Kenya's national income, and less than two percent of export earnings.^x This contribution is set to grow significantly (current estimates suggest the sector may grow to 10% of GDP).^{xi} The extractive projects are not solely carried out by the Kenyan government as the country does not yet have capacity to sustain its extractive industry without technical support from other countries with the capacity to do so. For instance, the oil exploration and exploitation in Northern Kenya is being carried out jointly by the Government of Kenya and Tullow Oil- an Irish Company – whose shares are listed on the Irish and London Stock and has its registered headquarters in London. Cement mining at the Kenyan coast is done largely by LafargeHolcim formerly known as Lafarge- a French industrial company that specializes in extraction and production of cement, construction aggregates and concrete. The prospecting of niobium at Mrima Hills in the Coastal region of Kenya was a joint venture by Pacific Wildcat Resources Corps (PAW), a Canadian firm and its Kenyan partner Cortec Mining Kenya (CMK).^{xii}

The enactment of the Special Economic Zones Act ("SEZ Act") is expected to drive up the interest of and actual injection of FDI in Kenya. Section 29(2) of the SEZ Act stipulates that a license to operate as a special economic zone shall be granted to an applicant if the business enterprise is registered in Kenya, whether or not the ownership is 100% foreign. The SEZ Act contains incentives relating to tax and work permits in order to encourage investment in Kenya. The Dongo-Kundu SEZ Project is a first in a series of projects which are intended to be model zones across the country.

1.4 INTRODUCTION: LAWS GOVERNING FOREIGN DIRECT INVESTMENT AND TRADE IN KENYA

Foreign Investment in Kenya is governed by the Public Private Partnership's Act ("PPA"), the Foreign Investment Protection Act Cap 518 and the Investment Promotion Act no. 6 of 2004 ("IPA"). These were enacted to promote and facilitate investment by assisting investors in obtaining the licenses necessary to invest and by providing other assistance and incentives. Investors seeking the incentives under the IPA are required to register with the Kenya Investment Authority. The PPA Act has provisions on what criteria has to be met in order for a public private partnership to be formed and further elaborates on the obligations of both parties.

Kenya is also a party to bilateral investment treaties which primarily promote and protect the contracting parties' investments. Kenya has signed 17 bilateral investment treaties but only 5 are in force. The investment treaties have a promotion and protection clause which stipulates that each party should endeavor to create favorable conditions for nationals or companies of the other contracting party to invest capital in its territory. The contracting parties are obliged to accord fair and equitable treatment to the investors, their companies and investments compared to that

which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

These bilateral treaties have force of law in Kenya.

1.5 INTRODUCTION: LINK BETWEEN FOREIGN DIRECT INVESTMENT AND LAND

A majority of FDI's in Kenya involve acquiring an interest in land.^{xiii} This can be either directly or through an equity stake. Whatever the case, there are serious legal challenges that such an investor is faced with. Often the challenges lead to litigation. The next chapter examines some of these challenges.

2. LAND BASED CHALLENGES FACED BY FOREIGN INVESTORS IN KENYA

A review of some of the legal restrictions facing foreign investors in Kenya where land is involved discloses the challenges that invariably affect growth and investments. These legal restrictions in regard to ownership of land by non-citizens has brought inconsistency and challenges which could potentially scare away foreign investors.

2.1 AN INCHOATE LAND LAW REFORM.

A study commissioned in the year 2009 on the status of land and the collateral process in Kenya identified the following key challenges which inhibited the creation perfection and enforcement of land rights:-

- *Weak and dispersed legal framework:* there were more than 20 statutes regulating land use and development. The laws lacked uniformity and result in a convoluted conveyance system. For example, freedom to contract was severely curtailed by the statutes that inhibit property rights through archaic procedures and regulations
- *Weak and dispersed registry system:* there were many registries, which were manual, inefficient, uncoordinated and inconclusive. This situation was exacerbated by the practice of using the registries as tax collectors;
- *Weak enforcement procedures:* the judicial system was identified as a failing to protect property rights and generally being a major hindrance to lenders' ability to raise security;

Significant land reforms have been witnessed in Kenya since then flowing from the 2009 Land Policy and the 2010 Constitution. A raft of new land laws-fewer and more relevant- are largely in place replacing the set of colonial laws that had become outdated and redundant. A new dispensation in land administration has been established with the National Land Commission working in tandem with the Cabinet Secretary for Lands, albeit with quite a few glitches along the way. There is an active attempt to improve record keeping and move towards automation.

Having acknowledged the great strides taken in land law reform since the year 2009, it is equally fair to admit that the land reform process is not where it should be. There are significant gaps and setbacks that require to be aligned to ensure the new land laws perform optimally and as intended. The greatest setbacks would appear to be as follows:

- *Weak and dispersed land survey function:* the survey function was devolved to the Counties but this was done without first having the enabling legal framework in place. The Survey Bill is still in discussion. As a result the survey function is not operating optimally and there is little coordination between the central survey office and the county survey offices. The land owners in rural areas suffer the greatest from the absence of a coherent land survey function.
- *Absence of automation:* there are still many registries, which are manual, inefficient, uncoordinated and inconclusive. This situation is likely to obtain until the registries are automated and record keeping as well as the conveyancing practice become automated.
- *Registries as Tax collection points:* There is a worrying practice of using the registries as tax collectors. At the moment, the registrars are effectively collectors of stamp duty. The revenue authority recently twined the payment i-tax portal so that a person is obliged to pay Capital Gains Tax before accessing the service for registration of instruments and payment of stamp duty. The High court however put a stop to this and ordered the Kenya Revenue Authority to untwine the i-tax portal to enable transactions to proceed without obliging sellers to pay Capital Gains Tax in advance.
- *Sanctity of Title:* the judicial function has often failed to have a uniform interpretation of the law on sanctity of title. There is a growing trend of conflicting judicial interpretation regarding the protection of property rights. In a recent judgment, the high court declined to protect the rights of innocent purchasers of value without notice who were facing eviction by the Government to enable a road to be built. The state was proceeding on the basis that 30 years before it had compulsorily acquired the land and paid the previous owners. The acquisition by the state was however not completed since the “owner” was left with the title and the records at the registry were not changed. This enabled the compensated owner to sell the same land to an unsuspecting developer who built homes on the disputed land. The Judge failed to uphold the rights of the innocent registered buyers. They were not compensated for their loss. The judge went against a long line of judicial pronouncements protecting the property rights of the innocent and declared that the public duty to build a road outstripped the owners’ property rights and all she could say is that she was sorry about their fate.

Justice Mumbi Ngugi in the case of *Cycad Properties Limited & another V Attorney General & 4 others* [2013]:

- *“It is true that the petitioners have a right to own property, and they are entitled to their properties to the extent that such properties have not encroached upon land that was acquired and set aside for a public purpose. Their right to property must be exercised within and in accordance with the framework of the law. Public lands acquired through compulsory acquisition are amongst the overriding interests stipulated under section 30 of the Registered Land Act which qualify the indefeasibility of title acquired under the Act as provided in section 28(b) above. The petitioners’ titles, to the extent that they comprise land which forms part of the*

Northern Bypass, are defeasible to that extent.”

- ***“While I appreciate the large investments that have gone into the construction of the residential houses and sympathise with the situation of the petitioners, I believe their recourse lies in a claim in law against those who sold the properties to them.”***
- ***“As I noted above, the petitioners are unwitting victims of those who sold the land to them, and of the surveyors who failed to exercise due diligence in carrying out the surveys of the subject property. While they are not entitled to retain the 20 metres of the road reserve, they ought to be given an opportunity to surrender it to the respondents. In this regard, and to obviate the need for further action on the part of the respondents for their removal from the part of the road reserve encroached upon, I direct that the petitioners do, within the next ninety (90) days from the date hereof, surrender the 20 metres of land out of their respective parcels that comprised the road reserve to the respondents. The titles to the parcels shall be rectified accordingly.”***

2.2 RESTRICTION UNDER THE CONSTITUTION

The Constitution is the supreme law of the land. Chapter 5 of the Kenya Constitution has provisions on land and environment spelling out rights of citizens to own land and the principles the use of land and environment should adhere to. This chapter also contains elaborate restrictions on ownership of land by non-citizens. Article 65(1) of the Constitution provides that a person who is not a citizen may hold land on the basis of leasehold tenure only and for a term not exceeding ninety-nine years.^{xiv} Any document purporting to confer on a non-citizen an interest of more than 99 years shall be regarded as an instrument conferring interest for 99 years.^{xv} Any trust arrangement in which a citizen would purport to hold such land on behalf of a non-citizen is prohibited.

2.3 SPECIAL RESTRICTIONS FOR AGRICULTURAL LAND

The Land Control Act prohibits foreign ownership or dealings in agricultural land. Consent must be obtained from the Land Control Board for any transaction involving the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land and for dealings in the shares of companies holding agricultural land. Consent will not be given to non-Kenyan citizens for any such transactions (save in the case of a mortgage or charge created in favour of a non-Kenyan lender). The only exception is where the president exempts a transaction from the requirements of the Act. Although a non-Kenyan citizen may apply for a presidential exemption from the application of the Act, in practice this method is exercised in the most exceptional of circumstances in which there are significant public interest. Considering that most infrastructural projects are situate in rural areas which are invariably agricultural, this restriction is very much in the way of growth and development. In addition, most land with agricultural user is held on freehold tenure, which are constitutionally out of bounds for non-citizens.

Affecting foreign investors directly is the provision that consent will not be granted where the disposition of the land or share (of a co-operative or a company that owns agricultural land) is to a person who is not: a Kenyan citizen, a private company or co-operative society all of whose members are citizens of Kenya; group representatives incorporated under the Land (Group Representatives) Act, 1968 (Cap. 287); or a state corporation within the meaning of the State Corporation Act, 1986 (Cap. 446)^{xvi}

Any foreign investor who would like to invest in the agricultural sector will therefore not be able to do so if his investment would have entailed the purchase of agricultural land or the acquisition of shares and eventual membership in a private company or co-operative society. If a foreign investor was to implement an agricultural investment, he would have to invest in a public company already holding agricultural land or get a presidential exemption. This is a heavy restriction and a great challenge to investment.

2.4 APPROVALS REQUIRED FOR SUBSTANTIAL TRANSACTION

The Land Act introduces restriction on dealings in which an investor wishes to acquire land from the government to carry out a *substantial transaction* for investment purposes. This would be done by converting public land to private land.^{xvii} A *substantial transaction* means a transaction that involves the transfer, leasing or licensing of land to a local or foreign investor either alone or in a joint venture to carry out developments in agriculture and other approved ventures with direct developmental benefits for Kenya through infrastructure or any other listed projects. Any substantial transaction involving the conversion of public land to private land shall require approval by the National Assembly or county assembly as the case may be.^{xviii} Parliamentary approval would be needed for actual conversion and disposition to occur. The rules setting out the procedure of approval are yet to be enacted. The absence of these rules poses a major hindrance to investors interested in undertaking substantial transactions in Kenya.

2.5 CONTROLLED LAND

A non-citizen is restricted from owning “controlled land” except with the approval of the cabinet secretary. Controlled land is defined in the statute to be land situate: (a) within a zone of twenty-five kilometers from the inland national boundary of Kenya; (b) within the first and second row from high water mark of the Indian Ocean; (c) any other land as may be declared controlled land under any law or statute. The rationale for this restriction is security considerations. The concern however is that by centralizing the source of giving the consent the law becomes susceptible to manipulation. This restriction is the subject of the Environment and Land Court Petition No. 19 of 2016 which is yet to be determined.

3. CHALLENGES OF IMPLEMENTATION

The successes of the project must in part be measured by the positive way in which it impacts those who are in closest proximity to it. This test is greater in instances of foreign investors who need to be accepted by the communities where they wish to set up their projects. It is often not enough to look at the macro-economic benefits of a project without also considering the micro side of things. Instances where communities have not accepted the project must be symptomatic of problems with implementation or the failure by others to play their role in ensuring the success of the project. In the next paragraphs we set out some of the challenges of implementation of projects in Kenya by foreign investors.

3.1 ABSENCE OF LOCAL CONTENT REGULATIONS

Projects have oftentimes been ahead of the law in Kenya. There are at the moment no credible regulations for local content to guide citizens in areas where projects are undertaken. In the absence of such regulations, the communities where projects are undertaken assume a subjective evaluation of what they are entitled with consequences that projects are paralyzed or subjected to expensive delays and litigation.

1. Kinangop Wind Power Project

Case Example

The Kinangop Wind Power Project stalled when residents took the project company to court over various issues including land and environmental rights.^{xix} The project had been proposed in 2004 and by 2008, the project ownership had changed and the Megawatts production up scaled from 30Mw to 50MW. As of 2015, the equity investors were entities registered in South Africa, Mauritius and Norway while debt was provided by Standard Bank South Africa. The project company had acquired lease hold interests over 40 plots by signing 40 leases. The residents some of them having leased their land however complained that a proper Environmental Impact Assessment wasn't carried out and that the running of the wind turbines would cause the residents harm. The judge ordered that the project be halted and a new EIA be carried out but by then the investors had already pulled out of the project. The project may seem to have succumbed to a legal technicality but it is also likely that it was marred in the political and social agendas of the region where the residents involved did not appear to have bought into the project or had not all agreed to the project.

In light of the growing foreign investment in Kenya, there is need to put in place structures which would ensure that the citizens of the country would be involved and ultimately benefit from such foreign investment. Local content policies are government led initiatives to see to it that foreign investment and specifically a foreign company ensures that a certain percentage of input in the production process come from local sources.

At the moment, we have a few statutes where reference to local content is made but this is often without a credible guideline as to how this is to be managed and enforced.

Example: Mining Act 2016.

The Mining Act entered into force on the 27th of May 2016. The Act's objective is to give purpose and force to the principles of land policy enshrined in Article 60 of the Constitution and to the provisions of the Constitution stating that public land which includes all minerals and mineral oils shall vest in the government to be held in trust for the people of Kenya.

The Acts obligates the holder of the mineral right to give preference to: local products, local services and local companies in its operations of prospecting, mining, processing, refining and treatment transport or any other dealings in minerals.

Marsabit Power Plant Case

The Court of Appeal upheld a challenge by the Community against the proponents of a power project in the case of ***Gitson Energy Limited vs. Hon. Francis Gachu Ganya and 6 others***¹. The community had opposed the setting aside of trust land for the advancement of a wind power project. The High court judge issued the order of certiorari on the basis that the procedure of setting aside the trust land under the Constitution of 1969 and the repealed Trust Land Act was flawed. The court of appeal judges upheld this decision albeit with different rationale. Lady Justice Okwengu in her judgment highlighted the fact that the issue of public participation as part of the decision making process was a fundamental factor in the process of setting aside trust land. The process of setting aside the land for the advancement of the wind energy project was not evidenced neither by any public participation or the participation of the division board under section 13(2) of the Trust Land Act. She highlighted the fact that the issue herein was not one of adequacy or inadequacy of public participation but compliance with the clearly provided decision making process for setting apart land that included structured participation. In light of this, the lady justice was of the opinion that the order of certiorari issued by the high court judge was to be upheld.

3.2 INCHOATE LAWS ON COMPULSORY ACQUISITION AND COMPENSATION

The route of compulsory acquisition of land and attendant compensation offers a way of achieving progress with projects in certain areas. Compulsory acquisition as defined by the Land Act means the power of the State to deprive or acquire any title or other interest in land for a public purpose subject to prompt payment of compensation.

Kenyan law is rather elaborate in protection of property rights and the entitlement of just compensation in case of compulsory acquisition. The exercise has been rather robust to a point where the Government feels the cost of compensation is making projects to become untenable. A case in point is the case of Five *Star Agencies Limited vs. National Land Commission [2014] eKLR.* The appellant in this case appealed against the decision of the Respondent on compensation payable for a portion of the land which it intended to compulsorily acquire. The Respondent had quoted an award of KShs. 87,804,225.00 as total compensation payable for the said portion of land and improvements thereon. The Appellant submitted that the portion of land to be compulsorily acquired had been drastically undervalued by the Respondent and that an independent valuation showed that the said premise for acquisition was worth Kenya shillings Four Hundred and Fifty Million, Eight Hundred Thousand (KShs. 450,800,000/=). The judge declared that the compensation guidelines to be used were that of the Land Acquisition Act in the absence of compensation regulatory rules and to this effect, the Respondent's compensation award was a gross undervalue of the Appellant's portion of land and not a full and just compensation as required by the Constitution, the Land Act of 2012 and the repealed Land Acquisition Act. The judge ordered that Appellant be awarded the sum of KShs 413,192,500/= as compensation for the compulsory acquisition of the land.

Compulsory acquisition then seems to be an expensive affair and one that would hinder any type of investment that would need acquisition of land by way of compulsory acquisition

In the case the government has entered into a public private partnership agreement with a foreign entity or a local investor, the high cost of compensation in part affects the investor in that the cost of putting up the project and advancing it is borne by both parties. The investor therefore suffers a higher expense and this factor may hinder foreign investment.

The Standard Gauge Railway Project (SGR).

The Government of the Republic of Kenya identified two corridors for the development of a modern, high capacity Standard Gauge Railway (SGR) transport system for both freight and passengers. This is a flagship project under Kenya's blue print Vision 2030, whose goal is to transform Kenya into a middle-income industrialized economy by 2030. It is the most important transport project in Kenya since the building of the first railway in the early 20th century. Construction of the 609km-long line began in October 2013 and is scheduled to be completed by December 2017. The Mombasa-Nairobi phase of the project is estimated to cost KES327bn (\$3.8bn). The project is being funded by China Exim Bank who will provide 90% of the financing while the remaining 10% is being contributed by the Kenyan Government. Land acquisition for the implementation of the

project was partly by compulsory acquisition of private land and use of public land. The total cost of land acquisition for the first phase was estimated at 15 billion Kenya Shillings. Part of this cost is compensation costs that would be directed to private land owners and following the compensation measures followed in Kenya at the moment, investment requiring private land to be compulsorily acquired becomes an expensive venture.

The project is a part of a larger project that involves connecting Uganda and Tanzania via the railway thereby promoting trade and investment. The expensive nature of the project is a cause for speculation and the project has been lauded as being one where value for money has not been considered. Claims of Rwanda pulling out of the project due to its expensive nature were reported albeit the reports were never confirmed.

In a bid to stem the high cost of compulsory acquisition, the Kenyan Parliament tabled a bill- The Land Values Index Laws (Amendment Bill) in 2014. The Bill states that valuation shall be based on the land value index developed by the national government. It also proposes that compensation for compulsorily acquired land shall be in the form of allocation of alternative parcel of land of equivalent value and comparable geographical location and land use to the land compulsorily acquired and monetary compensation shall only be limited to the cost of actual development on the land and any other lawful payment under the Act. This Bill is likely to run into headwinds as being against global best practices in matters of compulsory acquisition.

3.3 OPPOSITION FROM STAKEHOLDERS

Initiation of investment projects may encounter some hostility from the public and specifically the occupiers of the land where the project investment shall be implemented. The opposition factor is due to a number of reasons. Investment projects may disrupt the way of life of the inhabitants of the land and some may even be health hazards to the residents. The Kinangop Power Project for instance was halted by the court for the reason that a fresh EIA was not carried out when there was an upscale of the project. The residents went to court arguing that the upscale would disrupt their way of living as the wind turbines would cause them disturbances bearing in mind there was a setback distance of 130 meters. The residents wanted the setback distance to be set at 1kilometre. The judge ruled that there weren't any guidelines on setting of setback distances but the lack of a fresh EIA rendered the project illegal.

The Standard Gauge Railway project was also opposed on many fronts. The Railway has been constructed on land that is part of the Tsavo National Park. Phase 2 will see the rail pass through the Nairobi National Park. The opposition comes from the public and animal rights activists who were of the opinion that the construction would disrupt the ecosystem of the park and adversely affect the animals.

3.4 OVERLAPPING MANDATES/LACK OF GUIDELINES

The issue with most of the legislation on land in Kenya is that the law expressly gives a mandate for a body or an office to do an action but not provide guidelines on how it should be done. When the body mandated to do a task performs it, questions as to the legality of the process are raised. The action of a public body can then be rendered irregular and that invalidates the whole process and any interests created by the process are affected.

Another issue with the law is that different public bodies are given the same tasks and this notably applies to the Ministry of Land, Housing, and Urban Development and the National Land Commission. The overlapping mandates therefore cause an issue as to which public organ is to carry out what function. The overlapping mandates cause processes to be marred by technicality issues and eventual litigation in order to decide whether the process was performed in accordance with the laws.

The recent case of **Anthony Otiende vs. Public Service Commission & 2 others**^{xx} espoused the consequences of such irregularity. One of the core issues was whether the promulgation of regulation and forms by the Ministry of Land, Housing and Urban Development for the purpose of effecting the provisions of the Land Registration Act, 2012 was free of irregularity with regard to the process. In this case, the Ministry of Land, Housing and Urban Development issued forms that were to be used in the registration of interests under the Land Registration Act. The Ministry had enacted the forms without following regulations that were to be enacted by parliament which regulations had not yet been enacted. The Ministry moreover did not consult the National land Commission nor did it seek parliamentary approval. The judge issued an order declaring the registration forms as well as forms of title including Leases, Title Deeds, Grants and Certificates of Title or of Lease made and promulgated by the Ministry of Land, Housing, and Urban Development without the advice of or input of the National Land Commission, without the necessary public participation and or parliamentary scrutiny and approval as unconstitutional null and void. Considering the immediate consequences of the above declaration on the registration of titles processes currently ongoing and already undertaken, the judge suspended the declaration of invalidity in order to enable the Ministry of Land, Housing and Urban Development to initiate meaningful engagement with the public, seek and take into account the advice of the National Land Commission, if any, on the impugned regulations and forms.

The effect of the foregoing issues to investment is detrimental as pertains the validity of processes undertaken by an investor or even the validity of an acquired title in that an investor may have undertaken the due process in whatever land transaction only to be delayed or stopped by such judicial precedence

3.5 DEVOLUTION CHALLENGES

The National Land Policy envisioned a reformed institutional framework that would ensure devolution of power and authority, participation and representation, justice equity and sustainability.^{xxi} Devolution of land administration and management was realized by the passing of the Constitution and the Land legislation. The establishment of the National Land Commission (NLC) and the County Governments saw to it that the National Government's powers were transferred to the NLC and the County Government.

Devolution of land administration was part of the solution to address the issues that were caused by the old land regime such as hindered accessibility to land registries and protracted processes caused by bureaucracy in the lands offices.

The same devolution however poses a few challenges. It may be said the bureaucracy was transferred from the higher level office to the lower level office as complaints of hindered accessibility to land offices are still reported.

The change of guard may also pose an issue to any land owner and particularly investors. For instance if one had an existing lease from the National government as a lessor, it will subsist with the same terms and conditions and the change of land lord will not affect the lease during the term. If the lease however expires, the reversionary interest is vested in the County Government and in case the lessor would need a renewal, it has to be done on new terms and conditions as it will be considered a new lease. The new terms and conditions may not be agreeable as was with the preceding lease.

5. CONCLUSION AND RECOMMENDATIONS

Although Kenya has made great strides in land reforms, it stills falls short in some key areas relating to the ease of investments. According to the World Bank research bulletin:

“A competitive business and corporate sector is built on the foundation of strong property rights, ease of company formation, corporate governance, the availability of flexible collateral mechanisms to support the availability of credit, and reliable insolvency systems to minimise lender’s risk and encourage the rehabilitation of viable firms in financial difficulty.”

This paper puts forward a number of recommendations aimed at resolving the challenges that currently obtain and deny the country faster and more efficient support from investors particularly where land is involved.

The Government is urged to prioritise the necessary reforms, some of which are on-going, as a major contributor to economic growth and eradication of poverty in Kenya. There is a private members Bill for local content regulations. This Bill needs to be rationalised and made into law to ensure uniformity and predictability in local content requirements.

The Government also ought to take a more central role in ensuring the success of projects. Oftentimes the proponent of the project is the interface with the community and sometimes this leads to unintended consequences. It may be more prudent for the Government to play a bigger role in midwifing and integrating the project in the community. A number of project hindrances can be cleared if the Government took a more central role in enabling the project to happen. This support can be more than just the letter of support. It can be more along the lines of creating easements and enabling compensation through statute led initiatives rather than the contracts which are usually signed by proponents of the projects.

The CEO of General Electric in a recent interview quipped “You need a couple of things to happen. You need an ongoing sense of stability and the mineral resource wealth to be reallocated back into infrastructure industrialisation, so you need a stream of investment into infrastructure. You need a growing middle class that values things like healthcare and social security. All will support long-term growth. Sometimes small things get big and you want to be there when that happens.”^{xxii}

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^{xv} Constitution of Kenya 2010, Article 64 (2).

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