

# **Community Benefit in Large Scale Land Acquisitions in Kenya: Where is the Optimal Policy Balance?**

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**Note:** This paper presents a succinct summary of the research, findings and recommendations of the main research report entitled:

The detailed research report, of the research project undertaken over a three-year period from 2013-2016, can be accessed at: <http://www.ldgi.org/index.php/research>

## 1 Abstract

Kenya's Vision 2030 has been the official development blue print since 2008, with a focus on increasing food security, as well as enhancing infrastructure, and manufacturing. Notably, in October 2015, the Kenya Government released the "Kenya Industrial Transformation Plan (KITP), which focuses on enhancing agriculture's role in the economy, and more so the value addition through agribased manufacturing. This will in effect open up more parts of Kenya to socio-economic advancement. These approaches resonate with the ongoing construction of a Standard Gauge Railway line (SGR), a second port in Lamu, road infrastructure, and proposals for a resort city and complementing infrastructure in Isiolo, as part of the Lamu Port South Sudan Transport (LAPSSET) Corridor. The LAPSSET project is a key plank of Vision 2030 that seeks to develop infrastructure to develop parts of northern Kenya that have been historically marginalized.

The impact of large-scale land-based investment projects on communities has become of concern to investments policies, and includes a focus on land rights, procedural justice, awareness, involvement in investments, and access to justice mechanisms. In Lamu County (along northern Indian ocean coast neighbouring Somalia) for instance, field research by the authors of this paper established that a gap exists in the knowledge on land rights. Equally, the land administration system that should secure land rights through registration is dysfunctional, giving way to a thriving informal land market system that opens room for abuse of government procedures, insecure tenure for residents, as well as difficulties in ascertaining land rights during processes for land acquisitions. Nonetheless, a robust relationship was found to exist between local community leaders and the government officials. Still, not much knowledge was found to exist, amongst local leaders, on the exact breadth and scope of the LAPSSET project that will undoubtedly affect much of the lifestyle in Lamu County. The situation was found to be same in the other LAPSSET affected County of Isiolo. Yet, the residents will not only be directly affected by the investments, but may likely be displaced by the activities that derive from the land use based investments. Where compensation has been made for large scale land acquisition, e.g for Lamu Port, there was no apparent sign of the money being reinvested locally, with research indicating the funds were either moved to other parts of Kenya, or abroad.

This situation obtains despite Kenya having in place a recent (2010) Constitution that redefines and protects community and individual land rights, as well as a new land administration system. In reality, the challenge arises because of historical problems in adjudication and registration of land rights in places like Isiolo and Lamu County, where now land rights are central due to LAPSSET investments. This research, undertaken with financial support for the International Development Research Centre (IDRC), Canada) has found that country requires focusing on revisiting the land rights adjudication and registration process. This is because it is now clear that Kenya is banking a lot of economic advancement on large scale land acquisition, especially to open up previously marginalized parts of the country and promote its economy. Therefore, for there to be success and sustainability, these projects should be preceded by adequate field surveys to identify site suitability, community sensitization and discussions on anticipated benefits and compromises. This particular

outcome is informed by feedback from communities, who according to project documents are affected, but who in reality have never been directly consulted about the project(s). Indeed consulting communities is critical considering that the projects are being undertaken against a background of weakly enforced, failing or failed land administration mechanisms – which foster land tenure insecurity? Going forward therefore, there is need to explore how to create a hybrid mechanism of safeguards between contemporary/customary society structures with formal legal structures to allow for tenure security even as the trouble in the formal legal system takes time to sort out. For instance, it does not achieve much when legal mechanisms provide for communities to be consulted, but fails to secure access to, or provision of relevant information to the various affected parties. People have indicated interest in partnering with these undertakings, for instance by identifying business activities they can be involved in. Such an approach will help address the dearth of knowledge that exists among local communities across the research sites on land rights. Indeed, the paper argues for, and proposes the need to develop a training programme that is community based in design, content, delivery, and that allows a feedback system with the government for learning – and to pinpoint present or potentials areas of trouble. Such training is consistent with the tenets of developing public participation through enhancement of awareness to ensure the public can make a meaningful contribution whenever they are consulted.

## 2 Introduction

Land acquisitions, either driven by foreign investments or domestic investment needs have continued to polarize opinions. When this research was proposed, it was premised on arguments by scholars Ruth Meinzen-Dick and Helen Markelova, who had analysed agricultural land deals, and argued that there were potentially two schools of thought about foreign acquisitions over agricultural land.<sup>1</sup> Their school of thought regards them as “beneficial investments” whereby investors are viewed as bringing needed investment, possibly improved technology or farming knowledge, thereby generating employment and increasing food production. Meinzen-Dick and Markelova further argued that because these land acquisitions, foreign and domestic, are ongoing at a very fast rate, it is necessary for host countries to focus on what they can do to seize the opportunities and mitigate the risks associated with the deals. During implementation of the research project in Kenya, it became clear that although prior illustrations of land deals included foreign acquisitions (e.g. Dominion farms), a government economic policy focusing on mega-infrastructure projects was driving (or expected to drive) a much higher pace of land acquisitions either for primary infrastructure, or for the economic activities that flowed from the primary infrastructure. This is in the context of the Lamu South Sudan Ethiopia Transportation Corridor (LAPSSET) project, which is a flagship means for realization of Vision 2030;<sup>2</sup> Kenya’s current national development plan. Thus, a national conversation is necessary to debate the crucial question of how to provide safeguards to protect the interests of local communities directly affected by these investments, including compensation of land that is taken, and their place in the

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<sup>1</sup>Ruth Meinzen-Dick & Helen Markelova Necessary Nuance: Toward a Code of Conduct in Foreign Land Deals in Michael Kugelman and Susan L. Levenstein (eds) 2009 LAND GRAB? The Race for the World’s Farmland Woodrow Wilson International Center for Scholars, Washington, D.C. p. 69

<sup>2</sup> Sessional Paper No. 10 of 2012 on Vision 2030 (Government Print, Nairobi, December 2012)

socio-economic and environmental continuum of investment projects from design to implementation.

A primary concern in this case is the eligibility, in terms of law or legitimate interest, of local community members to compensation when land they have a claim on, is acquired. This eligibility draws from concern over the validity of land rights, especially due to non-application of formal systems of adjudication and registration in places such as Lamu, or Isiolo, as discussed later in this report. Land tenure is important because it normally defines methods by which individuals or groups acquire, hold, transfer or transmit property rights in land. It has to do with how rights to land and other natural resources are assigned within societies, and just as it determines *who* holds *what* interests in *what* land.<sup>3</sup> According to the Food and Agriculture Organization (FAO),<sup>4</sup> the breadth of tenure rights in land may comprise three elements, mainly (a) use rights (to use the land for grazing, growing subsistence crops, gathering minor forestry products); (b) control rights (to make decisions how the land should be used including deciding what crops should be planted, and to benefit financially from the sale of crops); and (c) transfer rights (right to sell or mortgage the land, to convey the land to others through intra-community reallocations, to transmit the land to heirs through inheritance, and to reallocate use and control rights).

Equally critical are the mechanisms for community participation during the process of land acquisition, flowing from identification of land as project-suitable, feasibility studies, environmental assessments, and the process of verification and valuation for compensation. Participation in this case will lack meaningful impact if the affected people do not have knowledge of the details of the investment at hand, or clarity on the acquisition procedures or valuation methodology.

This research was undertaken in research sites in Isiolo, Lamu and Siaya counties, based on selection criteria that is set out in section 3.1. The utilization of focus group discussions and key informant interviews proved valuable in generating qualitative data that has been applied for analysis in this report. The line of inquiry focused on the tracking whether legal provisions for compulsory land acquisition and compensation, as well as community benefit from investments provided equitable opportunities in terms of socio-economic (participation, livelihoods) and environmental benefits. In addition, the status of landholding and land administration became apparent, especially the continued non-application of laws on land adjudication and registration in many areas of Kenya that now happen to be a focus for land acquisition and investments. The research team paid particular attention to the mainstreaming of the roles of women in community processes, whether through formal and informal means, as one mechanism of testing equity. Community participation, on sum assessment, represents another form of equity with respect to giving voice to affected community members, and the research established both positive and negative outcomes. Giving voice to a community is important, and it has multiple facets, such as consultation,

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<sup>3</sup> Patricia Kameri-Mbote, "The Land has its Owners! Gender Issues in Land Tenure under Customary Law" (Paper presented at the UNDP-International Land Coalition Workshop: *Land Rights for African Development: From Knowledge to Action* Nairobi, October 31 – November 3, 2005) at 6. See also, Kameri-Mbote, "Land Tenure and Sustainable Environmental Management," *supra* note 23 at 262.

<sup>4</sup> Food and Agriculture Organization (FAO), 2002, *Land Tenure and Rural Development* (FAO Land Tenure Studies 3: Rome, pp. 9-10

representation, access to information, and awareness. Working with consultation and representation, the specific problem of meaningful public contribution to decision making arises. This particularly regards how to ensure the design and outcomes of consultations that have impact on the threshold of decisions eventually made by public officers.<sup>5</sup> With these considerations as a background, the next parts of the research report explain the methodology, and an analytical discussion of the results. A summary of the conclusions and findings is set out in section 9, in terms of policy level, and community level action recommendations.

### 3 Objectives of the Research

Deriving from the research problem, the principal research objective was to explore the legislative and policy options that will entrench accountability of formal processes to protect interests of communities in circumstances of large scale land acquisitions.

The research was guided by the following specific objectives –

- (i) To review the current policy and legislative criteria for acquisition and granting of land for investment purposes in Kenya
- (ii) To examine the formal and procedural guarantees of accountability and legitimacy in the policy and new laws enacted to implement the 2010 constitution
- (iii) To explore and propose mechanisms of implementing social, economic and environmental safeguards for communities during acquisition of land for investment purposes

These objectives provided a basis for inquiry into the legal and policy dimensions that can enhance accountability and legitimacy for large scale land acquisitions especially in application of compulsory acquisition powers of the government, resulting in compensation, and in some cases, involuntary resettlement through displacement. The study also reviews how the livelihoods can be safeguarded, and using the experience of the farming investment on Yala Swamp, evaluates how community socio-economic and environmental benefits have been protected through contractual obligations, and equitable opportunities, and the effects of lack of trust between an investor, and the adjacent (host) local community.

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<sup>5</sup> Robert Kibugi, “Conceptualizing Regulatory Frameworks to Forge Citizen Roles 173 to Deliver Sustainable Natural Resource Management in Kenya” in Wouters, Jan, Alberto Ninio, Teresa Doherty, and Hassane Cissé, eds. 2015. *The World Bank Legal Review, Volume 6. Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability*. Washington, DC: World Bank, p. 172

## 4 Research Methodology

The research methodology included defining criteria for research site selection, the sampling approach for respondents and focus group discussions, and the applicable research ethics. In addition, a qualitative research approach was adopted to guide the structure and system of data collection, and analysis.

### 4.1 Research Site Selection

This research was undertaken in research sites located in three counties that were selected on the basis of two criteria:

1. There having been a previous or ongoing process of large scale land acquisition for investments.
2. Previous or ongoing experience with community engagement and benefits from a large scale investment.

This approach resulted in the selection of three research sites, as follows –

- (i) **Siaya County** – This was in the area of Siaya County around the Yala Swamp, specifically that section that is subject to the Memorandum of Understanding (MoU) and lease agreement issued to Dominion Farms by the County Councils of Siaya and Bondo, in 2003. Here, the aim of the research was to assess the experience with this large scale land acquisition, including the continuing relationship between the investor and local community in terms of socio-economic benefits (jobs, farming skills transfer, etc) to the community.
- (ii) **Lamu County** – Lamu County is one of the primary counties where infrastructure for the LAPSET project will be set up. This involves the development of a new transport corridor from the new port at Lamu, with a road, railway line and pipeline through Garissa, Isiolo, Mararal, Lodwar, and Lokichoggio to branch at Isiolo to Ethiopia and Southern Sudan. This will comprise of a new road network, a railway line, oil refinery at Lamu, oil pipeline, and Lamu Airport. The scope of the proposed infrastructure has resulted in a need for large scale land acquisition. In addition, Lamu county has complex landholding arrangements with low levels of land adjudication and formal registration, thus with this research assessing these circumstances, it would generate valuable information on acquisition in a context without formal ownership. The specific research sites included Hindi and Bargoni settlements. By the time of the research, the process of land acquisition for the road to Garissa had moved along in various stages, with some residents having received compensation, while others had just concluded the process of parcel identification and verification of claims.
- (iii) **Isiolo County** – In this county, the previous experience with land acquisitions for LAPSET infrastructure (Isiolo airport), Isiolo-Moyale road, and anticipated arrival of other LAPSET infrastructure and investments, were the basic selection criteria. Land acquisition for the expansion of the Isiolo airstrip into an international

airport, for instance, had resulted in total displacement and involuntary resettlement of residents whose land had been taken but still resulted in questions on suitability of land given to them as compensation. Further, with selection of the area around Kipsing gap, as a suitable location for the Isiolo Resort city, the research provided valuable opportunity to examine how the system of land tenure and (pastoralist, farming, trading) livelihoods would interact with land acquisition and arrival of a different economic model. The specific research sites were Isiolo Town, Kiwanjani (airport area), Kambi ya Garba, Ngare Mara, and the community inhabiting the Kipsing Gap locality.

## 5 Conclusions and summary of findings

The foregoing research has disclosed valuable findings on the policy and practice issues that impact large scale land acquisitions for investments, especially where the mode of taking is through compulsory acquisition by the State. This paper presents a summary of the findings and conclusions, and the detailed research report can be accessed at: <http://www.ldgi.org/index.php/research>

### 5.1 Conclusions and findings requiring policy level interventions

#### 5.1.1 Regularization of landholding and tenure systems.

The absence or weakness of formal landholding, and land registration systems was evident in most of the research sites, in Isiolo and Lamu. This is despite Kenya having put in place new land laws in 2012 to give effect to constitutional provisions to protect land rights. This has resulted either in emergence of informal land administration and conveyance systems (Lamu), or the emergence of a complex system of formal land allocation that brings about multi-allocation of land through repeated issuance of allotment letters, (Isiolo), or non-adjudication and registration of community lands (Isiolo, Lamu). In either instance this results in undermining security of tenure, and enhances the vulnerability of concerned communities who will face difficulties securing their interests in the land ahead of any large scale land acquisitions, due to the entry of speculators, and persons interesting in grabbing the land by being first to obtain formal registration. In some instances such as Lamu, the government has tacitly allowed people to inhabit erstwhile public lands, and residents in settlements around Hindi (Roka A, B) have developed an expectation that since their occupation is in good faith (to develop livelihoods), the government will honour their interests through formal registration. A clear programme of land adjudication and registration in these areas is necessary.

The Kenyan national government should consider partnering with the County government in Isiolo in order to identify the nature and extent of, and take steps to resolve the problem of multi-allocations of land there. In addition, putting in place a programme for regularization of tenure rights by addressing the challenges of those without title is important as it will enhance the security of tenure of people affected by compulsory acquisition.

### **5.1.2 Enhancing tenure of certain communities through implementation of the provisions of Community Land Act.**

This conclusion is drawn from findings in research amongst the Aweer (Bargoni), and Turkana communities (Ngare Mara) where residents expressed apprehension over their tenure security in face of land acquisition for LAPSET infrastructure. This is because the land has not been (full) adjudicated or registered in favour of the community notwithstanding existence of the Land (Group Representatives) Act that preceded the 2016 community land law. This is viewed as first step to guaranteeing the beneficial interests of the community members, first by protecting tenure rights, and subsequently providing for equitable community land governance mechanisms.

### **5.1.3 Clarification on the practice and methodology of valuation of land and non-land assets for compensation.**

The repeal of the Land Acquisition Act, and with that the Schedule that defined the methodology of valuation of land requires to be resolved. In any event, based on the analysis in the research, and findings, there is need to formally resolve the entitlement to compensation for persons without legal title. In addition, it is imperative for Kenya to state in law or regulations the methodology to be applied in valuation of non-land assets, including the loss of livelihoods. Application of the full replacement cost methodology, as discussed, provides a viable option because, in addition to anchoring on the market value of the land, the replacement cost approach extends compensation to non-land assets, using the real cost of full replacement, and not factoring in any depreciation of the non-land assets being replaced, and takes into account all the transaction costs of purchasing (conveyancing fees, etc), or logistical costs of replacement non-land assets.

### **5.1.4 Internalization of resettlement safeguards principles and practice into Kenyan law of compulsory acquisition of land**

A review of the current legal situation in Kenya concerning compulsory acquisition of land discloses the absence of safeguards governing interaction with host community, as well as involuntary resettlement safeguards in the event of displacement by land acquisition. The IDP Act discussed earlier does not appear to have been implemented since enactment in 2012, in spite of the fact that it internalizes high value safeguards techniques such as the application of an FPIC process that emphasizes the quality and meaningfulness of affected community participation, including the impact that views obtained during consultations have on the final decision. Equally critical is the decision to vertically integrate the process by requiring the consultation of the affected public during project planning. In the sense of feasibility studies, and project designs, this suggests that community participation may add value to the process by being conducted much earlier on in the process, and contribute to analysis of project sites, and alternatives.

The failure to integrate provisions of the IDP Act with the land acquisitions process for development projects should be resolved. This may require the making of amendments to either the IDP law, or the Land Act, and the subsequent making of subsidiary legislation to guide the process of undertaking FPIC, or consultations through public hearings. Some considerations for resettlement and displacement should be whether the Land Act can adopt the IDP law standard that permits displacement and relocation only in exceptional cases, such as where no other feasible alternatives are found.

For practical purposes, Kenya could consider a legal requirement for a national Resettlement Policy Framework (RPF) would be helpful that would govern internalization of resettlement safeguards, including participation of communities. Key to this is that if a Resettlement Action Plan is required, in terms of EMCA, both the RAP and RPF would have undergone a Strategic Environmental Assessment thereby providing a means for risk assessment in advance of major implementation steps being underway.

#### **5.1.5 Policy linkage of investment promotion rules with investments flowing from land acquisitions to secure community benefit through contracts and business models**

At a policy level, it is important for Kenya to revisit, in a framework sense, how to use investment promotion rules and binding contracts to safeguard socio-economic, environmental benefits and livelihoods of local communities. This is mainly in context of the continuum of an investment, from land acquisition, and during its implementation. The Investment Promotion Act, while addressing the benefit to Kenya threshold, is not aggressively applied, and as evidenced by the Dominion contracts, critical socio-economic safeguards were not included. A clear policy evaluation of business models application, either contracts in the context of farming investments, or other types, should be undertaken and public disclosure of the proposed business model(s) should be undertaken early enough, to ensure affected project communities do not experience anxiety over their future.

This could be done in context of section 12 of the Land Act, which requires the National Land Commission to make regulations to govern how investments on public land will safeguard community benefits and livelihoods. The details of these considerations have been discussed at length earlier in this report.

## **5.2 Conclusions and findings requiring direct actions at community level**

In this category, the conclusions and findings are drawn to highlight matters that directly affect the voice and equitable benefit or participation of affected local communities, either in land acquisition process, or in the continuum of investments introduced in their midst.

### **5.2.1 A community dissemination manual for transfer of knowledge about land laws, policies and land administration processes**

In focus group discussions held in the course of field work, the research team got similar feedback multiple times that the (potentially) affected “had heard” on radio, or through other

fora that Kenya had new land laws in place, they did not really know the content of these laws. A similar sentiment was expressed with regard to knowledge of details about the components of the various LAPSET projects. Communities indicated that they would want to have some form of civic education on this, especially regarding tenure rights, the land administration system (surveying, adjudication and registration), the implications and contents of the new community land law, and legal protection of community rights during land acquisition. One key finding was a preference by community members to have their own members trained in order to pass the knowledge to the communities, a sentiment that arose from a desire to receive information from a trustworthy source who was part of the community. Another finding was that community members did not have clear details on available grievance mechanisms on the land administration system, and while some had managed to access the National Land Commission, they lamented that it was based in Nairobi.

This finding suggests there is a need to develop a basic community dissemination manual, that includes a provision for empowerment of community based trainers (through a Training of Trainers concept). In such an approach, the dissemination manual can be published in simple language, including translation to Kiswahili or local languages where preferable.

### **5.2.2 Enhancement of meaningful public participation in the entire continuum through effective consultations and disclosure of relevant information**

In order to enhance the voice of the community ahead of any process of land acquisition, it will be helpful to integrate a constructive and meaningful process of consultation with potentially affected communities, from early on during project planning, feasibility studies to onboarding of investments. This would particularly aid in providing value on local circumstances and risks that may not be obvious to technical teams. Occurrences such as in the Isiolo *Kiwanjani* settlement (displaced for the airport) where residents of *Kiwanjani Zone G Squatter* complained that maps generated during the acquisition process continued to record their land as being part of the airport complex despite there being a 75 feet road between the airport boundary, and the plots in question

Enhanced community participation would further provide a valuable avenue through which the [potentially] affected local community can enhance its voice by having an opinion (which is taken into account) early on in the stages of the project design. However, this approach would also require protection from speculative behavior, that could result in an artificial increase in market value of land, due to market behavior triggered by anticipation of a project, and land acquisition. Access to information requires that this type of information is made available to the public, but in order to control speculative behaviour that drives up the cost of land compensation, government can apply the new 2016 Access to Information Act to sieve out aspects that are either confidential or considered deliberative and therefore not to publicly disclosed. Another helpful approach would be to undertake the feasibility studies focusing on multiple alternative sites, without showing preference for any particular site.

Meaningful community participation requires a legal or policy definition of how to ensure consultations are effective. This could include possibility of requiring consulting (public) agencies to return to the host community and disclose how they considered the various opinions, and provide feedback. The community dissemination manual proposed above

would provide a valuable tool through which to structure techniques that affected local communities can apply in order to have meaningful consultations. The manual could also include implication of the procedures set out in the new 2016 Access to Information Act.

### **5.2.3 Promotion of Networking by Project Affected communities in various parts of Kenya to build knowledge and exchange thoughts**

There are multiple instances of compulsory acquisition of land in Kenya (e.g. For LAPSET projects), or the allocation of land by government for private investments (Siaya – Dominion). The processes are at various stages, either at conceptual point, or having gone through various steps of acquisition and onboarding of investments. Equally, others are complete and the investment has been operational for a number of years. In all these cases, there multiple lessons to be learnt between the various affected local communities. In both Lamu and Isiolo for instance, the research engaged with multiple focus groups drawn from within the same project locality but in different geographical sections – and there was evidence there was no integrated system to promote consultations and learning from each other. Further, even where acquisition and investments have been undertaken in separate parts of the country, people from Isiolo or Lamu could learn coping techniques from those in Siaya, or by learning of the adverse impacts in Siaya, become more interested in enhancing their voices in the local context to avoid a similar outcome. Therefore, the idea of a network that brings together representatives of the various communities is useful to consider. Such a network would also include policy makers drawn from the national and county governments. Already in most of these local communities, the research observed that chiefs (who are national government administration officers) are an integral part of the community process. Learning forums could be organized, and a feedback process put in place such that when representatives return to their local communities, they can provide details to their neighbours. Such a network would however require that policy makers also commit to provide valuable information and feedback to any questions and problems raised by participating communities.

An alternative to utilization of physical meetings for such a network is application of internet-based technology. In this case, a network can be developed through low cost options, such as through the WhatsApp Platform. Although this requires internet access through a smartphone, the Land Development and Governance Institute has been piloting a WhatsApp based platform that creates a Network aptly named **Community Land Matters**. The Platform, since inception in mid-August 2016, has had diverse experience, with active engagement by some community members that regularly update the group on actual relevant happenings in their local communities, including photographic images. Members have adhered to the rules requiring focus on community land matters. However, some members have remained inactive, or non-responsive despite having experienced enthusiasm at the beginning. One probable reason is that a virtual platform may appear rather distant to community members that have tangible problems at home – and as such may need to be integrated with the physical network proposed above. In addition, in certain instances, community members present acute challenges that require immediate attention from policy makers not in the online group, and the process of obtaining feedback can be slow. This could explain the frustration of some members, and perhaps coupling the online platform with a physical network could mitigate some of these outcomes.

