Exploring Options for Leaseholds in the Mukuru Special Planning Area

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ABSTRACT

The declaration of the informal settlements of Mukuru Kwa Njenga, Kwa Reuben and Viwandani slums as a Special Planning Area (SPA) was momentous given the numerous challenges that have been occasioned by lack of, or poor planning in the area. Extensive discussions have been held with the aim of finding solutions to the longstanding concerns of inadequate access to sanitation and lack of proper housing within these areas. Actualization of proposed solutions in the past have however stalled as a result of the unresolved question of land ownership within the slums. It has been noted with concern that the land question in the slums continues to be a barrier to planning imperatives that may be beneficial to these settlements. This paper explores some possible options available to Nairobi City County Government to deal with the leaseholds in the Mukuru SPA to enable proper planning and upgrading of Mukuru.

Key words: Mukuru SPA, Nairobi, Land Tenure

1.0 INTRODUCTION

In May 2017, the Nairobi City County Government (NCCG), through a notice published in newspapers of nationwide circulation, declared that 689 acres of Mukuru informal settlement was a special planning area. (SPA). In its notice, the county government directed that any further developments in the three settlements be stopped until the completion of a participatory development plan. This declaration was further anchored on a notification in the Kenya Gazette on the 1st of August 2017 made by the County Government and signed by the County Executive Committee member in charge of planning. The Gazette Notice informed the public of the County Governments statutory obligation to prepare a plan for the SPA within a period of two years from the date of gazettement as provided under section 23 of the Physical Planning Act.

The Declaration was based on the Fourth Schedule of the Constitution and the Physical Planning Act.[1] Section 23 of the Physical Planning Act highlights the process of declaration of an area as a SPA. It states that the Director[2] (or a County Executive Committee Member in charge of Physical Planning as the case may be) may declare in a Gazette Notice, an area with unique development potential or problems, as a SPA for the purpose of the preparation of a physical development plan.[3] This provision also authorizes the

[1] Chapter 286, Laws of Kenya

[2] In the Mukuru case, the County Executive Committee Member in charge of Physical Planning, instead of the Director of Lands and Urban Planning issued the Gazette Notice.

[3] Section 23(1) Physical Planning Act. Section 7 of the Sixth Schedule of the Constitution provides that the laws that existed prior to the promulgation of the Constitution must be interpreted with the necessary alterations. It reads: "[a]ll law in force immediately before the effective date continues in force and shall be construed with the

Director to suspend any development, for a period *not exceeding 2 years*, until the Minister approves the physical development plan (in the NCCG, the County Executive Committee Member and the County Assembly).[4] It further provides for the continuation of developments only in two instances: (i) where the local authority has given permission and (ii) developments that had commenced not less than 6 months before the suspension of development.

Upon the declaration, the NCCG In July 2017, convened external partners with different expertise to form eight consortia to assist it in the planning process of the Mukuru Special Planning Area (Mukuru SPA).[5] The land and institutional arrangements consortium[6] was one of the eight consortia that was formed. It consists of the NCCG (Lands and Legal department) as well as other external partners namely: Akiba Mashinani Trust, Haki Jamii, Katiba Institute, the Strathmore University School of Law and Thompsons Reuters Foundation (Sullivan and Cromwell LLP (United States of America and United Kingdom) and Pandya and Poonawala Solicitors (India). The consortium was mainly tasked with developing a comprehensive sectoral plan on the land and institutional arrangements arising in the Mukuru SPA, which will be incorporated in the integrated physical development plan.

1.1 OVERVIEW OF THE MUKURU SPA

The land tenure situation in Mukuru is convoluted as a result of the layered claims within the informal settlement.[7] This situation is partly attributable to the historical origins of the settlement. Mukuru SPA covers Mukuru kwa Njenga, Mukuru kwa Reuben and Viwandani areas. Mukuru kwa Njenga for example, is said to have developed as a result of settlements established on land that formerly had sisal farms. The attainment of independence saw massive rural-urban migration, which resulted in increased population in the village established in the former sisal farms and quarry. The departure of British farmers who had

alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution." This means that with the introduction of devolved government and the Fourth Schedule to the Constitution, planning is a function of the county governments and the Physical Planning Act should be interpreted with the necessary alterations to include County Executive Committee Members.

[4] Section 23(2) of the Physical Planning Act.

[5] The eight consortia are divided according to the different departments within the NCCG. They are (i) health;(ii) water, sanitation and energy; (iii) finance; (iv) environment; (v) land and institutional arrangements; (vi) community mobilization and public participation; (vii) education, youth and culture; and (vii) housing and planning.

[6] The Land and Institutional Arrangement Consortium will primarily deal with the issue of land in Mukuru SPA as well as the future structuring that must be put in place from the bottom to the top in order to ensure that the plan in the Mukuru SPA is realised.

[7] In the National Land Policy Sessional Paper No. 3 of 2009, 49, 'informal', 'spontaneous' or 'squatter' settlements are characterized by the absence of security of tenure and planning. There are different definitions for informal settlements and slums but for purposes of this sector brief Mukuru will be referred to as both an informal settlement and slum.

formerly occupied these lands saw the independence government designate these lands as unalienated government land.[8] Mukuru kwa Reuben was also established upon the departure of a white settler who owned the land leaving his former workers on the land. The subsequent expansion of the Mukuru informal settlement concurrently happened with population increases in the city of Nairobi and due to the constant demand for urban land.

Like in many informal settlements around the world, the question of land tenure is perverse in Mukuru given the history surrounding the establishment of the settlement and the numerous dynamics at play. These questions particularly flow from the wider debate on the manner in which public land has been illegally and irregularly allocated in the past. Indeed, the Report on the Commission of Inquiry into Illegal/ Irregular Allocation of Public Land (Ndung'u report), stated that a negative effect of illegal or irregular allocation of informal settlements in Nairobi city and other municipalities. These challenges particularly became more pronounced as populations kept rising within the informal settlements and the concomitant violence that has been meted against the occupants of these informal settlements by the State and private landowners. It is notable that in Nairobi County, approximately 10% of the city's slums are located on uncontested public land, 40% being on utility and riparian reserves while 50% are located on private land that was historically public land.[9]

The land situation is also complicated by the power struggles that are manifest when it comes to structure ownership within the slums. Absentee landlords are said to account for 95% of structure ownership with rent paying tenants accounting for 92% of all slum dwellers.[10] These informal arrangements have been informed by the need of the inhabitants of the informal settlements to access land for purposes of settlements and other activities hence they have devised mechanisms to enable them have access to land.[11] Within these slums, there also exist structures to facilitate access to basic services that have not been provided by the relevant government agencies. These arrangements however result in a 'poverty penalty' that is incurred by the inhabitants of these settlements since they have to access these basic services at higher prices compared to other inhabitants of the city.

[8] Antony Lamba, 'Land Tenure Management Systems in Informal Settlements: A Case Study in Nairobi', 59.
[9] IDRC Proposal.
[10] See Gulyani *et al.,* 'Inside Informality: Poverty, Jobs, Housing and Services in Nairobi's Informal Settlements', (2006) Report No. 36347- KF, The World Bank.
[11] Williamson *et al, Land Administration for Sustainable Development,* (ESRI Press, 2010).

As already noted, these multiple challenges flow from the unresolved question of land tenure. In addition, informal settlements in Nairobi are located on different categories of land. Some are found on public land that has been reserved for certain purposes such as environmental conservation or for certain development projects that are yet to be implemented.[12] Others like Mukuru informal settlement were established on public land that had either been vacant or allocated to private individuals through grants.[13] This notwithstanding, the question of land tenure in Mukuru is not clear-cut as it may seem. In fact, there exist multiple layers of contestation that ultimately exposes many to tenure insecurity with an associated effect on access to basic services. The second part of this paper elaborates on the tenure dynamics within Mukuru slums while highlighting on the contestations that inform access to land.

From the above, it was clear to the NCCG that there was a need to plan for the Mukuru informal settlement with the key goal of enabling access to social services by its inhabitants. In addition it was a concern for the NCCG that no informal settlement had been included in the Nairobi Integrated Urban Master Plan (NIUPLAN) and part of the objective of declaring Mukuru as a SPA is to ensure that a Physical Development Plan is developed that will feed into the County Integrated Development Plan (CIDP) and the NIUPLAN.

The foundation of the declaration of Mukuru as a SPA is the Physical Planning Act.[14] Section 3 of the Physical Planning Act, defines a Special Planning Area (SPA) as an *"area that cuts across the boundaries of two or more local authorities and which has spatial or physical development problems".* Section 23 of the Physical Planning Act further highlights the process of declaration of an area as a SPA. It states that the Director[15] (in this instance the County Executive Committee Member in charge of Physical Planning within the NCCG), may declare in a Gazette Notice that an area with unique development potential or problems as a SPA for the purpose of the preparation of a physical development plan.[16] This provision also authorizes the Director to suspend any development, for a period *not exceeding 2 years*, until the Minister

[12] Antony Lamba, 'Land Tenure Management Systems in Informal Settlements: A Case Study in Nairobi', (2005) ITC 55.
[13] Jane Weru *et al.,* 'Confronting Complexity Using Action-Research to Build Voice', 239.
[14] Chapter 286 of the Laws of Kenya.
[15] Here the CEC instead of the Director of Lands and Urban Planning issued the Gazette Notice.
[16] Section 23(1) Physical Planning Act. Section 7 of the Sixth Schedule of the Constitution provides that the laws that existed prior to the promulgation of the Constitution must be interpreted with the necessary alterations. It reads: *"[a]ll law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."* This means that with the introduction of devolved government and the Fourth Schedule to the Constitution, planning is a function of the county governments and the Physical Planning Act should be interpreted with the necessary alterations to include County Executive Committee Members.

approves the physical development plan (in the NCCG, the County Executive Committee Member).[17] It further provides for the continuation of developments only in two instances: (i) where the local authority has given permission and (ii) the developments had commenced not less than 6 months before the suspension of development.

1.2 THE UNIQUE DEVELOPMENT PROBLEMS AND OPPORTUNITIES IN MUKURU

There are several unique challenges and opportunities in Mukuru that led to the NCCG declaring it a SPA. Like many informal settlements, Mukuru is characterized by densely populated settlements that lack basic services and infrastructural amenities.[18] This situation has been occasioned by the rapid urbanization where many people are forced to move to urban areas in search of jobs, which in most cases do not pay much leading to widespread poverty.[19] The main characteristics of informal settlements are characterized by: *"(i) housing units built with poor quality construction materials and methods; (ii) settlement layouts and units in violation of legally specified minimum space and planning standards and regulations;(iii) physical infrastructure and services such as water supply, electricity, drainage, sanitation and (iv) highly inadequate street lighting."*[20] Further, in the Nairobi City County Integrated Development Plan 2018-2022, it has been noted that the county faces challenges in providing the basic amenities and infrastructural development in the informal settlements.[21]

Numerous challenges are endemic in the Mukuru SPA and these include:

a. Minimal water and sanitation facilities.
b. Dangerous electricity connections.
c. High child mortality rates.
d. Diseases linked to poor health and sanitation conditions such as diarrhea and cholera as well as incidences of malnutrition.
e. Poor land use such as unplanned and illegal developments, rubbish dumps, low quality structures

[17] Section 23(2) of the Physical Planning Act.
[18] Antony Lamba, 'Land Tenure Management Systems in Informal Settlements: A Case Study in Nairobi', 2.
[19] Ministry of Transport Infrastructure, Housing and Urban Development, 'Consultancy Services for Review of Guidelines for Land Tenure Regularization in Informal Settlements: A Report of Stakeholders Engagement Analysis', September 2017, MOLHUD/KISIP/CS/008/2014-2015, 4.
[20] Ibid, 62.
[21] Nairobi Integrated Development Plan 2018-2022 (CIDP), 105-7.

f. Economic burden characterized by the poverty penalty where residents of Mukuru informal settlement pay higher for basic services such as water and electricity more than those living in areas that have been properly planned within the city.

Before examining the tenure arrangements that are evident in Mukuru slums, it is important to note that the law has predominantly laid emphasis on formal tenure arrangements that are considered to have legal force flowing from the recognition that has been accorded to these arrangements.[22] On the other hand, informal tenure arrangements that are common within the informal settlements have perpetually operated in the peripheries with the law not recognizing their factual existence. This has resultantly left many beneficiaries of these informal arrangements outside the scope of legal protection with immediate effects being rampant cases of forced evictions and perpetual intimidation from authorities. This, as documented by Kuhnen, is attributable to the fact that land tenure systems are institutionally established and it becomes difficult to alter them as the political structures, cooperative ties and class, cultural, and ethnic interests and motives all work towards maintaining the established forms.[23] The National Land Policy has to this extent documented land rights in informal settlements as a land issue requiring special intervention.[24] However, it must be noted that due to the complexity of tenure issues in the Mukuru SPA, this paper has specifically limited its scope to the formal aspects of tenure and not the informal tenure arrangements.

2.0 LAND TENURE IN MUKURU

The land in Mukuru was in the immediate period after Kenya's independence designated as unalienated government land. This in effect allowed the government to allocate the land to private individuals and companies through grants. These allocations were further informed by the quest by the government to industrialize the country against the backdrop of the Structural Adjustment Programs adopted in the late 1980's early 1990's. The Government therefore, undertook to relinquish its control over certain parcels of land that it held and vested them to private entities. The repealed Government Lands Act, vested the president with the power to issue grants. Section 3 of the Act provided:

> *"The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—*

[22] Francis Kariuki, Smith Ouma and Raphael Ng'etich, *Property Law* (Strathmore University Press, 2016) 418.
[23] F. Kuhnen, 'Man and Land: An Introduction into the Problems of Agrarian Structure and Agrarian Reform', (Verlag Breitenbach Publishers, 1982).
[24] Republic of Kenya, 'Sessional Paper No.3 of 2009 on National Land Policy', (2009) 48.

(a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land…"[25]

The Government Lands Act[26] (repealed) provided for the procedures to be followed in issuance of grants. As it will be noted in the later discussions, the President largely ignored these procedures when issuing grants.[27] In early 1990s, the government granted 99-year leaseholds on Mukuru land to individuals and companies with special conditions attached to these grants. This was done notwithstanding the fact that some of the land within the slums had in fact been occupied by individuals who had established settlements and businesses on the land.[28] Efforts to evict the inhabitants from the land failed despite the fact that most of these attempts were done in a forceful manner.[29] These attempts were further met with rife opposition from the residents, civil society and human rights organizations.

2.1 THE GRANTS

The three informal settlements of Mukuru Kwa Reuben, Viwandani and Kwa Njenga occupy approximately 689 acres of public/government land that was in the nineteen eighties and nineties sub divided into a number of plots. The government allocated these plots and the recipients were issued with long term 99-year conditional leaseholds under the repealed Registration of Titles Act (RTA). Most of the grants were made to private individuals or corporations for business purposes and in most cases were specifically allocated for the development of light industries. A few grants were made to non-profit corporations for the development of public facilities. The grants also defined the annual rent payable by the grantees for their occupation and use of the land. A majority of the grantees went ahead to take charges on the land that had been allocated. At the time allocations were made, some of the parcels of land in Mukuru were already occupied. Others lay vacant for many years after allocation and were eventually encroached upon.[30] Without exception, all these grants have special conditions of grant contained in the leaseholds issued by the Commissioner of Lands.

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[25] Section 3 of the Government Land Act.
[26] Registration of Titles Act, Chapter 281 of the Laws of Kenya, (Repealed) (RTA).
[27] In Republic of Kenya, *Report on the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Ndung'u Report), 2014, 77 it is noted that one of the methods of land grabbing in Kenya occurred when the President or the Commissioner of Lands directly allocated public land contrary to the law. See also Republic of Kenya, *The Final Report of Truth Justice & Reconciliation Commission of Kenya*, Vol IIB, 3 May 2013 Version, 255.
[28] Antony Lamba, 'Land Tenure Management Systems in Informal Settlements: A Case Study in Nairobi', 59.
[29] Jane Wairutu 'Muungano Support Trust' available at http://muunganosupporttrust.files.wordpress.com/2012/02/mukuru-inventry.pdf (accessed on 20 December 2017).
[30] The Ndungu Report, 119 indicated this as one of the causes of informal settlements in urban areas.

The leaseholds granted in Mukuru were issued under the repealed Government Lands Act (GLA), which was the law regulating the leasing and disposal of government land. Part III of the Act provided for the disposal of government land within townships. Section 12 under Part III stated that leases of town plots, should unless the President otherwise orders be sold by public auction. The Act also provided that the Commissioner of Lands may cause land in townships to be divided into plots for disposal and for the erection of buildings for business or residential purposes.[31] The Commissioner of Lands was further tasked with determining the upset price at which the leasehold of a town plot shall be sold before the government sold it.[32] Further, before the sale, the Commissioner had to determine the rent payable, the building conditions applicable and the special covenants to be inserted in the lease. Leases of town plots could however not be granted for any period exceeding 100 years.

Regarding disposal of government land for special purposes, the procedures for allocation were laid out in Part V, section 35 of the GLA, which stated that all applications for leases for special purposes must be made to the Commissioner of Lands in writing. Sections 36 and 38 further provided that the President's sanction was required before a grant is approved and the Commissioner of Lands may with the approval of the President cause a lease to be sold by auction.[33] From our analysis of the law and from the reports generated from commissions on land, it is evident that the President through the commissioner of lands failed to follow the procedures laid down in legislation when issuing the grants. [34]

2.2 PARTICULARS OF GRANTS AND THE MANIFESTATION OF BREACHES

In this part, we document the manifestations of breaches to the grant conditions that can be deduced from our analysis of the grants that we were able to obtain. These typology of breaches discussed in this section is a representation of the nature of breaches by the grants issued in the SPA. It is apt to note at this point that most of the land where Mukuru SPA is located is currently private land. The exact nature of landholding within the settlements can however be challenged once the particulars of their allocation have been identified.

In the Mukuru SPA, we have analyzed a few of the leases and outlined two categories of grants that are representative of the entire settlement: (i) those issued for business purposes and (ii) for special purposes.

[31] Section 9 of the GLA.
[32] Section 11 of the GLA.
[33] We are to the best of our knowledge not aware of any formal application having been made by SEPU to the commissioner for the allocation of the leasehold in question. We are further not aware of any formal application for the President's approval being sought and given before the land in question was granted to SEPU.
[34] Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Report), 2004, 73.

Further there are five breaches of the leases which have been identified. This section will analyses an example of each of the categories of the grants and the breaches which take the following forms:

1. Settlements situated on private lands that are still in the hands of the first registered owners who failed to develop.
2. Settlements situated on private lands that have been (i) transferred to second or third buyers and (ii) transferred before developments.[35]
3. Settlements situated on lands whose titles have been charged to secure loans before developments.
4. Settlements situated on private lands that were developed and subsequently encroached upon.
5. The Orbit Chemicals case.

1) Settlements situated on private lands that are still in the hands of the first registered owners and failed to develop.

With regards to these settlements, grantees were required to notify the Commissioner of Lands in the event that they were unable to develop the land. The notice given would have to clearly indicate that the grantees were unable to complete the buildings and civil works within the period agreed upon. The Commissioner of Lands would then (at the grantee's expense) accept a surrender of the land. Where the notice was given within 12 months of the actual registration of the grant, the Commissioner of Lands was required to refund the grantees 50% of the stand premium paid in respect of the land, or at any subsequent time before the expiration of the building period the Commissioner of Lands would have refunded the grantee 25% of the stand premium. In the event of the notice being given after the expiration of the building period a grantee would not have been entitled to a refund. Despite the grantees breaching the conditions of the grants, the Commissioner of Lands never followed through with the consequences of breach. It is evident from the correspondence on file that many of the grantees, never intended to develop these lands but were merely holding them for speculative purposes. Similar conditions applied to other grants made in Mukuru to individuals and corporations.

This category also consists of land that was initially allocated to grantees who subsequently transferred the land to other buyers. A majority of land falling within this category was sold prior to the development of these lands by the grantees but after the squatters encroached on the land. This was in contravention of the special conditions contained in the grants.[36] A majority of the purchasers bought the land in question from the open market and for good value. In almost all instances these lands were sold before they were

[35] Ibid 15.
[36] Ibid.

developed and after they were encroached upon. The sales were thus often in contravention of the special conditions of grant, restricting the sale of grant land before development. This special condition with regards to transfer of titles to third parties was outlined in condition number 10 of the grants. It specifically provides that a grantee shall not sell, transfer, sub-let charge or part with possession of land granted except with the prior consent of the commissioner of land. The first consideration is whether the grantee/seller/vendor obtained the consent to purchase, transfer or charge the land from the commissioner of land. If the consent was obtained then there was a proper consent. If the grantee did not obtain the consent then the title is unlawful.

Some portions of Mukuru are situated on lands that have been transferred to subsequent buyers by the initial grantees. Many of these buyers bought the land in question from the open market and for good value. In almost all instances these lands were sold after they were encroached upon and before they were developed. The sales were thus often in contravention of the special conditions of grant restricting the sale of grant land before development.

Special Condition 10

"*a grantee shall not sell, sublet, charge or part with possession of the land except with the prior consent of the Commissioner of Lands. No application for such consent (except in respect for a loan for building purposes) shall be considered until the special condition no. 2 has been performed."*

Special condition No. 2 specifically provides for the erection of buildings and the construction of civil works in conformity with the plans and specifications presented for approval to the city council by the grantee. The Special Condition envisioned that the grantee would properly plan for the land allocated to them with the said plans being approved by the local authorities.

Special Condition 2

"The Grantee shall within six calendar months of the actual registration of the Grant submit in triplicate to the Local Authority and to the Commissioner of Lands plans (including block plans showing the positions of the buildings and a system of drainage for disposing of sewage surface and sullage water) drawings elevation and specifications of buildings the Grantee proposes to erect on the land and shall within 24 months of the actual registration of the Grants complete the erection of such buildings…"

What then is the impact of the failure by the original grantee to adhere to the special conditions of grant restricting the sale or transfer of granted land before development? Section 72 of the repealed GLA provided guidance on this issue, it provides that any covenants and conditions that were binding on persons claiming under a grant, lease or license, shall be binding upon all persons claiming an interest in the land whose title is derived through the grantee or lessee. The GLA further established the covenants implicit in all transactions of granted land before development. It was implied that in every grant given by the government, covenants were to guard against the indiscriminate disposal by grantees of interests issued to them over government land. These implied covenants were contained in section 18 of the GLA. Under this provision, grantees were barred from dividing, assigning or subletting the land granted without the consent of the Commissioner of Land in writing. This section specifically stated that:

> *"In every lease of a town plot under this Act there shall be implied by virtue of this act a covenant by the lessee not to divide the plot and to assign or sublet any portion thereof except with the previous consent of the commissioner in writing and in such manner and upon such conditions as he may prescribe or require, provided that:*
> *i) no application for such consent shall be entertained unless the building conditions (if any) have been complied with."*

The titles transferred by the first grantees to subsequent purchasers for value were all subject to any conditions or covenants contained in the original grants. Thus any defects or failings occurring from a breach of any covenants or conditions binding on the original grantee were brought to bear on the rights of the purchaser. The transfer of land before development was a defect that encumbered the titles obtained by all those who purchased land from the original grantees before development. Section 14 (7) of the National Land Commission Act provides that no revocation of title shall be effected against "a bona fide purchaser for value without notice of a defect in the title." The question then before us is whether the purchasers of land from the initial grantees or subsequent sellers were bona fide purchasers for value without notice of a defect in the titles that were transferred to them?

Special Condition 9

"The Grantee shall not subdivide the land without the prior consent in writing of the Commissioner of Lands".

The special conditions of the grant are clearly enunciated on the title documents that were the subject of the purchase. All the purchasers of land under this category were aware of the defects in the titles they were acquiring as the special conditions of grant, restricting the sale or disposal of land before development were clearly set out on the face of the title documents. They were therefore not bona fide purchasers and this provision does not apply to them. Title held by this category of grantees can therefore, be revoked under Section 14(7) of the National Land Commission Act.

2) *Settlements situated on lands whose titles have been charged to secure loans before developments*

This category consists of land that grantees have used as collateral in order to obtain credit facilities from financial institutions.[37] Most of the grantees who secured loans are using the land as security and did not pay back these amounts. Substantial portions of the lands on which informal settlements are situated have been used as collateral to secure loans from reputable banks and financial institutions. In almost all instances these loans were given after slum dwellers had taken occupation of the land. Without exception, the loans obtained were not used for the development of the lands charged and many of these loans were often not repaid.

The grantees in this case violated the special conditions in the grants. Like in the earlier cases, the grantees were under clause 10 of the special conditions of grant restricted from selling or charging the land that they held without the consent in writing of the Commissioner of lands. The consent from the Commissioner of lands would only be considered if a loan was required for building on the land granted.

Financial institutions like banks have an especially high duty of care when carrying out their business because they are trustees of depositor's funds. Consequently, conveyance practice requires that a bank exercises due diligence before giving any loans. In the conduct of their duties, banks routinely inspect and carry out valuations of the land that is to be used as collateral before a mortgage is given. Inspections and valuations are part of the internal control tools of a bank and are an essential part of the loan application process. To effectively carry out this role, banks ordinarily instruct registered valuers to inspect properties and conduct valuations. A visit to the property set to be mortgaged to establish its state and suitability as collateral is routine conveyancing practice.

The mortgage lender in valuing the property for a mortgage amongst other things seeks to estimate how much the property would sell for in the open market in the event that the lender would need to sell the

[37] Ibid, 19.

property in distressed circumstances. When reaching this decision banks take several factors into consideration, such as: Whether the land can easily be disposed of in the event of a forced sale, for example is the land occupied; the location and accessibility of the land; the condition of the building structures on the land; and any legal, contractual and planning restrictions.

Given the above circumstances, the banks which gave out these mortgages were grossly negligent in that they issued loans against charges on lands that had violated conditions 2 and 10 of the special conditions of the grants. In addition, some of the land used as collateral were already occupied at the time they were charged. The fact that the financial institutions were not vigilant during these transactions means that they should not be allowed to profit from their indolence.

3) *Settlements situated on private lands that were developed and subsequently encroached upon.*

This category consists of land whose grantees complied with the grant conditions utilizing the land for the purposes that were intended.[38] A few settlements within the city are situated on lands that were duly developed by the registered titleholders before they were encroached upon. The owners of these lands, in principle, complied with the development conditions contained in their titles by utilizing the land for the purpose for which it was intended. On the other hand large numbers of marginalized Kenyans live on these lands and are faced with the threat of forced evictions. An example of such is the parcel allocated to Woodcraft Limited, that is, LR. No 209/9541. On the 1st of May 1980 woodcraft limited obtained a leasehold grant from the Government of Kenya for a period of 99 years over a portion of land measuring 1.397 hectares. Squatters subsequently invaded the land and several attempts have been made in the past to negotiate with them to vacate the land.[39]

This category of grants poses a number of complexities due to the subtle nuances that underpin the issuance of the title. Though the Commissioner of lands may not have complied with the provisions of the Government Land Act in the allocation of public land, the grantee however complied with the development conditions contained in the lease. This makes claims by the grantees legitimate but challenges arise with regard to the encroachment that has occurred on these parcels of land. The bank on the other hand may have acted negligently by giving a loan over encroached land.

[38] Ibid, 22.
[39] Ibid.

4) The Orbit Chemicals case

There are five settlements in Mukuru kwa Njenga, that sit on a portion of Land known as LR 209/12425 that is registered in the name of Orbit Chemicals Limited. The land is approximately 100 acres, with about 75 acres occupied by the five slum settlements, and the reminder of the land occupied by commercial and residential high rise buildings. These five settlements are popularly known as; Sisal, Milimani, Zone 48, MCC and Wape Wape and have an average population of about 20,000 households. The land on which these settlements are situated is highly contested with numerous court cases filed by the grantees, the residents and various other interested parties.

The convoluted history of the land has seen a legal battle ensue between National Bank and Orbit Chemicals. While all this was going on thousands of people continued to move into the land. Some of them obtained forged and fake letters of allotment and title deeds for about 25 acres of the land. Those in possession of these fake titles constructed permanent buildings which mainly took the form of multi-floor blocks of offices and flats in the area popularly known as MCC. The source of these falsified title documents is not known. The rest of the property was occupied by slum settlements.

In 2004, Orbit Chemical Industries Limited filed a suit at the High Court claiming for loss of user, loss of profits, and for mesne profits against the State.[40] Orbit Chemicals contention was that it had suffered considerable damage as a result of the Registrar of Titles action of lodging a caveat in 1987 against the property, which prohibited Orbit Chemicals from ***"dealing with the land in any way"***. It further contended that as a result its Property could not be protected and so "squatters" moved into the land. It was Orbit's contention that the Registrar of Titles action of lodging the caveat caused the property to be "invaded" by squatters. The Attorney General filed a defense but in a ruling made by Justice Ojwang' in 2006, the Attorney General's defense was struck out and judgment was entered in favor of Orbit Chemical Industries Limited. The matter proceeded to formal proof and Orbit Chemicals Limited was awarded Kshs. 13 billion.[41]

[40] *Orbit Chemicals Industries Ltd v. the Attorney General* HCCC No. 876 of 2004.

[41] Orbit Chemicals further commenced eviction proceedings against the squatters. The company has also entered into a draft agreement for the sale of 1,200 plots within the property. The effect of such sales or demolition by orbit chemicals would be catastrophic, as it would affect the lives of thousands of households.

3.0 OPTIONS FOR DEALING WITH LAND TENURE ISSUE IN MUKURU

This section discusses the various options that are available for the NCCG to consider with regards to Mukuru SPA. Each option will provide the procedure for dealing with the land tenure as well as the strengths and challenges that are likely to arise in the adoption of these options. It is noteworthy that the following are the key highlights of differentiating the options as well as some key challenges in dealing with the land tenure question:

i. The NCCG seeks to have the land in the Mukuru SPA declared as public land for purposes of ensuring that it can effectively plan and upgrade Mukuru.
ii. The NCCG is committed to upholding the national values and principles as well as the principles of land policy when conducting stakeholder engagement and public participation with regards to the Ministry of Lands, the National Land Commission, leaseholders and tenants in order to develop the best pragmatic and feasible as well as long term solution to the Mukuru SPA.
iii. The NCCG is cognizant of the right to dignity and socio-economic rights of the inhabitants of informal settlements and is committed to ensuring that during the entire process of planning, it upholds its obligation to protect, promote and fulfil their rights.
iv. The key challenge in formulating these solutions is the possibility and likelihood of dissatisfaction from some stakeholders considering the land tenure system and conflicting interests. Therefore it can lead to a myriad of law suits that various aggrieved parties might file before the Court to challenge any of the proposed options.

3.1 OPTION 1: REVIEW OF TITLES AND ISSUANCE OF APPROPRIATE REMEDIES

3.1.1 MANDATE TO REVIEW TITLES OF PUBLIC LAND

The National Land Policy recognized the ills that have been occasioned by wrongful possession of public land by private persons. It recommended that in order to secure tenure to public land, the government shall *14(e) "establish mechanisms for the repossession of any public land acquired illegally or irregularly*."[42] In the Ndung'u Commission report it was noted that in Kenya, the intensity of illegally and irregularly allocating public land increased in the 1980s and the 1990s and the practice was referred to as land grabbing.[43] One consequence of the illegal and irregular allocation of public land was the rise of informal settlements.[44]

[42] Sessional Paper No. 3 of 2009, 14.
[43] Report of the Commission of Inquiry into the illegal/irregular allocation of public land, 2004 at 8.
[44] Ibid, 119.

As a result of the mismanagement and illegal allocation of public land, the Constitution of Kenya established the National Land Commission (NLC) as an independent body to deal with issues related to public land. Article 67(2) of the Constitution further provides for the functions of the NLC which include management of public land on behalf of the national and county governments and initiating investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

Parliament further enacted the National Land Commission Act,[45] to provide "*for the management and administration of land in accordance with the principles of land policy in Article 60 and the national land policy; for the operations, powers, responsibilities and additional functions of the [NLC] pursuant to Article 67(3) and for a linkage between the [NLC], county governments and other institutions dealing with land and land related resources"*.[46]

The Constitution of Kenya also contains provisions that can be used to remedy the past illegalities, particularly illegalities occasioned by the wrongful and unlawful allocation of public land. Article 40 of the Constitution recognizes the rights of persons to own property with a qualification that the protections accorded by the State shall not extend to property found to have been unlawfully acquired.[47] The National Land Commission Act provides for instances where the NLC has the power to address alleged irregularities and illegalities concerning public land.[48] The NLC is vested with the powers of revocation of title where it is established that the title was acquired in an unlawful manner or irregularly acquired.[49] The Commission in reviewing such a title will interrogate the indefeasible nature of the title as was seen in ***Compar***

[45] Act No. 5 of 2012. In relation to the revocation of titles, Section 14(5) is instructive. It reads:

> *"Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title."*

The Act also lays down procedures for the revocation of titles as follows in Section 14(7),(8) and (9) as follows:

> *"(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.*
>
> *(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.*[45]
>
> *(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1)."*

[46] Section 3(a), (b) and (d) of the National Land Act
[47] Article 40(6) of the Constitution (2010).
[48] Section 14 of the National Land Commission Act No. 5 of 2012.
[49] Ibid, section 14(5) and (6).

Investments Ltd v National Land Commission & 3 Others Petition No. 311 of 2014. The NLC has, therefore, developed regulations to guide the review of grants and disposition of public land.[50]

The Land Registration Act,[51] which is the law that repealed the GLA, provides that the registered proprietor of land shall be issued with a certificate of title which is to be held as conclusive evidence of proprietorship.[52] This certificate can be issued subject to certain conditions that are to be met by the registered proprietor.[53] With regards to leases containing conditions barring the lessor from transferring, sub-letting, charging or parting with the possession of the land, the Land Registration Act requires the production and authentication of the consent of the lessor before the land is registered.[54] Section 30 of the Act outlines the conditions that must be fulfilled before a person can be issued with a certificate of title. One such condition is that the lease must be for a period exceeding twenty-five years.[55]

Part XII of the Land Registration Act contains provisions on transition from the old legal regime (GLA) to the new regime. This part contains, among others, provisions dealing with dispositions that had been made pursuant to the repealed GLA and the RLA.[56] Section 105(1)(a) provides that title to land which is comprised in a grant or certificate of title issued under the repealed RLA will be deemed to be a certificate of title or certificate of lease issued under the Land Registration Act.

This means that grants previously issued under the repealed GLA and the RLA shall be deemed to be certificates of title issued under the Land Registration Act. Moreover, the Act provides that rights, liabilities and remedies of parties over land that was registered under the repealed laws will not be affected by the coming into force of the Land Registration Act. This means that any covenants that were stipulated in the grants pursuant to section 39 of the repealed GLA would still be applicable. These rights are consequently

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[50] See The National Land Commission (Review of Grants and Disposition of Public Land) Regulations, 2017.
[51] Land Registration Act No. 3 of 2012.
[52] Section 6 of the Land Registration Act.
[53] Section 26(1) of the Land Registration Act reads:

> *"The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except-*
> *(a) on the ground of fraud or misrepresentation to which the person is proved to be a part; or*
> *(b) where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme."*

[54] Ibid, section 55
[55] Ibid, section 30(1) (b).
[56] Chapter 300, Laws of Kenya (repealed).

enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under the Land Registration Act.[57] This is also the case with regards to rights, interests, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of the Land Registration Act.[58] This means that the rights or interests that accrued before the enactment of the Land Registration Act shall continue to be governed by the applicable repealed laws. However, provisions of the National Land Commission Act will provide guidance where questions of review of the grants arise.

In ***Mwangi Stephen Muriithi v National Land Commission and 3 others***[59]**,** the Petitioner whose title had been revoked by the NLC in his petition argued that the Commission did not have the mandate to revoke titles, grants or disposition of land. The Petitioner's case was that the NLC was not the body contemplated under Article 68 (c) (v) of the Constitution and that Section 14 of the National Land Commission Act was unconstitutional to the extent that it purports to grant powers to the NLC that it cannot constitutionally perform. The Constitutional and Human Rights Court did not agree with the Petitioner's arguments and held that the NLC had jurisdiction to review all grants and dispositions of public land. The Court was also of the view that with regard to grants and dispositions of public land, the Commission had the mandate to investigate how any such title was acquired and how land in this category was converted from public to private use. The Court went ahead to hold that Section 14 of the NLC Act was constitutional.

The ***Mwangi Stephen Muriithi*** case which was decided on 7th December 2018 importantly asserts the NLC's mandate to review grants and dispositions of public land. The case also importantly breathes life into the Commission's mandate to investigate legalities of any subsequent transfers of public land that had been allocated through grants. Moreover, the Commission's actions are also kept in check as the Court states in its Judgment that the NLC in discharging its mandate of review of grants and dispositions of public land must be guided by the rules of fair administrative action under Article 47 of the Constitution as read together with the Fair Administrative Action Act 2015 as well as the provisions in Article 50(1) of the Constitution on the right to a fair hearing. This latter holding by the Court on the need to take consideration of the rules of fair administrative action was earlier established in ***Shree Visa Oshwal Community Nairobi Registered Trustees v Attorney General & 3 Others***.[60]

[57] Section 106 (2) of the Land Registration Act.
[58] Ibid, section 107.
[59] Petition No. 100 of 2017.
[60] Petition No. 262 of 2013.

3.1.2 PROCESS OF REVIEW OF GRANTS AND DISPOSITIONS

The National Land Commission Act provides for instances for review of grants and dispositions. The Act in section 14(1) places exceptions with respect to the period of time within which a complaint can be raised. These provisions stipulate that the NLC on its own motion, the national or county government, a community or an individual may raise a complaint to the NLC to review a grant or disposition of public land. However, the Act stipulates that a complaint can only be raised within 5 years since the commencement of the Act. The commencement date of the Act was 2 May 2012 therefore the time period within which a complaint can be raised lapsed on 2nd May 2017.

However, a question that arises is whether the 5 year time bar or limitation under section 14 of the NLC Act is in line with Article 67 of the Constitution which states that the NLC has the mandate to deal with *present and historical injustices*. What did the Constitution drafters mean when they stated that the NLC has the mandate to deal with 'present' issues pertaining to public land? Was it the intention that the mandate of the NLC be limited to complaints raised within 5 years? In our opinion, this was not the intention of the drafters and of the Kenyan people who overwhelmingly voted for the Constitution. The NLC is a permanent Commission different from temporary Constitution commissions such as the Commission on the Implementation of the Constitution whose mandate was for a particular period of time. The 5 year time bar set by Parliament in effect bars the NLC on its own motion or any individual, community or national and county government from bringing a complaint with respect to the review of a grant or disposition. It could be argued that the legislature had intended that the complaints in relation to review of grants and dispositions to be dealt with in a timely manner. However, the Legislature ought to have considered instances where 'present' illegal or irregular allocation of public land take place. This means that the review mandate of the Commission can best be understood as a continuous mandate in line with the need to solve the mischiefs that have been witnessed in the allocation of public land.

It is noteworthy that Parliament tried to cure the time limitation placed in Section 14(1) through section 14(9) of the NLC Act, which states that if the NLC considers it necessary it may request Parliament to extend the time within which to conduct a review under Section 14(1). In our particular instance, the NCCG can request the NLC to investigate and review the grants, after the 5 year period since commencement of the Act and the NLC can request for Parliament to extend the time for review. However, our analysis of the Constitution provides that the mandate of the NLC to accept complaints or initiate investigations on grants should not be limited to 5 years because the Commission has a continuing mandate to deal with present and future disputes with respect to public land. Further, the NLC should not be subject to Parliament in terms of requesting the period within which to review grants. This in itself interferes with the operational

independence of the NLC as an independent commission. If Parliament for one reason or the other makes a determination that it will not extend the time period within which to review grants then the NLC will not be able to undertake its functions and the Constitution mandate to deal with present complaints would be negated.[61]

The second option is in Section 15 of the National Land Commission Act as read together with Article 67(3) of the Constitution. It deals with historical injustices and empowers the NLC to review grants, which were issued irregularly or illegally and the procedures to remedy the irregularities.[62] An analysis of sections 14(1) and 15(3)(e) shows the provisions are similar to the extent that they expressly require that the complaint be raised within 5 years of the commencement of the Act.[63] Section 38 of the Land Laws

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[61] See analysis of unconstitutionality of legislative provisions that overstep constitutional provisions in the Supreme Court of Kenya case in ***Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*** SC Petition No. 10 of 2013; [2014] eKLR.

[62] Section 15(1) of the National Land Commission Act.

[63] The other provisions of section 15 read:

(5) When conducting investigations under subsection (1) into historical land injustices the Commission may—

(a) request from any person including any government department such particulars, documents and information regarding any investigation, as may be necessary; or

(b) by notice in writing, addressed and delivered by a staff of the Commission to any person, direct such person, in relation to any investigation, to appear before the Commission at such time and place as may be specified in the notice, and to produce such documents or objects in the possession, custody or under the control of such person and which are relevant to that investigation.

(6) Where a complainant is unable to provide all the information necessary for the adequate submission or investigation of a complaint, the Commission shall take reasonable steps to have this information made available.

(7) If at any stage during the course of an investigation, the Commission is of the opinion that the resources of the Commission may be more effectively utilized if all claims within a given area or township were to be investigated at the same time, the Commission shall cause to be published in the Gazette or in such other manner as the Commission may deem appropriate, a notice advising potential complainants of the decision and inviting them to lodge claims within a period specified in such notice.

(8) A claim in respect of a matter contemplated in subsection (7) shall not be lodged after the expiry of the period specified in the said notice.

…

(10) Upon determination of a historical land injustice claim by the Commission, any authority mandated to act under the redress recommended shall be required to do so within three years.

(11) The provisions of this section shall stand repealed within ten years.

Amendment Act,[64] substituted and introduced this new section 15 that provides 'within 5 years of commencement of this Act' -so the interpretation means 5 years from commencement of the National Land Commission Act, that is by 2nd May 2017. However, section 15 does not have a provision similar to section 14(9), which the NLC may rely on to request Parliament to extend time within which it can receive complaints on historical injustices. In our opinion this provision can be argued to be contrary to the Constitution. This is because the NLC has the mandate to deal with historical injustices and ought not to be limited to only deal with historical injustices that have been complained about within 5 years. The very nature of a historical injustice regarding land should allow the NLC to carry out its mandate without limitation of time to investigate and redress any complaints.

An analysis of the functions of the NLC under this provision shows that soon after the amendment was introduced, the NLC formed a committee to deal with the complaints of historical land injustices.[65]

Therefore, based on these two provisions, the best option would be for the NCCG to approach the NLC to request the following:

i. In accordance with section 14(g) of the NLC Act, the NLC considers that the situation of Mukuru SPA is a necessary reason for seeking an extension from Parliament within which it can accept a complaint from the NCCG after the 5-year period. This is because it is in the public interest for the NCCG to develop an integrated physical development plan for Mukuru SPA in order to deal with the planning challenges such as public health, water, sanitation, environment and delivery of services.
ii. The NCCG will present the evidence of the grants it seeks to have the NLC review as well as request for the review of grants or dispositions in the Mukuru SPA that it might not have.
iii. The NCCG will then review the grants and issue the remedies that are necessary. In the instance where the conditions of the grants have not been met then the land should be reverted back to the NCCG.

[64] Land Laws Amendment Act No. 28 of 2016.

[65] See http://www.landcommission.go.ke/media/erp/upload/investigation_of_historical_land_injustice_claims.pdf (accessed on 20 January 2018).

It is noteworthy that the NLC has revoked several titles where complaints had been raised with respect to illegalities of titles by county governments.[66]

3.2 OPTION 2: COMPULSORY ACQUISITION

Compulsory acquisition is an option that is available to the NCCG can resort to in dealing with the land in the Mukuru SPA since most of the land is considered to be private land. Section 9(2) (c) (i) of the Land Act is instructive as it provides for the conversion of private land to public land through compulsory acquisition. The Land Act proceeds to provide an elaborate procedure under which compulsory acquisition should take place.[67] Section 107 lays the foundation in terms of the preliminary notice.[68] In a nutshell, the preliminary notice states as follows:

1. The respective Cabinet Secretary of the National Government or County Executive Committee Member of the County Assembly may request for compulsory acquisition.
2. The acquisition must be in line with the NLC guidelines and Article 40(3) of the Constitution.
3. Failure to adhere to the above then the NLC may decline to follow up on the request upon which it must write within 30 days expressing the reasons for the decline and the conditions that are to be met.
4. If approved the NLC shall publish in the Gazette and the County Gazette and deliver the copy to the registrar and any interested persons.
5. The Registrar must then make an entry in the register of the intended acquisition.

When conducting compulsory acquisition the NLC and other parties must bear in mind article 40 of the Constitution, which deals with the right to property. With respect to acquisition of property article 40(3) (a) is instructive as it provides that—

> ***"*** *(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—*
> *(a) results from an acquisition of land or an interest in land or a conversion of an interest*

[66] See http://www.landcommission.go.ke/media/erp/upload/in-the-matter-of-revocation-of-titles.pdf (accessed on 20 January 2017).

[67] In ***Patrick Musimba,*** the Court observed at para 84 that Part VIII of the Land Act that deals with compulsory acquisition was put to ensure a real connection between compulsory acquisition and the State's development needs.

in land, or title to land, in accordance with Chapter Five;…"

In addition in ***Patrick Musimba***, supra, the Court held that "the Constitution did not intend to have the land owner who is divested of his property compensated or restituted for loss of his property but to ensure that the public treasury from which compensation money is drawn is protected against improvidence.[69] Just as the owner must be compensated so too must the public coffers not be looted. It was further held that one must receive compensation commensurate to one's pecuniary loss and this can be done through establishing the market value of the land.[70] In the case of ***Five Star Ltd***, supra and ***Patrick Musimba***,[71] the Court noted that since the NLC had not gazetted any rules on compulsory acquisition then the Schedule of the repealed Land Acquisition Act,[72] applies. In ***Five Star Ltd*** the Court established that the market value of the property is that of the date of publication in the Gazette of the Notice to acquire land. This position has since been anchored in the provisions of the Land (Assessment of Just Compensation) Rules, 2017.

Still at the pre-enquiry stage, the NLC is required to inspect the land, which is subject to acquisition and do all that is necessary to ascertain that the land is suitable for its intended purpose.[73] In addition section 110 provides that the NLC must certify in writing that the land is required for public purposes or in the public interest or is necessary to the fulfillment of the stated public purpose. If the acquisition fails or ceases then the NLC may offer original owners or their successors to the title the pre-emptive rights to acquire the land. The Act also provides that just compensation must be paid promptly in full to all persons with an interest in the land.[74] The acquiring body is also required to deposit with the NLC the compensation, survey fees, registration fees and any other costs.

Using the above criteria and comprehensive procedures of compulsory acquisition, the NCCG could first request the NLC to conduct investigations as to validity of the titles. For those that are lawfully owned privately, the NCCG can request the NLC to start the process of compulsory acquisition of the land and the public purpose for which it will want to purchase the land would be for planning purposes in order to effectively deliver basic services to the people and avoid public health and sanitation challenges. The

[69] ***Patrick Musimba***, supra, para 118.
[70] Ibid, para 120.
[71] Ibid, para 133.
[72] Chapter 295 of the Laws of Kenya.
[73] Section 108 of the Land Act and the case of ***Patrick Musimba***, supra at paras. 88 and 89.
[74] Section 111 of the Land Act. See also ***Five Star Agencies Ltd v. The National Land Commission*** ELC Suit No. 445 of 2014; [2014] eKLR.

NCCG should also prepare its reasons as to what the just compensation for the compulsory acquisition should be. This involves selecting the suitable manner for land valuation of property in Mukuru SPA.[75]

3.2.1 LAND VALUATION DURING COMPULSORY ACQUISITION

In exercise of its compulsory acquisition powers, the State is required to ensure that just compensation is extended to the person whose property interest is to be extinguished. This means that proper valuation of the property must be done to enable the assessment of what shall be deemed to be just compensation. The Land (Assessment of Just Compensation) Rules, 2017 offer guidance as to how the acquiring agency, the NLC, is to assess just compensation. The Rules largely peg compensation during compulsory acquisition on the market value of the land. Market value is defined as 'the value of the land at the date of publication in the *Gazette* of the notice of intention to acquire the land.[76] In assessing the market value, the Commission is required to, among others, take consideration of the effect of any express or implied condition of title or law which restricts the use to which the land concerned may be put.[77]

The Land Value Index Laws (Amendment) Bill, 2018, which is currently in Parliament offers further guidance on the valuation of land in respect of compulsory acquisition. The Bill in Section 107B proposes that where the lessee of a public land is in breach of any terms or conditions of a grant, the land shall revert back to the national or county government. This provision, if passed will mean that where it is established that the grant conditions were not met by a grantee, the land will automatically vest in the County government. It may be argued that the land in Mukuru cannot be assigned a market value based on the special conditions that prohibits it from being exposed to the market. The special conditions essentially make the land inalienable unless certain conditions are complied with. It can thus be argued that where such conditions exist, the land cannot properly be assigned a market value. Moreover, the land in Mukuru was issued through grants, the grantees did not pay any amount that can be considered to be purchase fees before they were allocated the grants. The grantees cannot also claim loss of income from the property since they failed to invest in the land.

Valuation of land in Mukuru will also depend on two important factors; its utility and transferability. Regarding the former, the utility of the land in Mukuru is inhibited by the fact that most of the land cannot be put to effective use as a result of occupation by squatters. This essentially means that a potential buyer

[75] The main hurdle in this option is for the NCCG to analyze all the titles in the 550-acre of Mukuru SPA in order to adequately plan as to which of the titles are lawfully owned privately for purposes of compulsory acquisition.
[76] The Land (Assessment of Just Compensation) Rules, 2017, rule 2.
[77] Ibid, rule 2(a).

may not be able to extract adequate utility from the land with the squatter occupation and the fact that the settlement is underserved with social amenities. The value of the land resultantly goes down as a result of the numerous externalities that it is associated with. Moreover, transferability of the land under the grants in Mukuru is inhibited by the Special Condition prohibiting transfer of the grants.

3.3 OPTION 3: BREACH OF CONTRACT

By issuing grants of public land to the various grantees, the government entered into a contractual relationship with the grantees. This contractual relationship is governed by the title issued to the grantees which specified the conditions guiding the relationship between the government and the grantees ranging from the location of the land leased, the lease duration, the amount payable by the grantees and the conditions upon which the holding was subject to. In many jurisdictions, leases are considered to be contractual relationships. In the United States, as was seen in *Lion Raisins Inc. v. United States,*[78] where the government enters into contract relations, its rights and duties are therein governed generally by the law applicable to contracts between individuals.

The approach in the United States has been that leases issued by the government create contractual relationship between the state and the person issued with the lease. In ***Century Exploration New Orleans, Inc. and another v The United States***,[79] the Court held that an action of breach of contract could be founded on failure by a party to a lease agreement to abide by its undertaking. A similar holding has been made **in *J.J. Henry Co v. United States***,[80] where it was held that where a party possesses enforceable rights under a contract with the government, interference with such contractual rights will give rise to a breach claim. The contractual approach has been favored in these cases since it is accepted that the government in such cases acts in its commercial or proprietary capacity, rather than in its sovereign capacity.[81]

Similarly in Kenya, the issuance of grants by the government to private entities signifies the creation of a contractual relationship between the government and the entity vested with the land. This means that the contractual rights and obligations subsist until the contracts are fully performed and can be vitiated by non-performance by one or both parties. The grants issued in Mukuru were subject to the payment of

[78]416 F 3d 1356, 1370 (Fed. Cir. 2005).

[79] 103 Fed.Cl. 70 (2012).

[80] 411 F. 2D 1246, 1249.

[81] See ***Hughes Communications***, 271 F. 3d at 1070

consideration defined by the Commissioner of Lands, were for a term of 99 years and an annual rent was payable by the grantees to the grantor. In addition, the grants contained certain conditions that were to be met by the grantees failure to which the grantor could invoke certain remedies. All these are classical illustrations of the requirements for there to be a valid contract. In all these cases, contractual relationships subsisted between the Republic of Kenya and the various grantees.

The case of ***Shree Visa Oshwal Community Nairobi Registered Trustees v Attorney General & 3 Others***,[82] illustrates how a contractual relationship is created once the government issues a person with a grant. In this case, the petitioner had been conferred with land registered in Grant No. 18152 as L.R No. 209/5996 as a leasehold for a period of 99 years commencing 1st January 1954. One of the special conditions for this grant was that the petitioner would erect buildings for the purpose of a school and one residential house in the suit property within 24 months. The petitioner duly constructed the school. The 2nd respondent subsequently wrote a letter to the petitioner revoking the grant on the basis that the petitioner had converted the school constructed on the land to a private school and the petitioner was given six months to vacate the land.

The Court, in arriving at its decision, stated that the determination of whether the applicant was using the land for the purpose specified in the grant was essential establishing the lawfulness of the 2nd respondent's actions. The Court reiterated that Special condition No.4 contained in the grant required that the school must be used for the purposes for which it was established, that is, the establishment of a public school. Any contrary use would mean the land reverting back to the state. To this end, the Court held that the petitioner was in breach of the special condition and that the 2nd respondent was entitled to take the measures that it undertook.[83] The Court further held that the petitioner was only entitled to compensation as with regards to the developments put on the land and not for the loss of the land.

This case importantly sheds light on the implications of non-fulfillment with grant conditions. Such non-fulfillment is considered to be a breach of contractual obligations that a grantee undertook to perform. The case also illustrates that a grantee in breach of grant conditions cannot benefit from their non-fulfillment of the conditions and expect compensation where the state takes back the land. Needless to say, he/she who comes to equity must come with clean hands.

[82] Petition No. 262 of 2013.

[83] Ibid, para 49.

4.0 CONCLUSION

In this paper, we have attempted to outline three options that are available to the NCCG in dealing with the grants that were accessible to us. These grants, as already stated in this paper, are representative of the grants issued for the land in the entire area of the Mukuru SPA. The declaration of the area as a Special Planning Area will enable the NCCG to realize its planning mandate but this goal is highly predicated on the ability of the NCCG to unlock the land tenure question especially the question of the grants issued in the settlements. Unlocking the land question within the Mukuru SPA is also in line with the NCCG's ultimate intention to have the land in the Mukuru SPA declared as public land to enable proper planning and upgrading of the Mukuru informal settlements. The onus however, lies with the NCCG to explore the options outlined in this paper as it is the body that is best suited to explore the aforesaid options and fulfil its mandate to the inhabitants of Nairobi County.