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Jane Dwasi

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International Takings: Emergence of Takings Ligation in Kenya

*Dwasi Jane**

- I. OBJECTIVES OF PRESENTATION
- II. BACKGROUND INFORMATION
- III. RECOGNITION OF PHYSICAL TAKING IN KENYA
- IV. THE EXERCISE OF POLICE POWERS AND EMERGE OF REGULATORY TAKINGS CLAIMS
 - A. Imposition of Land Preservation Measures
 - B. Declaration of Environmentally Significant Areas
 - C. Imposition of Environmental Impact Assessment (EIA) Requirements
- V. EMERGENCE OF TAKINGS CLAIMS
- VI. CONCLUSION AND RECOMMENDATIONS

I. Objectives of Presentation

As countries attain democracy, their territorial borders and internal productivity systems open up to the functionalities of globalization, characterized by, among other things, trade and investment activities across national frontiers. In Kenya, improvements in democratic governance have attracted a wide array of land-based activities by both local private investors and those from virtually every country in the world, meaning that the country is now a viable destination for private investment. So significant is private investment to the country's development that its government has established a distinct institution, dubbed KenInvest, tasked with the responsibility of attracting private investments from around the world.¹

The need for development activities to spur the country's economic growth has created many investment opportunities that are deemed attractive by foreign and local investors. The result is that there are currently a large number of foreign and local investors undertaking a variety of land-based investment activities. Such projects include the establishment of tourist hotels by British, Italian, German, and investors of

* University of Nairobi, School of Law and National Environment Tribunal; Nairobi, Kenya.

1. KenInvest, INVESTINKENYA.COM, <http://www.investmentkenya.com/about-ken-invest> (last visited Feb. 28, 2013).

other nationalities (especially along the coast of Kenya);² large-scale cultivation of cash crops, including fruits by Del Monte;³ and biofuel crops by foreign investment companies.⁴ Among others, Chinese investors are constructing roads and residential apartments,⁵ and a British investor's mobile telephone banking service is now deemed to be one of the most lucrative investments worldwide, generating billions of shillings in revenue every month.⁶ Investments in all the aforementioned areas require possession of a valid interest in land, whether freehold or leasehold.⁷ Even operation of telephone banking services requires access to land, given that construction of telephone masts requires acquisition of a valid interest in land.

On the backdrop of the prevailing position summarized above, this paper seeks to increase actual and potential investor knowledge about (i) the existing government's restrictive regulations of private land use, and (ii) emerging developments in the nature of land ownership and related claims

2. For example, in *Watamu Marine Stakeholders Ass'n & Another v. Nat'l Env't Auth. & Blazer Watamu Ltd.* (2007) N.E.T. 07 (Kenya), Blazer Watamu Ltd., a company owned by Italians was in the process of constructing villas on a peninsula at the coast of Kenya. The Authority stopped the activity because of the ecological sensitivity of the peninsular.

3. See, DELMONTE KENYA LTD., Company Profile, <http://www.manta.com> (last visited Mar. 31, 2013).

4. Such companies include Bedford Biofuels Ltd., which, in *Nature Kenya v. Nat'l Env't Mgmt. Auth. (NEMA) and Bedford Biofuels Ltd.*, (2011) N.E.T. 79 (Kenya), sought to defend its decision to cultivate *jatropha caucous* on more than 219,000 acres of land in Tana Delta, Kenya.

5. See, for example, *China Signs Contract to Boost Kenya's Road Network*, STANDARD DIGITAL (Jan. 13, 2011), http://www.standardmedia.co.ke/?articleID=2000026600&story_title=China-signs-contract-to-boost-Kenya%E2%80%99s-road-network, which confirms that Chinese companies are undertaking road construction on most of Kenya's highways and that China Roads and Bridges Corporation, one of the companies involved in the works, has been in Kenya for over twenty six years. It is a fact that increasingly, the companies are also engaging in housing constructions works.

6. The Company is known as Safaricom. See, SAFARICOM, www.safaricom.co.ke (last visited Apr. 1, 2013).

7. All investments involving land-based activities require ownership of an interest in land and for that purpose, KenInvest is tasked with, among other things, "facilitation and management of investment sites, estates or land together with associated facilities on the sites, estates and land" (§ 15(2)(d)). The Ministry of Lands is one of the ministries represented in the Kenya Investment Authority (§ 16(2)(d) of the Investment Promotion Act, No. 6 of 2004).

against government regulation of private land use activities that might impact investment activities. This paper is also intended to inform readers of the emergence of regulatory takings claims in Kenya, lessons learnt from previous regulatory takings conferences, and the potential influence of United States regulatory takings jurisprudence on the determination of similar cases in Kenya.

II. Background Information

In traditional societies, there were informal rules and regulations governing acquisition, ownership, and use of land. However, there was no formal system of land law in Kenya until 1899, four years after the British administration declared Kenya a British Protectorate.⁸ When the British colonial administration was extended to Kenya, application of the Indian Lands Acquisition Act of 1894 was applied to provide a basis for settler acquisition, ownership, and use of land. The significance of that piece of legislation is that it marked the process of systematic introduction into Kenya of a common law system of land tenure, with all the attendant principles, doctrines, and concepts of ownership, use, and alienation. The progressive establishment of a common law system of land ownership in Kenya saw the introduction of a number of laws in the form of ordinances, particularly, the Crown Lands Ordinance of 1902, which conferred ownership of all land in the region now Kenya on her Majesty, the Queen of England, and introduced a system of land grants by her Majesty (through her assigns—governors and commissioners in Kenya) to individuals and companies in the form of leaseholds for a term of years and freeholds (ownership in fee simple).⁹

The progressive introduction of an English system of land law in Kenya did not occur in isolation—it was complemented by a number of English administrative laws, including the Administration of Justice (Miscellaneous Provisions) Act of 1939.¹⁰ The act established official limitations to land ownership and use rights, largely through the exercise of (i) the governmental power of eminent domain and (ii) police powers.¹¹ The

8. The process of establishment of a formal system of land law in Kenya commenced with adoption of the Land Acquisition Act of 1894 and subsequently, passage of the Crown Lands Ordinance of 1902.

9. Crown Lands Ordinance (1902) (Kenya).

10. Administration of Justice (Miscellaneous Provisions) Act (1939) (Kenya).

11. The power of Eminent Domain is the power of the state or its assigns to acquire private property for public purposes, subject to the prompt payment of compensation. Whenever the state exercises this power, it forces involuntary transfers of property from private owners to itself or its assigns. The power of eminent domain is derived from the feudal notion that as the sovereign, the state

exercise of both powers were retained after independence, as reflected in the country's former and current constitution and a number of statutes governing land and related matters including the Land Acquisition Act (now repealed),¹² the Agriculture Act,¹³ and more recently, the Environmental Management and Co-ordination Act of 1999¹⁴ and the Land Act of 2012.¹⁵

III. Recognition of Physical Taking in Kenya

Through the exercise of the government's power of eminent domain, the law of physical takings of private property has been recognized and officially legitimized in Kenya since colonial days.¹⁶ Eminent domain is the power of the State or its assigns to acquire private property for public purposes, subject to the prompt payment of compensation.¹⁷ In *Kanini Farm Ltd. v. Comm'r of Lands* (Civil Appeal No. 1 of 1981), for example, the court asserted that in case of derogation of the right to property through compulsory acquisition, prompt and just compensation must be paid.¹⁸ Whenever the State exercises this power, it forces involuntary transfers of property from private owners to itself or its assigns. The power of eminent domain is derived from the feudal notion that as the sovereign, the state holds the radical title to all land within its territory. In Kenya, this power was embodied in the former constitution, which mandated that private property could only be acquired compulsorily for public use.¹⁹ Further, the constitution required that such public use must be weighed against the

holds the radical title to all land within its territory. Police power is the power of the state to regulate land use in the public interest in order to secure proper resource utilization and management. Exercise of the power is also an attribute of the sovereignty of a state.

12. The Land Acquisition Act (1894) (India), whose application was extended to Kenya in 1899.

13. The Agric. Act, (1980) (Kenya).

14. The Env'tl. Mgmt. & Co-ordination Act, No. 8 (1999) (Kenya).

15. The Land Act, No. 6 (2012) (Kenya).

16. See expressions of the power in section 75 of the former national constitution, which authorized compulsory acquisition of private property, for public purposes. The power of compulsory acquisition of private property was subsequently expressed in article 40(3) of the current national Constitution and in sections 107 to 127 of the Land Act, No. 6 (2012).

17. CONSTITUTION, art. 40(3) (2010) (Kenya), and Land Act, No. 6 (2012) §§ 107-127.

18. *Kanini Farm Ltd. v. Comm'r of Lands* (1981) 1 K.L.R. 120, 120-26 (E&L) (H.C.K) (Kenya).

19. CONSTITUTION, § 75 (1987) (Kenya).

hardship that may be caused to the landowner.²⁰ Finally, the constitution required that the acquisition be accompanied by prompt payment of adequate compensation.²¹ The former constitution also provided for a modified form of acquisition in the case of trust land (referred to as “setting apart”), which may be activated by the President or local authorities.²² The rules governing the setting apart of trust land and the payment of compensation to affected residents are contained in the Trust Land Act.²³

The substantive law and basic tenets of compulsory land acquisition were incorporated in the new Constitution of Kenya that was approved by national referendum in 2010.²⁴ The right to own land is enshrined in article 40, which guarantees “every person” the right to own property of any description in Kenya.²⁵ It prohibits arbitrary deprivation of property,²⁶ but permits compulsory acquisition of land for public purposes upon payment of prompt and adequate compensation.²⁷ The new Land Act of 2012, in sections 108 through 121, reiterates the principle that land shall be compulsorily acquired for public purposes only upon payment of prompt and adequate compensation.²⁸ For the first time, section 121 uses the term “taking” with reference to physical taking of land compulsorily acquired.²⁹ One of the concepts newly introduced with regard to physical taking of land is a grant of alternative land (in lieu of payment of compensation)³⁰ and payment of additional compensation, where it emerges that the value of land compulsorily acquired was much higher.³¹

Courts in Kenya have had occasion to address various claims as a result of compulsory acquisition, arising mainly from failure to pay compensation at all,³² delay in payment of compensation,³³ payment of

20. CONSTITUTION, § 75(b) (1987) (Kenya).

21. CONSTITUTION, § 75 (c) (1987) (Kenya).

22. CONSTITUTION, §117 (1987) (Kenya).

23. Trust Land Act, (2009) Chapter 288 (Kenya).

24. CONSTITUTION, art. 3 (2010) (Kenya).

25. CONSTITUTION, art. 40(1) (2010) (Kenya).

26. CONSTITUTION, art. 40(2) (2010) (Kenya).

27. CONSTITUTION, art. 40(3)(b)(i) (2010) (Kenya).

28. The Land Act, (2012) §§ 108 and 121 (Kenya).

29. The Land Act, (2012) §121 (Kenya).

30. The Land Act, (2012) §117 (Kenya).

31. The Land Act, (2012) §120 (Kenya).

32. *See, for example, Shayona Timber Ltd. v. Kenya Nat'l Highway Auth.* (2012) H.C.K (Nakuru), Civil Suit No. 149 (Kenya). Kenya National Highway Authority purportedly acquired land reference number 9950/8 (original No. L.R. No. 9950/1/3, East of Nakuru Municipality) for road expansion without compensation.

inadequate compensation,³⁴ and payment of compensation where landowners are removed from acquired land before finding alternative settlement sites.³⁵ However, the law on physical taking of property by government and its agencies for public purposes has been in Kenya for a long time and is, generally, deemed to be acceptable; save for issues that arise concerning procedure, which are now governed by additional provisions in the new Land Act of 2012.

IV. The Exercise of Police Powers and Emergence of Regulatory Takings Claims

In addition to explicit authorization of physical taking of private property for public purposes, a number of laws in Kenya governing various matters concerning land permit the government to limit or restrict private use of land, without physically taking away land, for a variety of purposes and reasons. Such justifications include the need for proper land use planning,³⁶ prevention of environmental harm,³⁷ and insurance of sustainable utilization of land and related resources.³⁸ The exercise of police power is also an attribute of the sovereignty of the state. In relation to restriction of property use, the exercise of this power was expressed in section 70(c) of the former constitution. That section specified that the rights set out in sections 70(a) and (b) of the same constitution with regard to property rights, including land-related rights, were guaranteed subject to such limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.³⁹ In the current constitution, the power is expressed more explicitly with reference to government control of land use activities as follows: "The State may regulate the use of any land, or any

33. *Id.*

34. The issue was considered, among others, in *Nzioka & 2 Others v. Tiomin Kenya Ltd.*, (2001) 97 K.L.R. 427 (Mombasa High Court) (Kenya),

35. *Id.* Local inhabitants complained that the Respondent mining company promised to relocate them to alternative place before taking over the land but reneged on the promise.

36. Need for proper land use planning is specifically expressed in article 66(1) of the Constitution (2010). It is also reflected in article 60 of the same Constitution and in the Preamble to the Physical Planning Act (1986) (Kenya), among other provisions of law.

37. CONSTITUTION, art. 42 and 69(1)(g) (2010) (Kenya), and The Env'tl. Mgmt. and Co-ordination Act (1999) §§ 42-56, §§ 58-62, §§108-116, §142 (*inter alia*).

38. CONSTITUTION, art. 60(1) and 66(1).

39. CONSTITUTION, §70(c) (1969) (Kenya).

interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health or land use planning.”⁴⁰

An analysis of the laws indicates that so wide are some of the government’s land use control powers that their exercise could, in effect, render one’s private land less economically beneficial, or simply make it impossible for one to utilize his land at all. An overview of such provisions follows:

A. Imposition of Land Preservation Measures

Existing provisions in older legislation with far-reaching control effects that could make it impossible for one to utilize land at all, or prohibit the only economically viable use of land include provisions of sections 48(1)(a) through (e) of the Agriculture Act.⁴¹ The Act authorizes the minister responsible for matters concerning agriculture to require landowners to implement land preservation measures.⁴² In enforcing such preservation measures, the minister could issue orders prohibiting or controlling clearing or breaking land for cultivation, prohibit grazing or watering livestock on a particular parcel, and prohibit or control burning or destruction of vegetation.⁴³ The minister can also issue land preservation orders requiring landowners, instead of cultivating desired crops, to undertake afforestation and reforestation on their land and destroy or uproot any vegetation planted on their land in contravention of land preservation orders without compensation.⁴⁴ Orders may also be issued to prohibit the use of one’s land for agricultural purposes altogether.⁴⁵ Failure to comply with the orders attracts undesirable penalties.⁴⁶ It is noted that government orders requiring the specified actions would have the effect of making it impossible for landowners to fully undertake desired beneficial activities on their land or to use their land at all, and could amount to regulatory takings. However, it is also noted that the foregoing provisions of the Agriculture Act are rarely implemented.

40. CONSTITUTION, art. 66(1) (2010) (Kenya).

41. The Agric. Act, (1980) § 48 (1)(a)-(e) (Kenya).

42. The Agric. Act, (1980) Cap. 318, §43 (Kenya).

43. The Agric. Act, (1980) Cap. 318 §48 (1)(a)-(e) (Kenya).

44. The Agric. Act, (1980) Cap. 318 §48 (1)(b) & (c)-62 (Kenya).

45. The Agric. Act, (1980) Cap. 318 §48(1)(b)-(e) (Kenya).

46. The Agric. Act, (1980) Cap. 318 §60 (Kenya).

B. Declaration of Environmentally Significant Areas

Provisions in more recent legislation include section 54 of the Environmental Management and Co-ordination Act (EMCA), which empowers the responsible minister to declare areas of land to be environmentally-significant areas for purposes of protection.⁴⁷ On the basis of statutory authority, the minister may declare “any” area of land to be an environmentally significant area for purposes of promoting and preserving specific ecological processes, natural environmental systems, natural beauty, species of indigenous wildlife, or the preservation of biodiversity in general.⁴⁸ Thereupon, the National Environment Management Authority (NEMA) would prescribe measures for management and protection of an area so declared.⁴⁹ However, there is no provision for payment of compensation to an owner whose land is declared environmentally significant.⁵⁰ Nor does such a declaration constitute compulsory acquisition for which provisions for compensation would apply.

Although no area of land in Kenya has been so declared, there are many qualifying areas in the country, including cheetah breeding grounds, swamps, water catchment areas, and private lands that serve as habitat for wildlife. Both individual conservationists and conservation organizations have been urging the responsible ministers to issue declaratory orders to preserve deserving ecologically-significant areas as authorized by law.⁵¹ Under the circumstances, it may be just a matter of time before an area is so declared, giving rise to claims for compensation resulting from regulatory action. It is noted that provisions for declaration of environmentally significant areas affirm, in most minds, the government’s prioritization of environmental conservation measures that, together with other regulatory provisions of law, encourage citizens and other concerned parties to take enforcement actions including preparation of environmental impact assessments (EIA).

C. Imposition of Environmental Impact Assessment (EIA) Requirements

So far, enforcement of EIA provisions of EMCA has generated the clearest indication of landowner preparedness to present to the government a regulatory takings claim. EIA requirements in sections 58-64 of EMCA and

47. The Env’tl. Mgmt. & Co-ordination Act, (1999) §54(1) (Kenya).

48. *Id.*

49. The Env’tl. Mgmt. & Co-ordination Act, (1999) §54(2) (Kenya).

50. *Id.*

51. The statutory provisions authorizing declaration of environmentally significant areas on “any land” do not provide for compensation of landowners.

the EIA and Audit Regulations (issued by Legal Notice No. 191 of 2003) present the most commonly used government mechanism for restricting private land use, with far-reaching consequences.⁵² The basic idea behind an EIA is that the government should predetermine the impacts that a development might have on the surrounding environment, and on that basis, make a prior determination to prohibit it, allow it conditionally, or allow it unconditionally.⁵³ The Second Schedule to EMCA lists the kinds of activities requiring an EIA.⁵⁴ Additionally, any activity that is out of character with its surroundings requires an EIA.⁵⁵

EIA and audit regulations specify the procedure to be followed by developers, also known as project proponents, in conducting EIAs prior to approval and license of a development. The process involves preparation of a project report describing the nature of the development to be undertaken, the proposed location, materials to be used, the environment of the locality (baseline information on the environment of the locality), likely negative impacts, and a plan for mitigating negative environmental impacts.⁵⁶ If the National Environment Management Authority (NEMA), to which a developer submits a project report, determines from the report that a development is likely to have significant impacts on the environment or that a developer's proposed mitigation measures will not adequately address likely negative impacts, NEMA shall require a developer to undertake a full EIA study, to be conducted on behalf of a developer by an EIA expert.⁵⁷ At the end of the whole process, including public participation, NEMA may decide to reject the project (meaning that it cannot be undertaken at all), approve the project with conditions intended to safeguard the environment, or approve the development unconditionally.⁵⁸

Through the EIA process briefly discussed, the government has, through NEMA, restricted private land uses of many kinds in the interest of environmental conservation, including conservation of biological diversity. For example, the government has, through NEMA (hereinafter, the Authority), restricted a private landowner to developing a maximum of four

52. The Env'tl. Mgmt. & Co-ordination Act, (1999) §58-64 (Kenya).

53. The Env'tl. Mgmt. & Co-ordination Act, (1999) §63 (Kenya).

54. The Env'tl. Mgmt. & Co-ordination Act, (1999) (Kenya).

55. The Env'tl. Mgmt. & Co-ordination Act, (1999) (Kenya), Second Schedule, *Projects to Undergo Environmental Impact Assessment*.

56. EIA and Audit Regulations, Regulations 7(g) and (h) of the EIA and Audit Regulations, Legal Notice No. 101 (2003) (Kenya).

57. The Env'tl. Mgmt. & Co-ordination Act, (1999) §59 (Kenya), and Regulation 7(3) of the EIA and Audit Regulations, Legal Notice No. 101 (2003) (Kenya).

58. The Env'tl. Mgmt. & Co-ordination Act, (1999) §60 (Kenya) and §§ 10 & 23 of the EIA and Audit Regulations, Legal Notice No. 101 (2003) (Kenya).

floors, down from the eight floors that the landowner was in the process of building, to house twenty one units on its private land known as Plot No. 209/4902 in Riverside Gardens on Riverside Drive in Nairobi.⁵⁹ The government has also, through the Authority, restricted a landowner's development by requiring it to observe a six-meter riparian reserve of River Kirichwa Kubwa, which, in effect, forced the landowner to demolish a stone wall he had erected around his property.⁶⁰ Additionally, the government has stopped a private landowner from converting the use of his land in a residential neighborhood to a commercial center on the basis that such use would negatively impact the aesthetic character of the surrounding environment and cause noise pollution and vehicular traffic without a showing by the developer of sufficient mitigation.⁶¹

V. Emergence of Takings Claims

The foregoing cases, among others in which private land use was partially restricted, did not generate any kind of claim for compensation, though property owners did assert their property use rights. However, when the government, through the National Environment Tribunal, stopped a developer from constructing two luxury villas at the coast, it prohibited an investor from undertaking the desired development at all, and a claim of a regulatory takings nature emerged.⁶² The appeal was filed by an environmental conservation organization against the Authority's approval and license of the establishment by an Italian developer of seven luxury villas on the basis that the process of approval was flawed, the developer/investor had encroached onto a public beach access, the land subsequently transferred to the developer had been illegally acquired, and that stakeholders were not properly involved in the Authority's process of approval of the development.⁶³

In reply to the appeal, the investor raised the constitutionally guaranteed property right to utilize the land, which it stated was being infringed by parties seeking to stop the development.⁶⁴ Before the Tribunal concluded hearing the appeal, the investor filed a judicial review application

59. *Phenom Ltd. v. Nat'l Env't Mgmt. Auth. & Riverside Gardens Residents' Ass'n* (2005) 1, 4 N.E.T. 6 (Kenya).

60. *A.T. Kaminchia v. Nat'l Env't Mgmt. Auth. & M/S Bell Ways Garden Ltd.*, (2005) 1-13 N.E.T. 5 (Kenya).

61. *New Muthaiga Residents' Ass'n v. The Director General, Nat'l Env't Mgmt. Auth. & Gemini Properties Ltd.*, (2007) 24 N.E.T. 27.

62. *Malindi Green Town Movement & Another v. NEMA, Silversand Camping Site Ltd. & Another* (2005) 6 N.E.T. 3-12 (2nd Respondent's evidence) (Kenya).

63. *Id.*

64. *Id.*

in the High Court, claiming that by challenging its right to own and develop the property in question, both the Tribunal and the appellants had infringed its rights to own and use property.⁶⁵ The investor emphasized that the rights were derived from section 75 of the former constitution, which had elaborate provisions for protection of the right, now to some extent incorporated in Article 40 of the current constitution. The investor sought orders of prohibition to stop the Tribunal from continuing to infringe the right by stopping it from proceeding with hearing. The High Court granted the order of prohibition on the ground that the appellants did not have *locus standi* to prefer the appeal, in the process directing the investor to present its property rights claims to the Constitutional Court.⁶⁶ The Tribunal appealed the decision, based on legal expansion of *locus standi*, especially under section 3 of the Environmental Management and Co-ordination Act, EMCA of 1999 (it is noted that the new national constitution has further expanded *locus standi* on environment and human rights matters).⁶⁷ The Tribunal's appeal is still pending in the High Court.⁶⁸

One of the points of concern for the Tribunal in *Malindi Green Town Movement* was that an aggrieved party, a developer, had responded to the application of regulatory restrictions with a property rights claim, based on constitutional provisions. Would that be the end of such claims? Unfortunately, in judicial review, the High Court could not address the property rights matter, nor will it be addressed on appeal because the Tribunal only appealed the issue of *locus standi*. It soon emerged that similar claims would begin to appear as investors sought to avoid regulatory limitation of their land use activities.⁶⁹

A year later, through an appeal, the Tribunal stopped a leaseholder from constructing a tourist lodge and camp in a cheetah breeding ground in an area slightly outside Maasai Mara Game Reserve in an effort to preserve the cheetah breeding ground.⁷⁰ In that case, the landowner, who had leased land to a foreign investor, asserted his absolute land ownership rights and

65. Republic v. NET, NEMA, Malindi Green Town Movement & Malindi South Residents Ass'n. (2006) H.C.K., Misc. Application No. 391.

66. *Id.*

67. CONSTITUTION, art. 70(1) & (3) (2010), echoing § 3 of the Env'tl. Mgmt. & Co-ordination Act (1999) (Kenya).

68. Republic v. NET, NEMA and Malindi Green Town Movement & Malindi South Residents Ass'n, *supra* note 67.

69. See, *Mutaka Ole Mpoya v. Maasai Mara North Conservancy Ltd. & Kenya Tourism Fed'n* (Nakuru Constitutional Reference No. 66 of 2010 /JR 34/2010) in which a similar claim has been raised in *Malindi Green Town Movement*.

70. *Narok Cnty. Council & Kenya Tourism Fed'n v. Nat'l Env't Mgmt. Auth., Wasafiri Camp Ltd. & Ben Kipeno & Others* (2006) 07 N.E.T.

raised the issue of compensation of a regulatory takings nature.⁷¹ Ben Kipeno owns freehold land about two miles from the boundary of Maasai Mara Game Reserve, which he argued, he could not utilize for subsistence and commercial farming because of the presence of wildlife in the area.⁷² In order to generate money from the land, his only source of income, he invited a foreign investor to lease the land, at a fee, to establish tourist facilities thereon.⁷³ The investor prepared an EA project report and submitted it as part of his application to the Authority for an EIA license.⁷⁴ The investor's application was granted and the development approved at a project report stage—the fact that the land in question was a breeding ground having been overlooked, concealed, or ignored. After the investor commenced construction work, the Narok County Council, the local authority in whose jurisdiction the development in question was being undertaken, and the Kenya Tourism Federation, a conglomerate of a number of private agencies with various tourism related activities, appealed the Authority's decision to approve and license the development at the project report stage.⁷⁵ The County Council and the Tourism Federation contended that the EIA study process that informed the Authority's decision to approve the development was flawed, having significant issues such as the fact that the area in question was a cheetah breeding ground was overlooked (and yet cheetahs are an endangered species in Kenya), and that key stakeholders were not involved in the development's approval process.⁷⁶

The landowner's takings claims were raised in evidence during hearing of the appeal. The landowner claimed, *inter alia*, that he could not undertake any other activity on the land than team with an investor to establish a tourist facility because of the presence of wildlife in the area.⁷⁷ He stated that for subsistence, he could have been farming, but could not do so due to the wildlife.⁷⁸ He asserted that he had a constitutional right to use his property to earn a living and that stopping him from utilizing his land for the only commercially viable purpose was equivalent to taking his land away

71. *Id.*

72. *Id.*

73. The information was presented as part of Ben Kipeno's evidence in *Narok Cnty. Council & Kenya Tourism Fed'n*, *supra* note 71.

74. *See*, 2nd Respondent's evidence in *Narok Cnty. Council & Kenya Tourism Fed'n*, *supra* note 71.

75. *Kenya Tourism Fed'n v. NEMA & Ol Keju Ronkai Limited* (2008) N.E.T 30.

76. *Id.*

77. *See*, 2nd Respondent's evidence in *Narok Cnty. Council & Kenya Tourism Fed'n v. Nat'l Env't Mgmt. Auth., Wasafiri Camp Ltd. & Ben Kipeno & Others* (2006) N.E.T 7.

78. *Id.*

from him.⁷⁹ He argued that if the government stopped him from utilizing the land, it would have to pay him compensation for prohibiting him from making use of the land.⁸⁰ The landowner and his witnesses stated that if they were stopped from using the land without compensation, they would make it impossible for wildlife to exist on the land.⁸¹ The Tribunal ordered that a full EIA study be conducted for the project, and in the meantime stopped the development.⁸²

For the first time, the Tribunal was presented with a takings claim of this kind, which prompted members to seek more information on land use related claims where they could find it, and hence their attendance of the Regulatory Takings Conference for the first time. One of the lessons learned was that the legal system in the United States recognizes land holder claims based on government restrictions and regulations that substantially diminish commercial viability of land, and that there are established legal parameters within which such claims may be honored.⁸³

Further property rights claims were raised in response to appeals filed against private developments in the following cases:

Kenya Tourism Federation v. NEMA & Ol Keju Ronkai Limited (NET/30/08): In a developer's response to an appeal against the establishment of a tourist facility on the outskirts of Maasai Mara on the basis that the attempt to restrict the development infringed property ownership rights. The Tribunal's ruling on a preliminary objection, allowing the appeal to proceed, was appealed to the High Court and is still pending.⁸⁴

Maasai Mara North Conservancy v. NEMA & Wasafiri Camp Limited (NET/40/2009) and the related Constitutional Petition No. 68 of 2010- *Kerio Ole Naimodu v. Maasai Mara North Conservancy Ltd. & Kenya Tourism Federation*: In the appeal before the Tribunal in NET/40/2009, appellants challenged the Authority's failure to enforce the Tribunal's judgment in NET/06/2005 by preventing the developers from proceeding with establishment of a tourist

79. *Id.*

80. *Id.*

81. *See*, 2nd Respondent's evidence in *Narok Cnty. Council & Kenya Tourism Fed'n*, *supra* note 78.

82. *Id.*

83. *See*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987) and *Stop the Beach Renourishment, Inc. v. Florida DEP*, 130 S. Ct. 2592 (2010) in which courts in the United States expressed willingness to recognize certain government actions and decisions as constituting compensable regulatory takings.

84. *Kenya Tourism Fed'n*, *supra* note 78.

facility on a cheetah breeding ground. By the time of filing the appeal, land initially meant for the development had been merged with others, including a lot belonging to Kerio Ole Naimodu, the petitioner in the Constitutional Court, and leased to an investor as a partner with the landowners in Leopard Gorge Conservancy, for the establishment of a tourist facility.

Before the appeal was heard, Ole Naimodu, one of the land owners, filed a constitutional petition in the High Court in which he elaborately asserted his rights under sections 74-81 of the former constitution and sections 27 and 28 of the Registered Land Act (now repealed and replaced, in part, by the Land Act of 2012). Naimodu's petition argued that: (1) he had both constitutional and statutory rights of absolute ownership over his land; (2) the rights were constitutionally guaranteed and protected; (3) he had the right to protection from deprivation of property without compensation; (4) that he had a legal guarantee to utilize his land for subsistence and commercial activities; (5) that he had the right under section 76 of the constitution not to be held in slavery or servitude in relation to the use of his property; (6) that he had the right not to accept entry by others into his land except by his consent under section 76 of the constitution; (7) that leopards that strayed on his property should be moved to Maasai Mara Game Reserve in respect of his property rights; (8) that section 80 of the constitution guaranteed him the right not to be hindered in the enjoyment of his freedom to associate with others for protection of his property interests; and (9) that on the basis of his Title Deed, he had the right to live on the land and undertake any agricultural or other development activity thereon. He also claimed that by presenting an appeal to the Tribunal against the grant to his lessee of development approval and license by the Authority, the Appellants were depriving him of his property and contravening his constitutional right to enjoy the property. In addition, he claimed that by stating that the Leopard Gorge area constituted by part of his land was a cheetah breeding ground that should not be interfered with, Appellants elevated the rights of animals above his constitutionally protected property rights.⁸⁵

The claim by the petitioner that presenting an appeal to the Tribunal against the grant to his lessee of development approval and license by the Authority and his joint use of the land amounted to deprivation of his property is the aspect that comes close to claiming that application of EIA regulations deprive him of use of his property. However, the petitioner did not ask the Constitutional Court for compensation. He sought to stay proceedings in the Tribunal and obtain an order restraining appellants in the Tribunal appeal from filing further cases against his use of the property.

85. *Maasai Mara North Conservancy v. NEMA & Wasafiri Camp Ltd.* (2009) N.E.T. 40.

The Constitutional Petition has not yet been heard, but the Court has issued an order staying proceedings in the Tribunal.⁸⁶

Analysis of regulatory takings, like the claims in this paper, is limited to appeals, petitions, and judicial review applications that originated from the Tribunal. It does not include an analysis of other claims that may have been presented to the High Court, outside of the Tribunal's appeal processes. Therefore, it may not be concluded that takings litigation is at the stage at which it has manifested in matters revolving around the Tribunal's functions. What does appear clear, from the claims described in the foregoing paragraphs, is that they manifest assertions of property rights that go beyond and seem to be intended by claimants to override the exercise of police powers of the state. It also appears that as people become more enlightened, landowners are likely to advance their claims beyond the assertion of constitutional right to use property, to outright claims for compensation for land-based activities rendered impossible or limited by the application of official regulations, including EIA provisions, especially in light of the newly introduced provisions of the current constitution regarding property ownership and use.

Although the constitution provides in Article 66(1) that the State may regulate the use of any land, or any interest in or right over any land, in the interest of defense, public safety, public order, public morality, public health, or land use planning;⁸⁷ some of its provisions seem to lend credence to claims for compensation in cases of "regulatory taking." Provisions of concern include: (1) Article 40(2)(a), which provides that "Parliament shall not enact a law that permits the State or any person: (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4);"⁸⁸ and (2) Article 40(3), which specifies that:

The State shall not deprive a person of any 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 in land, or title to land, in accordance with Chapter Five (which includes Article 66(1) aforementioned, but negates

86. *Id.*

87. CONSTITUTION, art. 66(1) (2010) (Kenya).

88. CONSTITUTION, art. 40(2)(a) (2010) (Kenya). "Any interest in any property of any description" above could be understood to extend to development interests that one could now argue to be beyond government's limitation, unless it is deemed that there is an internal conflict between the above provisions and article 66(1).

regulation for specified purposes unless land is first acquired); or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that (i) requires prompt payment, in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.⁸⁹

VI. Conclusion and Recommendations

Claims already presented are indicative of the likelihood of presentation of more specific claims for compensation arising from application of government regulations, especially environmental regulations in the Tribunal and in the recently established Land and Environment Court. If arguments such as those described above are advanced a little further and with some knowledge of the relevant body of persuasive jurisprudence in other common law countries, the government could be faced with a number of costly regulatory takings claims. Therefore, further training on the applicability of government regulations as they relate to property ownership and use is necessary. A clarification of the full import of the constitutional provisions, especially articles 40(2) and (3) is also necessary. It is expected that actual and would-be investors would benefit from knowledge that there are government restrictions that might impact their investment activities, positively or negatively.

89. CONSTITUTION, art. 40(3) (2010) (Kenya).
