



(photo of Thika Road from Google)

## Land Acquisition and Compensation by Reginald Okumu

Vision 2030 is a bold statement of where Kenya should be in just under 15 years. The document set ambitious targets and has proposed development projects to propel Kenya into a middle income country status by 2030. The statement has been backed by huge infrastructure develop-

ments, some of which are already complete and in use (Thika Road), others are in various stages of construction (Standard Gauge Railway) while others are still on the drawing board (Lamu Port). These massive infrastructure projects, have brought with them the need to acquire land for either expansion of existing facilities or construction of new ones.

The Constitution does not just recognize private property rights, it ensures they are well protected. The supreme law also recognises the superiority of public needs and has provided for situations where the public may need to acquire private land for public use. The repealed legal framework provided for acquisition with fair compensation (market value plus 15%). The current constitution has not retained this position but has gone ahead to stop parliament from passing laws that will allow for acquisition or deprivation of private property without compensation. The Land Act No 6 of 2012 has further clarified this constitutional provision by empowering the National Land Commission to come up with rules to guide acquisition and compensation. In addition, the Act is also very clear on the procedure to be followed by a public agency acquiring land for public use.



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While the law is very clear, public agencies in urban areas have been taking advantage of property owners and developers by acquiring portions of their property without compensation. This is through what they call the surrender condition given to property owners when they place request for development permission. What makes this situation worse is that those with freehold title are being forced to surrender them for inferior interest like leaseholds (by the way if you have a freehold title you are exempt from applying for change of user, that is why it is called a freehold. What you are not exempt from is seeking development approval. This is requirement you adhere to before undertaking any development on land with a freehold title). This provision as is, appears harmless, but in effect, the property owner on acceptance ends up losing portions of land which is usually a strip with a depth of measuring anything from 3 meters to 10 meters of prime space. In the case of a freehold title one loses the reversionary interest and therefore "reversionary value". Developers particularly those with plans to develop do not seem to have much choice as it is usually a take or leave condition (where leaving means you cannot proceed with your development plans). Also given that the cost of this "surrendered land" is usually passed on to the unsuspecting buyers may be a good reason why property owners do not mind the condition.

It is difficult to trace the rationale behind this condition but a logical explanation is that County Governments (to be more specific Nairobi City County) found a way of acquiring land without a paying a single penny for it. This action amounts to a great injustice and all those who were forced to surrender parts of their land should be compensated unless they have willingly donated a portion of land to the County or National Government. In addition to this strategy by the County Government being illegal, there is a major drawback in that not everyone owning land along a stretch of road plans to redevelop their land and even if they do, there are time differences. This further delays provision of services.



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Due to this, a scenario is playing out in Upper Hill Area (and it has extended to other parts of the City) where Kenya Urban Roads Authority (KURA) has embarked on expansion of existing roads. The problem is they are operating on the assumption (thanks to Nairobi County Government's poor record keeping, they do not have a comprehensive list of "surrendered" portions of land) that

everyone "surrendered" portions of land to allow for road expansion. So while road construction is going on, the land to build the road is not available. Even where it was "surrendered" the boundaries were not resurveyed and the titles amended. The ignorance (or fear or both) of the property owners is working to the advantage of KURA and the road contractors as even those who have not surrendered portions of their land are preparing to move their boundary walls at their own cost to accommodate "development". That existing roads in Upper Hill and every part of the City need expansion is not in doubt, but due process must be followed. The Upper Hill land owners need the roads, but they should also be compensated (just like those in other parts of the country who received compensation for SGR and such other projects. It is common knowledge that completion of Langata Road expansion was delayed because a land owner had to be fully compensated and more recently a property owner was awarded KShs 1bn compensation for the southern by pass to proceed) for the portions of land that was reverting to public use. Upper Hill as a commercial area was not an afterthought as its planning can be traced back to the 1948 Nairobi Master Plan, the 1973 Nairobi Metropolitan Growth Plan and Hill Area Zoning Plan of 1992. For Road expansion to commence, enough funds not only for road construction but also for land acquisition compensation must have been budgeted for and set aside.

KURA which is undertaking the project should familiarise itself with the Constitution and the Land Act No.6 of 2012 and get to know that, what they are doing is building roads on private property. If the owners of the plots were to one day erect barriers on these roads and mark them private, the public will have no recourse. Public funds will have been used to build private roads.

The framers of the constitution were aware of the tricks that may be used to deprive people their property rights. They were wise enough to stop parliament from passing laws that would lead to such deprivation. If parliament is barred, it follows that public entities cannot administratively introduce conditions (such as surrendering 20% of the land for utilities) that lead to the same deprivation. The National Land Commission should as a matter of priority issue Land Acquisition guidelines and stop

this abuse of power by County Governments and other public agencies. Such guidelines will provide a clear and objective way for public agencies and private entities to engage. It is also necessary for organisations like COFEK to take up this matter as consumers of real estate suffer the most through high property prices as developers pass on the cost of surrendered portions off to buyers. For your information, you are not greedy when you ask for what is rightfully yours. You do not need to apply for change of user if you have a freehold title or surrender it for a leasehold. Also you do not have to surrender a portion of your land for road expansion or utility provision without compensation.

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