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USING EMINENT DOMAIN POWERS TO ACQUIRE PRIVATE LANDS FOR PROTECTED AREA WILDLIFE CONSERVATION: A SURVEY UNDER KENYAN LAW

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VOLUME
2/1

LEAD Journal (Law, Environment and Development Journal)
is a peer-reviewed academic publication based in New Delhi and London and jointly managed by the
School of Law, School of Oriental and African Studies (SOAS) - University of London
and the International Environmental Law Research Centre (IELRC).
LEAD is published at www.lead-journal.org
ISSN 1746-5893

The Managing Editor, LEAD Journal, c/o International Environmental Law Research Centre (IELRC), International Environment House II, 1F, 7 Chemin de Balexert, 1219 Châtelaine-Geneva, Switzerland, Tel/fax: + 41 (0)22 79 72 623, info@lead-journal.org

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This document can be cited as
'Using Eminent Domain Powers to Acquire Private Lands for Protected Area Wildlife Conservation: A Survey under Kenyan Law',
2/1 Law, Environment and Development Journal (2006), p. 84,
available at http://www.lead-journal.org/content/06084.pdf

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1 INTRODUCTION

A. General introduction

This paper reviews in detail the relevant laws and procedures for acquisition of private land by the government and the subsequent conversion of such land into wildlife use as protected areas or wildlife support zones.[1] It also examines the safeguards in place for checking excesses by the authorities in exercising the powers of eminent domain. This part is divided into four sections. The first discusses the place of private property rights under Kenyan law. The second highlights the circumstances under which private property may be compulsorily acquired by the State. The third section sets out the statutory procedure on how this may be done and then examines the position on compensation by the government to those whose lands it acquires. It answers questions as to whether compensation is provided, how it is determined and how it is paid. Part four explores the remedies available under Kenyan law for persons with grievances arising from or related to the government's acquisition of private land. Part five explores the challenges and opportunities, based on the actual situation, and provides the way forward by making recommendations for reform.

B. Basic terms and words

Some terms used in this paper are open to more than one meaning; hence, there is a need to state the context in which they are used, in order to avoid confusion. The following are the basic terms used in this study, namely: wildlife, eminent domain, protected areas, and private lands. The term 'wildlife', as used in this paper, refers to wild animals as well as birds. 'Eminent domain', in the context of this study, refers to the power of the State to compulsorily acquire privately owned land for public uses. 'Protected area,' means a national park, game reserve, game sanctuary, nature reserve, or a biosphere area.[2] 'Private land' refers to land that is under private ownership. The words 'conservation' and 'protection' are used interchangeably.

1 Also known as 'buffer zones'.

2 Kenya, Wildlife (Conservation and Management) Act, Cap. 376 of the Laws of Kenya, creates four categories of protected areas. These are national parks, national reserves, local sanctuaries and game reserves.

2 WILDLIFE CONSERVATION

A. Importance of Wildlife

The importance of wildlife to society and the need to conserve it cannot be overemphasised. It has numerous benefits than can be exhaustively enumerated. It is a source of food, a form of tourist attraction,[3] a reservoir for genes, a form of natural heritage, a source of employment,[4] and a principal component of the ecosystem. In sum, wildlife is a natural resource of biological, economic, social, recreational,[5] educational,[6] environmental, and nutritional value to the present as well as future generations. It is a valuable resource that should be protected and conserved.[7] The values of wildlife can be grouped into four broad categories, namely economic, ecological, nutritional, medicinal and, lastly, social-cultural. These are explained below.

1. Economic Value

Wildlife plays a major role in the economy in more than one way. Indeed wildlife is an economic sector in its own right. Firstly, the wildlife sector is a source of employment for many.[8] Secondly, it directly supports the tourism industry as most of the tourists visit to view wildlife and take wildlife trophies.

3 Wildlife-based tourism is a major source of foreign exchange. Bolen and Robinson (1995) report that tourists visiting Kenya spend about $130 million yearly and that, without wildlife, Kenya would attract far fewer tourists. *See* E.G Bolen and W.L Robinson, *Wildlife Ecology and Management* 435 (New Jersey: Prentice Hall, 1995).

4 The wildlife sector has created direct employment for many.

5 E.g. through sport hunting, wildlife watching and photographing.

6 For study and research to broaden one's mind and increase one's understanding and knowledge.

7 D.R Helliwell, *Planning for Nature Conservation* 1 (Chester: Packard Publishing, 1985).

8 Wildlife staff and those employed in hotels, tour companies and beach resorts associated with the sector.

Earnings from tourism, some times run into billions in direct income and foreign exchange, thereby contributing a large share to the national income. This takes the form of taxes, subsistence, transport, and park charges, purchase of gifts and curios, and salaries for employees in the industry. In Kenya for instance, wildlife tourism, it is estimated, contributes about five percent of the country's Gross Domestic Product.[9]

It is difficult however to evaluate with precision the monetary worth of wildlife and its resources since it is not easy to assign monetary value to it. This is because some of these values are more ethical or emotional than monetary. Wildlife's worth is hard to compute in monetary terms because in most countries wildlife is a public sector resource that is not in the market place. Helliwell,[10] however, argues that while it is difficult to accurately define the value of wildlife, it is possible to estimate its economic worth by comparing it with other things and other forms of land use.

In advancing the need to identify wildlife with economics, Babich observes, and rightly so, that the bulk of the supporters of wildlife conservation are sentimentalists who by over-protecting wildlife do more harm than good for their cause.[11] He then quotes Lyndon Johnson, a former US President, who in a Presidential Address to Congress on 8 February 1965 said the following about the difficulty of estimating the economic worth of wildlife:

> Wildlife's monetary worth is not an easy thing to measure. It does not show up in the Gross National Product, in the weekly pay cheque or in the Profit and Loss statement. But these things are not ends in themselves; they are a road to satisfaction and pleasure and good life. Wildlife makes its own direct contribution to those final ends. Therefore, it is one of the most important components of our true national income, not to be left out simply because statisticians cannot calculate its worth.[12]

2. Ecological Value

Wildlife has a crucial ecological function. This is foremost as wildlife is a major constituent of the ecosystem (ecological system). All forms of wildlife are members of a biotic community in which there is a symbiotic relationship between the respective members. A natural ecosystem consists of all the living organisms (including man) as well as non-living things, in a select area. Essentially, everything in an ecological system is intimately connected to everything else in the system, and any change in one part will invariably affect the other part(s). Wild animals also have a biological value as some of them are important in the biological control of certain insects, rodents and pests. Without such animals, harmful things will dominate the world and make life unbearable. Those that are scavengers, like hyenas, are instrumental in public health by cleaning the environment.

3. Nutritional and Medicinal Value

In many developing countries, wildlife is an important source of food. In most African countries for instance, people eat bush meat. This meat ranges from small bats and lizards to larger mammals such as antelope and buffalo. If properly managed, wild lands can yield a large crop of wild meat as well as numerous ancillary animal and plant products. Traditionally, most communities especially in Africa have relied on game meat and wild plants for food. There are communities that were classified as hunter-gatherer, hunting for meat and gathering fruits. To this day, game meat is still a delicacy in some hotels. Being a major source of food, it plays a significant role in nutrition by providing the body with the nutrients it requires.

Apart from this nutritional aspect of health, some of these animals are of medicinal value when their body parts are used for curing diseases or for

9 L. Emerton 'The Nature of Benefits and the Benefits of Nature: Why Wildlife Conservation has not Economically Benefited Communities in Africa', *in* D. Hulme and M. Murphree eds, *African Wildlife and Livelihoods: the Promise and Performance of Community Conservation* 207, 210 (Nairobi: East Africa Educational Publishers, 2001).

10 *See* Helliwell, note 7 above at 8.

11 K. Babich, The Financial Implications of Wildlife Utilisation 1 (Southern African Wildlife Management Association, Technical Session Paper No. 37, 1973).

12 *Id.*

manufacturing drugs. Krunk notes that several wild animals are popular for their supposed medicinal properties, with parts of some of them being used either in witchcraft or traditional medicine.[13] It should be noted however that wild animals not only contribute to traditional medicine but modern medicine as well, with some of their extracts being used by pharmaceutical companies as raw material for the manufacture of drugs. It is estimated that over 40 percent of all prescriptions in the US for instance, contain one or more such drugs that originate from wild species.[14] Some species may also be used in medical research.

4. Social-cultural Value

The social value of wildlife arises from the fact that it is used for education, research, recreational, and cultural purposes. Firstly, there is wildlife education with wildlife studies as a distinct career. Secondly, wild animals are also useful for scientific research, as most researchers use them as specimens for carrying out tests. Thirdly, some forms of wildlife are a source of recreation for humans through watching and sport hunting.[15] Fourth, some animals –lions, for instance- are part of traditional passing rites. In the course of an informal discussion with a village elder during the research period, the author learnt that there is a cultural practice according to which young adult men or morans (meaning a Maasai warrior) return home with the head of a lion as a symbol of bravery.[16] On a light note, the said elder stated an age-old joke among the Maasai that a lion is likely to take to its heels if confronted by a moran.

B. Externalities and Opportunity Cost of Wildlife Conservation

Meaningful conservation can best be understood in the context of other larger economic and social factors such as poverty, culture, livelihoods, and population expansion. The IUCN in a resolution at its twelfth General Assembly held in Kinshasa, Congo, in 1979, recognised that conservation efforts cannot succeed without the support of the local communities. Sayer observes that a wildlife conservation strategy that does not take into account the needs, aspirations and rights of the local peoples is non-viable in the long-term.[17]

Just as it is fit to highlight its positive contribution to human welfare, it is also proper to examine the opportunity cost and externalities of wildlife conservation. There are two limbs to this. Firstly, the economic and even social viability of reserving land for wildlife vis-à-vis alternative land uses such as agriculture. This is in terms of competition with man for space and resources, since wildlife conservation is a form of land use that should be compared to other forms. In the third world, especially Africa, biodiversity continues to be undermined by human activities, especially by the demand for land for agriculture and settlement. The second limb is about the negative costs that these wild animals impose on the people in terms of loss of life, limb and property.

With regard to the first limb, population in most of Africa is predominantly rural-based peasantry, mostly classified along ethnic lines. A large portion of the population lives in rural areas relying on subsistence faming for livelihood. In an agrarian society such as this, land should be devoted to agricultural use. Agriculture is extremely important, for it supplies the population with food, that is the driving force of life, and with raw materials needed for industry (for instance, with tea, coffee, cotton, sugarcane, sunflower, sisal, etc).

Unfortunately, only a small part of the total land surface is suitable for arable farming.[18] This makes it imperative that such land be devoted to agriculture. It is also justified that the rest of the land that is not very arable be applied to other forms of land use. This is coupled with the fact that some of the regions in which wildlife is present are primarily agricultural zones, supporting livestock and arable farming. The

13 H. Krunk, *Hunter and Hunted: Relationships between Carnivores and People* 121(Cambridge: Cambridge University Press, 2002).

14 UNEP, *Taking Action: An Environmental Guide for Your Community* 128 (Nairobi: UNEP, 1995).

15 *See e.g.,* E.D. Mungatana, Recreation Value of Wildlife Viewing: A Case of Lake Nakuru National Park, Kenya 5 (Unpublished, M.Sc Thesis, Agricultural University of Norway, 1992).

16 This came up in an informal interview the author had with a Maasai elder in Narok in the course of research.

17 J. Sayer, Rainforest Buffer Zones: Guidelines for Protected Area Managers 1 (Cambridge: IUCN Forest Conservation Programme, 1991).

18 Less than eighteen per cent, in the case of Kenya.

scarcity of land means that it should not be exclusively devoted to agricultural use for food security but should be available for other uses as well. This is made worse by the fact that not all the land suitable for arable farming is devoted to such use. Thus, arable farming has to compete for this land with other uses, such as industry, forestry, mining, settlement, recreation and wildlife.

Mungatana estimates that the net agricultural opportunity cost due to wildlife protected areas of alternative land uses and earnings forgone to the Kenyan economy is of approximately USD 203 million.[19] This he estimates to be 2.8 per cent of the GDP, and enough to support 4.2 million Kenyans.[20]

Regarding the second limb, despite their positive contribution to human welfare, wild animals also critically undermine the peaceful existence and livelihoods[21] of humans. They also injure or kill people, their livestock, eat their crops and destroy their physical property. This nuisance value of wild animals has given rise to a raging human-wildlife conflict. People in turn react by attacking the animals and poisoning them.

C. Protected Area Wildlife Management

One of the ways in which the law plays a role in wildlife management is through the establishment of protected areas (also called PAs). The 1992 Convention on Biological Diversity,[22] for instance, supports the protected areas system of wildlife management. It stipulates that parties must establish protected areas, restore degraded ecosystems, control alien species, and establish *ex situ* conservation facilities. The World Conservation Union (IUCN) has defined a protected area as 'an area of land and/or sea especially dedicated to the protection of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means'.[23]

There are various categories of protected areas, namely, nature reserves, national parks, game reserves, biosphere areas, and game sanctuaries.[24] The idea of protected areas, and of national parks in particular, originated in the US. In 1864 the US Congress set aside public lands and then gave them to the State of California. These lands were in the Yosenite Valley at Yellowstone. A national park was established there in 1872, becoming the first ever national park in the world.

Notably, there is however nothing so special about the protected area system of wildlife management. The system is certainly not inviolable. UNEP for instance reports that although the legally protected areas cover almost three per cent of the earth's land surface area, most of these areas exist only on maps.[25] They (PAs) are part of the land management system and should not be looked at in isolation of all national life, goals and aspirations. They are not just places for mere fun and adventure by tourists. As such they need to contribute to the natural objectives such as poverty alleviation, improving livelihoods and job-creation. Being part of the overall land use practices they ought to be made an integral part of land use planning and management.

Except where there is a community-based policy of wildlife management, the traditional Protected Area management approach is for confining animals in such areas for viewing and recreational purposes. A case in point is Kenya where the government has adopted indirect utilisation of wildlife through tourism, as opposed to direct utilisation through hunting for instance. The wildlife sector is an industry that should justify its existence. Until the people get from wildlife more than they receive from their cows, crops and other forms of land-use, they will not be prepared to support conservation.

19 Mungatana, note 15 above.

20 *Id.*

21 R. Kamugisha et al. *Parks and People: Conservation and Livelihoods at Crossroads - Four Case Histories* 190 (Nairobi: ACTS Press, 1997) define the term 'livelihoods' as the means of earning a living, implying availability of and access to production resources.

22 Opened for Signature in Rio de Janeiro on 5 June 1992. In force since 29 December 1993. Kenya became a party to this treaty on 26 July 1994.

23 *See generally* World Conservation Union (IUCN), Guidelines for Protected Area Management Categories 1 (Gland: IUCN, 1994). *See also* K.B. Ghimire, 'Social Change and Conservation: An Overview of Issues and Concepts', *in* K. B. Ghimire and M. P. Pimbert eds, *Social Change and Conservation: Environmental Politics and Impacts of National Parks and Protected Areas* 1, 10 (London, Earthscan, 2001).

24 *See generally* IUCN Guidelines, note 23 above.

25 UNEP, *The State of the World Environment* 24 (Nairobi: UNEP, 1991).

3 PRIVATE PROPERTY RIGHTS IN LAND

Land is a very sensitive aspect of man's life and especially in Africa, where the economies are predominantly agrarian. Agriculture in general and arable farming in particular is the main stay of Kenya's economy. Hence, apart from the land in urban areas and the land under protected area management, all the remaining land is characterised as agricultural land.

In fact, land is one of the basic natural resources available to man for his economic activities. Its efficient use and the appropriate distribution of its benefits should therefore be the concern of all peoples and nations. Since it is man's heritage, it should be well managed to generate the nations' resources needed by the present and future generations. It is a source of resources, providing irreplaceable sustenance for social as well as natural systems and should therefore be used wisely. Since land is a non-renewable resource, it will forever remain a scarce commodity in a world of continuing population expansion.

Despite its characteristic as a public resource, when it is subject to private ownership it is regarded as private property. Like any other private property, the inviolability of its ownership is guaranteed by the Constitution.[26] The Registered Land Act buttresses this position. The Act designates the registered landowner as a proprietor and guarantees him absolute proprietorship.[27] Indeed the protection of private property is one of the primary concerns of the government. This argument has foundations in legal theory as well as practice. Thomas Hobbes for instance depicted the state of nature as one in which there was no ownership of property, and that safeguarding private property is one of the main reasons for people installing sovereign authority.

The individualistic concept of property however is not limitless. There is for instance the need to balance private interests of ownership with wider social interests such as heritage, future generations, societal interests and public concerns. One way in which the law secures the latter is through the exercise of eminent domain powers. There are a number of reasons for justifying the State's intervention in the institution of private ownership of land.

Firstly, land and other natural resources are a heritage of mankind that should be available for present and future generations. In fact, it is argued that such resources are only held by the State in trust for future generations and that the citizens should – while utilising them – take into consideration the interest of future generations. Therefore, since land is entrusted in the hands of the State on behalf of all future generations, it is held by the present generation under the same constraints, and the State is entitled to administer this trust by enacting laws and regulations. This trust also puts on the individual landowner an obligation to preserve the land for future generations. Secondly, its importance and scarcity dictates that its tenure and distribution be controlled for the benefit of society.

4 THE CONCEPT OF EMINENT DOMAIN

As already noted elsewhere in this paper, the term eminent domain, in the context of this study, refers to the power of the State to compulsorily acquire privately owned land for public uses. The exercise of eminent domain powers is one way in which the State lifts the cloak of private property for public benefit. This power, although *stricto sensu* inconsistent with the concept of private property, is one way in which the private interest of a landowner [28] is reconciled with wider public interests such as conservation. For land ownership to be a viable institution, it should be possible for it to be expropriated in the public interest, lest it becomes a curse upon society.

26 Kenya, Constitution of the Republic, Section 75.
27 Kenya, Registered Land Act, Sections 27 and 28.

28 Usually selfish interests.

Absolute rights, however, are unfathomable in the modern world; hence, the private property rights can only be understood in the context of society.[29] Besides, in most jurisdictions the radical principle of title to land belongs to the crown and the subjects only tenants of the crown, merely enjoying certain bundles of interests in it at the latter's pleasure is prevalent. For this reason, the sanctity of private property is in reality a mere phrase. These powers should however be strictly regulated to prevent the ruling elite from whimsically alienating privately owned lands.

The foregoing observations result in eminent domain being a fairly contentious legal issue. The law on the one hand guarantees the right of private ownership, yet on the other hand it turns around to allow the government to expropriate such property even against the will of the landowner. This is akin to giving with one hand and taking with the other. There is a legal obligation on the State to respect and protect private property. With regard to land, the State has a corresponding moral obligation to ensure that the land is available to sustain other forms of life as well.

5 USING EMINENT DOMAIN FOR PROTECTED AREA WILDLIFE CONSERVATION UNDER KENYAN LAW

Kenya's performance in wildlife conservation is of significance for two main reasons. First, her wildlife is rated as one of the most abundant and varied in the world.[30] Secondly, Kenya hosts the headquarters of the United Nations Environment Programme, which is the only environment programme of the United Nations. This status in a way creates the need to assess her participation in environmental conservation efforts such as wildlife management. Cirelli observes that the establishment of protected areas is a traditional means for pursuing wildlife conservation.[31]

A. Kenya's Protected Area Wildlife Estate

Wildlife conservation is perhaps as old as man himself, because even in early times there were traditional customs, rules, taboos, beliefs and practices relating to wildlife.[32] However, formal wildlife management began with colonialism. Prior to this, there existed no formal policy or regulations on wildlife. People were free to utilise wildlife as they needed and in accordance with African customary practices and values.[33] After the establishment of colonial rule, the government adopted stiff regulations mainly on hunting and wildlife products. The major argument of the colonial government was that wildlife needed to be protected from the adversities of the natives. It claimed that African hunters were cruel and wasteful, while nomads over-grazed the land and out-competed wild animals.[34]

In 1945, protected areas (PAs) were established and formal regulations imposed on them. Wildlife ownership was also vested in the Crown.[35] Apart from being intended to protect wildlife by keeping it separate from people, PAs are a western concept of conservation. Under this concept, wildlife is confined in designated conservation areas as required by the land use planning regulations in western countries.[36]

29 Legal theorists such as Locke and Rousseau have argued that only rights in the state of nature (natural rights) were absolute, and that in the modern state man can only enjoy civil liberties, which are subject to limitations.

30 S.N. Muturi et al., Resources Allocation in Agricultural Research in Kenya: Part I Findings and Recommendations 4 (Kenya, National Council of Science and Technology, 1982). In some habitats live certain species that occur nowhere else on earth.

31 M.T. Cirelli, *Legal Trends in Wildlife Management* 47 (Rome: FAO, 2002).

32 Overseas Development Administration (ODA), Africa Wildlife Policy Consultation – Final Report of the Consultation 77 (London: ODA, 1996).

33 J.N. Muriuki, Cooperation or Conflict: Managing Scarce Resources of Africa: A Case for Community Wildlife Conservation in Kenya 8 (Mimeo, 1996).

34 G. Monbiot, 'Keepers of the Artificial Wilderness', *BBC Wildlife Magazine* 4 (July 1994), available at http://www.monbiot.com/archives/1994/07/01/keepers-of-the-artificial-wilderness.

35 *Id.*

36 S.M. Munthali, 'Traditional and Modern Wildlife Conservation in Malawi', 27/2 *ORYX* 1 (1993).

In setting up these PAs, the natives were displaced, sometimes forcibly, without any monetary compensation for the huge tracts of land that had been appropriated for conservation. The process was rather draconian and undemocratic since it was carried out without the participation or consent of the natives.[37] Monbiot says some of these places were among the longest inhabited places on earth and most of them agriculturally high potential areas.[38] This is corroborated by Munthali who notes that many of these areas were either habited by people, used by them for cultivation, ancestral burial grounds or sacred areas.[39] In almost each of these areas the people claim that the land occupied by PAs was their ancestral land, from which the colonialists ejected them without compensation of any kind.

While no compensation was paid by the colonial government for the land acquired from the natives for the establishment of protected areas, such a draconian approach may not work in the post-independence era. For one, independence meant expansion of the democratic space and regard for tenets of good governance, which require that the people be consulted. Besides, in those times the land was unregistered and the natives neither owned any land nor had any documentary proof of ownership. Since independence however, most of the land is registered and people have titles, with their ownership rights protected by both the Constitution[40] and legislation.[41]

More PAs have been established in the post-independence era. Presently, they constitute at least seven per cent of Kenya's total land area.[42] It is estimated that there are a total of 26 National Parks and 30 National Reserves in the country.[43] Despite designating some protected areas for wildlife conservation, not all wildlife is in these areas. A considerable portion of wildlife is outside the PAs. Besides animals sometimes leave the PAs and roam people's lands causing damage to the people and their property. This means therefore that most wildlife in Kenya spends a substantial amount of time on community land, usually leaving havoc in their wake.[44] These rural peasants lose more than they gain from wildlife in PAs. In Kenya, the local communities are not prepared to share their land with the state. There are three major justifications that are usually cited.

Even though these PAs are surrounded by human settlements, the inhabitants hardly get any benefits from such areas and usually do not participate in the revenue collected. The real benefits of wildlife go to urban-based tourist companies. In most cases there is hardly any mechanism for ensuring that such revenue trickles down to the local communities. Incidentally, these rural peasants are the people who daily interact with wildlife, since they share the same ecosystems. If their concerns and welfare are well addressed, there could probably be a stronger lobby for conservation.

37 E. Barrow and M. Murphree, 'Community Conservation: From Concept to Practice', *in* D. Hulme and M. Murphree eds, *African Wildlife and Livelihoods: The Promise and Performance of Community Conservation* 24 (Nairobi: EAEP, 2001).

38 *Id*. This means that these areas were very important for the subsistence of indigenous people.

39 Munthali, note 36 above at 5.

40 Section 75 of the Constitution of the Republic of Kenya. Sub section (1) thereof provides that even where the requirements as to the public interest have been satisfied no property shall be compulsorily acquired without payment of compensation. The compensation required under this section is 'prompt and full compensation', whatever that means.

41 Kenya, Section 27 and 28 of the Registered Land Act Cap 300 provides that the rights of an owner of land registered under it are absolute and indefeasible, subject only to certain overriding interests stipulated in Section 30 of the Act.

42 *See generally* UNEP/UNDP/DUTCH Joint Project on Environmental Law and Institutions in Africa, East African Sub-Regional Project 1999, Development and Harmonisation of Environmental Laws, *in* Report on the Development and Harmonisation of Laws Relating to Wildlife Management (Nairobi: UNEP, 2000). In Botswana, 37 per cent of the total amount of land area is devoted to wildlife conservation. *See also* Government of Botswana, Government Paper No. 1 of 2001: Community Based Natural Resources Management Policy (2001).

43 KWS, Wildlife Human Conflicts Executive Summary, available at http://www.safariweb.com/kwild/summery.htm. *But see* E. Barrow et al., *in* D. Hume and M. Murphree eds, *African Wildlife and Livelihoods: The Promise and Performance of Community Conservation* 59 (Nairobi, East Africa Educational Publishers, 2001), who estimate these wildlife areas to comprise 36 National Parks and Game Reserves occupying together at least 43, 673 km^2 (approximately 7.5 per cent of the total land area).

44 B. Sibanda, 'Wildlife Conservation in Kenya: Wildlife or Local Communities at Crossroads', 5/1 *Environmental Policy and Practice* 35, 40 (1995).

B. Human-Wildlife Conflicts Outside The Protected Areas

Undeniably, Kenya's wildlife is one of the most varied in the world.[45] It is Kenya's stated policy to preserve these species.[46] The government in its policy recognises the need to establish optimum balance between devoting land to wildlife and the demand for human settlement.[47] This is compounded by the fact that only less than 25 per cent of Kenya's wildlife is within the PAs.[48] With over 75 per cent of the wildlife population occurring outside the PAs,[49] the human-wildlife conflict is critical and threatens the future of wildlife conservation. Much of the original wildlife habitat of Kenya has been lost due to human interventions. Such interventions include expansion of permanent cropland, expansion of human settlements, construction of infrastructure such as roads, as well as other anthropogenic activities.

Experience has shown that this conflict is initially detrimental to humans when wildlife occasions them harm and loss, but subsequently the wildlife suffers too when people start attacking them in retaliation.[50] Unlike Botswana, where the PAs are surrounded by buffer zones in order to separate wildlife from human settlements,[51] in Kenya they are generally bounded by areas of human habitation. In this kind of scenario, the human-wildlife conflict is an increasing phenomenon. With a human population growth rate of four per cent per annum, the wildlife habitat will increasingly shrink as human beings settle and extend agricultural and development activities in what used to be the wildlife areas.[52] In some cases, the population in areas around protected areas seems to be increasing at rates higher than the national population growth rate.[53] A recent study reported that in the Maasai Mara environs, for instance, the human population and cultivated land increased by seven per cent and 1,000 per cent, respectively, between 1977 and 1997.[54] During the same period, the numbers of non-migratory wildlife declined by 58 per cent.[55] This is also the situation in other regions with wildlife.

In Laikipia District, for instance, people bought huge tracts of land that were formerly game ranches, and sub-divided them into small pieces of land for settlement and farming activities.[56] In the Mount Kenya region, people have moved onto and settled on elephant migration routes and corridors.[57] In Kajiado district, the land under cultivation has expanded by almost 800 per cent since 1971; while in Narok, agriculture has been expanding rapidly into areas previously used for grazing and as wildlife dispersal zones.[58]

It has been asserted that while such land-use changes take place, people often ignore the fact that these areas have been wildlife habitat.[59] Despite the presence of human settlements and activities in these areas that were formerly under vegetation, wild animals still try to migrate through them. Initially, many communities bordering game parks and reserves were essentially nomadic.[60] Over time, they have radically changed their lifestyles. Many of them have adopted permanent settlements and sedentary subsistence farming for

45 N.W. Sifuna, Kenya's Criteria for Participation in Environmental Treaties 5 (Moi University School of Environmental Studies, M.Phil (Environmental Law) Thesis, 1999).

46 See Kenya's current and preceding National Development Plans.

47 *Id.*

48 *See* Sibanda, note 44 above.

49 *See* Kenya Wildlife Service, Wildlife-Human Conflicts in Kenya: The Five-person Review Group (Nairobi: KWS, 1994).

50 N. Sifuna 'Providing Compensation for Damage Caused by Wildlife: A Case of Kenya with Particular Reference to Elephants', 20(1) *Journal of Social Development in Africa* 7, 11 (2005).

51 *See* Government of Botswana, Government Paper No. 1 of 2001: Community Based Natural Resources Management Policy (Gabarone: Government Printers, 2001).

52 *See* Kenya Wildlife Service, Wildlife-Human Conflicts/ Executive Summary, available at http:/www.safariweb.com/ kwild/summery.htm. *See also* M. Coughenour et al., *The Savanna Model: Providing Solutions for Wildlife Preservation and Human Development in East Africa and the United States*, 4 (Research Report, February 2000). These facts also emerged from interviews with conservationists and KWS officials.

53 *Id.*

54 W. Ottichillo et al., 'Population Trends of Large Migratory Wildlife Herbivores and Livestock in Maasai Mara Ecosystem, Kenya: 1977-1997', *38 African Journal of Ecology* 202, 204 (2000).

55 *Id.*

56 *See* Muriuki, note 33 above.

57 *Id.*

58 J. Mbaria, 'Is KWS a Relevant Outfit?', *Daily Nation* (Nairobi), 12 December 2001.

59 *See* Ottichillo, note 54 above.

60 The Maasai community, for instance.

food. The fact is that over 75 per cent of Kenya's wildlife population roaming out there, most of it on private land, indeed exacerbates the already raging clash between humans on the one hand and wildlife on the other. One way in which this trend can be stemmed is by increasing the wildlife habitat. This calls for acquisition of more land for expansion of protected areas and for establishment of buffer zones.

The Wildlife (Conservation and Management) Act[61] seems to underscore the need to reconcile human needs for land and the competing wildlife requirements as well. The Act in its preamble recognises wildlife as an important resource and goes on to note that proper land-use and management is essential for its conservation given that it takes time to revitalise it, if not properly managed.[62]

C. Land Ownership Rights in Kenya

When the British colonised Kenya, at the turn of the nineteenth century, they realised that there were not any well defined land ownership and land tenure systems. The colonial government introduced the then English property law, according to which the subjects held land as property of the crown. In fact, after 1915 Africans were said to be mere 'tenants-at will' of the crown, and thereafter beneficiaries of a trust established by the government to administer the land they occupied.[63] The situation has not changed much because even now the practice is that in Kenya a person owns land at the pleasure of the President. Ideally, the President has powers to allocate public lands as well as control the use of private land (police powers).

There are various legal regimes of land ownership in Kenya. Land is governed by various pieces of legislation. The predominant system of land ownership is the one under the Registered Land Act (RLA),[64] which is fashioned on the Australian Torren model. This model was adopted after independence in order to secure the proprietary interests of white settlers who then owned most of Kenya's arable land. The registration and ownership of land was consolidated into the RLA. This piece of legislation gives the registered proprietor of land an absolute and indefeasible title by virtue of the issuance of title deeds.[65]

D. Eminent Domain Powers Under Kenyan Law

1. Circumstances for Eminent Domain

In Kenya, the law protects the sanctity of private property and no private land can be acquired by the government compulsorily except in accordance with the law. Such land is private property and has to first be acquired by the State under the powers of eminent domain under the Land Acquisition Act[66]. Once it has been acquired and has become public land, it is then and only then that it may be converted into a protected area for wildlife conservation. This means, therefore, that it is a two-tier process, first by the Minister for lands then by the Minister for wildlife. If the latter wants to acquire private land for conservation he has to inform the former who then initiates the process.

With regard to the exercise of the powers of eminent domain, the law addresses four major questions as the bare minimum required for determining whether to compulsorily acquire a particular land. First, the use for which the land is being acquired. Second, the prior requirements to be fulfilled before the land is acquired. Third, the procedure to be followed for acquisition. Fourth, the safeguards necessary to prevent excesses by the authorities.

The circumstances under which land may be so acquired and the conditions to be observed are expressly stipulated in the Constitution[67] and in the Land Acquisition Act.[68] Under these laws the government may compulsorily acquire private land only when the acquisition is in the public interest.

61 *See* note 2 above.

62 The Act in its preamble states as follows: 'AND WHEREAS it is necessary, for the achievement of that objective that full account should be taken of the varied forms of land use and inter- relationship between wildlife conservation and management and other forms of land use...'.

63 H.W.O. Okoth-Ogendo, *Tenants of the Crown Evolution Agrarian Law and Institute in Kenya* 5 (Nairobi: ACTS Press, 1991).

64 Cap 300 Laws of Kenya.

65 *Id.*

66 Cap 295 Laws of Kenya.

67 *See* note 40 above.

68 *See* note 66 above.

The Constitution upholds the inviolability of private property and prohibits the taking of such land except where the following conditions are satisfied:[69]

a) the taking of or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of property so as to promote the public benefit; and

b) the necessity thereof is such as to afford reasonable justification that may result to any person having an interest in or right over the property; and

c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

The conditions as to the public interest are also contained in the Land Acquisition Act, which directs the Lands Minister to satisfy himself as to the existence of such public need, before setting in motion the process. It requires the Minister to be satisfied that such land is required for the purposes of a public body, and first that the acquisition is necessary and likely to promote public benefit.[70] In fact, it expressly provides that the necessity should be such as to justify the hardship that the intended acquisition may cause to any person having a legally protected interest.[71]

The obligation of the government to pay compensation for the land it acquires compulsorily under the powers of eminent domain is expressly stipulated in the Constitution[72] and the Land Acquisition Act[73]. The Constitution expressly states that no private property shall be compulsorily acquired by the government unless, among other conditions, provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.[74]

Section 8 of the Land Acquisition Act provides that 'where land is acquired compulsorily under this part, full compensation shall be paid promptly to all persons interested in the land'.

The Environmental Management and Co-ordination Act provides that all citizens have a right to a clean environment and a duty to safeguard it.[75] One of the implications of this provision is that environmental amenities such as wildlife also being public resources, responsibility for their well being is a collective as well as singular responsibility of all the citizens. This is in accordance with environmental ethics, under which man is a custodian of nature.

The above provisions are the ones that set the stage for the compulsory appropriation of private land and clearly stipulate the reasons and uses for which that is to be done. It follows therefore that under Kenyan law private property is sacrosanct and no land of such description may be compulsorily acquired by the State except for reasons of defence, public safety, public order, public morality, public health, town and country planning or the promotion of public benefit. Acquisition of land for protected area management or any wildlife conservation purpose therefore falls under the promotion of public benefit. The doctrine of eminent domain entitles the State to acquire land compulsorily. It entails the right of the Government to take private property for public use on providing just compensation for it. It is the power of a sovereign State to take or to authorise the taking of any property within its jurisdiction for public use without the owner's consent.

Under Kenyan law and practice, the opinion of the owner on whether or not the government should acquire his land is not considered. Accordingly, objections by the landowner are irrelevant and, provided the laid down procedural requirements are complied with by the government, the land will be acquired. In fact, any form of resistance or obstruction from protesters is criminalised. It is an offence to wilfully obstruct or hinder a government officer from carrying out any functions necessary for the acquisition of land.[76]

The Minister for Wildlife has discretionary powers under the Wildlife Conservation and Management

69 *See* note 40 above.
70 *See* section 6 (1), note 66 above.
71 *Id.*
72 *See* note 40 above. Section 75 (1), which provides that even where the requirements as to the public interest have been satisfied, no property shall be compulsorily acquired without payment of compensation. The compensation required under this section is 'prompt and full compensation'.
73 *See* note 66 above.
74 *Id.*
75 *See* section 3, note 66 above.
76 *See* section 32, note 46 above.

Act (WCMA) to establish protected areas[77]. The Act says that he may declare 'any land' a national park, game reserve or sanctuary, which strictly speaking connotes any land, be it public land or privately owned. However, in practice, this does not happen with private land, as it would infringe the proprietary rights guaranteed by the Constitution.[78] Besides, the Act stipulates the conditions under which this may be done.[79] One of them is that the minister shall exercise his discretion to declare, after consultations with the competent authority[80].

For practical purposes, the land subject to the exercise of these powers should mean and exclude private land. This is because such land may only be acquired either voluntarily by the Ministry of Wildlife from the owner on a willing seller-willing buyer basis or compulsorily by the Ministry of Lands through the powers of eminent domain. The first one is a voluntary procedure governed by the freedom of contract and the market forces of demand and supply, and has little potential for controversy.[81] Compulsory acquisition, for its part, is fairly controversial due to the lack of free will. It is this second type of acquisition that is the subject of compensation and therefore falling within the scope of this paper.

In this paper we are concerned with the acquisition of private lands for conservation.

Theoretically, it would seem that the wildlife minister would, in exercising his statutory powers, just declare any land a protected area. In practice, however, this does not happen to private land as it would infringe the proprietary rights guaranteed by the Constitution. Such land has first of all to be acquired by the Minister of Lands to become public land. It is then and only then that further steps may be taken by the government through the wildlife minister and the lands minister working in concert, so that it may be declared wildlife protected area.

2. *The Process of Eminent Domain*

The law specifically sets out the procedure to be followed by the government in compulsorily acquiring private land. This statutory procedure has been laid down in the Land Acquisition Act, as read together with the WCMA[82] and the Environmental Management and Coordination Act.[83] This process can be summarised into nine steps. Because even after the land has been acquired by the State, changes in ownership need to be effected at the land registry, and it cannot just be turned into a wildlife conservation area. Two further steps are necessary, namely consent of the Minister for lands and an Environmental Impact Assessment (EIA). The initial compulsory acquisition process can be summarised in nine steps set out below.

Step one: Ministerial Directive to the Commissioner of Lands

The process is initiated by the Minister of Lands, who in writing directs the Commissioner for Lands to acquire a particular parcel of land. These instructions should indicate the description of the land and the purpose for which the land is required.

Step two: Notice of Intention to Acquire

Upon receiving the Minister's instructions, the commissioner then prepares a notice of the Government's intent to acquire the said land and publishes it in the Kenya Gazette[84]. He also serves copies of the notice on every person who appears to him to be interested in the land. It was held by the Court of Appeal in Commissioner for Lands v Coastal Aquaculture Ltd[85] that the notice must state the public purposes for which the land is being acquired and, if it is for a public body, state the name of that body. In this case, the notice had neither indicated the

77 *See* section 6, note 2 above.
78 *See* note 40 above.
79 *Id.*
80 The meaning of competent authority is found in section 2 of the Act, which defines it as follows: '(a) In relation to Government land the minister for the time being responsible for matters relating to land; (b) In relation to trust land, the county council in which the land is vested: (c) In relation to any other land, the owner thereof or the person for the time being entitled to rents and profits thereof.'
81 The consideration of which is the agreed price.
82 *See* note 40 above.
83 Kenya, Environmental Management and Co-ordination Act, Act No. 8 of 1999.
84 This is the official government gazette published by the Government Printing Press.
85 *Commissioner for Lands v Coastal Aquaculture Ltd*, Mombasa Court of Appeal, No. 252 (1996).

purpose nor the name of the public body. The court declared the notice defective and by an order of certiorari quashed the acquisition. Pall JJ. (as he then was) observed that for compulsory acquisition to be lawful it must strictly comply with the provisions of the Constitution and the Land Acquisition Act.

Step three: Notice of Inquiry

After the publication of the Notice of Intention to Acquire, the Commissioner then appoints a date for the holding of an inquiry to hear claims for compensation by persons interested in the land, subject to acquisition.[86] He then publishes it in the Kenya Gazette and again serves it on every person who appears interested or who claims to be interested in the land.[87] This notice should be published in the Gazette at least fifteen days before the inquiry.

Step four: Holding of an Inquiry

This inquiry should be convened at least 21 days from the date when the Notice of Intention was published. On the date appointed for hearing of the inquiry, the commissioner shall make full inquiry into and determine: the persons interested in the land; the value of the land (determined in accordance with the principles set out in the schedule to the Act) and what compensation is payable to each of the people who he has determined to be interested in the land.

Step five: Award of Compensation

Following the inquiry and subsequent determination of the amount of compensation, the government then makes an award of compensation to the person entitled to it.

Step six: Transfer of Ownership to the State

After the award of compensation, the State then assumes ownership of the land. Appropriate changes made in the Ministry of Lands take place, removing the said parcel of land from the register of private ownership and placing it in the public domain as public utility land. It is from then on that it can be declared a protected area.

Step seven: Consent of Lands Minister

In Kenya, most public land is under the Ministry of Lands. To declare it a protected area, the Wildlife Minister is required by section 6 of the WCMA to consult with the Minister for Lands and obtain his consent. If the latter consents, he may go ahead to make the declaration. In case of dissent, he has no powers to appropriate the land, except by obtaining the approval of the Parliament through a resolution. But even after such consent or the Parliament's approval, as the case may be, has been obtained, a series of requirements of the Environmental Management and Coordination Act as to Environmental Impact Assessment (EIA) have to be complied with. The next step will be, accordingly, an EIA.

Step eight: Environmental Impact Assessment

Under the Environmental Management and Coordination Act of 1999 (EMCA), no national parks, game reserves and buffer zones may be created without undertaking a prior EIA.[88] This may come before or after the consent of the Minister for Lands and it is important because the EMCA supersedes all other pieces of legislation when it comes to environmental issues.[89]

Step nine: The land is declared a wildlife area

After fulfilling the requirements as to EIA and the Minister of Lands' consent, the Wildlife Minister may then by declaration place the land under protected area management.

3. The Amount of Compensation and how it is paid

The formula for determining the amount of compensation is stipulated in the Land Acquisition

86 The date of the inquiry should be not earlier than 21 days after the publication of the Notice of Intention.

87 The notice of inquiry calls upon the person interested in the land to deliver to the commissioner, not later than the date of the inquiry, a written claim for compensation.

88 *See* section 58 and the second schedule.

89 *See* section 148 of EMCA, note 83 above, which states as follows: 'All written law, in force immediately before the coming into force of this Act, relating to the management of the environment shall have effect subject to modifications as the case may be necessary to give effect to this Act, and where the provisions of any such law conflict with any provisions of this Act, the provisions of this act shall prevail'.

Act. In assessing the 'full compensation' the Act requires the Commissioner to appoint a date for the holding of an inquiry for the hearing of claims to compensation by persons interested in the land. To arrive at the appropriate amount he is required to apply the principles set out in the schedule to the Act.[90] These are summarised below.

(i) Matters to be considered in computing the quantum:[91]

- Market value of the land
- Damage sustained or likely to be sustained by persons interested at the time of the Commissioner taking possession of the land by reason of severing the land from his other land
- Damage sustained or likely to be sustained by persons interested at the time of the Commissioner taking possession of the land by reason of the acquisition injuriously affecting his other property, whether movable or immovable or in any other manner or his actual earnings
- If in consequence of the acquisition, any of the persons interested is or will be compelled to change his residence or place of business, reasonable expenses incidental to the change
- Damage genuinely resulting from diminution of the profit of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the commissioner takes possession of the land.

(ii) Matters not to be considered in computing the quantum:[92]

- Degree of urgency which has led to acquisition
- Any disinclination of the person interested to part with the land
- Damage sustained by the person interested which, if caused by a private person, would not be a good cause of action
- Damage which is likely to be caused to the land after the date of publication in the Gazette of the notice of intention to acquire the land or in consequence of the land or in consequence of the land will be put
- Any increase in the value of the land likely to accrue from the use to which it will be put when acquired
- Any outlay or additions or improvements to the land incurred after the date of publication in the Gazette of the notice of intention to acquire the land unless the same were necessary for the maintenance of any building in a proper state of repair.

Once the quantum of compensation has been determined, it has to be paid before the government can assume possession of the land. Under the Land Acquisition Act,[93] compensation need not be in the form of money; it may either be money or land, provided that if it is land the value of such land shall not exceed the value of the compensation that would have been allowable. Over and above the actual value of the land, the law also stipulates an additional payment of fifteen per cent of such value to the amount awarded as compensation[94]. It also provides for an interest of six per cent per year where the compensation awarded is not paid or paid into court on or before the taking of possession of the land, calculated from the time of taking possession until payment or payment before the court.[95]

The Act further fortifies the government's position by asserting the finality of the award. Section 10(2) of the Land Acquisition Act provides that every award of compensation shall be final and conclusive evidence of the acreage, value of land and amount payable, irrespective of whether or not the owner attended the inquiry. It further states that an award shall not be invalidated by reason only of a

90 *See* section 8, Cap 295 of the Laws of Kenya, note 66 above.
91 Principle 2.
92 Kenya, Principle 3 of the Schedule to the Act.
93 *See* section 12, note 66 above.
94 Kenya, Principle 4 of the schedule to the Act.
95 *See* section 16 (1), note 66 above.

discrepancy, which may thereafter be found to exist between the area specified in the award and the actual area of the land.

4. Mechanisms for Redress for an Aggrieved Landowner

A person aggrieved by the acquisition of his land by the government may petition the High Court for redress. His right for redress arises from the Constitution[96], the Law Reform Act[97] and the Land Acquisition Act[98]. Under section 84 of the Constitution, any person whose Constitutional rights have been infringed may apply to the High Court for a determination on the issue and an appropriate remedy. Section 75 (2) also gives an aggrieved party a direct right of recourse to the High Court for determination of his interest or right, the legality of taking possession or acquisition of the property, and the amount of any compensation to which he is entitled. It further provides that such a suit may also be for the purpose of obtaining prompt payment of that compensation.[99]

Such a suit may also be in the nature of an application for judicial review. By dint of Section Eight and Nine of the Law Reform Act, a person aggrieved by an executive decision like this one may apply to the High Court for prerogative orders of certiorari, mandamus and prohibition.[100] The Act empowers the High Court to issue prerogative orders in instances where the Supreme Court in England would issue them.

These orders are usually granted in judicial review proceedings where the High Court is exercising its supervisory powers over decisions of inferior tribunals and the exercise of executive functions. Decisions by the Commissioner of Lands pursuant to the statutory powers granted by the Land Acquisition Act are subject to the supervisory jurisdiction of the High Court and amenable to being judicially reviewed by it. In *Re Kisima Farm Ltd*, the High Court of Kenya held that the Commissioner for Lands, in determining claims to compensation under the Land Acquisition Act, should act judicially, and accordingly issued an order of prohibition restraining him from continuing to hold an inquiry into compensation.[101] The court further observed that the existence of a right of appeal from the Commissioner's decision does not preclude judicial review.

5. The Position Under the Proposed New Constitution of 2005

Kenya has for the last three years been undergoing a Constitutional review process, to revise the current Constitution. The Attorney General last year published a draft of the proposed new Constitution[102] that was subsequently submitted by the government to a national referendum. The draft was however rejected by an overwhelming majority of Kenyans who voted against it.[103] Despite this rejection, the Wako Draft provided interesting insights into how the law on compulsory acquisition of land might look in future.[104]

It is important to examine provisions in the draft Constitution relating to the exercise of these powers of eminent domain, and compare them with the provisions in the current Constitution. This comparison is to establish whether the Kenyan government has realised the problem associated with compulsory acquisition under the present legal regime discussed in the preceding part. It is also important to find out if the government has learnt from the past and is willing to improve. These facts can of course be established from an examination of the said draft that follows below.

As if to set the stage for rights to land, the draft began by stating that land is Kenya's primary resource and the basis of livelihood.[105] It also provided for two categories of land, namely, private land and public land; where the term 'private land' refers to land held by any person.[106] It then prohibited Parliament from enacting a law that permits the State, or any

96 *See* the Constitution, note 40 above.
97 Kenya, Law Reform Act, Cap 26 of the Laws of Kenya.
98 *See* note 66 above.
99 *See* the Constitution of the Republic of Kenya, note 40 above.
100 In such a suit he may cite the provisions of the Land Acquisition Act and/or the rules of natural justice or other established grounds for judicial review as well.
101 KLR 36 (1976).
102 Dubbed 'the Wako Draft' (named after Kenya's Attorney General Amos Wako, whose office prepared the draft).
103 At the referendum presided over by the Electoral Commission of Kenya, the 'NO' vote won against the 'YES' vote.
104 *See* article 58(1), note 101 above.
105 *Id*., article 78(1).
106 *Id*., article 54(1).

person to arbitrarily deprive a person of any interest in or right over property,[107] and proceeded to enumerate three instances in which acquisition is permitted.[108] The three instances are,[109]

- If it is for a public purpose or in the public interest and is carried in accordance with an Act of Parliament;
- If prompt payment of fair and adequate compensation is made to the person before the property is taken; and
- If any person who has an interest in or right over that property has a right of access to a court of law.

E. A Critical Appraisal of the Viability of Using Eminent Domain Powers to Acquire Private Land for Wildlife Reserves under Kenyan Law

Under Kenya's current law, the exercise of eminent powers is still largely fashioned along the draconian approach of the colonial regime. It is draconian and undemocratic in that it fails to recognise the landowner's right of dissent, which is an integral part of the freedom of conscience enshrined in the Bill of Rights. The process is devoid of considerations of human values and principles of good governance such as negotiation, consultation, livelihood, and human rights. The State retains an upper hand as apparently all that it is required to do is put the owner on notice, thereafter his views are irrelevant.

Such militaristic laws are not only unacceptable but also unsuitable to be used in conservation efforts. Wildlife conservation cannot succeed without the support of the local communities because these are the people who interact with animals on a day-to-day basis. This is especially true in the case of Kenya, where, despite the establishment of protected areas, a large population of wildlife still roams outside such areas. An unfair regime of acquiring private lands for conservation will further heighten the already existing human-wildlife conflict.

In 1975, the International Union for the Conservation of Nature (IUCN) at its twelfth General Assembly held at Kinshasa, Congo, adopted a resolution discouraging the establishment of wildlife reserves without adequate consultation.[110] Such consultation indeed thrives where the process is democratic, and not where the process is as undemocratic and unfair as Kenya's. Although in recent times there has not been any compulsory acquisition of private land by the State for expansion of protected area in Kenya, this is an avenue that can be explored to conserve wildlife for future generations. However, it still remains unsuitable for conservation until it is democratised.

The regime envisaged by the 'Wako Draft' is perhaps Kenya's best formulation with regard to the State's exercise of powers of eminent domain. Apart from being fairly elaborated, it also sought to put in place laudable safeguards in the exercise of these powers with adequate checks and balances. For this reason, if adopted in the future, the draft may set the stage for sweeping legal reforms that would have subsequently led to the amendment of the Land Acquisition Act. But even this draft could still have provided for a better and more democratic regime than it did. Suggestions on some of the issues that it should have addressed are made in the recommendation section of this paper.

Another flaw in the Kenyan practice is that the reasons set out in the law for compulsory acquisition are so vague and ambiguous as to be incapable of certainty. There is need for the law to clearly define the meaning of terms such as public uses, public body, public interest, prompt and full compensation. Unless the contexts in which these terms are construed are expressly spelt out in the law, they may be cited to justify even uses that are against the public good, such as the selfish interests of the ruling political elite. There ought to be safeguards to ensure they are used in good faith and for the public good. Presently, these are lacking and the consequences of their arbitrary use can be disastrous. To avoid

107 *Id*., article 54(2).
108 *Id*., article 58(3).
109 *Id.*

110 M. Colchester, 'Salvaging Nature: Indigenous Peoples and Protected Areas', *in* K. Ghimire and M.P. Pimbert eds, *Social Change and Conservation* 97, 116 (London: Earthscan, 1997).

injustice, for instance, instead of using the word 'prompt' the law could provide a time limit within which the government must pay compensation to the owner of any land it compulsorily acquires.[111]

Besides, a glance at the reasons stated in the law for compulsory acquisition shows that there was no intention to acquire private land for purposes of conservation. Neither the Constitution nor the Land Acquisition Act lists environmental protection or conservation as uses for which land may be compulsorily acquired. This is a great omission in this age and time where the environment has come to be recognised the world over as an integral component of sustainable development and a common concern of mankind. There is the need to make express provision for conservation. This is because under the regime set in place by the EMCA, for instance, all citizens have a right to a clean environment and a duty to safeguard it.[112] One of the implications of this provision is that environmental amenities such as wildlife are public resources, and that the responsibility for their well being is a collective as well as a singular one.

The only innovation by the post-independence approach perhaps is the provision of compensation, unlike in colonial times when land was taken without any compensation being paid. However the issue of compensation is still flawed. With regard to computation of the amount of compensation for instance, the law could provide a formula for calculation. Failing to address such concerns is tantamount to leaving such an important task to the whims of public officials, thereby making it one-sided. This may result in unfairness, especially where a wrong formula is used or where the officials fail to take into consideration the right factors. Sifuna asserts that leaving compensation process entirely to the public sector increases the likelihood of corruption, as is reported to have been the case in respect of compensation schemes for wildlife damage.[113] In countries like Kenya, with a high index of corruption, some public officials may collude with claimants to inflate the value of the land.

Indeed, eminent domain like any other power is subject to the likelihood of abuse and should be strictly regulated to avoid being abused or even misused. Without adequate safeguards expressly crafted in the law to check the whimsical or arbitrary exercise of these powers, they can be misused by mischievous political elites to attain selfish ends that are not in the interest of the people. This is important for instance to reign in unpopular governments such as those that ascend to power through military coups or rigged elections. The strict control of such powers is even more imperative in Africa where land is a very sensitive thing. In the continent, the people have very strong psychological and cultural attachment to land.[114]

In almost all communities in Africa, particularly in the sub-Saharan region, a man's wealth is measured in terms of how much land he holds. Losing any inch of his land is something that he will resist at any cost. Secondly, virtually all the land in Africa is ancestral, having been handed down from generation to generation. Thirdly, the African economy is predominantly agrarian, relying mainly on land, with agriculture as the main source of livelihood. Under such circumstances, the exercise of eminent domain powers is a fairly delicate issue.

This is even more delicate if the land is being acquired to expand wildlife reserves, especially in a country like Kenya where the relationship between the local communities on the one part and wildlife concerns on the other is not cordial, due to the stiff competition for scarce resources such as land and water. It is also due to the damage that wildlife occasions to people when it kills, injures them or destroys their crops and property. Because of these factors, there is hardly any public support for wildlife conservation. Compulsory acquisition of private lands for expansion of wildlife territory is like adding insult to injury; further exacerbating an already raging human-wildlife conflict. The government needs to be careful about policies and conducts that may further inflame this passion. To address the conflict, the State is well advised to adopt an approach likely to win the people's support for conservation.

In jurisdictions such as the Kenyan -one where the Constitution provides for the inviolability of private

111 E.g., six months before date of acquisition.
112 *See* section 3 of the EMCA, note 83 above.
113 *See* Sifuna, note 50 above, 18.
114 In Africa many lives have been lost in defence of land. In fact the violent resistance by natives to the colonialists was more because of land than because of political conquest.

property rights over land-, problems related to land allocation for conservation interests abound, especially of two typically competing interests; namely, the rights of the individual landowners versus conservation imperatives. Private property in land has far reaching implications for society in terms of private use and other public uses such as environmental conservation. This is because private ownership elevates ownership rights to a Constitutional plane where the individual owner has almost inviolable rights to own. Moreover the Kenyan Constitution guarantees the inviolability of private property.

In order to improve the system of compulsory acquisition and make eminent domain a useful tool in conservation efforts, Kenya can draw some important lessons from systems that seem to be working well. The author considers the one envisaged by the South African Constitution more democratic and therefore illustrative and desirable. Even if, like its Kenyan counterpart, it allows eminent domain on conditions of public good and the payment of compensation, the difference is in the way the clauses are framed. It stipulates that 'Property may be expropriated only in terms of law of general application- for a public purpose or in the public interest; and subject to compensation, the amount of which and time and manner of payment of which have either been agreed to by those affected or decided or approved by a court'.[115] It further requires[116] that such amount, time and manner must be just and equitable, reflecting an equitable balance between the public and private interest taking into account the following factors among others:

- The current use of the property
- The history of the acquisition and use of the property
- The market value of the property
- The extent of direct State investment and subsidy in the acquisition and beneficial capital improvement of the property, and
- The purpose of the expropriation.

115 Article 25 (2).
116 Article 25(3).

It should be noted that while there is need for protected area conservation, there are some non-PA strategies that may in the long run be more sustainable. One of them is conservation of wildlife outside the protected areas. Kenya's legislation makes provisions for the development of wildlife on privately owned land. The Wildlife (Conservation and Management) Act allows owners of such land, with the permission of the Minister in charge of wildlife, to establish wildlife ranches on their farms and even maintain facilities for game hunting.[117] Such private wildlife amenities can become a way for people to participate in wildlife conservation, as opposed to a protectionist approach where wildlife is an exclusive domain of the state.

6 CONCLUSION AND RECOMMENDATIONS

The paper has discussed the principles of eminent domain and has demonstrated that the power of compulsory acquisition of land, if exercised rightly and in good faith, can be instrumental in protected area wildlife management. Kenya's laws and processes of eminent domain have also been examined and found to be unfair and undemocratic. The processes disregard the landowner's right of dissent, which is an integral part of the freedom of conscience enshrined in the Bill of Rights. It also fails to embrace human values and principles of good governance such as negotiation, consultation, livelihood, and human rights. Unless the present laws are revised to embrace democracy and fair play, the eminent domain processes will remain unpopular and therefore unsuitable for use in conservation efforts. Apart from the process itself, the mechanisms provided in the law for computing the quantum of compensation, as was noted in the part on analysis, are largely vague and therefore unhelpful.

To set out the Kenyan context and provide a backdrop for critically examining the viability using

117 *See* sections 29 and 47, note 2 above.

eminent domain for conservation purposes, the paper has discussed the importance of wildlife[118] and Kenya's wildlife situation. The human-wildlife interface has also been highlighted to provide a backup for discussing the issue of compensation. It is otherwise out of the scope of the current paper but has been discussed by the author in a related journal article elsewhere.[119]

The study established that there has in recent times not been any compulsory acquisition of private land by the State for expansion of protected area. It is the author's view; however, that if democratised and exercised rightly and in good faith, this power can be instrumental in conserving wildlife for the present as well as for the future generations. Where the government decides to use eminent domain as a means of acquiring land for creating or expanding wildlife reserves it should ensure the process is democratic, fair and transparent. This is in the realisation that for conservation to thrive on a long-term basis it requires public support. Indeed, conservation efforts that are insensitive to the needs and aspirations of the people, such as the ones that ignore social dimensions, marginalise the local communities or violate their rights are doomed to fail.

Environmental protection and conservation, however, are not listed among the reasons stated in the Constitution and the Land Acquisition Act for compulsory acquisition. This may elicit an inference that the law does not envisage the use of eminent domain powers for purposes of conservation, which is a great omission in this age and time where the environment has come to be recognised the world over as an integral component of sustainable development and a common concern of mankind. There is the need to make express provision for conservation.

The article also established that despite its good attributes, the protected area management strategy has totally failed to achieve its goals especially in Africa, where the circumstances differ from those of the west where the concept originated. For one, having PAs surrounded by communities who are seriously afflicted by poverty[120] is an undoing, unless there is a system of revenue sharing between the players in the wildlife agencies and the local communities.

A. Recommendations

Although in recent times there has not been any compulsory acquisition of private land by the State for expansion of protected areas, it is nevertheless the author's view that if democratised and exercised rightly and in good faith this power can be instrumental in conserving wildlife for the present as well as future generations. Where the government decides to use eminent domain as a means of acquiring land for creating or expanding wildlife reserves it should ensure the process is democratic, fair, and transparent.

In order for eminent domain to be of any meaningful use to conservation, there is the need to urgently undertake the reforms listed below.[121]

Firstly, amend the Constitution and the Land Acquisition Act to include environmental protection and conservation among the uses for which private land can be compulsorily acquired.[122] Secondly, make provision for exhaustive prior consultations with the landowners to allow for more dialogue and exchange of views. This will also increase tolerance to dissent by the landowners. After all, such dissent is an extension of the freedoms of conscience and speech guaranteed by the Constitution. Fourth, to ensure certainty in the process, the law should stipulate clear definitions for words such as public uses, public body, public interest, prompt, and full compensation. This will avoid arbitrariness and ensure uniformity in the exercise of the powers.

Fifthly, there is need for a provision in the law expressly stating that the exercise of the power of eminent domain be exercised guided by the following considerations: human values, the land owner's Constitutional right of dissent, as well as the principles of good governance such as negotiation, consultation, livelihood, and human rights. Lastly, the law should address the quantum and payment of compensation. This can be done by

118 Its importance, the need to conserve it, as well as its external costs and opportunity cost.

119 *See* generally Sifuna, note 50 above.

120 Where PAs stand as islands in a sea of poverty.

121 Aimed at increasing democracy, fairness and certainty in its processes.

122 Kenya's present law for compulsory acquisition does not seem to show that it is intended to be used for conservation purposes.

setting an empirical and objective formula for computing the amount, stipulating the maximum amount of time for which the owner should wait to receive the compensation cheque, and providing that the amount be adequate, in line with economic realities such as the market value.[123]

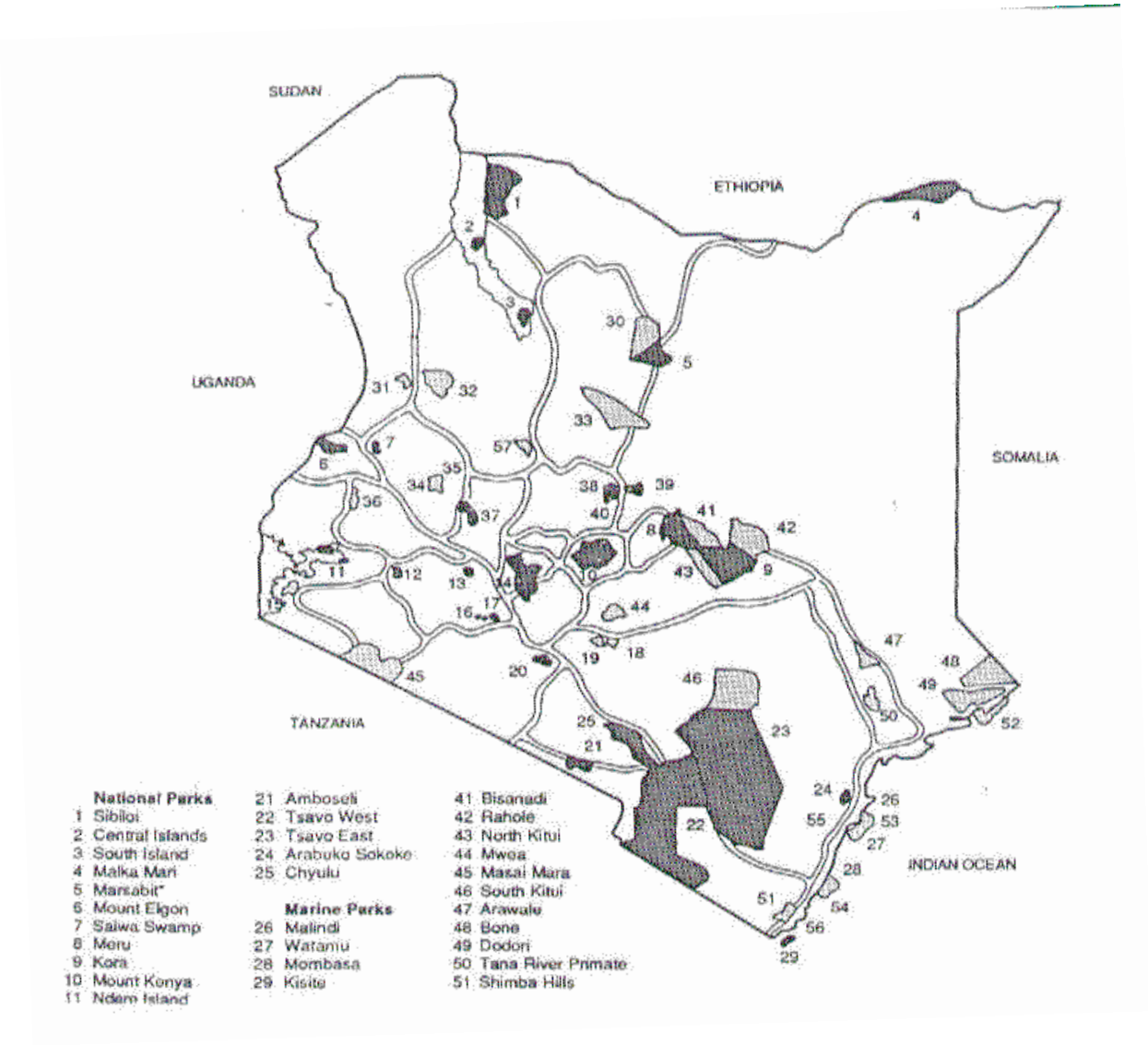
Kenya's draft Constitution -rejected by Kenyans at the referendum- presented perhaps her best formulation with regard to the State's exercise of powers of eminent domain. Apart from being fairly elaborate, it also attempted to put in place laudable safeguards in the exercise of these powers with adequate checks and balances. For this reason, if passed, it will set the stage for sweeping legal reforms that will lead to the amendment of the Land Acquisition Act. It is recommended in this paper that the draft be re-introduced and passed into law, or that any future draft Constitution adopts provisioning such as the one contained in the said draft as regards eminent domain.

Given the numerous demerits of the Protected Area system of wildlife management as discussed in this paper, it is advisable to consider alternative systems as well. One of the alternatives is to encourage people to allow wildlife on private land. By doing so, interest shall be aroused in people to support conservation. Wildlife agencies and interest groups could also consider leasing private lands for use as buffer zones or wildlife dispersal zones. A case in point is in the Kitengela area in Kenya, where the African Wildlife Foundation (AWF) has leased tracts of land from the local Maasai people to be used as dispersal zones and migration corridors for wildlife from the Nairobi National Park. Another way of easing the burden imposed on the government by the protected area system is by encouraging non-governmental players to establish private ranches. Besides, as already stated in this paper, Kenya's Wildlife (Management and Conservation) Act allows for wildlife conservation outside protected areas,[124] and people can be encouraged to establish private ranches and wildlife support facilities on the land they own.

123 The law should have a legal provision expressly using the words 'adequate compensation' and even defining what amounts to adequate compensation.

124 *See* note 117 above.

Figure 1. Kenya's Wildlife Protected Areas



Source: B. Sibanda 'Wildlife Conservation in Kenya: Wildlife or Local Communities at Crossroads', 5/1 *Environmental Policy & Practice* 35 (1995).

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