Land Grabbing, Tenure Security and Livelihoods in Kenya

Francis Kariuki

Strathmore Law School

kariukifranciso6@yahoo.com

Raphael Ng'etich

Strathmore Law School

raphael.ngetich@yahoo.com

Abstract

In Kenya, land grabbing can be examined by looking at three critical eras through which land governance has evolved. There is the first epoch that was characterised by colonial acquisition of land to establish colonial rule and provide land for incoming settlers among other reasons. Secondly, there is the post-colonial epoch that was characterised by land grabs orchestrated by the new political elites who were keen on retaining power upon independence. Thirdly, and most recently, the phenomenon of land grabbing has assumed a new face: a global face with graver consequences on communities and their livelihoods than ever before. The new form of land grabbing involves foreign multinationals and governments acquiring land in developing countries for a multitude of reasons, *inter alia*, mining, huge infrastructural projects, oil exploration and large-scale irrigation. This new phenomenon of land grabbing and its impact on tenure security and livelihoods amongst communities is examined here.

Keywords

land grabbing – tenure security and livelihoods – impact on communities

1 Introduction

Land is an important natural resource, economically, socially and politically yet a finite resource requiring sustainable utilisation. It is a vital resource to rural communities in Kenya as it is the source of their livelihoods.¹ Kenya has an area of approximately 582,646 sq. km, 97.8% of which is land. Only 20% of the land is arable while the rest is mainly arid and semi-arid land.² The arable land, is occupied by 75% of the country's population³ meaning that only a small percentage is available for productive use. In spite of the foregoing, the Kenyan economy is primarily dependent on agricultural and pastoral land uses. Apart from providing livelihood for over 75% of the population, agriculture and pastoralism support 70% of all wage employment and contribute over 80% of export earnings.⁴ Land scarcity continues to create conflicts among individuals, communities and other entities in the struggle to secure their livelihoods. This is in spite of the fact that tenure security guarantees access to and use of land in order to derive food, shelter, water, grazing and other activities.⁵ However, this guarantee is threatened by land grabbing, a phenomenon that is continually changing face.

2 Conceptualising Land Grabbing, Tenure Security and Livelihoods

2.1 *Land Grabbing in Kenya*

The term land grabbing refers to situations where individuals, corporations or states undertake large scale acquisitions of land, by way of lease, allocation, concession or purchase, for private use, food production, bio-fuel, crop production or large development projects involving displacement of hundreds of families and individuals.⁶ It is also defined as the buying or leasing of vast

1 Republic of Kenya, *Sessional Paper No 3 of 2009 on National Land Policy* (2009) para 29.

2 Ibid 11.

3 Ibid 16.

4 Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework Constitutional Position of Land and New Institutional Framework for Land Administration* (2002) 16.

5 Syprose Achieng, Ashebir Solomon, Carolina Cenerini and Alberto di Grazia, 'How to Deal with People in Post Displacement – Reintegration: The Welcoming Capacity Approach' (FAO Land and Water Division Working Paper 7, 2014) 8.

6 Serah Munguti and Paul Matiku, 'Land Grabbing in the Tana River Delta, Kenya' in GRAIN, Joan Martinez-Alier, Leah Temper, Serah Munguti, Paul Matiku, Hugo Ferreira, Wagner Soares, Marcelo Firpo Porto, Vahinala Raharinirina, Willi Haas, Simron Jit Singh and Andreas

tracts of land by wealthier, food-insecure nations and private investors from mostly poor, developing countries in order to produce crops for export.⁷ It also involves the illegal or irregular acquisition of large tracts of land by foreign investors, whether states or private entities, in developing countries⁸ for multiple reasons. Other definitions place emphasis on the size of land acquired. For example, according to the Food and Agriculture Organization of the United Nations, land acquisition amounts to land grabbing where the investment exceeds one thousand hectares.⁹

In addition, the concept of land grabbing is contested. Some consider it as originating from, and as being useful in examining the emerging brutal wave of acquisition of land used for export production in Southern countries. While others are in search of a less aggressive term, for example, 'land sharing'.¹⁰ Nevertheless, land grabbing is characterised by large scale displacement of poor people in rural areas without proper compensation and the destruction of ecological systems to pave way for industrial and agricultural developments.¹¹ Recent studies have linked land grabbing and biomass extraction with interests of a minor global class of consumers against the majority of the population.¹² The fight against land grabbing, therefore, is at the interface of climate change, food security, rights of indigenous communities, social and environmental justice.¹³ However, political and economic power imbalances ensure that this phenomenon overcomes any form of resistance.¹⁴ The perpetrators are armed with all the necessary means, legal or illegal, to realise their ends. The world is

Mayer (eds), *The Many Faces of Land Grabbing: Cases from Africa and Latin America* (EJOLT Report No. 10, 2014) 18.

- 7 Shepard Daniel and Anuradha Mittal, 'The Great Land Grab: Rush for World's Farmland Threatens food security for the Poor' (The Oakland Institute 2009).
- 8 Hans Theting and Brita Brekke, 'Land Investments or Land grab? A critical view from Tanzania and Mozambique' (Spire 2010).
- 9 Lorenzo Cotula, Sonja Vermeulen, Rebeca Leonard and James Keeley, 'Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa' (IIED/FAO/IFAD 2009).
- 10 GRAIN, Martinez-Alier, Temper, Munguti, Matiku, Ferreira, Soares, Porto, Raharinirina, Haas, Singh and Mayer (n 6) 6.
- 11 Ibid 1.
- 12 Philip McMichael, 'The land grab and corporate food regime restructuring' (2012) 39 *Journal of Peasant Studies* 681, 684.
- 13 Leah Temper and Joan Martinez-Alier, 'Mapping resistance and resilience to the global land grab: Definition financial activism and alliances' (Global Land Grabbing II Conference, Ithaca, October 2012).
- 14 GRAIN, Martinez-Alier, Temper, Munguti, Matiku, Ferreira, Soares, Porto, Raharinirina, Haas, Singh and Mayer (n 6) 7.

witnessing a major frontal assault on the world's peasantry that makes their survival increasingly difficult and dangerous across the globe.¹⁵ This is most common in countries characterised by weak land tenure systems, corruption, lack of accountability in decision making, poverty and powerlessness.¹⁶

Already, land grabbing has negatively impacted land management and administration in Kenya in all the three epochs.¹⁷ In the colonial period, the government passed several laws¹⁸ aimed at alienating land and resources from the natives and vesting them on the settlers. Natives were confined to the reserves. The Foreign Jurisdiction Act, 1890¹⁹ was enacted to facilitate the acquisition of control over foreign lands by conferring extra-territorial jurisdiction on the Queen.²⁰ To overcome the problem of title to land in the territory, the legal officers of the Crown advised that the Foreign Jurisdiction Act, 1890 empowered the Crown to control and dispose of waste and unoccupied land in protectorates deemed to have no form of settled government.²¹ These colonial 'legislative fiats' are the earliest instances of land grabbing in Kenya. Land was also acquired through 'agreements'²² which were unduly influenced by and in favour of the colonial government.

Upon independence, in 1963, land had become a fundamental factor in the dynamics of power and wealth allocation among the new political elite.²³ Illegal and irregular allocation of public and community land became the order of the day as politicians abused the trust placed on them as trustees of land.²⁴ Land meant for use as school grounds, cemeteries, playgrounds, parks, forests and other public uses was grabbed by individuals and private

15 Ibid 8.

16 Ward Anseeuw, Liz Alden Wily, Lorenzo Cotula and Michael Taylor, 'Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project' (International Land Coalition 2012).

17 Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, (2004) 7.

18 Foreign Jurisdiction Act 1890 (53 & 54 Vict Ch 37), Crown Lands Ordinance 1902, Crown Lands Ordinance 1915 and subsequent laws. These laws empowered the colonial government to deal with all land declared as crown land. The Crown Land Ordinance 1915, for example, had the effect of rendering natives tenants at the will of the Crown while Water Ordinance of 1929 which vested all water resources on the colonial government.

19 53 & 54 Vict. Ch 37.

20 Section 1, Foreign Jurisdiction Act 1890 (53 & 54 Vict Ch 37).

21 Towett Kimaiyo, 'Ogiek Land Cases and Historical Injustices, 1902–2004' Vol. 1, 2004, <<http://freeafrica.tripod.com/ogiekland/book/index.htm>> accessed 18 December 2015.

22 The Maasai Agreements of 1904 and 1911.

23 Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya* (n 4) 19.

24 Ibid 91.

companies.²⁵ Although the procedure for allocating land was outlined in the Government Lands Act,²⁶ it was rarely adhered to. The Commissioner of Lands could use unlawful procedures in allocating public land for political expediency.²⁷ Moreover, the powers vested in the President were also abused and used to reward political loyalists.²⁸

Today, land grabbing has taken a 'global' face fuelled by the need to amass food and energy resources particularly by foreign nations mainly after the financial and food crisis in 2008.²⁹ Foreign public and private entities are now concluding agreements with countries, mostly developing ones, for the control of large surfaces of land.³⁰ Kenya has not been left behind. Global land grabbing is manifesting itself in Kenya in various forms. The paper discusses the following: mining activities; big infrastructural projects; large scale agricultural concessions; diversion of land resources to meet the aggressive global energy demands; and the gazettement of certain areas as protected areas. To communities who depend on land for livelihood, land grabbing creates tenure insecurity thus threatening their survival.

2.2 What is Tenure Security?

Land tenure refers to the terms and conditions under which land rights are acquired, retained, used, disposed of, transmitted,³¹ or transacted.³² It also

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- 25 Ibid. This form of land grabbing continues even today, See Linah Benyawa, '20,000 public schools fail to get title deeds despite President Uhuru Kenyatta's directive' *Standard Digital*, 4 August 2015 <<http://www.standardmedia.co.ke/article/2000171524/20-000-public-schools-fail-to-get-title-deeds-despite-president-uhuru-kenyatta-s-directive>> accessed 18 December 2015.
 - 26 Chapter 280, Laws of Kenya, now repealed. It was an Act of Parliament enacted to regulate the leasing and other disposal of Government lands.
 - 27 Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya* (n 4) 102.
 - 28 Republic of Kenya, *Report of the Commission of inquiry into the Illegal/Irregular Allocation of Public Land* (n 17) 8.
 - 29 Pauline Makutsa, 'Land Grab in Kenya: Implications for Small-holder Farmers' (East Africa Farmers Federation 2010) 12 <http://www.sfoap.net/fileadmin/user_upload/sfoap/KB/docs/Report%20of%20Land%20Grab%20in%20Kenya.pdf> accessed 18 December 2015.
 - 30 FIAN, 'Land grabbing in Kenya and Mozambique: A report on two research missions – and a human rights analysis of land grabbing' (FIAN 2010) 8.
 - 31 Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya* (n 4) 46.
 - 32 Martin Adams, 'Tenure Security, Livelihoods and Sustainable Land Use in Southern Africa' (SARPN conference on Land Reform and Poverty Alleviation in Southern Africa, Pretoria, June 2001) 1.

outlines the rights and obligations of the landholder³³ and is a source of incentive, opportunity, equity and patterns in land use.³⁴ Land security exists when:

... an individual perceives that he or she has the right to a piece of land on a continuous basis, free from imposition or interference from outside sources as well as the ability to reap the benefits of labour and capital invested in that land, either in use or upon transfer to another holder.³⁵

This definition covers three components: breadth, duration and assurance.³⁶ Breadth refers to the quantum or number of rights and obligations that the landholder has in respect of the land, for example, the right to use, transfer and exclude. Duration indicates the time the landholder can validly exercise the rights and obligations over the land, for example, in a lease, the right to use a piece of land terminates at the end of the lease period. Assurance refers to the fact that the rights and obligations over the land and the duration are held by the landholder with certainty.³⁷

Tenure security entails more than title.³⁸ It also encompasses the political will to put into place measures to ensure that people have some degree of organised protection from unfettered market forces.³⁹ The market is important due to its value-adding trait but it also rewards and punishes unfairly hence becoming a threat to tenure security. It is, therefore, necessary for policy and law to actually provide tenure security instead of just giving paper titles.⁴⁰ Without tenure security it becomes difficult for the poor to meet their livelihoods.

33 John Bruce, 'A review of tenure terminology' (Land Tenure Centre 1993) 1.

34 Henry West, 'Land tenure, policy, and management in English-speaking African countries' in Jaap Arntzen, Leonard Ngcongco and Stephen Turner (eds), *Land Policy and Agriculture in Eastern and Southern Africa* (United Nations University Press 1986) 4.

35 Frank Place, Michael Roth and Peter Hazell 'Land Tenure Security and Agricultural Performance in Africa: Overview of Research Methodology' in John Bruce and Shem Migot-Adholla (eds), *Searching for Land Tenure Security in Africa* (Kendall/Hunt Publishers 1994) 19.

36 Ibid.

37 Ibid 20.

38 Perrine Burnod, Nicole Andrianirina, Céline Boue, Flore Gubert, Nelly Rakoto-Tiana, Julia Vaillant, Rado Rabeantoandro and Raphaël Ratovoarinony, 'Land Reform and Certification in Madagascar: Does Perception of Tenure Security Matter And Change?' (Annual World Bank Conference On Land And Poverty, Washington DC, April 2012) 5.

39 Lynn Ellsworth, *A Place in the World: Tenure Security and Community Livelihoods* (Forest Trends 2002) 13.

40 Ibid.

2.3 *What is Meant by Livelihoods?*

The term 'livelihood' means the ways in which individuals and communities derive food, shelter and clothing in order to sustain their lives.⁴¹ Simply put it is the means of living.⁴² It is made up of assets, natural, physical, human, financial and social, activities and access mediated by institutions and social relations.⁴³ Livelihoods of individuals and groups are said to be secure when there is access to the means of food production or generation of income to meet their needs.⁴⁴ People become vulnerable when they are exposed to life threatening conditions whether natural or artificial.⁴⁵

The achievement of better livelihoods is tied to the realisation of economic, social and cultural rights. For example, the right to food, the right to housing, the right to health and the right to adequate standard of living are all critical to a better livelihood. A common factor in the realisation of these rights is that they are all dependent on access to land. For example, access to land is a key means to realising the right to food. To realize the right to adequate food every man, woman and child, alone or in community with others, requires physical and economic access at all times to adequate food *or means for its procurement*.⁴⁶ Land is the source of food, shelter and water, and is used for grazing cattle and for spiritual and cultural activities. For smallholders, herders, fisher-folk and indigenous communities, access to land is a necessary condition for the achievement of a decent standard of living.⁴⁷

In some countries such as India, courts have adopted an expansive interpretation of the right to life to include the right to earn a livelihood. In *Olga Tellis v Bombay Municipal Corporation*,⁴⁸ the Supreme Court held that:

41 Economic Commission for Africa, *Land Tenure Systems and their Impacts on Food Security and Sustainable Development in Africa* (ECA/SDD/05/09 2004) 24.

42 *Olga Tellis v Bombay Municipal Corporation* [1985] 3 SCC 545.

43 Frank Ellis, *Rural Livelihoods and Diversity in Developing Countries* (OUP 2000) 10.

44 Timothy Frankenberger, 'Developing Sustainable Livelihoods: A proposed CARE Development Programming Strategy' (CARE 1995); and Robert Chambers, 'Poverty and Livelihoods: Whose Reality Counts?' (1995) 7 *Environment and Urbanisation* 173.

45 Economic Commission for Africa (n 41) 25.

46 ECOSOC 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 12 on the Right to Adequate Food' (E/C 12/1999/5) para 6.

47 UNCHR 'Report of the Special Rapporteur on the Right to Food' (2010) UN Doc A/65/281 para 1; UN Development Programme, 'Halving Hunger: It Can Be Done' (Summary Version 2005) 2.

48 [1985] 3 SCC 545. Emphasis added.

The sweep of the right to life ... is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to the procedure established by law. That is but one aspect of the right to life. An equally important fact of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.

2.4 *Land Grabbing, Tenure Security and Livelihoods*

As pointed out earlier, land is important for elemental survival, habitation, crop-growing, pastoralism and other social and political aspects⁴⁹ especially in Kenya where agriculture is the backbone of the economy.⁵⁰ However, land is a finite resource, and the remaining land is threatened by land grabs. Access to land, is especially vital in Kenya, since a large percentage of its agricultural output is derived from small scale farming as opposed to large scale farming.⁵¹ Greater tenure security implies that individuals and communities are able to secure access to means of deriving their livelihoods.⁵² Consequently, land grabbing (as a source of tenure insecurity) in its diverse forms leads to the acquisition of land belonging to communities depriving them of their means of livelihood.

3 **Contemporary Manifestations of the Land Grabbing Phenomenon in Kenya and its Implications on Tenure Security and Livelihoods**

Land grabbing is manifesting itself variously in contemporary Kenya. Land grabbing by the ruling class is still prevalent in many parts of the country. Public spaces meant for schools, hospitals, roads and other public purposes, community and private land are all prone to land grabs by politicians.⁵³ This

49 West (n 34) 1.

50 Ibid.

51 Caleb Kibet, 'Major Challenges facing Kenyan Agricultural sector' 21 June 2011, <<http://extensionconference2011.cta.int/node/111>> accessed 16 December 2015.

52 Daniel Fitzpatrick and Caroline Compton, 'Beyond Safe Land: Why security of land tenure is crucial for the Philippines' post-Haiyan recovery' (Oxfam Publishing 2014) 4.

53 See Benyawa (n 25).

form of land grabbing, a consequence of colonial rule, can be described as the 'traditional' land grabbing. Land grabbing, has, however, assumed a new face, where it is being powered by factors including globalisation and the scramble for Africa's natural resources.⁵⁴ The interplay between globalisation and world domination has led to the new 'scramble' for Africa's natural resources with the main actors in the 'new scramble for Africa' being China and the United States of America.⁵⁵ These actors are now engaged in an accelerated exploitation of natural resources, industrial and processing infrastructure.⁵⁶

The following are some of the ways in which land grabbing is manifesting itself in contemporary Kenya with dire consequences on livelihoods:

3.1 *Mining Activities*

Land grabbing manifests itself today through exploration and extraction of mineral deposits, oil and natural gas. Land occupied by individuals and groups is being compulsory acquired by the state and given to multinational companies.⁵⁷ The pre-existing uses of land are disregarded while exploration and extraction of minerals are given top priority. The livelihoods of individuals and communities are destroyed since their food crops, water sources, grazing zones, spiritual and cultural places are destroyed to pave way for prospecting and extraction of minerals.⁵⁸ The Constitution lists all minerals and mineral oils as part of public land.⁵⁹ The discovery of mineral deposits in land occupied by individuals and communities is, therefore, a source of tenure insecurity which increases their livelihood vulnerability since they have to involuntarily vacate the land.

The land on which minerals and mineral oils are discovered converts to public land irrespective of the social, cultural and economic activities that individuals and communities were carrying out. The compensation given is monetary. This does not fully take into account the value of the land to the

54 Africa Union (AU), African Development Bank (AfDB) and Economic Commission for Africa (ECA) 'Framework and Guidelines on Land Policy in Africa, Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods' (AU/AfDB/ECA 2010) 10.

55 Ibid.

56 Ibid.

57 Cotula, Vermeulen, Leonard and Keeley (n 9).

58 Edfas Mkandawire, Euan Hope and Tafadzwa Kuvheya, 'A Princely Plan in the Pipelines or a Pauper's Pipe Dream?' 07 November 2013 <<https://www.boell.de/en/2013/11/07/princely-plan-pipelines-or-paupers-pipe-dream>> accessed 19 December 2015.

59 Article 62(1)(f), *Constitution of Kenya* (2010).

individuals and communities. For African communities, '... land is much more than the physical soil.'⁶⁰ This is because

... for African peoples, this is a religious universe. Nature in the broadest sense of the word is not an empty impersonal object or phenomena ... God is seen in and behind these objects and phenomena ... The invisible world is symbolized or manifested by these visible and concrete phenomena and objects of nature ... the most fundamental religious heritages of African peoples ...⁶¹

Land is compulsorily acquired and the individuals and communities are compensated monetarily.⁶² They have to find another piece of land but they are never restored to the previous position. This is because they have lost the source of their livelihoods, their places of worship, the places of conducting their cultural activities. Any new piece of land does not restore such uses: their land is taken and with it goes a critical part of their livelihood. One notable feature of the areas where this occurs is that they are arid and semi-arid. These areas do not have adequate public services and are largely underdeveloped. Pastoralism is the main source of livelihood for the individuals and communities in such areas. They are not able to find enough land for grazing and watering their cattle. The compulsory acquisition of their land, therefore, means some aspects of their livelihoods are forever destroyed.

Although the Mining Act seems to protect community and private land holders from land grabbing fuelled by mining, it gives protection with one hand and takes it away with the other. Provisions on consent offer a good example. The Act requires the applicant seeking a prospecting or mining license to obtain the consent of the registered holders of public,⁶³ community⁶⁴ and private⁶⁵ land before the license is given. Registered holders are required to notify the applicant of the consent or refusal.⁶⁶ However, the Cabinet Secretary for mining is entitled to compulsorily acquire the land where he/she deems that the consent is '(a) unreasonably withheld; or (b) the Cabinet Secretary

60 Patrick Lumumba and Luis Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary* (Strathmore University Press 2014) 264.

61 John Mbiti, *African Religions and Philosophy* (Heinemann 1969) 57.

62 Section 111, *Land Act* (Act No 6 of 2012).

63 Section 36, *Mining Act* (Act No 12 of 2016).

64 Section 38, *Mining Act* (Act No 12 of 2016).

65 Section 37, *Mining Act* (Act No 12 of 2016).

66 Section 39, *Mining Act* (Act No 12 of 2016).

considers that withholding of consent is contrary to the national interest,'⁶⁷ after which it 'shall cease to be land excluded from prospecting or mining.'⁶⁸ The opportunity given to the land holder to give their consent, therefore, appears to be one that makes it mandatory for them to give the consent – for even if they refused, their decision would be overridden.

The Constitution requires that agreements relating to natural resources be ratified by Parliament.⁶⁹ The Natural Resources (Classes of Transactions Subject to Ratification) Act 2016 has been enacted to give effect to this provision. Among the classes of transactions subject to ratification include oil, gas and minerals.⁷⁰ However, exceptions are granted including where one is exploiting natural resources in line with a license issued pursuant to national or county legislation,⁷¹ which in this case would include the Mining Act 2016.

Confidentiality in natural resource agreements further pose a threat even where ratification is required. The Natural Resources (Classes of Transactions Subject to Ratification) Act 2016 empowers the Cabinet Secretary responsible for the transaction in question to grant a confidentiality request with respect to commercial confidentiality, national security or other public interest considerations.⁷² The public is then excluded⁷³ and the confidentiality request may only be challenged in the High Court.⁷⁴ For example, the licence fees and other payments and information relating to such concessions are not publicly available.⁷⁵ This design contributes to misuse of public funds.

The oil exploration activities in Turkana County are driving land grabbing. Large parcels of land are being licensed by the government for oil prospecting from community lands yet the communities lack information on the ownership

67 Section 40(1), *Mining Act* (Act No 12 of 2016).

68 Section 40(2), *Mining Act* (Act No 12 of 2016).

69 Article 71, *Constitution of Kenya* (2010).

70 Section 4(1), *Natural Resources (Classes of Transactions Subject to Ratification) Act* (Act No 41 of 2016).

71 Section 4(2), *Natural Resources (Classes of Transactions Subject to Ratification) Act* (Act No 41 of 2016).

72 Section 13(1), *Natural Resources (Classes of Transactions Subject to Ratification) Act* (Act No 41 of 2016).

73 Section 13(2), *Natural Resources (Classes of Transactions Subject to Ratification) Act* (Act No 41 of 2016).

74 Section 13(3), *Natural Resources (Classes of Transactions Subject to Ratification) Act* (Act No 41 of 2016).

75 Isaiah Lucheli, 'Council questions acquisition of land under oil' *Standard Digital* (31 March 2012) <<http://www.standardmedia.co.ke/mobile/article/2000055270/council-questions-acquisition-of-land-under-oil>> accessed 18 December 2015.

of land in cases of oil exploration.⁷⁶ The land taken from the communities for oil prospecting is also taken without consultation or compensation.⁷⁷ Community land around urban centres is given away for oil prospecting in contracts secretly concluded by businesspeople, government officials and politicians without consulting local communities.⁷⁸ This is taking place since community land is not well protected. The law required by the Constitution to be enacted was enacted after the deadline and its provisions further watered down the protection of community land. The Community Land Act 2016 ignores traditional systems and goes ahead to develop new land management institutions⁷⁹ based on the conventional views of property as opposed to communal holding.⁸⁰ For example, with the new structures, two-thirds of the registered members are allowed to dispose of community land.⁸¹ This is contrary to the management of African commons as the radical title was vested in the community – meaning the past, present and future members.⁸² Allowing the present generation to dispose of community resources greatly prejudices the future generations. This position was affirmed by the Supreme Court of Philippines in *Minors Oposa v Secretary of the Department of Environmental and Natural Resources*⁸³ where it observed that allowing the present generation to exploit communal resources without regard to intergenerational equity would amount to a situation of 'stealing' from their children and the future generations.

With these provisions, community land is going to end up in the hands of mining companies and the communities will be affected by negative environmental effects on the land and water which are important for their pastoral livelihood in an ecologically fragile part of the country.⁸⁴ The health of the community is also bound to be affected because of the burning of natural gas discovered alongside crude oil.

⁷⁶ Ibid.

⁷⁷ Cordaid, 'Oil Exploration in Kenya: Success Requires Consultation' August 2015, 9 < https://www.cordaid.org/media/publications/Turkana_Baseline_Report_DEF-LR_Cordaid_1.pdf > accessed 19 December 2015.

⁷⁸ Ibid 16.

⁷⁹ Part III, *Community Land Act* (Act No 27 of 2016).

⁸⁰ Francis Kariuki, Smith Ouma, and Raphael Ng'etich, *Property Law* (Strathmore University Press 2016) 333.

⁸¹ Section 15(5), *Community Land Act* (Act No 27 of 2016).

⁸² Hastings Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' (2003) 1 University of Nairobi Law Journal 108.

⁸³ Judgment of 30 July 1993.

⁸⁴ Cordaid (n 77) 9.

Mining by Tiomin Resources, a Canadian company, also offers another example of land grabbing through mining activities. The mining of the titanium deposits is accompanied by timbering, road construction, a mill, a power generating plant, power-lines and waste piles.⁸⁵ The Digo and the Kamba communities were displaced to pave way for the activities. The government and the company evicted the communities without regard to the fact that the livelihoods of the communities are dependent on access to the land since they are bound to the land economically, socially and spiritually.⁸⁶ The grave-sites and the spiritual areas called Kayas and Mafingo have been destroyed. There is no compensation for such aspects of lost livelihoods. The compensation was also done inadequately leading to destruction of the livelihoods since the communities did not get the necessary resources to find alternative sources of livelihood.⁸⁷ The consultation process conducted by the company in securing the land is questionable since the communities now realise that they did not make informed decisions due to lack of transparency on the part of the company.⁸⁸ The livelihoods of the local communities are further put at risk by the fact that the mining by the company will contaminate local soil and aquifers with heavy metals.⁸⁹ The land is, therefore, not likely to support any livelihoods after the expiry of the lease acquired by the company.

3.2 *Big Infrastructural Projects*

Another way in which contemporary land grabbing manifests itself is through big infrastructural projects undertaken by the government. The government compulsorily acquires the land required for such projects. The individuals and communities living in such lands are involuntarily evicted. They are forced to start new livelihoods in different places. Compulsory acquisition⁹⁰ is used to take away land from the communities irrespective of their uses without compensating them for all the value they attach to the land.

Big infrastructural projects require huge tracts of land. The Kenyan government is engaged in many such projects, for example, the construction of the

85 Domingo, 'Background Information: Tiomin Resources Inc. in Kenya' March 25 2001 <<http://www.miningwatch.ca/es/node/4819>> accessed 16 December 2015.

86 Ibid.

87 Ibid.

88 Ibid.

89 Environmental Justice Atlas, 'Titanium Mining in the Kwale District, Kenya' <<https://ejatlas.org/conflict/titanium-mining-in-the-kwale-district-kenya>> accessed 16 December 2015.

90 Part VIII, *Land Act* (Act No 6 of 2012).

Standard Gauge Railway and the Lamu Port-South Sudan-Ethiopia Transport (LAPSSET) Corridor Project. These projects occasion involuntary displacements of individuals and communities through compulsory acquisition. For example, the construction of the Standard Gauge Railway goes through people's lands, the Nairobi National Park and Tsavo National Park despite the availability of other options.⁹¹ The livelihoods of communities and wildlife are thus forever changed. They have to move to new areas that do not accommodate their land uses.

The LAPSSET Corridor Project which is a Kenya Vision 2030 flagship project intended to foster transport among Kenya, Ethiopia and South Sudan is an economic corridor set to be put up in the northern, eastern, north-eastern and coastal areas in Kenya. Some of the components of the project are: Lamu port; railway line; highway; crude oil pipeline and product pipeline; oil refinery; resort cities; airports; support infrastructure; high grand falls; and Lamu metropolis. The industries expected to be put up include refineries, petrochemical industries in Lamu and Isiolo, manufacturing industries along the corridor and thermal power generation.⁹²

The development of this project together with the accompanying developments requires large tracts of land. The project has already raised land issues before it fully takes off. Wealthy and well-connected individuals who had information before hand on the project moved in early and acquired land for speculative purposes.⁹³ The pastoralist communities in the area are worried about the potential impact of the project on their livelihoods and environment, and protection and compensation of those who will be adversely affected.⁹⁴ The project will disrupt pastoral livelihoods by blocking off the migratory routes used by the communities in searching for water and pasture.⁹⁵ The Lamu Port construction has led to displacement of individuals and communities but they

91 Daniel Wesangula, 'Proposal to construct Standard Gauge Railway through Nairobi National Park rejected' *Standard Digital* 16 September 2016 <<https://www.standardmedia.co.ke/article/2000216231/proposal-to-construct-standard-gauge-railway-through-nairobi-national-park-rejected>> accessed 8 March 2017.

92 Silvester Kasuku, 'Lamu Port-South Sudan-Ethiopia Transport (LAPSSET) Corridor Project: Building Africa's transformative and game changer infrastructure to deliver a just and prosperous Kenya' (Kenya-UK Investment Conference, London, December 2013).

93 Abdirizak Arale Nunow, 'The Displacement and Dispossession of the Aweer (Boni) Community: The Kenya Government dilemma on the new Port of Lamu' (International Conference on Global Land Grabbing II, New York, October 2012) 5.

94 Irin, 'Lapsset Project raises issues of Land' *The East African* (Nairobi, 20 October 2013) 35.

95 Ibid.

are yet to be compensated.⁹⁶ The compulsory acquisition and compensation for community land will occasion grave injustice on the community since land ownership documents are not there due to the fact that community land legislation is yet to be implemented.⁹⁷ The communities around the coastal area will also be denied access to parks and beaches.⁹⁸

The Standard Gauge Railway (SGR) Project is being undertaken by the Kenyan, Ugandan and Rwanda governments.⁹⁹ It was conceived on the Kenyan part as a flagship project under the Kenya Vision 2030 development agenda. The railway line will start from the port of Mombasa to Kigali through Kampala with a branch line to Juba. The Kenyan part will also have a branch line from Eldoret to Kisumu. The project is expected to revive urban development along the Mombasa-Nairobi highway. The line will have 33 crossing stations and many urban centres expected to develop.¹⁰⁰ The project provided an opportunity for politicians and land cartels in the Ministry of Lands and Provincial Administration to grab the land intended for the project and sold it to unsuspecting buyers who now stand to lose millions of shillings and livelihoods.¹⁰¹

3.3 *Large Scale Agricultural Concessions*

Large scale agricultural projects are an aspect of global land grab. It is estimated that the planet will have a population of about 9.1 billion people in the year 2050 and that to be able to cater for this population, there needs to be an increase in agricultural productivity by 70%.¹⁰² In the year 2008, world food prices soared making food security a serious concern.¹⁰³ And in 2009, the number of those suffering from hunger surpassed the billion mark¹⁰⁴ forcing countries to resort to large-scale, highly mechanised agriculture to meet growing world

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Kanyinke Sena, 'Indigenous Peoples' Rights to Land and Natural Resources, Investment and Land Grabbing: The case of the LAPPSET Corridor, Kenya' <http://www.iwgia.org/images/stories/sections/envir-and-devel/land_grabbing/land_grabbing_seminar/Docs/LAPSET_Presentation.pdf> accessed 16 December 2015.

⁹⁹ Douglas Kauda, 'Against all odds: Mega-Railway Project becomes a Reality' (2014) 1 *Uchukuzi Magazine* 6.

¹⁰⁰ Ibid.

¹⁰¹ Mwaniki Munihe, 'Land grab puts Standard Gauge Railway project in jeopardy' *Standard Digital* (15 June 2014) <<http://www.standardmedia.co.ke/article/2000124819/land-grab-puts-standard-gauge-railway-project-in-jeopardy>> accessed 19 December 2015.

¹⁰² Makutsa (n 29) 12.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

food demands. These events have occasioned a global land grab of monumental scale. Governments are now putting policies in place and allocating money for companies to secure land in foreign countries to grow food to be exported back to the home country.¹⁰⁵ These governments do not want to purchase food in the global market but want to control the product so that they can dictate the prices.¹⁰⁶ In their quest, they target countries where the legal and policy regimes on land are weak and/or are not well implemented.¹⁰⁷ Kenya is one such country. The local population, therefore, is not likely to benefit from the food produced in the land taken away for such projects. Their land is taken and they are somehow expected to have food to stay alive.

The Kenyan government is also engaging in large agricultural projects. Through the National Irrigation Board, the government has established the Galana-Kulalu Food Security Project in Kilifi and Tana River counties. The irrigation scheme is expected to cover an area of 1.2 million acres of land and will be realised in three phases.¹⁰⁸ The project is being undertaken jointly with private investors. The government provides land and related infrastructure while the investors plant the crops and set up factories to process the produce.¹⁰⁹

The communities in the Tana River delta region are dependent on the area for their livelihoods. They cultivate their food crops on the river edges, graze and water their cattle and engage in fishing.¹¹⁰ The Pokomo and the Mijikenda grow rice, maize, cassava, bananas, melons, beans, mango and vegetables mainly for subsistence.¹¹¹ The large scale investment projects threaten their tenure security, and in turn their livelihoods, since they lead to loss of access to land for small scale farmers who need land for subsistence food production and pastoralism, loss of access to natural resources, for example, fisheries

105 Ibid.

106 Ibid.

107 Anseeuw, Wily, Cotula and Taylor (n 16).

108 National Irrigation Board, 'Galana/Kulalu Food Security Project (GKFSP) Brief and Implementation Progress' <<http://www.nib.or.ke/schemes-stations/the-national-economic-food-security-project-galana.html>> accessed 16 December 2015.

109 EAGC-Ratin, 'Galana-Kulalu game changer in Kenya's quest for self-reliance in maize production' <<http://www.ratin.net/assets/uploads/files/053a3-monthly-digest-9.pdf>> accessed 16 December 2015.

110 Tom Bucx, Wim van Driel, Hans de Boer, Susan Graas, Victor Langenberg, Marcel Marchand and Cees van de Guchte, 'Comparative assessment of the vulnerability and resilience of deltas – extended version with 14 deltas – synthesis report' (Delta Alliance Report No. 7, Delft-Wageningen, 2014) 7.

111 Ibid.

and forest products such as honey and water.¹¹² They will not be able to access adequate water for household, farming and livestock use since the large scale projects in the area consume large quantities of water from the Tana River. A large section of the area is being cordoned off by foreign investors fuelling the existing resource-conflicts in the area since the communities around the delta will not access the cordoned-off resources.¹¹³

The livelihoods of these communities are, therefore, destroyed not only by the fact that fewer resources are now available to them but also the conflicts which will arise resulting in deaths and destruction of property.¹¹⁴ Both the farming and pastoralist communities in the delta have to squeeze on the remaining piece of land due to the fact that land is a finite resource. The communities are already fighting over water and grazing land. The farming communities accuse the pastoralists of grazing livestock on their farms.¹¹⁵

Kenya is also losing the biological diversity in the area. The delta is characterised by savannah grasslands, mangrove forests, coastal tropical forests, sand dunes and beaches. It is also home to wildlife including lions, hippos, wild goats, elephants and bird species.¹¹⁶ The agricultural projects will see the end of all these aspects of biodiversity as the area is being cleared to pave way for plantations. The pesticides and other agro-chemicals to be used in the plantations will also negatively affect the biodiversity in the area. The biodiversity not only makes Kenya unique but also contributes to livelihoods through the jobs created by the tourism sector in the economy.

The lack of tenure security of land rights in the area and the larger coastal part of Kenya facilitates the dispossession of the communities and destruction of biodiversity. The historical injustices on land ownership and access in the area are outlined in the National Land Policy.¹¹⁷ The government has failed to act on the recommendations of the policy. This failure is not accidental: it is designed to facilitate the grabbing of individual, communal and public land for these large projects. For example, the failure to enact the Community Land Act on time, as constitutionally prescribed, was intended to create an opportunity for grabbing of community land.

The continued taking of land by the state reduces the land available for farming, grazing and watering livestock by communities who are the largest

¹¹² Makutsa (n 29) 6.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid 27.

¹¹⁶ Ibid.

¹¹⁷ Republic of Kenya, *Sessional Paper No 3 of 2009* (n 1) para 184–193.

producers of food in the country.¹¹⁸ This results in various resource-conflicts leading to deaths and destruction of property. In August to December, 2012, over 157 lives were lost due to the violent clashes between farming and pastoral communities in the Tana River Delta region. Such conflicts are bound to increase with projects being implemented in the area.¹¹⁹

3.4 *Diversion of Land Resources to Meet the Aggressive Global Energy Demands*

Aggressive global energy demand is one of the factors driving the new form of land grabbing. Land resources which are being used for food crop production are being diverted to produce bio-fuel crops. Energy is an essential component for the survival of mankind. It is also one of the main factors that determine the power-politics in the world.¹²⁰ In order to secure their place at the power-table, countries are aggressively amassing energy sources even beyond what they need.¹²¹ This has fuelled global land grab occasioning far-reaching consequences. Land is now needed not just for oil and gas extraction but also for, bio-fuel, oil seed farming and general biomass.¹²² Countries have set out to acquire massive tracts of land around the globe for pursuing these objectives.

In the Tana River Delta area, for example, Bedford Biofuels, a Canadian incorporated multinational company has acquired land for cultivating biofuel crops including *jetropha curcas*. Its website indicates that it has acquired 160,000 ha and is in the process of acquiring another 200,000 ha of land in the coastal region for *jetropha curcas* cultivation.¹²³ There is also G4 Industries, a company registered in England, which intends to grow crambe, castor and sunflower on 28,911 ha in the delta. It expects to lease the land from the management of a group ranch called Wachu ranch. The company deems the occupants of the land as 'squatters' who have no legal claim to the land and, therefore, not entitled to alternative settlement.¹²⁴ This poses a risk to community land rights especially with the weaker protection provided by the Community Land Act.

¹¹⁸ Munguti and Matiku (n 6) 25.

¹¹⁹ Ibid.

¹²⁰ Carlos Pascual, 'The Geopolitics of Energy: From Security to Survival' 1 <http://www.brookings.edu/~media/research/files/papers/2008/1/energy-pascual/01_energy_pascual.pdf> accessed 19 December 2015.

¹²¹ McMichael (n 12) 684.

¹²² Ibid.

¹²³ Makutsa (n 29) 25.

¹²⁴ Ibid.

The land is used for production of energy sources which in turn puts the food security of individuals and communities in Kenya at risk. The use of huge tracts of land is being converted from food production to energy production. Considering that only a small part of the country is arable land, changing the land use from food production means that the food security is at risk.¹²⁵ It should be noted that there are also other competing uses, for example, urbanisation and infrastructure development. The arable land available for food production is, therefore, significantly diminishing. This problem is common to all African countries. Approximately 60% of the African population derives its livelihood and income mainly from small scale farming, livestock and related activities.¹²⁶ The continued allocation of land to energy development is significantly putting at risk the capacity of the many African countries to meet the internal food requirements hence putting livelihoods of their citizens in danger.¹²⁷

Over 10 million Kenyans are suffering from chronic food insecurity.¹²⁸ At any one time, it is estimated that 2 million people need assistance to get access to food and that during heavy rains or floods or drought, the number doubles.¹²⁹ The displacement of small-scale farming by the large scale projects is likely to worsen the situation. Small-scale farming accounts for 75% of the total agricultural produce and 70% of marketed agricultural produce in the country.¹³⁰ Livelihoods will be negatively affected since the food produced in the large agricultural projects will cost more and the distribution is likely to be inadequate.

3.5 *Gazettement of Certain Areas as Protected Areas*

The various laws¹³¹ in the country empower the government to declare certain areas as protected areas. This could be, for example, due to environmental concerns as in the case of the Mau Forest. This is also another manifestation of land grabbing. The declaration of such areas as protected areas is done without due regard to the individuals and communities who derive their livelihoods from such areas. The Ogiek ethnic community, for example, have been forced out of the Mau Forest which has been their habitat for over 150 years. Their

125 Carlos Casabona, Leire Epifanio and Aitziber Ciri3n, *Global Food Security: Ethical and Legal Challenges* (Wageningen Academic 2010) 296.

126 Africa Union, African Development Bank and Economic Commission for Africa (n 54) 17.

127 Ibid.

128 Republic of Kenya, *National Food and Nutrition Security Policy* (2011) 1.

129 Ibid.

130 Kibet (n 51).

131 See, for example, Sections 42 and 54, *Environmental Management and Co-ordination Act* (Act No 8 of 1999).

forceful removal from the forests puts their hunter-and-gatherer-livelihood at risk. Outside the forest, they have to start new and different livelihoods.

The Endorois case offers a classic case of land grabbing by the government through gazettelement of areas as protected. The Centre for Minority Rights Development and Minority Rights Group International filed a complaint against the Government of Kenya before the African Commission on Human and Peoples' Rights. It argued that eviction of the Endorois from their ancestral land around Lake Bogoria, the failure to adequately compensate them, the destruction of their pastoral livelihood and violation of their religious and cultural rights, amounted to violation of free practice of religion,¹³² the right to property,¹³³ the right to take part in the cultural life of a community,¹³⁴ the right of people to freely dispose of their wealth and natural resources¹³⁵ and the right of people to economic, social and cultural development¹³⁶ as provided in the African Charter.¹³⁷ They sought restitution and compensation for loss suffered. The Government was found to have violated their cultural, religious and property rights. However, the government is yet to honour the communication by the Commission clearly showing the government's outright and illegal dispossession of communities without regard for their livelihoods.

4 Conclusion and Way Forward

It is increasingly becoming difficult to address the issue of land grabbing in Africa. As shown by this paper, the menace has clothed itself with legal means, locally and globally, making it unnoticeable in many cases. This paper recommends better priorities by the Kenyan government in that food production should be given priority over energy production by foreigners. It is also necessary to fight for environmental justice by paying due regard to the rights of communities who derive their livelihoods from natural resources. Better laws for the protection of tenure security should be enacted. The Community Land

132 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 8.

133 Ibid art 14.

134 Ibid art 17.

135 Ibid art 21.

136 Ibid art 22.

137 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (African Commission on Human and Peoples' Rights, Communication 276/2003, 4 February 2010) para 1.

Act ought to be amended to better protect communities. A consideration ought to be given to conditions in concessions that a certain percentage of the food produced by foreign nations or multinationals should remain in the country to guarantee the food security and livelihoods of local communities. In relation to mining, oil and gas exploration and extraction activities, there is a need to take into account all aspects of the impact of these activities on the community's livelihood before venturing into them.