

# GOVERNMENT RESTRICTIONS ON THE USE OF PRIVATE LAND



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**Government Restrictions on the Use of Private Land**

## **Introduction**

On the thesis that state control is permanent and therefore crucial and might ensure an effective and sustainable framework for long-term planning and implementation of measures for biodiversity conservation, this study seeks to examine the law and practice of private land use restrictions in Kenya to assess their usefulness for achieving biodiversity conservation outcomes. In the process, a number of questions are explored, including: the legal bases (authorities) for governmental powers to restrict private land use, justification for exercising the government's powers/authorities, legal procedures for exercising the authorities, how the restrictive authorities are exercised in practice and critical issues regarding the authorities including whether or not private property should be absolute and free from government regulation. In considering all of the matters, relevant cases are presented for illustration.

Since land use and restrictions thereof form part of land tenure, it was deemed necessary to explain the kinds of land tenure systems in Kenya to also explain why in Kenya, there are different types of land and related tenure system, what the different types of land and related tenure systems are and the laws which form the basis of the existence of the various types of land and related tenure, which are also the laws that provide various kinds of government authorities to restrict private uses of the lands. All of these considerations necessitate some historical information to provide basis for understanding the development of land law and land tenure systems in Kenya. Therefore, the study begins by presenting the constitutional basis for protection of the right to property in Kenya but having noted that the provisions seek to protect the right rather than declare it for every one, it proceeds to explain not only why this is the case in Kenya, but also historical factors which influenced the kinds of land tenure systems in Kenya and the nature of private use controls that they permitted (which had little concern for biodiversity conservation) until EMCA came into being in 1999.

Attempt has been made to present the rest of the information consecutively in accordance with WRI's Draft Outline, including: powers of the state to regulate land use which explains government's application of both eminent domain and police powers; statutory mechanisms for government restriction of private land use presenting the various statutes authorizing various mechanisms which the government applies to restrict land use in the process of which purpose and intent of each form of land use restriction is explained; justification for exercising the authorities explaining when each may be exercised; how to determine that a proposed restriction is a justified use of government authority; legal procedures for exercising the authorities including responsible officials and explanations on verification and monitoring; the practice of exercising government authorities to restrict private land use; relevant court rulings on government's authority to restrict private land use and recommendations.

### **1. Constitutional foundations of the right to property and the importance of its regulation for wider public good**

In Kenya, the right to own and the related right to use land are recognized in the Constitution, specifically in section 70(c) which states, in part, that every person in Kenya is entitled to protection of property and from deprivation of property without compensation. Section 70 of the Constitution which lays the basis for recognition of the right to own and use land is complemented by section 75 of the same constitution which declares that no property of any description (including land) shall be taken possession of compulsorily and no interest in or right over property of any description shall be compulsorily acquired except under conditions specified in section 75 (1) (a)-(c). Section 70(c) of the Constitution and its complementary section 75 (1) and (2) constitute the constitutional basis for recognition of the right to own and use land and other property in Kenya. With regard to land, the right to own and use property is further asserted by statutes, such as the Registered Land Act, Chapter 300 whose section 28 among others, affirm registered owner's indefeasible rights to land. The right has been consistently affirmed in many court cases, which also assert that in case of derogation through compulsory acquisition, prompt and just

compensation must be paid. That was the decision in, among others, *Kanini Farm Ltd v Commissioner of Lands Lands*<sup>1</sup> in which the court also held that in case the right to own land has to be overridden by the government's power to compulsorily acquire, the process of acquisition must fully comply with sections 70 and 75 of the Constitution as well as provisions of the Land Acquisition Act. Regarding details of compulsory acquisition powers expressed in the Land Acquisition Act, the Constitution, in section 75(7) makes saving provisions to the effect that:

“Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the act in question makes provision for the compulsory taking of possession of property or the compulsory acquisition of any interest in or right over property...”

Most importantly, it can be understood that sections 70(c) and 75 (1) ad (2) of the Kenya constitution do not present the right to property as an absolute right. Instances of derogation of the right to property specified in section 75 (1) – (7) relate specifically to compulsory acquisition rather than restriction of use. However, a careful analysis of the rider to section 70 (c) indicates a saving of governmental powers to limit (or restrict) the right to property in the interest of the public. It provides that

“the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

The limitation or restriction envisaged has been effected through a number of Acts of Parliament that are considered later in this work.

It is also noted that both provisions of sections 70 and 75 of the Kenya Constitution are not as explicit on the right to own property as, for example, section 26 of the Constitution of Uganda which assert that “Every person has a right to own property individually or in association with others.” Kenya's constitutional provisions for the right to own land and other property appear to protect the right rather than declare it for every one or every Kenyan for which may reflect past colonial history of forceful and uncompensated land acquisitions. The following elaboration is instructive on factors underlying the current land tenure systems which, by extension, and in practice, affect government land use restrictions and their usefulness, or lack of it for achieving biodiversity conservation outcomes. It necessitates brief background information on the evolution of land tenure systems in Kenya.

### **Historical Background to the Current Land Tenure Systems in Kenya**

Before the commencement of British colonization of Kenya, each of the various tribes in the region now Kenya communally occupied distinct territories and their major land uses were either crop cultivation (for agrarian communities) or livestock raising (for pastoral communities). The common pattern of land use comprised concentration of either cultivation or livestock raising on one part of land for a period of time, followed by movement to another or other part of land to allow already used portions to regenerate. For pastoralists, movement was often extended over long distances. Against this backdrop, the British colonial administration officially assumed jurisdiction over Kenya by declaring it a protectorate in 1895 for a variety of reasons, including interest in establishing trade routes to Uganda. Access to Uganda would be secured through establishment of the Kenya-Uganda railway, which required huge financing and the Kenya colony had to be economically productive to generate finances (through taxation, e.t.c) for railway construction and to fund the colonial British administration. How would the British colonial administration generate finances from Kenya?

The British colonial administration deemed it necessary to undertake commercial agricultural activities in Kenya as a means to generate funds. For this reason, British nationals and to a smaller extent, nationals of other origins including the Dutch were encouraged to settle in Kenya for the purpose of undertaking commercial agricultural activities, mainly farming. Therefore, the need for better acquisition of land became paramount. To make the Kenya colony economically productive, it was necessary to secure incoming settlers' right to productive land, but the declaration of a protectorate status over Kenya had not given the colonial administrators authority to deal with land, meaning that without further measures, the administration and its invited settlers could only acquire land from natives through conquest, agreements and treaty or sale, all of which proved inefficient means of acquiring land. The hurdle was overcome, first by extension of the Indian Lands Acquisition Act of 1894 to East Africa Protectorate (including Kenya) in 1899. This piece of foreign land legislation had the effect of converting all land in Kenya that had not been appropriated by individuals or by the colonial administration into "crown land", meaning land belonging to Her Majesty, the Queen of England, which she could grant to individuals in leaseholds for a term of years or in fee simple.<sup>2</sup> However, there was no clarity on what constituted "crown land" for purposes of acquisition and use by the growing number of settlers and it was limited in quantity for the desired ends. In response and to expand the scope of what constituted crown land, an East Africa Order in Council was passed in 1901 in respect of land to define crown land, which thereby, became public land to include all land under the control of the Queen through agreement, treaty or convention and all other lands that she was to acquire,<sup>3</sup> but this effort also failed to effectively address the settler need for land.

On the basis of perception that natives did not own land and therefore had no land rights and could not sell land to the settlers and due to settler pressure for more land, a Crown Lands Ordinance was subsequently passed in 1902 which vested power in the British High Commissioner to Kenya protectorate both to acquire land, including land in native settlements and villages and to sell land in freeholds to any settler in lots not exceeding 1000 hectares.<sup>4</sup> In the process, there developed a new concept of land ownership and use, with the state asserting itself as a political entity owning land in Kenya and having the right to grant portions of it to individual users. In some cases, the state granted rights over land occupied by natives to settlers where such land was perceived to be owned by it, the state. These developments also led to the confinement of natives to "native reserves," often of low agricultural potential, to pave way for settler occupation of agriculturally productive land, keep natives away from settler farms and reduce native land use to facilitate their provision of labour to settlers.<sup>5</sup> The process of confining natives to native reserves gave rise to two interesting developments with critical implications for land use and biodiversity conservation. It was the genesis of another system of land tenure in Kenya. It also resulted in both population and production pressures on land which had negative implications for biodiversity conservation, especially because native reserves consisted of large numbers of people concentrated in small land areas while allowing intensive and extensive extraction of land resources in the settler farms.

In summary, the situation regarding land ownership and use remained as explained above as the country moved towards independence in 1963. The critical point about independence which has a bearing on existing constitutional provisions for protection of property rights is that Kenya's independence was a negotiated process between the British colonial administration and a group of native elites in which there was a strong expectation that the colonial system including its system of land ownership and use already established would continue, in order to allow settlers to adapt to changed political circumstances.<sup>6</sup> Most importantly, protection of property rights (already acquired by settlers) was considered to be key to the conclusion of independence negotiations held between 1960 and 1962.<sup>7</sup> Interestingly, negotiators of the constitution perceived that land rights had already been acquired (by settlers) and only needed constitutional protection. This notion seems to have influenced the crafting of the constitutional protection of the right to property in a way that it protects the right (assumed to be already acquired) rather than declare it for every one. However, the reality was that there were large numbers of Africans who had been rendered landless as a result of acquisition of their land through processes described above. The problem of landlessness was made worse by population increase in the designated native reserves. Moreover, in

the absence of minerals and a strong industrial base, the natives also needed land to form the basis of economy of the newly independent state. These were the driving factors behind the land tenure reforms undertaken soon after independence, which were to see the introduction of not one but three land tenure regimes in Kenya. The foregoing factors also explain the sensitivity of land ownership and use issues in Kenya, which has been made worse by the absence of both a national welfare system and other forms of wealth, such as minerals. The key point is that the tenure reforms which introduced the current land ownership and use systems, especially individual rights to land in Kenya, were not informed by any notions of biodiversity conservation. Also, although the fact was ignored, notions of customary land tenure continued to operate among the natives even after a new tenure system mainly in favour of the British Crown and settlers was introduced by the British. These factors gave rise to the current land tenure system which comprises: government land (formerly crown land), trust land (formerly native reserves) and customary or family land.

### **The Existing Categories of Land and Related Land Tenure Systems in Kenya**

This study is concerned about government restrictions on the use of private land. Use of land forms part of the bundle of private land tenure regime in Kenya, which exists alongside other tenure regimes, namely: public land and trust land. The latter regimes allow for private acquisition of land (as leaseholds or freeholds) from public and / or trust land. Since the origin of title to land, including the manner of acquisition may affect use rights and are often intertwined with it and certain restrictions on the use of private land have basis on the origin of title to land, from public or trust land, there is need for clarity on the three main categories of land and related tenure regimes in Kenya to provide basis for understanding how private land ownership may arise from both public and trust land, before focusing on government restrictions on the use of private land.

### **Land Tenure Defined**

Land tenure refers to a right to hold land together with related terms and conditions under which the right is acquired, held, and transferred or transmitted. Therefore, land tenure denotes the quantum of property rights that a given society has decided to allow individuals or groups thereof to hold, and the conditions under which those rights are to be exercised. Since it determines access to land and land-based resources, land tenure becomes “a critical variable in the management and conservation of the environment.”<sup>8</sup> Further, the importance of tenure in resource use and conservation explains why the state retains powers to regulate private land use or, in certain circumstances, entirely abrogate property rights in land in the interests of environmental conservation. Therefore, in an ideal situation, a land tenure system ought to establish a control system for the utilization of land-based resource under the tenure system in question.

There are three distinct categories of land tenure systems in Kenya, namely: public tenure, community tenure and individual tenure, with specified type of land under each tenure system. Public tenure comprises public land, or land owned by the government. Community tenure comprises communally owned land or trust land, which is land that is communally owned by certain tribes in Kenya. Private land tenure comprises land privately owned by individuals, groups of individuals and private corporate persons. Each of the three main categories of land attract a bundle of rights including rights to own, use and benefit from resources therein, under a particular system of law and authority. In each case, ownership rights are accompanied by obligations, which, in some cases, include environmental conservation, (with or without biodiversity conservation specifications). As alluded to in the preceding sections of this work, the three categories of land comprised in the respective tenure regimes do not remain static. While exercise of the bundle of rights in public land often gives rise to transfer of land from the public to the private domain and both ownership and use constraints largely result into conversion of communally owned land into privately owned land, there are also public mechanisms for transferring hitherto private land and communally owned land or trust land into the public domain.

### **Public Land and Related Public Land Tenure**

Public land tenure refers to a tenure regime in which the government is the owner of land and enjoys attendant tenure-related rights. As already explained, consideration of public or government land is necessitated by the fact that tenure rights under this regime often result in transfer of land from the public to the private domain, which forms the basis of this study.

In Kenya, public land tenure regime originated from the Crown Lands Ordinance of 1902 already discussed, which declared that all “waste and unoccupied land” in the Kenya protectorate was “crown land.”<sup>9</sup> A 1915 amendment to this ordinance redefined crown lands to include land in actual occupation by “native” Kenyans. Subsequently, land owned by natives were excised from crown land and vested in a Native Lands Trust Board established by the Native Lands Trust Ordinance of 1938. At independence, these native lands became trust lands and were vested in the respective county councils (local authorities) to hold them in trust for the benefit of all communities residing thereon.

At independence, crown land became government land, and was vested in the President, whom the constitution empowered to make grants or dispositions of any estates, interests or rights in or over unalienated government land. Most of the President’s powers in this regard have been delegated to the Commissioner of Lands. Today, public land tenure is embodied in the Government Lands Act Cap. 280 of the laws of Kenya, which also constitutes the principal framework for the conservation of biodiversity established by the Forests Act and the Wildlife (Conservation and Management) Act<sup>10</sup> but this study is concerned with restriction of private land use. Therefore, the Forests and Wildlife Acts do not merit further consideration here.

The Government Lands Act (hereinafter, the GLA) was derived from the colonial Crown Lands Ordinance of 1915 with only minimal amendments. It is both a substantive and procedural statute<sup>11</sup> with respect to government lands and provides the administration and conveyance of government lands. Under sections 2 of the GLA, read together with sections 204 and 205 of the Constitution, schedule 2 of the Kenya Independence Order -in- Council of 1963, and sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act of 1964, government land comprises (or did comprise, before extensive alienations):

- (i) all estates, interests or rights over land situated in the Nairobi area that were vested in the Queen or governor during the colonial period;
- (ii) lands registered in the name of the disbanded Trust Lands Board;
- (iii) land situated in the provinces that were designated by the governor as government land all estates, interests and rights in, or over land situated in a former region that immediately before the 22<sup>nd</sup> of October 1964 were vested in the former provinces;
- (iv) all estates and rights in, or over land that immediately before 12<sup>th</sup> December 1964 were vested in the queen of England or the Governor General on behalf of the government of Kenya;
- (v) lands formerly registered in the name of the Trust Land Board under the Land Registration (Special Areas) Ordinance;
- (vi) all movable and immovable property and all lands that were, before 12<sup>th</sup> December 1964 held by the Governor General, the government of Kenya, or by any person in trust for them;
- (vii) all immovable property acquired for the use of regions (provinces) and former regions;
- (viii) remnants of land in the City of Nairobi and Mombasa that were acquired for town planning purposes but were never used therefore;<sup>12</sup>
- (ix) forest reserves and other government land reserves;
- (x) lands belonging to the government within townships and other urban centers (for example, chief’s offices and offices of district and provincial officers);

- (xi) alienated government lands (for example, lands in the City of Nairobi that have been leased for 999 years) with reversionary interest in the state; and
- (xii) national parks.<sup>13</sup>

The quantum of Government land excludes land that was formerly government land but has already been conveyed to private persons, unless conveyance is of a lease with a reversionary interest in the state.

The key point in this section is that the GLA, which is the primary law providing for the administration as well as the alienation of government lands, permits conveyance or transfer of interests in government land to private persons including individuals in freeholds, leaseholds for a term of years and in the form of licenses. The GLA does not prescribe the circumstances under which grants may be made but authorizes presidential powers to be delegated to the Commissioner of Lands such that either the president in person or through the Commissioner may make land grants. Section 3 of the GLA permits the President to grant or otherwise dispose of government land and any interest therein (leaseholds, freeholds, e.t.c) to any person. The President may exercise the power personally or through the Commissioner of Lands, in certain cases. Also, under Section 9 of the GLA, the Commissioner of Lands is permitted (on behalf of the President) to subdivide land in townships owned by the government and to allot them to private persons in leaseholds not exceeding 99 years (section 10) for construction of commercial or residential buildings. Further, under section 35 of the GLA, government land may be leased or licensed to any person for “special purposes.” In addition, section 19 of the GLA authorizes the Commissioner of Land to alienate the government’s agricultural lands and convey them to private persons as leaseholds or freeholds. The various restrictions permitted by the GLA are considered in details in subsequent sections. Here, it is emphasized that the permissive provisions of the GLA have resulted in the conversion of government land to private land (town plots and agricultural lands including state farms), either as freeholds or leaseholds. It is also emphasized that use controls forming part of the GLA’s public land tenure regime follow government land transfers to private individuals and groups of individuals in ways that may or may not benefit biodiversity conservation. Depending on the nature of land (town plot or agricultural land) and the nature of interest therein transferred (leasehold or freehold), either the Registration of Titles Act or the Registered Land Act may apply, in which case, use restrictions in these other statutes may also apply, as explained in subsequent sections.

### **Trust Land and Related Customary or Community Tenure**

The trust land regime represents private property for group members. Under this regime, a set of clearly defined rights and obligations over land and land-based resources are held by a defined group of users, which may be an ethnic community or a clan (a smaller communal entity).

Before the colonial Crown Lands Ordinance of 1902 came into being, indigenous African communities owned, managed and passed land to succeeding generations on the basis of traditional customs which, invariably, recognized a whole community as the owner of land, with each family and adult family members having access and use rights. However, the Crown Lands Ordinance of 1902 declared “all waste and unoccupied land” in the Kenya protectorate, Crown land. In 1915, the Crown Lands Ordinance re-defined and in effect, expanded the concept of “Crown land” to include land that was in actual occupation by African tribes. Later in 1938, the Crown Lands (Amendment) Ordinance of the same year excised native reserves- areas occupied by African tribes from Crown lands, thereby designating them trust lands. These were subsequently invested in an independent Native Lands Trust Board (NLTB) by the Native Lands Trust Ordinance of 1938 (It is not clear whether the lands were registered in the name of the NLTB). An examination of the First Schedule to the Trust Land Lands Act, as in force on 31<sup>st</sup> May 1963 (The Trust Lands Ordinance of 1963), which established the boundaries of trust lands (then native reserves) reveal that the boundaries of trust land entrusted with the respective county councils were established along tribal lines such that the lands comprised the Kikuyu land unit,

The Maasai land unit, the Kamba land unit, Nandi land unit, Kavirondo land unit, Kipsigis land unit, North Pokomo land unit, the Coast land unit, and the Meru land unit and so on.

At independence, the NLTB was abolished and what comprised trust lands by that time vested in the County Councils within whose jurisdiction the lands were located to hold the lands for the use and benefit of the ordinary residents therein.<sup>14</sup>

The legal regime governing trust lands fall into two categories, one dealing with the management of trust lands and the other, with disposal or alienation of trust lands at which point, the land ceases to be trust land and becomes either government land or land privately owned. The substantive and procedural law governing trust lands are primarily the Constitution (sections 114 – 120), the Trust Lands Act, the Land Consolidation Act, the Land Adjudication Act, the Registered Land Act and the Group Representatives Act. The laws define trust lands and provide for their administration, management, alienation (disposal) and registration. What, then, is the process leading to the conversion of trust land (which is communally owned) into private land?

The first indication that trust land can be converted into private land appear in section 116 of the Constitution which permits registration of trust land or more specifically, portions thereof to private individuals who thereby, acquire private titles and interests to land that was formerly communally owned. The relevant section provides that:

“A county council may, in such manner, and subject to such condition as may be prescribed by or under an Act of parliament, request that any law to which this section applies shall apply to an area of trust land vested in that county council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council, it shall cease to be trust land.”

In effect, the constitutional provisions empower or more appropriately, empowered county councils that were vested with trust lands with power to cause the lands to be conveyed to private owners. This provision appears to have been intended to facilitate land tenure reforms initiated by the colonial government from the early 1950s and continued by the independent government as a way to redress imbalances in land ownership, use and related tenure. Land registration in trust land areas started in 1956. To facilitate the process, the Land Adjudication Act, Cap. 284 (formerly Land Adjudication Ordinance) was passed to specifically authorize ascertainment of interest in trust land to be alienated to private individuals, central government or local government). The Land Consolidation Act was also passed to facilitate recording of existing rights. In addition, the Registered Land Act, Cap. 300 was passed to regulate registration and issuance of titles to lands that were formerly part of trust lands to private individuals and also define the quantum of absolute ownership and use rights conferred thereby. Upon adjudication and registration, trust lands ceased to be trust lands and became private land (they also become, in a few cases, government land or local authority land).

The process of adjudication, consolidation and registration of trust lands in the names of private owners has been completed in most parts of the country with agricultural potential. In areas with low agricultural potential where pastoralism is predominant, a slightly different registration system with respect to trust land was adopted under the regime of the Land (Group Representatives) Act. Under this regime, communal lands in pastoral areas that were trust lands were registered into group ranches (comprising of smaller units of land than the larger trust lands) in the names of three to ten members of each of the groups (Maasais and other pastoral communities) for the benefit of all members. In recent years, group ranches have also been subjected subdivision, registration and issuance of freehold titles to private individual members, usually heads of families, especially under the Registered Land Act, Cap. 300. Once land forming part of trust land is registered in the name of an individual, the individual acquires the right

to, among other things, sell the land, subject to the rights and interests of other family members. In that process, ownership of land that has been privatized, so to speak, circulates among private land owners.

Through the process of registration, almost all former group ranches have been converted into privately owned land.<sup>15</sup> Currently, there is only very little left of former trust lands. Nevertheless, besides the constitution which provides for the existence of this kind of land, trust lands are, in all respects, subject to “the general law that may, from time to time be in force,” unless express provisions are made in the statutes to the contrary.<sup>16</sup> This implies that trust lands are also subject to Common Law whose significance in terms of regulation of private land use shall be explained shortly, but with respect to privately owned land.

The little that is left of trust lands in group ranches represents private property for group members, to the exclusion of nonmembers who can neither use the resource nor make decisions over it. Apart from the exclusion of non-members, the trust land regime and its customary tenure (with group members passing use rights to succeeding generations) do not seem to have or foster any regulatory mechanism that might provide basis for land use restrictions. Any meaningful use restrictions would have to be developed and implemented by county councils as permitted by the Local Government Act, the physical Planning Act and other relevant laws. However, subsequent discussions on restriction on private land use is focused on land privately owned by individuals and private corporate persons and not on land in group ranches because what remains of such land is too minimal. In any case, local authority land use controls and Common Law restrictions that are considered apply to these lands as well.

### **Privately Owned Land and Related Tenure Regime**

Government restriction on the use of private land is the core subject of this study. Therefore, it was necessary to explain how private persons (including individuals) and groups of private individuals come to privately own land in Kenya. From the preceding elaborations, it can be understood that transfer and other conveyance processes permitted over government land, customary land or trust land and groups ranches give rise to transfer of land into private ownership. Indeed, as explained, the process of privatization of land ownership started during the colonial days with the British administrator allocating large parcels of land (then Crown land) to settler farmers as a way to make land and related resources economically productive.

Regarding land customarily owned, which is formerly trust land, including trust land subsequently registered as group ranches, the main interest usually conveyed is freehold, under the Registered Land Act. The process of conveyance of government land permitted by the GLA already explained also results in private ownership of land by transferring land previously owned by the government (public land) into private ownership or domain. As already explained, the GLA allows the President in person and the Commissioner of Lands to effect conveyance or more specifically, allotment or grants of government’s urban plots and agricultural lands to private persons. The process results in the transfer of either leasehold interests in government lands, especially in urban areas, usually for a fixed term of 99 years and freehold interests, especially over land in agricultural areas.

Once land is acquired from the government as explained, with or without any consideration, beneficiaries become private owners of urban plots over which they have leasehold interests or agricultural land over which they may have either leasehold or freehold interests. In general, all persons acquiring land as grantees or allottees of the government become private owners of land as lessee or grantees with the right to dispose of the land through sale, lease or mortgage, unless such further transactions are prohibited by instruments of allotment, lease or grant. Those acquiring land from former trust land and group ranches as family beneficiaries or as former members of group ranches also become private owners of land with a bundle of rights, including the right to further convey or transfer the land or plot through sale, exchange,

inheritance or as a gift. Through such processes, other members of the Kenyan society become private owners of land, acquiring either freehold or leasehold interests.

Individual ownership of land and land-based resources is considered to be the strongest form of land ownership in Kenya. It is justified on the basis that private ownership of land provides incentive for productive use. It is argued that the possibility of personal gain fosters sound management of resources. Therefore, individual ownership is said to be the most rational, efficient and productive way of managing resources. However, that has not always been true in Kenya. There are major shortcomings with private land ownership because, among other things, private land ownership and the legal regime that fosters it ignores the wider social and ecological implications of resource utilization. It has been observed that individual ownership of land emphasizes short-term economic interests at the expense of wider and long-term social and ecological interests. In Kenya, individual tenure has also had negative implications for indigenous conservation practices which were based on indigenous tenure. Privatization of group ranches offers the clearest illustration in this regard.

The Group (Land Representatives) Act which provides for registration of communal group owners of land especially in pastoral areas was amended to allow subdivision and registration of former group ranches in the names of individual members. The process was guided by the philosophy that individualization of ownership by pastoralists would engender more productive use of land. However, individual tenure which was thought to be more responsive to market forces has not only contributed to the neglect of customary land management practices; it has also contributed to land and other ecological resource degradation, especially on lands adjacent to protected wildlife areas. Moreover, it has given rise to landlessness among former group ranch members as beneficiaries of former group ranches exercise their absolute ownership rights of sale and transfer to new owners, including non-members of their communities without community ties or concerns. These matters lead to the conclusion that private land ownership requires official regulation in the interest of society as a whole, for purposes of subsistence and sustainable development.

### **Powers of the State to Regulate Land Use**

In Kenya, land ownership and use are critical to sustenance and development of individuals and communities especially because the country lacks other forms of wealth, such as oil and a strong industrial base. The absence of other forms of wealth than land in Kenya raise the potential for intensive and extensive private utilization of land for land-based activities that the climatic factors and other local circumstances can support and sustain, such as agriculture and construction of buildings, especially for residential and commercial purposes. In many cases, such uses have actually and potentially generated negative impacts on neighbouring property and the surrounding environments, with far-reaching effects on the public and public interest. On the other hand, increasing government functions, especially those that are developmental in nature, such as the construction of public office buildings and roads, require land and yet land is increasingly becoming a scarce resource for both public and private purposes. For these reasons, the state may restrict private land use by taking it from a private owner and reallocating it to a public use or public uses, or leave property in private ownership but regulate its use. With regard to these two approaches, there are two legally-recognized bases for government regulation of the use of private land. The first is through eminent domain. The second is through the exercise of police power.

### **The Exercise of Governmental Power of Eminent Domain**

This is the power of the state or its assigns to acquire private property for public purposes, subject to the prompt payment of compensation. Whenever the state exercises this power, it forces involuntary transfers of property from private owners to itself or its assigns. The power of eminent domain is derived from the feudal notion that as the sovereign, the state holds the radical title to all land within its territory. In Kenya, this power is embodied in the constitution, which requires that private property can only be acquired compulsorily for public use (sections 70 & 75 of the constitution). Further, the constitution requires that

such public use must be weighed against the hardship that may be caused to the land owner. Finally the constitution requires that the acquisition must be accompanied by prompt payment of adequate compensation. The constitution also provides for a modified form of acquisition in the case of trust land, which is referred to as “setting apart” and may be activated by the President or local authorities. The rules governing the setting apart of trust land and the payment of compensation to affected residents are contained in the Trust Land Act. All other cases of compulsory acquisition are regulated by the Land Acquisition Act and the constitution. The power of compulsory acquisition thus provides the state with a useful instrument for the conservation of environmental resources, especially in cases requiring preservation of land or environmental media thereon, such as forests and wetlands, which would be in the public interest.

### **Exercise of Police Power of the State**

This is the power of the state to regulate land use in the public interest in order to secure proper resource utilization and management. The exercise of police power is also an attribute of the sovereignty of the state. In relation to restriction of property use, the exercise of this power is expressed in section 70 (c) of the constitution which specifies that the rights set out in sections 70(a) & (b) are guaranteed subject to limitations to such limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Currently, the exercise of police power that would limit private property use rights (among other effects) constitutes the widest and most commonly used basis and approach for government restriction of private land use to meet a variety of objectives. Unlike compulsory acquisition, the exercise of police power over private land does not extinguish property rights but merely regulates their use in order to vindicate public rights deemed to be overriding, such as the right to a clean and a healthy environment (section 3 of the Environmental Management and Coordination Act (EMCA) of 1999. Also, the state is not obligated to pay compensation whenever it exercises this power, the rationale being that it is simply requiring the land owner to stop causing harm to the public or to utilize private property in a manner that allows realization of societal goals and aspirations expressed in statute law. Therefore, while compensation is required when the state compulsorily acquires private land, no compensation is payable when the government, on behalf of the public, exercises police power in the interest of the public, including ecologically-related interests.

In addition to the Convention on Biological Diversity (CBD) to which Kenya is a party and agreements made prior to it such as the African Convention on Conservation of Flora and Fauna, ecologically-related interests, including biodiversity conservation, are espoused and/or expressed in a number of acts of Parliament, including those that specifically seek to achieve biodiversity conservation objectives. A number of acts of Parliament express requirements for one or more of the three components of biological diversity (species diversity, genetic diversity and ecosystem diversity), with or without making conservation of biological diversity the focus of the statute. Conservation of biodiversity is also part of the wider environmental conservation which a number of statutes seek to achieve in Kenya. In this regard, the relevant statutes include: The Wildlife Management and Coordination Act, the Agriculture Act, the Forests Act of 2005, the Water Act of 2002, EMCA and a number of subsidiary regulations, including Biodiversity Regulations developed by the National environment Management Authority (NEMA).<sup>17</sup>

In order to meet environment conservation (including conservation of biological diversity), sustainable development and socio-economic objectives, the government of Kenya exercises police power to restrict private land use with focus on various aspects of land use, namely: the type of use, for example whether land shall be used for agricultural, industrial or residential purposes; the density of use manifested in concerns over the total area of a particular piece or plot of land covered by a building or buildings on it; when and how to use land resources largely through chiefs’ compulsive orders; and the effect of a particular use of land on the surrounding environment, including effects on aesthetic value thereof. Government restriction of these aspects of land use has been effected through a variety of

mechanisms which, in many cases, determine whether or not land shall be used at all as desired by a land owner, the use or uses to which land may be put and the scope or extent of permitted use. Mechanisms so far applied to restrict private land use as authorized by the respective laws include:

- (a) imposition of restrictive covenants on private land titles under the GLA;
- (b) direct statutory restrictions on the use and development of agricultural land under the RLA;
- (c) chiefs' compulsive orders under the Chief's Act;
- (d) Restriction of subdivision of land under the Local Government Act, Cap. 265;
- (e) application of zoning regulations under the Physical Planning Act and related statutes;
- (f) development and application of land use plans;
- (g) application of environmental impact assessment and other mechanisms under EMCA;
- (h) restrictions on dealings with family land or land customarily held under the Registered Land Act, Chapter 300 and the related Land Control Act, Chapter 302 and
- (i) Common Law Restrictions of private land use.

All these mechanisms find government authorization or authority in many pieces of legislation whose consideration illuminate the nature and scope of government restriction of private land use in the country. The following is a detailed consideration and analysis of the Statutory Mechanisms for Government Restriction of Private Land Use. Objectives or purposes of the government's use restrictions are included in the analyses.

### **Land Use Restrictions Authorized by the Government Land Act**

#### *Restrictive covenants*

The statute that authorizes the government to restrict private land use through imposition of restrictive covenants is the Government Lands Act (GLA). Although the Act applies to government lands, such land can and has been widely transferred to private owners through processes already explained in previous discussions. The law permits the government to encumber town plots and agricultural lands alienated and transferred to private persons through the imposition of express and implied restrictive covenants, which often appear as special conditions in land titles. In this regard, there are two types of covenants; those restricting development and those restricting alienation of the land by the beneficiary. In the case of leaseholds, the government, under section 39(2) of the GLA, prohibits holders from undertaking any other development than that specified in the lease. Such specifications usually appear in a private holders' certificates of lease as special conditions. For example, certificates of lease and grants of government lands usually contain conditions which state, among others, that:

1. "The land and buildings shall only be used for residential purposes."
2. "The building shall not cover more than fifty per centum of the area if the land or such lesser area as may be laid down by the local authority in its by-laws"

All such conditions usually appear, among others, in grants and certificates of titles issued by the government.

In addition, the GLA authorize the government to restrict development of land leased by the government to private persons for agricultural purposes in section 32 of the GLA, read together with the First Schedule to the Act. In effect, the person who, by virtue of government allotment or grant, becomes a private lessee or owner of agricultural land is restricted to a period of three years in terms time within which to undertake the nature of improvements permitted, such as construction of farm house, installation of machinery and sinking of borehole and the time within which to effect improvements for purposes of farming. The provisions of section 32 are complemented by those of section 33 which require private owners of farms leased or granted by the government to maintain developments that they have undertaken

on farm lands and do not exceed the value of developments on the lands permitted by the government. There is no clear objective of the restriction but it would appear that they are intended to ensure that non-farming activities do not take place on land leased or granted for agricultural purposes and that installations and developments that are not compatible with agriculture are not undertaken on land intended for agricultural purposes. The restriction does not seem to have been intended to serve biodiversity objectives.

Further, the GLA, in sections 34 and 39, authorize the government to restrict private holders of leases and freeholds over government land (town plots and farm lands) in terms of subdivision, assignment, subletting or transfer. Private holders of leasehold and freehold interests in formerly government lands are prohibited from subdividing, assigning, subletting or transferring the property without first obtaining consent of the Commissioner of Lands. A certificate of title or a grant made out of government land may, for example, state, among other things, that:

“The grantee shall not sell, transfer, sublet, charge or part with possession of the land or any part thereof without the prior written consent of the Commissioner of Lands.”

This prohibition does not serve any useful purpose because in practice, the Commissioner’s consent to transfer or to do any of the other prohibited acts is usually sought just as a matter of formality. In many cases, land grants and leases have been further sold, leased or subdivided with the Commissioner’s consent. Nevertheless, in the event that the restrictive covenants are breached, section 77 authorizes the government to repossess the land and the private leaseholder or freeholder to forfeit the same.

The purposes and intent of the government’s authorized land use restrictions can be discerned or implied from the Preamble to the GLA and from analysis of the provisions of the Act. The Preamble states that the purpose of the GLA is to regulate the leasing and other disposal of government lands and to make provisions for other (unspecified) purposes. Other purposes envisaged by the Act might be implied from sections 81 and 82 of the Act which contain the only restrictions in the GLA that might have biodiversity connections. The sections prohibit conveyance, lease or licence under the GLA that might confer any right to the foreshore, any spring, river, lake or stream. However, lease and free holders are entitled to such water as they may require for domestic purposes in connection with their land.

### **The Agriculture Act and Statutory Restrictions on the Use and Development of Agricultural Land**

The Agriculture Act, Chapter 318 of the Laws of Kenya, is another statute that authorizes the government to restrict the use and development of agricultural land, which comprises much of the land in the country side where land owned and/or utilized as part of family land and transmitted customarily. The Act also restricts use of agricultural land leased or granted by the government out of government land.

The Agriculture Act and rules made thereunder authorize the government to restrict private use of agricultural land in a number of ways, namely: by requiring land owners to implement land preservation measures (sections 48-62), by requiring land owners to comply with land development orders and schemes made thereunder (sections 64-75); by requiring farmers to plant essential crops and by zoning privately owned agricultural land for purposes of cultivation of essential crops (sections 100-108 and section 186A).

#### *Use Restrictions Through Land Preservation Measures*

Sections 48, 50 and 51 of the Act authorize the Director of Agriculture and the Minister of Agriculture, whenever they deem necessary, to issue land preservation orders and make any rules necessary therefore: prohibiting or controlling clearing or breaking land for cultivation; prohibiting grazing or watering

livestock on a particular land; prohibiting or controlling burning or destruction of vegetation; for protection of land against storms, winds, rolling stones, floods and landslides; for protection of land against soil erosion; and for maintaining water within one's land Further, the Minister for Agriculture may act in person or through the Director of Agriculture to issue land preservation orders requiring land owners to: undertake afforestation and reforestation of their land; protect water catchment areas on their land; undertake drainage works on their land; to destroy or uproot any vegetation planted on their land in contravention of land preservation orders without compensation; and prohibiting the use of the land for agricultural purposes altogether (section 48 (1)(b)-(e). Government orders requiring the specified actions have the effect of restricting private land owners from utilizing their land for desired agricultural activities and instead, undertaking preservation measures on their land as ordered. Failure to comply with a land preservation order attracts a penalty under section 60 of the Act.

#### *Restrictions through land development orders, programmes and schemes*

Further, the Agriculture Act authorizes the government to restrict private development of agricultural land through the issuance of land development orders, programmes and schemes to be executed by land owners on their land. These include requirement that a land owner implements a particular farming practice on his land or place certain things on the land as required. Failure to comply with a land development order attracts a penalty as authorized by section 73 of the Act. Further, Basic Land Usage Rules Made under the Agriculture Act prohibit land owners whose land abut water courses from cultivating, destroying soil, cutting down vegetation or depasturing livestock on any part of their land which lies within two metres of the watercourse (Regulation 6). There is, also, Land Utilization Rules which empower District Agricultural Committees to prevent excessive crop cultivation (Rule 5). These actions also have the effect of restricting a land owner's use of his land.

#### *Restrictions through requirement for cultivation of essential crops*

In addition, the government may restrict private use of land by requiring a land owner to cultivate what the government considers to be "essential crops." Where the government considers that certain crops are essential, sections 100 – 103 authorizes it to compel land owners to cultivate the crops on the basis of crop cultivation programmes prepared for that purposes, at the risk of penalty for non-compliance. The specified objective of provisions for cultivation of essential crops is to fulfill requirements of Kenya's exports and ensure good land management.

#### *Specific Purpose and Intend of Government Restriction of Use and Development of Agricultural Land*

The purpose and intent of government's far-reaching restrictions authorized by the Agriculture Act are specified in the Preamble to the Act and in some of the substantive provisions of the Act. The Preamble states that the Agriculture Act is intended to, among other things, "...provide for the conservation of the soil and its fertility... in accordance with the accepted practices of good land management and good husbandry." Further, section 48 which provides for the issuance of the order specifies that such orders shall be made "Whenever the Minister considers it necessary or expedient to do so for the purposes of conservation of the soil, or the prevention of the adverse effects of soil erosion on any land." In such cases, the Minister "... may...make rules..." The rules to be made are those prohibiting, regulating or controlling clearing of land and other matters aforesaid. Land preservation measures are specifically intended to preserve agricultural land and its fertility. There is no specified objective of land development orders but, in the basis of the Preamble to the statute, they can be understood to be intended to contribute to conservation of soil and soil fertility and to good land management.

Clearly, land preservation and land development measures are specifically intended to preserve agricultural land and its fertility and any biodiversity conservation that arises therefrom may only be incidental. Provisions such as those requiring protection of water catchment areas, afforestation and re-forestation of land and those prohibiting destruction of vegetation could serve biodiversity conservation ends but generally, the Agriculture Act seeks to secure the proper utilization and management of

agricultural land so as to maximize output. However, the Agriculture Act is hardly enforced. Regarding permitted government orders for cultivation of essential crops, the intended objective is to maximize agricultural output in order to meet demands in East Africa. Biodiversity conservation may result from “good land management” envisaged by the relevant provisions for essential crops, but such considerations seem to be secondary.

### **Restriction of Private Land Use through Chiefs’ Compulsive and Coercive Orders**

The Chief’s Authority Act is sanction and compulsion oriented. It is an instrument of law and order which defines the powers and functions of provincial administration officials, notably, chiefs. In Kenya, chiefs are in charge of administrative units known as locations which number over two thousand in the country, meaning that there are at least five thousand chiefs with powers to make compulsive and coercive orders and directives to maintain law and order countrywide.

The Chiefs’ Act has two important provisions relating to the conservation of natural resources which provide basis for their authorization to restrict private use of land. The first are sections 10 and 11 which empower chiefs to issue orders requiring the planting of trees on private and public land and controlling or prohibiting the cutting of timber and the destruction of vegetation cover on private land. These provisions are increasingly being used by chiefs in various parts of the country to require private land owners to plant trees on their land. Once trees are planted, the chief’s powers extend to prohibiting their cutting down by private owners, unless the respective chief’s permission is first obtained. Even where permission is obtained, cutting down of all trees as may be desired by a private land owner is not guaranteed; chiefs have power to limit the number of trees cut at a time on private land as well as to require a land owner to plant a seedling for every tree cut. In *Shah Rajesh v. The National Environment Management Authority (NEMA) & Titus Kiptoo Kosgei* (NET/47/2009), it emerged that although NEMA had issued orders directing the Appellant to cut down trees he had planted on his land because the trees were damaging the Respondent’s land, the private land owner could not cut the trees down without first obtaining authorization by the respective chief of the area.

The second set of restrictions appear in section 13 of the Chiefs Act which are intended to control grass fires and to restrict or prohibit grazing of livestock in specific areas. The provisions are intended to, among other things, restrict private land owner’s right to clear vegetation through burning in certain areas. They also restrict private land owners’ cattle grazing activities.

### **Purpose and Intent of Land Use Restrictions under the Chief’s Act**

The command and control provisions of the Act have been used to implement and enforce environmental conservation measures (conservation of trees, private and public forests, soil, water courses, water catchment areas, e.t.c). However, their authoritarian character precludes public participation in resource conservation activities.

### **EMCA and its Authorization of Private Land Use Restrictions through EIA and other Mechanisms**

Through EMCA (Act No. 8 of 1999) and various environmental regulations and quality standards made thereunder, the government introduced a number of mechanisms and tools whose intended effect is to restrict private land use in order to ensure sustainable development in the light of environment conservation concerns, including conservation of biological diversity. The Act introduces EIA requirements, as well as requirements for:

- (ii) protection of hill tops, hill sides, mountain areas and forests (section 44, 46 & 48),
- (iii) protection of environmentally-significant areas (section 54),
- (iv) gazettement of coastal zones for protection (section 55),
- (v) the development and application of environmental quality standards (section 70);
- (vi) the development and application of noise standards (sections 101 & 102);

- (vii)the issuance of restoration orders (sections 108, 109 & 111);
- (viii)the imposition of environmental easements (section 112 & 115);
- (ix)the issuance of environmental conservation orders (section 112); and
- (x)the application of internationally-recognized environmental principles.

EIA requirements in sections 58-64 of EMCA and the EIA and Audit Regulations (issued by Legal Notice No. 191 of 2003) present the most commonly used government mechanism for restricting private land use, with far-reaching consequences. The basic idea behind EIA is that the government should pre-determine the impacts that a development is likely to have on the surrounding environment and on that basis, make a prior determination to prohibit it, allow it on conditions or allow it unconditionally. The Second Schedule to EMCA lists the kinds of activities requiring EIA. In addition, any activity that is out of character with its surrounding requires EIA.

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

Through the EIA process briefly discussed, the government has, through NEMA, restricted private land uses of many kinds, in the interest of environment conservation, including conservation of biological diversity. The government has restricted a private land owner to develop a maximum of four floors, down from the eight floors that the land owner was in the process of building to house twenty one housing units on its private land known as Plot No. 209/4902 in Riverside Gardens on Riverside Drive in Nairobi (in *Phenom Limited v. National Environment Management Authority & Riverside Gardens Residents' Association* - NE/04/06/2005). The Appellant had applied to NEMA for approval and EIA licence of its construction of 21 housing units in an eight-storey building on 0.3035 hectares of plot No. 209/4902 in Riverside Gardens along Riverside Drive in Nairobi. In the process of review of the Appellant's project report, NEMA considered, among other things, that the development in question had the potential to damage the riparian environment because the lower end of buildings would abut too closely to a nearby stream and that the Appellant proposed to construct an eight storey building in an area whose Nairobi City Council zoning allow high rise buildings of only up to four floors. These factors, among others, led NEMA to approve the development on condition that the appellant's building would be scaled down to four floors occupying a maximum of 35% of the land, whereupon, the Appellant/developer appealed to the Tribunal. In its ruling, the Tribunal affirmed that the developer had to be restricted to constructing no more than four floors. Among other things, the Tribunal found that Nairobi City Council's approval of the construction in question was unlawful for the reason, among others, that it allowed construction on a plinth area of 4,370 square metres, which far exceeded the 2,504 square metres permitted by the Council's policies and regulations on plot ratio, ground coverage and number of floors. If permitted, the Tribunal found, the development would not only flout Council regulations; it would affect the nearby riverine environment and the aesthetic character of the surrounding. In effect, the ruling also restricted the development to occupy only 35% of the land.

The government has also restricted a land owner's development by requiring it to observe a six-meter riparian reserve of River Kirichwa Kubwa which, in effect, mandated the land owner to demolish a stone wall he had erected all round its property in *A.T. Kaminchia v. National Environment Management Authority & M/S Bell Ways Garden Limited* - NET/05/2005 of 2005); stopped a leaseholder from constructing a tourist lodge and camp site in a cheetah breeding ground in an area slightly outside Maasai Mara Game Reserve to preserve the cheetah breeding ground and cheetah populations in *Narok County Council & Kenya Tourism Federation v. National Environment Management Authority, Wasafiri Camp Limited & Ben Kipeno & Others* - NET/07/2006); and stopped a private land owner from converting the use of his land in a residential neighbourhood to a commercial center on the basis that such use would, among other things, negatively impact the aesthetic character of the surrounding environment and cause noise pollution and vehicular traffic without a showing by the developer of sufficient mitigation measures in *(New Muthaiga Residents' Association v. The Director General, National Environment Management Authority & Gemini Properties Limited* - NET/24/2007). These are a few examples of land use restrictions that the government has effected through the application of EIA laws and regulations.

In addition to private land use restrictions explained in the foregoing paragraphs, EMCA permits the government to restrict private land use activities through:

- (i) issuance of orders to land owners to undertake measures for protection and conservation of hill tops, hill sides, mountain areas and forests and to control harvesting of forests and other natural resources thereon for the specified purpose of protecting water catchment areas, preventing soil erosion and regulating human settlements (section 44 & 46);
- (ii) gazettement of lands declared by the Minister for Environment to be "environmentally significant" for purposes of their protection in order to conserve biological diversity, among other specified objectives (section 54);
- (iii) gazettement of coastal areas deemed to require protection, thereby prohibiting certain activities thereon (section 55);
- (iv) development and application of environmental quality standards, such as standards for noise which restrict use of private property to only those activities that do not generate a certain amount of noise (sections 70, 101 & 102);
- (v) issuance of environmental restoration orders whose effect is to stop a private land holder's activity and require the land holder to restore the land to its previous state as much as possible (sections 108, 109, & 111);
- (vi) issuance of environmental conservation orders to impose one or more obligations on a land owner in respect of the use of land for the benefit of environment, which burdens affected land in perpetuity or for a term of years (sections 112 & 115) for the specified objective of biodiversity conservation (section 112(4); and
- (vii) application of internationally-recognized environmental principles.

In section 2, EMCA authorizes the application of a number of principles, including: polluter pays principle, precautionary principle, and the principle of sustainable development. These principles are intended to guide the conduct of land owners, among others, to ensure that their land-based activities do not adversely affect the environment. In effect, they restrict the nature and extent of land based activities to ensure that the activities and the manner of carrying them out do not result, for example, in pollution of the environment. In practice, courts have applied the principles with or without specific relevant provisions such that even in the absence of law that specifically applies to a particular matter or situation, one or more of the principles may be applied to limit a private land owner's activities.

### **The Local Government Act and its Restriction of subdivision of land**

In section 162 (g), the Local Government Act empowers local authorities (municipalities and townships) to control or prohibit subdivision or cutting up of land or building lots into smaller areas. Further, local authorities are empowered to develop regulations requiring that no transfer of any subdivided land shall be registered in any land titles registry without their approval and certification. This provision has been consistently applied by local authorities, especially the City Council of Nairobi to prohibit subdivision of private land within its jurisdiction unless and until its approval is sought and granted. Approval of subdivision of land is usually dealt with internally by local authorities and in practice, does not involve or, in law, require public participation. Where subdivision is granted, the law requires its registration against the owner's title. In practice, land registries do not allow registration of subdivisions of land without local authority approval.

Where subdivision is approved, it usually gives rise to a new land title in respect of the subdivided land. If, for example, an individual or a corporation obtained a grant or a lease of government land from the government of ten acres of land under one title and the beneficiary wishes to construct residential maisonettes for sale, each occupying 0.02 acres, the respective local authority's approval to subdivide would have to be sought. If granted, the original ten acres may end up being subdivided into 500 units, each holding a maisonette and each of the units would, upon registration, have its own title. Therefore, the original title (the mother title) would, upon subdivision, generate five hundred new titles. However, this may not happen in every part of the country or in every part of Nairobi.

In deciding whether or not to approve land subdivision and the extent of subdivision, local authorities are usually guided by applicable development restrictions, based on local area development plans or part-development plans. Among other things, many local area development plans restrict subdivision of land for agricultural, residential or commercial purposes, based on specified lower limits of subdivision. In Karen area in Nairobi, for example, the respective local area development plan does not permit subdivision of land below half of an acre. This requirement is very strictly observed by both the respective local authority (Nairobi City Council) and residents of the area. The Council cannot approve any plan to build in Karen area on land that is less than half acre. Neither can the Council approve any subdivision of land below one acre in the area. It goes without saying that as a result of the land use restrictions, land in Karen is very expensive. The aesthetic value of the area is also very high.

### **The Local Government Act and the Physical Planning Act and their Land use Restrictions through Zoning Regulations**

Zoning requirements are authorized by The Physical Planning Act, Chapter 286 of the Laws of Kenya and the Local Government Act, Chapter 265 of the Laws of Kenya. In section 166, the Local Government Act authorizes local authorities (municipalities, townships and counties) to prohibit and control the development and use of land and buildings, in the interest of the proper and orderly development of their areas. The provision complements sections 29, 30, 31, 32, 33 and 33, 36, 39 and 41 of the Physical Planning Act, Chapter 286 which require local authorities to, among other things: control or prohibit subdivision of land or existing plots into smaller areas in their areas of jurisdiction, reserve and maintain all land planned for parks, urban forests and green belts and formulate by-laws to regulate zoning in respect of use and density of development. For these purposes,

“No person shall carry out development within the area of a local authority without a development permission granted by the local authority...” (section 30, Physical Planning Act).

Clearly, local authorities have power, especially under section 29 of the Physical Planning Act to conserve the environment and the biodiversity therein, by taking actions as necessary, including approval, conditional approval or denial of development permission to prohibit or restrict any land use that might affect parks, urban forests and green belts within their jurisdiction. However, local authorities' power to restrict private land use through the development, application and enforcement of zoning regulations is

the most frequently used power with far-reaching consequences in terms of restriction of private land use in Kenya.

Local authorities are authorized to develop zoning regulations not only to control or prohibit subdivision of land or existing plots into smaller areas but also to regulate use and density of development in their areas (section 29(e) of the Physical Planning Act), including development of commercial and residential buildings and areas. Implementation of these provisions by the Nairobi City Council (NCC) provides the best example of the extent to which zoning regulations could restrict private land use. In response to the foregoing provisions of the Local Government Act and the Physical Planning Act, the NCC developed a Development Master Plan for the City of Nairobi in 1973, a Policy on Landscaping and Tree Planting in 1981, Zoning Regulations approved by the Council and both a Zoning Map and a Zoning Table for Nairobi in subsequent years. In addition, the NCC has applied physical development plans (provided for by sections 16, 17, 23, 24 & 29 of the Physical planning Act and elaborated in subsequent paragraphs herein). These are the instruments that the NCC has applied over the years to restrict land use and development<sup>18</sup> in Nairobi.

In accordance with the instruments aforesaid, the NCC has zoned the City of Nairobi into 21 zones as appear in their zoning map. The map can be better understood if read together with the NCC's Zoning Table which specifies which developments and uses of land are allowed in which zones of the City and indicate the manner in which land uses are restricted by the Council. For example, in the City of Nairobi, farming is restricted to only those farms (whether private or government owned) that are at least twenty acres in size. Any body owning less than twenty acres of land in Nairobi cannot be permitted by the NCC to farm. It goes without saying that private owners of land that is less than twenty acres are restricted to utilizing their land in the City for either commercial or residential purposes, however farming (of flowers, mushrooms, e.t.c.) may be lucrative. Currently, most, if not all land owners in Nairobi own less than twenty acres.

Further, certain uses of land are not accepted in certain zones in Nairobi and in many of the zones, the NCC regulations control density of development including restrictions on both vertical and horizontal . aspects of buildings. For example, Zone 1A, which is the core Central Business District in Nairobi is restricted to use for commercial purposes only. Moreover, buildings can only cover up to 80% of the ground available to a developer. In Zone 3, including Westlands, Kileleshwa and Lavington areas, private land owners are restricted to utilize their land for commercial, office and residential purposes only. High-rise buildings are allowed, however, land owners are restricted to construct only up to four floors. In effect, these restrictions are intended to ensure that zone 3 remains a low density area. Cases, such as *Phenom Limited v. National Environment Management Authority & Riverside Gardens Residents' Association* (NE/04/06/2005) illustrate how zoning regulations are applied in conjunction with EIA requirements to restrict private land use in Kenya.

#### **Private Land Use Restrictions through Development and Application of Physical Development Plans under the Physical Planning Act**

The Physical Planning Act also seeks to control development of land through the development and application of physical development plans at regional and local levels. To this end, sections 4 and 5 of the Act establishes the office of the Director of Physical Planning (now housed within the Ministry of Lands) to be responsible, in collaboration with local authorities, for the development of regional physical development plans and local physical development plans. Section 16 of the Physical Planning Act declares that physical development plans, which may be prepared with respect to government land, trust land or private land, are intended to improve land, ensure proper physical development of land and to secure suitable provision for infrastructure, public purposes, commercial, residential and recreational areas including parks and reserves. For these purposes, regional development plans may provide for planning of an area comprised in the plan, provide for reconstruction of the whole of an area or part of it

or provide for controlling the order, nature and direction of development of an area (section 16(2). Matters to be dealt with in a regional development plan are specified in section 17 (a) to (f) of the Physical Planning Act and in the First Schedule to the Act. It is noted that “natural resource endowments” of an area are to be considered in developing a regional development plan (First Schedule, Paragraph 2).

Unlike regional development plans which are intended to be developed at the provincial or district levels, local development plans are to be developed with reference to local authority areas (section 24 of the Physical Planning Act). Local authorities are the ones legally authorized to ensure the proper execution and implementation of approved development plans (section 29(d)). Local authorities specifically have statutory power to prohibit or control the use and development of land and buildings within their jurisdiction in the interest of proper and orderly development of their areas (section 129(a)). In more elaborate terms, the act specifies that the purpose of local physical development plans is to ensure

“...orderly, co-ordinated, harmonious and progressive development of the area to which it relates in order to promote health, safety, order, amenity, convenience and general welfare of all inhabitants, as well as efficiency and economy in the process of development and improvement of communications” (Second Schedule to the Physical Planning Act, paragraph 1).

In practice, local development plans have often been developed in the form of “part development plans” which affect only specified areas within a municipality, township or county. The specified purpose of local development plans is to guide and coordinate development of infrastructural facilities for areas specified in the plans, to control the use and development of land and to provide for land public purposes in affected areas (section 23(3)). Therefore, a local physical development plan shall, among other things, indicate the manner in which land in affected areas may be used (section 25(2)), having regard to a number of considerations, including “ Conservation of natural beauty of the area, including lakes and other inland waters, banks of rivers, foreshore or harbours, and other parts of the sea, hill slopes and summits and valleys.” (Second Schedule to the Physical Planning Act, paragraph 6).

Physical development plans are intended to restrict the nature of land-related developments of areas affected thereby. They determine whether specified areas shall be left open, used for residential purposes only, used for commercial purposes only, used for a mix of residential and commercial purposes or used for recreational purposes. Further, such development plans are intended to affect the density of development such that the area to be covered by housing developments may be restricted thereby. The Number of people to occupy such areas may also be restricted.

*Public participation in the development of regional physical Development plans:* Section 19 and 26 of the Physical Lanning Act permits public participation in the development of regional physical development plans at tow levels, namely: the respective local authorities and the general public. The Director of Physical Planning is obligated to publish development plans and to allow local authorities whose areas are affected by it to present their support or objections thereto. The Director is also required to issue a notice of the development of a regional plan in the Kenya Gazette and to allow members of the public to present their views in support or objections thereto. However, in section 19(3), the Director is authorized to exercise his discretion to accommodate or decline to accommodate public views. Once he approves a plan, section 21 requires him to publish it. In practice, regional development plans are hardly developed or implemented. This renders the purpose and intent of the plant nugatory, with the result that poor physical planning is reflected in almost every part of the country.

## **The Registered Land Act (RLA) and Government Restrictions on Dealings with Land Registered Thereunder**

Land registered under the RLA is largely agricultural land which belongs, generally, to families and is customarily owned. The processes that led to the existence of family land, also known as land held under family or customary tenure has been explained in previous discussions. Family land which is customarily held and transmitted from generation to generation comprises the largest category of land in Kenya. Having been derived from former African reserves, the land, known as trust land was adjudicated, consolidated and eventually registered in the names of heads of families at the time (on behalf of family members), under the Registered Land Act (hereinafter, the RLA), Chapter 300, except in pastoral areas where large tracts of land were registered in the names of group owners under the Group Representatives Act. It has been explained that most, if not all of lands so registered, have also been subdivided and registered in the names of individual members of the groups, also under Cap. 300.

The Registered and Act defines the rights and interests that the law accords holders of land registered under the Act, as well as encumbrances which restrict private dealings with or use of this category of land. In sections 28 and 28, the RLA confers registered owners indefeasible rights of ownership, meaning absolute ownership rights, together with all privileges and appurtenances relating thereto. The law also declares that ownership of land registered under the RLA is free from all interests and claims but in the same provisions, expresses that such land shall, nevertheless, be subject to encumbrances specified therein.

Encumbrances specified in the RLA which limit private land owners' use of land registered therein are: overriding interests (section 30 and 31), registered restrictive agreements (section 95), inhibition of dealings places on land by courts (section 128), restrictions placed by the respective land registrars (sections 136 and 137) and Common Law restrictions (section 163). It is noted that land registered under the RLA is also subject to the government's power of compulsory acquisition (section 30(c)). In addition, land registered under the RLA is subject to provisions of Land Control Act, Chapter 302 which controls certain dealings in Agricultural land. Except for the government's power of compulsory acquisition (which extinguishes ownership rights rather than restrict use), land use restrictions imposed by the various statutory limitations are explained as follows: under section 30 (a)-(h) and 31 of the RLA, use of all registered land is subject to: rights of other family members entitled to occupy and use the land which may or may not be noted on the register, rights of way, right of access to natural water sources, right to light, air, water and support, lease agreements, charges of unpaid rates and electricity supply lines, telephone poles and lines, pipelines, aqueducts, canals, weirs, and dams erected or constructed by virtue of power conferred by any written law. Section 31 states that every owner of land registered under the RLA is deemed to be aware of the overriding interests and to respect them. Needless to state, there was no consultation with the public prior to the imposition of these interests, neither is anyone expected to complain about them.

In reality, many of the statutorily recognized overriding interests have imposed onerous restrictions on private use of land. For example, the erection of electricity lines and poles which require that some distance be maintained between the poles and any structures erected on the same land at the pain of penalty for non-observance has resulted not just in serious limitation of the size of land that an owner could use, even in areas where land is very expensive, but effectively, in the loss of private land to power and telephone companies without compensation. Similarly, the right of access to light has restricted construction of high rise buildings especially where owners or occupiers of neighbouring lands complain that the construction of such buildings might overshadow their land or buildings. However, although overriding interests were intended to ensure the enjoyment of similar rights by other private land owners and to secure space of public services, such as provision of electricity, the limitations could, incidentally, conserve biological diversity. For example, the public right of access to water may restrict a private owner of land abutting the water source from dealing with land or the water in a deleterious manner and thus protect the biodiversity therein or supported thereby.

Where a land owner fails to respect an overriding interest over his land, the respective land registrar has power, under section 163 to issue a restrictive order against him which could include a specified restriction of the land owner's use of the land or a prohibition of his use thereof. However, before such an order is issued, the law, in section 137 sets out brief due process requirements, requiring an inquiry into a land owner's alleged failure to observe overriding interests, notification of the land owner of the inquiry and findings thereof, and grant to the land owner of a chance to be heard by the land registrar before a restrictive order is issued.

Further section 95 of the RLA permits land owners to enter into voluntary agreements to restrict their land use, for example, to provide a common access where none exists in a government survey plan. Once such agreements are registered in the respective lands registry, they are noted in the encumbrance section of the register for the land in question and become binding, unless and until a contrary agreement is reached by parties thereto to. For as long as a registered restrictive agreement exists, it restricts or prohibits a private land owner whose land is encumbered thereby from dealing with the burdened land in any manner that is inconsistent with it. There is no procedure for the making of such agreements, neither do members of the public, other than parties to such an agreement participate in their making or undoing. In section 163, the RLA permits the application of Common Law to land registered thereunder. This means, for example, that the law of nuisance applies. Restrictions imposed by Common Law on private use of land registered under the RLA and other lands is considered under "Common Law Restrictions of Private Use of Land"

#### **The Land Control Act, Chapter 302 and its Authorized Restrictions on use of Agricultural Land**

In addition to land use restrictions specified in the RLA, the Land Control Act, Chapter 302 places a number of restrictions on dealings with agricultural land, also known as family land or land customarily held and registered under the RLA (Cap. 300). The Land Control Act was intended to control certain transactions involving land registered under the RLA (Cap. 300).<sup>19</sup> It declares certain transactions involving this category of land to be controlled transactions. These are: sale, transfer, lease, mortgage, exchange or other disposal of or dealing with any agricultural land.<sup>20</sup> This means that a private owner of land under this category cannot engage in any of the specified dealings at will.

Section 8 of the Land Control Act mandates every private land owner who wishes to subdivide or undertake any one or more of the other transactions to first apply for and obtain consent of the respective Land Control Board (LCB).<sup>21</sup> The Land Control Act provides the LCB with two approaches to dealing with applications for LCB consent. First, although the Board has a fair amount of discretion to decide an application, section 9 of the Act provides statutory guidance to boards in determining whether or not to give consent. Boards are required to:

- (a) have regard to the effect which the grant or refusal of consent is likely to have on economic development of the land concerned or on the maintenance or improvement of standards of good husbandry within the area; and
- (b) act on the principle that consent ought to be generally refused where the person to whom the land is to be disposed of is unlikely to farm the land well, to develop it adequately, is unlikely to use the land profitably for the intended purpose owing to its nature; already has sufficient agricultural land or, that terms and conditions of a transaction, including the price is unfair.

Secondly, section 9 of the Land Control Act authorizes LCBs to refuse consent where land to be disposed of by way of sale, transfer, exchange or lease is to a person who is not:

- (a) a citizen of Kenya;
- (b) a private company or cooperative incorporated under Land (Group Representatives) Act;
- (c) a state corporation within the meaning of the state Corporations Act; or

(d) a private company.

Where the LCB refuses to grant consent, none of the controlled transactions can proceed. Section 9(2) invalidates any agreement for sale, lease, transfer, subdivision or mortgage of Cap 300 land where the respective LCB's consent is denied. These provisions are very stringently enforced. For example, no lands registry would agree to register a transfer of any Cap. 300 land if there is no proof that the respective LCB's consent has been obtained. Section 9(2)(b) authorizes appeals against LCB decisions but usually, there is very little chance for a person who fails to secure LCB consent at the divisional or district level to succeed on appeal.

### **The Mining Act, Chapter 306 and its Restrictions on Mining**

In section 4, the Mining Act declares that

“All unextracted minerals (other than common minerals) under or upon any land are vested in the Government, subject to any right in respect thereof which, by or under this Act or any other written law, have been or are granted, or recognized as being vested, in any other person.”

In effect, the provisions prohibit all private land owners with minerals in or on their land (murrum, sand, et cetera) from harvesting or otherwise dealing with the minerals in any manner whatsoever. In the use of their land, such land owners are restricted to those uses that do not involve mining or mineral prospecting at the risk of statutory penalty for non-compliance (section 6).

### **Common Law Restrictions on Private Land Use**

Common Law applies in Kenya, generally, by virtue of section 3 of the Judicature Act, Chapter 2 of the laws of Kenya which define the laws that shall apply in the country. In relation to privately and customarily owned family land, applicability of Common Law is expressly imported by provisions of section 163 of the RLA which provides that Common Law shall apply to land registered under the act. In simple terms, the body of laws, including legal principles and doctrines which developed out of the customs of English people apply to matters concerning private land use, including restriction of use thereof. That has been the case since the year 1897 when Kenya became a British protectorate and later, a colony.

There are four Common Law doctrines or rules whose application to private land owners have the effect of limiting their land use activities. These are: trespass or the rule against trespass, nuisance or the rule against nuisance, strict liability rule, also known as the rule in *Rylands v. Fletcher* and the rule against negligence. For better appreciation of the nature and extent of their limitation of private land use, applicability of each of the rules is presented below, including, where possible, illustrative court cases.

#### *The Rule Against Trespass*

Trespass arises where a person causes physical matter to come into contact with or enter another's land. The person in this case could be a neighbouring land owner. Whenever a land owner, as a result of anything he does on his land, causes any physical matter to come into contact with another's land, the action amounts to trespass and is illegal. Therefore, the rule against trespass, which has been incorporated into the Trespass Act, a criminal statute, restricts a land owner to utilize his land in ways that do not permit any physical matter to come into contact with another's land. Thus the rule against trespass protects land owners' or occupiers' right to enjoy their land without unjustified interference.

Although EMCA is now the comprehensive law governing environmental matters in Kenya, Common Law rules, such as the rule against trespass still apply, though to a limited extent, to protect the environment in ways that tend to restrict private land owners right to utilize their land. For example, in the case of *Samuel Wanjala v. The Republic* (2004) eKLR, a land owner was tried and convicted of the

offence of trespass under the Trespass Act for allowing his cattle to stray onto neighbouring land and destroy growing cane. Upon conviction, he was fined 18,000 Kenya shillings.

### *Nuisance*

Nuisance arises when an activity or situation gives rise to loud noise or foul odor that interference with others' use or enjoyment of property. Activities which are so widespread as to interfere with the public's reasonable comfort and convenience constitutes public nuisance. An activity which interferes with a land owner or occupier's use and enjoyment of his land constitutes private nuisance. The liability of a land owner for nuisance arises from using his land in such manner as to injure a neighbouring occupier or owner. Therefore, nuisance imposes a duty on private owners and users of land to utilize the land reasonably, meaning, it restricts private land use to only uses and activities that do not interfere with the uses of other land owners. A case in point is *Gitiriku Wainaina & Another v Kenafri Industries & Another* (Tribunal Referral No. NET 08/2006 ) The case was initially filed in the High Court in Nairobi but was referred by the presiding judge with consent of all parties to the Environment Tribunal for hearing and final determination. In the case, the Plaintiff sought an injunction against the Defendants stopping them from operating their business involving the manufacture of sandals on their land number LR 336/8/ Baba Dogo Estate/Nairobi until they stopped the flow of waste liquid, chemicals and noxious smell from their premises onto the Plaintiffs neighbouring land LR number 336/1059/Baba Dogo Estate Nairobi. The plaintiffs that the defendants had constantly caused offensive waste liquid and chemicals to flow and pestilential gases, smells and vapors to come into and be on the Plaintiffs' premises causing a nuisance. The Plaintiff also claimed damages against the Defendants for the corrosion of iron sheets on the roof of a block of 33 flats that he constructed for residential use in 1989 on the basis that the corrosion was caused by gaseous emissions emanating from the Defendant's manufacturing activities through chimney stacks.

The Tribunal found the Defendants liable for causing a nuisance and stopped the Defendants from continuing to operate their activities in ways that result in liquid and gaseous discharges onto the Plaintiff's property. In addition, the Tribunal awarded the Plaintiff, against the Defendants, the sum of Kshs. 340,000 in damages for the corrosion of the Plaintiff's iron sheets as a result of the Defendants' manufacturing activities.

### *Strict Liability of a Land Owner*

The rule of strict liability against a land owner is one that holds a land owner strictly liable without a land owner's actual negligence or intent to harm. It applies when there is breach of an absolute duty, here, on a land owner, to ensure that his land-based activities do not result in harm to other people. The strict liability rule is also known as the rule in *Rylands v. Fletcher* because it is based on an English case after which it is named. The facts of the English case help to understand the basis of the rule. In *Rylands v. Fletcher*, the Defendant, a land owner, had constructed a reservoir to collect and hold water for his mill. Under his land were underground workings of an abandoned coal mine whose existence he was unaware of. After the reservoir he constructed had been filled, water escaped down the underground workings through some old shafts and flooded the plaintiff's colliery. The plaintiff sued and the court found the defendant land owner liable, stating the rule that:

The person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and if he does so, is *prima facie* answerable for all the damage which is the natural consequence of the escape.

The rule makes an owner or occupier of land strictly liable for the consequences of escapes from his land, especially those resulting from "non-natural" use of the land or land use which involves bringing onto land things that not naturally there. Although the rule has the effect of limiting a land owner or occupier's use of land to those uses that do not result in escapes onto other people's land, it has not been relied on much.

### *Negligence*

Negligence arises from a failure to exercise the care demanded by the circumstances, here, of a land owner's use of his land, which results in the suffering of injury by another. There has to be a duty of care owed by a land owner to another or to others and a breach of that duty in order to sustain a claim of negligence. The duty of care is owed to those whom the land owner could foresee might suffer injury as a result of the land owner's acts or omissions.<sup>22</sup> In the Kenyan case of *Gitiriku Wainaina & Another v Kenafic Industries & Another*, the Tribunal also found that the Defendants had been negligent in failing to comply with public health regulations, thereby allowing noxious and offensive gases, smells and vapors to come into the Plaintiffs' premises causing a nuisance.

The purpose and intent of all common law rules restricting private land use is both to prevent undue interference with a private land owner's quiet use and enjoyment of his land and to protect the public's reasonable comfort and convenience from interference. These purposes might, incidentally, serve biodiversity conservation interests when, for example, private land use threatens to damage a public recreational facility, such as a public park or garden. However, *locus standi* rules requiring that a complainant first demonstrates that he has or stands to suffer as a result of the private land owner's action(s) complained of limits the effectiveness of the rules.

### **Justifications for Exercising the Authorities**

The foregoing sections explain that although the right to own and use private land is protected by the Kenya Constitution, various statutes authorize the government, in specified circumstances, to restrict private land use. This is in addition to Common Law whose authorization of restrictions on private land use has been explained. In summary, the laws authorizing government restriction of private land use are:

- (i) The Government Lands Act (restrictive covenants),
- (ii) The Agriculture Act,
- (iii) The Chief's Act,
- (iv) Environmental Management and Coordination Act (EMCA)
- (v) The Local Government Act
- (vi) The Local Government Act and the Physical Planning Act,
- (vii) The Registered Land Act,
- (viii) The Land Control Act, and
- (ix) Common Law.

The following is a consideration of when each of government authorities for private land use restrictions may be exercised.

### **When Each of the Authorities Can be Exercised**

#### **Restrictions Under the GLA, Cap. 280**

The GLA authorizes restriction of private land use through covenants which restrict private persons to whom the government leases or grants urban plots and agricultural lands: to utilize the lands only for permitted purposes, undertake only permitted developments on the land, observe ground coverage limitations, not to sell, subdivide, transfer, assign or sub-let without consent of the Commissioner of Lands and to pay such rates, taxes and duties over the land as assessed by the government and the respective local authority.<sup>23</sup>

All of the foregoing restrictions constitute restrictive covenants which are expressed in government grants (grant document) and leases (lease documents) as terms and conditions thereof at the time of issuance of the documents of title. This means that the government exercises its authority to restrict the private land

uses of beneficiaries of their leases and freeholds at the time of issuing the beneficiaries with title documents. Thereafter, the Commissioner of Lands, the Director of Physical Planning and the respective local authority have power to ensure that the restrictive covenants (title conditions) are observed such that, for example, no subdivision or sale can be allowed without prior permission by the Commissioner. Similarly, no use other than that permitted in the terms and conditions of title (restrictive covenants) can be permitted unless the land holder first applies for and obtains change of user from the physical planning department. The law authorizes failure to observe the land use restrictions to attract forfeiture of land grant or lease under section 77 of the GLA, demolition of unauthorized structures and criminal prosecution. This means that government's authority to restrict land use is effected at the issuance of title documents. However, it can be enforced any time a land holder fails to comply with restrictive covenants. In *Ismail v. Republic* [Criminal Appeal No. 851 of 1962], the Appellant had been granted land in the City of Nairobi on condition that the land would be for construction of a shop and stores, which condition was also incorporated in the by-laws of Nairobi Municipality (as it then was). However, after construction of the buildings, he allowed them for use not only as shop and stores but also for residential purposes. He was prosecuted for allowing the unauthorized user. However, both the LGA and the Physical Planning Act permits leaseholders and freeholders to apply to the Physical Planning Department for change of user which, if granted, may permit, for example, construction of residential apartments in a area formerly restricted for agricultural purposes.

### **Restrictions Under the Agriculture Act, Cap. 318**

On the basis of provisions of Cap. 318, land preservation orders required by sections 48-62 may be issued by the Director of Agriculture and/or the Minister of Agriculture, whenever they deem it necessary to do so (sections 48, 50 and 51) in order to meet specified objectives, such as prohibiting or controlling destruction of vegetation. There is no specified procedure requiring, for example, a public hearing prior to issuance of such an order. There is also no indication in the law of what should inform the Minister's or Director's opinion that such an order is necessary at a particular point in time. The Director of Agriculture may also direct private land owners to comply with land development orders, programmes and schemes requiring them to adopt certain farming practices or to place certain things on their land (sections 64-75). In practice, such orders were issued whenever it became necessary to protect soil from soil erosion or to restore soil fertility but the orders were hardly preceded by scientific studies or analyses. In sections 100-108, the law also authorizes both the Director of Agriculture and the respective Minister for Agriculture to require farmers to plant essential crops and to comply with zoning regulations of privately owned agricultural land for purposes of cultivation of essential crops. In this regard, the law permits the government to restrict other uses of agricultural land in favour of what the government determines to be essential crops in order to meet local and external demands for cash crop. All of these restrictions have lost meaning because unlike in the colonial days when government authorities were regularly exercised, currently, the government hardly issues orders against farmers as permitted. Decisions concerning farming and farming practices are left largely in the hands of farmers themselves.

### **Restrictions Under the Chief's Authority Act**

Chiefs are permitted mainly by sections 10 and 11 of the Act to issue orders requiring the planting of trees on private and public land. The provisions also permit them to control or prohibit the cutting of timber and the destruction of vegetation cover on private land. The law does not specify exactly when the Chiefs' powers may be exercised but chiefs are guided by provisions of the law requiring them generally to restore law and order. In practice, chiefs have issued orders pursuant to government directives such that when the government issues directives mandating tree planting, chiefs issue similar orders in villages. However, chiefs can, on their own initiative, exercise their powers to ensure law and order to direct populations within their jurisdiction to plant trees, among other things. Chiefs also always ensure that trees planted pursuant to their orders are not cut or destroyed without their express (written) permission.

### **Restrictions under EMCA**

As already explained, EMCA authorized private land use restrictions through the following mechanisms:

- (i) EIA requirements (sections 58-64 of EMCA), read together with EIA and Audit Regulations issued by Legal Notice No. 101 of 2003;
- (ii) requirements for protection of hill tops, hill sides, mountain areas and forests (section 44, 46 & 48),
- (iii) requirements for protection of environmentally-significant areas (section 54),
- (iv) requirements for gazettement of coastal zones for protection (section 55),
- (v) requirements for the development and application of environmental quality standards (section 70);
- (vi) requirements for the development and application of noise standards (sections 101 & 102);
- (vii) requirements for the issuance of restoration orders (sections 108, 109 & 111);
- (viii) requirements for the imposition of environmental easements (section 112 & 115);
- (ix) requirements for the issuance of environmental conservation orders (section 112); and
- (x) express legal authorization of the application of internationally-recognized environmental principles.

The following is an explanation of when each of the authorities may be exercised:

1. Environmental impact assessment of the kinds of developments listed in the Second Schedule to EMCA and any development that is likely to be out of character with the surrounding is required to be undertaken by a project proponent *before financing of the project, before commencing the project, before proceeding with it, before executing or conducting it and before causing a project to be financed, commenced, proceeded with, carried out, executed or conducted by another person* (EMCA, section 58(1)). The legal implication is that restrictions to land use which arise as a result of EIA requirements and processes are required by law to apply and to be applied before the projects are finance and, needless to state, before the projects commence. Therefore, impacts of EIA restrictions can be effected in advance of project commencement if, for example, after the financier submits an EIA project report (the first step in the EIA process) to NEMA as required under section 58 of EMCA, NEMA determines, on the basis of the project report, that a proposed development is likely to have significant adverse impacts on the environment which cannot be adequately mitigated and denies an EIA licence, thereby prohibiting the development in question.

Where a developer commences a project without or before submitting a project report to NEMA specifying details of the project required by Regulation 7 of the EIA and Audit Regulations, NEMA can restrict the development by stopping the developer from continuing with work and imposing a fine of not less than Kshs. 300,000 or instituting criminal prosecution at the end of which a developer may be imprisoned for a term of not more than eighteen months (EMCA, section 145).

NEMA can also restrict a project through the imposition of development approval conditions upon receipt and review of a project report thereof or upon the conduct of a full EIA study subsequent to review of a project report. Such of NEMA's actions are based on NEMA's powers under EMCA to ensure a clean and healthy environment, which gives the Authority both express and discretionary powers to regulate and restrict developments to safeguard water sources, preserve or restore the aesthetic character of an area, or to conserve biological diversity, among other environmental concerns. NEMA may also base its restrictive conditions on applicable zoning regulations or restrictive covenants. In *Phenom Limited v. National Environment Management Authority & Riverside Gardens Residents' Association*, NEMA, upon receipt of the developer's project report in which the developer proposed to construct an eight- floor residential apartment, issued development approval and subsequently an EIA licence both with conditions restricting the development to only four floors on the basis of Nairobi City Council's existing zoning regulations.

The *Phenom* case illustrates other points at which EIA restrictions can be applied. The developer ignored NEMA's restrictions and appealed to the Environment Tribunal. The Tribunal affirmed NEMA's restrictions in NE/04/06/2005, by which time, the developer had defied NEMA's conditions and not only commenced work, but also started selling unfinished apartments. The developer appealed against the Tribunal's ruling to the High Court in *Phenom Limited v National Environment Management Authority & Riverside Gardens Residents' Association*. The High Court Affirmed the Tribunal's ruling by which time, the developer had nearly completed construction of an eight floor apartment. However, upon affirmation of the Tribunal's ruling limiting the development to four floors, the developer had no choice but to demolish the four extra floors constructed against the restrictions.

2. For protection of hill tops, hill sides, mountain areas and forests, the law does not specify exactly when protective measures may be taken. However, it does mandate District Environment Committees to identify hilly and mountainous areas within their jurisdiction which are at risk from environmental degradation, including areas that should be targeted for afforestation and reforestation (sections 45 & 46). This is to facilitate NEMA's development of regulations, guidelines, procedures and measures for sustainable utilization of hill sides, hill tops, mountain areas and forests (section 44). The aim is to control harvesting of natural resources located on the hill tops, mountainous areas, hill sides and forests in order to protect water catchment areas, prevent soil erosion and regulate human settlement.

3. Regarding protection of environmentally-significant areas, section 54 of EMCA authorizes the Minister for Environment to declare **any area** of land (including private lands), sea, lake or river to be a protected natural environment. The authorizing provisions do not specify when the Minister's powers may be exercised. They only require that the minister does consult with relevant Lead Agencies (such as Kenya Wildlife Service, Forestry Service and local authorities) before issuing a gazette notice of his declaration. Therefore, by necessary implication, the Minister may, *whenever* it appears necessary to do so, consult with lead agencies for purposes of declaring any area to be a protected natural environment. For purposes of conservation of biological diversity, regulation 8 of the Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefits Sharing Regulations (Legal Notice No. 160 of 2006) declares that the Minister's powers under section 54 of EMCA shall also be utilized to gazette identified areas of any land, sea, lake or river.

Section 54 (1) of EMCA expressly declares that the purposes of the Minister's authorization is

*"...to promote and preserve specific ecological processes, natural environment systems, natural beauty or species of indigenous wildlife or the preservation of biological diversity in general."*

NEMA is authorized by section 54(2) to issue guidelines prescribing measures for the management and protection of any area declared by the Minister to be a protected natural environment.

4. Measures for protection of coastal zones were intended by law to be effected "*as soon as practicable upon the commencement of this Act...*", meaning EMCA (EMCA, section 55(2)). Measures leading to gazette of coastal areas as protected coastal zones, including the development of an integrated national coastal zone management plan were required by law to be undertaken by NEMA as soon as EMCA took effect (EMCA, section 55).

5. There is no performance timeframe stated in the law regarding development of environmental quality standards. The provisions of sections 70 and 71 requiring standards imply that such standards are to be developed and reviewed consistently and continuously by a standing Standards and Enforcement Review Committee of NEMA. So far, NEMA has developed more than ten environmental quality standards and regulations including: Waste Management Regulations (Legal Notice No. 121 of September 2006), Water Quality Regulations (Legal Notice no. 120 of 2006), Controlled Substances

Regulations (Legal Notice No. 73 of 2007) and Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefits Sharing Regulations (Legal Notice No. 160 of 2006). The later of the regulations are more specific to conservation of biological diversity including genetic resources thereof. An analysis of the Biodiversity regulations, especially regulation 5, indicates the expectation that application of the regulations could limit private land use. Regulation 5 authorizes NEMA to act in consultation with relevant Lead Agencies to impose bans, restrictions or similar measures on the access to and use of **any threatened species** in order to ensure its regeneration and maximum sustainable yield. Threatened species are not limited to occupy public lands, such as forests. They may be found on private lands whose use would be limited by the provisions in the interest of their regeneration and/or maximum sustainable yield.

6. As authorized by sections 108, 109 and 111 of EMCA, environmental restoration orders may be issued whenever any action or activity degrades the environment.

7. In accordance with sections section 112 & 115 of EMCA, environmental conservation orders may be issued by any court "...upon an application made..." (section 112(1). In effect, environmental conservation orders impose "...one or more obligations in respect of the use of land..." which is, in EMCA, referred to as "the burdened land" (section 112(2), being the land in the vicinity of the environment benefited by the order. Conservation orders are intended to facilitate the conservation and enhancement of the environment (the benefited environment).

8. Environmental easements may be issued by any court upon an application being made by any person or group of persons for the grant of one or more environmental easements (EMA, section 113(1). If granted upon any land, an environmental easement shall be registered (as an encumbrance) according to the system of registration of that type of land (EMCA, section 115) and can be enforced, if necessary (section 114). However, section 116 permits compensation of land owners who have lost value of their land as a result of the imposition of environmental easements.

9. Section 2 of EMCA authorizes the applicability in Kenya of internationally-recognized environmental principles, such as the principle of sustainable development. The principles may be applied in the absence of express statutory provisions on environmental conservation to restrict land use activities in the interest of environmental conservation. For example, the principle of sustainable development can be applied any time a matter comes up for consideration of environment and development issues to limit or control development to ensure that development gains are realized without unacceptably high levels of negative environmental consequences.

#### **Restriction of subdivision of land under the Local Government Act**

In section 162 (g), the Local Government Act empowers local authorities (municipalities and townships) to control or prohibit subdivision or cutting up of land or building lots into smaller areas and to develop regulations requiring that no transfer of any subdivided land shall be registered in any land titles registry without their approval and certification. This authority has been exercised by local authorities in consideration of the government's restrictive covenants over certain alienated lands and existing land use policies (including the City of Nairobi's Master Development Plan which expired in the year 2000) and regional and local physical development plans required by the Physical Planning Act. The law does not specify exactly when the powers should be exercised but by necessary implication, land use regulations restricting subdivision of land are required to be periodically reviewed. In practice, there has been efforts by Nairobi City Council to undertake reviews once every five years, with very little consistency. However, the reviews conducted so far have led to local authority downward variation of restriction on subdivisions in terms of land sizes. For example, the NCC and the Department of Physical Planning initially developed regulations prohibiting subdivision of land in Karen area in Nairobi below one acre. This means that only land that was at least one acre could be developed in the area. However, over time, a

review was conducted, prompted more by development needs, especially for housing, which led to a downward variation of the prohibition to allow land subdivision of up to half acre. That is still the position.

The foregoing provisions are enforced at the time of application for subdivision of land, at which point permission to subdivide are denied. They are also enforced at the time of application of approval of building plans. At that point, local authorities, in the process of determining density of development, consider the size of land. If it is found that the land in question is below the lowest quality of subdivision permitted, approval of building plans are denied. If approval of building plans are denied, a developer cannot undertake any building works because any structure that he tries to construct shall be demolished by the respective local authority.

### **Restrictions under both Local Government Act and the Physical Planning Act**

Zoning regulations are effected at the time of local authority consideration of applications for subdivision and applications for approval of building plans. Usually, local authorities deny permission to subdivide land and approval of building plans when the applications seek authorization of activities that do not conform to zoning regulations. As noted in the foregoing discussions, NEMA also bases its restrictive development approval conditions on, among other things, zoning regulations and requirements of a particular area. In many cases, NEMA does not approve developments that are inconsistent with local authority zoning requirements.

### **Restrictions Under the Registered Land Act, Cap. 300**

The authority to impose a number of restrictions under the RLA has been considered. Here, it suffices to state that overriding interests in the nature of the rights of other family members entitled to occupy and use the land which may or may not be noted on the register (section 30 of the RLA) is usually enforced to restrict or prohibit the registered family member's use and alienation of the land at the time the registered family member is discovered to be contemplating or in the process of dealing with the land in a manner prejudicial to the interests of other members. If, for example, a father or grandfather in whose name the land is registered is discovered to be trying to sell or subdivide the land without consent of other family members, he can be prohibited from doing so by a land registrar who would, in such circumstances, reject an application for transfer. The respective provisions of the RLA (section 30) are complemented by the provisions of the Land Control Act which require LCB consent to transfer, sell or subdivide family land. LCB consent cannot be granted without consent of family members, which three reason LCBs require hearings of applications for their consent to be attended by all family members (especially both husband and wife but NOT husband only or wife only).

Other overriding interests such as rights of way, electricity supply lines, telephone poles and lines and pipelines, are usually enforced and land owners' use of land restricted thereby when, for example, a utility company seeks to undertake necessary installations. As already noted, Section 31 states that every owner of land registered under the RLA is deemed to be aware of the overriding interests and to respect them. Therefore, there is no need for any application to be made anywhere for a utility company to enter into private land and commence excavation works for the laying of electricity posts where the relevant survey shows the power lines to exist, even though it may be necessary for them to notify the land owner of their intended works in advance.

### **Restrictions on use of Agricultural Land Authorized by the Land Control Act**

On the basis of provisions of the Land Control Act already explained, a private land owner may be restricted or prohibited from using his agricultural land for sale, subdivision or transfer of, for example, the land owner seeks to sell the land to a non-Kenyan. The restriction is usually effected at the time a land owner applies for the respective Land Control Board's consent through denial of consent. None of the

controlled transactions, for example transfer of land to another person, can be registered by any land's registry in Kenya without land control Board consent.

### **Restrictions on Mining under the Mining Act, Chapter 306**

The government's authority to restrict private land uses to those uses that do not involve mining or prospecting for minerals can be exercised any time it becomes known, by whatever means, that there are or may be mineral deposits on a particular private land.

### **Common Law Restrictions on Private Land Use**

In effect, Common Law rules against nuisance, trespass, negligence and the strict liability rule restrict private land owners only to those uses of their land that do not interfere with other land owner's quiet and peaceful enjoyment of their property and the public's comfort and convenience. The Common Law mechanisms are reactive rather than preventive. This means that for the courts to hold a private land owner's use to constitute nuisance, for example, there must have been some action or activity by the land owner which constitutes a nuisance or some other Common Law offence. Therefore, generally, the courts' authority to apply Common Law rules to restrict private land use can be exercised whenever any individual, groups of individuals or the Attorney General (on behalf of the public) institutes a civil suit or claim of nuisance, negligence, trespass or strict liability. If such a claim succeeds, a court may issue an injunction or such other restrictive orders as may stop or prohibit a land owner from continuing with the action or activity complained of.

#### ***How it is determined that a proposed restriction is a justified use of the authority***

The answer to this question lies in the general body of administrative law in Kenya. Since in its imposition of land use restrictions, the government acts through its administrative agencies such as NEMA, land control boards, local authorities and the Physical Planning Department, the doctrine of *ultra vires* applies to the exercise of authority. The essence of the doctrine is that anything a public administrative body or official does in excess of its powers/authority or without authority is *ultra vires* and whatever is *ultra vires* is null and void (so held in, among other cases, *Sarah Wambui Mugo v. Land Dispute Tribunal & 2 Others*<sup>24</sup> where the court ruled that the Defendants had acted *ultra vires* by making an award of land without legal authority to do so). It follows that on the basis of the doctrine of *ultra vires*, a public administrator can only do those things that it is authorized by law to do. This means that before NEMA, land control boards, local authorities or some other governmental agency imposes a land use restriction of any kind (restrictive covenants, conservation easements, et cetera, it would have to first examine the provisions of law governing its functions to determine whether the provisions authorize the particular kind or restriction envisaged. Therefore, the authorizing law itself provides justification for a government agency's imposition of a land use restriction.

Under Common Law, an injunction or some other restrictive order may be justified only upon proof that the action or activity complained of constitutes nuisance, trespass, negligence or strict liability.

### **Legal Procedures for Exercising Government Authorities to Restrict Private Land Use**

An analysis of the relevant laws discloses that while some of the government's authorities to restrict private land use have elaborate procedures established by law, some have very short processes provided for by law while others have no specified procedures at all. The following restrictive mechanisms have no procedures specified by law at all:

- (a) restrictive covenants under the GLA for which shall be implied in titles to leases and freeholds from government land under sections 33, 34, 39 and 70 of the Act;
- (b) development controls under the GLA;
- (c) land preservation orders under the Registered Land Act (RLA);

- (d) land development orders, programmes and schemes under the RLA;
- (e) government orders for preservation of essential crops under the RLA;
- (f) Chiefs' coercive and compulsive orders for planting of trees and prohibition of tree cutting under the Chiefs' Authority Act;
- (g) overriding interests under the RLA;
- (h) restrictions on mining and mineral prospecting under the Mining Act;
- (i) gazetting of environmentally-significant areas under EMCA, section 54; and
- (j) the issuance of restoration orders under EMCA, sections 108, 109 & 111, upon identification of the responsible person.

Restrictions for which there are short legal procedures are mainly:

- (a) registered restrictive agreements which are voluntarily made by private parties under the RLA (section 95);
- (b) inhibition of dealings places on land by courts under the RLA, section 128 upon proof, to the satisfaction of land registrar, of the event complained of;
- (c) restrictions placed by the respective land registrars under the RLA, sections 136 and 137 for prevention of any fraud, improper dealing with land or lease or for any sufficient case shown to a land registrar by any concerned person;
- (d) restrictive orders under the RLA, section 163. This could comprise a restrictive order issued against a land owner's use of his land or a prohibition of his use thereof. However, before such an order is issued, the law, in section 137 sets out brief due process requirements, requiring an inquiry into a land owner's alleged failure to observe overriding interests, notification of the land owner of the inquiry and findings thereof, and grant to the land owner of a chance to be heard by the land registrar before a restrictive order is issued;
- (e) restrictions on sale, transfer and subdivision under the Land Control Act; and
- (f) gazetting of coastal zones for protection under EMCA, section 55, which requires a prior survey and a survey report with baseline information on existing coral reefs, et cetera, preparation of an integrated national coastal zone management plan based on the survey and a gazette notice without public participation requirements.

Those with specified procedure in statute or Common Law

- (a) local authority restriction on subdivision of land;
- (b) zoning regulations;
- (c) development and application of physical development plans;
- (d) development of environmental quality standards and regulations;
- (e) the imposition of environmental easements and environmental conservation orders; and
- (f) environmental impact assessment (EIA) requirements.

**(a) Local Authority Restrictions on Subdivision of Land**

Section 162 (g), the Local Government Act empowers local authorities (municipalities and townships) to control or prohibit subdivision or cutting up of land or building lots into smaller areas and to develop regulations requiring that no transfer of any subdivided land shall be registered in any land titles registry without their approval and certification. Although the authorizing provisions do not specify the procedure to be followed by local authorities in their imposition of restrictions on subdivision, the law envisages the development of local authority regulations to implement the restrictions or, at least, local authority decisions to restrict or prohibit subdivision of land. The making of both local authority decisions and regulations is governed by the Local Government Act, Chapter 265 (sections 75 – 84 governs local authority decisions while sections 201 – 211 govern the making of local authority by-laws) and Common Law rules. In the case of restrictions on subdivision of land, the proper procedure would begin with a local authority decision to make restrictive regulations or by laws. Sections 75 – 84 require decisions to

be made at meetings called to consider specified matters at issue. In meetings, decisions are taken by way of voting. In a meeting to consider restriction on subdivision of land, a local authority would be required to take into consideration its development policies and any existing physical development plan.

Once a decision is made in support of regulations restricting subdivision of land, sections 201 – 211 would kick in. In summary, the provisions require local authorities to notify the public of their intention to make by law by publishing their intention in at least one newspaper circulating in the area to be affected by the by-law/regulation. In the notice, the public would be accorded fourteen days within which to raise objections to the by law. A copy of the intended by-law shall also be published in the local authority's offices for public information. At the end of fourteen days, the respective authority considers the proposed by-law in light of objections received and makes a decision on whether or not to proceed with the making of the by-law. If it does proceed, the final process involves publication of the by-law in the Kenya Gazette, whereupon it becomes binding. The practice of Nairobi City Council, in particular, has been to review its restrictions on subdivision of land in Nairobi. As already explained, in Karen area, for example, the Council first restricted subdivisions to one acre. However, upon review in light of developments in the City and the need for housing, it did allow further subdivisions of up to a minimum of half acre, which is the current position.

#### **(b) Zoning regulations**

Local authority making of zoning regulations as explained in preceding sections is governed by the Local Government Act and Common Law. The procedure is similar to the one in (a) above. However, there has been a more vibrant activity, especially in Nairobi City Council with regard to zoning than restrictions on subdivision of land *per se*. In response to various aspects of development, including increase in density of development and intensity of development activities, the Council has reconsidered its zones in Nairobi and adopted a number of approaches. In some cases, for example in Upper Hill in Nairobi, which was formerly under Zone 3 but has drastically changed from a residential area to an up-market commercial area, the Council has carved out the area, identified it as a sub-zone in zone 3 and re-defined its purpose to be commercial rather than residential. Although the law requires the procedure explained above to be followed, including public participation, there was very little Council consultation with the public in its re-designation of Upper Hill area. In other cases, the Council has permitted uses that were formerly prohibited in certain zones, in response to intensity of such uses in areas where they were previously minimal. A good example is Eastleigh area which was initially zoned purely for residential purposes. In recent years, it has become a popular commercial hub.

#### **Responsible Officials, Verification and Monitoring**

Within local authorities, the offices and officers responsible for the processes explained in the preceding paragraphs are the directorate and director of City Planning, City Engineers, City Planning Department and the Physical Planning Department. In law, all of the offices and officers ought to work in collaboration with the office of the Clerk as the executive officer and all actions, as already explained should be based on the council's approval decisions. So far, there is no procedure in law or in practice for verification or monitoring of local authority exercise of powers or authority to restrict subdivision of land or its development and implementation of zoning regulations. The exercise of the powers are usually questioned only when affected or concerned individuals and groups of affected or concerned individuals challenge one or more of local authority actions, especially through the process of judicial review. In that event, courts (the High Court) exercises supervisory powers over local authority actions by examining the manner in which actions are taken or decisions made in light of the applicable law and invalidates actions and/or quashes decisions if found to be unlawful. For example, in *Gitau v. Savage & 4 Others*,<sup>25</sup> local residents filed a suit against Nairobi City Council challenging the Council's approval of a development of a commercial nature, namely a petrol station on plot LR No. 7413/5 on Mukoma, Kisembe and Kikeni Estates of Magadi Road whose zoned user was residential in an area which was designated as a residential

area, claiming that the approval was contrary to the provisions of the Physical Planning Act. In response, the court granted an injunction.

**(c) Development of Physical Development Plans.**

The physical Planning Act (PPA) authorizes and indeed, requires the development of regional physical development plans (sections 16-23) and local physical development plans (sections 24-28). The law details the procedure to be followed in developing both kinds of development plans.

Regional physical development plans are required for "...any government land, trust land or private land within the area of authority of a county council..." (section 16(1)). In terms of the area over which a regional development plan ought to be developed, the guiding word here is, "county council." This means that a regional development plan is intended to cover or to be applied in an area falling within a county council. In terms of administrative divisions, areas under the jurisdiction of county councils form districts. Therefore, it is accurate to state that regional development plans are required at the district level. On the other hand, local physical development plans are intended for much smaller areas – within the jurisdiction of a city, municipal council, town council or for any trading or marketing centre (the PPA, section 24(1)). For example, a local physical development plan may be developed to apply only to an area within Nairobi City, such as Karen.

In the process of developing such plans, the law requires, first, the development of a technical report on the area over which the plan is to apply, stating the conditions of development in the area, resources and facilities therein to justify proposed physical development policies, proposed location of developments in the area and proposed allocation of resources for the area. The technical report should be based on a study of the area. Secondly, maps and plans showing present and future land uses in the area should be developed, taking into consideration: the potential of agricultural land, land tenure, and natural resource endowments of the land, among other factors (see First Schedule to the PPA).

Third, after a draft plan is developed, the law requires the local authority whose area is affected to be notified of it within thirty days of its preparation. After notification, the local authority (county) is required to make representation in respect of the plan (to the county council) and thereafter, to gazette it in the Kenya Gazette and in such other manner as he deems expedient. In both the Kenya Gazette and any other medium in which the local authority publishes a draft plan, the local authority is required to notify the public that the plan is open for inspection at places and times specified in the notice or notices and invite any interested person to express views, objecting to it or supporting it within sixty days of the notice (PPA, section 19(1) & (2)).

It is noted that although the law grants opportunity for public participation in the process with one hand but takes it away with the other. Section 19(2) of the PPA requires the public to be notified of the development of draft physical development plans and invited to raise their views in support thereof or objections thereto, but in section 19(3), the Director of Physical Planning, which is the government official with key responsibilities for the development of the plan is authorized to deny the public a chance to raise views about a proposed physical development plan, so long as he gives reasons therefore. After the expiry of the sixty day period, or where the Director declines to allow public views, immediately after development of a draft physical development plan, it shall be gazetted in the Kenya Gazette and thereupon, it becomes operational. Any person aggrieved by the development of a physical development plan may appeal to the respective liaison committee under section 13 of the PPA.

**Responsible Officials, Verification and Monitoring**

The person with oversight responsibility to ensure that regional and local physical development plans are developed and implemented is the Director of Physical Planning, whose office is located within the Ministry of Lands. As explained, the Director works in collaboration with respective local authority officials. Local authorities are specifically responsible for availing to the public draft physical

development plans in their offices for public view and comment. There is no requirement or procedure for monitoring or verification of the process of development or implementation of regional and local physical development plans. In any case, there is no known regional physical development plan that has ever in post-independent Kenya, been developed in accordance with the procedural requirements set out in the law and implemented as anticipated in the PPA, for the purpose of improving land, for proper physical development of land or for securing suitable provisions for transportation, public purposes, utilities and services or for any other statutory purpose specified in section 16(1) of the PPA. In general, there is massive failure in physical planning in Kenya.

**(d) Development of environmental quality standards and regulations**

NEMA's development of environmental quality standards and regulations is authorized by EMCA, especially sections 70 and 71. Sections 70 and 71 of EMCA which require standards provide for consultation between NEMA's Standards Enforcement Review Committee and Lead Agencies, without detailing the procedure to be followed by NEMA in developing environmental standards and other regulations. However, the general body of administrative law in Kenya, including Common Law, require government agencies, such as NEMA, to observe due process in the course of formulating regulations. The process, which NEMA and its committees have complied with to a large extent, involve: notice on the daily newspapers of its intention to make regulations or to develop environmental standards, consultation with lead agencies and stakeholders, invitation of public views, draft of regulations and gazettment thereof. If these procedures are not followed, an agency's regulations can be successfully challenged by affected or concerned persons.

**(e) The imposition of environmental easements and environmental conservation**

The imposition of environmental easements and environmental conservation orders is authorized by EMCA, sections 112 & 115. Although the law does not detail the procedure thereof, it requires the orders be issued by a court of law upon an application by a concerned person. All court process must observe due process of law. Therefore, although the Act is silent on details, a person against whom such order is sought would have to be informed of the application made against him and given a fair chance to respond. This means that the court would have to conduct some hearing of the matter before deciding whether or not to issue an environmental easement order or an environmental conservation order. As with many of the processes, there is no requirement for verification or monitoring of the exercise of this power. Any unlawful action or activity with regard to environmental easements and conservation order would have to be challenged by concerned and affected persons in order for their validity to be questioned.

**Responsible Officials, Verification and Monitoring**

In the process of developing environmental quality standards and regulations, NEMA officials, especially those comprising the Standards Enforcement and Review Committee established under section 70(1) of EMCA, officials in the EIA Department and Lead Agencies, including representatives of local authorities, take responsibility for the necessary processes. Often, experts in various fields, depending on the nature of the standard or regulation to be developed, also participate in the process or are consulted. However, there is no specified statutory procedure for monitoring or verification of the process of standards development, even though the law envisages review of environmental standards and regulations, once developed.

**(f) Environmental impact assessment (EIA) requirements.**

On the basis of sections 58-64 of EMCA which authorize the applicability of EIA as a tool in Kenya, the procedure for conducting EIA is detailed in Environmental Impact Assessment and Audit Regulations issued by Legal Notice No. 101 of 2003 (hereinafter, EIA Regulations). It has been stated in other sections of this work that development activities (projects) that must undergo EIA are specified in the Second Schedule to EMCA. Apart from the projects/activities that are specifically listed, the Second Schedule states that the following activities also require EIA: (a) any activity that is out of character with its surrounding; (b) any structure of a scale not in keeping with its surrounding; and (c) major changes in

land use. It is always advisable for developers who are not sure whether or not their proposed activities should be subjected to the EIA process to seek guidance from NEMA.

As required by section 58 of EMCA, the first step in the EIA process involves the preparation of a project report, stating all of the matters about a proposed project that are required by Regulation 7 of the EIA Regulations. These include a statement on: the nature of the project, the proposed location and baseline information about the proposed location, the design of the project, materials to be used, by-products expected to be generated, potential environmental impacts of the project, an action plan for the prevention and management of possible accidents during the project cycle and a plan to ensure the health and safety of workers and neighbouring communities.

In addition, Regulation 7(2) mandates all project proponents in the process of preparing project reports (through their EIA experts) to “...pay particular attention to the issues specified in the Second Schedule to these Regulations.”

The additional issues which must be carefully considered in a project report are intended to ensure, among other things, conservation of biological diversity. They include: ecological considerations, namely: effect of a proposed development on the number, diversity and breeding habits of wild animals and vegetation; and gene pool of domesticated plants and animals; effect of proposed activity on breeding populations of fish, et cetera; ecosystem maintenance including effect of proposed activity on fragile ecosystems; social considerations, including potential impacts of a proposed activity on human health; landscape including visual impacts of a proposed development; and effect of proposed development activity on current land uses and on land use potentials.

The next step involves submission of a project report to NEMA, which constitutes a project proponent's application to NEMA for an EIA licence. Upon receipt of a project report, NEMA is required to make one of three decisions to: approve a project with or without conditions and issue an EIA licence therefore if the authority, after reviewing a project report, forms the view that a project will not have significant environmental impacts or the project report discloses sufficient mitigation measures for likely negative impacts; or, direct a project proponent to undertake a full EIA study if a project report discloses that a project is likely to have significant impacts on the environment but proposed mitigation measures are not sufficient.

Where NEMA approves a project at the project report stage, it issues an EIA licence for it and the EIA procedure ends there. If it decides that a project proponent conducts a full EIA study, rules 11 - 23 of the EIA Regulations apply in relation to procedure. The Regulations require that a project proponent hires an EIA expert and draws terms of reference for an EIA study to the expert stating matters required to be considered in the EA process. The EIA expert's first task is to undertake a study involving, among other things, identification of anticipated impacts of a proposed project on the environment and the scale of the project and identification and analysis of alternatives to the proposed project (Regulation 16). The next step involves public participation. The EIA expert is required to seek the views of persons who may be affected by the proposed project, usually through interviews with potentially affected communities, posting posters in strategic public places in the vicinity of the site of the proposed project informing affected parties and communities of the proposed project, publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation and making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks (regulation 17(2)).

Subsequently, a project proponent is required to liaise with NEMA to hold at least three public meetings with potentially affected parties and communities to explain the project and its effects at which point, a suitable coordinator has to be appointed to record both oral and written comments of the public received

during the meeting. Subsequently, the project proponent's EIA expert prepares an EIA study report including all the matters specified in Regulation 18. Once NEMA receives the report, Regulation 20 requires it to submit copies thereof to relevant Lead Agencies, seeking their comments on the proposed project. Further, Rule 21 of EIA Regulations require NEMA to publish a notice in one of the daily newspapers with wide circulation inviting the public to make comments on the report within fourteen days of its receipt.

Rule 22 mandates NEMA to hold a public hearing subsequent to the foregoing processes. Finally, NEMA is required by Rule 23 of the EIA Regulations to make a decision within three months of receiving the EIA study report either to approve or reject the project, taking into account: the validity of the project report, comments made by Lead Agencies and other interested parties, report of offices presiding at public hearing and other factors which NEMA may consider to be crucial to the project. NEMA is mandated by law to give reasons for its decision (Regulation 23(2) of the EIA Regulations). If NEMA decides to approve a development, it shall write to a project proponent an approval letter with or without conditions. If an approval letter has conditions, a project proponent has to write to NEMA accepting the conditions before NEMA issues an EIA licence.

It is in NEMA's approval conditions that it usually specifies restrictions on a proposed development. For example, in *Phenom*, already cited NEMA approved the development in question on conditions that the developer scales it to four floors, down from eight.

Any person who commences a project that should undergo EIA without an EIA licence commits an offence and is liable to a fine or imprisonment (Regulation 45 of the EIA Regulations and section 45 of EMCA).

### **Responsible Officials, Verification and Monitoring**

NEMA has the overall responsibility for the conduct of EIA. However, as explained, there are various players under NEMA's oversight and supervision, including project proponents (specifically in relation to drafting terms of reference to EIA experts and ensuring that EIA experts carry out their tasks in accordance with the law. In this regard, every person in Kenya is deemed to know the law), Lead Agencies such as Kenya Wildlife Service and local authorities in whose jurisdiction a project is proposed (usually give their comments on whether or not they have any objection to a project and whether or not a project proponent has fully complied with their requirements, such as submission of building plans for approval), the physical Planning Department, especially with regard to land use and related approvals, officers appointed to preside over public hearings who are, in some cases, provincial administration officers and NEMA's Technical Advisory Committees on Environmental Impact Assessment.<sup>26</sup>

There is no provision in EMCA or any other law that authorizes monitoring and/or verification of the EIA process. However, the appeals process provided for by sections 125 – 130 of EMCA serve to ensure that the prescribes EIA processes are complied with in accordance with the law. The law establishes an Environment Tribunal whose functions are: to hear appeals against NEMA's decisions on matters concerning the environment, including EIA and to advise NEMA on complex matters of environmental law. Through the appeals process, many of NEMA's decisions on EIA that are not in accordance with the law have been set aside. In addition, parties who are aggrieved by some of NEMA's procedures *per se* may find recourse through the process of judicial review (The Law Reform Act, section 8 & 9 and Order 53 of the Civil Procedure Rules).

### **The Practice of Exercising Government Authority to Restrict Private Land Use**

Preceding sections explain the various categories of government restrictions on private land use, based on the authorizing statutes and Common Law. In reality, there are some restrictive authorities that the

government hardly exercises at all while others are frequently applied. It should also be noted that there are restrictions on private land use that require private action for enforcement, rather than government imposition.

#### *Restrictive Covenants*

Under the GLA, restrictive covenants are regularly imposed, with the result that more often than not, beneficiaries of government land resort to seeking change of user approval from the Physical Planning Department than risk demolition of their building structures that contravene the covenants. In any case, change of user is almost always granted as a matter of course and without assurance by the Physical Planning Department that necessary infrastructure that would accommodate the new uses of land that they permit are in place. For example, in *Syokimau Neighbours Association v. NEMA & Mr. & Mrs. Stanley Waruimbo Wangendo* (NET/46/2009), it emerged that the 2<sup>nd</sup> Respondent, Mr. Waruimbo had been granted change of user approval from use of the land in question for residential purposes to commercial purposes (shops and high-rise apartments) against an agreement between the residents of the area and Mavoko Municipal Council that the area would remain for residential purposes only. Moreover, the Council and the Physical Planning Department (PPD) approved the change of user without considering that the necessary infrastructure, such as roads and public sewer that ought to have accompanied the change of user were not in place at all. In many cases, as in *Syokimau*, it appears that local authorities and the PPD only focus on permission to change use rather than on consequences of change of use on the environment, among others. Therefore, although restrictive covenants were intended to ensure orderly development of land, and, incidentally, environmental conservation, they have been rendered less effective by the ease with which land holders obtain them. Needless to state, restrictive covenants are hardly applied to protect the environment.

#### *Power to Restrict subdivision of land*

In practice, the government's power to restrict sub-division of land is always exercised such that lease holders and freeholders from the government and owner's of land registered under the RLA (Cap. 300) almost always seek authority to subdivide. Usually, authority to subdivide is granted by the PPD and local authorities upon application, unless there is, in place, a local development plan restrictive downward subdivision below a certain acreage. It has been explained, for example, that in Karen area in Nairobi, the PPD and Nairobi City Council cannot approve any subdivision of land below half of an acre. It should be noted, however, that the kind of restriction on subdivision of land that the government (both central and local government) exercises over certain areas in Nairobi is not emulated anywhere else in the country. In most parts of the country, the kind of land use restriction that always applies is that exercised by land control boards over subdivision of agricultural land. A land owner must seek and obtain the respective board's consent to subdivide. In most cases, the legal procedure set out in the Land Control Act with regard to land board consent are followed. However, the board hardly denies consent to subdivide or to undertake any of the other controlled land transactions, so long as its procedures in seeking subdivision are followed. This is, perhaps due to absence of regional physical development plans.

#### *Land Use Restrictions through Zoning Regulations*

The authority to restrict land use through zoning regulations is not regularly exercised country wide. In Kenya, local authorities have largely failed in exercising their power to zone areas under their jurisdiction for purposes of orderly development. Only Nairobi City Council has made efforts to zone the city for purposes of controlling land use in terms of permitted uses and allowable densities. None of the other 174 local authorities country wide have made similar efforts. The result is that poor development planning is reflected almost every where in the country. In Nairobi, the Council has, to a large extent followed its zoning regulations and the established legal procedures to control construction of buildings of various kinds and their uses but these procedures do not permit public participation. It is interesting to note that although section 33 of the Physical Planning Act permitted local authorities to conduct EIA in their process of development approval and to allow public participation long before EMCA came into force, it

was confirmed during this study that section 33 was never implemented at all and the permitted EIA process under the Act has never been conducted at all as part of implementation of the Physical Planning Act. However, there are a few cases in which the Council has approved housing and other developments against its own zoning specifications or failed to take action to demolish housing and other structures constricted in violation of its zoning regulations. Moreover, the law and practice of change of user approval has also had negative impacts on zoning regulations in Nairobi. As explained in previous discussions, the Physical Planning Act authorizes physical planning departments to approve change of user upon application by a developer. The result is that in areas whose zoning requirements permit only single dwelling houses, change of user has been permitted to allow construction of high rise building with negative impacts on the aesthetic and other aspects of the environment. It is also worth pointing out that zoning regulations are hardly used for the purpose of environmental conservation *per se*, even though implementation of zoning requirements would, if strictly complied with, have positive incidental impacts on the environment.

#### *Restrictions Authorized by the Agriculture Act*

The Act authorizes land use restrictions through a variety of mechanisms including land preservation orders. However, in reality, provisions for land preservation orders, land development orders, programmes and schemes, orders for cultivation of specific cash crops and many other restrictive mechanisms under the Act are not implemented at all. Since independence, the government has not tended to avoid the use of command and control mechanisms to maximize agricultural productivity, which is the key objective of the Agriculture Act. The government hardly requires individuals and communities to undertake soil conservation measures, which are the measures closest to environment conservation in the Act. The few mechanisms that seem to have relevance under the Act are overriding interests of utility companies, among others, which are regularly enforced by power and pipeline companies, among others to facilitate their establishment of pipelines, power lines, sewer lined, et cetra but the procedures do not permit public participation. There are also overriding interests related to preservation of the rights of other family members than the registered member to land which are usually insisted upon by family members seeking to limit the registered member's use rights to permit their access to and use of family land in cases of disagreement on the rights. A few cases also suggest that owners of agricultural land are prepared to seek court redress to enforce their "natural" rights to light, among other land ownership rights (*Shah Rajesh v. The National Environment Management Authority (NEMA) & Titus Kiptoo Kosgei - (NET/47/2009)* in which the appellant raised, among others, a claim that the Respondent's eucalyptus farm was overshadowing his farm, thereby blocking his crops from sunlight and proper growth).

As explained in previous sections, the Land Control Act also makes provisions authorizing restriction of certain transactions involving agricultural land, namely: sale, subdivision and transfer through the process of grant of Land Control Board consent. This is an authority that has been consistently exercised in accordance with the law in almost every case involving one or more of the controlled transactions. However, the objectives are those specified in the Act, such as prohibition of sale of agricultural land to non-Kenyans and prohibition of sale of family agricultural land without consent of family members but not environmental conservation.

Land Use restrictions under the Chiefs Authority Act do not permit public participation because they are and were intended to be command and control in character. In some parts of the country, the chiefs' powers are regularly exercised to ensure that communities plant trees as part of environmental conservation, to control soil erosion and land slides and to ensure availability of timber. However, in many other parts of the country, chiefs do not exercise the powers at all for a variety of reasons, including official lethargy and there is, so far, no mechanism for ensuring that they do.

The Mining Act declares that all minerals, including those on private land, belong to the government, meaning that a land owner would be constrained from dealing with his land for farming or for any other purpose if the land has minerals. There was no public consultation before the law took effect and needless to state, the public does not support the provisions. Perhaps this is the reason there has been very little mineral prospecting in Kenya because fear of government acquisition of private land with minerals keeps land owners away from anything that might suggest that their land has minerals. For these and other reasons, the Mining Act is currently under review and eventually, Kenya may have a new mining law that is more responsive to the wishes and needs of the population.

Common Law restrictions on private land use served useful purposes, especially to ensure quiet and peaceful enjoyment of property as well as public convenience and comfort. However, attempts to rely on the law for purposes of environmental conservation in many cases met with obstacles, especially those related to requirements of *locus standi*. In the era of environmental awakening, new and comprehensive environmental laws have been enacted which make better provisions for environmental conservation, with the result that reliance on Common Law to serve, for example, biodiversity conservation purposes is diminishing even though it may still have some relevance. Application of Common Law involves court processes and in every case, the stipulated civil procedures have been followed by the courts to arrive at decisions on claims based on the law.

#### *Restrictions through EIA Procedures and requirements*

Through NEMA, the government regularly exercises its authority to restrict private land uses in the interest of environmental conservation. It has been explained that EMCA and EIA Regulations require special consideration of biodiversity conservation in the EIA processes. Both the public and NEMA and other relevant government agencies are increasingly becoming aware of EIA requirements and the government's power to restrict developments through the processes as authorized by law.

To an appreciable extent, NEMA has exercised governmental authority to restrict private land uses of many kinds in the interest of environmental conservation. For example, in *Peter Bogonko v. National Environment Management Authority (NEMA)* (Nairobi High Court Miscellaneous Application No. 1535 of 2005), NEMA rejected a project report presented by a private land owner as part of his application for NEMA's licence of his construction of a petrol station on plot No. West Mugirango/Siamani/5818 on the ground that the construction and operation of the petrol station would have negative impacts on nearby water catchment areas. NEMA's exercise of authority to restrain use of the land in question for a petrol station was upheld by the High Court. Also, in *Jamii Bora Charitable Trust & Another v. Director General, NEMA* (Tribunal Appeal No. NET/02/03/2005), NEMA had rejected an application by the appellants to develop a housing estate in Kisaju Sub-location in Kajiado on the basis that the proposed location of the project was in a wildlife area and if permitted, it would adversely affect flora and fauna in the area and their habitat. Also, in *Phenom Limited v. National Environment Management Authority & Riverside Gardens Residents' Association* (NE/04/06/2005), NEMA, upon receipt of the developer's project report in which the developer proposed to construct an eight- floor residential apartment, issued development approval and subsequently an EIA licence both with conditions restricting the development to only four floors. These are just a few of the cases in which NEMA has exercised its authority to restrict private land use. The cases, among others, indicate that NEMA's authority is exercised for purposes of conservation of the environment which, in Kenya, includes the built environment.

To an appreciable extent, NEMA has followed the EIA procedures stipulated in EMCA and the relevant regulations. In the process, the public has, in a number of cases, been accorded the right to participate. However, there are cases where NEMA has failed to comply with one or more of the required EIA procedures. For example, in *Watamu Association v. NEMA & Salama Beach Hotel Limited* (NET/22/2007), NEMA approved the development of villas on Plot LR. No. 762/Gede/DAbaso in

Dongokundu Sub-location, Watamu Location in Malindi District on the basis of a project report alone, and yet the project report had not disclosed sufficient mitigation measures. Therefore, NEMA's approval was in violation of sections 58 and 58 of EMCA and Regulation 10(3) of the EIA Regulations which obligate NEMA to order a developer to conduct a full EIA study if a project report discloses that a proposed project will have significant adverse impacts on the environment but the report does not contain sufficient mitigation measures. Also, in *Tourism Promotion Services (Kenya) Limited v. Director General, National Environment Management Authority (NEMA), County Council of Transmara & Cobra's Corner Limited* (NET/34/2008), NEMA had issued the 3<sup>rd</sup> Respondent with an environmental impact assessment (EIA) licence authorizing the 3<sup>rd</sup> Respondent to construct 27 luxury tourist cottages on L.R. No. Transmara/Enkul/27703 in the Mara Triangle without allowing public participation in the process of its approval and without due consideration of the fact that area has at all times been recognized as a fragile ecosystem for which numerous initiatives have been undertaken by the appellants, among others, to conserve the environment, including wildlife therein. The Tribunal set aside NEMA's approval and cancelled the EIA licences issued. These are just a few of the cases in which NEMA and other government agencies have failed to exercise their authority to restrict private land use in the interest of the environment. There are various reasons for agency failure to strictly comply with restrictive EIA requirements, including: inadequate understanding of the legal requirements, lack of appreciation of the significance of environmental conservation and ineptitude.

### **Relevant Court Rulings on Government's Authority to Restrict Private Land Use**

Some of the relevant court rulings which demonstrate the government's exercise of powers to restrict private land use have been considered in preceding sections. While cases, such as *Phenom* illustrate the actual exercise of power to restrict land use, others, such as *Peter Bogonko* demonstrate not only the exercise of restrictive powers, but also the potential of public challenge of the exercise of restrictive powers. In *Peter Bogonko*, the developer challenged NEMA's powers to restrain his efforts to develop a petrol station on many bases, including his right to undertake the proposed development. However, the trend of cases filed in both courts and the Tribunal indicate that the judicial organs are prepared and always ready to effect the laws in order to meet intended objectives, including environmental conservation.

Court rulings have set precedent on a number of issues concerning EIA and related government controls of development. One of the novel issues raised in *Peter Bogonko* for the first time since EMCA was regarding the meaning and applicability of the statutory discretion accorded developers. Section 58 (8) requires NEMA to respond to a developer who has submitted a project report seeking an EIA licence within a period of three months. Section 58(9) authorizes any developer who submits a project report to NEMA but does not hear from NEMA within three months to start his undertaking. This was the provision that Peter Bogonko claimed to have relied on to start building a petrol station after failing to hear from NEMA within three months of his submission of a project report. Therefore, one of the questions the court had to determine was whether Bogonko could exercise his discretion to commence the project after three months without NEMA's decision. Although the court did find that Peter Bogonko was not entitled to exercise his discretion under EMCA section 58(9) because he failed to publish his development in a newspapers for two consecutive weeks and that extended the commencement of the three month period within which EMA could respond, the court went further to determine whether NEMA's hands could be fettered by the exercise of the statutory discretion by private parties. In that regard, the court took into consideration NEMA's contention that it cannot be stopped from interfering with the applicant's discretion because it, NEMA, was merely performing its statutory duty even though the decision to do so was made out of the statutory period allowed. In response, the court, after referring to several decided cases set the rule that NEMA, being a public body entrusted by Parliament with the exercise of powers for public good cannot fetter itself in the exercise of the powers and cannot be estopped from doing its public

duty, subject to the qualification that it must not misuse its powers and that it is a misuse of its powers for it to act unfairly or unjustly. Further, the court cited an authority<sup>27</sup> which states that:

“The underlying principle is that the crown cannot be estopped from exercising its powers, whether given in a statute or common law when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to the private individual...”

On the basis of the authorities cited, the court concluded that it could not fetter NEMA’s powers given by statute. This sets the precedent that although section 58(9) of EMCA authorizes developers to commence development if NEMA fails to respond to their applications for EIA licences within three months of receipt of their project reports, NEMA can, nevertheless, stop such a developer and if the developer turns to court for redress, he will meet the rule that NEMA, being a body authorized by Parliament to exercise powers to control developments, cannot be fettered in doing so, even if it does so out of the time specified by law.

Another statement that the court made in the *Peter Bogonko* case, which sets the rule regarding the exercise of governmental power vis a vis private interests is that in the exercise of the powers, government agencies ought to weigh the public interest in controlling land use (development) against the private interest of a developer or land owner. In doing so, the court stated, public interests (in a clean and healthy environment, a water catchment area, et cetera) outweigh private rights and interests of developers (and land owners). In the present case, public interest which demanded that water catchment areas be preserved prevailed.

Another important case in which the court has affirmed the existence of a public interest in environmental conservation is *Rodgers Muema Nzioka v. Tiomin Kenya Limited* (Mombasa High Court Civil Case No. 97 of 2001). In that case, the applicants sought injunctive orders against the defendant for commencing tiomin mining before and without first subjecting the project to EIA processes that would permit necessary controls to be exercised by NEMA. The court cited a number of authorities, including the US case of *Atchinson Topeka & Santa Fe Railway Co. v. Callaway* (392 F. Supp. 610 (DDC 1974)) to arrive at the decision that

“...environmental degradation is not necessarily individual concern or loss but public loss...”

Therefore, in a matter of the kind presented in the *Rodgers Nzioka* case, the court stated, the balance of convenience to be considered in determining whether or not to grant an injunction against a developer is not only convenience of the parties to the suit, but also of the public at large. On that basis, the court considered that if it did not issue an injunction, any form of feared degradation, danger to health and pollution would be caused to the detriment of the population. On the other hand, if the court issued an injunction, only the investor would be kept at bay but life would continue for the population safely without risk. The court went ahead to issue injunction against the developer.

The Environment Tribunal has also set important precedent on matters concerning environmental conservation, especially with regard to EIA processes. As explained in previous sections of this work, EMCA and the EIA Regulations authorize NEMA to approve a development on the basis of a project report alone. It is only where a project report discloses significant environmental impacts but without adequate mitigation measures that NEMA is required to direct a developer to undertake a full EIA study. In law, NEMA is the one to decide, after reviewing a project report internally, whether or not these factors are present to warrant approval without a full EIA study or absent to warrant the conduct of a full EIA study before approval. It has also been noted that in law, it is the process of a full EIA study that allows meaningful public participation, including through a public hearing. Public hearings and

consultations with potentially affected persons were not specifically required where NEMA approves on the basis of a project report alone. However, it emerged through appeals to the Tribunal that in some cases, NEMA approved on the basis of project reports alone and without public consultation, developments that ought to have undergone full EIA study, including public participation. In order to avoid dangers that this kind of approval posed both to the environment and public health, the Tribunal set the rule that where NEMA is minded to approve a project on the basis of a project report alone, it must take steps to at least, consult with potentially affected persons. This rule was established in *James Mahinda Gatigi & 3 Others vs. NEMA & Universal Corporation Ltd* (NET /15/2006 OF 2007) and has been consistently reiterated in subsequent cases, such as Hon. Beth Mugo & 7 Others v. Director General, National Environment Management Authority (NEMA) and Silver Crest Enterprises Ltd (NET/23/2007) and in *Maasai Mara North Conservancy Limited v. NEMA, Kenya Cheetah Foundation, Jorge Alesanco Rodriguez del Castillo & Kenya Wildlife Service* (NET/37/2009).

### **Current Issues Before Court Regarding Exercise of Governmental authority to Restrict Private Land Use**

Claim for compensation by land owners whose right to develop their land has been curtailed through the application of EIA regulations is, perhaps the most interesting issue currently being raised in court. In a few cases, such as *Mutaka Ole Mpoya v. Maasai Mara North Conservancy Limited & Kenya Tourism Federation* (Nakuru Constitutional Reference No. 66 of 2010 /JR 34/2010), land owners are raising claims for compensation for their land where EIA regulations have been applied to restrict use of the land. None of the cases has been decided upon and it would not be appropriate to comment any further. Concerned parties look forward to a court decision that would set precedent for future cases.

### **Critical Issues Regarding the Exercise of Private Land Use Restriction Authorities**

In order to ensure sustainable development and to avoid unacceptably high levels of health impacts of development activities, exercise of private property rights ought to be regulated by government. There are clear examples of, for example, what has become known in Kenya as “concrete jungles” comprising that are densely concentrated in certain parts of the country, especially in Nairobi, areas that are fast growing into slums with property values and environmental values diminishing and buildings so poorly constructed that they collapse, killing large numbers of people in Nairobi, Mombasa, Kiambu and other parts of the country. All of these indicate that private land owners ought not to be left to their own devices. The government ought to step up its exercise of powers to control development through all of the mechanisms already provided for by law, including application of the Building Code to protect not just the environment, but also public health and safety. Clearly, EIA and other laws as well as decisions of court in cases such as *Peter Bogonko v. National Environment Management Authority (NEMA)* set parameters for and limitations of government controls of private land use. Government agencies ought always to balance the public interest to be protected or preserved, including the interest of environmental conservation against private interests. In every case, public interest should outweigh private interests and inconveniences. Courts have ruled, at least in the *Peter Bogonko* case, that government’s exercise of power should be upheld even though it may work some unfairness to the private individual, so long as government agencies exercise their powers without misusing them and without acting unfairly or unjustly towards private citizens where there is no overriding public interest to warrant their actions.

Needless to state, all procedures for exercising government’s restrictive authorities ought to be democratic. The public, especially potentially affected persons, ought always to be accorded a chance to participate in government decision making. It has emerged that in certain cases, including cases of conservation, local communities may be better placed to help make determinations and to act because they tend to have incisive knowledge of local circumstances. Public participation also provides basis for local communities including potentially affected persons to own processes leading to developments in their areas. Those who will live with a project in their area for the rest of their lives ought to, at least, know about the project and have basis in their participation to support it.

It is already noted that private land owners are increasingly seeking compensation for land use restrictions, especially those imposed by EIA laws and processes. The question whether or not compensation should be paid ought to be determined in light of the applicable law. Already, some laws provide for compensation in certain cases of government restriction of private land use. For example, section 115(5) of EMCA already provides for compensation of land owners whose land is burdened by environmental easements and environmental conservation orders. The law, in EMCA section 116, prescribes the manner in which compensation of such land owners shall be calculated, basically, by the court that granted the easement or conservation order. EMCA has other provisions for monetary incentives for environmental conservation. Among other provisions, its section 54 authorizes the Conservator of forests to enter into contractual arrangements with land owners for purposes of gazetting of private forests for conservation.

Where there is no law that applies to authorize compensation or some other tangible conservation or other land use restriction benefit, the point to consider in deciding that compensation ought to be paid is whether a restriction diminishes all economic values of land or burden land in a way or ways that make it impossible for the land owner to make any economic use of it. If a restriction with such an effect is imposed in the public interest, then the affected land owner ought to be compensated. There are also cases, especially of land use restrictions through the application of EIA regulations that only require appropriate guidance by specialists, at the instance and expense of the government, of all other possible and productive uses of land (especially where use is restricted due to presence of wildlife) that would be consistent with environmental conservation. For example, in areas adjacent to protected wildlife areas, such as Maasai Mara, land use restrictions for purposes of environmental conservation ought to be accompanied by some land use guidelines, pointing land owners in some direction of alternative uses of their land that would be equally beneficial. Where a land owner has to incur extra costs in order to use land as suggested, the government ought to avail finances for it. In every case, the market value of land should form the basis of compensation.

### **Recommendations**

The law, as explained in preceding paragraphs. Already provide for instances in which the government should restrict private land use in the interest of environmental conservation. It is suggested that even soil conservation orders mechanisms provided for in the Agriculture Act that are hardly used should be re-introduced with a new focus on both environment conservation and agricultural productivity.

In Kenya, environmental conservation, in general, warrants the exercise of the government's restrictive powers because the law already accords every person in the country a clean and healthy environment and environment is broadly defined to include the built environment, aesthetic aspects of the environment and biological factors of animals and plants (EMCA, section 2). Courts have also, in cases such as *Peter Bogonko*, set rules on how to balance environmental interests of the public against private interests of land owners and developers. Case law has set the rule that public conservation interest overrides private interests. That remains the law unless and until changed. The law as it is, allows for very little, if any, cost/benefit analysis. This also renders any question that development trumps environmental conservation nugatory.

In Kenya, the law, including the general body of administrative law, sets out consequences of official failures to strictly comply with laws regarding private land use restrictions. Such consequences include invalidation of every official act that is unlawful. All that seems to remain is to empower the public to be more vigilant to cases of official corruption in regard to land use restrictions.

Finally, it would be utterly wrong for the government to exercise land use restrictions, especially in wildlife areas in order to allow conservation benefits to be drawn from wildlife or some other

environmental media, without sharing that benefit with land owners whose uses of land have to be restricted in order to allow beneficial conservation to take place. However, where the government merely uses its police powers to control land use in the interest of the public (public order, public safety, public health and environmental conservation) without making it totally impossible for a land owner to use his land beneficially, then compensation ought not to be paid. There are examples in Kenya which indicate that government restriction of land use is not totally bad. Experience shows that in many cases, especially in Nairobi, stringent government control of land use has increased both the monetary and environmental values of the land. A good example is restriction of land use in Karen area in Nairobi. The result of stringent land use controls in the area is that land values are very high (half acre without any development on it currently costs the equivalent of between US \$ 121,621 and US \$ 161,161). The area is also very beautiful. Similar results have been achieved with land use restrictions in Spring Valley, Muthaiga, Runda and several other areas in Nairobi.

## **CONCLUSION**

In Kenya, the Constitution does not expressly provide for the right to own property. Instead, it provides for protection of that right. This means that the constitution guarantees every person who owns land other property protection from, among other things, undue interference with use. However, provisions of the same constitution permit abrogation of the right in cases of compulsory acquisition and restriction of the right, especially the right to use private property. Property rights limitation, especially in relation to use, are permitted by a number of statutes and Common Law, which restrict use rights for a variety of purposes.

It is noted that land use restrictions are not always imposed for the purpose of environmental conservation in Kenya. While the Agriculture Act and other statutes seek to accomplish other objectives, including maximization of agricultural productivity, EMCA and the EIA Regulations made thereunder restrict land use chiefly for the purpose of conserving the environment, including, statedly, biodiversity.

In many of the processes of land use restrictions, the law, expressly or by implication, permit public participation. However, the law in this regard, has not been consistently followed. Increasingly, private parties are seeking audience with courts in cases where government agencies fail to accommodate public views in their land use restriction processes but public awareness of available avenues for redress is still generally low. Nevertheless, while in the economic sector, private land use has achieved increased property values, in the environment sector, there are indications that it holds the potential to reasonably ensure, for every person in Kenya, a clean and healthy environment. For these reasons, one would conclude that government restriction of private property use is acceptable, so long as use restrictions are imposed in the interest of the public including environmental conservation, procedures thereof are free from official abuse and where use restrictions deny all economically beneficial uses of land, compensation is paid.

## **END NOTES**

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<sup>1</sup> *Kanini Farm Ltd v Commissioner of Lands*, Land Acquisition Act Appeal No. 1 of 1981.

<sup>2</sup> For further reading, see Okoth Ogendo, H.W., African Land Tenure Reform in AGRICULTURAL DEVELOPMENT IN KENYA 152 (Heyer, J., ed., 1976).

<sup>3</sup> Section 1 of the East Africa Order in Council passed in 1901.

<sup>4</sup> Section 4 of the Crown Lands Ordinance of 1902.

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- <sup>5</sup> See, generally, Masters and Servants Ordinance, No. 21 of 1927.
- <sup>6</sup> Wasserman G., The Independence Bargain: Kenya Europeans and the Land Use, 1960-1962, 11 J. Comm. Pol. Stud.
- <sup>7</sup> Report of the Kenya Constitutional Conference (1962).
- <sup>8</sup> Bondi D. Ogolla & John Mugabe, *Land Tenure Systems and Natural Resource Management*, in IN LAND WE TRUST: ENVIRONMENT, PRIVATE PROPERTY AND CONSTITUTIONAL CHANGE 85 (Calestous Juma & J.B. Ojwang, eds., Nairobi: Initiatives Publishers, 1996).
- <sup>9</sup> Bondi D. Ogolla & John Mugabe, *Land Tenure Systems and Natural Resource Management*, in IN LAND WE TRUST: ENVIRONMENT, PRIVATE PROPERTY AND ONSTITUTIONAL CHANGE 104 (Calestous Juma & J.B. Ojwang, eds., Nairobi: Initiatives Publishers, 1996)].
- <sup>10</sup> Bondi D. Ogolla & John Mugabe, *Land Tenure Systems and Natural Resource Management*, in IN LAND WE TRUST: ENVIRONMENT, PRIVATE PROPERTY AND ONSTITUTIONAL CHANGE 105 (Calestous Juma & J.B. Ojwang, eds., Nairobi: Initiatives Publishers, 1996).
- <sup>11</sup> In certain cases, the Registration of Titles Act, Cap 281, and the Registered Land Act, Cap 300, may apply to land formerly belonging to the government.
- <sup>12</sup> See the list of the functions of the Commissioner of Lands with respect to government lands shows that government lands include remnants of land in the City of Nairobi and Mombasa that were acquired for town planning purposes but were not used therefore, section 3, Cap 280.
- <sup>13</sup> The Principal Registrar of Government Lands has a list of government lands.
- <sup>14</sup> Currently, the following County Councils hold land for the benefit of people ordinarily resident in their areas: Taveta area Council, The Pokot Area Council, Mosop Area Council, Tinderet Area Council, Elgeyo Area Council, Marakwet Area Council, Baringo Area Council, Olenguruone Local Council, Mukogodo Area Council, Elgeyo Local Council, and Kuria Local Council. See section 114 (2) of the Constitution.
- <sup>15</sup> In Kenya, the policy has been to replace customary tenure with individual tenure. The policy of individualization of tenure has been based on the proposition that customary tenure systems have contributed to less than optimal uses of land and to environmental degradation. The effectiveness of customary tenure largely depends on the existence of socially recognized institutional arrangements that regulate the behavior of individuals with respect to resource use. When these institutions break down as they have in many cases, so does the property regime.
- <sup>16</sup> Trust Lands Act, Section 59.
- <sup>17</sup> The regulations are known as The Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefits Sharing Regulations, issued by Legal Notice No. 160 of 2006.
- <sup>18</sup> Development of land is defined in section 3 of the Physical Planning Act to mean.....
- <sup>19</sup> See Preamble to the Land Control Act.
- <sup>20</sup> The Land Control Act, Chapter 302, section 6.
- <sup>21</sup> Land Control Boards are established by 5 of the Land Control Act to exist at the divisional and district levels. In addition, the law establishes a Provincial Land Control Appeals Board and a National Land Control Appeals Board.
- <sup>22</sup> So held in *Donoghue v. Stevenson* [1932] A.C. 562.
- <sup>23</sup> The Government Lands Act, sections 32, 33, 34 and 39, 81 & 82, among others.
- <sup>24</sup> *Sarah Wambui Mugo v. Land Dispute Tribunal & 2 Others*, High Court Miscellaneous Application No. 126 of 2006.
- <sup>25</sup> *Gitau v. Savage & 4 Others*, High Court Civil Suit No. 2250 of 1998.
- <sup>26</sup> NEMA may set up a Technical Advisory Committee (TAC) to advise it on environmental impact assessment-related reports in which case, NEMA's Director General shall prescribe the terms of reference ad rules of procedure for the TAC (EMCA, section 61).
- <sup>27</sup> *Maritime Electronic Co. Ltd. v. General Dairies Ltd.* [JOB, 227]