



## HAKI MADINI KENYA (HMK)

SUBMISSIONS ON THE LAND VALUE INDEX LAWS (AMENDMENT) BILL, 2018

PRESENTED ON 3RD OCTOBER 2018 TO THE SENATE COMMITTEE ON LAND,  
ENVIRONMENT AND NATURAL RESOURCES

### Introduction

Haki Madini Kenya (HMK) is a community centered coalition that brings together communities in and around mining areas, civil society organizations, faith based organizations and individuals engaging in the mining industry with the primary aim of promoting responsible stewardship of mining resources. The vision of the Coalition is to have a 'country where mining resources are exploited in a sustainable way for the benefit of all and the mission 'to effectively promote community participation, multi-stakeholder engagement and responsible stewardship in the mining sector in Kenya'.

Based on the foregoing and considering that land is a crucial factor in mining sub-sector, the Land Value Index Laws (Amendment) Bill, 2018 touches directly on the work Haki Madini Kenya undertakes. The Bill proposes extensive amendments to the Land Act 2012, Land Registration Act and the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act in order to provide for the assessment of land value index in respect of compulsory acquisition of land.

On the 21st September 2018, the Senate through the standing committee on Land, Environment and Natural Resource announced for public hearing on the said bill inviting the public and stakeholders to give their views and inputs to the bill. As a stakeholder, we note that this is a very important bill that is poised to address very serious concerns and challenges arising from compulsory land acquisition including matters of land valuation, land titling, and compensation methods among others. It is on this strength that Haki Madini Coalition presents this memorandum. See the specific inputs as articulated in the table below.

No	Section in the Bill	Provision in the bill	Proposal/recommendation/position	Rationale
1	S. 2	Definition of <b>“prompt”</b> Prompt in relation to payment of compensation for compulsorily acquired land or creation of wayleaves, easements and public rights means— (i) <b>within a reasonable time</b> of the taking of possession of the land by Commission; <b>or</b> (ii) a written undertaking indicating the appointed dates, not being more than one year from the date of the undertaking, when compensation is to be made.	Specificity is required in the definition of <b>“prompt”</b> compensation:  Prompt payment should include payment, or portion of payment, at the time of acquisition and a total payment within a defined period, but not exceeding 3 months.	As currently defined, it leaves it at the discretion of the National Land Commission to determine <b>“reasonable time”</b> which may include any time within period of a year. This may have adverse negative impact on displaced people who may have no means of income having lost possession to their livelihood source - lar
2	S. 2	Definition of <b>“full”</b> <b>“Full”</b> in relation to compensation... means the restoration of <b>not more than</b> the value of the land including improvements thereon and any other matter provided for in this Act	Delete the word <b>“not more than”</b> ...	Compulsory acquisition of land most times occasion extremely severe social and economic disruption that compensation should not only be limited to the value of land but also take greater consideration about the value and quality of livelihood of the affected persons after the loss of land and compensation.
3	S. 3	(4A) Despite subsection (4), if the land is required for a public purpose, the court may not grant relief against forfeiture even if the grantor makes good the default.	Delete the entire clause	This is an infringement of grantors rights under Article 40 of the Constitution of Kenya that protects right to property which also allows any person who has an interest in or over a property the right of access to a court of law
4	S. 4	(3A) Despite subsection (3), if the	Delete the entire clause	

		land is required for a public purpose, the court may not grant relief against forfeiture even if the licensee makes good the default.		
5	S. 6	<b>107A. (1)</b> Valuation of freehold land and community land for purposes of compensation under this Act shall be based on the <b>land value index developed jointly by the national government and county government...</b>	<p>Land value index development should be made an inclusive process which in addition to National and County Governments, also consider involving the National Land Commission and other stakeholders in the land sector including a valuer, surveyor and qualified non-state representative.</p> <p>Consider establishing a land value index committee/body for consistency, institutionalization of the process and continued learning.</p> <p>The bill should also include a clause allowing cabinet secretary in charge to enact regulations setting out further details on the value index process. For instance, can the value index developed at a given time subject to challenge and even in court or tribunal? Is the value index public information... among other clarification that can go into regulations</p>	If this bill passes, the Land Value Index will be a key factor in land valuation and costing and thus should be developed in participatory manner by the National Government, County Governments and Stakeholders in the Land Sector
6	S. 6	107A (4)(c)(i) In assessing the value of freehold land and determining the just compensation to be awarded for land acquired... an increase in the value shall be <b>disregarded if</b> — the increase in the apparent value	Replace the part appearing in bold to read... <b>immediately or after the date of publication in the Gazette of the notice of intention to acquire the land</b> and delete the rest of the clause	While we note that this clause may be an intended as deterrent to land speculator and to cushion the cost of compensation from undue increase, we also contend that it adversely offends the rights of communities whose livelihoods may be entirely dependent on land. The clause

		of the land is occasioned by any development or improvement to the land if— (i) the improvement was made on the land <b>within two years prior to the date of publication in the Gazette of the notice of intention to acquire the land</b> , unless it is proved that the improvement was made <i>bona fide</i> and not in contemplation of proceedings for the acquisition of the land:		further deprives an individual from the right to develop their land and may occasion further deprivation if an improvement on land within two years cannot be proved to have been done without contemplation of acquisition.
7	S.6	107A (10) The compensation payable under subsection (6) <b>shall not in any case exceed the value of the structures and improvements on the land.</b>	Delete the section or replace the word <b>‘shall’</b> with <b>‘may’</b> and delete the phrase <b>“in any case”</b>	Compensation is an emotive process that most times cause serious social, economic and cultural disturbance and has aspects that may be difficult to ordinarily value. Compensation payable should therefore not be very restricted.
8	S.7	<b>Forms of Compensation:</b> (a) allocation of alternative parcel of land of equivalent value and comparable geographical location and land use to the land compulsorily acquired;	Introduce an exception to limit communities who may be affected by the land acquisition as a unit towards land-for-land compensation. This is crucial to maintain social ties and family relationships  Insert the word <b>‘or high’</b> immediately before <b>‘value’</b>  Expand clause (a) to set out principles to be considered for the compensation land (new land). According to IFC:	Compensation especially for a large group of people affected and disrupted together should preferably exceed what prevailed before the disturbance.  There are experiences where communities are compensated in alternative land in which life becomes unbearable. A case in

			<ul style="list-style-type: none"> <li>▪ New land should comparably be equivalent or superior in production potential</li> <li>▪ New land should be located in reasonable proximity to the land which is compulsorily acquired</li> <li>▪ New land should be provided free of any transaction cost or encumbrances</li> <li>▪ New land should be prepared for productive levels similar to the land compulsorily acquired</li> </ul>	point is Kwale County where communities have been complaining that they were settled in swampy land having been displaced by mining being undertaken by Base Titanium.
9	S.7	(b) monetary payment either in lump sum or in instalments spread over a period of not more than one year;	Expand clause (b) to set out the principles to be observed where monetary/cash compensation is used;	
10	S.7	(1B) Subject to subsection (1A), an owner of land compulsorily acquired shall elect the form of compensation.	Replace the word 'shall' with 'may'	We take great caution with the clause particularly considering the case where land being acquired is commonly owned or land acquisition that affect large/section community as a unit. In such case, guidance should be provided so that the form of compensation to be used takes due consideration for continued livelihoods
11	S.13	(3A) Upon the formal taking of possession of land by the Commission no order stopping any development in the land may be issued <b>by any court</b> if public funds have already been committed.	Delete the clause	This clause would limit the jurisdiction of the court to hear land disputes which therefore blocks an important avenue for seeking redress
12	S.16	Amendment to section 125 of the land act in subsection (1) by	Retain section 125 of the land act 2012 without amending it	There are risks associated with acquisition of land before making payment. This

		deleting the phrase “before taking possession,” appearing immediately before the word “pay”; and by deleting subsection 2		provision can also be misused by NLC. IFI recommends that compensation should be made before any acquisition of assets takes place unless those payments are staggered to enable affected people to begin preparation of new sites
13	S.17	The Establishment of the Land Acquisition Tribunal in Part VIIIA	Delete the entire section proposing establishment of a Tribunal	It is our take that there are adequate leg redress mechanism including Land and Environment Court and thus no need for tribunal. We also contend that the establishment of the tribunal violates the Constitution i Art40 (3)(ii)which: “allows any person who has an interest in, or right over, that property a right of access to a court of law.

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<sup>1</sup> World Bank Standards, International Finance Corporation OD 4.30