

**COMPENSATION FOR LANDS COMPULSORILY ACQUIRED BY THE STATE: ISSUES OF
NON-COMPLETION OF ACQUISITION, NON-PAYMENT OF COMPENSATION AND
POTENTIAL UNJUST ENRICHMENT**

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ABSTRACT

The exercise of eminent domain by the State to undertake compulsory acquisition of property for public benefit was used by the British colonial administration to secure lands for public infrastructure such as roads, streets, public service institutions and others. The post-independent governments assumed this power and applied it to acquire lands and properties for public purpose or benefit from the 1960s to date. However, compulsory acquisitions have been fraught with problems such as non-completion of laid-down acquisition processes and non-payment of compensation to owners of property immediately before the acquisitions were made, even though the public institutions on whose behalf executive instruments were issued to initiate the acquisitions have occupied the lands or properties. This study focused on why this situation occurs, and whether or not it is just. Analytical legal research methods were used to investigate the issues of the study through critical review of constitutional provisions, enactments, regulations, case law, and legal texts. The findings show that the acquisition processes tend to exclude the owners immediately before the acquisition, and the acquisitions by the State remain valid since they were based on appropriate legislation. However, the rightful owners tend to lose their property by operation of law or due to barriers imposed by limitation statutes. The article concludes that this situation borders on potential unjust enrichment to the State which gains property without payment by operation of the rules created for compulsory acquisition.

Keywords: Compulsory land acquisition, Compensation payments, Unjust enrichment, Ghana

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Introduction

Land is an indispensable resource because almost all economic and livelihood activities occur in relation to it. Ghana covers a total land size of 239,460 km square, and of this, 78 percent of the land is owned by stools, skins, clans, families and individuals.² The State has acquired about 20 percent of lands and another two percent is owned in partnership between the State and customary authorities (ibid). The Ghana Living Standards Survey Round Seven Report of 2019³ indicated that over 65 percent of people living in rural areas are involved in agricultural production which depends on land, inclusive of cocoa production, which remains a longstanding foreign exchange earner for the country. Other important sectors of the economy such as mining, quarrying, real estate, construction of dwellings in urban and rural communities all depend on land. However, compulsory acquisition powers granted to the State through the principle of eminent domain, often lead to detrimental consequences for citizens and thereby block their access to land for economic and other purposes. Compulsory acquisition occurs where the State publishes an executive instrument to acquire land or property, which extinguishes all other interests in the land or property thereof.⁴

Prior to the passage of the Land Act, 2020 (Act 1036), all compulsory acquisitions by the State relied on the Administration of Lands Act, 1962 (Act 123) and the State Lands Act, 1962 (Act 125). The Administration of Lands Act, 1962 (Act 123) was intended to empower the President of the Republic to acquire land or property, when it is deemed conducive to public welfare and for the interests of the State or for public purposes. Under this Act, the interests of the owners, stool or skin, were not completely extinguished with the publication of the executive instrument. Compensation was usually paid for developments on the land or crops found on it, but not for the land per se since it is vested in the President in trust for the stool, skin or the original owners, who receive annual rents or payments for the land from the State. Sections 1 and 3 of the State Lands Act 125 empower the President to issue executive instruments to acquire any property for the State for public purposes, and this extinguishes any encumbrances on the property. These provisions granted strong powers to the State to acquire land and any property deemed to

² W.O, Larbi, *Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies*, FIG/FAO/CNG International Seminar on State and Public Sector Land Management, Verona, Italy, September 9-10, (2008). https://www.fig.net/resources/proceedings/2008/verona_fao_2008_comm7/papers/09_sept/4_1_larbi.pdf .Date of access April 19,2021.

³ Ghana Statistical Service, *Ghana Living Standards Survey Round 7 Main Report*. Accra, (Ghana Statistical Service 2019). https://www.statsghana.gov.gh/qssmain/fileUpload/pressrelease/GLSS7%20MAIN%20REPORT_FINAL.pdf . Date of access, April 19,2021.

⁴ The Administration of Lands Act, 1962 (Act 123); The State Lands Act, 1962 (Act 125).

be in the public interest. However, the exercise of these powers by the State has occasioned several undesirable consequences on families, clans, stools, skins and individuals.⁵

The new law which empowers the State to compulsorily acquire property is founded on the Fourth Republic Constitution of Ghana, 1992. The right to property by citizens and protection from unnecessary interference is guaranteed under the 1992 constitution and these are stated in article 18 and buttressed by provisions in article 20 (1-6), which spell out stringent conditions that have to be met such as stated purpose, public benefit and payment of compensation. The import of these provisions indicate that the State must have valid reasons for taking possession of any property for public benefit, and this must be clearly stated and justified. However, several questions remain regarding justification of public benefit and public interest, since such lands have often been leased for establishment of private, for-profit fuel stations and hotels with the claim that they provide employment to citizens and therefore serve public benefit.⁶ Furthermore, article 20(2) states that compulsory acquisition by the State shall only be made under a law which makes provision for the prompt payment of fair and adequate compensation. Article 20(5) states that any property compulsorily taken possession of or acquired in the public interest or for a public purpose shall be used only in the public interest or for the public purpose for which it was acquired. These provisions served as the framework upon which the new Land Act, 2020 (Act 1036) was enacted.

Compulsory acquisition of land by the State is accompanied by several problems that affect the original owners and other right-holders of the property. These include deprivation of rights over the lands and loss of access; instances of non-completion of acquisition but land occupied by the State or the agency or department in whose name the acquisition instrument was executed; instances of non-use of acquired lands but still held by the State, thereby blocking access to original owners and users; and non-payment of compensation for the acquisition while the land continues to be held by the State. For example, an inventory of State-acquired lands in the Central region of Ghana conducted by the Ministry of Lands and Forestry in 2008⁷ showed that the State has issued executive instruments to initiate acquisition of some 692 land sites, comprising 51,030.16 hectares. Of these, only 141

⁵ W. Anim-Odame, *Compulsory Acquisition and Compensation in Ghana: Principles & Practice*, Paper presented at the American Real Estate Society Conference in Seattle-Washington, USA from 13 -16 April 2011. See also: W.O, Larbi, Antwia, A, Olomolaiye, P (2004) Compulsory land acquisition in Ghana—policy and praxis, *Land Use Policy* 21 (2004) 115–127, https://www.researchgate.net/publication/222841349_Compulsory_land_acquisition_in_Ghana-policy_and_praxis

⁶ N. A. Kotey, *Compulsory acquisition of land in Ghana: Does the 1992 Constitution open new Vistas?* In Toulmin, C., Delville, P.L. and Traoré, S (Eds). *The dynamics of Resource Tenure in West Africa*, London, GRET/IIED, (James Currey & Heineman 2002). Date of access, April 19, 2021.

⁷ *Supra*@ footnote 2, Larbi (2008).

sites have been fully acquired, representing 7,660.25 hectares. However, the remaining 551 sites, made up of 43,369.91 hectares remain occupied by State agencies for whom the properties were acquired. Thus, even though the acquisition process has been initiated but not completed, the original owners and users have lost access and any rights therein.

Regarding compensation for the acquisition, the inventory revealed that only 3.8 percent of the sites acquired in the Central region have been paid for, even though they were occupied by State agencies. Thus, there pertains a situation where private lands, stool lands, and customary lands have been lost to the State without payment of compensation. These have often led to protracted litigations where acquired lands have been put to different use by the State, and not necessarily used for public interest or benefit.⁸ In some instances, the land is not used at all but still held by the State, while the original owners and users suffer hardship. This state of affairs requires a resolution, hence the motivation for this research.

Restitution principles have been an integral part of the development of common law, and are closely related to the concepts of 'injustice', 'unjust factors', and 'unjust enrichment'.⁹ There is a general recognition of the law of restitution regarding the reversal of unjust enrichment, even though it does not explain all instances of restitutionary liability, and is sometimes contested.¹⁰ A number of important cases have been used by the courts in common law jurisdictions to define the principles of unjust enrichment, which include *Lipkin Gorman V. Karpnale Ltd* [1991] 2 A. C. 548 (UKHL) and *Woolwich Equitable Building Society V. Inland Revenue Commissioners* [1993] A.C. 70. The *Lipman Gorman* case involved recovery of stolen money which the thief had used to stake a gamble and lost to the defendant. Lord Templeman, ruling for the claimants, stated that they were entitled to the stolen money simply because it belonged to them, and that the defendant had been unjustly enriched. This case also helped to set the four key elements necessary to establish a case of unjust enrichment, namely, i) the defendant must have been enriched, ii) the enrichment must have been at the expense of the claimant, iii) there must be a relevant unjust factor, and iv) there must be no available defences.¹¹

In the *Woolwich Equitable Building Society* case, the claimant overpaid tax to the Inland Revenue which they later challenged in court. The House of Lords struck down the legal

⁸ *Nsiah v Asare* [1959] GLR 17 at p.20; *Nii Tetteh Opreme II v Attorney-General & Anor*, No. 20/04/1999 (unreported); *Amontia v MD Ghana Telecom Company* [2006] 2GLR 69; *Norga Grumah v Madam Nafisa Iddrisu*, Civil Appeal No. J4/21/2012, 24 May 2013.

⁹ Hedley, S (1995) Unjust Enrichment, *The Cambridge Law Journal*, Vol. 54, No.3, (Nov 1995), pp 578-599.

¹⁰ Webb, C (2009) What is Unjust Enrichment? *Oxford Journal of Legal Studies*, Vol.29. No.2, Summer 2009, pp.215-243.

¹¹ Leow, R and Liao, T (2013) Unjust Enrichment and Restitution in Singapore: Where Now and Where Next? *Singapore Journal of Legal Studies*, December 2013, pp.331-360.

basis of the overpayment of tax and ordered a refund to the claimants based on unjust enrichment principles. Thus, in spite of some theoretical disagreements over unjust enrichment, it continues to be applied in the common law jurisdiction. The situation of non-completion of compulsory acquisition and non-payment of compensation to owners of property immediately before their acquisition in Ghana, is examined in the light of the principles of unjust enrichment in this article.

The Government of Ghana has issued executive instruments to acquire properties in almost every region of the country, including State lands and vested lands.¹² An analysis of payments for compulsory acquisitions showed that 90 percent of all lands acquired by the State since 1966 have not been paid for, but still held by the State anyway, amounting to a debt of over US\$ 94 million.¹³ This situation of the State occupying one fifth of all lands in the country, without payment of compensation requires investigation in order to find ways to resolve this problem. The study was limited to land or property acquired within the territory of Ghana by the State under Act 125 and Act 123, excluding any acquisitions under the new Land Act, 2020 (Act 1036).

The key questions that underlie this research include the following: first, what processes have been laid out in law regarding compulsory acquisition by the State, and have they been complied with in compulsory acquisitions undertaken by the State before passage of Act 1036? Second, what were the existing compensation payment regulations, and have they been complied with by the State in the acquisitions? Third, do the acquisitions remain valid despite non-completion and non-payment of compensation, and does the situation border on unjust enrichment for the State? Fourth, does Act 1036 provide remedies for defects and problems occasioned by the previous legislation?

The paper makes a significant contribution to scholarly literature by pulling together the relevant legislation on compulsory acquisition, pointing out important defects in the law and processes, and identifying potential remedies to cure the defects in the law for acquisitions

¹² Food and Agriculture Organization of the United Nations (2020) Accessing land in Ghana for agricultural investment: Advice for women and youth, Rome, FAO. Online: <http://www.fao.org/3/ca7939en/CA7939EN.pdf> Date of access, April 21, 2021.

¹³ Larbi, W.O, Antwia, A, Olomolaiye, P (2004) Compulsory land acquisition in Ghana—policy and praxis, *Land Use Policy* 21 (2004) 115–127, https://www.researchgate.net/publication/222841349_Compulsory_land_acquisition_in_Ghana-policy_and_praxis date of access April 21, 2021.

See also: W.O, Larbi, *Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies*, FIG/FAO/CNG International Seminar on State and Public Sector Land Management, Verona, Italy, September 9-10, (2008). https://www.fig.net/resources/proceedings/2008/verona_fao_2008_comm7/papers/09_sept/4_1_larbi.pdf. Date of access April 19, 2021.

which have not been completed and for which compensation has not been paid from 1966 to December 2020.

Methods

This study followed textual analysis research method which falls within analytical legal research framework.¹⁴ Thus, the research focused on understanding why a legal situation exists and how to resolve it. This method mainly consists of identifying and collecting legal materials or resources, and analyzing them in order to discover answers to pertinent research questions. In the context of this research, it involved collecting and analyzing legal texts in order to discover relationships, patterns and principles to resolve the legal issues of the study. The procedures followed to conduct the research involved determining the issues to be resolved, identifying relevant sources of law and cases related to the issues in Ghana and within common law jurisdictions, and applying them to the questions of the study.

The principal source identified for the research was the laws of Ghana embodied in article 11 of the 1992 constitution. These include the 1992 Constitution itself; enactments; orders, rules and regulations; existing law; common law, rules of equity and customary law. Secondary sources included interpretation acts and citations from legal textbooks based on their persuasive effect although they carry no binding authority. The method of analysis involved breaking down the main issue of the study into sub-issues, identifying relevant constitutional provisions, enactments, court decisions, rulings and other legal rules that relate to the issues. This was done with a focus on determining why non-completion of acquisition processes occur, why situations of non-payment of compensation occurs, and potential situation of unjust enrichment. The passage of the new Land Act, 2020 (Act 1036) seems to have pre-empted some of the research questions; however, most of the provisions in the new Act relate to compulsory acquisitions after its passage in December 2020, and therefore issues predating this period remain pertinent for investigation.

Findings

Constitutional Provisions on Compulsory Acquisitions by the State

Constitutional provisions regarding the right to own property and protection from interference with property are stated in article 18 of the Constitution, 1992. Specifically, article 18, clause 1 and 2, which state that every person has the right to own property alone or in association with others, and that no person shall be subjected to interference of

¹⁴ Singh Rabir, Singh Ghamshyam, Rai Priya and Verma Akash, *Digital Library-Legal Education and Research*, National University of Law Delhi, New Dehli (NLUD 2010). Sloan, Amy E, *Basic Legal Research: Tools and Strategies*, 7th edition, New York (Wolters Kluwer 2018).

his or her property except in accordance with law as may be necessary in a free and democratic society. Furthermore, article 20 (1-6) specify the conditions, procedures and rules governing compulsory acquisition of property by the State. These provisions serve as the first line of protection of property, which are further buttressed by article 20, clauses 1 to 6. The relevant provisions include satisfaction of conditions for compulsorily taking possession of property by the State, which include necessity of the acquisition in the interest of national defence, public safety, public order, public morality, public health, town and country planning, development or utilization of the property in such a manner as to promote the public benefit. Compulsory acquisition must also make provision for prompt payment of fair and adequate compensation, with a right of access to the High Court by any person who has an interest in the property to seek determination of their interests. It also provides that where the property is not used in the public interest or for the purpose for which it was acquired, the owner of the property immediately before the compulsory acquisition, has the first option for acquiring the property upon offer from the State, and on such re-acquisition shall refund the whole or part of the compensation paid or such other amount as is commensurate with the value of the property at the time of the re-acquisition.

Under the Directive Principles of State Policy in the Constitution, 1992, article 36 (7) guarantees ownership of property and right to inherit property. In addition, article 257 vests all public lands and other public property in the President of the Republic and article 258 of the 1992 constitution establishes the Lands Commission as the statutory institution to manage lands in the Republic. Article 267 also outlines the legislation governing stool or skin lands in the Republic, which are managed by the Office of the Administrator of Stool Lands. Finally, article 295 which is the interpretations provision of the 1992 constitution defines "public interest" to include 'any right or advantage which ensures or is intended to enure to the benefit generally of the whole of the people of Ghana'. This definition is key to determining the justification for compulsory acquisition and consequential matters if the acquisition is not used for the intended purposes. These relevant provisions of the constitution are applied to the questions of this research in the discussion section of this article.

Enactments on Compulsory Acquisition by the State

Statutory provisions or the relevant enactments regarding compulsory acquisition from the colonial era include the Towns Act, 1892 (CAP 86), section 3 of which concerns the purchase of land for streets. It states that a Minister, on paying compensation to the persons entitled to it, may acquire a land or an easement for the purpose of widening, opening, enlarging, draining, or otherwise improving a street, or of making a new street. The next relevant statute is the State Property and Contracts Act, 1960 (CA 6), section 3 of which transferred the power of the colonial administration to the President, who may

exercise same by publication of executive instrument for the public services. This provision explicitly stated that the Minister responsible shall, on the conclusion of the agreement, pay reasonable compensation for the property and accordingly on the payment of the compensation the property so required shall become vested in the President in trust for the Public Services of the Republic. These provisions are important because they served as the key legislation under which the first post-colonial government assumed the powers of the Crown and were used to secure land and other properties for development purposes.

Furthermore, the Administration of Lands Act, 1962 (Act 123) was passed to govern the use of land for public purposes. In section 10 of the Act, it stated that the President may authorise the occupation and use of a land for a purpose which, in the opinion of the President is conducive to the public welfare or the interests of the State, but due compensation must be paid to assuage any hardships occasioned by the compulsory acquisition.

The State Lands Act, 1962 (Act 125) was later passed to regulate public lands which did not fall under Act 123. Furthermore, section 1(3) of the same Act stated that on the publication of an instrument made under this section, that land shall, without any further assurance than this subsection, vest in the President on behalf of the Republic, free from any encumbrance whatsoever.

This provision seemed to suggest that all interests in land or property were extinguished by publication of an executive instrument in the Gazette to denote compulsory acquisition. However, the courts gave differing interpretations when cases regarding this matter were brought before them as discussed in subsequent sections of this article.

The new Land Act, 2020 (Act 1036) which was passed in December 2020 is intended to consolidate all existing legislation on land and to provide for related matters. Section 238 which concerns availability of funds for payment of compensation of compulsorily acquired land and property is of special interest to this paper due to the provision for the establishment of an interest yielding escrow account to provide for compensation payments. It states that compulsory acquisition of land shall not be undertaken or facilitated by the Lands Commission unless the intended user of the acquired land proves in writing to the satisfaction of the Commission that the funds for the payment of compensation and other costs associated with the acquisition have been paid into an interest yielding escrow account managed by the Lands Commission. Secondly, where the intended user is a public body that is fully dependent on public funds, the public body shall obtain Cabinet approval and have an approved budgetary allocation for the payment of compensation and other costs associated with the acquisition before the commencement of the acquisition. Thirdly, where the

intended user is a public corporation or a statutory corporation which is not a public service, the funds for the payment of compensation and other costs associated with the acquisition shall be paid into an interest yielding escrow account before the commencement of the acquisition. Fourthly, where after payment of compensation and other costs associated with that acquisition there is a short fall in the escrow account that shortfall shall be paid by the intended user to the Lands Commission and where there is a balance in the account that balance shall be paid to the intended user. These provisions are very important because they go to the heart of issues surrounding non-completion of acquisition and non-payment of compensation for compulsorily acquired lands even though the State continues to possess them.

Judgments on Compulsory Acquisition Cases

Judgments on compulsory acquisition cases have produced orders, rules and regulations that have influenced the law on compulsory acquisition. The most significant cases that have been decided by the courts in Ghana include the case of *Nsiah v Asare*¹⁵, in which the court ruled that the original owners of land or property have a right to compensation only after compulsory acquisition by the State. However, in the case of *Nii Tetteh Opreme II v Attorney-General & Anor*¹⁶ the High Court ruled for the return of acquired lands to pre-acquisition owners in the event of any change of use of any portion of the land other than the stated purpose for which it was acquired by the State. Regarding a similar matter, in the case of *Amontia v MD Ghana Telecom Company*¹⁷, the Court of Appeal ruled that the provision of a staff housing scheme for a public corporation on land which was acquired for a public wireless station, was not inconsistent with the purpose for which that land was acquired for public interest or benefit.

With regard to subsistence or extinguishing of any title or interest in a compulsorily acquired land by original owners, the ruling by Wood, JSC (as she then was), in the case of *Norga Grumah v Madam Nafisa Iddrisu*¹⁸, clarified that original owners still retain the right of first option to re-acquire the property upon offer from the State, when it is not used for its intended purpose. Wood, JSC, stated as follows:

Absolute title in land or property which has been compulsorily acquired by the State for public interest does not pass to the State, where it has not been used for the purpose for which it was acquired or for any public purpose or interest, or only a part of it has been used for the intended purpose. Owners still have a right of first option for re-acquisition upon

¹⁵ [1959] GLR 17 at p.20

¹⁶ No. 20/04/1999 (unreported)

¹⁷ [2006] 2GLR 69.

¹⁸Civil Appeal No: J4/21/2012, 24 May 2013.

offer of the whole or a part of the property from the State, and to pay the appropriate payment for re-acquisition. Until they reject the offer, that right of first option remains with the original owners from whom the property was acquired.

In *Nii Kpobi Tettey Tsuru III v Attorney-General*¹⁹, Dotse, JSC, also ruled that projects undertaken with compulsorily acquired land or property should inure to the benefit of the entire country either directly or indirectly. This implied that it is not restricted to only the specific project named in the acquisition instrument but any other project that will benefit the public or country directly or indirectly, including provision of opportunities for employment through the establishment of a for-profit company, granted lease or license by the State from the compulsorily acquired land. This position is buttressed by the provision in section 46 of the Interpretation Act, 2009 (Act 792), which states that: 'public interest' includes a right or an advantage which enures or is intended to enure for the benefit of the whole of the people of the Republic.' The weights of the legal sources identified above are applied to the issues under consideration to legally analyse them in the subsequent section.

Discussion

Non-Completion of Acquisition and Extinguishing of Interests of Original Owners

One of the important statutes which enabled the first post-colonial government of Ghana to undertake compulsory acquisition of property for the State was the State Property and Contracts Act, 1960 (CA 6), section 3 of which allowed the President to acquire property and vest the property in an authority on behalf of the Republic. Section 4 of the same Act stipulated that such property may be acquired for the Public Services by the President through the publication of an executive instrument to declare the property as required for the Public Services. Upon such a declaration, the Minister responsible for that public sector may enter into an agreement with the owner and the parties having an estate or interest in the property for the absolute purchase for a consideration in money, or for any other property in exchange of the property. Upon conclusion of the agreement the Minister must pay reasonable compensation for the property, and accordingly on the payment of the compensation, the property so required shall become vested in the President in trust for the Public Services of the Republic. Thus, these provisions demonstrate that it is upon payment of compensation that the property becomes vested in the President. This implies that until payment was made, the interests of the original owners in the property were not extinguished.

¹⁹ [2010] SCGLR 904.

The next important legislation related to this issue was the Administration of Lands Act, 1962 (Act 123) which was passed to govern the use of land for public purposes. Section 10 of the Act granted powers to the President to authorise the occupation and use of land which in the opinion of the President is conducive to the public welfare or the interests of the State, and to pay into the appropriate account, out of moneys provided by Parliament, an annual amount of money which appears to the President, considering the value of the land, and the benefits derived by the people of the area in which the land is situated from the use of the land, to be proper payments to be made for the land. It goes on further to state that where the President authorises the occupation and use of a land under this section, the President shall publish a notice in the Gazette giving particulars of the land, of the use to which it is intended to be put, and of the payments which it is intended to make under this section in respect of the use of the land. These provisions which concerned stool lands and vested lands, still attached payment of compensation on an annual basis to compulsory acquisition by the State, and the interest of the original owners of the property subsisted. In other words, the State held the property in trust for the original owners even though the property was being used for public purposes.

The State Lands Act, 1962 (Act 125) which was passed to regulate public lands which did not fall under Act 123, appears to be the legislation that sought to extinguish the interests of the original owners upon publication of executive instrument by the President. Section 1 of Act 125 stated that whenever it appears to the President in the public interest so to do, he may, by executive instrument, declare any land specified in the instrument to be land required in the public interest; and accordingly, on the making of the instrument it shall be lawful for any person, acting in that behalf and subject to a month's notice in writing to enter the land so declared for any purpose incidental to the declaration so made. Furthermore, section 1(3) of Act 125 stated that on the publication of an instrument the land shall, without any further assurance than this subsection, vest in the President on behalf of the Republic, free from any encumbrance whatsoever. This provision effectively extinguished any other interests or encumbrances in regard of the property, and arrangements for payment of compensation came to be treated as a separate issue which could not change the acquisition status in any way. This seems to have allowed the State to hold on to property whether payment has been made for it or not.

However, the courts have interpreted this position regarding subsistence or extinguishing of interests of original owners and the State in property which has been compulsorily acquired. For example, in *Norga Grumah v Madam Nafisa Iddrisu*²⁰, the courts clarified that the original owners of property still retain some interests per the ruling by Wood, JSC, which indicated that the interests of original owners are not completely extinguished from

²⁰Civil Appeal No: J4/21/2012, 24 May 2013.

compulsorily acquired property, even where compensation has been paid to them, because they retain a first option for re-acquisition upon offer from the State if the property is not used for the intended purpose. Thus, it would be illogical to hold a position that the interests of original owners have been completely extinguished or all encumbrances removed upon publication of an executive instrument which is public declaration of the intentions of the government. It can therefore be argued that interests of original property owners are not completely extinguished upon publication of an executive instrument.

Non-Payment of Compensation and Interests of Original Owners

Another statute which dealt with compulsory acquisition of property was the Towns Act, 1892 (CAP 86) of the colonial administration. Section 3 CAP 86 concerns the purchase of land for streets, and it stated that:

The Minister, on paying compensation to the persons entitled to it, may acquire a land or an easement for the purpose of widening, opening, enlarging, draining, or otherwise improving a street, or of making a new street.

This provision suggests that it is upon paying compensation to the persons entitled to the payment that the property can be legally acquired. This means that until the payment had been made, the acquisition remained incomplete, since payment was closely tied to the acquisition process. Thus, the interests of original owners were not extinguished until payment had been made.

The position of tying compulsory acquisition to payment of adequate compensation has been reinforced in article 20 (2) of the 1992 Constitution. The provision states that compulsory acquisition of property by the State shall only be made under a law which makes provision for the prompt payment of fair and adequate compensation and a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any other authority, for the determination of his interest or right and the amount of compensation to which he is entitled. This provision effectively means that all persons with interests in the property continue to hold that interest, until compensation has been paid and the property has been used for the intended public purpose. Indeed, the original owners retain a right of re-acquisition of the property as provided in article 20 (6), where it is stated that:

Where the property is not used in the public interest or for the purpose for which it was acquired, the owner of the property immediately before the compulsory acquisition, shall be given the first option for acquiring the property and shall, on such re-acquisition refund the whole or part of the

compensation paid to him as provided for by law or such other amount as is commensurate with the value of the property at the time of the re-acquisition.

This provision implies that the interests of original owners are retained even where compensation has been paid, and therefore, it cannot be said that all subsisting interests have been extinguished with the publication of the executive instrument for compulsory acquisition. This position is a clear departure from the ruling in *Nsiah v Asare*²¹ in 1959 in which the court ruled that the original owners of land or property have a right to compensation only after compulsory acquisition by the State. The current position of the law remains that the original owners continue to hold subsisting re-acquisition rights even after receiving compensation. It can therefore be argued that compulsory acquisition does not extinguish all interests of original land owners in the property acquired by the State.

Exclusion of Original Owners from Compulsory Acquisition Processes

Analysis of the procedures regarding properties compulsorily acquired by the State since 1966 appear to show that the acquisition processes were designed to keep out the original property owners until the publication of the executive instrument. The procedure as indicated in the land acquisition regulations (State Lands Regulations 1962, L.I 230) and State Lands (Amendment) Regulations, 1979 (AFRCD 62) involves the following: first the institution that is interested in a particular property applies to the Regional Minister or Permanent Site Advisory Committee (PSAC) which is responsible for acquisitions at the regional level.²² The PSAC then considers the suitability of the property and refers it to the Site Advisory Committee, which is headed by the District Chief Executive responsible for the area where the property is situated. The membership of the SAC includes representatives from the Lands Commission, Ministry of Lands, Forestry, Mines, Water Resources, Works and Housing, Town and Country Planning, and Electricity Company of Ghana and the Ghana Water Company. Conspicuously missing from the list are the representatives of the stools, skins, families or individuals whose lands or properties are being considered for compulsory acquisition. Thus, original owners immediately before the acquisition are excluded from the start. When the SAC considers the property suitable, a report is sent to the Regional Minister who approves and forwards same to the Lands Commission. The Lands Commission

²¹ [1959] GLR 17 at p.20.

²² W.O, Larbi, *Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies*, FIG/FAO/CNG International Seminar on State and Public Sector Land Management, Verona, Italy, September 9-10, (2008), pp5-7.
https://www.fig.net/resources/proceedings/2008/verona_fao_2008_comm7/papers/09_sept/4_1_larbi.pdf. Date of access April 19,2021.

prepares the executive instrument and forwards same to the Minister responsible for Lands for execution.

Upon approval, the executive instrument is published in the Gazette, and that is when copies of the notice of acquisition is served on the original owners personally, on any person in occupation of the land, or the traditional authority in the area to bring it to the attention of the owners; it may also be affixed or posted at a convenient place on the land, published in a newspaper circulating in the district or area where the land is located or as the Minister may direct.²³ At the same time that the publication is taking place, the public authority which requested for the land can apply for Certificate of Allocation (CoA) or lease for the property from the Lands Commission, and when the lease is prepared and executed, they take possession of the property. Thus, the public authority gains possession of the property when the original owners may not have been contacted in the acquisition process to initiate payment negotiations. In the meantime, the original owners are barred from access to the land or property after publication of the executive instrument.

This process is very problematic and is responsible for the situation of loss of land or property to the State through compulsory acquisition without completion of all the processes and payment of requisite compensation. Thus, though the acquisitions remain legally valid, there is a major challenge of non-completion of acquisition procedures, resulting in non-payment of compensation for about 90 percent of all compulsory acquisitions from 1966 to date.

Defects in Law, Hardship to Original Land Owners and Unjust Enrichment

The situation under legislation before the passage of Act 1036 can best be described as unjust enrichment of the State resulting from defects in the law. Unjust enrichment as stated in the case of *Lipkin Gorman v Karpnale Ltd*²⁴, is said to occur where a defendant has been enriched, the enrichment occurred at the expense of the claimant, the enrichment is unjust or as a result of failure of consideration, and there is no justifiable bar or defence. Most of these elements apply to the situation between the Government of Ghana and original owners of property immediately before their compulsory acquisition by the State. The State and public institutions that occupy properties while acquisition processes have not been completed and compensation payments have not been made can be said to have been enriched unjustly. However, this legal situation has to be tested in the courts.

Fortunately, section 238 of the new Land Act, 2020 (Act 1036) makes provision for availability of funds for payment of compensation of compulsorily acquired land or property

²³ *Supra* footnote 19

²⁴ [1988] UKHL 12.

before initiation of acquisition. It makes provision for the establishment of an interest yielding escrow account to provide for compensation payments, stating that the compulsory acquisition of land shall not be undertaken or facilitated by the Lands Commission unless the intended user of the acquired land proves in writing to the satisfaction of the Commission that the funds for the payment of compensation and other costs associated with the acquisition have been paid into the account which shall be managed by the Lands Commission. Furthermore, the intended public body or corporation shall obtain Cabinet approval and have an approved budgetary allocation for the payment of compensation and other costs associated with the acquisition before the commencement of the acquisition. These provisions would cure the defect where executive instruments were published for acquisitions without funds set aside to pay the appropriate compensation. The major problem with the new law is that since the provision does not have retrospective effect, all acquisitions which were made from 1966 to December 2020 and have not been paid for are not covered, and likely to fall through the cracks in the law. So, the key question which remains to be answered is: what happens to lands for which executive instruments have been issued, and which have been duly occupied by public institutions without payment of compensation until the passage of Act 1036?

Section 10 (1) of the Limitation Act, 1972 (NRDC 54) bars anyone from bringing an action to recover land after 12 years from the date on which the action accrued. It states as follows:

A person shall not bring an action to recover a land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to a person through whom the first mentioned claims to that person.

This provision raises further barriers to original land owners whose properties have been acquired by the state. This implies that if for some justifiable reasons the original owners could not bring an action within the stipulated period to recover compensation, then the property is lost to the state. This may well constitute unjust enrichment to the state by operation of law. This situation cannot be said to be just.

Common law scholarship recognizes restitutionary liability in situations of unjust enrichment as discussed by Webb²⁵; similar principles have also been clearly enunciated in the scholarly work of Leow and Liao²⁶. The work of Hedley²⁷ also pointed to components of injustice and unjust factors which are associated with the legal concept of unjust enrichment, some of

²⁵ 2009 *supra* footnote 9.

²⁶ 2013 *supra* footnote 11.

²⁷ 1995 *supra* footnote 10.

which have been determined in courts within the common law jurisdiction. The situation that pertains in relation to compulsorily acquired lands without completion of acquisition processes and non-payment of compensation in Ghana appears caught within the legal fray of unjust enrichment.

Conclusion

From the analysis and discussions above, some modest conclusions can be drawn: first, original owners of property immediately before compulsory acquisition by the State are excluded from the acquisition processes from the start which does not allow them adequate time to prepare and organize themselves for negotiations for compensation. Second, there are several instances where acquisition processes have not been completed but the land or property has been occupied by the State agency or body, on whose behalf the executive instrument was issued for the acquisition. Third, it has been assumed that once executive instrument is published for compulsory acquisition, all other interests in the property are extinguished, and non-payment of compensation does not invalidate the acquisition. This has led to a situation where about 90 percent of all lands acquired by the State since 1966 had not been paid for as at 2004,²⁸ and the situation has not changed very much to date.

It can be concluded that compulsory acquisitions undertaken by the State remain legally valid because they were grounded in the appropriate legislation in spite of all other associated defects. However, the loss of lands to the original owners without payment of compensation could be characterized as a situation of unjust enrichment²⁹ for the State and the beneficiary institutions, while the original owners suffer hardship. This is especially so, since the new Land Act, 2020 (Act 1036) which was passed in December 2020 does not have retrospective effect, and cannot be relied on to resolve issues with previous acquisitions.

Based on the findings of this research, it is recommended that all existing acquisition processes which have been initiated through publication of executive instruments must be completed, due valuations undertaken on the properties, and the appropriate payments with interests placed in a special account, while the rightful owners are identified and contacted for payment of compensation. If the rightful owners cannot be identified, the funds could be used for the development of the locality where the land or property was acquired. It is also recommended that identification of owners of property immediately before their acquisition

²⁸Larbi, W.O., Antwia, A., Olomolaiye, P (2004) Compulsory land acquisition in Ghana—policy and praxis, *Land Use Policy* 21 (2004) 115–127, https://www.researchgate.net/publication/222841349_Compulsory_land_acquisition_in_Ghana-policy_and_praxis date of access April 21, 2021.

²⁹ *Lipkin Gorman v Karpnale Ltd* [1988] UKHL 12.

by the State should not preclude setting aside the compensation payments due the property. It is hoped that the provision for the establishment of an escrow account under the new Land Act, 2020 (Act 1036) would cater for future compensation problems associated with compulsorily acquired lands.

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