

ASSESSING COMPENSATION FOR CUSTOMARY PROPERTY RIGHTS IN MALAWI: THE CASE OF MOMBERA UNIVERSITY PROJECT

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ABSTRACT: Provision of public facilities and infrastructure in various sectors such as agriculture, mining, transport, education, and health among others requires a lot of land, which government usually expropriates as it may not have the appropriate land, or in appropriate quantities, or in appropriate locations. Compensation is normally required to cover consequential expropriatory losses occasioned to expropriated people. This paper aims to deepen our understanding of the applicability of market value as a basis for valuing customary property rights for compensation purposes during expropriation. By using the case of Mombera University project, this paper analyses how compensation is valued for customary property rights that are dominant in Malawi. The paper demonstrates that practically compensation for expropriating customary properties is generally inappropriate because market value, as a compensation valuation basis, and the methods used for its determination, are ill-equipped for customary properties. In this regard, the paper argues that prevailing assessment practices lead to inappropriate compensation for customary property rights in Malawi.

KEYWORDS: Compensation, Customary property rights, Expropriation, Market value.

INTRODUCTION

Expropriation of property rights enables governments to acquire much-needed land for provision of various public infrastructures and services and achieve numerous socio-economic development goals. In addition to these public purposes, the need to pay compensation to affected people to cover the property lost and other expropriatory losses suffered, and restore them to their previous niches, further restricts expropriation (Denyer-Green, 2009; Barnes, 2014). In that regard, Denyer-Green (1989) emphasises that generally, expropriation without compensation may not be acceptable. As a developing country, Malawi is increasingly executing various projects in different sectors such as agriculture, education, health, and transport among others to improve the welfare of Malawians (Malawi Government, 2012). These programmes catalyse expropriation of a lot of land, which, in Malawi, is mostly under customary tenure (National Statistical Office, 2011). Expropriation and compensation laws in Malawi require that compensation for any expropriated property be based on market value, to enable the affected persons to replace lost property from the market with that compensation (Malawi Government, 2002). Thus, the study aims at deepening our understanding of the applicability of market value as a basis for valuing customary property rights for compensation purposes during expropriation. Using Mombera University project, the study analyses how customary property rights are assessed for compensation purposes and what challenges are encountered and how valuers deal with them.

Methodologically, the research employs key informant interviews and focus group discussions using semi-structured questions. Respondents in the research included the regional commissioner for land (north), one government lands officer (north), two government valuers at the regional lands office (north), one district lands officer at M'belwa District Council (that is Mzimba District Council), one group village headman and one village headman for the affected community, chairman of Mzimba Heritage Association and seventeen affected people. The primary data collected was triangulated by asking the same questions to more than one person of the same group or level and different levels. Secondary data is sourced from various legal documents (including the Constitution), academic literature (books, journals, academic theses and previous scholarly works) and other documents.

The paper has six sections. Section two discusses property rights in Malawi while section three looks at compensation requirements before moving to the case study of Mombera University and its process in section four. Key challenges are discussed in section five while section six concludes the study.

PROPERTY RIGHTS IN MALAWI

Malawi operates a hybrid tenure system with customary, private, and public property classes. Customary tenure is the right to own, use or dispose of land rights based on customary laws, and legitimate to the community, enforced in the customary courts, or by social pressure and normally unwritten. Such land rights are reducible to ownership of specific rights by individuals, families and communities (Malawi Government, 2002). Paradoxically, colonial policies considered customary land rights as only occupational rights to discourage the development of land rights equivalent to freehold or concessions claimed by European settlers. This stand suffocated the development of customary land law in Malawi (Pachai, 1978; Malawi Government, 2002).

At over 75% (National Statistical Office, 2011), customary tenure dominates in Malawi and remains essential to cultural identity and social organisation (Malawi Government, 2002). It is transferable through inheritance following matrilineal or patrilineal practices (Berge, Kambewa, Munthali and Wiig, 2014; Tschirhart, Kabanga and Nichols, 2016), allocation by chiefs (Malawi Government, 1965; Chipeta, 1971) and direct purchasing under customary institutions (Takane, 2008), which mostly go unrecorded. Because customary property rights are rarely registered, information relating to the nature of the property, ownership, and any transactions, is hardly available and therefore, not conducive for competitive property markets. Technically, properties with inadequate or no documentation are invisible beyond their own system or markets (De Soto, 2000).

Section 25 of the 1965 Land Act provides that all customary land is the lawful and undoubted property of Malawians, vested in perpetuity in the President and administered by the Minister for Lands for the common use and benefit of Malawians while Section 26 considers customary land as public property. This consideration leaves customary land holders as occupiers or users only, a stand taken by colonial perceptions. On the other hand, people holding land customarily consider it as their own. Customary land rights are recognised and protected to some extent by some laws and the Malawi Constitution.

Conversely, private land is all land exclusively owned, held or occupied under freehold tenure or customary estate by a clearly defined community, corporation, institution, clan, family or individual (Malawi Government, 2002, pp. 28-29). Private land rights are guaranteed and protected by statutory laws. Broadly, private land in Malawi has the same characteristics as anywhere else and can be used for financial facilities and freely exchangeable (Besley and Ghatak, 2009), subject to prevailing laws. This exchangeability supports competitive property markets that provide necessary information on ownership, land details, prices, and rentals; and indicate state of the market. These aspects support valuation for different purposes (Mooya, 2009), impersonal market transactions (Furubotn and Richter, 1998), and compensation assessment (Baum, Sams, Ellis, Hampson and Stevens, 2008). Private land in Malawi accounts for less than 3.0% (Pachai, 1978; National Statistical Office, 2011) while the property market is still developing.

Public land accounts for less than 20.0% of all land holdings in Malawi (National Statistical Office, 2011). According to the National Land Policy (2002), public land class is strictly reserved for land managed by government agencies and in some cases by Traditional Authorities in trust for the people, and openly accessible by the public. This class includes land used for national parks, conservation, historical issues, and defence purposes among others. For customary land managed by Traditional Authorities, common access land such as dambos and communal woodlots and forests, exclusive to members of the Traditional Authority, fall under public land (Malawi Government, 2002). However, public land suffers encroachments and squatting in many cases, both in urban areas (UN-HABITAT, 2012) and rural areas (Malawi Government, 2002). On the other hand, the national land policy laments that the Malawian property law remains rudimentary and undeveloped to date (Malawi Government, 2002).

COMPENSATION REQUIREMENTS IN MALAWI

POWERS OF EXPROPRIATION AND COMPENSATION

While section 28 of the Constitution assures every Malawian of the right to acquire property individually or in partnership and guarantees their protection, these property rights are limited by subsection 44(3) of the same Constitution that empowers government to expropriate such properties for public utility, subject to compensation. The expropriation provision stipulates that:

'Expropriation of property shall be permissible only when done for public utility and only when there has been adequate notification and appropriate compensation, provided that there shall always be a right to appeal to a court of law.'

In Malawi, any property is to be taken against a public utility and not otherwise. The Malawi National Land Policy offers that land for national development purposes shall be acquired¹ based on eminent domain principle, by virtue of government's sovereign authority and in the public interest² or for public use³. The Land Act (1967) and Lands Acquisition Act (1971) provide for expropriation of any (customary) land for a public purpose⁴ or in the interests of Malawi⁵, either by compulsory acquisition or agreement (Malawi Government, 1971). However, public utility is not defined in any of the main laws providing for expropriation in Malawi, thereby spawning confusion, misinterpretation, and abuse of power through arbitrary takings. The national land policy corroborates this observation and reiterates that purposes or public services that trigger

1 Subsection 4.2.5 (a), Malawi National Land Policy, 2002.
 2 Subsection 4.8.3, Malawi National Land Policy, 2002.
 3 Subsection 4.16.1, Malawi National Land Policy, 2002.
 4 Section 27, Land Act, 1965.
 5 Section 3, Lands Acquisition Act, 1971.

expropriation in Malawi, be conspicuously outlined (Malawi Government, 2002).

Expropriation in Malawi requires appropriate compensation to defray any expropriatory losses, damages and disturbances suffered by affected persons⁶. Compensation is meant to prohibit arbitrary deprivation of any property⁷, ensure equitable protection against any discrimination on grounds of property⁸, and prevent seizure of private property⁹. The national land policy emphasises that government is duty bound to protect the free enjoyment of legally acquired property rights in land, and that any landholder whose property is expropriated for a public use, is entitled to fair and adequate compensation for the loss, to be made whole again¹⁰. The primary goal for compensation in Malawi is therefore to indemnify affected people of their losses and fully restore them to their previous status as if expropriation did not happen. Seemingly, appropriate compensation that indemnifies affected people of their losses includes the property taken, losses in value of remaining land due to the taking or proposed works (severance and injurious affection), other disturbances and consolatory allowances (solatium) (Barnes, 2014). In some cases, special value is considered depending on person-property relationship and benefits to the person (Keon-Cohen, 2002). The legal basis for assessment of compensation for expropriated properties in Malawi is market value (Malawi Government, 1971, 2002).

MARKET VALUE

The Malawi National Land Policy (2002) considers market value as the best price a property interest would reasonably sell in an unconditional exchange on the valuation date, assuming that: seller and buyer are willing; prior to valuation date, there was a reasonable period (having regard to the nature of the property and the state of the market) for the proper marketing of the interest, for the agreement of price and terms and for the completion of the sale; state of the market level of values and other circumstances were, as on any earlier assumed date of exchange of contracts, the same as on the date of valuation; a purchaser with special interest takes no account of any additional bid (Malawi Government, 2002, p. 6). This definition assumes that the property interest is exchangeable and a market exists. Similarly, the International Valuation Standards Council (2017, paragraph 30) defines market value as the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion. Thus, the underlying principle for market value is 'willing seller'.

Broadly, market value is considered as a good basis as it plainly defines property value and the value determination process. It is seemingly an autonomous amount validated by market evidence, accomplishes fair and efficient expropriation, as expropriated persons get appropriate compensation to replace lost properties from the market, and become whole again (Baum et al., 2008; Barnes, 2014). Further, the market is considered as a neutral measure for property values. Ironically, Kelly (2006, p. 6) argues that it is difficult to determine how much owners value their properties, as market value ignores some real aspects of the property, such as historical and family value (Kaufman, 2010, p. 86). Thus, market value does not always equal owner's real loss and insufficiently indemnifies property losses.

Practically, comparison, income, and cost methods, that are heavily market-reliant, are the common methods for calculating market value in most countries including Malawi are. Comparison methods compare subject property with comparable properties exchanged recently in the market to estimate value. Use of comparable market evidence reduces uncertainties as in other methods (Blackledge, 2009). Income methods capitalise income into value. Capitalisation converts income into a present value by using a suitable discount rate (Scarrett, 2008). Principally, value is found by dividing the property's net income by discount rate. For cost techniques, property value is equal to land value plus depreciated current cost of reproducing or replacing

6 Subsection 44(4), Constitution of Malawi, 1994.
 7 Subsection 28, Constitution of Malawi, 1994.
 8 Subsection 20, Constitution of Malawi, 1994.
 9 Subsection 21(6), Constitution of Malawi, 1994.
 10 Subsection 4.16.1, Malawi National Land Policy, 2002.

the improvement (Blackledge, 2009). Cost methods are used when the other approaches are unsuitable or to supplement them. In the case of Malawi, the Regional Valuation Officer 1 (North) (8 August 2016) explained that at times, they use spot valuation technique, which also requires market data and that the valuer is knowledgeable about the state of the subject market and with ample experience to apply this method.

THE CASE OF MOMBERA UNIVERSITY PROJECT

Malawi Government has embarked on a new public university project - Mombera University (of Agriculture), situated about 12 kilometres to the south of Mzimba District headquarters and about 110 kilometres south east of Mzuzu City, northern Malawi. This project is part of the strategies to increase access to higher education and improve the capacity of highly skilled and educated workforce in Malawi (Malawi Government, 2012, pp. 88-89).

PROPERTY RIGHTS IN PROJECT AREA

Government expropriated 432 hectares of customary tenure from 17 owners in 2015. About 71.0% of the affected people relocated from the project site while 29.0% had farmland within the project area. The local people believe that land belongs to their ancestors, the dead, the living and future generations, as explained by the Chairman of Mzimba Cultural Heritage (16 October 2016). All affected people who were interviewed (17), cite inheritance as the main mode of acquiring land in the area. Other acquisition methods include allocation by local leaders and relatives at 41.0%, economic exchanges at 29.0% and through marriage for females at 12.0%. Customarily, land is a valuable asset to the local owners and forms the backbone of their livelihoods, but government officials consider it less valuable and accords it dismal recognition since it is unregistered and perceived to have no value (Regional Commissioner for Lands (North), 14 September 2016).

ASSESSING COMPENSATION FOR EXPROPRIATED ASSETS

Compensation assessment for Mombera University project was done by government valuers using government existing guidelines as there are no specific guidelines for assessing compensation for customary properties. As discussed in section 2.0, customary land is generally considered as public property and not compensable when expropriated in Malawi, as in many other African countries (Cotula and Vermeulen, 2011). Accordingly, compensation for the university project covered buildings (houses, kitchens, toilets, bathrooms, granaries, kraals, and others), planted trees (fruit and others) and crops and graves, while land losses and other disturbance allowances were not paid. The discussion on compensation assessment therefore focuses on how the compensated items were assessed based on market value and the challenges encountered and how these challenges were addressed. But first, let us briefly look at the property market.

THE GENERAL PROPERTY MARKET IN MALAWI AND PROJECT AREA

The property market in Malawi is generally underdeveloped and non-existent in rural areas. Formal property markets are concentrated in urban areas where private land account for 20.0% and parallel property markets guided by traditional practices are dominant even in the urban areas, where customary land stands at 47.0% (UN-HABITAT, 2012, p. 33). Most dealings in the parallel markets normally go unrecorded. The rural property market is overwhelmed with exchanges based on customary practices, which rarely keep records. The current state of the property market thus entails that market information is difficult and costly to access. The lack of data clearing houses, reluctance of fellow valuers to share information due to mistrust and fears of data misuse, and misinformation among other factors, worsen the situation. The sentiments of the Regional Valuation Officer 1 (North) (8 August 2016), represent those of all valuers interviewed, that it is hard to access market information in the Malawian property markets, and almost non-existent in rural areas and that

available evidence is highly questionable.

As highlighted in subsection 4.1, about 29% of the respondents in the project area explained that it is possible to buy or sell customary land, guided by traditional arrangements. Transactional data to support determination of objective property values is hardly available. Essentially, there is no formal property market that can be relied upon, apart from prevailing practices, which are not recognised by market value. How were expropriated properties then assessed in the project area?

ASSESSMENT OF COMPENSATION IN THE PROJECT AREA

Compensation assessment for lost assets involved collecting data of the physical aspects of the buildings and noting the status of the building components such as roofs, walls, floors, and doors among many. The buildings were also measured externally to collect data necessary for computation of external gross areas. The data was collected for each building of the affected household. Most of the buildings were constructed of traditional materials such as poles, unburnt bricks, grass, mud, and other local materials while some were made of burnt bricks, corrugated iron sheets, and cement floors. Photographs of the buildings together with the owners were then captured. All affected respondents alleged that they were not involved in the data collection exercise.

Market data was then searched in the local area and elsewhere to aid computation of compensation based on market value. Compensation amounts were calculated and tallied against each property on the list. The list of properties with values was subsequently taken to the affected people for verification purposes. The verification exercise helps to capture any omitted properties or affected people, collect wrong property ownership, and disclose tentative compensation values. Once all the feedback and queries are considered, a final compensation report is prepared and submitted to the clients for their action.

MARKET VALUE AS A COMPENSATION BASIS

Market value assumes that the property in question is exchangeable. As discussed in the previous paragraphs, customary tenure dominates in the project area, property market is very thin and any pecuniary exchanges of property rights are not documented because of the prevailing customary settings. Market information is virtually unavailable. Such an environment is not conducive for assessing compensation based on market evidence as the property market is suppressed. Likewise, market data from other sources related to private property exchanges is unsuitable to support compensation valuation for customary properties because the properties are naturally different with different value schemes (Small and Sheehan, 2008). Additionally, the use of compensation data from other expropriations may not be ideal as the data may not have been tested with actual market evidence, as contended by Baum et al. (2008). In this case, resultant figures lack external authentication and cannot measure compensation for lost customary properties fairly. The absence of discernible property market in the project area challenges resultant amounts as appropriate to enable expropriated people to replace their lost properties.

Conceptually, the market value definition in the Malawi National Land Policy (2002) assumes that the seller and buyer are willing to exchange their property rights. In expropriation settings, there is no one willing to transact. The buyer is empowered to acquire any property right by any means for public purposes or interests. As discussed in subsection 3.1, there are several statutes authorising the buyer (government) to expropriate any interest in property for a public utility but the key ones are the 1994 Malawi Constitution, Malawi National Land Policy (2002), Land Act (1965) and Lands Acquisition Act (1971). On the other hand, the owner had no wish to surrender the property at that time. In this case, government is forced to expropriate customary land to be able to execute Mombasa University project while property owners were under statutory compulsion to surrender their land unwillingly. It is quoted elsewhere that the people expressed their unwillingness and stated that had they been asked, they would have rejected the taking of their land, and even the project. The compulsive nature of expropriation defeats the principle of the willing seller (and willing

buyer), and an objective market value cannot obtain in such an environment, even if the valuer does his best to hypothesise a normal market transaction. Principally, the non-existence of a property market or unavailability of comparable evidence for customary properties in the project area or elsewhere, makes the imagination of a real exchange more challenging for the purposes of compensation assessment.

Contrariwise, market value considers physical conditions of subject properties during assessment (Baum et al., 2008), and disregards other intangible values such as customary ownership of the land, long occupation, cultural identity and social organisation. Consequently, seventeen households, who have been on the project land for over 100 years, lost their customary land without any compensation; their long occupation of over a century was not considered, while the social organisation of family ties was severed or disturbed when the households relocated to different neighbourhoods, instead of only one location as originally. Kaufman (2010) emphasises that non-compensation of these real values inherent in properties hurts many expropriated property owners. Similarly, Akujuru and Ruddock (2014) argue that affected customary property owners consider compensation adequate when their social and cultural values to property are covered. All these issues culminate into inadequate compensation as many intangible aspects are left out in this case. One respondent, during a focus group discussion, perceived received compensation as being very little with a lot of assets taken (Mombera Affected People Focus Group Discussion, 7 October 2016). As Kakulu (2008) and Mitchell, Myers, and Grant (2015) contend, valuers are generally not prepared to compute prices for intangible aspects in the market and therefore overlook them during market value assessment.

Market value is also assumed to be a product of an exchange of a property that was reasonably marketed before the valuation date, while considering the nature of the property and the state of the market. Private properties are normally advertised through various means. But customary properties are rarely traded in the open and seldom marketed. In the case of Mombera University acquisition, this assumption is hard to imagine because of the nature of the acquired properties – customary, which scarcely exchange or whose exchange data is barely available to aid assessment of values for other like properties. There is no discernible property market to support market value assessments.

Furthermore, expropriation has, more often, one buyer - the acquiring authority or government, and the owner has no choice but to sell to that buyer, regardless of the exchange conditions (Denyer-Green, 1989). Fundamentally, government is the only bidder with a special interest to get the customary property at any cost, and used its advantageous position, laws, and assessors to fix its own compensation amounts, which the owners consider to be inadequate in the case of Mombera University project.

While an independent market value requires that the transaction be an objective one with both parties acting knowledgeably, prudently and without compulsion. The customary land owners in this case had insufficient information if any, about the expropriation and compensation, the nature, and characteristics of similar assets for comparison purposes, actual and potential uses of their properties since they never thought of exchanging them, nor had they had the slightest idea of the state of any actual or imagined market and how similar properties were exchanging, could not make a fair decision on the exchange. Apparently, the government actors were more informed and experienced about other property markets and the expropriation and compensation process. Expropriated people could not act judiciously in the compensation assessment process as they had no market information. One is only prudent when relevant and quality market information is available at the time (International Valuation Standards Council, 2017). Finally, expropriated customary owners were coerced to surrender their land without any negotiations or agreement on the amounts they would want to relocate. Government and local leaders intimidated the people that the land is public property and they had no say. The expropriated people felt that if they asked for what was due to them, they might be imprisoned and gave up. During a focus group discussion, this is what they stated:

‘... So, all these things are what we had that side as an established village with its livelihoods. Most of these things like many graves were not considered in compensation and we gave up as it is government, fearing that it might imprison us.’

Broadly, affected people were unwilling, uninformed, imprudent, and forced to accept the expropriation of

their land, without any open and free negotiations to agree on the terms and conditions of the taking, how compensation will be handled and what is their role in the whole process. Most of the requirements to realise market value for the expropriated customary land for Mombera University project were not there.

The treatment of customary land as public property and not compensable, bewilders many customary owners as they have arguably occupied, used, and held the land for over a century in this case. The defence used in the past was that free land was plentiful such that expropriated people would easily be replaced with other lands by the community. This was the normal practice in many former British colonies (Benson, 2008), including Malawi. This is impractical nowadays as land is scarce and valuable, despite some idle land (Malawi Government, 2002), and hence rare free land allocations beyond the family. During a focus group discussion with the expropriated people, they complained that they had to pay some money to get land to resettle on even though they were not compensated for land by government. Those who cannot afford, have no farm land since 2015 as free land for allocation by the group village headman is unavailable (Mombera Affected People Focus Group Discussion, 7 October 2016). This assertion was corroborated by the Regional Valuation Officer 1 (North), who stated that:

'...At a certain point, I did compensation with some group village headmen who said that land is very scarce and they don't have land even for such [expropriated] people so that they can distribute to them or they can give them. They also have the same challenge that they don't have more land.'

However, Pachai (1978) and Mitchell et al. (2015) argue that compensation for customary land is ignored in many cases because of difficulties in establishing the actual bundle of property rights to value since such rights are not fixed by boundaries (as cited in Sheehan, 2000, p. 47). How were the various items compensated then assessed in the Mombera University project?

COMPENSATION ASSESSMENT METHODS USED

Compensation laws in Malawi only provide market value as a compensation basis while the choice of the valuation methods is left to the discretion of the valuer. Methods used in assessing compensation for Mombera University project are discussed under each of the broad items compensated - buildings, planted trees and crops and graves.

Buildings: According to the government valuer who conducted the valuation, a comparison approach was used for buildings that could exchangeable and market evidence could be obtained were assessed using comparison approach while those that scarcely exchange were valued using cost approach. As alluded to elsewhere, there is no discernible property market in the project area to provide necessary market evidence to support either of these methods. The valuer explained that data was searched in property markets in as far as Mzuzu City. However, it is hard to envisage how the data from an urban market was adjusted to fit properties mostly made of rudimentary materials in a typically rural setting. The valuer complained that market data scarcity is a major challenge in the assessment using comparison approaches. For the cost technique, calculation of building cost estimates requires costs of building materials or similar, newly completed buildings. Information on fees for professional work and labour is also desirable. The paradox is that most of the customary properties expropriated were made of materials that lack known costs, professional fees, labour charges and depreciation information for such materials as grass, trees, and bamboos, among others. Such data gaps challenge application of cost approaches in valuing customary properties. Generally, it is challenging to assess compensation using comparison and cost methods for expropriated customary properties as they are difficult to quantify and monetise into reliable amounts due to their nature, as observed by Small and Sheehan (2008) in Australia. Alemu (2013) in Ethiopia and Anuar and Daud (2012) in Malaysia.

Planted trees and crops: All trees planted by the affected person whether fruit or others were assessed using government prices gazetted in 2010 in the Florestry Act (Malawi Government, 2010). These price rates are presumed to be exchange prices for the different trees, fruit trees and crops as of the time of gazetting. The amount for compensation for crops and fruit trees was found by multiplying the price per yield (kilograms) per hectare for each crop or fruit while compensation for planted trees used for poles, timber, fuelwood, among many was the product of the price per cubic metre and the quantity in cubic metres. However, the major challenge in getting acceptable amounts pertains to the outdatedness of the price rates since they were gazetted in 2010 and no provision is made for appreciating or updating them annually. The reliability of such price rates is questionable in an environment characterised with high inflation and price fluctuations.

Graves: Graves are among those sentimental assets that were compensated. The valuer from the regional lands office (north) indicated that these assets, which are very subjective, were assessed using the cost approach. When asked where market data for the assessment of land values and costs for building materials was sourced from, he indicated that data was obtained from the affected people and local leaders. The valuer explained that he usually consults the local leaders and other elders on how they culturally handle issues of graves and how much they had spent to put a tombstone or pave the graves. He admitted that the challenge with this data is that the sources were not sure of the total amounts spent on the works since labour was contributed by themselves except where they needed the technical work of a brick layer. Based on the data obtained, the valuer adjusted the data and calculated that K120,000.00 (about USD 160.00) for graves that were not paved (earth) and K350,000.00 (about USD 467.00) those that were paved were adequate amounts. However, this data is not tested in the market. The valuer also explained that he used his understanding as to how much it would cost an unpaved or a paved grave. On the other hand, the valuer did not indicate how much was the value of each lot of a grave and what aspects were considered in the computations. Assessing compensation for graves challenges assessors because of the sentimental attachments people have over graves and it is not surprising that the valuer in this case had to do a lot of guess work. It is hard to believe that the amount attached to the graves were representative.

KEY CHALLENGES IN COMPENSATION ASSESSMENT

Assessment of compensation for expropriated customary properties faces several challenges. The first challenge regards the nature of customary properties. Customary properties are not bound with fixed lines and some of its rights go beyond what is seen by most people. Conceptually, customary property rights belong to the ancestors, the dead, living, and future generations and are not meant to be exchanged. These aspects are hard for an alien to understand and appreciate their relevance including valuers. Less tangible values are normally disregarded during compensation assessment. The sixteen valuers interviewed indicated that broadly, customary properties are valued in the same way as private properties, though the two are ontologically different. This treatment ignores the less tangible values of customary property rights and leads to inappropriate compensation.

The second challenge concerns absence of a visible property market in the project area for property rights. Ostensibly, some customary properties are exchanging hands on an economic basis based on existing traditional arrangements, which rarely keep hard evidence of such transactions. This situation is not supportive to market value basis and market reliant compensation assessment methods. All valuers involved in the study complained that quality comparable data is hard to find. This bottleneck is addressed by seeking comparable information from other markets and practitioners, though difficult to get it; by keeping and using own data including other compensation assessment data, which might not be suitable for the work at hand.

The third challenge is that available data to aid compensation assessment is usually unreliable. About 50.0% of the valuers interviewed (16) indicate that the available data is very unreliable while only 19.0% considered it reliable with 6.0% saying that as valuers, they try to make the data reliable through adjustments to do the work at hand. According to the remaining 25.0%, reliability of data depends on its source and it might therefore be dependable or not. However, the main challenge that the study observed is that most of the available data has never been tested in the market to see if it represents reasonable values for the properties

or not. For example, most of the compensation assessment evidence used is that which valuers generate themselves and not from the general market. Data for private exchanges is also unsuitable because of the ontological differences between customary and private properties and location differences. With the state of the property market in rural Malawi, it is hard to get reliable data and hence knowable market values for compensation purposes.

The fourth challenge is the sole use of market value as a compensation assessment basis for customary properties. Market value depends on market evidence to be objectively determined. The absence of a discernible property market in the project area to furnish market evidence renders market value as a compensation basis deficient and challenging to obtain reasonable amounts. All respondent valuers transplant market data from other markets mostly urban which information is unsuitable for customary properties, and adjust it to fit rural and customary properties. This often results in erroneous figures which are called market values. But they are just some figures as market value requires data generated based on the willing seller principle.

The fifth drawback is that the absence of any known property market in the project area and hence reliable market information, makes the use of comparison and cost methods difficult and unsuitable for customary properties. All sixteen valuers involved in the study said that they use whatever information is accessible to them by adjusting the same to suit their needs. Customary property exchange data is hardly there while cost estimates for traditional building materials is non-existent. Using data for private properties from other markets worsens the situation because the properties are different and the markets are dissimilar, regardless of any proportion of adjustments.

The sixth problem relates to the knowledge, skill, and experience of the (government) valuers entrusted with compensation assessment. As much as these valuers have the necessary academic qualifications, they seem to be lacking on the conceptual framework of market value and the nature of customary property rights for them to come up with acceptable compensation packages. For example, 25.0% of the valuers who said that available market data is reliable are young valuers with less working experience. Their response show that they consider any data that come from other valuers or that from other compensation assessment as useful in all other compensation cases. They do not question the credibility and if the data has seen the test of the market. Additionally, what they know is that compensation is done using market value as the basis and market-based valuation methods, even though customary properties lack the necessary data to use these methods. When asked for alternatives, they had no idea. The lack of ample knowledge, skill and experience regarding market value, property rights and assessment methods jeopardises compensation outcomes.

All the above challenges culminate into inappropriate compensation given to the affected people, as highlighted in the following excerpt:

'Very little compensation with a lot of assets taken. We compared how prices of things are when you sell. For example, if you are given K300,000.00 (about USD400), to hire someone to mould bricks, burn them, transport them to where you need them, buying firewood; then you see that these structures are incomplete because the money is inadequate. We were staying in grass thatched houses but good ones.'

CONCLUSION AND RECOMMENDATIONS

The absence of any operational or known property market bears an environment that lacks in market evidence and challenges the assessment of an autonomous market value as a basis for compensation. The absence of market data also means that methods for assessing compensation that depend on market evidence such as comparison, income and cost cannot be relied upon. These factors, couple with the nature of customary property rights, scarcity and unreliability of available market data and inadequate knowledge,

skills and experience of valuers entrusted with compensation assessment lead to inadequate compensation for customary properties. These drawbacks are dealt with by using the available data and making necessary adjustments to suit the work at hand.

Accordingly, this paper recommends that a comparative study to analyse the challenges of valuing customary property rights with those of private property rights for compensation purposes, be carried out, and a research to look at alternative bases to market value for assessing compensation for customary properties, and other methods of valuation that are more suitable for compensation assessment in environments where customary property dominates or where property markets are thin.

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