Contents

Introduction .............................................................................................................................................. 2
Session 1: Contemporary Questions regarding Land That May Have a Bearing on The Extractives Sector ........................................................................................................................................ 2
Session 2: The Human Rights Angle to Land Acquisition and Access for Extractive Sector Projects...... 5
Session 3: Institutional Coordination Regarding Land Acquisition and Access for Extractive Sector Activities .................................................................................................................................... 5
Conclusions and Outcome ......................................................................................................................... 8
Introduction

The sixth Extractives Sector Forum (ESF) took place on June 15th, 2017. It was the second in a series of discussions focused on the issues surrounding land access and acquisition for extractives projects. The main aim of this forum was to discuss the institutional roles and coordination of various government ministries and agencies with regard to land access and acquisition for the extractives sector. This report consists of key highlights from the discussions and is intended to serve as a record of the same. Additionally, the discussions are also relevant to ongoing policy, legal and regulatory framework discussions on land and in this regard, can be used as an incentive. It brings to light the gaps, conflicts and overlaps among the institutions involved in land access and acquisition for extractives projects. The goal of this report is to incite thought and promote discussions among the various players in the extractives industry to deal with this matter.

Session 1: Contemporary Questions regarding Land That May Have a Bearing on The Extractives Sector

The first presentation highlighted important questions on land that may have an impact on the extractives sector. These questions, presented below, are not exhaustive but seek to exemplify some of the ambiguities involved in land.

1. The Historical Land Question
   Access to land is a major issue affecting communities in Kenya as majority derive a living directly from it. However, distribution and access has not been equitable thus causing tensions between those with access and those without. Historically, where no legal title to land existed, the same was viewed as ‘vacant’ or ‘unused’ land and more often than not, its inhabitants, as squatters. Moreover, the division of the country’s administrative units by way of culture and ethno-groupings continues to foster ethnic divisions that have citizens viewing issues from an ethnic rather than state perspective and this has a huge impact on land access.

2. Jurisprudence
   The recognition of collective land rights in the Constitution of Kenya, 2010 is a shift from old perspective that was carried over from the colonial era. However, our courts are yet to transcend from colonial jurisprudence which is more individualistic, to pay attention to collective rights and how they are produced. Making the shift is important if communities, the holders of collective rights, are to get their rights upheld in national courts. Until recently, communities have had to resort to international human rights protection mechanisms. A recent example is the judgement in favour of the Ogiek community made by the African Court of Human Rights, which sits in Arusha,
Tanzania. The Ogiek, an indigenous community, has suffered various injustices with regard to land rights which date back to the colonial era.\(^1\)

3. **Leases**

The land tenure system in Kenya is in a transitional stage. Many long-term leases are coming to an end and thus discussions on renewal are upcoming. Experts and civil society actors are of the view that discussions on renewal of leases cannot be had in isolation and the issues of landlessness, re-distribution, and minimum acreage ought to be addressed as well. Moreover, for the discussions to have any chance of success, they must be faithful to the principles outlined in Chapter Five of the Constitution and be preceded and supported by forensic audit of expired leases and civic education on respect for the rights of others (the sanctity of land ownership) among others. Current lease holders and other large-scale land owners should also start considering redistribution as a potential solution to landlessness.

4. **The Meaning of Security of Land Tenure**

Property is not an absolute concept. Security of land tenure must be seen as a bundle of rights that includes the rights to use, transfer, own, manage or even inherit. These rights can therefore be allocated to different people, which differs from the prevailing understanding that the rights can only be allocated to individuals. From the foregoing, the assumption that having a title deed is sufficient in security tenure and that it guarantees exclusive rights is incorrect.

Property, as defined by Professor Wesley Hohfeld\(^2\), is seen as a complex web of legally enforceable relationships. This view adds to the traditional conceptualization of property by Prof. A.M Honore\(^3\) that views property as a bundle of rights. Therefore, land tenure must be seen as a relational concept and as a bundle of rights. The problem of the current framework is that it can only be allocated to individuals instead of a collective group of people. The speaker posited that security of land tenure should be treated as a bundle of rights not as an absolute right.

5. **Contempt of Court Orders**

Contempt of court orders has increased over the years. A quick analysis reveals that eviction orders target the poor or economically weak while restoration orders favour the rich, or economically endowed and the political elite. This is unfortunate for the economy and ones power or prestige should not be the determining factor in prioritising competing interests and rights over land.

---


\(^2\) An America jurist and author of *Fundamental Legal Conceptions as Applied to Judicial Reasoning and Other Essays (1919)*

\(^3\) Anthony Maurice Honoré is a British lawyer and jurist, known for his work on ownership, causation and Roman law.
6. Community Land

Community Land Act 2016 expands the definition of a community as a consciously distinct and organized group of users of communal land, who are citizens of Kenya and who share any of the following attributes:

(a) Common ancestry;
(b) Similar culture or unique mode of livelihood;
(c) Socio-economic or other similar common interest;
(d) Geographical space;
(e) Ecological space; or
(f) Ethnicity

This expanded definition is an attempt to break away from the purely-ethnic concept of community. The challenge that will present at implementation stage will be how to galvanise the various characteristics.

7. Politics

Politics plays a major role in Kenya’s land tenure system. As a result of political involvement two major problems arise;

a) Poor economic logic on how land is used.

b) Corruption when land is converted from public to private land and vice versa; this is well highlighted in the Ndung’u Report.⁴

Additionally, there are cases where elected political officials claiming to act on behalf and for the interest of the community have been accused of keeping people in the dark about projects on their land for their own selfish gains.

Kenya needs to re-evaluate the economic potential of land including community land and use it as the basis for putting in place a land use policy. Titling alone is not the solution to the land question but the solutions must help realize the not just the economic potential but assure all that they can share in the various bundle of rights deriving from land. The new land laws must be interpreted in a transformative way so as not to entrench historical injustices.

Session 2: The Human Rights Angle to Land Acquisition and Access for Extractive Sector Projects

Chapter Four of the Constitution promotes and protects the Bill of Rights which is inherent to every Kenyan citizen.

Nonetheless, some challenges arise in relation to land acquisition and access for extractive sector projects when it comes to human rights. These are:

1. Displacement of populations. This results in adverse effects such as destruction of property and loss of livelihoods among individuals affected.
2. Environmental degradation
3. Degradation of Economic and social rights.

Land acquisition should adopt a Human Rights Based Approach\(^5\) to better understand how to respect rights in those processes. Even where resettlement occurs as a result of displacement, it must be human rights compliant. Stakeholders in the extractives industry must ask themselves the following:

1. To what extent have they included the individuals and communities affected?
2. What are the accountability mechanisms in these processes?
3. How does the process and outcome assure equality and non-discrimination assured?
4. How transparent is the process and do affected persons fully understand it?
5. Does the process embody respect for the rule of law?
6. Issues dealing with sustainability in the extractives sector. It is important to remember that land is used to support livelihoods and is not just a means of economic production. In this context, exploitation of natural resources must be sustainable i.e. utilization of resources must be intergenerational.

Session 3: Institutional Coordination Regarding Land Acquisition and Access for Extractive Sector Activities

The main issue addressed by this session was the challenge in coordination between the different government institutions. Participants were briefed on roles of different institutions as follows.

The Ministry of Lands and Physical Planning is the principle state organ in charge of land administration and management. Thus, it is the duty of the ministry to ensure implementation of the land laws. It is in discharging this mandate that the ministry is has developed draft regulations for the implementation of the Community Land Act 2016 and the Land Laws

Amendment Act 2016. The regulations have been subjected to a process of stakeholder engagement in fulfilment of the public participation requirement and to capture the views of stakeholder.

The National Land Commission is charged with among other duties the administration of public land and overseeing compulsory acquisition of land. A government entity wishing to compulsorily acquire private, public or community land, for public purpose, must make an application to the National Land Commission. The procedure for compulsory acquisition is provided in the Land Act 2012.

The Council of Governors secretariat representing the different county governments shared that the role of individual county governments is dependent on the prevailing tenure system. Those in areas where land is predominately held by communities, the Community Land Act assigns them the role of trustee. Moreover, the national government and investors should find modalities of sharing information and working together with county governments for the betterment of the investment climate. However, it does not stop there for there is need to make communities who are hosting these investments equal participants.

On its part, the Ministry of Mining oversees the mineral sector in the country and in undertaking its functions aims to enhance the growth of the sector. With regards to land matters, the ministry has established a licensing committee comprising of various stakeholders including the NLC to balance the rights of the land owners and the investors.

With the above background participants then focused the question of participation: in policy and regulatory framework formulation, and in extractives project processes.

The notion of public participation is a constitutional imperative. Consequently, the law-making process should ensure participation of the public and that the resulting laws reflect the views of the people. While acknowledging that this was happening, sections of the participants wished to know how they can give their views on the National Extractives Policy process. Moreover, there are other ongoing processes touching on the extractives sector such as the formulation of the Country Mining Vision, and a section of the participants were of the view that these processes should be harmonised or made complimentary.

On public participation in the individual extractives projects, participants wished to have clarity on the role of government. On its part, the Ministry of Mining shared information that draft Community Development Agreements (CDAs) Regulations have been developed which will enhance and empower community participation. While this is a positive step, it was argued that CDAs are not a tool for participation but for benefit sharing. The Ministry of Energy and Petroleum also prioritises public participation and is consistently working towards improving its strategy in this regard. Additionally, a Public Participation Bill6 is currently being developed: it will provide a general framework for effective public participation.

---

Compulsory acquisition was also discussed at length. Generally, the Constitution protects private property and compulsory acquisition is an exception to this. The principles for undertaking compulsory acquisition are also laid out in the Constitution: it must be lawful, for a public purpose, and fair, full compensation must be paid. What constitutes public purpose is laid out conclusively in the Land Act. Acquisition of land for extractives projects falls into what is referred to as a substantial transaction under Section 9 of the Land Act.

["substantial transaction" means a transaction that involves the transfer, leasing or licensing of land to a local or foreign investor either alone or in a joint venture to carry out developments in agriculture and other approved ventures with direct developmental benefits for Kenya through —

(a) a commitment for improving food security for Kenya through technology transfer leading to innovation, productivity increase and the requirement for a certain minimum percentage of the crops produced to be sold on local markets;
(b) infrastructural developments from which the public can benefit;
(c) demonstrable strong backward and forward linkages to other industries in Kenya;
(d) generation of substantial foreign exchange through import substitution and exports;
(e) sustainable agricultural practices and sustainable forest management which can contribute to addressing climate change concerns;
(f) emphasis is on reference to Kenya and the application of Kenyan law without waiver of any rights of Kenya.]

Participants also learnt that the Land Act provides for the procedure to be followed in cases of involuntary displacement and also for the eviction of unlawful occupiers. The National Land Commission is expected to develop resettlement guidelines and those for the assessment of compensation. In so doing the peculiarities of different communities should be considered. For example, the fact that mobile and communal pastoralists have more difficulties stating claim to land than sedentary groups including small scale farmers who exercise control over a specific unit of land.

In closing the discussions, the importance of civic education on land laws, and in particular on the rights of the different right holders was emphasised.
Conclusions and Outcome
The following are the outcomes of the discussion.

1. There exists inadequate public participation in extractive sector projects;
2. There are gaps in law with regard to land acquisition for extractives projects. Notably, the lack of a legal framework for assessing compensation and to guide resettlement;
3. There are number of historical land questions yet to be addressed and these threaten the success of implementing the new land laws; and
4. There is need to devolve the discussions to county and project levels.
Annex 1: Agenda

6th Extractives Sector Forum
LAND ACCESS AND ACQUISITION FOR EXTRACTIVES PROJECTS: INSTITUTIONAL ROLES AND COORDINATION
Royal Tulip Hotel | Nairobi | Thursday | June 15 2017 | 7.30am – 2.00pm

<table>
<thead>
<tr>
<th>Time</th>
<th>Activity</th>
<th>Lead</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.00am-8.30am</td>
<td>Arrival and registration</td>
<td>All</td>
</tr>
<tr>
<td>8.30am-9.00am</td>
<td>Opening remarks and context setting</td>
<td>IHRB/ILEG/EB</td>
</tr>
<tr>
<td>9.00 – 10:30am</td>
<td>Setting the Stage</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Contemporary land questions in land that may have a bearing on the extractives sector</td>
<td>Dr Steve Ouma – Executive Director, Pamoja Trust</td>
</tr>
<tr>
<td></td>
<td>The human rights angle to land acquisition and access for extractive sector projects.</td>
<td>Mrs. Patricia Nyaundi – CEO/Commission Secretary, Kenya National Commission on Human Rights</td>
</tr>
<tr>
<td>10.30am-10.45am</td>
<td>Tea Break</td>
<td></td>
</tr>
<tr>
<td>10.45am-12.15am</td>
<td>Panel Discussion (Moderator: Benson Ochieng)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The roles of different institutions and stakeholders with regard to land acquisition and access for extractive sector activities: Gaps, conflict, and overlaps</td>
<td></td>
</tr>
<tr>
<td>12.15am-12.30am</td>
<td>Wrap up</td>
<td>Benson Ochieng – Executive Director, ILEG</td>
</tr>
<tr>
<td>12.30pm-1:30 pm</td>
<td>Lunch and departure</td>
<td></td>
</tr>
</tbody>
</table>