



## MEETING REPORT LAND ACCESS AND ACQUISITION FOR EXTRACTIVES PROJECTS: BALANCING DIFFERENT INTERESTS

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## **Introduction**

The fifth Extractives Sector Forum (ESF) that took place on March 16, 2017 discussed the complex issue of land access and acquisition for extractive sector projects. The goal of the discussions was to establish how to balance different interests at stake in extractives related projects. Indeed, the concept of land proved to be one that needs deeper interrogation and discussion among industry, stakeholders and the two levels of government in Kenya - national and county - including the relevant administrative bodies, in particular the National Land Commission (NLC). The question of land use and development drew much interest and led to a call by participants for a national land use policy that would set a broader framework in Kenya beyond the existing land laws to clearly guide the process of use, management and development of land resources optimally and in a way that avoids or minimizes conflict.

This report highlights the outcome of the discussions during the ESF. The report is in no way exhaustive of the issues involving land acquisition and access but highlights the challenge of addressing the question and the need to further interrogate the issues. This report is complemented by a background paper prepared by IHRB attached to this report.

## **Session I: Legal Analysis of the Land Access and Acquisition Frameworks in Kenya by the National Council for Law Reporting**

The National Council for Law Reporting (Kenya Law) is a state corporation established within the judiciary by the National Council for Law Reporting Act, 1994. The Council's mandate includes monitoring the development of jurisprudence as well as revising, updating, consolidating and publishing the laws of Kenya and related functions under delegated authority from the Attorney General. The Council representatives participating in the meeting provided an overview of the legal framework and laws that address land access and acquisition in Kenya, summarised as follows:

### **a) The Constitution**

Land is defined under Article 260 of the Constitution of Kenya, 2010 as follows:

Land includes:

- a. The surface of the earth and the subsurface rock;
- b. Any body of water on or under the surface;
- c. Marine waters in the territorial sea and exclusive economic zone;
- d. Natural resources completely contained on or under the surface; and
- e. The air space above the surface.

Additionally, Chapter V. of the Constitution provides the **principles on land ownership and management**. All land in Kenya belongs to the people of Kenya collectively as a nation, as communities or as individuals. Land is further classified as public, private or community. The classification or tenure system is important as it determines the terms and conditions under which land rights are acquired, retained, used or transferred.

- Private land is land held by any person either as freehold or leasehold or land declared by law to be private;
- Community land is held by communities or registered group representatives but administered under the right of commons and members cannot be excluded from the benefits of enjoying that land;

- Public land on the third part is any other land that is neither private nor community held.

Various land laws are in place to regulate the rights acquired by land owners or occupiers under each tenure. This includes the regulation of land use in the public interest, for example, through planning laws and compulsory acquisition of land where after due compensation is paid land is taken from private or community use for public benefit.

The notion of **compulsory acquisition** is entrenched in the Constitution under Article 40(3). In summary, it provides that: the state shall not deprive any person of property or interest in property unless it is in accordance with the Constitution and established statutory law; the acquisition is for public interest or for a public purpose and; upon the prompt payment of full and just compensation. Moreover, a person whose land is subject to compulsory acquisition has the right to access a court of law.

#### **b) The Land Act 2012**

This Act consolidates the previous numerous land laws and seeks to provide for sustainable administration and management of land and land based resources. It comprehensively deals with administration and management of public and private land while community land issues are addressed under the Community Land Act. However, its provisions on compulsory acquisition also apply to all categories of land, including community land. The compulsory acquisition procedure is set out in Part VIII.

In summary, any land can be subject to compulsory acquisition by either national or county government, which should make its requests to the NLC. The NLC is mandated to develop criteria and guidelines to be followed by the acquiring authority based on Article 40(3) of the Constitution. The law further provides for notice to be served upon all parties with an interest in the land in question and for a public hearing to determine interested parties and to receive written claims for compensation. The NLC is also authorised to issue guidelines to regulate the assessment of just compensation. Under the law, full and just compensation is payable promptly and prior to taking possession. A grant of land in lieu of compensation may also be made.

#### **c) The Community Land Act 2016**

This Act repealed the Land (Group Representatives) Act (Chapter 287 of the Laws of Kenya) and the Trust Lands Act (Chapter 288 of the Laws of Kenya). It requires registration of communities and provides for the creation of a community-level body charged with the responsibility of administering and managing land on members' behalf. It also provides for the appointment of a community land registrar who is charged with the mandate of registering community land when the registering community tenders evidence of ownership.

The Act expands the definition of community from one that is focused on ethnic or tribal affiliation to one that focuses on regional community interests in land. Under the Act, the community acts through its representatives but decisions relating to land use, management or transfer are to be made by at least two-thirds of the registered community members. The county governments hold in trust unregistered community land and cannot deal with it unilaterally, for instance, they cannot issue it to investors. According to the NLC, counties are required to consult the Commission in such instances.

Community land like any other land can be subject to compulsory acquisition in accordance with the procedure established in law - Land Act 2012 - and for a public purpose. The Act favours alternative dispute resolution (ADR) for the resolution of grievances arising out of its application while maintaining the right to access the courts.

*\*The presentations on the Mining Act and Petroleum (Exploration, Development and Production) Bill, 2015 did not cover the aspects of land acquisition and access.*

#### **d) The Mining Act 2016**

This Act gives effect to Articles 60, 62, 66, 69 and 72 of the Constitution of Kenya. The Act applies to the minerals that are listed in the 1<sup>st</sup> Schedule. The Act's provisions address critical aspects in the mining sector including but not limited to preemptory rights, mineral rights, environmental protection, artisanal miners operations, mineral agreements, benefits sharing, local content and dispute resolution.

#### **e) The Petroleum (Exploration, Development and Production) Bill 2015**

Provisions are geared towards promotion of investment, local content and training as well as payments and revenue management. The Bill provides for equitable sharing of benefits but currently there is no agreement on the sharing formula. In fact, ESF meeting participants were not clear on the agreed percentages for national and county governments and communities.

### **Session II: Regulatory and Administrative Perspectives**

This session featured a panel discussion with government stakeholders, and sought to increase understanding of how the agencies within the two levels of governance – national and county - deal with issues related to land access and acquisition. Particular focus was given to community land.

Land can be acquired for exploration and exploitation of minerals or oil and gas, from an individual, public body or a community subject to payment of compensation by the entity-licensed to carry out the activity. Under the law, compensation is payable by the company that has been licensed to carry out exploration or exploitation. However, it is noteworthy that the compensation payable is for the loss of interest in the land and not for the mineral or oil & gas underneath the land. It is this loss of interest in the land that guides an assessment of the amount payable. Under the law, all minerals including fossil fuels belong to the people of Kenya as a collective and not to the person or persons upon whose land they are found. In determining the value of land, the NLC takes into account the specific details of each community i.e. the social and economic value established by looking into how the community uses the land. Establishing the real value for community land was cited as an ongoing challenge as many communities have not had an established land market that would help in this regard, but it is an issue that has to be addressed collectively by the NLC in close consultation with affected communities. For instance, decisions in Turkana county to 'sell' land in exchange for schools or health centres, may not be considered as due compensation.

#### **a) Need for Collaboration**

Meeting participants agreed that the various government bodies - ministries, departments, agencies and commissions and to the extent possible county governments - can and should improve collaboration with other actors over current actions. There are efforts in this direction through an executive order issued in 2016 requiring development of a national extractives policy. The goal of the policy will be to coordinate oil, gas and mining activities and cross-cutting issues for clarity to investors, including how to handle land, community engagement and compensation. This process is being spearheaded by the Ministry of Mining and a zero draft of the policy is ready and is expected to be released to the public for comments.

From the meeting discussion, it was apparent that there could be some misunderstanding of functions with regards to land among government agencies both at national and county levels. The lack of capacity, a challenge faced across the board by county governments, should be addressed to support the

implementation of the Constitution and other laws and for the success of devolution in general as set out in Article 6(2), which makes clear that national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.

Considering the enduring conflicts over land and land based resources in the country, there is need to ensure complementarity of the roles. Importantly, how counties define the nature and ways investments should be made at the county level, including acquiring or leasing land, is important. This is critical considering investors are required to consult with county governments as stakeholders in accessing and acquiring land. As there are currently no guidelines on how counties should engage investors, some participants noted that investors must work through lengthy, expensive and tedious consultative processes.

An additional area for collaboration identified by participants was in the law drafting process. Current practice involves lawyers being tasked with drafting without steps to ensure consultation with non-legal land experts. The result is laws that are difficult to implement, necessitating amendments from time to time. A good example is the recent amendment of numerous provisions of the Land Registration Act 2012 by the Land Laws (Amendment Act) 2016.

#### **b) Need for Policies**

**Participants underlined** the urgent need to finalize policies on national land use, mining and energy and petroleum, for which drafts exist. The lack of policies in these areas has resulted in a situation where the national government continues to make laws that are not anchored in or geared towards a broader objective.

Citing the land use policy as an example, such a policy would provide overall guidance for the management of land development based on societal needs while safeguarding natural resources. Currently land developments are highly politicised with many unchecked developments that are not based on long term or future projections. Geological data relating to minerals and fossil fuels (for which there are current efforts to obtain and consolidate) would also be considered in the process of developing such a policy.

With regard to mining and petroleum laws, participants felt that the lack of a policy has resulted in a law making process and laws that are primarily geared towards attracting investments. This raises the question of whose interests are preferred over others with investors perceived as having an upper hand. Participants felt that trade-offs need to be made to achieve the desired climate to invest as well as protect the rights of other stakeholders especially the host communities and for the protection of the environment.

#### **c) Compulsory Acquisition, Consent and Compensation**

Compulsory acquisition of land is spelt out in Article 40(3) of the Constitution with respect to public purpose or in public interest and upon prompt payment of just compensation. Circumstances in which such acquisitions may take place are also clearly set out in this Article.

The Land Act 2012 describes the process that should include among others a gazette notice, inquiry to establish different interests and a conflict redress mechanism. The Mining Act at sections 36-39 covers situations where consent must be acquired under different land tenures prior to the issuing of prospecting and mining rights. However, under Section 40 of the Mining Act, the Cabinet Secretary may initiate compulsory acquisition of the land over which prospecting and mining rights has been awarded, if the persons required to give consent have unreasonably withheld it, or such withholding is against the national interest. In such cases, the NLC which acquires the land on behalf of national or county government is required under Section 107 of the Land Act 2012 to prescribe the criteria and guidelines to be adhered to by the acquiring authority and under Section 110 of the same, to certify that the land is required to fulfill the stated public purpose.

The issue of compulsory acquisition (CA) was discussed at length. Establishing **public interest** in the process of acquisition of land and more especially in the case of compulsory acquisition raises concern over whose interests prevail i.e. investor interests or individual interests. Of concern especially is how public interest is established. Participants heard that public interest can be contested and that sometimes overlooking individual interests may actually be against public interest. Furthermore, given that government holds land in trust of the Kenyan people, this trust should in no way cause harm to people.

Participants heard that communities and land owners withhold **consent** because they feel ignored and uninvolved from the onset. A challenge was also raised with regard to community land where it has been difficult to establish the genuine representatives with whom to engage. The Community Land Act, establishes community level land administration and management structures and spells out a decision making process which it is hoped will ameliorate this challenge. Participants, in particular those drawn from affected communities and civil society, were of the opinion that explicit consent must be sought at all times and that the CA process should only be used in exceptional circumstances.

The question on how compensation is currently provided for and practiced was of interest to participants. The Land Act 2012 provides for a more detailed process not just of acquisition but of compensation as well. It was observed that there is no clear compensation policy especially in the case of discovery of extractives resources. The need for clear guidance on compensation was reiterated here. In the case of compulsory acquisition, compensation is determined by and payable through the NLC and this process is elaborately set out in Part VIII of the Land Act 2012.

Where there is a gap is in situations where land is acquired with the consent of the land owner or community. Although consent may be given, disputes over the amount to be awarded often arise. Importantly, compensation should be based on a mutual agreement between the owner of the land and the license holder. What is compensated at present is the land and not the value of the natural resources below the land. The question of valuation was also raised. Participants felt that compensation should therefore not only look at the present value of land but include compensation for the future loss of use of the land. The issue on who actually owns the resources was addressed with emphasis that natural resources found in the land belong to the people of Kenya and are held in trust by the State i.e. they do not belong to the government but are administered by the government.

Compensation was viewed as a complex process due to multiple interests at stake that include investors, politicians as well as communities. Investor and political interests were thought to prevail especially due to existing power and information asymmetry and therefore have an upper hand. The need to build the negotiation capacity of communities, including providing them with information, is paramount if the process is to achieve a fair and just result for all. Investors and governments have the responsibility to provide information while building capacity the civil society may also support. Compensation should therefore involve a detailed awareness process that outlines the options especially for those to be compensated.

The challenge of fair and just compensation needs closer interrogation. Parameters such as current value as well as future loss for the current owner should be taken into consideration. As already noted, community understanding of customary practices, pricing and multiple aspects revolving around use of land must also be ensured. As such, a one-size-fits all approach across different projects should be avoided to achieve a just and fair compensation process. The role of both investors and government in securing consent is one that is central to a successful process in access and acquisition of land.

Finally, more often than not, upon a discovery being made, new buildings appear practically overnight around the site with owners angling for higher compensation and the price of land often skyrockets as

speculators flock in. This can make land acquisition very expensive to the point of threatening the investment.

### **Session III: Emerging Approaches**

This session included a discussion with industry and civil society representatives focused on how communities are dealing with the issue of land access and acquisition in the context of extractives projects.

#### **a) Community Bargaining Power**

There were divergent opinions about communities' capacity to bargain and negotiate for good land compensation packages with investors. Whereas one panelist felt that communities were very informed and had the skills it took to get the maximum benefits, others felt that communities might have an understanding of their needs, but articulation of these as part of agreements may be a challenge. It was pointed out that the investors have highly trained personnel and experts leading their negotiations, which results in uneven bargaining power and communities being disadvantaged.

A case in point was Turkana where land is largely communal. Communities in Turkana have come together and negotiated "Land Access Agreements" that are very elaborate and comprehensive. The traditional structure i.e. elders were used for negotiations on behalf of communities and therefore land in Turkana has not been sold. Instead, the community has given only access for use of the land by the investors. A good practice would be one where the process of access and acquisition is cognizant of the existing traditional structures that can be used to facilitate access and acquisition. Such structures are critical in ensuring that both investors and government have deeper understanding of land use by local communities. Contributing to the discussions, participants advised on the need to establish prevailing land use trends in the different affected communities to help tailor the most suitable approach for each context e.g. in some contexts offering alternative land will be the best option.

#### **b) Corporate Social Responsibility (CSR) vis-à-vis Community Expectations**

Communities look to license holders and investors to fill the gaps for basic service delivery which ideally is a function of government. They expect that the investors should undertake development projects and initiatives that are the government's mandate and responsibility. On the other hand, there is a view among some that community expectations are to be managed by keeping them as low as possible as opposed to undertaking dialogues with them about important issues. This approach is linked to an attitude that communities are trouble makers out to jeopardise projects.

There is need for community awareness as to what CSR is and what it is not. Negotiations for land access should be over and above basic CSR projects. Importantly, companies need to appreciate the dynamics of acquiring a social license to operate even when they have the legal license to operate in a specific region. Participants observed that the community social structures for obtaining social license are dynamic but it is important that the structures should at all times be representative and have the authority to make decisions. Social license requires continuous renewal and for companies' constant consultation based on information

sharing and ensuring it is understood is critical. On the other hand, the discussions also underscored that it is important for communities to understand that any kind of development results in economic and social changes and thus project support should not be for only those they view as not having such implications.

### **c) Gender Aspects, Participation and Community Perceptions**

There is also a notion that extractive projects only have negative impacts, which is not the case. Local communities need to be informed of both positive and negative impacts. Participation and negotiation is simpler if the community is united and has strong structures. However, this is usually not the case and there are groups in communities that are often excluded such as women. Women's involvement was seen as central considering there complexities in land ownership that tend to disadvantage women especially when it comes to titling and succession.

Also raised was the question of the extent to which investors and government should engage. Engagement was seen as a continuous process and not a one off exercise geared towards land acquisition and access. It was clear that the public holds the position that there is a great deal of secrecy in the sector and that governments as well as investors do not want to divulge information to the public concerning among others, the terms of agreement, revenue generated and level of local content.

### **Outcomes**

The discussions sought to increase understanding around land access and acquisition and how to balance different interests. Main points of the discussion can be summarised as follows:

1. Understanding the extractives sector: A number of challenges remain in fully understanding the extractives sector and its connection to land and in particular the relationship between surface rights and mineral rights.
2. Governance: There is a gap in coordination among the various levels of government in Kenya on matters relating to land.
3. State of legislation and policy formulation: The policy and legislation making process requires deeper reflection, especially in ensuring that policies guide the law making process. Importantly, operationalisation of the laws through formulation of regulations should be fast-tracked as is being done in the case of the Mining Act 2016 where some eighteen regulations have been drafted out of which nine are already before parliament. There are gaps in the area of land especially, compulsory acquisition, compensation and resettlement for which the NLC could take the lead in proposing regulations. The complexities in the policy and legal frameworks creates themes that can be discussed in future ESF forums.
4. Addressing community and gender rights: there is a need to deeply consider how to balance investor rights with community and gender rights. This should involve giving meaning to community rights and related customary structures that influence access and acquisition of land. Importantly, there is need to develop clear guidelines on establishing public interest over and above individual interests. The public trust doctrine needs to be further defined to ensure that government does not abuse this trust to infringe on community rights.
5. Bringing the discussions to the county level: there is need to consider county level forums that will interact with community members and further interrogate issues plaguing the communities at the

local level. ESF’s credibility is also dependent on how best it accommodates local level issues through discussions at the county level.

6. Revenue sharing: parliament should agree on the formula for revenue sharing with regard to O&G in the Petroleum (Exploration, Development and Production) Bill 2015.

## Annex 1: Agenda



### 5<sup>th</sup> EXTRACTIVES SECTOR FORUM

#### LAND ACCESS AND ACQUISITION FOR EXTRACTIVES PROJECTS: BALANCING DIFFERENT INTERESTS

**Boma Inn Hotel| Nairobi| Thursday| March 16 2017| 7.30am – 2.00pm**

Time	Activity	Lead
7.30am - 8.00am	Arrival and registration	All
8.00am - 8.30am	Opening remarks and context setting	IHRB/ILEG/EB
8.30am – 9:00am	Legal Analysis of the current Land Access and Acquisition Framework	National Council for Law Reporting
<b>9:00am – 10:30am: Regulatory and Administrative Perspectives: Moderator: Dr. Alex Awiti</b>		
Mr. Ken Mwaita - County government-Taita Mr. Felix Mutunguti, Snr. Supt. Geologist – Ministry of Energy and Petroleum (MOEP) – Ministry of Mining Mr. Leonard Omullo, Director Natural Resources - National Land Commission		

<b>10.30am - 10.45am</b>	Tea break	
<b>10.45am - 12.15am: Emerging Approaches: Dr. Melba Wasunna</b>		
Mr. Gino Cocchiaro, Head of Extractives - Natural Justice Mr. Andrew Orina, Program Manager - Friends of Lake Turkana Mr. Moses Njeru, Chief Executive Officer -Kenya Chamber of Mines		
<b>12.15am– 12.30am</b>	Wrap up	Benson Ochieng -ILEG
<b>12.30pm-1:30 pm</b>	Lunch and departure	ALL

#### Annex 2: List of participants

	<b>Name</b>	<b>Organization</b>
1	Philippa Hutchinson	Acacia Mining
2	Justus Wambayi	OXFAM
3	Felix Mutunguti	Ministry of Energy and Petroleum
4	Brian Kazungu	Land Development and Governance Institute
5	Dr. Melba Wasunna	Extractives Baraza
6	Monica Gichuhi	Ministry of Mining
7	Stephen Waema	KIPYA Africa LTD
8	Long'et Terer	Kenya Law Reports
9	Rose Kimotho	Institute for Human Rights and Business
10	Benson Ochieng	Institute for Law and Environmental Governance
11	Jackie Okanga	Aga Khan University - East African Institute
12	Lucy Githaiga	Diakonia
13	Faith Pesa	Ministry of Mining
14	Gino Cocchiaro	Natural Justice
15	Arnold Mahero	Tullow PLC
16	Purity Kagendo	Diakonia-Haki Madini
17	Geoffrey Kerecha	Extractives Baraza

18	Paul Mwaura	Kenya Land Alliance
19	Rehema Mohamed	Kenya Oil and Gas Association
20	Joseph Kibugu	Business and Human Rights Resource Centre
21	Orina Andrew	Friends of Lake Turkana
22	Hadley Becha	Community Action for Nature Conservancy
23	Mwenda Makathimo	Land Development and Governance Institute
24	Mohamed Ramadhan Ruwange	Extractives Baraza
25	Bernard Ochieng	Caritas Kitui –Haki Madini
26	Moses Njiru Njeru	Kenya Chamber of Mines
27	Laura Muniafu	Extractives Baraza
28	Dr. Alex Awiti	Aga Khan University - East African Institute
29	Ken Mwaita	County government of Taita
30	Peter Shambi	Hamasa Initiative
31	Jael Amati	Groots Kenya
32	Mary Alwanyu	Groots Kenya
33	Omondi Winstone	Timu Community Development
34	Linda Were	Africa Oil
35	Beatrice Poror	Africa Oil
36	Kenyamann Eriong'oa	Turkana Natural Resources Hub
37	Michelle Samba	Strathmore Extractives Centre
38	Duncan Okowa	Institute for Law and Environmental Governance
39	Tom Kigen	Kerio Valley Development Organization
40	David Ekiru	Turkana Professionals Association
41	Angela Mutsotso	Natural Justice
42	Leonard Omullo	National Land Commission
43	Muthoni Koinange	KEXPRO
44	Lucy Njuguna	KEXPRO
45	Joel Omondi	TIMU



