



## 2<sup>ND</sup> QUARTERLY FIRESIDE CHAT

### FORUM REPORT

ON

*“Innovative Public Participation Models: Analyzing Emerging Trends and Practices”*

**Dates:** 27<sup>TH</sup> June 2017

**Venue:** Strathmore University

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## **About the Quarterly Fireside Chat**

The Quarterly Fireside Chat organized by the Extractives Baraza offers a multi-stakeholder platform for peer learning and knowledge sharing to improve understanding around the implications and impact of policy options on Kenya's extractives sector. It is an expert-led forum, in consultation with the government, private sector, civil society organizations and think tanks, aimed at generating open, inclusive, robust and candid discussions, contribute to consensus building among diverse stakeholders and crafting innovative, collaborative and mutually beneficial solutions for natural resource governance and development.

The Extractives Baraza ("EB") is an advocacy-neutral platform that promotes knowledge, transparency and evidence-based stakeholder dialogue on the extractives sector in Kenya and the broader African region. Our ultimate goal is to enhance citizen participation and engagement in the governance of Kenya's extractives sector. For more information about us, see [www.extractives-baraza.com](http://www.extractives-baraza.com).

## **The Second Quarterly Fireside Chat**

The second Quarterly Fireside Chat (QFC) themed *Innovative Public Participation Models: Analyzing Emerging Trends and Practices in Kenya's Extractives Sector*, focused on innovative industry-led models towards public participation in the extractives industries. The QFC had an in-depth analysis of the issues surrounding public participation law, practice, and future trends at the national and county levels. The QFC further laid emphasis on some of the challenges and divergent views on "public participation" *vis a vis* "public benefit" in Kenya's extractives industry. Lastly, the Chat also interrogated whether law and practice have moved beyond mere theoretical underpinnings and procedures. The QFC drew participants from different stakeholders including the civil society, national government, legal practitioners, industry and private sector representatives.

This report highlights the key issues that were discussed and shall highlight the progress, if any, and challenges around public participation in the extractives sector.

## Session 1: Expert Presentations

### 1.1 The Legal Foundation of Public Participation in the Extractives Sector

*Cindy Oraro- Oraro & Co. Advocates*

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The first expert presentation highlighted the legal foundation of public participation in Kenya's legal system and its relevance to the extractives sector especially against the backdrop of project failure due to poor public participation structures.

In the context of the extractives industries, the expert presentation:

1. Defined public participation as a process involving individuals, organizations and government entities relevant to or affected by an activity or subject, before decision making.
2. Stated that public participation in the extractives is anchored on various constitutional and statutory principles make it an inalienable requirement in conducting extractive activities.

Constitutional provisions include;

- Article 174(c) and (d) providing for public involvement as an aim of devolution which is one of the foundational principles of the Constitution;
- Article 118(1)(b) and Article 196(1)(b) mandating Parliament and county assemblies respectively to involve the public in the legislative process;
- Article 232(1)(d) charging Kenya's public service with the duty to involve the public in the policy making process.

Statutory provisions in the *Mining Act* (No. 12 of 2016) include;

- Section 29 provides for the creation of a database of geoscience and information that shall be made available to the public on request;
  - Section 119 provides for the publication of mineral agreements;
  - Sections 191 and 192 providing for public access to the register of mineral rights and the mining cadastre.
3. The presentation further highlighted that the **scope of application of public participation is however, still undefined seeing as Parliament has not yet enacted a statute operationalizing public participation.**

4. The failure by parliament has also been replicated by the devolved governments simply noting that no County Government has managed to enact a *county-centric* legislation. However, the Courts have ruled on different aspects of public participation, especially on legislative and policy processes at the county levels. In *Kenya Small Scale Farmers Forum and 6 others v Republic of Kenya and 2 others* [2013], it was noted that public participation ought to be real/practical and not illusory and **ought not to be treated as a mere formality**. This line of judicial reasoning was also replicated in *Robert N Gakuru vs. Governor of Kiambu County and 3 others* [2014] which discussed national and county legislative processes.
5. While **there is no legislation** yet on public participation, the presenter noted that the *Public Participation Bill* has substantive provisions on the framework of application of public participation models providing guiding principles for effective, meaningful and reasonable opportunities for public participation by relevant parties.

The Act provides in;

- Section 85 for the setting up of a trust fund set up from the community's share of the proceeds from petroleum managed by a board of trustees established by the County Government in consultation with the local community. [SEP]
  - Section 117 for various community rights including the right to information and education on petroleum operations.
6. Lastly, the presenter noted that while there is an adequate constitutional framework, the *Public Participation Bill* needs to be passed into law to provide general guidelines on public participation in the country.

## 1.2 Strategic Environmental and Social Assessment (SESA): Outcomes and Recommendations on Public Participation Methodologies

*Prof. Jacob Kibwage (KEPTAP, SESA Component Lead)*

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The second presentation was guided by a study commissioned by the Kenya Petroleum Technical Assistance Project (KEPTAP) to carry out a Strategic Environmental and Social Assessment (SESA) on the oil and gas industry in Kenya. The SESA was meant to analyze and address the environmental effects of policies, plans, programs and other strategic initiatives in the oil and gas industry. The SESA, pursuant to Section 57A of the Environmental Management and Coordination Act adds an extra 'social' component in the conventional Environmental Impact Assessment (EIA). The SESA study also incorporated a vital public participation component- especially, the public perception on how it has been conducted this far.

The presenter:

1. Highlighted that the adoption of public participation in Kenya was formalized with the promulgation of the Constitution as public participation is a prerequisite before instituting any project that is of 'public benefit' - including extractives projects.
2. The speaker traced the principle of public participation to the 1972, Stockholm *United Nations Conference on the Human Environment* where public participation was highlighted as a key pillar of sustainable development.
3. The presentation then noted that the legal framework requiring Strategic Environmental Assessments is contained in the *Environmental Management and Coordination Act (1999)* which was amended in 2015 to introduce the critical component of an Integrated Environmental Assessment and Strategic Environmental Assessments.
4. The Strategic Environmental and Social Assessment of the Petroleum Sector in Kenya was therefore conducted to present strategic recommendations for policies, plans, and programs that will guide environmental and socio-economic planning and decision making in the upstream, midstream and downstream oil and gas sectors. A review of the report can be found [here](#).
5. The presentation noted the vital importance of creating a stakeholder mapping model that is as inclusive as possible to engage all relevant stakeholders in a manner that would

accurately represent community interests. This eventually leads to a project acquiring the necessary ‘social’ license.

Following the recently conducted SESA, the presentation provided critical recommendations on carrying out effective public participation in the oil and gas industry as follows;

- Public participation should deliberately incorporate *transparency* when engaging with the public.
- *Effective communication strategies* should be in place in order to ensure efficient dissemination of information to the grassroots level.
- To foster dissemination, stakeholders in any extractives project should conduct *informative and educative workshops* that enable locals to understand the processes and the products of the entire mineral value chain.
- Government agencies, project proponents and all the stakeholders should *cooperate with local communities* towards finding sustainable solutions to inherent dangers.
- Public participation should be *initiated early and sustained*.
- The model chosen should be *well planned and focused on negotiations*.
- The parties in charge of model chosen should be *supportive to participants without blurring ethical guidelines*.
- There should be *respect* for local values, norms and culture.
- Feedback should be provided to communities.

## **Session 2: From the Field**

### **2.1 The Extractives Baraza Listening Project**

*Extractives Baraza & Aga Khan University – East African Institute*

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The Listening Project is a joint study between the Extractives Baraza and Aga Khan University East African Institute that is aimed at carrying out an information needs assessment in oil, gas and mining areas. The inaugural research, being primary the ‘test’ research was commissioned in Kitui County with a focus on the effects of coal exploration. The overall idea was that ‘through listening’, stakeholders can identify possible and sustainable interventions. This is premised on the

fact that most exploration companies come with preconceived solutions to problems that they might not have encountered.

The methodology adopted by the researchers was to first identify key stakeholders by attending and participating in county meetings and workshops. Survey questionnaires were also handed out at the county level as a precursor to public meetings, focus group discussions and community conversations at the Community level.

It was noted that the best way to engage these communities was **through the chiefs** who are still figures of authority at the grassroots level. However, it was noted that using the chiefs may involve significant delays since they need direct authority from the Ministry to allow the meetings to proceed.

Other findings from the study include;

- Government unwillingness to share information cited as the most significant barrier to access information on coal exploration. <sup>[[L]]</sup><sub>SEP</sub>
- The most utilized medium to access information was through public meetings and conferences while television was the least utilized medium. <sup>[[L]]</sup><sub>SEP</sub>
- 15.4% of the respondents indicated to have come across the EB website while 84.6% have never visited the website. <sup>[[L]]</sup><sub>SEP</sub>
- Both the survey and community conversations revealed a genuine interest to engage with the EB platform. <sup>[[L]]</sup><sub>SEP</sub>

## Session 3: The Fireside Chat

### 3.1 Sustainable Inclusive Business Models

*SIB Kenya / Kenya Private Sector Alliance*

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Representatives of the private sector noted that enterprises must look for **overlapping needs** with communities and other stakeholders to create an inclusive framework that balances profit with community engagement. Acknowledging that there is indeed a **business case** for public participation, it was however observed that companies should not stretch themselves and should instead create sustainable and mutually beneficial engagement models with communities.

### 3.2 Perspectives from Oil and Gas

*Kenya Oil and Gas Association (KOGA)*

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The speaker noted that the main reason for project failure in the oil and gas is because of non-technical risks like inadequate community engagement. It is therefore important that these engagements are sustainable and inclusive to create maximum benefit to all relevant stakeholders. The presenter outlined the fact that by virtue of communities regarding extractive companies as quasi-governmental entities with public service delivery obligations, these companies also need to engage with county and national governments to create sustainable models of development. Crucially, **capacity building** in both government and in communities is important for meaningful public participation.

The presenter also underscored the importance of synchronising the *Public Participation Bill* with the *Mining Act*, *Local Content Bill* and the *Petroleum (Exploration and Production) Bill* in order to avert inconsistencies in application of the guidelines.

### 3.3 Community Engagement Models in Kakamega County

*Acacia Exploration Kenya Limited*

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The presenter stated that in looking for an effective public participation model, the company settled on relying on a **committee** that had stakeholder representation. The decision was arrived after extensive consultations with all the affected stakeholders. The committee was then mandated to

develop trust, enhance communication, shared understanding and facilitate decision making in all issues regarding the project in Kakamega County.

Despite capacity challenges, the speaker noted that the committee continues to be the best model for community engagement. Acacia Exploration Kenya LTD uses also other community-engagement avenues including: maintaining a community outreach office, organizing site tours and convening barazas.

### **3.4 Procurement of goods and services in Turkana County** *Tullow Oil*

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The presenter stated that one of the most sustainable public participation models is to involve the community in the economic/financial aspects of a project. Tullow selected three ways to build the capacity of the local community in Turkana to enable them supply goods and services to the company.

- *Lease-to-own programme* with Toyota where Toyota leased vehicles to the community who would then lease to Tullow.
- *Supply of food programme* where Tullow created training sessions with women groups to build capacity on how to supply the food and manage businesses.
- *Employment of guards* from the local community to secure the Tullow camp.

### **Conclusion**

In conclusion, the participants agreed that there is no standard, industry best practice towards realizing effective public participation. The models could vary from region to region and to an extent depending on the mineral being extracted. Lastly, there is need for the county governments government to realign their public participation regimes with the national legislation to avoid a conflict of laws. In summary, the following were the key stand-out points;

1. Public Participation is not limited to public bodies and the private sector-including individual mining companies have a role to play.

2. Apart from earning the social license to carry out the mining activities, there is a proper business case for effecting effective public participation.
3. There is need to foster partnerships for broad and inclusive public participation.
4. Capacity building at all stages of a mining cycle is key to strengthen public participation.
5. There is need for a differentiation between public participation and benefit sharing.
6. There is need to synchronize national and county laws on public participation.
7. Mapping of stakeholders is key to achieving full stakeholder participation.
8. Pragmatic interventions are needed such as involving women and women groups in creating public participation models.
9. The models of public participation settled on must be based on consensus and extensive consultations.
10. There is need to tailor community engagement strategies according to different communities.
11. There is need for the mining companies to partner with communities in the procurement process.

It was agreed that public participation is essential to successful management of resource wealth and continuous engagement with communities is a vital part of resource governance.