



Meeting Report

Sixth Workshop of the Extractive Sector Forum

Land Access and Acquisition for
Extractives Projects: Balancing
Different Interests

June 2017



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1. Introduction

The sixth Extractives Sector Forum (ESF) took place on June 15th, 2017 in Nairobi. It was the second in a series of discussions focused on issues surrounding land access and acquisition for extractives projects. The main aim of this Forum discussion was to explore the institutional roles and coordination of various government ministries and agencies with regard to land access and acquisition for the extractives sector. This report provides a summary and key highlights from the discussions. Additionally, the discussions are relevant to ongoing policy, legal and regulatory framework discussions in Kenya on land and in this regard can be used to identify gaps, conflicts and overlaps among the institutions involved in land access and acquisition for extractives projects. The goal of this report is to encourage further thought and promote dialogue among the various players in the extractives industry to deal with these matters in ways that ensure respect for international human rights standards.

2. Session 1: Contemporary Land Questions

The first presentation highlighted important issues on land in Kenya that may have an impact on the extractives sector. These issues, presented below, are not exhaustive but raise some of the ambiguities involved.¹

The Historical Land Question

Access to land is a major issue affecting communities in Kenya as a majority of people derive a living directly from it. However, distribution and access to land have not been equitable thus causing tensions between those with access and those without. Historically, where no legal title existed, land was viewed as 'vacant' or 'unused' and more often than not, its inhabitants were perceived by authorities as squatters. Moreover, the division of the country's administrative units by way of culture and ethno-groupings has fostered ethnic divisions among citizens rather than viewing these matters from a state perspective. These divisions have resulted in significant impacts on questions relating to land access.

Jurisprudence

The recognition of collective land rights in Kenya's Constitution 2010 is a shift from the old perspective that was carried over from the colonial era. However, courts are yet to move beyond colonial jurisprudence which is more individualistic to pay attention to collective rights and how they are protected. Making the shift is important if communities - the holders of collective rights - are to see their rights upheld in national courts. Until recently, communities have had to resort to international human rights mechanisms when seeking such protections.

1 *A presentation by a land rights scholar

A recent example is the judgement in favour of the Ogiek community made by the African Court of Human Rights, which sits in Arusha. The Ogiek, an indigenous community in Kenya, has suffered various injustices with regard to land rights which date back to the colonial era.² In summary, the court found that the Kenyan government had violated the rights of the Ogiek people, a hunter-gatherer community, when it evicted them from their ancestral lands in the Mau and Mount Elgon forests.

Leases

The land tenure system in Kenya is in a transitional stage. Many long-term leases are coming to an end and discussions on renewal are upcoming. Experts and civil society actors are of the view that discussions on renewal of leases cannot happen in isolation and issues of landlessness, re-distribution, and minimum acreage ought to be addressed as well. Moreover, for these discussions to have any chance of success, they must be faithful to the principles outlined in Chapter Five of the Kenyan 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.

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 one person. From the foregoing, the assumption that having a title deed is sufficient for security of tenure and that it guarantees exclusive rights is incorrect.

Property as defined by Professor Wesley Hohfeld³ is seen as a complex web of legally enforceable relationships. This view adds to the traditional conceptualization of property by Prof. A.M Honore⁴ that views property as a bundle of rights. 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 one individual only instead of a group of people. The speaker posited that security of land tenure should be treated as a bundle of rights not as an absolute.

Role of Court

A quick analysis reveals that eviction orders by the courts target the poor or economically

2 <http://minorityrights.org/2017/05/26/huge-victory-kenyas-ogiek-african-court-sets-major-precedent-indigenous-peoples-land-rights/> accessed 20th June 2017.

3 An American jurist and author of *Fundamental Legal Conceptions as Applied to Judicial Reasoning and Other Essays* (1919)

4 Anthony Maurice Honoré is a British lawyer and jurist, known for his work on ownership, causation and Roman law.

weak while restoration orders favour rich or economically endowed and the political class. This is unfortunate as economic and other forms of power should not be the determining factor in prioritising competing interests and rights over land.

Community Land

The Community Land Act 2016 expands the definition of a community as a consciously distinct and organized group of users of community land who are citizens of Kenya and 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 in terms of implementation concerns how to galvanise these various characteristics of a community.

Politics

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

- a) Lack of land use policy means that there is no clear economic consideration in land use.
- b) Corruption when land is converted from public to private ownership and vice versa; this is well highlighted in the Ndung'u Report.⁵ The Ndung'u Report was authored by an adhoc commission appointed by President Kibaki in 2003 that comprised of 20 prominent individuals and its mandate was to look into illegal and irregular allocation of public land in Kenya.

Additionally, there are cases where elected political officials claiming to act on behalf of 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 to put in place a new land use policy. Titling alone is not the solution to the land question but any approach must help realize the economic potential as well as assure all involved 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

⁵ See, Ndung'u Report on Land Grabbing in Kenya, Legal and Economic Analysis, http://kippra.or.ke/index.php?option=com_docman&task=doc_view&gid=254&Itemid=

entrench historical injustices.

3. Session 2:⁶ The Human Rights Angle

Nonetheless, some human rights challenges arise in relation to land acquisition and access for extractive sector projects. 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 – air, water and soil pollution are major concerns in this regard.
3. Degradation of economic and social rights – a variety of factors play into this and there are links to environmental degradation that impacts on livelihoods. Furthermore, the in-migration often associated with extractives projects is of particular concern to communities due to the erosion of the social fabric.

Those responsible for land acquisition should adopt a Human Rights Based Approach⁷ 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?
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. Are sustainability good practices being implemented by 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.

4. Session 3:⁸ Institutional coordination

The main issue addressed by this session was the challenge in coordination between different government institutions. The following summarizes the roles of these different institutions: 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

6 *A presentation by the Kenya National Commission on Human Rights Chapter Four of Kenya's Constitution promotes and protects the Bill of Rights which is inherent to every Kenyan citizen.

7 See, <http://hrbportal.org/faq/what-is-a-human-rights-based-approach>

8 *This section summarises a panel discussion with public officers drawn from various ministries, departments and agencies.

implementation of Kenya's land laws. The ministry 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 stakeholders.

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 acquire private, public or community land, for public purpose, must make an application to the National Land Commission (NLC). The procedure for compulsory acquisition is provided in the Land Act 2012.

The **Council of Governors** secretariat represents the different county governments. The role of individual county governments is dependent on the prevailing tenure system. In areas where land is predominately held by communities, the Community Land Act assigns them the role of trustee. The national government and investors should find modalities of sharing information and working together with county governments for the betterment of the investment climate. This includes making communities who are hosting these investments equal participants.

The **Ministry of Mining** oversees the mineral sector in Kenya and aims to enhance the growth of the sector. With regards to land matters, the ministry has established a licensing committee comprising various stakeholders including the NLC to balance the rights of the land owners and the investors.

With the above background, participants then focused on the question of public 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 resulting laws reflect the views of the people. While acknowledging that this was happening, some 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, which participants noted should be harmonised or made complimentary. On public participation in individual extractives projects, participants wished to have clarity on the role of government. 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 Bill⁹ is currently being developed, which 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

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http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/PublicParticipationBill_2016.pdf

falls into what is referred to as a substantial transaction under Section 9 of the Land Act.

The term "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 a innovation, productivity increase and the requirement for a certain minimum percentage of the crops produced to be sold on local markets; (b) infrastructure 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 application to Kenya and the application of Kenyan law without waiver of any rights of Kenya.

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 guidelines for resettlement as well as for the assessment of compensation. In so doing the peculiarities of different communities should be considered. For example, mobile and communal pastoralists have more difficulties stating claims to land than sedentary groups including small scale farmers who exercise control over a specific unit of land.

In closing the discussions, participants emphasized the importance of civic education on land laws, and in particular on the rights of the different right holders.

4. Conclusions and Outcome

Inadequate public participation in extractive sector projects continues to be a challenge. Renewed commitment and action is needed in order to ensure broader meaningful engagement by all concerned actors.

Gaps in law remain with regard to land acquisition for extractives projects. Notably, a legal framework for assessing compensation and to guide resettlement must be developed. A number of historical land questions have yet to be addressed with respect to land acquisition and use. Such issues threaten the success of implementing the new land laws unless addressed comprehensively.

There is a need to devolve discussions relating to land access and acquisition to county and project levels.

Annex 1: Agenda

Royal Tulip Hotel, Nairobi

Thursday 15th June 2017, 7.30am – 2.00pm

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| 8.00am - 8.30am | Arrival and registration |
| 8.30am – 9.00am | Opening remarks and context setting (IHRB/ILEG/EB) |
| 9.00 – 10:30am | <p>Setting the Stage</p> <p>Contemporary land questions in land that may have a bearing on the extractives sector</p> <p>Dr Steve Ouma – Executive Director, Pamoja Trust</p> <p>The human rights angle to land acquisition and access for extractive sector projects.</p> <p>Mrs. Patricia Nyaundi – CEO/Commission Secretary, Kenya National Commission on Human Rights</p> |
| 10.30am – 10.45am | Tea Break |
| 10.45am - 12.15am: | <p>Panel Discussion</p> <p>The roles of different institutions and stakeholders with regard to land acquisition and access for extractive sector activities: Gaps, conflict, and overlaps</p> <p>Moderator: Benson Ochieng</p> <p>Panellists:</p> <p>Ms. Terry Gathagu - Chief Legal Counsel, Ministry of Lands and Physical Planning.</p> <p>Mr. Ben Opaa - National Land Commission (NLC)</p> <p>Ms. Anne Tek – Programme Officer, Natural Resources Management, Council of Governors</p> <p>Ms. Naomi Githui - Ministry of Energy and Petroleum</p> <p>Ministry of Mining (TBC)</p> |
| 12.15am– 12.30am | <p>Wrap up</p> <p>Benson Ochieng – Executive Director, ILEG</p> |
| 12.30pm-1:30 pm | Lunch and departure |