Assessment of Policy Frameworks and Practices Affecting Land Access for Oil and Gas Projects on Community Land in Turkana County, Kenya

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Executive Summary

Land is a source of livelihoods for most people and to some; it ties to their social, cultural and religious identities. Land tenure and acquisition processes vary from Country to Country. Transfers of land rights may however happen by way of voluntary transfer or by compulsory acquisition by the state. Compulsory acquisition is subject to compensation for rights and developments adversely affected. In many countries, communal land rights are recognized by law but the forms of surveying, planning registration, valuations and management practices lag behind those applied under private individual tenure regimes. Development and increased population continues to raise demand for land across the world. This demand has been pronounced in areas where oil, gas and other extractive projects have been undertaken; bringing to the surface various question regarding processes of; acquisition, valuation and compensation for community land and in particular unregistered community land.

In Kenya, oil was discovered in 2012 in Turkana the second largest County in the Country. The Land in this area is communally owned and the communities predominantly practice nomadic pastoralism. Since the discovery there has been increased demand for land for oil exploration and production sites. The development has also resulted in increased acquisition of land for road, rail, pipeline and other services. The land development and governance set out to assess the policy frameworks and practices affecting land access for oil and gas
projects on community land in Kenya’s Turkana County. We found that there is no formal property market in the areas. However there is a traditional way to issue selected pieces of land for settlement and social establishment. It was also noted that no formal land acquisitions were undertaken but select community leaders signed land access consent upon promise that the extraction projects will bring development and revenue.

It was further established that there were no open negotiations with the community with respect to land transfer but social ceremonies were conducted as a sign of establishing a relationship between the investor and the community. The communities stated that they had no information with respect to formal property valuation done prior to, during and after acquisition of sites; the rate for leasing of land for various projects were declared on a flat rate of one million per site per year by the County Government. The statutory valuation methodologies relating to compulsory acquisition and the practice in relation to non-statutory valuations in Kenya are largely anchored on open market bases and limited in instances of valuation of unregistered customary land.

The investors and contractors are not compelled to place any bonds, deposits or guarantees to cover for land compensation claims and the petroleum law is skewed in favour of investors on matters of compensation claims despite constitutional foundations for land rights, just and prompt compensation.

Given that no substantive engagements took place between investors and communities over the land acquisition issue, effectively there was no compensation received by communities except for tokens in form of goats, camels, and social investments such as; schools, hospitals
and boreholes. With regard to resettlement, it was established that no adequate safeguards by the government and the private investors have been put in place to mitigate negative impacts. In addition, the fact that there are no specific laws on resettlement in Kenya makes it difficult for communities to hold the government and the investors accountable. Finally it was established that communities had limited knowledge and understanding of their land rights hence limited capacity to make informed decisions and hold the investors, National and County Governments accountable.

The research recommends that; that the issuance of project licenses in Kenya should be subject to prompt and just compensation; the inclusion of other basis of valuation apart from market value such as equitable value, and social value; the catering for short term entries, disruptions and exclusions for other periods that do not amount to permanent displacement such as exploring; development of laws and regulatory frameworks to guide resettlement; development of an FPIC policy framework and recognizing non static enterprises such as those of nomadic pastoralist. Finally the institute recommends the continuous capacity development of communities on relevant laws that affect their livelihoods and rights to resources.
# Table of Contents

Acknowledgement.......................................................................................... iii  
Executive Summary......................................................................................... iv  
List of Abbreviations....................................................................................... ix  
1.0 Introduction................................................................................................... 1  
2.0 Problem Statement....................................................................................... 2 
3.0 Objectives..................................................................................................... 3  
4.0 Methodology and Study Site........................................................................ 4  
   4.1 Study Site..................................................................................................... 4  
   4.2 Data Collection............................................................................................. 5  
   4.3 Ethics........................................................................................................... 7  
   4.4 Data Analysis............................................................................................... 7  
5.0 Literature Review........................................................................................ 8  
   5.1 Land Rights and Land Tenure................................................................. 8  
      5.1.1 International Policies on Land rights and tenure........................ 8  
   5.2 Legal frameworks and policies on land acquisition in other jurisdictions................................. 10  
   5.3 Policies and laws governing Compensation for land compulsorily acquired................................. 14  
   5.4 Policies on Resettlement of persons affected by development projects........................................ 17  
   5.5 Free Prior and Informed Consent (FPIC)................................................ 20  
   5.6 Dispute Resolution Mechanisms............................................................ 21  
6.0 Valuation Practice in Kenya........................................................................ 23  
   6.1 Valuation Methods..................................................................................... 25  
      6.1.1 The Direct Sales Comparison method............................................ 26  
      6.1.2 Income Capitalization (Investment) method.................................. 27  
      6.1.3 Profits (Accounts) Method............................................................... 28
6.1.4 Replacement Cost Method............................................29
6.1.5 Reproduction Cost Method...........................................29
6.1.6 The summation (Contractors) method.........................30
6.2 Valuation of Property for Compulsory Acquisition Purposes in Kenya.................................................................31
6.3 Forms of compensation for compulsorily acquired land in Kenya..................................................................................35
6.4 Gaps and challenges in valuation of property for compulsorily acquisition purposes...............................................37
7.0 Land Acquisition for Oil and Gas Projects in Turkana........40
  7.1 Turkana Community............................................................40
  7.2 Land Tenure...........................................................................42
  7.3 Land Acquisition in Turkana for Oil Projects...................42
  7.4 Valuation of land acquired for oil projects in Turkana....44
  7.5 Compensation for Land acquired in Turkana.................44
  7.6 Resettlement of Projects Persons Affected in the study area..........................................................................................47
  7.7 Application of Free Prior and Informed Consent principles in project sites.................................................................48
  7.8 Restoration of Land and post project reversion..............49
8.0 Recommendations...............................................................50
9.0 References..................................................................................53
# List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>CBO</td>
<td>Community Based Organization</td>
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<tr>
<td>CS</td>
<td>Cabinet Secretary</td>
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<td>CSO</td>
<td>Civil Society Organizations</td>
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<td>DCF</td>
<td>Discounted Cash Flow</td>
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<td>FAO</td>
<td>Food and Agriculture Organization</td>
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<td>FGD</td>
<td>Focus Group Discussion</td>
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<td>FPIC</td>
<td>Free prior and informed consent</td>
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<td>IFC</td>
<td>International Finance Corporation</td>
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<td>ILO</td>
<td>International Labor Organization</td>
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<tr>
<td>ISK</td>
<td>Institution of Surveyors of Kenya</td>
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<td>IVSC</td>
<td>International Valuation Standards Council</td>
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<td>LDGI</td>
<td>Land Development and Governance Institute</td>
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<td>NLC</td>
<td>National Land Commission</td>
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<td>SI</td>
<td>Social Investment</td>
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<td>UNICITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<tr>
<td>UNPFII</td>
<td>United Nations Permanent Forum on Indigenous Issues</td>
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<td>GoK</td>
<td>Government of Kenya</td>
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1.0 Introduction

Extractive resources play a significant role economically, socially, and politically. Where managed properly, they have the potential to greatly contribute to the growth of a country. The extraction of oil has however been considered a resource curse in areas where it has been mismanaged. Since 2012 when commercially viable oil deposits were discovered in Turkana Kenya, there has been a wave of positive expectations. To facilitate the effective extraction and production of the oil, road, rail and pipeline networks are being developed as well as investment in service industries such as communication and financial sectors. All these investments have greatly raised the demand for land in Turkana. The expansion of the extractive sector and the massive acquisition of land is raising practical questions with respect to community land rights protection, community participation and environmental implications of the developments. Land in Turkana is held communally and the communities’ main source of livelihood is pastoralism. There is need to assess the communities’ awareness and understanding of laws relating to land and the potential positive and negative impacts of the investments. It is also important to put under scrutiny the valuation methods used to determine compensation to the communities for land rights affected by the new developments in Turkana.
2.0 Problem Statement

While the procedure for acquisition of private land has been clear under the Kenyan Law and policies, there have been challenges experienced in real practice with regard to the determination of compensation amounts relating to community land. The Government and investors have tended to view compensation for land as escalating project costs and therefore seek to minimize the compensation amounts to the disadvantage of some marginalized rural communities.

The acquisition of unregistered community land for extractive projects in Kenya has brought forth many practical challenges to local communities in relation to their livelihoods; displacements, loss of livelihoods and disruption of social systems. Questions as to whether transactions have taken place at arms length between investors and local communities with respect to land acquired/accessed arise frequently. The fact that no formal market transactions have been registered over this type of land presents challenges as to how open market values are established.

Given the lack of formal market transactions over unregistered community land, valuation process for both open market and compulsory land acquisition have faced limitations. This in turn poses challenges as to how just and fair compensation for unregistered community land rights is arrived at given that the statutory methodologies are based on assumptions of existence of formal property markets.
3.0 Objectives

The main objective of this project is to assess policy framework and practices affecting land access for oil and gas projects on community land in Kenya.

Specific objectives;

(i). Review International policies, standards, laws and practices governing land access and acquisition of community land.

(ii). Review the legal and policy framework governing acquisition of community land in Kenya.

(iii). Examine the community experiences, with regard to acquisition of land for oil and gas projects in Turkana County.

4.0 Methodology and Study Site

4.1 Study Site

Image 1: Map of Kenya showing Oil Blocks
(Source; www.tullowoil.com accessed on 04.02.2019)

The study was conducted in Lokichar, Nakukulas, loperot and lochwaa within the blocks where oil extraction development projects are taking place in Turkana County.

Turkana is one of the 47 counties formed under the 2010 Constitution
and the County Government’s Act, 2012. It is the second largest county and covers an area of 77,000 square kilometers. Its population is approximately one million\(^1\). The county boarders Baringo and West Pokot to the South, Samburu to the South East, and Marsabit to the East. It in addition shares International borders with South Sudan to the North, Ethiopia to the North East and Uganda to the West\(^2\). The county is located in arid and semi arid lands in Kenya with temperatures ranging from 20° - 40° Celsius.

The County is home to the Turkana community which mainly practices nomadic pastoralism and fishing. Their main livestock include; goat, sheep, camel, cattle and donkey.

4.2 Data Collection

The study largely comprised of qualitative research. At the beginning of the study, a reconnaissance visit was conducted. The visits also involved transect walks to identify key areas and persons for data collection; in addition, they provided a general understanding of the area, the various land uses, and resources. During the visits, the research team engaged in photography to record observation; this was done ethically and with permission from the community.

\(^1\) Turkana County, 2015, County Statistical Abstract, Kenya National Bureau of Statistic

\(^2\) Cordaid, 2015, Assessment of Community Perception of Oil Exploration in Turkana County, Kenya
Following the reconnaissance; purposive sampling was applied in identifying groups and individuals with ability to give information responsive to the research questions. Further, the aspect of stratified sampling was applied in the selection of focus group discussants; this was done to ensure adequate representation of women and youth in the areas. Key informants interviews were undertaken with select individuals from the communities, National and County Government Officers, Civil Society Organizations and officers from the corporations. The communities selected were from areas where either oil exploration or extraction had begun and where land had been earmarked for development of the road and pipeline. The community informants were selected on the basis of their age (above 18), place of residence special and representation of special groups (youth and women). Politicians and activists were excluded from the meetings.
4.3 Ethics

In undertaking the study, the research team explained the objectives of the research and the purpose for which the information would be used. Permission was also sought for audio recording and taking of photos at the sites. Interviews were conducted after receiving the respondents’ informed consent.

4.4 Data Analysis

Data analysis followed a thematic format and involved; listening and transcribing of the audio recordings to identified important issues and responses that answered the research questions; coding of data was done in line with the thematic areas established;

(i). Land tenure and use.
(ii). Access to and acquisition of community land for oil
and projects and allied infrastructure.

(iii). Compensation for acquired land.

(iv). Valuation methods used to determine compensation for land acquired for extractive related investments.

(v). Community participation in the land acquisition processes.

(vi). Resettlement of project affected persons.

(vii). The application of Free Prior and Informed Consent requirements in the land acquisition process.

5.0 Literature Review

This section looks at; land tenure, land acquisition and land compensation processes as practiced and experienced by other countries around the world.

5.1 Land Rights and Land Tenure

5.1.1 International Policies on Land rights and tenure

Many people depend on land for their livelihoods and economic development; Land is also key to peoples identities, their social and cultural rights. This makes the administration and management of the resource important. Various international and domestic instruments recognize land and land rights as key to any jurisdiction and its sustainable development.
Land Tenure\(^3\) is the relationship, whether legally or customarily defined among people, as individual and groups with respect to land. Article 17 of the Universal Declaration of Human Rights proclaimed in 1948 states that, everyone has the right to own property\(^4\) alone as well as in association with others and that no one shall be deprived of his property”. This right gives the owner the right to use and benefit from the asset and it excludes others from it.

In 1979, at World Conference on Agrarian Reform and Rural Development FAO adopted a declaration of principles and programme of Action, referred to as “the Peasant Charter “that promotes the reorganization of land tenure, tenancy reform, regulation of changes in customary tenure and with community control over natural resources.\(^5\)

In most African countries there exists dual legal system of statutory laws and the customary law. It is estimated that the biggest percentage of developing countries’ land is undocumented and under customary systems hence need to ensure its sustainable use and development. Article 14 of the African Charter on Human and Peoples’ Rights states that, “the right to property shall be guaranteed and that it may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws \(^6\)”.

\(^3\) FAO, 2002, Land Tenure and Rural Development, FAO Rome Italy  
\(^5\) Accessed from http://www.fao.org/docrep/u8719e/u8719e00.htm on 17.07.2018  
The ILO’s Indigenous and Tribal Peoples Convention No. 169 of 1989 recognizes the special relationship between the indigenous people and their rights and provides safeguards against their arbitral removal from their ancestral land and promotes transmission of their land rights with the respect of cultural procedures\(^7\).

### 5.2 Legal frameworks and policies on land acquisition in other jurisdictions

Countries around the world have established legal frameworks and practices with regard to land rights, land tenure, land access for investments and compulsory acquisition to suit their contexts. In Australia, the government can acquire land through negotiated agreement, compulsory acquisition or urgent acquisition. Land is acquired compulsorily if; the owner cannot be found, land has no title, the owner has difficulty establishing the proof of title or when an owner is unwilling to sell\(^8\). When land is acquired through negotiated agreement the land owner receives the amount agreed based on agreement. Compensation is provided as soon as the land acquisition is over\(^9\).

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\(^7\)ILO, 1989, Convention on Indigenous and Tribal Peoples , (N0. 169)


In Bangladesh the “subject to any restrictions imposed by law, every citizen has the right to acquire, hold, transfer or otherwise dispose of property and no property is compulsorily acquired, nationalized or requisitioned save by the authority of law under Article 42 of the Constitution. The Government may acquire land by nationalization or requisition with compensation\textsuperscript{10}.

Land in Tanzania is divided into village, reserved and general land. Village land is managed and administered by village councils, which are elected by village Assemblies as per village land act of 1999. Reserved land which includes wildlife conservation, public creation, Marine Park and utilities is governed and managed by sectoral government agencies. General land is that land that is neither village land nor reserved land and is regulated under the supervision of Ministry of Lands\textsuperscript{11}. All these land rights are limited under the caveat that land is vested in the president as trustee. Hence transfers across land categories are subject to executive approval. Tanzania land laws provide protection for customary rights which are placed on the same footing with statutory rights. Overall land ownership in Tanzania is restricted to citizens except in the case of investments, where derivative rights of occupancy issued through the Tanzania.

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Investment Centre are permitted. Where Village land is required for investments by private investors such transfer requires approval of village assemblies and cannot exceed 250 ha of land\textsuperscript{12}. Where compulsory acquisition of developments over land occurs the affected persons are compensated for the developments thereon.

In Ghana the Constitution forbids sale of customary land and only allows temporary alienation through leasehold titling. Customary land can only be reclassified to state land through the use of state’s right to eminent domain, which enables involuntary expropriation of customary land for public purpose. Land under customary ownership is administered under traditional Council who constitute paramount chief and village elders who hold the ultimate right to retract user rights and reallocate and alienate land. The Traditional Council thus has sole authority to negotiate with project developers over the leasehold terms\textsuperscript{13}. The Constitution mandates the Traditional Council to discharge their functions for the benefit of the people of Ghana, of the Stool, Skin or family concerned and are accountable in this regard\textsuperscript{14}.

\begin{flushleft}
\textsuperscript{12}Lusugga Kironde et al, 2009, Improving Land Sector Governance in Africa: The Case of Tanzania, Land Governance in Support of MDGs Workshop, Washington DC, March 9-10 2019


\end{flushleft}
The Constitution of Kenya 2010 sets out principles that land to be managed and used in an equitable, productive, efficient and sustainable manner\textsuperscript{15}. It provides that, all the land belongs to the people collectively as a nation, communities or individuals. Under Article 40 of the constitution there is protection for everyone’s right to own property anywhere in Kenya either individually or in association without any discrimination. And the state shall not deprive a person of property of any description, or of any interest in or right over property. In the event of eminent domain, the acquisition has to be for public purpose and in the public interest and has to follow the Constitution and the legislated laws.

From the above review, it is clear that matters of land tenure and acquisition processes vary from country to country. Transfers of land rights may however happen by way of voluntary transfer or by compulsory acquisition by the state. Compulsory acquisition is subject to compensation for rights and developments adversely affected. Given the mandatory requirement for compensation, the section below looks at the various policy and legal frameworks across different institutions and jurisdiction.

\textsuperscript{15} Mwenda Makathimo, Lizahmy Ntonjira. 2017, Assessment of Legal and policy frameworks affecting land access for extractives projects in Kenya, Land and Poverty Conference, World Bank, March 19-23 2018
5.3 Policies and laws governing Compensation for land compulsorily acquired

Article 14 of the African Charter on Human and Peoples’ Rights states that, the right to property shall be guaranteed and that it may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws. Article 21(2) states that In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

In Vietnam, the constitution mandates the payment of compensation for the expropriated property at market price and the payment ought to guarantee the interest of the person and ensure nondiscrimination.

The compulsory purchase must also be for the public interest and the acquisition process should be conducted according to the stipulate legal procedures.

In China, the compensation principle is to “maintain the living standard of the peasant”. In deriving compensation, China considers; the compensation fee for the land. With regard to arable land, compensation for expropriated land should be 6-10 times value of the arable land.

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average value of the annual output in the previous three years. Resettlement compensation should be 4-6 times’ value of the arable land average annual output in the previous three years, not exceeding 15 times value of the average annual output 3 years prior, the total number of the land compensation fees and resettlement fees should not exceed 30 times value of the average annual output value for 3 years before expropriation. Compensation of the expropriated land is paid within 3 months after the approval and compensation and resettlement plan.

Nigeria’s land Use Act, section 28 endows the state the power to revoke the right to occupancy while section29 obliges the government to pay compensation for the revoked occupancy rights\(^{20}\).

The Constitution of Ghana states under article 20 (1) that, no property of any description or interest or right over any property shall be compulsorily taken possession of or acquired by the state unless it is necessary in the interest of; defense, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner the public benefit”. It further provides that compulsory acquisition of property by the state shall only be made under a law which makes provision for (i) prompt payment of fair and adequate compensation and (ii) a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any

other authority, for the determination of his interest or right and the amount of compensation to which he is entitled\textsuperscript{21}. Various claims for which the owner of an expropriated property may be compensated include; Market value of the land, replacement value of the land taken, disturbance and damages\textsuperscript{22}. Kenya’s Constitution under Article 40 (3) stipulates that in the event the state deprives an individual of property, that payment shall be made in full, shall be prompt and just. It allows any person with an interest in or right over that property right of access to a court of law. In addition, provisions may be made for occupant in good faith of Land acquired; who may not hold title to the land\textsuperscript{23}. Further to the foregoing, it is evident that compensation is handled differently by different states and institutions. The basis may be output, market value, replacement cost, disturbance or other considerations relevant to the context where the acquisition is taking place.


5.4 Policies on Resettlement of persons affected by development projects

Image 4. Acquired Community Land for Extractive Project

The International Finance Corporation (IFC)\textsuperscript{24} performance standard recognizes two types of resettlement – Physical displacement (relocation or loss of shelter) and economic displacement (loss of assets or access to assets that lead to loss of income or other means of livelihoods). It categorized resettlement as follows;

**Rural resettlement:** This is often as a result of grazing, farmland or pastoral land or the abstraction of natural resources which rural communities depend on for their livelihoods.

\textsuperscript{24} International Finance Corporation, 2012, Performance Standard 5, Land Acquisition and Involuntary resettlement
**Urban Resettlement:** Urban and peri-urban resettlement is as a result in physical and economic displacement affecting housing, employment, and enterprises.

**Linear resettlement:** This describes projects with linear patterns of land acquisition (highways, railways, canals, and power transmission lines). In sparsely populated areas, these projects have minimal impact unlike in densely populated areas.²⁵

**Site Specific Resettlement:** This is associated with discrete nonlinear projects such as factories, ports, highway interchanges, hotel, and commercial plantations, etc., where land acquisition encompasses a fixed area. However, site-specific resettlement associated with mining and other extractive industries such as oil and gas may require progressive land acquisition over long periods.²⁶

The World Bank policy on resettlement states that displaced people shall be assisted in their efforts to improve their livelihoods and standards of living or at least restore them in real terms to pre-displacement levels or levels prevailing prior to the beginning of project implementation, whichever is higher. It further notes that the states shall provide effective mechanisms for just and fair redress for any such activities and

appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.  

In Kenya, Article 43 of the Constitution provides that every citizen has a right to social security, accessible and adequate housing. There is no law on resettlement in Kenya, however, there is an Evictions and Resettlement Procedures Bill, 2012 which is intended to give the appropriate procedures for forced evictions as well as provide for protection, prevention and redress for forced evictions of all persons occupying land. Currently, the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 offers safeguards and protection from arbitrary displacements. Where displacement is as a result of development projects, the Government is compelled to put in place measures for assistance and protection of the displaced communities with special dependency and attachment on their land. Normally resettlement involves land for land compensation but this is not the case in Kenya as most citizens prefer cash compensation. As cited earlier the Constitution provides that compensation may be paid to occupants of land in good faith even though their rights are not registered.

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It is therefore overt that the Standards and policies of the International financial institutions that fund development projects and the Constitution of Kenya provide a basis upon which resettlement of persons affected by extractive related projects would be conducted despite the non enactment of a national framework law to guide the specific resettlement processes.

5.5 Free Prior and Informed Consent (FPIC)

FPIC principles recognizes peoples inherent rights to their lands and resources and respect their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent.31

According to the UN Permanent Forum on Indigenous Issues (UNPFII), communities should be provided with adequate information about the scope and impacts of the proposed development activities on their lands, resources and wellbeing. Communities should be given opportunity to approve (or reject) a project prior to commencement of operations. FPIC as a process “establishes through good faith negotiations between the client and the affected communities, it involves a continuous iterative process of communication

and negotiations spanning the entire project cycle\textsuperscript{33}.

In Kenya there are no laws that explicitly refer to FPIC and corporations do not require community’s consent to commence operation. However the spirit of the process is carried in the Constitution and various other laws. The Bill of Rights, Article 35, provides that every individual has right of access information by the state and information held by another person and required for the exercise and protection of any right or fundamental freedom\textsuperscript{34}. Community Land Act in giving effect to Article 63 of the Constitution gives communities the right to own land collectively based on ethnicity, culture or similar interests and also provides for affirmative actions to protect their rights. These rights include; right to own property, clean environment, develop their culture, livelihoods as well as participate in decision making\textsuperscript{35}.

The Kenyan laws are however vague on what is adequate information and what amounts to consent. There is therefore a gap with respect to specific statutory or regulatory framework nationally upon which FPIC requirements in the financier standards and international declarations are to evaluated, despite the existence of Constitutional principles correlating to the FPIC basics.

\textsuperscript{33}International Finance Corporation, 2012, Performance Standard 7 Indigenous Peoples (IFC)

\textsuperscript{34}Republic of Kenya, 2010, the Constitution of Kenya, National Council for Law Reporting, Nairobi, Kenya, Article 35

\textsuperscript{35}Republic of Kenya, 2016, the Community Land Act, Government Printers, Nairobi, Kenya
5.6 Dispute Resolution Mechanisms

Protracted disputes are costly, for the oil companies as well as communities. Some of these costs are directly quantifiable, such as losses in production through strikes and the actual costs of resolving disputes\textsuperscript{36} which are often characteristic of litigation processes. To address this challenge alternative dispute processes are recommended and include among others; negotiation, mediation and arbitration. They have the following potential benefits; speedy determination, parties can select individuals to assist in the negotiation and in providing expert evaluation; process flexibility, cost saving, confidentiality and the relationship between parties is maintained. It is however less desirable if there is significant difference in power dynamic\textsuperscript{37} Structures to address investment dispute among corporations and between Corporations and Governments are normally well established. However, in most cases there are inadequate structures to address disputes between investors and communities. Under Kenya’s Constitution, Alternative dispute Resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted as long as they do not contravene the Bill of rights, are not repugnant to justice and morality and not inconsistent with the Constitution and

\textsuperscript{36}Belynda H and Johan B, 2003, Pioneering New Approaches in Support of Sustainable Development in the Extractive Sector: Guidelines and methodologies for conflict management, ICMM, ESMAP, WB
\textsuperscript{37}Pignataro, Diogo 2015 International Arbitration in the Oil and Gas Industries, Springer International Publishing Switzerland 2015; 251-268
any written law\textsuperscript{38}. The Kenya’s Petroleum Act states that, any person that objects to a proposal to develop upstream petroleum infrastructure on his land shall raise his objection in accordance with the provisions of written law and that all disputes between parties to a petroleum agreement arising from upstream petroleum agreement shall be resolved through alternative dispute resolution mechanisms in the first instance as may be provided by the petroleum agreement\textsuperscript{39}. If any dispute remains unresolved, either party have the right to serve upon the other party a detailed statement stating the issue; 14 days of receipt of statement or other mutually agreed period; the cabinet secretary and other chief executive of the contractor shall meet to resolve the difference in dispute. Where no settlement is reached within 30 days from the date of meeting, either party shall have the right to have such dispute resolved through arbitration in accordance to UNCITRAL arbitration rules adopted by the United Nations Commission on International Trade.

It is therefore important for investing corporation and communities to establish structured mechanism to address disputes that arises as a result of project implementation on community land.

\textsuperscript{38}Republic of Kenya, 2010, the Constitution of Kenya, National Council for Law Reporting, Nairobi, Kenya, Article 159 (2c)

\textsuperscript{39}Republic of Kenya, 2017, the Petroleum (Exploration, Development and Production Bill), Government Printers, Nairobi, Kenya, Article 53
6.0 Valuation Practice in Kenya

Under Article 40 of the Constitution of Kenya 2010, there is protection for everyone’s right to own property anywhere in Kenya either individually or in association without any discrimination. It is provided 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. In cases where the land is compulsorily acquired for public purpose or in public interest; prompt payment of full and just compensation is required. It is therefore imperative that if oil and gas extractive projects result in the need for acquisition of property belonging to affected persons or communities, then prompt, full and just compensation must be made. There is need to have the policies, statutes, regulations and practices governing valuation of land and property for acquisition purposes and the resettlement of persons affected by oil and gas projects reviewed and well aligned to satisfy the above cited constitutional requirements effectively.

The valuation practice in Kenya is governed by the Valuers Act Cap 532, which provides for a Valuers Registration Board that regulates the activities and conduct of Registered Valuers in Kenya are registered upon application to the Board and are required to be full members of the Institution of Surveyors of Kenya (ISK) Chapter of Valuation and Estate Management Surveyors. The Act governs the formation and composition of valuation practices including the qualification of Valuers. The Board also deals with discipline and complaints in respect to valuation practice.
The Institution of Surveyors of Kenya administers professional examination for full membership qualification. Upon admission into the Institution as a full member of the Valuation and Estate Management Surveyors Chapter one is required to abide by the Institutions code of conduct and practice rules.
Upon registration and obtaining the license to practice Valuers are required to follow the various foundational principles set by the Constitution of Kenya, relevant statutes, regulations, guidelines and Standards set by ISK and the International Valuation Standards Council (IVSC).
Among the notable statutes governing valuation is the Valuation for Rating Act Cap 266 and the Rating Act Cap 267 which deals with valuation and administration of property rates. The Land Act No.6 of 2012 makes provisions for the National Land Commission (NLC) to make Rules to govern valuation (Assessment for Just Compensation) for compulsory acquisition purposes following repeal of Land Acquisition Act Cap 295. NLC in exercise of powers thus granted, made and published in the Gazette the Land (Assessment of Just Compensation) Rules 2017.

6.1 Valuation Methods

The Valuers in Kenya being members of the Institution of Surveyors of Kenya Subscribe to the International Valuation Standards (IVS) set by the IVSC. These standards together with the guidelines set under the ISK Valuers and Estate Management Surveyors Handbook prescribe the concepts, approaches and bases for undertaking valuation in Kenya. These standards, guidelines principles and concepts outlined
therein serve the purpose of promoting consistency and transparency in valuation practice. The standards\textsuperscript{41} prescribe three Approaches that underpin valuation methods. These Approaches are:

(i) Market Approach
(ii) Income Approach
(iii) Cost Approach

The market approach derives the value of an asset by comparing the asset with comparable (similar) assets for which sale price information is available. It assumes all assets are sold and bought in an open market. The Income approach establishes an indication of value by converting future cash flow from an asset to a single present value taking account of time value for money. It assumes assets are held for investment purposes.

The cost approach seeks to determine the value of an asset using the economic principle that a buyer will pay no more for an asset than the cost to obtain an asset of equal utility, whether by purchase or by construction in normal circumstances.

Based on the foundations of these approaches the following valuation methods have been variably applied in the valuation of assets in Kenya.

(i). Direct Sales Comparison (Comparable) Method
(iv). Replacement Cost Method.
(vi). Summation (Contractors) Method.

\textsuperscript{41}International Valuation Standards, 2017
6.1.1 The Direct Sales Comparison method

This is based on comparing the asset to be valued with similar or identical properties and prices achieved for them, allowing for differences between them, thus arriving at the likely price to be attained for the subject asset.

This is done systematically by; identifying the units of comparison that are used by participants in the relevant market; selecting the relevant comparable transactions; calculating the key valuation metrics for those transactions; undertaking comparative analysis of qualitative and quantitative similarities and differences between the comparable assets and the subject asset; making necessary adjustments to the valuation metrics to reflect differences between the subject asset and the comparable assets; applying the adjusted valuation metrics to the subject asset, and reconciling the indications of value. It should however be observed that real properties are heterogeneous by nature. They can never be identical. They are differentiated by location, the physical state, tenure, use, date and time of construction or acquisition. These characteristics of property and the dependence on existence of a vibrant property market with readily available information limits the application of this method at times.

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42 International Valuation Standard (IVS 105, 30.6) 2017
6.1.2 Income Capitalization (Investment) method

This is based on the principle that assets are acquired for investment purposes. It seeks to value the future flow of income by discounting it at an appropriate rate of interest to determine its present value. It mainly employs the Discounted Cash Flow (DCF) techniques. This involves choosing the most appropriate type of cash flow for the nature of the subject asset; determination of the most appropriate explicit period over which the cash flow will be forecast; preparation of cash flow forecasts for that period; determination of the appropriate terminal value for the nature of the asset; selection of the appropriate discount rate, and application of the discount rate to the forecasted future cash flow, including the terminal value to establish the total present value\(^{43}\).

6.1.3 Profits (Accounts) Method

The method computes the value of an asset based on the actual business volume achieved. It is premised on the fact that properties held for business purposes depend on unique factors which influence the sales and profit levels achieved and therefore difficult to compare with others. Knowledge of the type of business and ability to interpret books of accounts and profits is critical in the determination of value\(^{44}\). The method is applied to properties that are sold as part of business for instance hotels and petrol stations. The value of the asset is established by deducting all working expenses from the total sales to establish the

\(^{43}\)IVSC 105,38 (2017)

net profit. This net profit is adjusted to reflect an efficient operator. The operators share (fee) is then deducted to leave the landlords share (rental value) which is then capitalized to establish the value of the asset.

6.1.4 Replacement Cost Method

This method generally establishes the cost of a modern equivalent asset, which is one that provides similar function and equivalent utility to the asset being valued, but which is of a current design and constructed or made using current cost-effective materials and techniques. Frequently the cost of replacement is adjusted for physical deterioration and all relevant forms of obsolescence. After the adjustments, it is referred to as depreciated replacement cost. Replacement cost is arrived at by calculating all of the costs that would be incurred by a reasonable person seeking to create or obtain an asset providing equivalent utility; determining whether there is any deprecation related to physical, functional and external obsolescence associated with the subject asset, and deducting the total deprecation from the total costs to arrive at a value for the subject asset.

6.1.5 Reproduction Cost Method

This entails computing the cost of recreating a replica of an asset. The method is applied when the cost of a modern equivalent asset is greater than the cost of recreating a replica of the subject asset, or the utility offered by the subject asset can only be provided by a replica.

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45 IVSC105, 70 (2017)
6.1.6 The summation (Contractors) method

This entails the adding up of values / costs of each component of the asset. The component values/costs are established using the appropriate valuation approach. The method assumes that all the costs incurred by a developer in the development of an asset plus the profits constitute the value of that asset. This method sums all the costs of Finance, design, acquisition, planning and approval, site clearance, services, construction, developers profit to establish value of an asset. It is used to value development properties or specialized properties.

It should be observed that the purpose of the valuation assignment and the nature of the subject asset determine the method that is adopted for valuation. Valuers in Kenya generally apply the above methods depending on the instructions of the client and in line with the standards. It should however be noted that the standards acknowledge and allow for some valuation assignments to be guided by laws of the jurisdiction where the valuation assignment is being undertaken. In Kenya Valuation for compulsory acquisition and Valuation for rating purpose are for instance provided for by specific statutes and regulations under those statutes. The section below discusses the legal provisions that guide the approaches and methods for carrying out valuation for compulsory acquisition of property in Kenya.

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46IVS (2017)
6.2 Valuation of Property for Compulsory Acquisition Purposes in Kenya

Valuation of property for compulsory acquisition purposes is necessitated by the provisions of Art 40(3) (b) of the Constitution which allows the state to acquire property, interests and rights over property in accordance with the provisions of any Act of Parliament for public purpose or in public interest provided Prompt Payment in Full of Just Compensation is made to the affected person. The determination of the ‘Just Payment’ for the property right or interest becomes the subject of valuation. Art. 40(4) of the Constitution allows for provisions to be made for compensation to be paid to occupants in good faith not holding title to land where land is acquired for public purposes or in public interest. Assessment of Just Payment to such occupants in good faith is therefore a subject of valuation.

Pursuant to the Constitutional provisions the Land Act, 2012 has made provisions to guide the process of Compulsory acquisition of land and the attendant processes.

The Land Act interprets public purposes to mean transportation including roads, canals, highways, railways, bridges, wharves and airports; public buildings including schools, libraries, hospitals, factories, religious institutions and public housing; public utilities for water, sewage, electricity, gas, communication, irrigation and drainage, dams and reservoirs; public parks, playgrounds, gardens, sports facilities and cemeteries; security and defence installations; settlement of squatters, the poor and landless, and the internally displaced persons; and any other analogous public purpose. Land and property compulsorily acquired for these purposes is therefore

\footnotesize{\textsuperscript{47}The Constitution of Kenya (2010)}

\footnotesize{\textsuperscript{48}Land Act no. 6 of 2012 S. 3}
what constitutes the subject of valuation.

Section 111 (1) of the Land Act provides that if land is acquired compulsorily, just compensation shall be paid promptly in full to all persons whose interest in land have been determined.


These Rules give the procedure and considerations for valuation of property and interests in land for purposes of payment of compensation to the affected persons.

The rules interpret Market Value to mean the value of the land at the date of publication in the Gazette of the notice of intention to acquire the land.

The Rules provide that the commission shall consider the following factors when assessing compensation;

(i). The market value of the land

(ii). Damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of severing the land from his or her other land

(iii). Damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of the acquisition injuriously affecting his or her other property, whether moveable or immovable in any other manner or his or her actual

49 Land (Assessment for Just Compensation) Rules, 2017
earnings;

(iv). *Reasonable expenses incidental to the relocation any of the persons interested or who will be compelled to change residence or place of business as a consequence of the acquisition;*

(v). *Damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the Commission takes possession of the land*\(^{50}\).

In addition to the factors enumerated above, the commission is required to determine the award taking into consideration the effect of conditions of the title or law which regulates the use of the subject property. Increases in the market value of the subject property are disregarded if the increases arise from;

(i). Improvements by the owner after the date of the publication of the notice of intention to acquire the land.

(ii). Use of land contrary to the law or detrimental to the health of the occupiers of the premises or public health.

\(^{50}\)Land( Assessment of Just Compensation ) Rules, 2017
The Rules direct that the following shall not be considered in the determination of compensation:

(i). *The degree of urgency which has led to the acquisition.*

(ii). *Any disinclination of the person’s interest to part with the land.*

(iii). *Damages sustained by the claimant which will not represent a good cause of action.*

(iv). *Damages which are likely to be caused to the land after the publication of the acquisition notice or as a consequence of the future land use.*

(v). *Increases in land value likely to accrue from its future use after acquisition.*

(vi). *Any development at the time of acquisition notice, unless these improvements were necessary for maintaining the land*\(^\text{51}\).*

In addition to the amounts determined above the Rules provide that the commission shall add a sum of fifteen percent of the market value of the amount of compensation as compensation for disturbance. From the foregoing outline of the considerations in valuation, it is clear that the market value of the affected property, injurious and severance effects on the remaining property, costs of relocation, loss of profits plus the statutory disturbance amount form the core contents of compensation payment amount.

\(^{51}\text{Land (Assessment of Just Compensation) Rules 2017 S.5}\)
6.3 Forms of compensation for compulsorily acquired land in Kenya

The Land Act 2012 section 114 provides that the State may award a grant of land in lieu of money compensation (“land for land”), upon agreement, and provided the value of the land awarded does not exceed the value of the money compensation that would have been allowable. It is therefore legal for compensation to be paid either as ‘Land for Land’ or ‘Cash for Land’ in Kenya provided that the affected persons and the state have entered into a mutual agreement.

Upon the conclusion of the public inquiry required under the Land Act 2012, and once the National Land Commission (NLC) has determined the amount of compensation, the NLC prepares and serves a written award of compensation to each legitimate claimant. The NLC will publish these awards which will be considered “final and conclusive evidence” of the area of the land to be acquired, the value of the land and the amount payable as compensation. It should be observed that the NLC is the legal body required to carry out and assessment for just compensation. The NLC may undertake this exercise using its in house valuers or it may procure valuation services from valuers in private practice who are qualified under the provisions of the Valuers Act Cap 532. The affected persons may also procure the services of private practising valuers to prepare for them a valuation report to form the basis of their claim for compensation. Whatever the case and whichever the side the valuers are acting for, they are required to carry out valuation for just compensation amounts following the legal provisions discussed above.

The Land Act, Section 113(2) (b) stipulates that an award shall not
be invalidated by reason only of a discrepancy between the area specified in the award and the actual area of the land. As much as this provision is meant to guard against frivolous petitions against awards it has potential for being abused by under stating the area and thus procuring unjust compensation to the affected persons.

With respect to payments of compensation for unregistered community land, the Community Land Act states that the county government shall hold in trust for a community any amounts payable as compensation for compulsory acquisition; and that upon registration the county government shall release to the community all monies payable for compulsory acquisition. Non registration or delayed registration may lead to affected community members never getting the compensation moneys, despite their land being compulsorily acquired.

Under Section 100 of the Petroleum (Exploration, Development and Production Bill, 2017 (Passed by parliament, assented by the president but awaiting publication by the time of production of this report), a person wishing to enter upon any land, other than that person’s land to undertake exploratory activity relating to upstream petroleum operations or carry out survey for the purpose of exploration shall seek consent of the land owner, which consent shall not be unreasonably withheld. The Act further states that the owner of the land shall be granted adequate compensation for land taken for upstream petroleum operations in accordance with relevant laws and constitution. The

\[55\text{Community Land Act, Section 6}\]
Act further provides that if entry is denied the Cabinet Secretary can request the National Land Commission to initiate the compulsory acquisition process.

It is important to observe that the Petroleum Development and Production law does not require the holder of the petroleum resources licence or the contractor to place any compensation bond or guarantee unlike the requirement under Section 153 of the Mining Act of 2016. The contractor is also not explicitly denied entry until just compensation is paid in full as under the Mining Act. In sum the provisions for compensation for loss of land rights under the Petroleum law is skewed in favour of the investors against the rights of land owners. This asymmetry is practically more pronounced where the land rights are unregistered and communally held.

### 6.4 Gaps and challenges in valuation of property for compulsorily acquisition purposes

The Considerations and processes for valuation and determination of just compensation amounts outlined above presume the following:

(i). Existence of a formal property market where information about transactions is readily available

(ii). That Market Value approach is conclusive and procures

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56 Republic of Kenya, 2018, Petroleum (Exploration, Development and Production Bill), Government Printers, Nairobi, Kenya

Just amounts for compensation purposes

(iii). Existence of land use plans and zoning regulations governing land uses

(iv). There exists an up to date formal cadaster where subject properties are surveyed and registered.

(v). Individual persons interests in property are registered and can be quantified or shares established.

(vi). Permanency of settlement of Affected Persons

These assumptions do not always hold in Kenya. Unregistered community land in Kenya constitutes approximately sixty percent. Transactions over this type of Land are not supported by the National Cadaster and are not processed through the Land Registries. No formal information repositories or indices exist. Land rights are not recorded anywhere but known within the communities. Most rights are communal and land resources are thus shared. The Land uses are regulated through customs and norms. Formal planning rules, regulations and zoning with the attendant controls are not applicable. A majority of people in these regions lead a nomadic way of life and therefore do not have permanent residences. Formal property markets do not therefore exist in the regions where land is held under this form of tenure.

The fact that no formal market transactions have been registered over these types of land presents challenges as to how open market values are established. The valuation considerations provided for under the Land Act of 2012 and the Land (Assessment for Just Compensation) Rules 2017 therefore face limitations in practical application over these types of property. This in turn poses challenges as to how just and
fair compensation is arrived at given that the statutory methodologies are based on assumptions of existence of a formal property market. The statutory provisions cover physical relocation and appear not to address economic displacement of persons with un registered property rights. Loss of profits addressed under the considerations seems to only regard property owners with enterprises traceable to the particular parcel of land. This appears to preclude the non-static enterprises reflected in nomadic lifestyles.

The valuation approach prescribed ignores other resource values save for those reflected in a property market set up. Loss of medicinal plants, cultural sites, critical ecological services are not regarded.

The factors outlined under the Rules do not address how public assets and communal facilities are to be valued. Assets like schools, cattle dips, social halls, boreholes, animal watering points, communal tanks, water supply systems, animal holding grounds, shrines, and other cultural assets are not traded in any market. Their value cannot be established using the market approach.

The consideration and approach provided by the Rules and the Statute are blind to methodologies suitable for valuation of Special use facilities like hospitals, recreational and sporting developments like golf courses, stadia, public parks.

The question of how interests of occupants of land in good faith will be addressed in assessment of just compensation is not overtly addressed under the Land Act 2012, or in the Rules. Statutory and policy guidance is necessary to ensure that the affected persons are
not exposed to injustice.
The public purposes enumerated under the Land Act tend to address instances where property rights and interests are permanently extinguished or where the purpose purely involves public entities or authorities. The scenarios where economic or physical displacements occur during exploration and development stages in oil and gas extraction involving investors with government licenses directly dealing with communities is not addressed. Just Compensation for these types of displacements that are brought forth by investments which cannot be categorized as public purpose need to be addressed in policy and statute.

7.0 Land Acquisition for Oil and Gas Projects in Turkana

7.1 Turkana Community

Under the Community Land Act, a community is defined as a “consciously distinct and organized group of users of community land who are citizens of Kenya and who share any of the following attributes; common ancestry, similar culture or unique mode of livelihood, socio economic, geographical space, ecological space or ethnicity”\(^\text{58}\). The Mining Act defines a community as a group of people living around an exploration and mining operation area or a group of people who may be displaced from land intended for exploration and mining operation\(^\text{59}\).

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\(^{58}\) Republic of Kenya, 2016 Community Land Act, Government Printers, Article 27

It is notable that the Petroleum Act does not define Community but adopts the definition of Community land under Article 63 of the constitution. This research views community as defined by the Community Land Act 2016.

Turkana community is composed largely nomadic pastoralists who primarily depend on livestock for their livelihoods. It is located in the Arid and Semi Arids Lands of Kenya. The demand for land in the county has significantly increased due to the discovery of oil and other developments taking place in the region.
7.2 Land Tenure

In Turkana land is mainly communally owned. It is un demarcated and through local agreements, member can move from one area to another in search of water and pasture for their livestock. The uses are designated customarily in all the communal areas. The County Government manages the land in urban areas and acts as the trustee for all the land except public land under the National Government. There is no formal property market in the communal areas but the urban areas have an active property market although there isn’t a formal property market in the communal areas there is a traditional way to issue selected parcels of land for settlement and social establishments such as schools and religious centers and hospitals guided by community based local leadership. Land uses in urban areas have been guided by physical planning codes, County Government laws and the repealed Trust Lands Act.

7.3 Land Acquisition in Turkana for Oil Projects

The necessity for land acquisition arises from Investment corporations needs for land to base their exploration, development and production work. In addition there is demand for land by the government to build infrastructure to support and compliment the extractive related activities. Communities occupying the areas where oil projects are being implemented in Turkana were informed by the government of the planned exploration processes. The information given with regard to the nature, length of the project, the scope and the impact was limited. After the discovery of commercially viable oil deposits
in 2012, community awareness meetings were done by the County Government, Corporations, and National Government and Civil societies. These meetings focused on the communal benefits from oil production and the securing of community cooperation. No formal land acquisition processes were undertaken but select community leaders signed land access consents upon promise that the extraction projects will bring development and revenue...The Corporations obtained formal access rights from the National Government and the County Council (now county government); there were no open negotiations with the community with respect to land transfer but social ceremonies were conducted as a sign of establishing a relationship between the Communities and investors. The national Government granted block license to the investors directly without participation of the local communities; The corporations secured the Oil pads and adjacent sites with the help on the National Government and County Government officials. The implication was that the subject land, grazing areas and the other resources where effectively transferred from the Community to the Corporations. The land acquired for development of attendant infrastructure by the Government was done directly with discussions being held between the National and the County Government. The respondents indicated that there were hardly any direct engagements between the acquiring authorities and the local communities. There are however notices made in the Kenya Gazzette with respect to intentions to carry out compulsory land acquisition. No formal meetings were held with communities to make any claims to their land.
7.4 Valuation of land acquired for oil projects in Turkana

The community representatives interviewed had no information with regard to formal property valuation done prior to, during or after the acquisition of project sites. The County Government officials however indicated that they base the charges for leasing land for extractive projects on a declared a flat rate of one million per site per year. The basis for this declaration or the supporting rationale was however not explained. There was no involvement of qualified valuers in the process of setting the flat rate and no participation of communities was witnessed save for indication that the rates were passed by the County Assembly as part of the Finance Bill. The community respondents however indicated that the community has social ways of valuing their resources such as pastures, grazing areas, water points, sand among others.

7.5 Compensation for Land acquired in Turkana

Given that no formal engagements took place between the investors and communities with respect to land acquisition, effectively there wasn’t any compensation given for land to community members. It was however established that there were tokens given in form camels and goats, and some cash handouts variably given to communities living around the affected sites in Lokichar. The investors also built a school and water points as social investments.
According to the community members the County Government and the Investors did not involve them in consultations on land
access fee and or compensation modes or amounts. It was however established that the communities living around the sites situated in Lochwaa which are yet to be developed have had discussions with the investors and agreed to the investor making an annual contribution to their development fund of Seven Million Kenya Shillings. There was however no basis provided for how the computation of the fund was done and whether it was fair and just and whether the payments will be prompt.

It was disclosed that the County Government has given consents for the sites to be taken over by the investor subject to the payment of the flat rates charged per site per annum. The communities indicated that they have no information regarding the use of the funds paid to the County Government by the investor for use of their land. Community respondents had no information regarding compensation monies paid to the County Government for land acquired by National Government Agencies for implementation of infrastructure projects implemented in the areas where oil production projects are being undertaken.

From the feedback obtained it can be deduced that the Constitutional right to fair, just and prompt compensation for property acquired compulsorily was not upheld. Even where the acquisition was by social consent, no equitable consideration was made to the affected communities. In addition there lacks clear mechanisms for ensuring that County Governments account openly for compensation monies or lease fees received on behalf of communities with respect to their land resources.
7.6 Resettlement of Projects Persons Affected in the study area

According to the communities their land is slowly shrinking due to acquisitions for various investments and development projects. This has forced them to change their migratory routes to longer and more dangerous routes. The communities established that the reduced size of their land means lose of valuable food and water supply for their livestock further stretching the resources and endangering their livelihoods. This is slowly changing their way of life from normal nomadic migration to adaptive migration. In addition, they have had to move their manyattas hence disrupting their social setup and access to resources. The community further disclosed that, the literacy and skills levels are very low making it difficult for majority of them to adapt to new ways of life. The community expressed fear of forced evictions as more and more land is being acquired for infrastructure and oil extraction related projects.

From the feedback on resettlement, it can be inference that no adequate safeguards by the Government and the private investors have been put in place to mitigate negative impacts resulting from resettlements of the communities. This is exacerbated by the fact that there is no specific law on resettlement in Kenya; this gap makes it difficult to hold the government and investors accountable.
7.7 Application of Free Prior and Informed Consent principles in project sites

The community reported that at the beginning of oil extraction, the government had offered the investor license without their informed consent. However in subsequent acquisitions there have been efforts to involve the communities in consultations as was the case in Lochwaa community which received some consideration and a ceremony conducted to celebrate the agreement. They however did not have written records on what was communicated and agreed. It was also noted that copies of the final agreement were not availed to the members of the public.

With regard to information, it was established that the community had low knowledge and understanding of their land rights; furthermore communities in Lokichar and Nakukulas felt that valuable information had been withheld from them with regard to the extractive investments; the potential benefits and challenges, giving the investor an upper hand. The community also reported that there were no structures or platform that enabled the communities to continuously demand transparency and accountability.

The limited information meant that the community lacked capacity to make informed decision. FPIC should involve good faith negotiations, leading to documentation of mutually accepted process and evidence of the agreement with indigenous people\(^\text{60}\). There is also need for increased stakeholder engagements to support the establishment of structures that can promote effective FPIC processes thus sustainable development.

\(^{60}\) Oxfam, 2017, Testing community consent, Tullow oil project in Kenya, Oxfam GB.
7.8 Restoration of Land and post project reversion

The decommissioning of oil and gas project sites entails the returning of a site to its original status before the development of projects. The activity takes place over a period of time and requires financial and labor input. The Energy Bill requires that at the conclusion of activities, every person shall remove all infrastructures they may have brought to the land for purposes of his or her operations and rehabilitate the land; the decommissioning practice must meet good practices as may be prescribed by the Cabinet Secretary on regulations\textsuperscript{61}.

The Petroleum Bill 2017 requires contractors to undertake restoration of the affected land. In the event that the contractor fails to undertake restoration, then the land owner is compelled to do so at the contractors cost. The mechanism for enforcing cost recovery is however not explicit and no deposits, bonds or guarantees from the contractor are required by law. Where the communities are poor or lack capacity to undertake restoration they remain exposed to the adverse effects in case of weak government enforcement. Post restoration, the law is silent on handover processes and the status of the reversionary interests on the affected land. It is important to have this issue clearly addressed to avert post project land grabs.

\textsuperscript{61} Republic of Kenya, 2017, Energy Bill, Government Printers, Section 24
8. Recommendations

Further to the challenges and gaps highlighted in the above reviews, discussions and findings we recommend the following:

(i). Issuance of extractive project licenses in Kenya should be strictly subject to prompt and just compensation by the Government in the case of compulsory acquisition or by the Investors in the case of willful transfer of land rights of affected persons.

(ii). That a statutory and regulatory framework be formulated and enacted to guide the resettlement of development projects affected persons whose land rights are not formally registered.

(iii). Amendments be made to the Land Act to provide a criteria for identifying occupants in good faith.

(iv). Development of a policy framework for implementation of FPIC requirements in extractive and other development projects in Kenya.

(v). Amendments of the Community Land Act, 2016 to provide for mechanisms for direct remittance of compensation money to community members affected by the extractive and other development projects where community land is un registered.

(vi). Include other basis for valuation apart from market value such as equitable value, and social value to account for instances where the affected assets are not traded in the property market or where no formal property market exists.
(vii). Provide for consideration of other factors (approaches) besides market value, to include income, replacement cost, restoration cost, cultural factors and specify circumstances under which departures would be allowed to accommodate the diverse nature of property interests and rights.

(viii). Adopt existing use as a premise of value where Planning rules, regulations and controls do not exist and where application of strict and highest and best use principle is not possible.

(ix). Allow for identification and quantification of rights and interests not recorded under the formal registration and cadastral systems to form the subject of valuation in the cases of unregistered land such as community land.

(x). Cater for short term entries, disruptions and exclusion for other periods that do not amount to permanent displacement such as during exploration.

(xi). Include valuation of communal, public and social assets that may not be attributed to a private person.

(xii). Recognize non static enterprises such as those of nomadic pastoralists.

(xiii). Explicitly provide for valuation of assets and interests associated with occupants of land in good faith without title, while putting caveats to deter speculative occupation and perennial squatting.

(xiv). Address assessment of just compensation for physical, economic and social displacements occasioned by
nonpublic or state authorities such as investors in oil and gas industry.

(xv). Develop a frameworks for dispute resolution to address issues arising from land access on community land.

(xvi). Establish capacity building activities for communities to enable understand their rights, effectively engage investors and the government and wisely use the compensation received for sustainable development.

(xvii). Establish a Legal framework to allow more forms of compensation such as annuity based so as to help in sustainable livelihoods. Valuation to take into consideration restoration element.

(xviii). Establish continuous monitoring and evaluation mechanisms for the projects to ensure that agreements are adhered to and frameworks are effectively implemented.
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