



Land Governance in an Interconnected World

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ASSESSMENT OF LEGAL AND POLICY FRAMEWORKS AFFECTING LAND ACCESS FOR EXTRACTIVE PROJECTS IN KENYA.

Dr. Mwenda Makathimo¹ **Lizahmy Ntonjira**²,
Land Development and Governance Institute, Kenya
makathimo@ldgi.org

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Abstract

Before the year 2012, extractive projects in Kenya mainly covered medium and small scale mining operations. Thereafter, an incredible growth in the sector has taken place owing to the discovery of commercially viable oil deposits. This growth has occasioned acquisition of large tracts of land to roll out extractive related projects. The acquisition is mainly affecting unregistered community land and is threatening security of tenure rights. It is likely to increase land related conflicts. How these threats are addressed is of significant importance.

A need has emerged for assessing the adequacy of the legal and policy frameworks governing land acquisition (access) in relation to oil and gas exploration, development, production and mining operations in Kenya. This paper provides an assessment of these frameworks. It is guided by sustainable development principles

Key words: Land Access, Extractives, Legislation, policy

1.0 Introduction

Extractives projects in Kenya before the year 2012 mainly covered medium and small scale mining operations. They involved mining of rocks like titanium and non-metallic substances such as soda ash, fluorspar and gemstones. The oil and gas projects dealt with exploration only. Thereafter, an incredible growth in the sector has taken place owing to the discovery of commercially viable oil deposits. This growth has occasioned the acquisition of large tracts of land that harbors minerals, oil and gas to roll out development, production projects and further exploration work.

It is worth noting that the oil and gas finds have taken place largely in arid and semi-arid zones where land is held communally. The dominant land use in these areas has been pastoralism. There have been no restrictions on access to these grasslands and community members have hitherto been freely moving with their animals in search of pasture and water. Most of the communal land in these regions is unregistered. In addition it has neither been surveyed nor planned. There are no formal land markets and hence no recorded transactions or information



that would form the basis of open market valuation¹. Community members therefore have limited capacity to engage with oil corporations on negotiations for land related transactions at an arm's length position.

Besides the investment corporations' needs for land to base their exploration, development and production work, there is a resultant demand for land by the government to build infrastructure to support and compliment the extractive related activities. It should be appreciated that most of the areas where these projects are based do not have basic infrastructural services like roads, electricity and water mains supply. In addition to the basic services, industry related infrastructure like pipelines and refineries also require land on which to be constructed.

With the above highlighted increase in demand for land to set up the extractives related projects, a need has emerged for assessing the adequacy of the legal and policy frameworks that govern land acquisition (access) in relation to oil and gas exploration, development, production and mining operations.

The Constitution of Kenya 2010 sets out principles that guide land access, ownership and management. It requires land to be managed and used in an equitable, productive, efficient and sustainable manner². It provides that, all the land belongs to the people collectively as a nation, communities or individuals. Article 62 of the Constitution stipulates that all minerals including fossil fuels belong to the people of Kenya collectively and are held in trust by the national government³. Discovery of minerals, oil and gas where land is held communally or individually would therefore affect the tenure rights of the respective land owner. How these effects on private individual and communal tenure are addressed in terms of acquisition, conversion, or access by government or investing corporations becomes of significant importance.

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. It is

1 Cordaid., 2015., Oil exploration in Kenya: Success requires consultation

2 Government of Kenya, The Constitution of Kenya 2010, Laws of Kenya Section 60(1)

3 Ibid section 62(3)



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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; prompt payment of full and just compensation is required.

To satisfy the above cited constitutional requirements effectively, there is need to have the statutes governing land management processes and those addressing mining; oil and gas exploration, development and production well aligned. The Land Act 2012 is the main framework governing administration and management of land and land based resources. It expansively deals with administration and management of public and private land while community land issues are addressed under the Community Land Act 2016.

The framework for governing mining operations in Kenya is provided under the Mining Act No. 12 of 2016. It addresses processes including prospecting, mining, processing, treatment, transport and all dealings in minerals. Petroleum and hydrocarbon gases exploration and production activities on the other hand are governed by the Petroleum (Exploration and Production) Act of 1984. A recent notable legal development in the petroleum and the hydrocarbon subsector is the drafting of Petroleum (Exploration, Development and Production) Bill 2015 to repeal the 1984 Act. The Bill is currently before the Senate for consideration.

The Legal and policy frameworks and the attendant practices for land acquisition ought to reflect a balance between economic, social and environmental considerations. The respect for property rights for communities as well as individuals should be observed. The requirement for Just and prompt compensation for any property rights expropriated has to be explicitly provided for in the laws⁴. Compliance with these laws and policies ought to be ensured and where non-compliance arises, corrective mechanisms and deterrent sanctions need to be effective.

The sections below expound the current legal and policy frameworks in relation to acquisition of different categories of land.

4 Extractives Baraza., 2017. Land access and acquisition for extractives projects: balancing different interests.



2.0 Legal and Policy Frame work

The principles, rights, obligations, and processes that guide land acquisition for extractives processes in Kenya are found in various laws and policy provisions. The provisions in the particular statutes are founded on the values, principles, rights and other specific dictates of the constitution of Kenya 2010.

2.1 The Constitution

The Constitution of Kenya 2010 sets out National values, Policy principles and the foundation upon which property rights are held, managed, exercised, converted, acquired or disposed. Notable values under Article 10 are equity, justice, accountability, justice and non-discrimination. The principle of sustainable development is also provided for as a key value to guide public policy. Article 60 (1) of the constitution requires that Land in Kenya be held, used and managed in a manner that is equitable, efficient, productive and sustainable. This constitutional directive is further elaborated through the following policy principles; equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent the Constitution.

These values and principles provide the frame upon which all laws, public policies and their implementation should be based. Land access / acquisition processes and practices in the extractives sector are therefore subject to these overarching national values and land policy principles.

Before delving into the land acquisition and disposal issues, it is important to highlight that the Constitution affords protection of property rights. Due to the significance of property rights in people's livelihoods this protection is provided for under the Bill of rights. Article 40 specifically gives protection for everyone's right to own property anywhere in Kenya either individually or in association with others without any discrimination. It is provided that the state shall not deprive



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any person of property or interest in property unless it is in accordance with the Constitution and established statutory law. The constitution makes provision for compulsory acquisition of land only for public purpose. In cases where the land is compulsorily acquired for public purpose; prompt payment of full and just compensation is required. Should a person with an interest in or over the land being compulsorily acquire be aggrieved they have a right to access a court of law⁵ to seek redress.

Based on the values, principles and rights foundations outlined above, the Constitution of Kenya has classified land into three types; private, public and community⁶. Private land is registered land held by any individual on either leasehold or freehold tenure or any other land declared as private land under an act of parliament⁷.

Article 62 of the Constitution describes Public land as un alienated government land as defined by an Act of Parliament in force at the date of the promulgation of the Constitution; land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease; land transferred to the State by way of sale, reversion or surrender; land in respect of which no individual or community ownership can be established by any legal process; land in respect of which no heir can be identified by any legal process; all minerals and mineral oils as defined by law; government forests , government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas; all roads and thoroughfares provided for by an Act of Parliament; all rivers, lakes and other water bodies ; the territorial sea, the exclusive economic zone and the sea bed; the continental shelf; all land between the high and low water marks; any land not classified as private or community land under this Constitution; and any other land declared to be public land by an Act of Parliament.

⁵Government of Kenya. The constitution of Kenya 2010.Article 40(3)(b)(ii)

⁶Government of Kenya. The constitution of Kenya 2010.Article 61(2).

⁷Government of Kenya. The constitution of Kenya 2010.Section 64.



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Community land is scoped as land lawfully registered in the name of group representatives under the provisions of any law; land lawfully transferred to a specific community by any process of law; any other land declared to be community land by an Act of Parliament; and land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by the county governments.

Given that extractives projects can be located on different categories of land, it is important to observe that the land access or acquisition processes are as varied as the classification of land outlined above and the tenure types. It is also worthy observing that the acquisition methodology will also depend on whether the project at hand is one of a public purpose undertaken by the government or if it is of a non-public purpose undertaken by an investor.

2.2 Acquisition of Private Land

When private land is required for a public purpose like the construction of a road, a railway or pipeline then it has to be acquired through any of the ways provided for under the provisions of Section 9(2) (c) of the Land Act. The provisions hold that, private land can be converted to public land by compulsory acquisition, transfer through sale, surrender or reversion of leasehold interest to the government after expiry of a lease. Private can also be leased.

Compulsory Land acquisition is guided under Section 107 of the Land Act, which provides that whenever land is to be acquired compulsorily by either the National or County Government, the request for acquisition is submitted to the National Land Commission (NLC). The NLC is required to give the criteria and guidelines for compulsory land acquisition for public use. Compensation for the land acquired is paid by the acquiring government agency through the commission.

Where land is to be acquired through direct purchase or leasing, it is expected that the transactions will be conducted at arm's length. That means both the buyer and the seller must be willing to enter into the transaction and each must be acting knowledgeably. These kind of



transactions happen in cases where land is held privately mostly because an active land market exists assuming there are no other hindrances that prevail.

Under the mining Act 2016, prospecting and mining right over private land cannot be given without express consent of the registered owner. For consent to be given, a binding agreement that allows conducting of the operation and evidence for payment is required.

2.3 Acquisition of Public Land

The Land Act Section 9(2) (a) provides that public land can be converted to private land by the process of alienation. Public land can be allocated by way of public auction to the highest bidder, public notice tender, public request for proposal, public exchange of an equal value or by confirming application to a targeted group to upgrade their disadvantaged position.

It is easy for the government to procure public land for a public use like road construction or laying a pipeline because no compensation is required. The process only becomes sensitive if it involves the acquisition of ecologically sensitive areas like national parks, catchment areas or forests. Where acquisition involves environmentally sensitive lands, the test of the acquisition processes then becomes compliance with environmental conservation standards, laws like Environmental Management and Coordination Act (EMCA), the Forest Act and the levels of transparency and accountability to the citizenry.

The acquisition of public land becomes lengthy and complex where private investors in the extractive industry are involved given the need for transparency and accountability in compliance with principles and values set out under the constitution. It is expected that such acquisition will be done through the National Land Commission in full compliance of the steps set out under the Land Act and the Land Registration Act of 2012. It is the public expectation that ecologically sensitive areas shall not be alienated for private investment since that would go against the provisions of Article 69(1)(g) of the Constitution of Kenya which requires that the state and the people shall eliminate processes and activities that are likely to endanger the environment.



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Where for instance the exploration, development and production of oil and gas have to be undertaken within the ocean, strict adherence to EMCA as amended and the attendant regulations and standards is expected. In cases where the public Land is required for a short period, NLC is allowed to process Temporary Occupation Licenses on behalf of the government in accordance with the land Act. NLC can grant a person a license to use unalienated land for a period not exceeding five years. In this scenario, planning principles are to be adhered to and fees to be paid as prescribed by the NLC. The Commission is expected to ensure the transactions are open and the fee is at par with current open market valuation.

2.4 Acquisition of Community Land

Registered Community land can be converted to private or public land. Registered community land can either be converted to private land through transfer or allocation by the registered community. Community land under section 14 (1) of community land Act can be allocated/ leased by the community to individual persons or to corporates subject to payment of a fee appropriate to the lawful use, not sub leasing and adherence to the provisions of laws and regulations of land use. Upon approval by a registered community to allocate community land, the registered community shall issue a certificate of customary rights of use and occupancy in the form that is prescribed.

Community land can be converted to public land by setting apart or compulsory acquisition. This is commenced by publishing the intentions to convert the land into public Land in the official gazette by the NLC. This is followed by processes of laying claims by the affected parties, valuation, giving the due awards and subsequent payment of compensation before the final registration of the affected land as public. When unregistered community land is compulsorily acquired the monies paid as compensation is held in trust for the community by respective County Government.

Compensation for registered community land arising from compulsory acquisition is paid to the registered community. Interested parties are identified and determined for compensation through



a public hearing⁸. The interested persons of the land being acquired can be any person whose interests appear in the land register, spouses or any person who is actually occupying the land. For compensation to be paid, a written claim to for the NLC for just compensation is made.

According to section 36 of the Community Land Act, all investment agreements in community land shall be made after a free, open and consultative process between the investor and the community. The agreements should be approved by two thirds of adult members at a community assembly meeting. In instances where a dispute arises involving a community land, alternative mechanisms of dispute resolution will be used as a priority to resolve the dispute.

Under the mining Act section 38, a permit for prospecting and mining right is granted, when a Registered Community or the County government in relation to unregistered community land, gives consent. A legally binding agreement showing payment of adequate compensation and allowing the carrying out of the prospecting and mining operations is considered as consent. Communities where extraction activity has been prospected have in many cases declined to give consent since they feel that they have not been involved in the negotiation of land acquisition and access. In some instances community hostility to the investors has been seen.

3.0 Challenges

While the procedure for acquisition of private land has been clear under the statutes, there have been challenges experienced in real practice relating to the determination of compensation amounts⁹. The government and investors have tended to view compensation for land as escalating project costs. On the other hand private land owners have inclined to view compensation money as an avenue for making profits. This has resulted in speculative purchases in areas where it is anticipated that infrastructural projects will be undertaken following discovery of oil, gas and other precious minerals. These speculative purchases have tended to

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9 Monica Obongo et.al. 2017. Land for infrastructure development: compulsory acquisition and compensation of unregistered/undocumented land in Kenya. 2017 World bank conference on Land and Poverty.



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create abnormal markets and thus pose challenges in determining just and fair compensation amounts.

The acquisition of public land for extractive projects has at times not been conducted in the most transparent manner as required by the constitution. Given that most information about discovery of oil and gas is known to investors and the government before it is released to the public decisions to acquire or allocate land happen way before such information is disseminated to the public. Even where public engagement happens, the ability for the members of the public to make informed decisions is compromised.

The licensing processes for oil and gas exploration are the reserve of the ministry of energy and petroleum under the National Government. As much as the constitution regards oils, gas and minerals as part of public land, the fact that the same resources are vested under the National Government, leaves room for decisions to license exploration, development and production to be made without involvement of the National Land Commission. As a result the determination of payments for access and use of such land may be done without independent computation and scrutiny and chances of under valuation arise.

The acquisition of unregistered community land for extractive projects in Kenya has posed many practical challenges when gauged using constitutional values and principles. Where investors have sought access/or acquired land, the questions whether the transactions have happened at an arm's length arise. 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.

Given the lack of formal market transactions over unregistered community land, the valuation process for compulsory land acquisition has also faced limitations. 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.

Where unregistered community land has been acquired compulsorily or through leasing by investors questions have arisen as to how the proceeds get to the community given that negotiations are done with and payments made to the County Governments.



4.0 Conclusion

From the discussion above, it is clear that there are legal Provisions already in place that govern land acquisition/ access under different tenure systems. These provisions are founded on the values, principles, rights and dictates of the constitution which align with the requirements for sustainable development. It is however observed that the provisions are scattered under the numerous statutes.

There are gaps in the laws and policy relating to the methodology of determining fair and just compensation for rights over unregistered community land. The statutory approaches are based on assumptions of existence of a formal property market which do not hold in the case of unregistered community land.

The laws and policy exhibit gaps with regard to curbing speculative tendencies that escalate compensation claims and create abnormal property markets.

5.0 Recommendations

To satisfy the above cited constitutional requirements effectively, there is need to have the statutes governing land management processes and those addressing mining; oil and gas exploration, development and production well aligned.

There is need to provide clear and proper guidelines in law for the mechanisms to be used to get a fair compensation especially for the unregistered community land.



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A clear framework should be put in place to guide how compensation and other proceeds from the extractive projects are shared fairly by the community members.

The government should come up with regulatory mechanisms for curbing speculative purchases in areas where development projects are anticipated.

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