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Public-private partnerships in the energy sector in Kenya: the case for effective public participation

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STRATHMORE UNIVERSITY

STRATHMORE LAW SCHOOL

JUNE, 2019

MASTER OF LAWS THESIS

**TOPIC: PUBLIC-PRIVATE PARTNERSHIPS IN THE ENERGY SECTOR IN
KENYA: THE CASE FOR EFFECTIVE PUBLIC PARTICIPATION**

By:

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Submitted in partial fulfillment of the requirements for the Master of Laws Degree (International Financial Law and Regulation) Strathmore Law School, Strathmore University.

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DECLARATION

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, this thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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Munyao Scola Nduku

10th June, 2019

APPROVAL

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ABBREVIATIONS

APCL -Amu Power Company Limited

BOO-Build-Own-Operate

BOT- Build, Operate and Transfer

DBFMO-Design, Build, Finance, Manage and Operate

EOI- Expression of Interest

ESIA- Environment and Social Impact Assessment

KAICD- Kenya's Africa Infrastructure Country Diagnostic

LCPDP-Low Cost Power Development Plan

NEMA-The National Environment Authority

O&M -Operate & Maintain

OECD-Organisation for Economic Cooperation and Development

PPP Act-Public Private Partnership Act

PPP-Public Private Partnership

UNECE- United Nations Economic Commission for Europe

UNESCO- United Nations Educational, Scientific and Cultural Organization

LIST OF CASES

1. *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* [2015] eKLR
2. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* ICJ GL No 135 [2006] ICJ Rep 113
3. *Robert N. Gakuru & Others vs. Governor, Kiambu County* [2013] eKLR
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others* [2014] eKLR

LIST OF STATUTES AND REGULATIONS

1. Public Private Partnerships Act (Act No. 15 of 2013)
2. The Public Private Partnerships Regulations, 2014
3. The Public Private Partnerships Facilitation Fund Regulations, 2017.

ABSTRACT

This thesis examines the extent to which the lack of a policy, legal and regulatory framework for public participation in the identification, initiation and appraisal stages of Public Private Partnership (“PPPs”) projects in the energy sector in Kenya, particularly in the Lamu coal-fired power Project, has contributed to opposition by stakeholders leading to delays in the implementation of the project. It demonstrates that whereas the Constitution of Kenya, 2010 provides that all sovereign power belongs to the people who then delegate it to the three state organs- the executive, legislature, and the judiciary- the people retain residual powers through which they can call both public entities and the private entities involved in PPPs to account. One of the ways through which this residual power is exercised is through public participation which is one of the national values and principles of governance under Article 10 of the Constitution.

Granted that Constitutions are not self-enforcing documents, there is need for additional laws to operationalize this constitutional principle and aid in the day to day governance. No such body of laws has been enacted, yet, in respect of public participation in PPPs. There is, however, a draft public participation policy and a bill pending before the Senate which have been criticized as proposing a cookie cutter-one-size-fits-all- approach regardless of the circumstances of each case. This lacuna has seen entities mandated to carry out public participation involved in tokenism- a mere checking of the constitutional check box- at the expense of meaningful and effective public participation.

This thesis proposes incorporation of a public participation framework in line with international standards in the Public Private Partnerships Act, 2013 or an amendment to the Public Participation Bill, 2018 to ensure that it recognizes and imposes similar obligations for carrying out of effective public participation at all stages of a project on both the public and private entities involved. This will ensure that the resultant projects are acceptable, socially responsive and lead to sustainable development. It also proposes that appropriate sanctions be imposed for non-compliance with the framework so created together with other amendments to ensure realization of the benefits sought in the PPPs contracting framework.

CHAPTER ONE

1.1 Introduction

After a decade of agitation for constitutional reforms, Kenya finally promulgated a new Constitution on 27th August, 2010 (“the Constitution”)¹. Constitutional experts have lauded it as one of the most progressive constitutions in the world for being people-centred as well as for providing a comprehensive bill of rights.² The Constitution restructured and transformed the state-society relations in a number of significant ways. Relevant to this research, the Constitution vested all sovereign power in the people of Kenya which power the people can exercise directly or through their democratically elected representatives.³ The people then delegate the power to the three state organs which are the legislature, the executive and the judiciary. These organs are required to exercise their functions in accordance with the Constitution. This delegation of power creates a social contract between the state and the people.

Further, the Constitution provides for national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever they apply or interpret the constitution, enact, apply or interpret any law or make or implement public policy decisions.⁴ Among these principles is participation of the people, good governance, integrity, transparency, accountability and sustainable development. The Constitution, therefore, places the people of Kenya at the centre of development and related governance processes through the provision for public participation.⁵ Effective public participation is an indispensable element of democracy and people-centred development. It legitimizes state actions and decisions. Other relevant principles that guide all aspects of public finance in the Republic include openness, accountability, including public participation in financial matters.⁶ These national values and principles present an avenue for the people, the sovereign, to exercise the residual powers by calling the government and the state organs generally to

¹ *Constitution of Kenya* (2010)

² UNDP: Four years on: assessing gains made in the Kenya Constitution: <http://www.ke.undp.org/content/kenya/en/home/presscenter/articles/2014/4-years-of-Kenya-Constitution.html> on 4 May 2018.

³ Article 1, *Constitution of Kenya* (2010)

⁴ Article 10, *Constitution of Kenya* (2010)

⁵ Article 10 (2) (a), (c) and (d), *Constitution of Kenya* (2010)

⁶ Article 201, *Constitution of Kenya* (2010)

account for the exercise of the powers delegated to them. The research will particularly focus on the principle of participation of the people otherwise referred to as public participation. While the Constitution provides for public participation, Constitutions are not self-enforcing documents. A need arises for an additional body of laws and other mechanisms to facilitate day to day governance by law particularly because governments have often manipulated Constitutions to undermine public interest.⁷ This body of laws is lacking.

The Kenya Vision 2030 (2008-2030), a long-term development blueprint for the country, aims to transform Kenya into a newly industrializing, middle income country providing a high quality of life to all its citizens in a clean and secure environment.⁸ One of the four pillars of the blueprint is deploying world class infrastructure, facilities and services. Part of the necessary infrastructure development relates to production of energy necessary to power the economy. This will be achieved by increasing Kenya's installed power capacity from 2351 MW to 7, 213.88 MW by 2030.⁹ The cost of achieving universal access to electricity and meeting the energy demands in Kenya stands at 14-18 billion USD¹⁰ yet budgetary provisions or debt cannot sustainably meet this demand.¹¹ With debt to GDP ratios at unacceptable levels, borrowing to fund infrastructure development projects is no longer viable.¹² It is for this reason that there has been a growing interest in Public Private Partnerships (PPPs) as they entail the use of private capital to develop public infrastructure which eases the budgetary burden on the Kenyan taxpayer.

⁷ Akech M, *Administrative law*, Strathmore University Press, Nairobi, 2016, 25.

⁸ *Kenya Vision 2030. A Globally Competitive and Prosperous Kenya. Policy Document.* www.vision2030.go.ke/about-vision-2030 on 4 April 2018.

⁹ USAID. *Kenya Energy Sector Overview*. Power Africa. <https://www.res4africa.org/wp-content/uploads/2016/05/Power-Africa-Fact-Sheet.pdf> on 8 May 2018.

¹⁰ Smith, S. *Hybrid networks, everyday life and social control: Electricity access in urban Kenya*. *Urban Studies*, 2018. 56(6), 1250–1266. <https://doi.org/10.1177/0042098018760148> on 8 May 2018.

¹¹ Kenya's Africa Infrastructure Country Diagnostic (KAICD) Report, 2018 estimates that to address the country's infrastructure deficit will require sustained expenditure of approximately Kshs.400 Billion per year, which is 20% of Kenya's GDP, over the next decade.

¹² Kenya's revenue collection in the 2017/2018 fiscal year amounted to Kshs.1.27 Trillion against a budget of Kshs.3 Trillion which leaves a budgetary deficit of Kshs.1.73 Trillion. The budgetary provision for infrastructure was Kshs.113 Billion which is less than 30% of the annual requirement as per the KAICD report. The Government's debt as at June 2018 was at Kshs.5 Trillion which translated to approximately 58% of the Gross Domestic Product 8% above globally accepted debt levels-Kenya Government Debt to GDP. Trading economics. online. 2019 Available at <https://tradingeconomics.com/kenya/government-debt-to-gdp> on 12 March, 2019.

The Organisation for Economic Cooperation and Development (OECD) defines PPPs as long term agreements between the government and a private partner whereby the private partner delivers and funds public services using a capital asset, sharing the associated risks.¹³ The Public Private Partnership Act, 2013 (“the PPP Act”) defines a PPP as an arrangement between a contracting authority and a private party under which a private party undertakes to perform a public function or to provide a service on behalf of the contracting authority or receives a benefit for performing a public function.¹⁴

While the provision of infrastructure through PPPs across the world has been largely successful¹⁵, a number of problems have been encountered. In Kenya, particularly, one of these problems is stakeholder opposition leading to delayed or even collapse of or ineffective implementation of the projects.¹⁶ A case on point is the 1050 MW Lamu Coal-Fired Power Plant Project (“Lamu Power Project”) which is the case study on this thesis for its illustrative power on the issue of public participation. This project was set to commence in 2015 but is yet to owing to stakeholder opposition leading to the filing of numerous cases where stop orders have been issued and extended over time.¹⁷ The opposition mainly emerges from two (2) reasons: lack of access to information and conflict between expectations of different stakeholders involved in PPPs.¹⁸ Other issues are often as a result of the imbalance in reactive and proactive stakeholder management approaches. They also arise from the absence of any guidance on the responsibility and accountability issues surrounding the stakeholder management of PPP projects.¹⁹

Barron and Barron define stakeholders as those persons who have an interest in and are directly affected by the project and also possess large potential to influence the project.²⁰ This

¹³Organisation for Economic Cooperation and Development, Recommendation of the Council on Principles for Public Governance of Public Private Partnerships. <https://www.oecd.org/gov/budgeting/oecd-principles-for-public-governance-of-public-private-partnerships.htm> on 4 April 2018.

¹⁴ Section 2(1), *Public Private Partnership Act* (Act No. 15 of 2013).

¹⁵ <https://www.intheblack.com/articles/2017/12/01/success-public-private-partnerships> 9 June 2019

¹⁶ El-Gohary N M, Osman , H., El-Diraby T.E. ‘Stakeholder management in public private partnerships’, 24 *International Journal of Project Management* (2006), 595-604.

¹⁷ <https://www.kenyans.co.ke/news/33677-lamu-coal-plant-stop-order-reinstated-high-court-nairobi> on 4 May 2019.

¹⁸ Levy, M, Build, operate, transfer: paving way for tomorrow’s infrastructure. *Wiley*, New York, 1996.

¹⁹ Schepper, De, Dooms M, Haezendonck E, ‘Stakeholder dynamics and responsibilities in Public-Private Partnerships: A mixed experience’.32 *International Journal of Project Management* (2014) 1210-1222.

²⁰ Barron A & Barron M. ‘Project Management’. Houston. Connexions, Rice University. Chapter 5, 2013.

research focuses on the community that is directly affected by PPP projects in the energy sector in Kenya as the primary stakeholders. These are the communities on whose land or within whose locality or whose neighbourhood a project is to be set up (“the locals”), the environmental activists supporting the locals and other persons directly and indirectly affected by the project. This research focuses on the project identification and initiation phases as the case study used has not reached project implementation stage yet.

The Lamu Power Project was originally set to be established in Kilifi County but this did not materialize because the government met a unified opposition from the residents.²¹ The Least Cost Power Development Plan (LCPDP) which was in charge of the project proposed that the power plant to be transferred to Lamu where the government was unlikely to receive a unified opposition.²² Public participation in this project was being undertaken after the expression of interest had been issued, the tendering process completed and an award of the contract made.²³ The National Environment Management Authority (“NEMA”) released the environmental and social impact assessment (ESIA) for the project on 26th July 2016.²⁴ The public participation was conducted after a decision had been made to establish the power plant and a private entity already identified. It was, in fact, the private party, Amu power, that undertook the public participation. In a bid to fast track the project opposing groups were left out of the public forums.²⁵

This study shows that public participation in Kenya, and particularly in the identified case study, falls below the best practices as exemplified by international scholars, binding and non-binding instruments including but not limited to the citizen participation ladder developed by Sherry Arnstein,²⁶ the Public Participation Spectrum prepared by the International

²¹ DeCOALonize. ‘The impacts on the community of the proposed coal plant in Lamu’.31 *UNEP Perspectives*, (2018),4.https://wedocs.unep.org/bitstream/handle/20.500.11822/25363/Perspectives31_ImpactCoalPlantLamu_28032018_WEB.pdf?isAllowed=y&sequence=1 on 8 March 2019.

²² DeCOALonize. The impacts on the community of the proposed coal plant in Lamu.

²³ Ministry of Energy. The development of one 900-1000MW Coal Power Plant at Lamu, Lamu County by Private Investors, 2014. <https://www.decoalize.org/wp-content/uploads/2017/02/original-tender.pdf> on 18 March 2019.

²⁴ Amu Power. Environmental and Societal Impact Assessment Study. Main Volume, 2016. <https://www.amupower.co.ke/esia.html> on 18 March 2019.

²⁵ DeCOALonize. The Impacts on the Community of the Proposed Coal Plant in Lamu.

²⁶ Arnstein, S.R. ‘A ladder of citizen participation’. 35 (4) *Journal of the American Institute of planners* (1969), 216-224.

Association for Public Participation²⁷ and Article 10 of the Rio Declaration on which Aarhus convention²⁸ is founded. Generally, these international standards provide for the following as the parameters for effective public participation: provision of balanced and objective information to the public; obtaining feedback from the public and analysis of the best possible alternatives; working directly with the public throughout the project planning and development process to ensure that any concerns raised by the public are addressed on a consistent basis and the decisions concerning the project are explained in a clear and transparent manner; partnering with the public in decision making and identification of preferred solutions and placing the decision before the public to decide; and finally, that the public should have access to judicial remedies in the event that the government agency excludes them from decision making. The end result of compliance with these standards would be improved and quality decisions and legitimacy of the project.²⁹

Since PPPs in the energy sector are scientific in nature and there is a movement to adopt citizen science as a best standard for public participation.³⁰ Citizen science entails the collection and analysis of data relating to the natural world by members of the general public, typically as part of a collaborative project with professional scientists. It involves engaging the public in scientific research on matters concerning the project. The feasibility studies and environmental impact studies for PPPs are conducted by professional scientists. Scientific studies that inform public policy should be open to the affected community.³¹ Citizen science is also a central tenet of effective public engagement leading up to the implementation of a PPP. Citizen science finds foundation on Article 2(6) of the Espoo Convention which requires affected parties by a transboundary environmental project to participate in environmental impact assessment.

²⁷ International Association for Public Participation, 2014. Iap2 Public Participation Spectrum. Louisville. [https://iap2canada.ca/Resources/Documents/0702-Foundations-Spectrum-MW-rev2%20\(1\).pdf](https://iap2canada.ca/Resources/Documents/0702-Foundations-Spectrum-MW-rev2%20(1).pdf) on 2 March 2019.

²⁸ Also known as UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,

²⁹ Margera, E. "An Update on the Aarhus Convention and its continued global relevance.

³⁰ Louv, R. and Fitzpatrick, J.W., 2012. Citizen science: Public participation in environmental research. Cornell University Press.

³¹ Muki Haklay. "Citizen Science and Policy: A European Perspective". Woodrow Wilson International Center for Scholars, 2015, p. 11.

1.2 Problem Statement

Whereas the Constitution places public participation at the centre of all development, there is lack of a succinct policy, legal and regulatory framework to govern the day to day implementation and enforcement of this constitutional principle. Secondly, in the assessment of the suitability of a PPP project in Kenya, the concerns of the local community, the primary stakeholders, are not considered as one of the key assessment areas. The focus is largely on profit, cost efficiency and value for money test with little emphasis on public participation.

This study looks at international standards on public participation to establish how effective public participation can be adopted in PPP projects in Kenya to ensure that social concerns are taken care of at all stages.

1.3 Hypotheses

The present enquiry proceeds from four hypotheses:

1. The people of Kenya are the sovereign, therefore, engaging them in decision making in PPP projects through effective public participation will result in acceptable, socially responsive and sustainable development;
2. PPP projects present an avenue for the Kenya government to fund infrastructure development through the use of private sector resources thus minimizing reliance on budgetary provisions that are barely sufficient and debt which is presently at unsustainable levels.
3. Kenya's policy, legal and regulatory framework for PPPs does not incorporate guidelines for effective public participation in line with international standards;
4. PPP projects in the Energy Sector in Kenya, and particularly the 1050 MW Lamu Coal-Fired Power Project, fail to incorporate effective public participation in the project identification and initiation phases leading to stakeholder opposition resulting in delays in the implementation of the projects;

1.4 Research Objectives

The following are the objectives of this study:

1. To evaluate the growing interest in PPPs as an avenue for the Kenya government to fund infrastructure development through the use of private sector resources to lessen the reliance on debt and meagre budgetary provisions.
2. To evaluate the existing policy, legal and regulatory frame work on PPPs in Kenya to ascertain whether it makes provisions for the implementation of the constitutional principle of public participation;
3. To identify and discuss relevant international standards that Kenya can adopt to ensure that there is effective public participation in the PPP project identification, initiation and appraisal stages which are most critical to the social acceptability of the projects;
4. To investigate the Lamu Coal-Fired Power project to ascertain the causes of the sustained stakeholder opposition against it; and
5. To make recommendations for effective public participation in Kenya as an integral part of the PPP project assessment process.

1.5 Research Questions

This thesis investigates four (4) principal questions:

1. Is there justification for the use of PPPs to fund infrastructure development in Kenya and if so, what strides has Kenya taken to ensure that there is appropriate policy, legal, regulatory framework to support PPPs?
2. Does the policy, legal and regulatory framework for PPPs in Kenya incorporate provisions for public participation?
3. What standards exist internationally for assessing effective public participation?
4. What lessons for future design of PPPs in Kenya can be learnt from the Lamu Coal-Fired Power Project particularly in relation to stakeholder management?

1.6 Literature Review

Mikangi (2013) argues that a bulk of the literature in Kenya in respect of PPPs has been authored by economists and engineers. For this reason, the focus has been largely on profit,

cost efficiency and value for money considerations and not the normative aspects of PPPs.³² Public participation is a national value enshrined under article 10 of the Constitution of Kenya. It is also an expression of the sovereignty of the people of Kenya under Article 1 of the Constitution. There is, therefore, a need to shift focus from the monetary aspects of PPPs to the normative values in view of this constitutional dictate.

There are several debates around the issue of public participation in PPPs. There are those who believe that public participation at all stages of development of a PPP project is necessary for purposes of dealing with the social related problems in PPPs such as low acceptability and poor stakeholder relations.³³ Another debate is around the effectiveness of public participation on the innovative character, quality and performance of a PPP project and the argument that public participation is suitable in certain kinds of PPP projects as opposed to others.³⁴ Wong & Wong argue that as of necessity, any call for public participation especially the aspect of disclosure should strike a balance between transparency and accountability on the one hand and protection of commercially sensitive information on the other hand.³⁵ Others see public participation as an extra check for accountability purposes and propose that it should be advocated for on normative grounds.³⁶

Thuo D. N. recommends the identification of public interest goals by stakeholders in the implementation of PPPs before embarking on any PPP project and the establishment of a mechanism for public participation and information disclosure at a very early stage of the PPP process as a means of dealing with the social related problems, low social acceptability, and poor internal and external stakeholders' relationships that have been identified as barriers to PPP projects implementation.³⁷

³²Mikangi I, 'Public private partnerships by local authorities in Kenya; Legal and policy lessons for county governments' Unpublished LLM Thesis, University of Nairobi, 15 November, 2011, 13

³³ Wong K, Wong J M W, 'Public participation in PPP projects-the way forward' 142, *WIT Transactions on Ecology and Environment*, 2010, 1743-3541.

³⁴ José N, Erik H K, 'Stakeholder involvement in public- private partnerships: its influence on the innovative character of projects and on project performance' *Administration and Society Journal*, 2017, 1-27

³⁵ S.T., Wong, J.M.W. and Wong, K.K.W. Public participation in public private partnership projects—the way forward. *The Sustainable World*, 142, 2011, p.79.

³⁶Gazley, B. Beyond the contract: The scope and nature of informal government- nonprofit partnerships. *Public Administration Review*, 68, 2008, 141-154.

³⁷ Thuo N. D, 'Public private partnerships model in Kenya-Opportunities and challenges'

<http://www.kenyalondonnews.org/public-private-partnerships-model-in-kenya-opportunities-and-challenges/>
19 Nov 2015

Wong K, Wong J of the University of Hong Kong argue that despite PPPs becoming an increasingly popular mode of delivery of public facilities and services, little attention has been attributed to uplift the process of public participation in PPP projects. They believe that there is need to examine what should be done to ensure the interests of the community are catered for without compromising on the financial return. They further argue that in PPPs it is absolutely necessary to balance the interests of the private investors (profits) and those of the community (people and the planet.). They make the proposition that to enhance the success of a PPP, it is necessary that the concerns of the society being affected by or interested in scheme are taken into account.³⁸

In a study conducted in 2017 by Jose N. Erik H K, to establish the impact of stakeholder involvement on the innovative character of projects and the quality of projects performance it was established *inter alia* that stakeholder (citizens and societal groups) involvement is contingent upon the type of PPP project. It was further established that stakeholder involvement in Design, Build, Finance, Manage and Operate (“DBFMO”) did not lead to a better project performance contrary to earlier findings in non-DBFMO environmental projects. The researchers, however, explained that this could be the case because the stakeholders were only involved after the tendering process was over and hence their involvement could only result in minor changes.³⁹

The Kenya courts have had many opportunities to underscore the importance of public participation. The Supreme Court of Kenya in a case challenging the sharing of spectrum, airwaves and other forms of signal distribution by the Communications Authority of Kenya held that “*public participation ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted*”.⁴⁰

³⁸ Wong K, Wong J M W, ‘Public participation in PPP projects-the way forward’ 142, *WIT Transactions on Ecology and Environment*, 2010 1743-3541.

³⁹ José N, Erik H K, ‘Stakeholder involvement in public- private partnerships: its influence on the innovative character of projects and on project performance’ *Administration and Society Journal*, 2017, 1-27

⁴⁰ *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR

The High Court of Kenya has held that public participation should be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfillment of the Constitutional dictates.⁴¹ In the Mui Coal Basin case,⁴² Lady Justices Thuranira, Mutende and Justice Prof Ngugi laid out the principal tenets of effective public participation. The first tenet of public participation requires the government agency concerned to fashion out a programme for public participation. In doing this, the concerned agency should take into consideration the quantity and quality of the public participation.⁴³ The second tenet is that depending on the nature of the project, the public institution involved should come up with innovative ways of ensuring that there is effective public participation granted that communities have different means of accessing information and participating in public discourse. The third tenet is that the public participation programme should include a means of disseminating information to the public to ensure that the local community is able to access the necessary information about the project. In the fourth tenet, the court recognized that not everyone would be able to take part in public participation. However, efforts should be taken to ensure that there is diversity and inclusivity. Those most affected by the project should have a bigger say in its implementation and design. The fifth principal tenet is that it is not the duty of the government agency to accept all the views but to act in good faith and ensure that all views are taken into consideration. In conclusion, the court held that the right to public participation is not meant to usurp the technical and democratic role of office holders but rather to cross-fertilize and inform the different views of the stakeholders.

From the above literature, it is evident that there exists a research gap on the failure to put in place and implement a framework for effective public participation for PPP projects in the energy sector in Kenya.

1.7 Methodology and Approach

This thesis relies on one case study, the 1050 MW Lamu Power Project which has faced massive external stakeholder opposition leading to a delay in its implementation. The project

⁴¹*Robert N. Gakuru & Others v Governor, Kiambu County* [2013] eKLR

⁴²*Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015]

⁴³*Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*

was scheduled to commence in 2015 but is yet to start, to-date in June, 2019, with parties embroiled in disputes before the National Environmental Tribunal and the courts.

The study relies on the review and analysis of peer-reviewed journal articles that document empirical research as well as secondary and tertiary sources of literature. It shall entail a thorough review of statutes, journal articles, newspaper reports and case law relevant to the research.

On approach, the study adopts a qualitative method and focuses on the Lamu Power Project as a case study to formulate an argument for the need for effective public participation. It is focused on PPP projects in the energy sector in Kenya and particularly narrows down on the identified project because of its illustrative power as it exhibits the points under consideration in this research.

The literature analysis of international standards and writings from various countries around the world is aimed at drawing the benefit from world best practices.

1.8 Limitations and Assumptions

The research methodology adopted owing to limited resources and time denies the researcher the use of self-collected and processed empirical data from which conclusions would be easily drawn.

The Lamu Power Project has also been heavily politicised. The political nature of the issues around it may obscure the real issues leading to a skewed outcome.

The author makes the assumption that there has been accurate reportage of the issues surrounding the project as this research is entirely based on secondary sources of information.

1.9 Chapter Breakdown

Chapter one provides the backdrop against which this research was undertaken. It presents the problem, the hypothesis, research objectives and the questions answered through this research. It also sets out the methodology and approach, limitations and assumptions made in the study. The chapter also sets out the available literature relevant to the study.

Chapter two provides the conceptual framework underlying the study which includes a definition of key concepts relied on as well as international standards of public participation.

It also provides an opportunity to see how the courts in Kenya have interpreted this normative requirement.

Chapter three provides an explanation of the PPP model as well as the justification for its use since the 1990s. It also sets out the policy, legal and regulatory framework governing PPPs in Kenya as well as the framework relating to public participation generally and specifically to PPPs.

In chapter four, an analysis of the case study is undertaken particularly on issues relating to public participation or the lack thereof and the outcome.

Chapter five provides a conclusion of the study and recommends an appropriate framework for public participation in PPPs to ensure that there is a balance between private sector and public-sector interests leading to sustainable and socially responsive development.

CHAPTER TWO

2.0 Conceptual Framework

2.1 Introduction

Public participation has over the years been offered by scholars and practitioners alike as the solution to the twin crisis of failure of states and markets in the developing world. Ackerman J argues that state failure can be reversed through the action of an informed citizenry that knows its rights and requires the government to uphold them.⁴⁴ Whereas the world has experienced a shift from citizen's faith in state intervention to an acceptance of the market model, the latest wave of development thought appears to be founded on a solid commitment to public participation⁴⁵. It is, therefore, no surprise at all that participation of the people is recognized in the Kenya Constitution as one of the national values and principles.⁴⁶

The purpose of this chapter is to provide a conceptual framework for the study of public participation generally and particularly the participation of the communities affected by energy sector PPPs such as the Lamu Power Project. I will first discuss the emergence and definition of the concept of public participation with the aim of establishing a working definition for this study as well as the justification for public participation. I will subsequently discuss the related concept of accountability.

Public participation as a matter of necessity entails the mapping out of relevant stakeholders. I will assess two tools for stakeholder analysis and recommend one. Thereafter, I will assess the existing binding and non-binding international legal instruments and standards on public participation and in conclusion provide what I consider the parameters for effective public participation.

2.2 Emergence and Definition of Public Participation

As noted in the introduction, the Constitution of Kenya vests all sovereign power in the people of Kenya.⁴⁷ The people exercise this power either directly or through democratically elected

⁴⁴ Ackerman, J, Social Accountability in the Public Sector; A conceptual discussion, *World Bank Social Development Papers* no.82, March 2005

⁴⁵ Ackerman, J, Social Accountability in the Public Sector; a Conceptual discussion

⁴⁶ Article 10, *Constitution of Kenya*, 2010

⁴⁷ Article 1, *Constitution of Kenya*

representatives. The representatives to whom power is delegated are the three state organs- the executive, legislature and the judiciary- which are in turn expected to exercise the power in accordance with the Constitution. The people retain residual powers through which they can hold the state organs to account for their decisions and also participate in decision making.

The notion of public participation in decision-making is not novel. It emerged during the time of the Greek City-States, where it was believed that every 'citizen' should be allowed to participate in decision-making.⁴⁸ The word 'participation' became popular political vocabulary in the late 1960s under the impetus of demands, notably from students. It was one of the last of De Gaulle's rallying calls in France⁴⁹ and in America the great society anti-poverty programme included a provision for maximum-feasible participation of those concerned.⁵⁰

With the recent revival of public participation, there have been many shifts in understanding of the concept of participation as there are varied definitions of the same. Sherry Arnstein (1969) defined participation as the redistribution of decision-making power that enables the 'have-not' citizens, presently excluded from the political and economic processes, to be deliberately included in the future. In other words, she defined participation as the means by which disadvantaged citizens 'can induce significant social reform, which enables them to share in the benefits of the affluent society'.⁵¹

Public Participation refers to the process by which citizens, as individuals, groups or communities (also known as stakeholders), take part in the conduct of public affairs, interact with the state and other non-state actors to influence decisions, policies, programs, legislation and provide oversight in service delivery, development and other matters concerning their

⁴⁸ Robert K, Hannsen F, *The origins of democracy: a model with application to ancient Greece. The Journal of Law & Economics* Chicago University Press, Vol. 49, No. 1 (April 2006), pp. 115-146

⁴⁹ Gordon B, The formations of De Gaulle's political philosophy-legacies of the belle epoque. *Historical Reflections* vol.19 no. 1 1993, 63-80

⁵⁰ Shalom B Y, Moffit A R, Scholz K.J, an assessment of the effectiveness of anti-poverty programs in the US, *Oxford Handbook on the Economics of Poverty*, Oxford University Press, 2012

⁵¹ Arnstein, S.R. A ladder of citizen participation. *Journal of the American Institute of planners*, 35(4),1969, pp.216-224.

governance and public interest, either directly or through freely chosen representatives.⁵² I believe that this definition is all-encompassing for purposes of this study.

2.3 Justification for Public Participation

Since the mid-1990s, calls have been made for involvement of the public in policy development processes and decision making in response to the perceived crisis of democracy, which questioned the normative and functional adequacy of democratic institutions and of the rights and responsibilities of citizens.⁵³ Proponents of this discourse have constantly argued that traditional representative democracy has become dysfunctional necessitating the direct involvement of citizens in policy and decision making.⁵⁴

Public participation has been proposed as a mechanism for seeking accountability from the state organs to which the people, the sovereign, delegate their power. Impatience with biased, ineffective and outright corrupt institutions has led people to seek new forms of engagement with existing accountability systems – and to invent new ones when necessity seems to dictate it. Where they cannot participate directly in closed official oversight processes, civic groups have often mimicked their functions through, for instance, people’s audits of government spending or public hearings on the environmental impacts of proposed infrastructure projects.⁵⁵

Any engagement in public participation will as a matter of fact require an identification and mapping of the stakeholders to be engaged in the exercise. This exercise must be effective to ensure that no relevant stakeholder is left out. I will now discuss some of the tools available for stakeholder identification for public participation.

⁵² The Public Participation Bill, 2018

⁵³ Mc Bride M, *Public participation: theoretical perspectives and application in contexts of poverty and inequality*, 2005

⁵⁴ Dahl R A, *Democracy and its critics*, Yale University Press, New Haven, 1989, 3. Traditional democratic process entail four distinctive characteristics to wit; effective participation which meant that that throughout the decision- making process citizens would be given an adequate opportunity to express their preferences as to the final outcome. The other three characteristics include voting equality at the decisive stage, enlightened understanding and lastly that people must control the agenda. With representative democracy at the nation level representatives cannot be said to represent the views of the community hence the views of the community would need to be addressed through other channels hence the emergence of public participation as an additional check and safeguard against state excesses.

⁵⁵ Goetz M.A, Jenkins R, *Reinventing accountability: Making democracy work for human development*, International Political Economy Series, Palgrave Macmillan, 2005

2.4 Stakeholder Analysis Tools

2.4.1 Imperial College London's Influence-Interest Grid

The Interest-Influence Grid stakeholder analysis tool was developed in 2007 at the Imperial College in London⁵⁶. This tool plots stakeholders according to their influence and interest in a project. Stakeholders are placed in four (4) categories: those that are involved in the project, those that are affected by the project and those that can influence the project.⁵⁷ The first group comprises of individuals of high influence but who show little interest on the project. The key is to provide them with sufficient information about the project but not to overwhelm them with data. The second group of stakeholders comprises of individuals of high influence and high interest. The prime objective is to manage these stakeholders closely;⁵⁸ this category of stakeholders must be identified and engaged with great efforts. The third group of stakeholders is made up of those who have low influence and low interest in the project. The project planners should keep them informed but only minimal effort should be spent on this group. The fourth group of stakeholders is made up of those with low influence and high interest. This group of stakeholders should be adequately informed and consulted to ensure that all the issues are addressed.

The justification for stakeholder prioritisation is that stakeholders cannot be managed as a homogenous group- their different roles and responsibilities ought to be taken into account as well as their different concerns, expectations and priorities.⁵⁹ As such simultaneous interaction with all identified groups of stakeholders with attempts to evenly meet their interests is costly and ineffective. Prioritization allows the use of limited resources strategically to address the concerns of all stakeholders.⁶⁰

⁵⁶ DFID Tools for Development: A Handbook for those Engaged in Development Activity. Version 15.1, March 2007, UK http://www.mindtools.com/pages/article/newPPM_07.htm on 27 May 2019

⁵⁷ Mints, A. and Evelina K. "Methods of Stakeholder Prioritisation In the Context of Stakeholder Management." (2019).

⁵⁸ Mints, A and Evelina K. "Methods of Stakeholder Prioritisation In the Context of Stakeholder Management."

⁵⁹ Aapaoja, A., & Haapasalo, H. (2014). A framework for stakeholder identification and classification in construction projects. *Open Journal of Business and Management*, 2, 43-55. <https://doi.org/10.4236/ojbm.2014.21007>

⁶⁰ Mabrouk, M., Sperandio, S., & Girard, P. Stakeholder mapping in a collaborative project for a sustainable development. (2014) *IFIP Advances in Information and Communication Technology* (vol. 439, pp. 518-525). https://doi.org/10.1007%2F978-3-662-44736-9_63

2.4.2 Bourne's Stakeholder Circle

The Bourne's Stakeholder Circle is based on the premise that a project can only exist with the informed consent of the key stakeholders⁶¹. The power axis in the stakeholder circle is maintained by the collaboration of all stakeholders.⁶² Some stakeholders such as the investors and the donors have the power to stop the project through withdrawal of funds allocated to the project.⁶³ The local community has the power to stop the project through political opposition. The success of a project is dependent on the successful management of these stakeholders.

Bourne proposed the method to assess the relative importance of stakeholders by considering such factors as power, proximity and urgency. Based on these three factors an "Index Value" was calculated that varied 1 (low) to 5 (high). Bourne emphasised a degree of subjectivity in applying this method of prioritisation as it would be difficult to avoid subjectivity connected with the use of expert evaluation methods in the process of stakeholder prioritisation.⁶⁴

I recommend the Bourne's Stakeholder Circle as it proposes a coherent methodology of identification, prioritization, visualization, engagement and monitoring of stakeholders throughout the project life.

2.5 Accountability

Because holding delegated authority accountable is integral to the idea of a government subject to popular control – to democracy – there is no escaping the idea of accountability.

Accountability is a relationship where ordinary citizens are able to hold office bearers answerable for their actions. Anne Marie Goetz and Rob Jenkins define accountability as a way of providing citizens a means to control the behaviour of actors such as politicians and government officials, to whom power has been delegated, whether through elections or some other means of leadership selection.⁶⁵ Accountability institutions exist to support the rights of the less powerful in accountability relationships. Accountability has two elements:

⁶¹ Bourne, L. Stakeholder identification and prioritisation. Series on stakeholder engagement. 4 (5) *PM World Journal*, (2015) 1-6

⁶² Bourne, L., and Derek HT W. "Visualising and mapping stakeholder influence." *Management decision* 43, no. 5 (2005): 649-660.

⁶³ Bourne, Lynda. "Project relationships and the stakeholder circle." In *PMI Research Conference. Montreal Canada, PMI*. 2006.

⁶⁴ <https://www.stakeholdermapping.com/stakeholder-circle-methodology/> on 8 June 2019

⁶⁵ Goetz M.A, Jenkins R, *Reinventing accountability: Making democracy work for human development*

availability of information about decision making by public officers and the provision of justifications for decisions by public officers. The public officers should be in a position to suffer penalties for those that are dissatisfied with the correctness of their decisions or the reasons given for their decision. For a power holder to be answerable, they must provide a written rationale for their decision supported with documentation and the testimony from people consulted in the process.

Some authors have argued that accountability can only exist as an element of a “principal-agent relationship”.⁶⁶ Others have argued that accountability emphasizes the external nature of the accountability relationship.⁶⁷ I am of the view that although externality and superior authority are key elements of accountability, the two are by no means necessary for accountability to exist. Examples of accountability beyond the two elements exist in ‘internal’ and ‘horizontal’ accountability relationships that do not rely on the two elements.

Failed democracy has highlighted the shortcomings of conventional accountability mechanisms and the need for substantial institutional renewal to come up with new ways of making powerful actors, within and beyond the state, accountable for the impact of their actions on poor people. Increased ‘participation’, most notably through a proliferation of consultative exercises to bring the ‘voices of the poor’ to the ears of policy-makers, has been touted as the solution. These initiatives have, however, turned to be mere tokenism hence the need to shift the focus from simply capturing the voices of the marginalized to holding the powerful accountable.⁶⁸

According to classic democratic theory, governments are accountable to the people because the citizens are the original power holders who delegate authority temporarily and over certain specific issues to the government.⁶⁹ This understanding of the structure of democracy should ground all discussions of accountability.

⁶⁶ Moreno E., Crisp, B., & Shugart, M. “The Accountability Deficit in Latin America.” In Mainwaring & Welna, ed. (2003): 79-131.

⁶⁷ Mulgan, R, “Accountability: An Ever-Expanding Concept?,” *Public Administration*, Vol. 78, No.3, pp. 555-573.

⁶⁸ Goetz M.A, Jenkins R, *Reinventing accountability: Making democracy work for human development*, International Political Economy Series, Palgrave Macmillan, 2005.

⁶⁹ This classic theory is aptly captured by Article 1 of the Constitution of Kenya, 2010

Ackerman J proposes six parameters for designing an intervention around social accountability as follows: a. Incentive Structure - punishment or reward based approach; b. Accountability for what? – rule following or performance orientation; c. Level of institutionalization – ranging from independent external initiatives, to one where the governments have institutionalized participation of outside groups; d. Depth of involvement – is the engagement with government consultative in nature or does it involve closer interaction from the planning stages; e. Inclusiveness of participation – ranging from including only the “well behaved” groups to having extensive consultations with a variety of actors, including marginalized groups; and f. Branches of government – whether target of effort is executive, legislature or judiciary.⁷⁰ Ackerman’s parameters for designing intervention my view is an apt analysis for accountability interventions and is readily applicable to public participation which is a form of accountability mechanism.

2.6 Public Participation in Environmental Decision Making

According to Du Plessis, public participation is critical in environmental decision making because it is an effective tool in establishing environmental priorities. It offers solutions to the existing environmental challenges and it guides the decision maker to the most accurate decision.⁷¹ Under public international law, public participation is considered essential because the affected stakeholders are highly likely to be unrepresented in environmental matters and in decision making processes.⁷² Communities may provide useful information to decision makers since environmental values cannot be easily quantified. Under international environmental law, public participation fosters accountability and ensures that the public officials stick to legal procedure in dealing with environmental matters. An environmental policy or public project runs the risk of delays in implementation where the views of the public are not considered.⁷³ One of the overriding problems in all PPPs in Kenya has been the lack of a proper mechanism for engaging the public. A case in point is the Lamu Coal Power

⁷⁰ Ackerman, J *Social Accountability in the Public Sector; a conceptual discussion*, World Bank Social Development Papers no.82, March 2005

⁷¹ du Plessis, A. Public participation, good environmental governance and fulfilment of environmental rights. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 11(2), 2008, pp.1-34.

⁷² du Plessis, A. Public participation, good environmental governance and fulfilment of environmental rights.

⁷³ du Plessis, A. Public participation, good environmental governance and fulfilment of environmental rights.

Project which has faced delays as a result of court cases and public opposition.⁷⁴ The delays in implementation arise from the failure to involve the affected local community and other stakeholders through an effective public participation process.

Professor Jona Razzaque argues that public participation has a limited impact in environmental decision making.⁷⁵ He believes that the reason why public participation process does not bring any change is that it does not challenge the power and authority of the institutions in decision making.⁷⁶

2.7.0 Public Participation in International Law

There has been a slow growth of public participation in international law. The slow development meant that states did not have an obligation to ensure that there was effective public participation on issues of development.⁷⁷ To fill the gap left by international and domestic laws, several scholars and associations have developed parameters for public participation as follows:

2.7.1 Sherry Arnstein's Citizen Participation Ladder

Sherry Arnstein (1969) developed the citizen participation ladder to explain the varying levels of public participation. The first two stages of the citizen participation ladder are manipulation and therapy.⁷⁸ These two levels are non-participatory because the contracting authority has developed a plan and the job of the contracting authority is to drum public support for the project and educate the public about the best plans fashioned by the contracting authority.⁷⁹ The third step in the citizen participation ladder. The contracting authority informs the public about the project or plan as a legitimate step towards public participation but there is no feedback required.⁸⁰ The fourth step on the ladder is the consultation step where the

⁷⁴ Downing, K. How is China using environmentalism to gain influence in the developing world? (Master's thesis).

⁷⁵ Richardson, B.J. and Razzaque, J. Public participation in environmental decision-making. *Environmental law for sustainability*, 6, 2006, pp.165-194.

⁷⁶ Banisar, D., Parmar, S., de Silva, L. and Excell, C. Moving from principles to rights: Rio 2012 and access to information, public participation, and justice. *Sustainable Dev. L. & Pol'y*, 12, 2011, p.8.

⁷⁷ Biygautane, M., Neesham, C. and Al-Yahya, K.O. *Institutional entrepreneurship and infrastructure public-private partnership (PPP): Unpacking the role of social actors in implementing PPP projects*. *International Journal of Project Management*, 37(1), 2019, pp.192-219.

⁷⁸ Arnstein, S.R. *A ladder of citizen participation*. *Journal of the American Institute of planners*, 35(4), 1969, pp.216-224.

⁷⁹ Arnstein, S.R. *A ladder of citizen participation*

⁸⁰ Arnstein, S.R. *A ladder of citizen participation*

contracting party organizes public meetings and carries out surveys on the project. Arnstein believed that this stage is the window dressing stage and without taking the feedback into consideration this process is just meant to prevent legal hurdles. The fifth step in the citizen participation is the placation stage.⁸¹ This is the first step towards effective public participation where the stakeholders are handpicked and placed into committees. Citizens are able to advise and plan but office holders still have the right to judge the legitimacy and the feasibility of the advice.⁸²

The sixth step in the ladder is the partnership stage where power is evenly distributed between the citizens and the power holders. Joint committees that allow for sharing of power in planning and decision making are created.⁸³ The seventh step on the ladder is delegation of power where citizens hold the majority of the seats in the committees and have delegated powers to make decisions. The final step in the citizen participation ladder is citizen control where citizens handle the entire process of planning, policy making and managing the programme.⁸⁴ At this point, there are no intermediaries on the project and the citizens have control to ensure accountability in the process.

Arnstein's public participation ladder is perceived as problematic in the context of developing countries in that it relies on individual citizen power in determining the end product of public policy. In the context of developing countries, community action is perceived as more significant than individual action.⁸⁵ Choguill's community participation concept places emphasis on communal as opposed to individual participation as well as the strategic importance of assistance from outside in the process of participation whether it comes from government or non-governmental sources. She concludes that different levels of community participation will depend on the governmental attitude towards the community.⁸⁶

⁸¹ Arnstein, S.R. *A ladder of citizen participation*

⁸² Arnstein, S.R. *A ladder of citizen participation*

⁸³ Arnstein, S.R. *A ladder of citizen participation*

⁸⁴ Arnstein, S.R. *A ladder of citizen participation*

⁸⁵ Choguill M B G, *A Ladder of Community Participation for Underdeveloped Countries*, University of Sheffield, UK, 1996

⁸⁶ Choguill M B G, *A Ladder of Community Participation for Underdeveloped Countries*

2.7.2 Rio Declaration on Environment and Development

The Rio Declaration on the Environment and Development was passed after extensive deliberation between party states. It is a non-binding legal instrument but it outlines the key tenets and principles that are necessary for sustainable public participation. Principle 10 of the Rio Declaration states that environmental issues are best handled with the participation of the concerned citizens at the relevant levels.⁸⁷ This principle lays down the framework for states on how to approach public projects that have an impact on environmental issues. Concerned citizens are the primary stakeholders and should be involved in the design and implementation of the project.⁸⁸ Principle 10 further states that concerned citizens at the national level should have appropriate access to information concerning the environment that is held by public authorities. Public authorities are required not to conceal information especially that is detrimental to the environment.⁸⁹ They are required to disclose information about hazardous materials arising from a project as well as furnish the public with the available opportunities for public participation.⁹⁰ The cornerstone of public participation is the state coming up with mechanisms to ensure that the concerned citizens participate in the design and implementation stages of the project.⁹¹ States have an obligation to facilitate and encourage public participation and should make information available. In addition, the concerned stakeholders should have access to judicial and administrative proceedings to seek redress and remedies.⁹²

Principle 10 of the Rio Declaration has far-reaching implications not only on environmental justice but in democratic governance as well.⁹³ It provides the foundation upon which international legal instruments on public participation have emerged. The Aarhus Convention on public participation is founded on Principle 10 of the Rio Declaration. Under the Aarhus Convention, civil society or the public is required to bring cases before the court

⁸⁷ Hens, L. The Rio Declaration on environment and development. Regional sustainable development review: Africa. Oxford, UK, Eolss Publishers, 2005.

⁸⁸ Hens, L. The Rio Declaration on environment and development

⁸⁹ Hens, L. The Rio Declaration on environment and development

⁹⁰ Orellana, M. Governance and the sustainable development goals: The increasing relevance of access rights in principle 10 of the Rio declaration. Review of European, Comparative & International Environmental Law, 25(1), 2016, pp.50-58.

⁹¹ Hens, L. The Rio Declaration on environment and development

⁹² Colombo, E., 2017. Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration. UCLA J. Envtl. L. & Pol'y, 35, 2005, p.98.

⁹³ Hens, L. The Rio Declaration on environment and development

where the concerned citizens feel that the state is not complying with the tenets of the convention.⁹⁴ The Aarhus Convention established the Compliance Committee where citizens and the civil society can litigate cases involving non-compliance with the articles of the Convention.;

2.7.3 Aarhus Convention

The Aarhus Convention, also known as the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, came into force on 25th of June 1998. The Convention has been ratified by 46 states and the European Union.⁹⁵ The aim of the Convention is to provide for transparent and accountable public participation and to foster public support for environmental decisions.⁹⁶ Article 2(3) of the Convention defines environmental information as any information whether written, visual, aural or electronic that states the factors and policies that are likely to affect the environment and the assumptions that are considered when making decisions that have an effect on the environment, state of human health safety and the conditions on human life that are affected by the decisions that have an impact on the environment.⁹⁷ Parties to the Convention are required to maintain a clear, transparent and consistent framework to enable public participation.

Article 5(1) (b) requires parties to establish mandatory systems to ensure a regular and constant transfer of information from the public authority to the public on projects that are likely to have a significant impact on the environment. Article 5(1) (c) requires that in the event that there is imminent danger to the human health any information that could be helpful in mitigating the risk should be released immediately and without delay to the members of the public who are most affected by the imminent danger.⁹⁸ Arguably, the strongest feature of this Convention is that it embodies a presumption in favour of public disclosure of

⁹⁴ Hens, L., 2005. The Rio Declaration on environment and development

⁹⁵ Devane, D.J. The Aarhus Convention and the experience of public participation in environmental impact assessments, 2016.

⁹⁶ Mauerhofer, V. Public participation in environmental matters: Compendium, challenges and chances globally. *Land Use Policy*, 52, 2016, pp.481-491.

⁹⁷ Ziakova, M.C., Hirano, M., Bouyt, G. and Ferapontov, A. Stakeholder involvement activities in Slovakia. NRA's Commitment to Transparent Regulatory Process. Stakeholder Involvement in the French Regulatory Process-From Public Information to Public Participation. Stakeholder involvement in nuclear decision making in the Russian Federation (No. NEA--2017-01-17-19), 2017.

⁹⁸ Rendón, L.O.U., Gubareva, A.V. and Kovalenko, K.E. Aarhus convention: Exceptional duties or stimulus to development. *QUID: Investigación, Ciencia y Tecnología*, (2), 2018, pp.116-119.

information and places the burden of proof on the public body to justify non-disclosure by citing legitimate reasons that outweigh the public interest in disclosing the information.

If Kenya were a signatory to the Convention, these state obligations would be binding upon it and it would particularly be required to provide information on the measures put in place to mitigate the danger posed by the Lamu Power Project which, no doubt, poses a health danger to the inhabitants of Kwawasi in Lamu County and areas beyond. Article 5(2) (b) requires state parties to ensure that public authorities maintain a list, registers or files on the environmental information concerning the project. The article further requires public officials to support the public in accessing the information as per the Convention. This requirement is to ensure that public authorities and public officials do not become a hinderance in accessing information concerning projects with adverse environmental impact. The Convention further requires public authorities to ensure that environmental information is accessible through an electronic database.⁹⁹ Article 9 requires parties that are aggrieved by the environmental decisions to have access to justice through administrative or judicial proceedings.

The Convention has a broad definition of relevant stakeholders otherwise referred to as “the public concerned”. This means the public that is likely to be affected by or having interest in environmental decision making. Environmental Non-Governmental Organizations that have interest in the matter including non-governmental organisations qualify to be categorized as ‘the public concerned’.¹⁰⁰ Each party member under Article 3(4) of the Convention shall provide appropriate recognition and support to associations, organizations and groups that promote environmental protection. There is a further obligation under this article to ensure that the national legal system is consistent with this provision. This provision is set to ensure that governments do not employ draconian methods to harass and intimidate non-governmental organizations that seek to promote environmental justice.

Article 3(8) of the Convention requires state parties to ensure that persons who are exercising their rights under this convention are not penalized and harassed for their involvement.¹⁰¹

⁹⁹ Peters, B. Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention. *Journal of Environmental Law*, 30(1), 2017, pp.1-27.

¹⁰⁰ Devane, D.J. *The Aarhus Convention and the experience of public participation in environmental impact assessments*, 2016.

¹⁰¹ Devane, D.J. *The Aarhus Convention and the experience of public participation in environmental impact assessments*, 2016.

Public participation in Kenya is often riddled with persecution of persons opposed to the project.¹⁰² Article 5(1) requires public bodies to collect information and update information regularly. This is to ensure that the public is well informed about environmental matters on a continuously consistent manner.

It is imperative for Kenya to ratify the Convention to allow effective participation in decision making. The ratification of this treaty will entrench the obligation to ensure that there is a clear, transparent and consistent framework to enable public participation. It will also entrench the obligation for establishment of a mandatory system to ensure regular and constant transfer of information on projects with significant impact on the environment. It will also lead to a recognition of non-governmental organizations and other lobby groups that seek to protect the environment as the public concerned and as legitimate stakeholders.¹⁰³ It will criminalize the harassment and intimidation of the concerned stakeholders who are opposed to the project. The ratification of the Convention will help entrench public participation, particularly, in the implementation of PPPs in the energy sector in Kenya that have an impact on the environment. This will allow the concerned stakeholders to participate in decision making and as such eliminate the legal challenges that usually arise when a PPP contract is awarded.

2.7.4 African Charter for Popular Participation in Development and Transformation

The African Charter for Popular Participation in Development and Transformation (“the Charter”) was formally adopted in February 1990 following a conference on international conference in popular participation in Arusha.¹⁰⁴ The Charter was later officially adopted during the 25th Session of the Economic Commission for Africa. The Charter was adopted in response to the slow economic growth in Africa and the need for Africans to foster economic

¹⁰² Devane, D.J. The Aarhus Convention and the experience of public participation in environmental impact assessments.

¹⁰³This may, however, not necessarily have any far-reaching implications as by Article 22 of the Constitution of Kenya, 2010 the rules of standing in Kenya are fairly flexible to allow environmentalists or any person for that matter to file complaints or seek judicial intervention on matters environmental and any other matters of public interest.

¹⁰⁴ Tieku, T.K. and Gelot, L. An African perspective on global governance. *Global Governance from Regional Perspectives: A Critical View*, 2017, p.119.

growth through indigenous methods that reflect the African values.¹⁰⁵ The Charter uses the term popular participation to mean the empowerment of the people to effectively involve themselves in creating structures, policies and programmes that serve the interest of all as well as to effectively contribute to the development process and share equally its benefits. The term popular participation is used synonymously with effective public participation.¹⁰⁶ The principal role of fostering public participation is opening up the public participation process to accommodate different opinions and to foster consensus in developmental planning and to keep the government accountable. The Charter requires states to end all wars in order to allow states to participate effectively in governance.¹⁰⁷ To foster effective public participation, African governments are required to combine indigenous communication systems with modern low-cost systems to create avenues and forums for effective public participation. The Charter also advocates for the participation of women and the youth for a balanced public participation process.

African governments are under obligation to foster the popular participation of the citizens in their countries and implement indigenous and people-centric developments that do not ignore the culture and the aspirations of the African people.¹⁰⁸ The principal objective behind this charter is to ensure that African economies recover from poverty and years of recession with people-centric developments. Article 23 (1) of the Charter states that African governments should adopt programmes and development strategies that do not alienate the African values and environmental realities. This provision is critical in the sense that African countries do not adopt indigenous development projects. PPPs in Africa are often solicited. Developing countries such as Kenya do not have complete control over their development projects and the constant reliance on foreign assistance erodes the sovereignty of developing countries. PPPs in Africa should be cognizant of the African values and the environmental realities.

In order to foster effective public participation, the African Charter for Popular Participation in Development and Transformation requires African countries to prepare the citizenry for

¹⁰⁵ Ngang, C.C. *Towards a right-to-development governance in Africa*. Journal of Human Rights, 17(1),2017, pp.107-122.

¹⁰⁶ Yimer, M. *Governance and leadership Challenges in Africa*. International Journal of Political Science Development, 3(3), 2015, pp.129-137.

¹⁰⁷ Breuer, A. and Asiedu, E. *Can gender-targeted employment interventions help enhance community participation? Evidence from urban Togo*. World Development, 96, 2017, pp.390-407.

¹⁰⁸ Breuer, A. and Asiedu, E. *Can gender-targeted employment interventions help enhance community participation?*

effective participation through establishing autonomous grassroots organizations to promote public participation, develop the capacity of the people to participate in economic policy and developmental issues. African governments need to build the capacity of the people to be able to analyze and formulate development approaches. Effective public participation requires members of the public to be able to evaluate a proposed project and approve the project or give viable alternatives. To enhance popular participation, African governments should promote literacy and education to ensure that citizens have the capacity for effective public participation. African governments are also required to do away with traditional beliefs and gender-based customs that impede the participation of women in development projects. Public participation can only be effective if it is not gender-biased. People with disabilities should also be able to participate in stakeholder meetings.¹⁰⁹

The Charter presents a unique approach of achieving effective public participation through the lens of human rights. The African Union cast public participation as an instrument of economic development.¹¹⁰ Effective public participation allows quick and efficient implementation of public projects. In PPPs, private entities exercise government powers and functions and without effective public participation these projects would lack the procedural legitimacy and social acceptance by the local communities.¹¹¹ When the Charter was enacted, PPPs had not become popular in Africa as a means of funding budget deficits and development agenda. African countries heavily relied on foreign aid to fund infrastructure and carry out the basic functions of governments. The aid dependency was not working because it was not stimulating economic growth.¹¹² African countries became dependent on foreign aid as opposed to adopting sound economic policies and principles of good governance. Donor fatigue made PPPs popular and African countries such as Kenya began financing their development projects using the PPP model.¹¹³ The principles set out under the Charter are relevant to the use of the PPP model to finance projects in the energy sector. Kenya should amend existing legislation to adopt some of the principles espoused under this

¹⁰⁹ Breuer, A. and Asiedu, E. *Can gender-targeted employment interventions help enhance community participation?*

¹¹⁰ Breuer, A. and Asiedu, E. *Can gender-targeted employment interventions help enhance community participation?*

¹¹¹ Breuer, A. and Asiedu, E. *Can gender-targeted employment interventions help enhance community participation?*

¹¹² Adejumobi, S. *Region-Building in West Africa*. In *Region-Building in Africa* (pp. 213-230). Palgrave Macmillan, New York, 2016.

¹¹³ Hagmann, T. and Reyntjens, F. *Aid and authoritarianism in sub-Saharan Africa after 1990*. In *Aid and authoritarianism in Africa: development without democracy*.-London, 2016 (pp. 1-19).

Charter to ensure that PPP projects are alive to the realities facing the continent including low literacy levels that would call for a blend of communication systems for information dissemination and capacity development for effective public participation.

2.7.5 Public Participation Spectrum

The International Association for Public Participation developed the public participation spectrum to guide public officials in public participation. The principal goal behind the policy is to ensure that the stakeholders participate in every level of the spectrum. The first level in the spectrum requires the government agency to give the stakeholders balanced and objective information to assist them in examining the available alternatives to the project.¹¹⁴ The second level of the public participation spectrum requires the contracting agency to collect feedback from the public and undertake an analysis of the alternative decisions and choices. The third level of the public participation spectrum requires the agency to work directly with the public to ensure that all the concerns are addressed, understood and considered. The fourth level of the public participation spectrum requires that the government agency to partner with the public in each aspect of the decision making including the development of alternatives and the identification of the preferred solutions.¹¹⁵ The fifth level in the public participation spectrum is placing the decision in the hands of the public.

2.8 Proposed Parameters for Effective Public Participation

The above binding and non-binding legal and scholarly instruments for public participation provide various standards that can be adopted to enhance the experience for meaningful and effective public participation in Kenya. Based on the foregoing discussion, the following, in my view, can be considered as the parameters for effective public participation in Kenya and particularly for projects involving marginalized communities as the primary stakeholders such as the Lamu Power Project.

1. The Government ought to promote literacy and education to enhance its citizens' capacity for public participation. This should be coupled with continuous public awareness on the role and place of public participation generally which awareness can be carried out within the context of grassroot organisations.

¹¹⁴ International Association for Public Participation. Iap2 Public Participation Spectrum

¹¹⁵ International Association for Public Participation. Iap2 Public Participation Spectrum

2. For purposes of specific project, the party fronting the project must first carry out an appropriate stakeholder identification and mapping to ensure that all relevant stakeholders are identified and a plan for engagement prepared.
3. Once the mapping and identification has been done, the party should proactively provide objective and balanced information on the proposed project to enable the stakeholders to appreciate the problem sought to be solved and the alternative solutions available. The information should be provided in a language understood by the primary stakeholders. It would also be necessary to use a blend of communication systems to reach all the marginalized communities that may not have access to the print and television media. The communication should take into account the diverse cultures of the communities living in Kenya for it to be effective.¹¹⁶
4. Once the information has been disseminated, feedback should be collected in all relevant forums and modes including but not limited to village barazas, formal meetings, online surveys and written memoranda. Information, in suited cases may be disseminated through the traditional leadership structure to reach marginalized communities. To make the opportunity meaningful, the public must be informed in good time about the issues, the background, and how participation can take place.
5. The timing for participation is most critical. It must be done when decisions have not already been made and those making the decisions must keep open minds and genuinely consider the feedback provided by the people. For PPPs, this engagement must be conducted at the project proposal and initiation stages to be effective. In this way, participation will not be a matter of tokenism but an opportunity for genuine engagement with a view to enriching the ultimate decision.
6. Public participation should be inclusive, not target only those who will agree with the authorities making the decision but based on equality and on respect for the dignity of everyone involved. Women, the youth and persons with disabilities should be included in the engagement. Participation should be voluntary and all stakeholders should be free to express their concerns without fear of victimization or retaliation. While not

¹¹⁶ *Mui Coal Basin Local Community & 15 Others vs. Permanent Secretary Ministry of Energy & 17 Others* [2015] eKLR

everyone can possibly give their views, the process must take into account inclusivity and diversity.

7. Once the feedback has been collected, an analysis of the alternative decisions and choices should be undertaken and feedback given to the people as to whatever decision is made and the rationale for it. The public, through a few representatives, should be included in the decision-making unit/committee to ensure the feedback provided is indeed taken into account and used to enrich the eventual decision to be made.
8. Further, participation should not be a one-off event. The public must be consulted and involved in decision making in all phases of the project and any concerns raised addressed consistently.
9. Lastly, parties dissatisfied with the process must have access to judicial and administrative proceedings to remedy the situation. This process should not be riddled with hurdles on *locus standi* and technicalities aimed at locking out interested participants.

To make all this possible, it is imperative that the party embarking on a public participation engagement should formulate an appropriate programme that takes into account all these variables and the unique circumstances of the engagement including the cultural backgrounds and diversity of the key stakeholders.

2.9 Conclusion

I set out in this chapter to develop a conceptual framework for this study on public participation and in doing so analysed the concept of public participation, its emergence and justification and international standards. I sought to answer the question as to what these standards are and what Kenya can borrow from the, to establish parameters for effective public participation. I settled on a definition for public participation as the one set out in the public participation Bill, 2018, discussed the need for public participation and proposed the Bourne's Stakeholder Circle as an appropriate tool for stakeholder analysis. I have reviewed relevant international standards and developed parameters for effective public participation on the basis of which the Kenya policy, legal and regulatory framework in chapter 3 and the case study in chapter 4 will be assessed. In conclusion, there's a wealth of standards for public participation that Kenya can benefit from to enhance stakeholder engagement through participation. An appropriate guideline in tandem with the identified parameters of effective

public participation should be formulated on the basis of which parties engaged in public participation.

CHAPTER THREE

3.0 Policy, Legal and Regulatory Framework Governing Public Private Partnerships in Kenya

3.1 Introduction

In the previous chapter, I set out to establish a conceptual framework for public participation and concluded to establishing what I consider parameters for effective public participation informed by international standards. This chapter seeks to analyse the existing policy, legal and regulatory framework on Public Private Partnerships (“PPPs”) generally and sets out to answer the question as to whether the framework is appropriate to support the growing interest in PPPs as an avenue for infrastructure development and secondly whether it makes provision for implementation of the constitutional principle of public participation. This analysis will be done against the backdrop of the parameters for effective public participation set out in chapter two. Besides looking at the framework, I will analyse two leading decisions from the Kenya courts to see how this constitutional principle has been applied.

PPPs enable the public sector to tackle development issues through the use of private sector resources, expertise and market-based approaches that can provide better and more sustainable outcomes.¹¹⁷ They are now seen as a possible approach to address strategic issues leveraging the resources and skills of a range of actors in creative ways to reach better development outcomes.¹¹⁸ Getting the private sector involved in the provision of public facilities and services could not only increase market competition and reduce reliance on government¹¹⁹ but it could also help stimulate the economy and create jobs.¹²⁰

PPPs take various models. In some cases, the private party is required to design, build, finance, operate and transfer (DBFOMT). In others, the private party will build, operate and transfer (BOT) or build-own-operate (BOO) or simply operate & maintain (O&M)

¹¹⁷ Beisheim, M., Ellersiek, A., Goltermann, L. and Kiamba, P., 2018. Meta-governance of partnerships for sustainable development: Actors' perspectives from Kenya. *Public Administration and Development*, 38(3), pp.105-119.

¹¹⁸ USAID. “Statement on peer review of U.S. Global Development Efforts” press release, Washington D.C., July, 2011

¹¹⁹ H M Treasury, Value for money assessment, HMSO:London, 2004

¹²⁰ Zhang X., Financial Viability analysis and capital structure optimization in privatized public infrastructure projects, *Journal of Construction Engineering and Management*, ASCE, 131 (6) 656-668, 2005.

infrastructure assets traditionally provided by the public sector.¹²¹ These partnerships are characterised by a sharing of investments, risks, rewards and responsibilities between the two parties. Under the PPP contract, the Government retains total strategic control of the service or facility and secures new infrastructure which becomes part of government assets at the end of the contract life.¹²² In addition to this, the project's performance risks are allocated to the party best able to manage or mitigate them.¹²³ One of the proponents of PPPs, Harold Ayodo, argues that the PPPs may save the Kenya Government from unreliable contractors who, with delayed completions, burdened the economy with cost overruns, poor maintenance, poor design, poor project selection and grand corruption.¹²⁴ In many developing countries, governments are also using PPPs to finance and manage toll expressways, airports, shipping ports, and railroads and to reduce environmental pollution, build low-cost housing, and develop ecotourism.¹²⁵ Some of the PPPs entered into and successfully performed in Kenya include the Mtwapa and Nyali bridge concessions, the Olkaria geothermal plant, Tsavo, Kipevu, Mumias and Rabai power plants, the port of Mombasa grain terminal, Jomo Kenyatta International Airport cargo terminal and Malindi water utility among others.¹²⁶

While the PPP model has been hyped as a solution for addressing the infrastructure funding gap with the effect of easing the budgetary pressure as well as bridging the demand-supply gaps, the pre-2005 slow uptake of the model in Kenya was largely blamed on the lack of a proper policy, legal and regulatory framework governing the said arrangements.¹²⁷ There was no specific legal framework governing PPPs but amendments to several sector specific legislations provided a rudimentary framework on the basis of which the engagements were perfected. Against this backdrop, the Kenya Government undertook a study in 2007 on consolidation, strengthening and harmonisation of policy, legal and institutional framework

¹²¹ Thai K V 2009. 'International Handbook of Public Procurement' CRC Press, Taylor and Francis Group.

¹²² Pearson M., Opportunities and obstacles for wider adoption of PPP models in Hong Kong

¹²³ Stralexgroup, 2013. 'A review of the Public Private Partnerships Act no. 15 of 2013': <https://stralexgroup.blogspot.co.ke/2013/09/a-review-of-public-private-partnerships.html>

¹²⁴ Harold Ayodo: Public- private partnerships the way to go' November 5th 2015 https://www.standardmedia.co.ke/business/article/2000181596/public-private-partnerships-the-way-to-go_6 February, 2018.

¹²⁵ J. Rivera, E. Brenes, and G. Quijandria, "The Tourism Industry in Costa Rica," in B.S. Gentry (ed.) *Private Capital Flows and the Environment: Lessons from Latin America*, (Cheltenham, England: Edward Elgar Publishing Ltd., 1998): 223-240.

¹²⁶ Stralexgroup, "A review of the public private partnerships Act no. 15 of 2013".

¹²⁷ Policy statement on public private partnerships, November, 2011

on PPPs. In 2009, Kenya issued the Public Procurement Disposal (Public Private Partnerships) Regulations, 2009, outlining the regulatory and institutional framework for PPPs.

3.2 Policy Statement on Public Private Partnerships 2011

The Kenya Government did not deem the 2009 regulations as sufficient and as such, in 2010 it undertook a further review of the legal and regulatory framework. This resulted in the issuance of the policy statement on PPPs by the office of the Deputy Prime Minister of Finance in November, 2011 (the “PPPs policy”). The objective of the PPPs policy was to articulate the Government's commitment to PPPs and to provide a basis for the enactment of a PPP law to address the identified gaps as well as conflicts in the legal and regulatory framework.

The policy statement was developed to aid the government in implementing Vision 2030 and to reduce the budget deficit in implementing infrastructure projects across the country.¹²⁸ It was an effort by the country to create a favourable environment to attract the private sector in financing, building and operating infrastructure services in the country. The policy was also designed to address the challenges and constraints the Government of Kenya had experienced in accessing capital to accelerate the economic growth in the country.¹²⁹

The policy established central institutions for championing the PPP agenda in Kenya. These are: the PPP Steering Committee, the PPP secretariat, the PPP unit and PPP nodes.¹³⁰ The policy also seeks to mobilize domestic and international private sector by creating an operational framework for partnership between state and non-state entities.¹³¹ Through the policy, the Government seeks to provide clear and transparent processes for entering into public private agreements and providing government support through guarantees.

The Government of Kenya, through the policy statement commits to support PPP projects by setting up a Project Facilitation Fund. The Fund will allow public entities to prepare private partnership proposals and ensure that those projects are bankable. The fund will also be used to plug the viability gap finance to implement the projects that are socially desirable but they

¹²⁸ Government of Kenya PPP Policy Statement, 2011

¹²⁹ Ong'olo, D.O., Public private partnerships (ppp) practice and regulatory policy in Kenya, 2006.

¹³⁰Section 1.1 (i) Government of Kenya PPP Policy Statement;

¹³¹Section 1.1 (ii) Government of Kenya PPP Policy Statement.

are not bankable without government intervention. The Fund will also provide a liquidity source to meet contingent costs that arise unexpectedly during the project implementation. The Government of Kenya also commits to annual budgetary allocations to the Fund to allow the government to meet its contingent liabilities.¹³²The PPP Project Facilitation Fund (PPP PFF) Regulations were gazetted on 19th May 2017¹³³ and were issued pursuant to section 68 (4) of the PPP Act by the Cabinet Secretary, Treasury.

The Policy also sets out the project process which begins with project identification, selection and prioritization.¹³⁴ During the project identification stage, the projects that will be selected and prioritized are those that are economically viable for the country.¹³⁵ For projects that entail collecting fees from the public, the relevant public entity is required to conduct a feasibility study to ensure that the revenues collected from the project are viable. The second stage is project preparation and appraisal. The relevant public entity is required to employ the services of a transaction advisor to perform the social cost benefit analysis.¹³⁶ The public entity will also reveal the affordability of the project through the proposed tariff system to the users. The project proposal will also describe whether land acquisition will be necessary and the estimated cost of the land. At this stage of the project, the public entity is expected to identify the relevant stakeholders and engage them in a consultation process. The next stage is the tendering process. The public entity should disclose the level of government support the project is going to get. After project tendering, the next stage is preparing and organizing for the negotiations with the first ranked bidders. Project approval follows. After the project is approved, the next stage is project implementation with periodic evaluation and monitoring. The public entities are required to develop a plan for project monitoring and evaluation to ensure compliance with the agreement and the transfer of assets upon completion of the project.¹³⁷

¹³²Section 1.1 (iii) Government of Kenya PPP Policy Statement

¹³³¹³³ *The PPP Project Facilitation Fund Regulations, 2017*

¹³⁴ Section 3.4 Government of Kenya PPP Policy Statement

¹³⁵Section 3.4 (i) Government of Kenya PPP Policy Statement

¹³⁶Section 3.4 (ii) Government of Kenya PPP Policy Statement.

¹³⁷Section 3.4 (iii-vi) Government of Kenya PPP Policy Statement.

3.3 Public Private Partnership Act No. 15 of 2013

As earlier noted, the PPPs Policy was intended to lay a basis for the enactment of a PPP law, the Public Private Partnerships Act which was subsequently enacted in 2013. (“The PPP Act”). The objective of the PPP Act is to provide for the participation of the private sector in the financing, construction, development operation, or maintenance of infrastructure or development projects of the Kenya Government through concession or other contractual arrangements; the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects and for connected purposes.¹³⁸ The law was adopted in line with the Kenya Vision 2030 whose implementation includes key projects that require substantial funding which in practice cannot be supported by the Government.¹³⁹

The PPP Act is the principal legislation guiding public and private partnerships in Kenya. It also establishes the relevant institutions for the monitoring and evaluation of PPP projects. Section 4 of the Act establishes the PPP Committee with the responsibilities of ensuring that each and every project agreement is consistent with the policy guidelines on PPPs. The committee also has the role of approving the project proposals submitted to it by the contracting authority.¹⁴⁰ The committee is also in charge of approving and accepting feasibility studies on project proposals. The Committee has powers to oversee the implementation of the policies laid out under section 7 of the Act, require information from any parties and to take custody of project agreement made under the Act.¹⁴¹

Section 11 establishes the Public Private Partnership Unit (“PPP Unit) within the National Treasury as the Centre for PPP excellence in the country. The functions of the PPP Unit are set out under section 14(1) of the Act. The PPP Unit is expected to serve as a technical arm to the committee and provide legal and financial expertise to the committee.¹⁴² Section 14 (2) (b) provides that the PPP Unit shall conduct civic education to promote the awareness and

¹³⁸ *Public Private Partnerships Act* (Act No. 15 of 2013)

¹³⁹ Getuno P M, ‘Public Private Partnership Regulations, (2014) implementation and Organizational Performance of Kenya State Corporations’ *International Journal of Information Research and Review* Vol. 2, Issue, 02, 2009, pp.433-440 February, 2015.

¹⁴⁰ Government of Kenya PPP Policy Statement

¹⁴¹ Section 7, Public Private Partnership Act

¹⁴² Section 14(1) Public Private Partnership Act

understanding of the PPPs process amongst stakeholders. This is in recognition of the fact that the public is impeded in participating in discussions about a project when relevant information on the project is not available. Under Section 14 (2) (b) there is also a requirement for the PPP Unit to conduct civic education on the processes of PPPs, generally.¹⁴³ Since it is a relatively new approach to financing development and infrastructure projects, the public often sees PPPs as a corrupt scheme to syphon funds from the public coffers.¹⁴⁴ Civic education on the nature of the PPPs will highlight the unique role that the private sector and the non-state entities can play in the economic development of the country.¹⁴⁵ It will also make the process of conceptualizing, tendering and implementing PPPs transparent. The citizens will also understand their role in the PPP process.¹⁴⁶

For any contracting authority to enter into a PPP agreement with a private party, the authority shall establish a PPP node as outlined under section 16 (1) of the Act. The PPP node shall be headed by the accounting officer. The node shall consist of financial, legal, technical and procurement personnel of the authority.¹⁴⁷ The functions of the node are outlined under section 16 (2) of the Act and these include identifying and screening PPP projects based on the guidelines issued by the committee. The node is responsible for preparing the project agreement and to ensure that the agreement is in compliance with legal, regulatory and social-economic viability of the project.¹⁴⁸ The role of undertaking the tendering process is assigned to the PPP node under section 17 (1) (d) of the Act.¹⁴⁹ The PPP node is also required to liaise with all the key stakeholders during the life cycle of the project under Section 17 (1) (f) of the Act. It is therefore the role of the PPP node to ensure that there is effective stakeholder mapping and identification.¹⁵⁰ Under the PPP agreement, the private entity will be carrying out a role that is ordinarily carried out by a public entity. Since it is a private party, the views of all stakeholders should be taken into consideration.

¹⁴³ Section 14 (2) (b) Public Private Partnership Act

¹⁴⁴ Harold Ayodo: Public-private partnerships the way to go.

¹⁴⁵ Brinkerhoff, D.W. and Brinkerhoff, J.M. Public-private partnerships: Perspectives on purposes, publicness, and good governance. *Public administration and development*, 31(1),2011, pp.2-14.

¹⁴⁶ MirafTAB, F., 2004. Public-private partnerships: The Trojan horse of neoliberal development? *Journal of Planning Education and Research*, 24(1),2004, pp.89-101.

¹⁴⁷ Section 16 (1) of the Public Private Partnership Act

¹⁴⁸ Section 16 (2)

¹⁴⁹ section 17 (1) (d) of the Public Private Partnership Act

¹⁵⁰ Section 17 (1) (f)

Under Section 59 (1), a successful bidder is required to establish a project company for the purposes of undertaking its contractual role.¹⁵¹ Under section 59(2), the company may include a public body as a minority shareholder. This provision allows a winning bidder to incorporate a public body for the purposes of ensuring the primary stakeholders benefit from the project.¹⁵² The Project company is prohibited from pledging any shares for the purpose of financing the project under section 59 (6) of the Act.¹⁵³ This requirement is set out to ensure that the winning bidder performs its role without wriggling out of its contractual agreement.¹⁵⁴

Besides section 33 of the PPP Act that implicitly provides for public participation during the feasibility study stage, the Constitutional principle of public participation is captured under section 65 (c) of the Act where it is provided that a contracting authority in conjunction with other policy regulators shall liaise with the private party, the users of the facility or service and other relevant stakeholders in the implementation of the project agreement.¹⁵⁵ This provision is enacted in order to ensure that contracting party or the private entity continues to engage the stakeholders after the formal public participation forums are over. The Act is not specific as to the extent of the liaison between the contracting authority and the relevant stakeholders. It is also does not set out what form and/ or steps the liaison would take.

3.4 Public Private Partnership Regulations, 2014

The Public Private Partnership Regulations, 2014 (PPP Regulations, 2014) were enacted pursuant to Section 71 (1) of the PPP Act which gives the Cabinet Secretary of the National Treasury the authority to make the regulations.¹⁵⁶ The regulations apply to every PPP agreement in terms of design, financing, construction and the maintenance of the project or the provision of public services by a private entity. The regulations do not apply to PPP projects by the national government that have a capital expenditure of less than eighty-five (85) million Kenyan shillings or a county government project that has a capital expenditure of more than five (5) million Kenyan shillings.¹⁵⁷ Under section 2 (c), the regulations do not

¹⁵¹ Section 59 (1)

¹⁵² section 59(2)

¹⁵³ 59 (6) of the Public Private Partnership Act

¹⁵⁴ section 59 (6)

¹⁵⁵ Section 65 (c)

¹⁵⁶ Section 71 (1) of the Public Private Partnership Act

¹⁵⁷ Section 2 of the Public Private Partnership Regulations, 2014

apply to a PPP project that does not have a capital expenditure of more than five (5) million shillings in lifestyle costs. Under section 6(2) of the regulations, each PPP Unit is required to maintain both physical and electronic records of projects for a period of 6 years.¹⁵⁸ Under Section 12 the Contracting Authority is expected to prepare a project proposal that contains demand assessment, the estimated cost of the project based on the prevailing market rates, an updated cost of similar projects and international best practices.¹⁵⁹

The project proposal shall also contain the details of the project, the social economic benefits of the project and the role of private sector in implementing the project. The project proposal should also contain a report highlighting the operational and strategic benefits of the project. It is the role of the PPP node¹⁶⁰ to prepare the feasibility study for the proposed project. This role is outlined under section 14 (2) of PPP Regulations, 2014. A feasibility study highlights the economic, legal, technical and scheduling factors that might influence the successful completion of the project. A feasibility study is expected to highlight the risks involved to prevent the National or County Government from entering into a risky contract that will result in the negative return of investment.¹⁶¹ The PPP Committee has the role of receiving and approving the feasibility studies under section 16(1) of the regulations. Upon the receipt of feasibility study, the committee shall write to the contracting authority advising on whether or not to issue public tenders for the PPP project. Under Section 16(2) the Committee is expected to set down in writing the reasons for its refusal to accept the project and the steps that will have to be taken in order for the project to be approved. Kenya's sovereign debt is on an unsustainable path and as such, the Government of Kenya must be cautious to ensure that it can honour its contractual obligations with private entities. Under Section 16 (3) of the Regulations, the Public Private Committee is expected to take into account the approval of

¹⁵⁸ Section 6 (2) of the Public Private Partnership Regulations, 2014

¹⁵⁹ Section 12 of the Public Private Partnership Regulations, 2014

¹⁶⁰ A PPP Node is established by a contracting authority that intends to enter into a public private partnership arrangement with a private party. According to Section 16 (2) of the Public Private Partnership Act, it shall be headed by the accounting officer of the contracting authority and shall consist of such financial, technical, procurement and legal personnel as that authority shall, in consultation with the PPP unit, consider necessary for the performance of its functions in relation to a project under the Public Private Partnership Act.

¹⁶¹Section 14(2) of the Public Private Partnership Regulations, 2014

the Debt Management Office when making the decision to accept or refuse the project proposal.¹⁶²

Part VII of the regulations provides the guidelines for solicited public procurement proposals. Under Section 28 a contracting authority may create a list of pre-qualified private entities that have the technical and financial capabilities to develop and implement a particular PPP proposal. Under Section 29 (1), the contracting authority may invite persons to apply for pre-qualification. Under Section 34 (1), a contracting authority may alter the specifications of the project based on the outcome of the meeting with pre-qualified bidders. The alteration should not be done in a manner to disqualify any particular bidder. After the alteration, the contracting authority should inform the all pre-qualified bidders of the alterations.¹⁶³

Under Section 51 (1) of the Regulations, a contracting authority may accept a privately initiated investment proposal. The contracting authority is prohibited from accepting privately initiated investment proposal if the proposal is not in the contracting authority's development programme.¹⁶⁴ A contracting authority shall develop the guidelines for negotiating for a privately initiated investment proposal. For a privately initiated investment proposal, the contracting authority is required to apply for approval of the Cabinet Secretary. The Cabinet Secretary should review the application based on the recommendations of the committee. A privately initiated investment proposal should be affordable, should provide value for money and should provide an effective transfer of risk from the contracting authority as set out in section 51 (2) of the Regulations.¹⁶⁵ Under section 55 (2), the contracting authority is required to appoint a negotiation team for the purposes of negotiating a project agreement. The negotiation team should get the best value for money for the contracting authority and the public as well.

The PPPs Petition Regulations are being finalised as well as the PPP manual to provide standard bidding documents, templates, toolkit or user guidelines. In view of the above developments, it can be argued that the current legal and policy framework is rather elaborate and all-encompassing and should provide a conducive environment for PPP development

¹⁶² Section 16 (2) of the Public Private Partnership Regulations, 2014

¹⁶³ Section 34 of the Public Private Partnership Regulations, 2014

¹⁶⁴ Section 55(1) of the Public Private Partnership Regulations, 2014

¹⁶⁵ Section 55 (2) of the Public Private Partnership Regulations, 2014

except for the lack of clear guidelines on what form and shape consultation of the public should take.

3.5 The Public Participation Bill, 2018

The Public Participation Bill, 2018 was introduced in the Kenya Senate in March 2018 by Senator Amos Wako. It is currently pending before the committee of the whole house after it was passed during the second reading.¹⁶⁶ The Bill is intended to give effect to the tenets of participatory democracy enshrined in Articles 1(2), 10(2), 35, 69(1)(d), 118, 174(c) and (d), 184(1)(c), 196, 201(a) and 232(1)(d) of the Constitution. It seeks to introduce an overarching framework for effective and coordinated public participation governance processes by providing mechanisms for non-state actors to provide input in public affairs. Public participation in governance ensures that the office holders are accountable to the public. The bill seeks to promote transparency and accountability in decision making.¹⁶⁷ Another objective of the bill is to enhance public awareness and understanding of the governance process as well as to promote community ownership of public decisions and public participation in the governance process¹⁶⁸. The Bill, therefore, seeks operationalize the constitutional principle of public participation. The PPP Act does not contain specific provisions for effective public participation. This bill will provide the guidelines and principles that will govern the contracting authority and the private party in conducting effective public participation.

Under Section 4 of the Public Participation Bill, 2018 the public, communities and organizations that are to be affected by a decision shall have a right to be consulted and involved in the decision-making process. This provision will protect organizations such as Save Lamu which were not considered stakeholders for the purposes of public participation in the Lamu Power Project.¹⁶⁹ Under Section 4(c), participants shall have equitable access to information they need to make an informed decision. Access to information is one of the central tenets of effective public participation.¹⁷⁰ The public will be unable to make informed decision without all information concerning a public-private partnership. Section 4(c)

¹⁶⁶ <http://kenyalaw.org/kl/index.php?id=7937> on 8 June 2019

¹⁶⁷ Section 3(c) of the Public Participation Bill 2018

¹⁶⁸ Section 4 (a) of the Public Participation Bill 2018

¹⁶⁹ Ndungu, A.G. A Kenyan Youth Perspective on Climate Change. *Development*, 59(3-4),2016, pp.266-269.

¹⁷⁰ Section 4 (c) of the Public Participation Bill 2018

provides for the development of appropriate feedback mechanisms. Without an effective feedback mechanism, public participation will be merely and has indeed been merely illusory. Section 4(1) provides that the public participation process shall be guided by the interest of all the stakeholders including the interests of the decision makers.¹⁷¹ Under this proposed bill, public authorities will be guided by the public participation principles proposed in the bill. Public authorities will also be required to develop their own guidelines for public participation and publish them on the Kenya Gazette. Section 5(2) (d) places the responsibility of developing public participation guidelines for every ministry to the Cabinet Secretary. Under Schedule 1 of the proposed bill, every public participation forum shall be conducted with realistic time for consultation and reasonable time between each meeting.

Several shortcomings with this Bill have been identified, firstly the Bill proposes that each responsible authority develops its own public participation guidelines. Rather than leave participation to each individual authority, perhaps it would be more effective to train and designate officers responsible for public participation or an agency to give guidance on public participation otherwise a lot of reinventing of the wheel is likely to be undertaken, unnecessarily. A cookie cutter approach is, however, not desirable as the public participation programme ought to be fashioned around the literacy levels of the stakeholders, existing traditional leadership structures especially for marginalized communities as well as language and culture of the people involved. Secondly, the Bill seems to envisage participation as an event, with a venue, yet there are many ways of carrying out public participation including focus groups of various types, written submissions, online surveys etc.¹⁷².

3.6 Application of the Constitutional Principle of Public Participation by the Kenya Courts

In Kenya, public participation is not only a constitutional principle but also one of our national values under Article 10 (2) (a) of the Constitution. Public participation allows citizens to participate in decision making especially on the issues that affect them. PPPs should meet the constitutional requirements of public participation since they involve that exercise of power donated to the government by the sovereign, the people of Kenya, and shared with a private entity. The private entity under the PPP agreement then performs a duty or delivers a

¹⁷¹ Section 4 (1) of the Public Participation Bill 2018

¹⁷² <http://www.katibainstitute.org/engaging-in-a-public-participation-law/Jill> Cottrell Ghai

service categorized as public good or service. Professor Migai Akech has argued against the delegation of power to private entities because there are no formalities to ensure that this power is not abused.¹⁷³ Besides the constitutional principle under Article 10 (2) for public participation, Kenya does not have an enabling legislation to provide a legislative guideline for public participation.¹⁷⁴ There are, however, mentions of consultation of the people within the PPP policy framework with no guideline as to how the same is to be conducted. As a consequence, public bodies have devised their own standards of ensuring that they meet the constitutional threshold for the approval of public projects or policy.

The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*¹⁷⁵ reaffirmed the place of public participation as the cornerstone of sustainable development as provided in the Constitution. It further held that public participation ensures that:

*..private “sweet heart” deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted.*¹⁷⁶

A three (3) judge bench of the High Court in the *Mui Coal Basin Local Community Case*¹⁷⁷ established six standards for effective public participation as follows:

First, the court held that the government agency is required to craft a programme for public participation. The concerned government agency should come up with modalities of public participation that take into consideration the quantity and the quality of the governed to actively take part in governance. The modalities of public participation should also take into

¹⁷³ Momanyi, J., 2017. *Zero emissions, zero poverty in Kenya: a review of whether Lamu Coal Power Plant promotes a pro-poor low carbon development pathway* (Doctoral dissertation, University of Cape Town).

¹⁷⁴ There is, however, a draft public participation policy pending approval and gazettement and a public participation bill, 2018 pending in Parliament.

¹⁷⁵ *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR

¹⁷⁶ *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR

¹⁷⁷ Justices Thurania, Mutende and Prof. Ngugi in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR

consideration the subject matter of the public participation in coming up with a public participation programme.

The second principle established by the court is the effectiveness principle. The court declined to establish a litmus test and held that the only test it would be willing to consider is whether the public participation process was effective. According to the court, effective public participation requires that no single regime or programme for public engagement because of the diverse cultures of the communities living in Kenya.¹⁷⁸ Language is a principal tenet of culture and as such the court noted that the principal agency should have provided information in a language that was familiar to the local residents.

The third principle is that the members of the public must have access to information to make informed decisions. The concerned agency should come up with innovative ways of meeting this obligation.¹⁷⁹ In establishing the third principle for effective public participation, the Honourable Court held that it was, indeed, paramount for the governed to have access to crucial information on the subject matter in a language that they can understand.

In the fourth principle, the court held that effective public participation does not require that every person must give their views but rather that the process takes into account inclusivity and diversity.¹⁸⁰ If there are clear attempts to keep out bona fide stakeholders from giving their views, then the public participation programme would be rendered illegal by definition.¹⁸¹ It is essential for the public agency to identify and map out the bona fide stakeholders in order to ensure that there is effective and meaningful public participation. The Honourable Court further held that in a public participation programme it is the duty of the agency to take all views into consideration but there is no obligation to accept all views. The court held that the government agency ought to act in good faith while examining the public views received as a result of the participation programme.¹⁸² Taking the views of the governed into consideration

¹⁷⁸ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR

¹⁷⁹ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR

¹⁸⁰ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR

¹⁸¹ Momanyi, J., *Zero emissions, zero poverty in Kenya: a review of whether Lamu Coal Power Plant promotes a pro-poor low carbon development pathway*

¹⁸² *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*

demonstrates that the public participation process is not just a mere attempt aimed at ticking the constitutional box to prevent legal challenges in court.¹⁸³

The final standard laid out by the court is that the purpose of public participation is not to usurp the technical and democratic role for office holders but rather to enrich and cross-fertilize the views of all the stakeholders and guide the office holders in making the best decision possible. It is note worthy that the standard proposed in this case falls short of the need to engage the public in decision making and having control vested in the people as proposed by international standards.

Despite the lack of a statutory guideline for public participation, our courts have commendably been at the forefront enforcing this requirement, most notably in enforcing participation in the legislative processes. Their work and that of public authorities, could however, be eased by the provision of a guideline for effective public participation that meets the parameters proposed in chapter two.

3.7 Conclusion

I set out to answer the question as to whether Kenya has an appropriate policy, legal and regulatory framework necessary to support contracting in PPPs with growing interest in the area for purposes of funding infrastructure development especially with Government debt ballooning beyond acceptable and recommended levels. I have established that indeed in the period between 2007 and 2017 the Government set out to establish an appropriate framework for this purpose. This framework comprises of the PPP Policy Statement, PPP Act No. 15 of 2013, the PPP Regulations, 2014 and the PPP Project Facilitation Fund Regulations, 2017. I also sought out to establish whether the policy, legal and regulatory framework incorporates provisions to aid in the implementation of the constitutional principle of public participation. I established through this study that there are no legal instruments for implementation of an the Constitutional principle leaving implementation to the various entities. There is also a requirement for civic education set out under section 16(2) of the PPP Act for the PPP Unit to promote awareness on PPPs and conduct civic education on the PPP in Kenya which has not been implemented at all. The Public Participation Bill, 2018 is meant to provide guidelines

¹⁸³ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*

and principles for conducting effective public participation in PPPs. With the necessary reengineering of the bill, as it is still a work in progress, the bill should seal the legal lacuna that has enabled public agencies to conduct sham public participation for the mere purpose of ticking the constitutional check box.

CHAPTER FOUR

4.0 Case Study: Public Participation in the Lamu Power Project

4.1 Introduction

Chapter 3 entailed an analysis of the existing policy, legal and regulatory framework governing PPPs in Kenya generally to ascertain its appropriateness to support PPP contracting in light of heightened interest in PPPs for infrastructure development. It also entailed an evaluation of the framework to ascertain whether or not it makes adequate provision for effective public participation with the parameters set out in Chapter 2 as the bench mark. In this Chapter, I analyse public participation in the Lamu Power Project, a PPP project initiated under the PPP Act, 2013 to determine how effective the same was and the outcome of the process.

The Least Cost Power Development Plan (LCPDP) proposed the development of a coal plant in Kenya in 2005 which was to be implemented within twenty (20) years. The initial proposal was for a 150 MW power plant to be constructed in Dongo Kundu near Mombasa.¹⁸⁴ The proposed project was dropped in 2008 when LCPCD proposed a 2x150MW coal plant in Kilifi and initiated feasibility studies on the project.¹⁸⁵ The community in Kilifi vehemently opposed the construction of the coal power plant especially based on land issues including acquisition and displacement from ancestral land. The community was concerned that the coal power plant would lead to the destruction of religious shrines.¹⁸⁶ The communal land tenure system in Kilifi was another stumbling block in acquiring a location to build the coal plant. Disagreements between the government and a community unified in opposition of the project on compensation and re-allocation plans made the proposed project unattractive to policy planners and investors.¹⁸⁷

The Government of Kenya decided to relocate the power plant to Lamu. The decision to establish the coal plant in Lamu was guided by two (2) primary factors. The first one was that

¹⁸⁴ Energy Regulatory Commission. Least Cost Power Development Plan Study period 2011-2031. Nairobi.

¹⁸⁵ Energy Regulatory Commission. Least Cost Power Development Plan Study period 2011-2031. Nairobi.

¹⁸⁶ DeCOALonize. The Impacts on the Community of the Proposed Coal Plant in Lamu: Who, if Anyone, Benefits from Burning Fossil Fuels? UN Perspectives. Issue No. 31

¹⁸⁷ DeCOALonize. The Impacts on the Community of the Proposed Coal Plant in Lamu: Who, if Anyone, Benefits from Burning Fossil Fuels?

Lamu had multiple ethnicities which meant that the government would not experience a unified political opposition as it had experienced in Kilifi.¹⁸⁸ The second guiding factor was that the LAPPSET corridor was already in place and as such, the government would not experience similar compensation problems as it had experienced in Kilifi.¹⁸⁹

The Ministry of Energy and Petroleum officially initiated plans to develop the Lamu Coal Power Station in 2013. The proposed power plant would generate 1050 MW (gross) and would occupy 965 acres of land in Kwawasi, Lamu County.¹⁹⁰ After identifying the location for setting up the coal plant, the government of Kenya advertised the expression of interest in 2013 to attract potential investors.¹⁹¹ Following a competitive tendering process, the Kenya Government awarded the project to Amu Power Company Limited, which is a special purpose vehicle formed by the consortium of Gulf Energy and Centum Investments Company Limited.¹⁹² The coal plant would initially rely on imported coal from South Africa but switch to local supply once the mining of coal located in Mui Basin Kitui County commenced.¹⁹³

The World Heritage Committee inscribed the Lamu Old Town in the UNESCO World Heritage List in 2001.¹⁹⁴ Environmentalists have expressed concerns that if a power plant is constructed at Kwawasi, the project would interfere with the world heritage site. Besides, it will interfere with the Lamu Archipelago which hosts several historical and archeological sites of great cultural importance to the people of Lamu.¹⁹⁵ The coal plant will also have an extensive environmental degradation to the neighboring community. Based on the South African experience with coal power plants, it is expected that the neighboring community will

¹⁸⁸ DeCOALonize. The Impacts on the Community of the Proposed Coal Plant in Lamu: Who, if Anyone, Benefits from Burning Fossil Fuels?

¹⁸⁹ DeCOALonize. The Impacts on the Community of the Proposed Coal Plant in Lamu: Who, if Anyone, Benefits from Burning Fossil Fuels?

¹⁹⁰ Lutta, N. Diversification of Africa's Energy Portfolio': Economic Outlook a Case Study of Kenya. Africa Energy and Technology Conference, 2016.

¹⁹¹ Atkins, L., Brautigam, D., Chen, Y., & Hwang, J. Challenges of and opportunities from the commodity price slump. CARI Economic Bulletin, (1), 2017.

¹⁹² Heffron, R.J. The global future of energy law. *International Energy Law Review*.

¹⁹³ Heffron, R.J. The global future of energy law. *International Energy Law Review*.

¹⁹⁴ Wanderi, H. Infrastructural development and conservation of heritage: a case study of Lamu Old Town World Heritage site. *World Heritage for Sustainable Development in Africa/Le Patrimoine mondial pour un développement durable en Afrique*, 2018 p.241.

¹⁹⁵ https://ke.boell.org/sites/default/files/uploads/2018/06/petition_as_delivered_-_decoalonize_coal_ni_sumu_english.pdf

experience, among other adverse effects, 1200-1600 premature births in a year.¹⁹⁶ The gases produced by the Lamu Power Project will also have an effect on the Kenyan coastal reef and in faraway places such as Mtito Andei.¹⁹⁷

Another major concern facing the Lamu coal power project is whether establishing a coal power plant is the only viable way of expanding Kenya's energy production capacity. Through the PPP agreement, the Lamu Power Project commits Kenya to a 25-year agreement where each year the country will pay Kenya Shillings 25 billion to keep the power plant running.¹⁹⁸ The astronomical tax payer expense that will be incurred by operating the coal power plant created project stakeholders beyond the physical location of the power plant to include all taxpayers who will bear the cost of the project. Granted that Kenya has the seventh largest geothermal deposits in the world, it has been argued that this would be the most suitable alternative for generating power for industrial use as it is essentially clean energy.¹⁹⁹

4.2 Stakeholder Mapping and Identification

The public participation process for the Lamu Power Project was organized by Amu Power Company Limited (APCL), the successful bidder in the process. APCL disseminated information about the project through one-on-one consultation with the key stakeholders. Information was also disseminated through focus group workshops and community public meetings. APCL also engaged the general public through media briefings which were necessary to raise nationwide awareness of the project.²⁰⁰ According to the ESIA study report, APCL also distributed a project background information document which contained information relating to the proponent's details, the technical description of the project, its potential impacts and the description of the ESIA project. The project background documents

¹⁹⁶ Momanyi J, Zero emissions, zero poverty in Kenya: a review of whether Lamu Coal Power Plant promotes a pro-poor low carbon development pathway (Doctoral dissertation, University of Cape Town), 2017.

¹⁹⁷ Ogolla, P.A. Africa and the Plight of Climate Change. *Development*, 59(3-4),2016 pp.373-376.

¹⁹⁸ Power Purchasing Agreement between Amu Power Limited and Kenya Power Limited dated 4th of August 2017. Available <http://www.decolonize.org/wp-content/uploads/2018/07/170804.-Amu-Power-KPLC-Power-Purchase-Agreement-lamu-coal.pdf>

¹⁹⁹ Nyabola, N. Cashing in on CoalKenya's Unnecessary Power Plant. *World Policy Journal*, 34(3), 2017, pp.69-75.

²⁰⁰ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

also included information about the mode of stakeholder participation in the proposed PPP project.²⁰¹ s

APCL identified the relevant stakeholders and placed them in 3 distinct categories; public sector stakeholders, the civil society and private sector stakeholders. These categorizations ensured that neither of the categories of stakeholders met in joint public participation forum and thus there was a clear lack of cross-fertilization of views and concerns amongst the various stakeholder categories that would have provided a holistic approach to public participation. According to the ESIA study report, APCL established and maintained a database of all the stakeholders which was reviewed on a regular basis as stakeholder engagement took place. Public sector stakeholders were identified based on their level of influence in decision making on the project. Vulnerable communities living within the Hindi locality were also categorized as *bona fide* stakeholders.²⁰²

Below is a table of the private sector and civil society stakeholders who were identified for the purposes of stakeholder engagement.²⁰³

No.	Civil Society Stakeholders	No.	Private Sector Stakeholders
1	Nature Kenya	1	Amu Power Company Limited
2	Media	2	Lenders
3	Save Lamu	3	Owners of HSE Consultant (KTL)
4	UNESCO	4	Land Owners
5	World Wide Fund- for Nature, Kenya	5	Non-Land Owners
6	Haki Jamii	6	Youth
7	Ujamma Center	7	Women
8.	Lamu Marine Conservation Trust	8.	Vulnerable Groups

²⁰¹ It is imperative to note that in my research I did not come across the document through which this information was disseminated and as such it remains an allegation in the report that has not been verified.

²⁰² Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan. Available at <https://s3-ap-southeast-1.amazonaws.com/amupower/ESIA+STUDY/Appendix+10+Stakeholder+Engagement+Plan.pdf>

²⁰³ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan.

9.	Lamu Environment Preservation and Conservation Group	9.	Contractors
10.	Lamu Chonjo (Magazine about Lamu)	10.	O & M Company
11.	Lamu Museum and World Heritage Site	11.	General Public
12.	Lamu Cultural Festival	12.	Africa Practice
13.	Lamu Tourist Association	13.	Owner's Engineer
14.	Kenya Sea Turtle Committee		
15.	Kenya Marine Forum		
16.	Faith Based Organizations		
17.	Arocha International		
18.	NGOs in the area		

4.3 The Public Participation Process

The ESIA study report indicates that APCL prepared stakeholder invitation letters and public meeting notices, as an effort to engage the public, which were distributed in both the English and Kiswahili languages. It also provided stakeholder registration logs and power point presentations on the proposed project. These support materials were provided to ensure that there was sufficient stakeholder participation in the project. APCL chose Nairobi, Lamu Town, Kwawasi and Pate Island as the primary locations to disseminate information about the project.²⁰⁴ The choice of public meetings was based on the proximity to the site, the areas that would be adversely affected by the project, and the most suitable areas which would be convenient for stakeholder meetings about the project.

The public participation process started on 9/1/2015 at Subira Hotel in Mainland Lamu. The meeting was attended by the Ward Administrator Hindi, community leaders from the affected

²⁰⁴ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

communities and the mangrove cutters representative. The main objective of the meeting was to introduce the project to the stakeholders and discuss any other issues that may arise. On the same day, 9/1/2015, another introductory meeting was held at the Lamu Museum with the National Museum of Kenya representatives. APSL held another meeting with Save Lamu representatives at Mwana Arafa Restaurant Gardens, Lamu Island on 24/1/2015. Male and female opinion leaders were involved in a workshop on the project on 25/1/2015 at the same venue.

After the consultation meetings with the above groups, APCL facilitated another meeting involving the general public on 26/1/2015 at Bargoni Primary school which was attended by Bargoni and Ngini residents.

On 27/1/2015 the APCL organized 3 meetings: one at the Lamu County management board office, which was a project briefing meeting, the second for Mokowe residents held at Mokowe primary school on the same day where the public was informed of the project and initial discussions on the project were had. The third meeting was held at Hindi Digital Sports Center and News which was attended by Hindi residents. The next consultation meeting was held on 28/1/2015 at Changa Chini, Pate Island involving the residents of Mtangawanda. A similar meeting was held at Pate Island attended by Pate residents who were also informed about the project on 28/1/2015.

Subsequent to the initial public consultation meetings held in January 2015, APCL's focus shifted to public sector stakeholders who would be the key decision makers in the project. APCL held a Lamu County Government workshop meeting between 2/2/2015 and 3/2/2015 at Sarova Panafric Hotel in Nairobi. This was followed by media editors briefing which was held on 10/2/2015 in Nairobi. The meeting was closely followed by Lamu County assembly workshop which was held on 12/2/2015 and 13/2/2015 at Tamani Jua Resort in Malindi.²⁰⁵ There was another media house briefing on 24/2/ 2015 at Crowne Plaza Hotel in Nairobi. The information dissemination and public meetings did not continue until 1/4/2015 when the county government was hosted to a consultation meeting at Mwana Arafa Restaurant Gardens, in Lamu Island by APCL.

²⁰⁵ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

The next rounds of public meetings were held between 22/6/2015 and 24/6/2015. APCL organized a meeting with the vulnerable stakeholders and pastoralist communities on 23/6/2015 at the Hindi Chief's camp. On 24/6/2015 APCL organized two separate meetings with women from communities living in close proximity to the project and elders from the indigenous minority groups.²⁰⁶ The last stakeholder meeting and discussion was held on 25/6/2015 at the Chief's camp, Pate Island. The meeting was attended by farmers who would be affected by the coal power plant. The purpose of all these meetings was to inform the stakeholders about the project and give them opportunity to share their views.

4.4 Stakeholder Issues Arising from the Stakeholder Meetings

Following the public consultation meetings, the stakeholders, especially women in Lamu County, expressed the need for regular and reliable supply of water. APCL was requested to prioritize access to portable water as part of its social responsibility initiative. The stakeholders also identified the lack of access to quality education on the basis that educational institutions in the area were few and far apart. The stakeholders were concerned about the low literacy levels among the youth and the need for the youth to have marketable skills. The local community was also concerned about the number of hospitals in the region.²⁰⁷ The community expressed its displeasure with the lack of medical equipment in the region. The stakeholders decried the need for the existing hospitals to be upgraded and satellite clinics to be established in the region to provide maternal health services. The residents were concerned about the potential loss of their livelihoods as a result of the project having a detrimental impact on their fishing and agricultural activities.²⁰⁸ They also expressed the need for impartation of financial literacy to those who would be receiving land compensation and also requested that the community members who would be economically displaced as a result of the project be compensated as well.

In the meetings, the members sought clarity on the opportunities that would be availed by the establishment of the project. APCL was specifically requested to provide information about the economic opportunities available to the public and also explain how the public would

²⁰⁶ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

²⁰⁷ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

²⁰⁸ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

benefit from those opportunities.²⁰⁹ The members of the public also expressed the need for APCL to explain the percentage of jobs that would be allocated to the local communities. Women from the indigenous communities expressed the need for financial literacy and loans to enable them to access the opportunities presented by the project.

One of the issues that was extensively discussed was the concern over the lack of title deeds for persons who are living in the area that was earmarked for the project. The stakeholders stated that there was need to demarcate the exact boundaries of the project. The stakeholders did not understand how the compensation for the landowners in the affected region would be carried out as there was no information as to who was responsible for compensation as well as the price per acre for the land that would be acquired.²¹⁰ The stakeholders further sought to know what plans APCL had in respect to the relocation of persons living within the affected area. The stakeholders also wanted to know the clear procedure for identifying the persons affected by the project who would be eligible for compensation.

The stakeholders were also concerned about the fraudulent nature of land acquisition especially by influential persons in the wake of the project with the sole aim of getting compensation. The locals were also concerned about people purchasing land from the local community for speculative purposes. The stakeholders were also concerned about the land that would be made available for relocation as they were afraid that the land would not be as productive as the one, they were currently living on.²¹¹

The stakeholders explained that they needed assurance that the project would not be implemented if it would be detrimental to the health of the community without sufficient mitigation measures to counter the detrimental effects of the project. The stakeholders also expressed the need to ensure that the Environment and Social Impact Assessment (ESIA) would be transparent. The community wanted to be involved in carrying out the process.²¹² The local community was concerned that APCL would not honor its commitment to ensure that the locals benefitted from the project. The locals were also concerned the project would

²⁰⁹ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

²¹⁰ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

²¹¹ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

²¹² Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

benefit a few affluent persons in the society. It was also not clear how long APCL would be committed to ensuring that the local communities benefitted from the project.

4.5 APCL's Response to Stakeholder Issues

APCL analyzed the issues raised by the various stakeholders and initiated development projects with the local communities in Lamu County in response. APCL has also partnered with the County Government of Lamu, local community members and the civil society to ensure that there are sufficient community development activities in the region. In an effort to support local fishermen, APCL provided fishing supplies and equipment to more than 50 fishermen to increase their efficiency in fishing and also to enable them to fish in the deep seas. In addition to providing the fishermen with fishing supplies and equipment, APCL also purchased a cold room freezer with a capacity of 10 tonnes to store fish captured from the ocean.²¹³ The purpose behind the cold room freezer is to ensure that local fishermen have sufficient time to negotiate for better prices and eliminate the rampant practice of selling fish at throw away prices. The cold room freezer allows the fishermen to explore new markets. Amu Power has also acquired an Ice flake machine that will assist fishermen who go into the ocean without ice. Lack of ice during fishing causes the fish to rot before it reaches the market.²¹⁴ To solve the issue of water supply, APCL has constructed water reservoirs within the local communities to support free deliveries of water. The community members no longer have to walk long distances to fetch water for domestic use. APCL is also committed to installing up to 20 tanks in the remote locations to ensure that the residents of Kwawasi, Pate and Mpeketoni have adequate supply of water. APCL has partnered with Lamu County Government to install street lights to ensure that businesses operate for long hours. APCL has also partnered with Muthaura Foundation to give scholarships to needy students in the region and also launched an afforestation program with a goal of planting 300,000 trees.²¹⁵ It has also assured local communities that the community members will be given first priority in employment opportunities in the project.

²¹³ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

²¹⁴ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

²¹⁵ Amu Power ESIA Study. Volume II. Appendix 10 Stakeholder Engagement Plan

4.6 Analysis

A number of issues arise relating to the public participation process described above:

From it was clear that the views and feedback from the public were not intended to enable the government undertake an analysis of available alternatives and decide whether or not to undertake this project. There are several pointers to this: Firstly, the Government of Kenya released the Expression of Interest (EOI) regarding the Lamu Power Project on 28 September 2013 and the EOI remained open until 23 of October 2013 when it was officially closed.²¹⁶ The National Environment Management Authority (“NEMA”) released the environmental and social impact assessment (ESIA) for the project on 26th July 2016. This was three (3) years after the project had already been advertised and Amu Power Limited awarded the contract in 2013.²¹⁷ Any public engagement at this stage can only amount to manipulation and window dressing to drum up support as the critical decision on whether or not to undertake the project was long made before the people were involved.²¹⁸

Secondly, people were clearly not prepared for public participation, they had little capacity, if any, to engage effectively in public participation. It is for this reason that most of the concerns raised related to provision of public services such as water, education, lighting, healthcare etc, all of which were not related to the project at hand but are corporate social responsibility issues. Out of the myriad of issues raised in the public forums and consultation meetings, only three touched on the project. These are details on the compensation price for the land to be acquired for the project, a guarantee that the project would not be established if it would have an adverse effect on the health of the community and the need for compensation for non-land owners who would experience economic displacement as a result of the establishment of the project. The civil society also expressed the need for a transparent ESIA process.

Thirdly, the public participation process did not identify all the elements of the project and as such *bona fide* stakeholders were left out. There was failure in stakeholder identification and

²¹⁶ Ministry of Energy. The development of one 900-1000MW Coal Power Plant at Lamu, Lamu County by Private Investors, 2014. <http://www.decoalize.org/wp-content/uploads/2017/02/original-tender.pdf> 18 March 2019

²¹⁷ Amu Power. Environmental and Societal Impact Assessment Study. Main Volume, 2016. <https://www.amupower.co.ke/esia.html> 18 March 2019

²¹⁸ DeCOALonize . The Impacts on the Community of the Proposed Coal Plant in Lamu.

mapping. One of the key elements of the project is the Lime stone mining in Witu.²¹⁹ APCL did not disclose this essential element of the project and as such, the community in Witu that would be affected by the establishment of the project was not consulted.²²⁰ On the same issue, APCL did not engage all the bonafide stakeholders in the public meetings. The Civil society groups identified as stakeholders were largely left out in the public meetings.²²¹ Although there were over 17 *bona fide* civil society stakeholders that were identified, APCL conducted public consultation meetings with only one civil society stakeholder, Save Lamu only once on 24/1/2015. No further meetings or follow ups were held after the initial meetings.

Fourthly, the public participation programme did not meet the standards espoused in the Mui Coal basin case and the parameters of effective public participation established in chapter two as there was no deliberate effort to release in advance all pertinent information on the project, in a language that all residents would understand²²² and a clear programme and agenda for the scheduled meetings.²²³ A look at the process adopted reveals that the purported public participation process was only meant to inform the local residents that APCL would be establishing a coal plant in the region, explain the nature of project, possible benefits and adverse impact without a meaningful attempt to collect and act on feedback received in a clear and transparent manner.²²⁴ Members of the public were not given an opportunity to submit written memoranda on the project before the meetings.

Lastly, a question of the suitability of the formal meetings as a form of information dissemination and collection of feedback also comes to the fore. Granted that the stakeholders involved were largely illiterate, perhaps informal barazas or dissemination of information

²¹⁹ The coal power project technology is based on super-critical heating of pulverized coal which ensures the highest efficiency in burning coal to reduce Greenhouse Gases (GHG) emissions. In addition, the project will include a wet Limestone Flue Gas Desulphurization (FGD) System to minimize Sulphur dioxide emissions, Low Nitrous Oxide Burners to be used in combustion technology to reduce Nitrous Oxide emissions. The wet limestone will be mined in Witu.

²²⁰ Momanyi, J. Zero emissions, zero poverty in Kenya: a review of whether Lamu Coal Power Plant promotes a pro-poor low carbon development pathway (Doctoral dissertation, University of Cape Town).

²²¹ Momanyi, J. Zero emissions, zero poverty in Kenya: a review of whether Lamu Coal Power Plant promotes a pro-poor low carbon development pathway.

²²²The project background information document was prepared in English, not in the Swahili language that the residents are familiar with.

²²³Downing, K. How is China using environmentalism to gain influence in the developing world? (Master's thesis), 2019.

²²⁴ Downing, K. How is China using environmentalism to gain influence in the developing world? (Master's thesis), 2019.

through the traditional leadership structures available within the community would have been better suited.

In APCL's response, the pertinent issues raised about the project were not addressed. APCL, however, made commitment to engage in social corporate responsibility initiatives such as providing street lighting, providing scholarship to students from the local communities, establishing a water reservoir and purchasing fishing equipment for fishermen.²²⁵

Viable alternatives to the project were not addressed by APCL, expectedly. Kenya has the seventh largest geothermal reserves in the world that are not fully exploited to this day. It has been posited that this would have made a viable alternative to the coal power plant.²²⁶ The available options were not provided to the stakeholders at the initial phase of the project. The deleterious health effects and the adverse nature of the project to the Lamu mangrove harvesting business were not revealed.

Most of the key stakeholders only met the officials of APCL once. Effective and meaningful public participation would not take place when the stakeholders are only engaged in one meeting. There was need for a second and third follow up meetings to address the issues raised in the first meeting by providing feedback on what was possible and what could not be achieved. Without crucial information about the project especially on health, the local residents were not in a position to effectively participate in the project which explains why their concerns related to social corporate responsibility.²²⁷

One of the key ingredients of effective and meaningful public participation as identified in chapter two is the need to involve the stakeholders in decision making. There was no attempt to involve the stakeholders in decision making at all. It is clear from the identification of the stakeholders, to public meetings and APCL response to the issues, the purported public participation exercise was only meant to drum up public support for the project.

Effective decision making requires that the project is an input of all the stakeholders hence the need for engagement at the project identification and initiation phases. The views of the

²²⁵ Full Resettlement Action Plan Summary - Lamu Coal Project. Resettlement Action Plan

²²⁶ Energy Regulatory Commission. Least Cost Power Development Plan Study period 2011-2031. Nairobi.

²²⁷ Full Resettlement Action Plan Summary - Lamu Coal Project. Resettlement Action Plan

people that are most affected by the project should prevail.²²⁸ The government has shown willingness to compensate the landowners whose land has been earmarked for the project. The government is, however, not willing to compensate thousands of the Lamu County residents who will be economically displaced when the plant is established as its effects will be felt by residents beyond the physical location of the project.²²⁹ No viable alternatives have been given to the residents of Lamu county who will lose their means of livelihood when the land is acquired.²³⁰

Although the Kenyan public is expected to be the beneficiaries of the project, APCL failed to involve members of the public in the decision-making process. All the opposing views on the project were not given sufficient consideration and the APCL did not state how it would address the concerns voiced by the stakeholders except for social corporate responsibility.²³¹ APCL offered to plant trees in response to the detrimental effects of the coal plant to the environment. This response is not an effective one because afforestation will not solve the problems of smog and acid rain which are caused by the emissions from the coal power plant. From the analysis of the process of public participation in the Lamu Power Project, it is clear that there was no effective and meaningful public participation in line with the parameters set out under chapter two.

4.7 Conclusion

I set out to answer the question as to whether there was effective public participation in the Lamu Power Project. I have established, through this study that public participation in this project was illusory, a mere charade intended to check the constitutional box. The decision to build the coal plant in Lamu arrived at way before relevant stakeholders were consulted and as such it would have had no meaningful effect. An analysis of the public accounts on the public participation revealed that *bona fide* stakeholders were left out of the public participation process and for those that were involved, the government and APCL failed to take into account their views in good faith. There was no clear programme for public

²²⁸ Downing, K. How is China using environmentalism to gain influence in the developing world? (Master's thesis).

²²⁹ Momanyi, J. Zero emissions, zero poverty in Kenya: a review of whether Lamu Coal Power Plant promotes a pro-poor low carbon development pathway

²³⁰ Cilliers, J., Donnenfeld, Z., Kwasi, S., Shah, S.S. and Welborn, L., 2018. Shaping the future-strategies for sustainable development in Kenya

²³¹ Full Resettlement Action Plan Summary - Lamu Coal Project. Resettlement Action Plan

participation and the information about the project was provided in a language that the residents of Kwawasi village were not familiar with. APCL failed to address the issues of transparency in the ESIA process, land compensation issues and the commitment not to establish the project if it was detrimental to the health of the residents.

Effective public participation requires that concerns raised by the public are addressed and viable alternatives to the project considered. The potential negative effects of the project were also not addressed. The classification of stakeholders into civil society, public sector and private sector stakeholders prevented the meeting of either of the groups because each category held separate consultation meetings and did not get to learn about and appreciate the concerns raised by other categories of stakeholders. This led to a failure of cross-fertilization of ideas out of the various interests and concerns that would merge in such a forum.

It is, therefore, clear that the public participation process was a sham and was only meant to drum public support for the project and to tick the constitutional check box when the aggrieved groups moved to court. It did not meet international standards for effective public participation as set out in chapter two and this has led to opposition to the project as seen in the cases pending before the National Environmental Tribunal and the High Court.

CHAPTER FIVE

5.0 Recommendations and Conclusion

5.1 Introduction

The in-depth analysis of the public participation process undertaken in Chapter 4 has shown that the parties involved in the Lamu Power Project were cognizant of the constitutional dictate for public participation and that indeed they undertook a process for public participation. The project has, however, stalled owing to sustained stakeholder opposition to the project which brings to the fore the question of how effective the public participation process was. This chapter will make recommendations on the steps Kenya can take to ensure that there is effective and meaningful public participation in PPPs in the energy sector. The chapter will also suggest legislative amendments and regulatory changes that will facilitate effective public participation in the energy sector.

5.2 Public Participation Challenges and Proposed Solutions

The lack of effective public participation in public and private partnerships can be traced to inadequate stakeholder mapping and engagements. Some interest groups that are adversely affected by the project are left out in the public participation process as it was the case with Lamu Power Project.²³² Adequate stakeholder mapping is essential to ensuring that PPP projects are not stalled by court cases or other forms of interferences.²³³ I recommend that an appropriate tool for stakeholder analysis be adopted to ensure that all relevant stakeholders are identified, prioritized, visualized, engaged and involved in decision making.

PPPs have faced slow implementation because of the lack of clarity on what constitutes effective public participation.²³⁴ The contracting authority on public participation regarding public-private partnership has focused on meeting the constitutional threshold for compliance

²³² Myllyvirta, L. and Chuwah, C. Assessing the air quality, toxic and health impacts of the Lamu coal-fired power plants, 2017.

²³³ Downing, K. How is China using environmentalism to gain influence in the developing world? (Master's thesis).

²³⁴ Full Resettlement Action Plan Summary - Lamu Coal Project. Resettlement Action Plan. African Development Bank Group. Available https://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/Kenya_-_Lamu_Coal_Power_Project_%E2%80%93_RAP_Summary.pdf

purposes. As a consequence, public participation has been illusory and the whole process just a mere charade to drum public support for the project.

Chapter two of this thesis sets out what I consider the parameters for effective public participation. By way of a summary, these include: promotion of literacy and education to enhance its citizen's capacity for public participation as well as continuous public awareness on the role and place of public participation generally which awareness can be carried out within the context of grassroots organisations; proper mapping out of stakeholders; pro-active dissemination of objective information relating to projects in a language understood by the primary stakeholders. The mode of communication and forums for dissemination of information and collection of feedback should be designed to reach all the marginalized communities; receiving of feedback, its analysis and use in decision making at which stage a select number of representatives are involved; further the timing for participation is most critical, it must be done before decisions are made and feedback genuinely considered; the participation should take into inclusivity and diversity; once the feedback has been collected, an analysis of the alternative decisions and choices should be undertaken and feedback given to the people as to whatever decision is made and the rationale for it; further, participation should not be a one off event but a process through which the public is continuously consulted and any concerns raised addressed consistently; lastly, parties dissatisfied with the process must have access to judicial and administrative proceedings to remedy the situation. This process should not be riddled with hurdles on *locus standi* and technicalities aimed at locking out interested participants.

The state has adopted a minimalist approach to public participation process which has created a 'compliance attitude' in public officials. The compliance attitude is fueled by the desire to ensure that they get the approval of the PPP and weather down the opposition to the project. The 'compliance attitude' among decision makers is fueled by the mistaken believe that the public participation process usurps the authority of office holders.²³⁵ The lack of understanding of the nature of public participation has made public officials and agencies to go through motions with the intention of ticking the constitutional requirement of public

²³⁵ King, C.S., Feltey, K.M. and Susel, B.O.N. The question of participation: Toward authentic public participation in public administration. *Public administration review*, 1998, pp.317-326.

participation.²³⁶ The Court also stated that the role of public participation is to cross-fertilize and enrich the views of those that are most affected by the decision. There is economic benefit in effective participation because the project is implemented without unnecessary delays when the public authority conducts effective public participation.²³⁷

In Kenya public participation process begins after the project has already been designed, conceptualized and a private party already engaged. The possibility of the process informing decision making including on the exploration of alternative solutions to the problem sought to be solved is nil as a decision to implement the project will have been already made and the stakes extremely high for the state and the private party for the project not to be implemented. The public participation process should begin during the design and conceptualization stage of the PPP project, before the award of the contract to the private party. In this case the views of the public will be considered and taken into account by the decision makers and possibly influence their decisions.²³⁸

5.3 Proposed Amendments to the Public Private Partnership Act, 2013

PPP Act of 2013 is the principal legislation governing PPPs in Kenya. It provides the legislative framework for private entities to partner with the government in infrastructure and development projects through concessions and contractual agreements.²³⁹ While it is noted that there is a Public Private Partnership (amendment) Bill, 2017, the same does not touch on matters relating to public participation. The PPP Act should be amended to allow for effective and meaningful public participation. Section 7 of the Act should be amended to include a provision stating that PPPs should adhere to the principle of effective public participation and proceed to define what this would entail by including the parameters for public participation discussed above.

Section 16 (1) of the Act states that a public authority that intends to enter into a public and private partnership with a private entity should establish a public private node. Section 16 (2)

²³⁶ Walker, H., Sinclair, A.J. and Spaling, H. Public participation in and learning through SEA in Kenya. Environmental Impact Assessment Review, 45, 2014, pp.1-9.

²³⁷ Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR

²³⁸ Walker, H., Sinclair, A.J. and Spaling, H. Public participation in and learning through SEA in Kenya. Environmental Impact Assessment Review, 45, 2014, pp.1-9.

²³⁹ Short title, Public Private Partnership Act No. 15 of 2013

states that the node shall be headed by the accounting officer and shall consist financial, technical, procurement and legal personnel that the authority shall consider necessary for the performance of its functions.²⁴⁰ This section should be amended in regard to the composition of the node to include 3 appointees from the local community most affected by the project to ensure that the societal concerns are addressed and the community involved in decision making.

PPPs in Kenya are not attractive to investors and private entities because of the delays in implementation that have plagued the already existing projects. The delays are occasioned by engaging the public when the project has already been conceptualized and the tendering process has already been done. When a PPP project has been subjected to effective public participation and subsequently tendered it will give investors' confidence as there will not be delays in implementation.

5.4 Regulatory Gaps in the Public Private Partnership Regulations, 2014

PPP Regulations, 2014 provide the regulations that shall govern every PPP agreement in the country. Section 2 (a) of the Regulations state that the Regulations do not apply to a national project with a capital expenditure component of more than eighty-five million Kenyan Shillings. Most of the PPP in the energy sector in Kenya run into billions of shillings and as such section 2 (a) of the PPP Regulations, 2014 eliminates a regulatory framework for most of the PPPs. PPPs of less than eighty-five million are likely to attract local investors and the donor community. The legal effect of this clause is that low value PPPs will experience stricter regulations as opposed to high value PPPs. Under section 2 (b) of the public private regulations 2014, these regulations do not apply to county government projects that have a capital expenditure of more than five million Kenyan shillings.

Section 2 (c) of the PPP Regulations, 2014 states that national government projects and county government projects that have life cycle costs of more than 5 million Kenyan shillings are exempt from these regulations. Any national and county government projects will have repair and maintenance costs exceeding five million Kenyan shillings in order to provide its value to the public. When you factor in agency costs, upgrade costs, repair costs and user

²⁴⁰ Section 16(2) of the Public Private Partnership Act

expenses, the life cycle costs for every public project will exceed five million Kenyan shillings or its equivalent in USD.²⁴¹ As such, all the public and private partnership projects in the energy sector are exempt from these regulations. Without a regulatory regime, most of the PPP projects are therefore implemented without the need for public participation. Section 2 of the Public Private Regulations, 2014 should be amended to ensure that the Regulations apply to all the PPP projects.

5.5 Gaps in the Proposed Public Participation Bill, 2018

While the Public Participation Bill, 2018 would provide an overarching framework for public participation, it would be imperative that a section is included on its applicability to PPPs for the avoidance of any doubt especially in view of the general misconception that public participation would be a requirement for public entities only. Related to this, it is imperative to note that while the Bill is indicated to apply to private bodies, most of its obligations are for public officers in the contracting authorities with no specific obligations placed on the private parties. Public participation in PPPs should be guided by joint committees, technical teams and citizen commissions. Effective and meaningful public participation should go beyond collecting feedback from the public to incorporating the citizens in the decision-making process.²⁴² The role of decision making should not be left to the office bearers but rather citizens and office bearers should form joint committees which will give citizens a role in decision-making. Effective public participation goes beyond merely ticking the constitutional box for the purposes of the approval of the project. Effective public participation requires that the citizens have access to the information available on the project.²⁴³ The Public Participation Bill should also make it a requirement for public authorities or the relevant bodies to pro-actively provide information to the members of the public.

The Public Participation Bill 2018 is vague on time frame between the first advertisement and the first public participation forum. The affected stakeholders should be given not less than 14 days to submit their written memoranda (if any) before the hearing. The public authority

²⁴¹ Roehrich, J.K., Lewis, M.A. and George, G. Are public-private partnerships a healthy option? A systematic literature review. *Social science & medicine*, 113, 2014, pp.110-119.

²⁴² Gikonyo W. Memorandum of Public participation Bill, No. 4 of 2018. Institute of Social Accountability. Nairobi, 2018.

²⁴³ Gikonyo W. Memorandum of Public participation Bill, No. 4 of 2018. Institute of Social Accountability. Nairobi.

should make publicly available the written memorandum to ensure that there is a meaningful discussion on the relevant issues.²⁴⁴ Public participation forums should not happen less than 7 days after the written memoranda have been made available. Similarly seems to envisage public participation as an event, with a venue. This must be changed in favour of flexibility to suit specific circumstances relating to each case as would be informed by the relevant stakeholders' unique characteristics.

The Public Participation Bill 2018 does not set out public funding mechanism for effective public participation. Both the County Governments and the National Government have not set aside funds for public participation. Organizing the public participation forums requires coordination with non-state actors and all the relevant stakeholders. Without funds set aside for stakeholder mapping and identification, there are high chances that the process will fail.

The Bill proposes that each responsible authority develops its own public participation guidelines. Rather than leave participation to each individual authority, it has been proposed that Kenya may train and designate officers responsible for public participation or an agency to give guidance on public participation otherwise a lot of reinventing of the wheel is likely to be undertaken, unnecessarily. A cookie cutter approach is, however, not desirable.²⁴⁵

5.6 Conclusion

As it has been demonstrated by the case study, the process of planning and implementation of PPPs in Kenya has been devoid of effective and meaningful public participation. Public participation for PPPs in the energy sector in Kenya has been left to elites and opinion leaders.²⁴⁶ The result of the failure to involve all stakeholders has been manifested in stalled projects and sometimes total failure to implement the project owing to sustained opposition.

The Constitution of Kenya, 2010 radically transformed the nature of state-society relations.²⁴⁷ It firmly entrenched the principle of public participation in our governance and reaffirmed that governance and the decision-making process in public affairs will be based on social

²⁴⁴ Full Resettlement Action Plan Summary - Lamu Coal Project. Resettlement Action Plan.

²⁴⁵ <http://www.katibainstitute.org/engaging-in-a-public-participation-law/Jill> Cottrell Ghai

²⁴⁶ Gikonyo W. *Memorandum of Public participation Bill*, No. 4 of 2018. Institute of Social Accountability. Nairobi, 2018.

²⁴⁷ Mbondenyei, M.K and Ambani O.J. *The New Constitutional Law of Kenya. Principles, Government and Human Rights: Principles, Government and Human Rights*. African Books Collection, Law Africa, 2010

contract between the government and the electorate.²⁴⁸ The people of the Republic of Kenya are the sovereign and as such they should be engaged in the planning and implementation of PPPs. While the PPP model had been in use for a while in Kenya, efforts have been made for its use as a preferred model of public financing when it became evident that Vision 2030 and the Sustainable Development Goals may not be achieved without partnership with non-state actors.²⁴⁹

Public participation in PPPs in Kenya lacks uniformity because of the lack of clear guidelines and standards. Ineffective public participation has also been fueled by the lack of laws and regulations on delivering the constitutional promise of public engagement through public participation.²⁵⁰ Another challenge that has plagued public participation in PPPs is the challenges in the access to information about the project where there has been no meaningful effort to disseminate information that takes into account literacy levels of the stakeholder to enhance meaningful engagement.

In conclusion, Kenya needs to secure the partnership of private entities and other non-state actors to develop an energy sector that will support a robust manufacturing sector in a sustainable manner. It is, therefore, imperative that steps are taken to ensure that these projects are owned by the people within whose communities the projects are established. This will be achieved by ensuring the public concerned, the relevant stakeholders, are not only consulted but also involved in decision making from the project proposal stage all through to its implementation to ensure ownership of the projects that will eventually be socially responsive and sustainable .

²⁴⁸ Wanda, R.E., 2016. Constituting folklore: A dialogue on the 2010 Constitution in Kenya. *Journal of Pan African Studies*, 9(1), 2012, pp.59-84.

²⁴⁹ Abdulsamad, A., Stokes, S. and Gereffi, G. Public-private partnerships in global value chains: Can they actually benefit the poor?. *United States Agency for International Development-Leveraging Economic Opportunities Report*, (8), 2015.

²⁵⁰ Beisheim, M., Ellersiek, A., Goltermann, L. and Kiamba, P. Meta-governance of partnerships for sustainable development: Actors' perspectives from Kenya. *Public Administration and Development*, 38(3),2018, pp.105-119.

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