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**MEDIATION: A MEANS OF RESOLUTION OF GRIEVANCES FACED
BY THE TURKANA COMMUNITY AS A RESULT OF UPSTREAM OIL
ACTIVITIES**

**A research proposal submitted in partial fulfillment
of the requirements of the Master of Laws Degree at
Strathmore University Law School.**

By
Mark Gitonga Mathenge.

120013

**Prepared under the supervision of
Dr. Francis Kariuki**

**16th November 2020
Word count (37,340)**

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ACKNOWLEDGEMENT

I would like to appreciate my family especially my parents for the understanding, patience, moral and financial support that they have given gave me throughout the study period, My supervisor Dr. Francis Kariuki for the able guidance and to the many other persons who assisted me in one way or the other, and whom I may not mentioned, I convey my gratitude and may the Lord bless you all!



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, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Name of Candidate -----

Signature-----

Date-----

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LIST OF ABBREVIATIONS AND ACRONYMS

ADR	ALTERNATIVE DISPUTE RESOLUTION
COK	CONSTITUTION OF KENYA
ELC	ENVIRONMENT AND LAND COURT
KAM	KENYA ASSOCIATION OF MANUFACTURERS
KNBS	KENYA NATIONAL BUREAU OF STATISTICS
MOP	MINISTRY OF PETROLEUM
NLC	NATIONAL LAND COMMISSION
NLP	NATIONAL LAND POLICY
NMAS	AUSTRALIAN NATIONAL MEDIATOR ACCREDITATION SCHEME
TDRM	TRADITIONAL DISPUTE RESOLUTION MECHANISM
AJS	ALTERNATIVE JUSTICE SYSTEMS
PEV	POST ELECTION VIOLENCE



LIST OF CASES

County Government of Turkana v The National Land Commission & another (2019) eKLR

Jackson Ekaru Nakusa & 32 Others vs National Land Commission & 2 Others (2019) eKLR

Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others (2015) eKLR

Patrick Musimba v National Land Commission & 4 Others (2016) eKLR

LIST OF STATUTES

Constitution of Kenya (2010)

Civil Procedure Act (Cap 21)

Civil Procedure Rules 2010

Community Land Act 2016.

Intergovernmental Relations Act 2012

Energy Act 2019

Land Act 2012.

Petroleum Act 2019.

Mining Act 2016

Mediation Bill 2020

National Land Commission Act 2012

Natural resources (Classes of Transactions subject to Ratification) Act 2016

Environmental Management & Co-ordination Act 2012





ABSTRACT

Exploitation of natural resources especially in developing nations leads to a rise of grievances with respect to land and sharing of benefits accruing from the natural resources. This has been seen with the exploration of the oil resource in Turkana where grievances have arisen among the various stakeholders being both levels of the Kenyan government, community and the International investor. The grievances revolve around lack of public participation in exploration activities being carried out by the investors, compulsory acquisition of land resulting in the loss of communal land, access to employment opportunities, revenue sharing, beneficial use of natural resources and lack of transparency due to poor information sharing among others.

Access to justice through litigation has been hindered by disadvantages of formal dispute resolution processes which include high costs for instituting a suit, codified complex procedures, low educational levels among members of a community and lack of legal knowledge. These issues can be resolved by the use of mediation. The problem that this thesis seeks to address is lack of timely resolution of grievances and issues that arise and have arisen as a result of upstream oil activities in Kenya.

This research has adopted a doctrinal research methodology and shall use an interpretive approach to data, texts and studies within the context of grievances that have arisen and examine the role that mediation can take in resolving such grievances. The research findings have indicated that mediation as a grievance resolution mechanism can play a role in solving grievances arising as a result of the extractive industry, that there are statutes that provide for the use of mediation in Kenya and Internationally and mediation can save time and resources in resolution of grievances by enabling parties such as an IOC or Government to obtain the social license to operate.

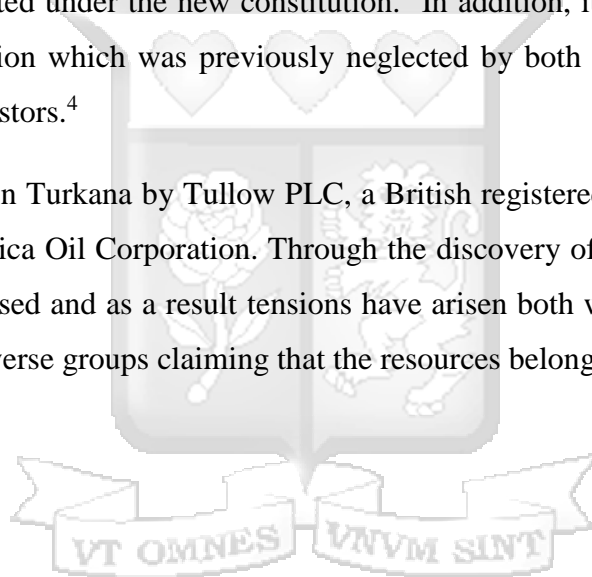
The research further concludes that the proper use of mediation as one of the ADR mechanisms will resolve any animosity between the parties involved in the extractive industry such as the government, International investors and local communities living in the area where a resource is being extracted and ensure that the people benefit from the resource in form of revenues, jobs and infrastructure such as schools and hospitals.

CHAPTER ONE

1.0.BACKGROUND TO THE PROBLEM

Since the confirmation of the presence of oil in Turkana, disputes among various stakeholders such as both levels of government and the local community have arisen.¹ Oil discovery in Turkana County magnified and highlighted the issues faced by the Turkana people, a community whose main economic activity is pastoralism and are found in north-western part of Kenya.² The community has been on the periphery of marginalization since independence until the year 2010 when counties were created under the new constitution.³ In addition, it has also generated quite some interest in this region which was previously neglected by both Kenyan and non-Kenyan actors in the form of investors.⁴

Oil was first discovered in Turkana by Tullow PLC, a British registered company that partnered with Canadian based Africa Oil Corporation. Through the discovery of oil, the stakes for power in Turkana have been raised and as a result tensions have arisen both within the political sphere and among clans with diverse groups claiming that the resources belong solely to the Turkana.⁵



¹ Johannes E, Zulu L & Kalipen E, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?' *African Geographic Review*, 2015, 2.

² Johannes E, Zulu L & Kalipen E, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?', 2015, 4.

³ Johannes E, Zulu L & Kalipen E, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?', 2015, 4.

⁴ Johannes E, Zulu L & Kalipen E, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?', 2015, 4.

⁵ Wasunna M, Okanga J & Kerecha G, 'Advancing Capacity and Access to Justice in Kenya's Extractives Sector', 2018 14.

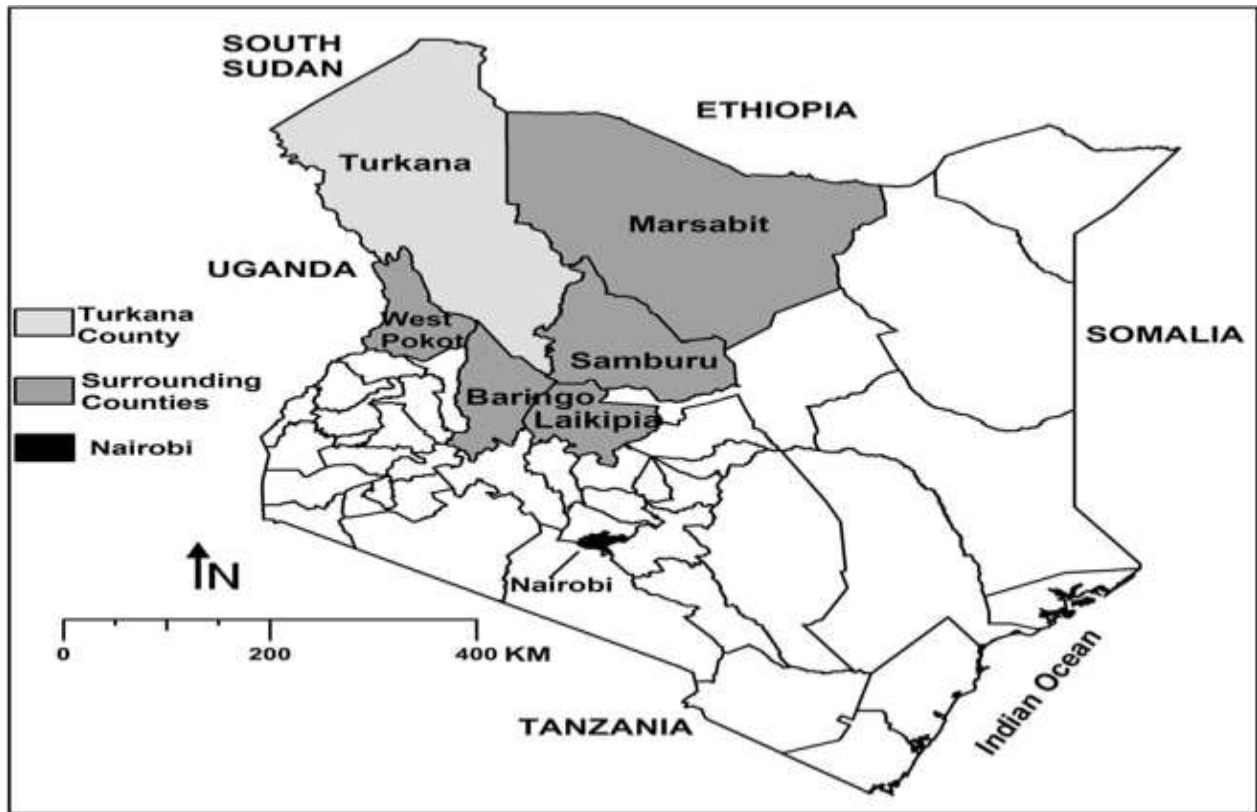


Figure 1: Location of Turkana county and surrounding counties in Kenya.

Source: Eliza M. Johannes, Leo C. Zulu & Ezekiel Kalipeni (2014): Oil discovery in County, Kenya: a source of development or dispute?

Data from the Kenya National Bureau of Statistics with regard to the socio-economic conditions in Turkana are shocking. The Turkana languish in poverty and this is compounded by the fact that their major economic activity is pastoralism. As a result of heavy reliance on pastoralism which is heavily impacted by drought as Turkana is an arid region, they form part of the citizens who are the poorest in Kenya.⁶ A brief analysis of disputes in this region and the surrounding counties such as Baringo, Laikipia, and Marsabit, shows that these regions historically suffer from violent conflicts especially due to resource sharing.⁷ Examples of the various types of

⁶ Johannes E, Zulu L & Kalipeni E, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?', 2015,6.

⁷ Johannes E, Zulu L & Kalipeni E, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?', 2015,10.

conflict include inter-clan conflicts and conflicts with neighboring communities found in Ethiopia.⁸

An increase in the risk of conflict has been further actuated by the lack of public participation in the exploration activities being undertaken by investors, locking out the Turkana who are pastoralists hence rely on land as a communal resource. Oil discovery raised the hopes of the Turkana and surrounding communities for jobs, especially because local communities and their leaders believed that a majority of the workforce would be sourced locally. However, once extraction of the oil began, the locals were given menial jobs, which did not offer good monetary compensation, leading to disillusionment and lack of satisfaction among members of the community.⁹

In Kenya, 67% of land is owned communally and such land supports about one quarter of the country's population and 70% of the livestock population.¹⁰ A large majority of these lands are characterized by harsh weather conditions such as high temperatures, low rainfall and as such they have been occupied by communities that practice pastoralism which involves owning large herds of cattle that are well-suited for these conditions.¹¹

The resulting grievances that have arisen especially among members of the Turkana Community revolve around "local content, information asymmetry, beneficial ownership, land and compensation, revenue sharing, and security risks among others."¹² Incitement due to reports by the political class of irregular acquisition of land where oil was discovered led to protests. This

⁸ Johannes E, Zulu L & Kalipen E, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?', 2015,10.

⁹ Johannes E, Zulu L & Kalipen E, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?', 2015,15.

¹⁰ Online: Njagi T, 'Communal land good for pastoralists in Kenya', The Standard, 25th May 2016.

<https://www.standardmedia.co.ke/article/2000202935/communal-land-good-for-pastoralists-in-kenya> accessed on 16/9/2109

¹¹ Njagi T, 'Communal land good for pastoralists in Kenya', The Standard, 25th May 2016.

¹² Wasunna M, Okanga J & Kerecha G, 'Advancing Capacity and Access to Justice in Kenya's Extractives Sector', Extractives Baraza and Strathmore University, 2018,6.

can be seen in an instance where as a result of a dispute, the governor was threatened by the MP for Turkana South who openly said that he should not go to his constituency.¹³

Furthermore, the oil discovery has led to disputes especially around Ngamia 1 area for example intense rivalry regarding access of land for grazing purposes and water. Tension has also arisen as a result of the existence of two land regimes namely modern and customary. The locals are also weary of losing land as it is being privatized to outsiders which contradicts the whole customary regime governing pastoral lands. This has also had negative impacts on pastoralists and their rights, which shall lead to disputes in the future.¹⁴

The Oil industry has, unlike what was expected by the local community not resulted in large scale employment opportunities as it requires technical skills and the industry is highly mechanized. The South Lokichar basin, where the oil wells are being explored lie in Turkana County. The Kenyan constitution provides that communally owned land shall vest in the communities and shall be held on the basis of identification through similar community of interest, ethnicity or culture.¹⁵ In addition, it provides that any land that is not registered as communal shall be held by the county government in Trust and that such land shall be held on behalf of a given community.¹⁶ These factors have inflamed tensions causing grievances to the Turkana as a community having had high expectation. It has also led to the community feeling that they are being left out of opportunities that should belong to them as senior level jobs have been given to expatriates or members of other local communities.

Conflict is further exarabated by the fact that the elite in the community have had the power to control interactions between community members and the investing company therefore dictating distribution of good opportunities to those who are well connected politically.¹⁷ This often

¹³ Wasunna M, Okanga J & Kerecha G, 'Advancing Capacity and Access to Justice in Kenya's Extractives Sector', 2018, 12.

¹⁴ Wasunna M, Okanga J & Kerecha G, 'Advancing Capacity and Access to Justice in Kenya's Extractives Sector', 2018, 15.

¹⁵ Article 63, *Constitution of Kenya* (2010).

¹⁶ Article 63 (3), *Constitution of Kenya* (2010).

¹⁷ Mkutu K & Wandera G, 'Conflict, Security and The Extractive Industries in Turkana, Kenya- Emerging Issues 2012-2015', United States International University-Africa (USIU) and Kenya School of Government (KSG), 2016.

<http://crimeresearch.go.ke/wp-content/uploads/2018/02/Conflict-and-Extractive-Industries-in-Turkana.pdf> on 2 February 2020

resorts in inter-clan conflicts as politicians from different clans compete to secure opportunities for their own.¹⁸

A great catalyst of conflict between the three actors is the division of revenue generated from oil production. However, this was solved in 2019 by the enactment of the Petroleum Act. Section 58 provides for allocation of twenty percent (20%) of to the county government, five percent (5%) to the community living around where the resource has been discovered and seventy five (75%) to the national government with the percentages liable for review after a period of 10 years.¹⁹

Recently, in the month of March 2019, thirty-three members of the Turkana Community and the County government of Turkana instituted separate law suits in the Environment and Land Court at Kitale being *County Government Of Turukana vs National Land Commission & Another*²⁰ and *Jackson Ekaru Nakusa & 32 Others vs National Land Commission & 2 Others*.²¹ These petitions sought conservatory orders to stop the implementation of NLC's decision to compulsorily acquire land communally owed by the Turkana. Acting through a gazette notice dated 8th February 2019 and titled Upstream Development, South Lokichar Basin, the National Land Commission sought to compulsorily acquire six thousand three hundred and forty eight (6,348) hectares of land for the said project at the request of the Ministry of Mining.²² In *County Government Of Turukana vs National Land Commission & Another* opposed the action by the NLC and argued that it was not involved nor was it engaged by the NLC with respect to acquisition of the claimed parcel, and that the NLC Proceeded to initiate acquisition of the said land without regarding of the Land Act and Constitution of Kenya. The court in its judgment delivered on 29th April 2019 found that save for the more imperatively framed provisions of the **Intergovernmental Relations Act** and **Article 189** of the Constitution direct inter-

¹⁸ Mkutu K & Wandera G, 'Conflict, Security and The Extractive Industries in Turkana, Kenya- Emerging Issues 2012-2015', 2016.

¹⁹ Section 58, *Petroleum Act* (Act No. 2 of 2019).

²⁰ (2019) eKLR.

²¹ (2019) eKLR.

²² Kenya Gazette, Notice No. 1157, "Upstream Development, South Lokichar Basin Oil Project" 8th February 2019. http://kenyalaw.org/kenya_gazette/gazette/download/Vol. CXXI-No .16 .pdf on 17 September 2019.

governmental disputes to alternative dispute resolution mechanisms as the first stop before any judicial proceedings can be lodged by any of the parties.²³

Sharing of natural resources is a conflict generator with stakeholders who seek to benefit from these resources pursuing interests that frequently clash.²⁴ The push and shove over beneficial usage of resources has led to violent conflicts of great magnitude amongst communities and given rise to animosity between nations, consequences of which tend to be loss of lives as well as property.²⁵

The ownership of land as a resource is a highly emotive issue in Kenya.²⁶ Looking back in history, land is perceived as the major reason for the Mau Mau's fight for independence. Ratification and passing into law of the Community Land Act 2016, although a step in recognizing the rights of pastoralists to land as a community, has failed to protect the local community land rights. This can be seen through analysis of the act which provides for complex steps to be followed by communities to register and secure their interests in land despite a majority of the members of the Turkana community being illiterate and hence hindering their ability to enforce or register their interests in land.²⁷

The Land Act 2012 provides that compulsory acquisition of land should be done in compliance with applicable legislation and for a beneficial purpose to citizens at large and upon instant payment of just compensation after obtaining uncoerced, prior and informed consent.²⁸ The terms upon which compulsory acquisition can take place are vague and can easily be elucidated to the advantage and for the purpose of meeting the interests of investors and the government at large. Compensation is also not covered adequately under Community Land Act and therefore

²³ (2019) eKLR.

²⁴ Muigua K, 'Natural Resources and Conflict Management in East Africa', 1st NCMG East African ADR Summit, Nairobi, 25th & 26th September, 2014,2.

²⁵ Muigua K, 'Natural Resources and Conflict Management in East Africa', 2014,2.

²⁶ Ochieng A, 'Securing Community Ownership and Control of Land Rights in Kenya: Opportunities and Challenges', Unpublished LLM Thesis, University of Nairobi, Nairobi, 2017.

²⁷ Mkutu K & Wandera G, 'Conflict, Security and The Extractive Industries in Turkana, Kenya- Emerging Issues 2012-2015', 2016.

²⁸ Part VIII, *Land Act* (Act No. 6 of 2012).

creating a loop hole with respect to whom exactly is meant to be compensated when communal land is compulsorily acquired.²⁹

Community land is defined as land that is socially and historically attached for beneficial use by an ethnic community, social interest group or specific purpose group.³⁰ In light of this, ownership of community land where it is unregistered is bestowed in the county government in Trust for the local community.³¹ Part IV of the Community Land Act lays emphasis on the Certificate of Title being the ultimate proof of proprietorship.

The Community Land Act which was primarily ratified to protect the rights of pastoralist communities does not point out clearly which land forms part of community land that can be subjected to registration in Kenya. It just mentions the procedure to be followed in registration.³² The community's right to land ownership is further limited by the provision that compulsory acquisition of land by the national government can be done for a public purpose. This means that land marked for use in investment purposes can be re-converted to become public land.

The pastoralist Turkana community experiences a very high rate of poverty yet the Community Land Act does not protect the community, Exposing them to involuntary displacements and manipulation during the process of acquiring land.³³ This is because the Act does not promote beneficial use and accountability to the community in large scale land acquisitions owned by a community. As such, the law currently lacks efficient mechanism(s) to facilitate implementation of economic, social, and environmental, safeguards geared towards the protection of the communities when land is acquired for investment purpose.

²⁹ Mkutu K & Wandera G, 'Conflict, Security and The Extractive Industries in Turkana, Kenya- Emerging Issues 2012-2015', 2016.

³⁰ Section 2, *Community Land Act* (Act no 27 of 2016).

³¹ Chavangi T, Swazuri M, Nyamasege G & Dokhe E "Complications in Land Allocations: Appraisal of the Community Land Act, 2016, Kenya", 2017 World Bank Conference On Land and Poverty, Washington DC, 2017,20.

³² Chavangi T, Swazuri M, Nyamasege G & Dokhe E "Complications in Land Allocations: Appraisal of the Community Land Act, 2016, Kenya", 2017.

³³ Chavangi T, Swazuri M, Nyamasege G & Dokhe E "Complications in Land Allocations: Appraisal of the Community Land Act, 2016, Kenya", 2017.

The Act takes into consideration the practices and cultures of pastoralist communities in relation to land use.³⁴ Their right to graze animals is limited and subject to the size of the herd owned by the community, this restriction creates conflict as most of the community land is found in areas with harsh climatic conditions and are mostly occupied by pastoralist communities. Turkana communities, for example, have to walk for long distances to search for pasture. Placing such restrictions and having off huge tracts of land to conduct oil exploration activities therefore has a negative impact on the economic activity of the Turkana resulting in grievances and conflict with the local community being the Turkana.³⁵

The NLP & Constitution do recognize the import of resolving disputes relating to land through recognized methods such as the application of Alternative Dispute Resolution Alternative Justice Systems.³⁶

One form of alternative dispute resolution mechanism is mediation and although it is effective and cost efficient, it is the most underutilized mode of dispute resolution both nationally and internationally in addressing of disputes arising over the exploitation and use of nature based resources. One of the main reason is that Natural resource conflicts are quite technical in nature and require mediators who are highly skilled or have access to technical expertise. Another challenge is that where the required skills are available, the political dimension of the dispute over a natural resource is often overlooked.

The methods employed to deal with conflicts that have arisen such as seeking redress in court have not been effective in addressing them fully. Mediation has the ability of catering for the interests of all stakeholders and may be a more efficient means of securing the pastoralists land rights. Local communities view mediation to be reconciliatory unlike litigation which results in a win-lose situation that cultivates seeds of discord.³⁷

³⁴ Chavangi T, Swazuri M, Nyamasege G & Dokhe E “Complications in Land Allocations: Appraisal of the Community Land Act, 2016, Kenya”, 2017,15.

³⁵ Chavangi T, Swazuri M, Nyamasege G & Dokhe E “Complications in Land Allocations: Appraisal of the Community Land Act, 2016, Kenya”, 2017.

³⁶Chavangi T, Swazuri M, Nyamasege G & Dokhe E “Complications in Land Allocations: Appraisal of the Community Land Act, 2016, Kenya”, 2017,16.

³⁷ Kariuki F, Kerecha G& James O. Kirwa, ‘Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers’, 2018, 68.

An example of the successful use of mediation in Kenya, specifically in the extractive industry can be seen in the Magarini Inquiry that was conducted in the coastal region. In the instant case, the Kenya Association of Manufacturers (KAM) used the ufadhili trust as a neutral party and ufadhili trust played the part of a mediator. The mediation was conducted between the companies involved in mining and the local community and its main purpose was to create and maintain trust between the two parties and also enable them to deepen their engagement. Ufadhili built a platform that enables communication and increased the companies capacity to participate in strategic community grievance resolution practices. The platform further enables the guidance of the parties in the development and implementation of plans of action to address conflicts revolving around ownership of land, impact of company activities on the environment among others. This had a direct impact in improving relations between the parties and the role of the mediator reduced enabling the companies to directly engage with the communities via their Corporate Social Responsibility committees hence increasing trust and effective resolution of conflict.³⁸

A majority of laws found in the East African states do not have provisions on conflict management between contractors, governments, and local communities.³⁹ The laws also do not make reference to the affected communities or persons.⁴⁰ Mediation has been associated with several advantages such as allowing for out of the box solutions, personal emancipation, increased control by parties, and addressing of the main ground of the grievances arising. Mediation promotes voluntariness and outcomes that are lasting.

The constitution of Kenya recognizes mediation Use of mediation under Article 159.⁴¹ This provides that while exercising judicial authority, tribunals and courts shall be guided by ADR mechanisms including; mediation, reconciliation and arbitration and the shall promote TDR.⁴² In

³⁸ Institute for Human Rights and Business (IHBR), “Human Rights in Kenya’s Extractive Sector: Exploring the Terrain”, 2016, 77.

https://www.ihrb.org/uploads/reports/IHRB_Human_Rights_in_Kenyas_Extractive_Sector_Exploring_the_Terrain_Dec_2016.pdf (Accessed on 29/10/19)

³⁹Muigua K, ‘Natural Resources and Conflict Management in East Africa’, 2014, 19.

⁴⁰Muigua K, ‘Natural Resources and Conflict Management in East Africa’, 2014, 19.

⁴¹ Article 159, *Constitution of Kenya* (2010).

⁴² Article 159 (2)(c), *Constitution of Kenya* (2010).

view of the above, the High Court (Family and Commercial Divisions) has implemented court-annexed mediation on a pilot basis after the enactment of the Mediation (Pilot Project) Rules, 2015. As per these rules, the Mediation deputy registrar is empowered to screen all civil actions and refer suitable matter to Mediation. The civil procedure act establishes the mediation accreditation committee which maintains a register of mediators who are qualified and appoints mediators to manage disputes referred to mediation.

The Ministry of mining and Petroleum has also adopted alternative dispute resolution mechanisms to resolve grievances faced by the Turkana as a community through the establishment of the Turkana Grievance Management Committee via Gazette notice number 8046 dated 7th August 2018.⁴³ The committee is empowered to create means of resolving emerging issues and concerns that arise facing the host community or contractor.

The Turkana Grievance Management Committee comprises of 19 members with the chair being the County Commissioner of Turkana and vice chair being a representative of the Ministry of Petroleum. The nineteen (19) members are diversified and some of them are;

- (i) One (1) representative of the ministry of industry, trade and co-operatives
- (ii) One (1) representative of the Ministry of Labour and Social Protection
- (iii) One (1) representative of the Ministry of Devolution
- (iv) One (1) representative of the Turkana County Assembly
- (v) One (1) representative of the Turkana County executive committee

Mediation as an efficient means of dispute resolution is also recognized internationally. On 7th August 2019, forty six (46) countries signed the Singapore Mediation convention on Mediation. The United States and China were the first signatories to the treaty which is officially known as The United Nations Convention On International Settlement Agreements Resulting from Mediation. The impact of ratification of the said treaty is that mediation agreements will become enforceable in countries which are signatories therefore enabling such agreements to be

⁴³ The Kenya Gazette, Gazette Notice No. 8046 dated 7th August 2018.
http://kenyalaw.org/kenya_gazette/gazette/download/Vol.CXX-No_.93_.pdf (Accessed on 14/8/19)

applicable outside the country in which it has been executed. The treaty will become effective once at least three countries have ratified it.

As illustrated above, grievances facing the Turkana community have arisen due to lack of adequate community engagement and the land question and as such mediation can therefore be used as a remedy to make sure such grievances are resolved in an inclusive manner that is agreeable to all stakeholders.

1.1. Statement of the Problem

Grievances and conflict are said to arise where two people or groups have the notion that their interests are at cross-purposes. They become a thorn in the flesh when existing mechanisms and institutions for dispute resolution do not cater for their interests resulting in violent conflict. In order to prevent conflict, there needs to be mitigation of economic, environmental, social and gender impacts, equal sharing of benefits and engagement of all the stakeholders.

Discovery of oil and upstream oil activities such as exploration and production has created and increased grievances faced by the Turkana as a community. The grievances revolve around lack of public participation in exploration activities being carried out by the investors, compulsory acquisition of land resulting in the loss of communal land, access to employment opportunities, revenue sharing, beneficial use of natural resources, lack of transparency due to poor information sharing among others.

With the upstream activities such as oil exploration and production being carried out in Turkana, a multiplicity of grievances are bound to arise and have arisen. Access to justice through litigation has been hindered by disadvantages of formal dispute resolution processes which include high costs for instituting a suit, codified complex procedures, low educational levels among members of a community and lack of legal knowledge. Mediation can solve this issues and the problem that this thesis seeks to address is whether mediation can be an alternative to normal judicial adjudication of extractive grievances in Kenya, if there is a legal framework

existing that supports the use of mediation in resolving extractive grievances and whether mediation is the best remedy to resolve such grievances.

1.2. Research Questions

1. Whether mediation plays a role in solving grievances facing the extractive industry in Kenya?
2. Whether there is a legal framework existing in support of the use of mediation to solve grievances that arise as a result of the extractive activities?
3. Whether mediation the best remedy to solve the grievances that arise in the extractive industry?

1.3. Hypothesis/Assumption

Mediation is the most appropriate mechanism of resolving grievances faced by the Turkana community.

1.4. Justification of Study

This thesis recognizes that one of the causes of economic instability is as a result of disputes among the national government, investors and the Turkana local community which inhibits exploration of the newly discovered oil wells. As a result, it derails the economic development of Turkana County and Kenya as a whole.

Furthermore, that the value chain of the extractive industry involves five stages with several stakeholders involved in each stage such as companies and the civil society all of whom have diverse interests and expectations that clash most of the time. The Kenyan legal framework allows for the use of mediation as an ADR mechanism including acts that regulate the exploration of oil and other natural resources in Kenya.

To the best of our knowledge, no study has been undertaken on the role mediation can play in the swift and effective resolution of grievances that arise as a result of extractive activities. This gap

has contributed to the reliance on formal adjudication mechanisms such as litigation which is slow and adversarial in nature and the gaps and challenges that have arisen continue unabated.

This study will contribute to literature on grievance management on extractive disputes using mediation which is an AJS mechanism and give guidance on the possible actions that need to be taken by various stakeholders such as IOC'S, relevant government ministry, judiciary and the mediation fraternity in Kenya to bridge the knowledge gap.

1.5.Theoretical Framework

This theoretical framework is guided by Aristotle's theory of law and the views held by various scholars such as Anton-Hermann Chroust and David L. Osborn on the same. According to Anton- Hermann and David the term just can be defined in two ways.⁴⁴ The first meaning is principally used to describe a conduct that can be said to conform with the "law" and is interpreted to mean conduct which aligns with an established, authoritative rule of human conduct and irreproachable control.⁴⁵ This form of justice can be termed as a virtue. This was Socrates view as he termed justice as perfection to the other three cardinal virtues.⁴⁶

The second meaning of justice signifies equality and fairness.⁴⁷ This meaning of justice is not concerned with the moral conduct of man but rather the law in action.⁴⁸ The clear distinction between the two forms of justice is that justice as a virtue looks at the human conduct. Plato speaks to this when he stated that "justice does not depend upon a chance, convention or upon external force. It is the right condition of the human soul by the very nature of man when seen in the fullness of his environment."⁴⁹ While justice as equality, on the other hand, deals with commensurable things.⁵⁰

⁴⁴ Chroust A & Osborn D, 17 'Aristotle's Concept of Justice',2, *Notre Dame Law Review*, 1942, 129.

⁴⁵ Chroust A & Osborn D, 17 'Aristotle's Concept of Justice',2, *Notre Dame Law Review*, 1942, 129.

⁴⁶ Plato, 'The Republic', Basic Books ,2002,52.

⁴⁷ Chroust A & Osborn D, 17 'Aristotle's Concept of Justice',2, *Notre Dame Law Review*, 1942, 130.

⁴⁸ Chroust A & Osborn D, 17 'Aristotle's Concept of Justice',2, *Notre Dame Law Review*, 1942, 130.

⁴⁹ Plato, 'The Republic', Basic Books, 2002,116.

⁵⁰ Chroust A & Osborn D, 17 'Aristotle's Concept of Justice',2, *Notre Dame Law Review*, 1942, 132.

& David L. Osborn Anton-Hermann Chroust further posit that the difference that lies between "commutative Justice," and "distributive Justice" is without a doubt the defining and most significant feature of Aristotle's "theory of law."⁵¹ Equality, also referred to as "Justice in the narrow sense," consists of two main phases, the first being the action of "distributing" certain matters between two or more people, or in adjusting "them to their proper proportions"⁵²

On the aforementioned basis, for there to be Justice and Equality, at least four different factors need to be present namely, two clashing claims and two claiming people.⁵³ If the two people are unequal they cannot be treated similarly "for the principle of Equality demands that only equals be treated equally." In this context, Equality is interpreted as a means of Justice that allocates burdens according to each person's capacity to carry them and support is provided in amounts which vary in accordance with the needs of the individuals and this can be regarded as proportionality and referred to as "distributive Justice."⁵⁴ "commutative Justice," which constitutes the second phase of the principle of Equality or "equitable fairness," is different from "distributive Justice" in the sense that it ignores the rank of the persons involved. "commutative Justice" therefore requires two factors, since its task is particularly limited to the proportionate ratio between two "goods" - damage and recovery, labour and wages.

The main concept of Distributive justice is giving each member of the community a "fair share" of the benefits and resources available.⁵⁵ Nevertheless, an issue that arises is while people might agree with the fair distribution of wealth, a disagreement does arise on what is considered a "fair share." Some possible criterion used for distribution to be deemed to be fair are equity, equality, and need.⁵⁶

According to Aristotle, men's disproportion is founded on the basis that men inherently are of different value or "worth."⁵⁷ This difference in man's value becomes an crucial element of "distributive Justice." On the other hand, "Commutative Justice," entirely disregards the

⁵¹ Chroust A & Osborn D, 17 'Aristotle's Concept of Justice', 2, *Notre Dame Law Review*, 1942.

⁵² Chroust A & Osborn D, 17 'Aristotle's Concept of Justice', 2, *Notre Dame Law Review*, 1942.

⁵³ Chroust A & Osborn D, 17 'Aristotle's Concept of Justice', 2, *Notre Dame Law Review*, 1942.

⁵⁴ Chroust A & Osborn D, 17 'Aristotle's Concept of Justice', 2, *Notre Dame Law Review*, 1942.

⁵⁵ https://www.beyondintractability.org/essay/types_of_justice accessed on 8 February 2020.

⁵⁶ https://www.beyondintractability.org/essay/types_of_justice accessed on 8 February 2020.

⁵⁷ Chroust A & Osborn D, 17 'Aristotle's Concept of Justice', 2, *Notre Dame Law Review*, 1942.

individuals worth, "dignity," or positions in society of the parties involved. "Commutative Justice" is the "Justice of co-ordination," since the two parties involved interact with each other as equals⁵⁸

When conflict arises, in order to restore balance and bring harmony, man usually seeks a perception of justice.⁵⁹ According to Aristotle, justice could be defined using two concepts: rectification and proportionality: "Proportionality" necessitates that the unfair is that what contravenes the proportion. Hence, one party becomes too big while the other too small, as happens in practically where a man who acts unfairly has too much, and the man who is treated unjustly has too little of what is considered good.

The remaining concept of justice is "the rectificatory," which comes up in relation to both voluntary and involuntary transactions. This approach desires that justice demands us to find the correct balance between rights and duties by founding systems that can require a solution when such balance is at risk.⁶⁰ This viewpoint creates the foundation for establishing the theory of "formal justice," or "justice based on the law," and highlights the need of the law.⁶¹

A section of people have a strong belief that the agreed upon definition of justice is formal justice where justice must be in association with the designation of the legal calibre of a given case, as "what justice requires is what the law requires."⁶² According to Sherif Elnegahy⁶³, justice achieved through the law will always be the best way to implement Aristotle's proportionality and amendments concepts. In order to protect the weak from the powerful and achieve equality and in the process equalize the power between disputing parties, it can safeguard several important areas related to public interests, such as validation of the rule of law, the public declaration of acceptable and unifying norms and values in the society, and deterrence

⁵⁸ Chroust A & Osborn D, 17 'Aristotle's Concept of Justice', 2, *Notre Dame Law Review*, 1942.

⁵⁹ Elnegahy S, 'Can Mediation Deliver Justice?' 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 2.

⁶⁰ Elnegahy S, 'Can Mediation Deliver Justice?' 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 4.

⁶¹ Elnegahy S, 'Can Mediation Deliver Justice?' 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 5.

⁶² Elnegahy S, 'Can Mediation Deliver Justice?' 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 9.

⁶³ Elnegahy S, 'Can Mediation Deliver Justice?' 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 9.

by administer the courts' judgments. In addition, formal justice presents consistency which is a key dimension of justice.⁶⁴

One of the limitations identified facing the formal justice system is generalization and the absence of particularization.⁶⁵ This means that the modern day legal system offers general standards and principles that should apply for particular instances and not a tailor-made approach and as such disputes tend to be generalized.⁶⁶ This is not ideal as one should recognize the particular nature of the wrong doing and address it as it is without having to relate it to a similar occurrence. Another limitation is that the legal remedies do not offer a wide array of remedies as remedies are include damages in monetary form in instances of civil matters or imprisonment and/or fines when one is convicted in a criminal matter. This may not be considered as ideal since parties should be able to demand solutions that solve their conflict but are not available in their spectrum of legal cures.⁶⁷

In cases where parties are allowed to participate in the act of creatively crafting an outcome, that in itself is said to present its own sense of justice. This is because parties get a chance to use whatever aspirations they aspire to, and are not restricted to standards that have been accepted by the legislature or judicial precedence. They create an alternative form of justice arising from discerned inadequacies of formal justice. This is actively promoted by mediation and scholars acknowledge that parties' common harmony over the need of fairness is a valid form of justice and have used the term creative justice to refer to it.⁶⁸ Creative justice further allows all the stakeholders to inclusively come up with solutions to any grievances that arise as a result of extraction or natural resource exploration.

Justice can be defined as the manner of reinstating and supporting the parity between people in their relations and disputes of interests, which requires protecting and welcoming certain principles and levels. Formal justice is achieved when legislators decide and works best if the

⁶⁴ Elnegahy S, 'Can Mediation Deliver Justice?18 *Cardozo J. Of Conflict Resolution* 759, 2017,9.

⁶⁵Elnegahy S, 'Can Mediation Deliver Justice?18 *Cardozo J. Of Conflict Resolution* 759, 2017, 10.

⁶⁶Elnegahy S, 'Can Mediation Deliver Justice?18 *Cardozo J. Of Conflict Resolution* 759, 2017,10.

⁶⁷Elnegahy S, 'Can Mediation Deliver Justice?18 *Cardozo J. Of Conflict Resolution* 759, 2017, 11.

⁶⁸Elnegahy S, 'Can Mediation Deliver Justice?18 *Cardozo J. Of Conflict Resolution* 759, 2017, 12.

adjudication method is used while creative justice is where the parties decide and here non-adjudication methods such as mediation are practiced.⁶⁹

Internationally, Restorative justice has been recognized especially in connection to peace and conflict resolution. It responds to pain, negative and psychological experiences caused by the parties and grievances hence enabling it to not only respond to conflicts of interest as other forms of justice do but also the underlying interests. This form of justice aspiration is to correct wrongs and return equilibrium through the adoption of four viewpoints to be applied either approaches or together.⁷⁰ The four approaches are: restitution, compensation, retribution and forgiveness.⁷¹ Under Restorative justice, focus is less on financial compensation and more on corrective aspect and desired emotional relief with respect to restoring balance.⁷²

Retribution refers to a situation an anguished party requires that the offender responsible for committing the injustice suffers in a way that is equal to his suffering and could be either limited (“an eye for an eye”) or unlimited (“death for insult”).⁷³

Unlike retribution which is often perpetuated by a third party, restitution is more likely to directly involve the second party (the victim or recipient of the injustice). The victim receives some material good or service to replace that which was damaged.⁷⁴ Compensation which focuses on the needs of the victim. However, it may not always be possible to restore what was lost or damaged.⁷⁵

A fourth way of restoration of justice is through forgiveness. This process is important, particularly in established interactions. However, forgiveness can also be an act from one party that is not dependent on any given response by the perpetrator.⁷⁶

⁶⁹Elnegahy S, ‘Can Mediation Deliver Justice?’ 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 13.

⁷⁰Elnegahy S, ‘Can Mediation Deliver Justice?’ 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 14.

⁷¹Elnegahy S, ‘Can Mediation Deliver Justice?’ 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 14.

⁷² Elnegahy S, ‘Can Mediation Deliver Justice?’ 18 *Cardozo J. Of Conflict Resolution* 759, 2017.

⁷³Elnegahy S, ‘Can Mediation Deliver Justice?’ 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 15.

⁷⁴Elnegahy S, ‘Can Mediation Deliver Justice?’ 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 15.

⁷⁵Elnegahy S, ‘Can Mediation Deliver Justice?’ 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 15.

⁷⁶Elnegahy S, ‘Can Mediation Deliver Justice?’ 18 *Cardozo J. Of Conflict Resolution* 759, 2017, 15.

Mediation is a voluntary negotiation approach where an independent third party who shares no interest in a dispute assists parties to amicably reach a mutually satisfactory agreement using specialized skills and techniques.⁷⁷ Parties to the said dispute have the right to make the decision for themselves on if they want to settle a dispute and the terms of the settlement. Unlike judicial resolution such as litigation where the court tends to be the final arbiter, mediation facilitates disputants to reach a middle ground. mediation once successful removes the feeling of a win or loss by the said parties as it is not based on a party's power over the other and is voluntary, thus empowering parties to achieve mutual satisfaction of needs.

Within the last decade, an increasing number of contentions in the extractives sector have resulted in the use of ADR than ever before.⁷⁸ Conflicts at the community-level, for example, occur frequently in nations where the environmental protection frameworks is weak, Insecure water rights and land tenure and high economic and social inequality.⁷⁹

During the duration of a project, the contract between parties tends to be challenged by three sets of structural pressures.⁸⁰ The first structural pressure arises as a result of fluctuations of commodity prices thus subvert existing contracts and create a challenge as to their legitimacy, second, shifts in ideology as a result of power transitions which often trigger demands for the re-negotiation of deals and lastly, the shift of bargaining power over the life-cycle of a project may empower one party to take an action that may be detrimental to the other.⁸¹ An example is where companies hold more bargaining power due to access to finance and technical know-how at the beginning of a projects life-cycle. However, the balance of power can shift especially when investment costs are sunk⁸²

⁷⁷ James Mang'erere 'Mediation Practice Manual', 2017, 3.

⁷⁸ Stevens P, Kooroshy J, Lahn G & Lee B, 'Conflict and Co-Existence in The Extractive Industries', *Brookings Institution Press*, 2014, 2.

⁷⁹ Stevens P, Kooroshy J, Lahn G & Lee B, 'Conflict and Co-Existence in The Extractive Industries', 3.

⁸⁰ Stevens P, Kooroshy J, Lahn G & Lee B, 'Conflict and Co-Existence in The Extractive Industries', 4.

⁸¹ Stevens P, Kooroshy J, Lahn G & Lee B, 'Conflict and Co-Existence in The Extractive Industries', 4.

⁸² Stevens P, Kooroshy J, Lahn G & Lee B, 'Conflict and Co-Existence in The Extractive Industries', 4.

ADR mechanisms such as negotiation and mediation allow public Participation and enhance access to justice as they put forward an element of autonomy, speed, efficiency, flexibility, voluntariness and cost effectiveness in conflict management.⁸³

Communally owned land continues to exist and the Turkana, being a pastoralist community owns its land as a community subject to restrictions placed by the Community land act. Expropriation of the said land for oil exploration activities is bound to create grievances and has created conflicts among all the parties since proper public participation and the economic interests of the local community have not been entirely met. There is a need to identify and use of a dispute resolution mechanism that will not expose any party to economic loss or dissatisfaction while at the same time resolving any issues as they arise in the quickest time possible.

1.6.Literature Review

Kariuki Muigua in “Resolving Conflicts Through Mediation in Kenya”.⁸⁴ talks about natural resource based conflicts. He posits that such conflicts involve three broad themes: resource actors and stakes.⁸⁵ As a result, He contends that disputes can be solved with either the actor-oriented approach, resource oriented approach, Stake- oriented approach or a mixture of the three.⁸⁶ Notwithstanding the existence of the aforementioned approached, he posits that there are key principles such as the following which include but are not limited to participatory approaches where stakeholders are brought together to participate formally or directly in a stage of the decision making process , capacity building, context of the conflict and increased access, equitable representation and distribution of information, that must always be considered.⁸⁷

Kariuki Muigua further states that the process of managing natural resource- based conflict is a by - product of the right to access of environmental justice and in addition environmental

⁸³ Muigua K, ‘*Resolving Conflicts Through Mediation in Kenya*’, Glenwood Publishers, Nairobi, 2017,136.

⁸⁴ Muigua K, ‘*Resolving Conflicts Through Mediation in Kenya*’, Glenwood, Nairobi, 2017, 138.

⁸⁵ Anderson J, Gauthier, Thomas M & Wondolleck G ‘*Addressing Natural Resource Conflicts Through Community Forestry: setting the stage,*’ 2002.

⁸⁶ Muigua K, ‘*Resolving Conflicts Through Mediation in Kenya*’, Glenwood, Nairobi, 2017, 139.

⁸⁷ Muigua K, ‘*Resolving Conflicts Through Mediation in Kenya*’, Glenwood, Nairobi,2017, 139.

democracy.⁸⁸ The Kenyan constitution outlines the principles of governance and national values which must bind all public officers, state officers, State organs and every other persons whenever any of them :enacts, applies or interprets any law; applies or interprets the Constitution or makes or implements public policy decisions.⁸⁹ These values and principles include: Sharing and devolution of power, rule of law, integrity, patriotism, national unity, Participation of the people and Democracy, human dignity, non-discrimination, Sustainable development, equity, social justice, transparency and accountability; inclusiveness, equality, human rights, non-discrimination and protection of the marginalized and good governance.⁹⁰

The Rio declaration lays emphasis on participation of the public as an important aspect of environmental management through access to justice. Further, Kariuki Muigua posits that the best way to handle environmental issues is through the involvement of all concerned citizens, at the relevant levels and with constructive access to judicial and administrative proceedings, a solution shall be provided.⁹¹ One approach that has been increasingly advocated for is a participatory approach as it is a efficient process for decision making that addresses complex environment and sustainable development issues.⁹²

Extractives related conflicts in Kenya are caused by the following issues. First being land control and ownership, issues of lack of inadequate consultation of the community's feelings especially when it comes to extractive projects. The community members also tend to demand a share in the benefits from these extractive projects. There also issues relating to environment and health concerns and disruption of pastoral livelihoods.⁹³

⁸⁸ Muigua K, 'Reflections on the use of mediation for Access to justice in Kenya: Maximizing on the benefits of mediation', 2018, 8.

⁸⁹ Muigua K, 'Reflections on the use of mediation for Access to justice in Kenya: Maximizing on the benefits of mediation' 8.

⁹⁰ Article 10, *Constitution of Kenya* (2010).

⁹¹ Muigua K, 'Reflections on the use of mediation for Access to justice in Kenya: Maximizing on the benefits of mediation' 9.

⁹² Muigua K, 'Reflections on the use of mediation for Access to justice in Kenya: Maximizing on the benefits of mediation' 9.

⁹³ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers',2018,5.

Following the launching of the Early Oil Pilot Scheme by the Government, the Turkana and neighboring communities raised issues of, security, jobs and business opportunities.⁹⁴ There was also lack of adequate participation of the community from the start of oil explorations, and the elite members of the Turkana community were the ones who were consulted and more often than not, they did not adequately represent the wishes of the communities as they did not face the greivances.⁹⁵ He further stated that Stakeholder engagement was and continues to be highly transactional and extemporary rather than integrated in the corporate strategy of stake holders such as the oil company and the government.⁹⁶

Stephanie A. Malin, Stacia Ryder & Mariana Galvão Lyra in Environmental justice and natural resource extraction: convergence of power, equity and access, talk about Restorative justice as a concept of Environmental justice.⁹⁷ They further state that Extractive industries are mostly looked at as economic necessities for rural and semi-urban areas.⁹⁸

Environmental justice is contingent on some different kinds of justice at a conceptual level namely: restorative justice, distributive, recognition, and procedural.⁹⁹ Restorative justice in the instant case focuses on the historical exclusion of Native and Indigenous people whose interaction with the land have been changed through cooptation, industrialization, and defilement of their ancestral homes.¹⁰⁰

Many African communities practice restorative justice as a dispute resolution model that puts forward the community members, victims and offenders to address and resolve a crime or a

⁹⁴Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 2018,7.

⁹⁵ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers',2018,7.

⁹⁶ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers',2018, 7.

⁹⁷ Malin S, Ryder S & Galvão M, 'Environmental justice and natural resource extraction: intersections of power, equity and access' 5 *Environmental Sociology* 2,2019,111.

⁹⁸ Malin S, Ryder S & Galvão M, 'Environmental justice and natural resource extraction: intersections of power, equity and access' 5 *Environmental Sociology* 2, 109.

⁹⁹ Malin S, Ryder S & Galvão M, 'Environmental justice and natural resource extraction: intersections of power, equity and access' 5 *Environmental Sociology* 2,111.

¹⁰⁰ Malin S, Ryder S & Galvão M, 'Environmental justice and natural resource extraction: intersections of power, equity and access' 5 *Environmental Sociology* 2,111.

dispute.¹⁰¹ It aims at community participation, restoration, compensation and re-integration, in tackling crime, disputes, and related problems that affect members of the community.¹⁰² However, this form of justice was swept aside with the colonization of Kenya¹⁰³ as the colonialists imposed their own laws and as such we adopted them blindly.¹⁰⁴ Africans were permitted to proceed using customary law but it was viewed as an inferior system to the British common law system, which the British had made the main legal system of Kenya¹⁰⁵ As a result, Kenya adopted the use of common law system on every matter except those which fell within the orbit of native custom and this system was maintained even after independence.¹⁰⁶

A majority of pastoralist communities in Kenya resolve their conflicts without the inclusion of the State due to the fact that they highly regard kinship ties which they would not want to be violated by other organs. During the pre-colonial era, the Agikuyu society resolved disputes through the use of the family, clan or the council of elders depending on the type of conflict.¹⁰⁷ Minor conflicts at the household level were handled by the concerned family, where the family failed to handle, the clan leader were obligated to, those that were of a serious nature were handled by council elders and lot of urgency placed on settlement of such matters amicably. Respected leaders could deliberate and give a judgment on a case.¹⁰⁸

Kariuki Muigua in his paper titled “Natural Resources and Conflict Management in East Africa”.¹⁰⁹ States that natural resources conflicts should be handled in the most expeditious and effective way and consequently, effective conflict management mechanisms are needed. He further argues that the framework that is currently in use has not been successful in resolving conflicts. A new approach in resolving such conflicts should include principles of public

¹⁰¹ Gabagambi J, ‘A Comparative Analysis of Restorative Justice Practices in Africa, 2018. https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html on 20 November 2020.

¹⁰² Gabagambi J, ‘A Comparative Analysis of Restorative Justice Practices in Africa, 2018.

¹⁰³ Gabagambi J, ‘A Comparative Analysis of Restorative Justice Practices in Africa, 2018.

¹⁰⁴ Gabagambi J, ‘A Comparative Analysis of Restorative Justice Practices in Africa, 2018. https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html on 20 November 2019.

¹⁰⁵ Gabagambi J, ‘A Comparative Analysis of Restorative Justice Practices in Africa, 2018. https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html on 20 November 2020.

¹⁰⁶ Gabagambi J, ‘A Comparative Analysis of Restorative Justice Practices in Africa, 2018. https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html on 20 November 2019.

¹⁰⁷ Gabagambi J, ‘A Comparative Analysis of Restorative Justice Practices in Africa, 2018. https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html on 20 November 2019.

¹⁰⁸ <http://www.ijird.com/index.php/ijird/article/view/110849> on 10 November 2020.

¹⁰⁹ Muigua K, ‘Natural Resources and Conflict Management in East Africa’, 2.

participation, Use of ADR mechanisms and environmental democracy aimed at guaranteeing environmental democracy is achieved.¹¹⁰

Members of the Turkana community take preference to informal modes of dispute resolution such as mediation, and would easily accept elders as neutral third parties. This form of settling disputes is understanding and more flexible and as such effective communication and dispute resolution is achieved as opposed to where litigation is used. Of importance is that the community views mediation as being reconciliatory as opposed to litigation which ends up creating sharp severances in the long-run.¹¹¹

Litigation has many challenges one of them being that it is normally a lengthy process. This can be illustrated by a study of cases filed in the courts at Lodwar where not more than 10 percent proceed to full trial as majority are settled or abandoned. Mediation is thus expected to enable easy access to justice and avoid the challenges that face adjudication such as expense required which is quite unaffordable to the common mwananchi. The practice of court annexed mediation, which embraces an inclusive approach as the last resort may therefore be better suited for use by members of the Turkana community and various stakeholders as it is a system which they locally practise.¹¹²

1.7. Research Methodology

This study shall take a doctrinal research methodology approach as the nature of the study involves the assessment of the current law in place. Most of the material will be drawn from the Constitution, Acts of Parliament and case law. Furthermore, I shall refer mainly to secondary sources of information derived from scholarly articles, journals, textbooks where appropriate as data collection will be expensive due to the scope of research as well as the location of oil wells in the country. The use of these secondary sources will assist in depicting the existing legal

¹¹⁰Muigua K, 'Natural Resources and Conflict Management in East Africa', 2.

¹¹¹ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 34.

¹¹² Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 34.

framework for mediation in the extractives industry in Kenya. This will also help in realizing the challenges facing extraction from oil from communally owned land in Turkana.

The study shall examine the successful use of mediation in solving grievances and conflicts within the Extractives Industry using local case studies in Kenya and other African countries.

1.8.Assumptions

1. That Aristotle's theory of law is best placed to allow for creative justice which mediation fosters.
2. That the data gathered on grievances that have arisen as a result of exploration activities in Turkana county by researchers and through studies are accurate and representative of the reality on the ground.

1.9. Limitations of The Study

The study will focus on Kenya and the East Africa as a whole which form different jurisdictions thus field work research although highly recommended will be difficult. This is attributable to factors such as limited scope of time and resources that may be involved in conducting this research and as a consequence, it may lead to a risk of inaccurate capturing of the perceptions of members of the local communities on the reasons of conflicts that have arisen and omission of injustices that are yet to be brought to the attention of the national government.

Furthermore, unlike litigation where decisions are uploaded onto various databases to act as precedents, there is no database for mediation decisions hence difficult to measure the success rate of mediation as an alternative dispute resolution mechanism.

1.10. Chapter Breakdown

The objective of this study shall be comprehensively addressed in five chapters broken down as follows;

1.10.1. Chapter 1: Introduction.

This chapter shall introduce the background to the problem, the problem statement, research questions, hypothesis, theoretical framework, literature review, research methodology, assumptions and limitations of the study.

1.10.2. Chapter 2: Analysis of Existing Legal Framework for Mediation in Kenya.

This chapter shall analyze the concept of Mediation in Kenya, legislative provisions on the same and basis for the use of mediation in solving communal land grievances being faced by the Turkana Community. It will further explore the role that mediation can play in solving such grievances.

1.10.3. Chapter 3: Principles that guide the successful use of mediation and their application in the Extractive sector in Kenya.

This chapter shall focus on an analysis of the Principles that guide the successful use of mediation and application of the said principles in the extractive sector. It shall examine mediation as an effective mechanism as espoused in legislation in Kenya in tackling issues arising out of oil exploration.

1.10.4. Chapter 4: A case for Mediation as the Best Remedy for Resolution of Grievances in The Extractive Industry.

This chapter shall focus on the benefit of mediation as an alternative dispute resolution mechanism in catering for the interests of the stakeholders in the extraction of oil in addition to being economical and time saving.

1.10.5. Chapter 5: Findings, Recommendations and Conclusion.

This chapter shall conclude the study by answering the research question, addressing the hypothesis and proposing recommendations on the way forward.

CHAPTER TWO

2.0. LEGAL FRAMEWORK FOR MEDIATION IN THE EXTRACTIVES INDUSTRY IN KENYA

2.1. Introduction

The effect of the extractive industry on communities are of a wide-range and affects them both positively and negatively.¹¹³ In resource rich countries, positive effects are experienced when royalties and taxes provide funds that contribute to the development of social services, infrastructure as well as creation of jobs at the the local level.¹¹⁴ Activities arising from the extractive industry have an impact through the creation of high demand for services and goods that are locally produced hence contributing to economic growth.¹¹⁵ However, extractives revenues as seen in developing nations can be plundered as a result of corruption, leading to the reduction of the benefits that are derived in terms of change in living standards or productive investment. The existence of laws that cater to the community and that address the above mentioned grievances cannot be over-emphasized.¹¹⁶

New laws have been enacted in Kenya in the petroleum and mining industry that attempt to take into consideration concerns by the community and provide protection and opportunities that benefit them through their provisions.

This chapter shall analyze the legal frameworks governing the extractives industry in Kenya and their provisions with respect to mediation. It shall start by outlining the legal framework by referring to materials such as statues and International conventions. Thereafter I shall critique its effectiveness and lastly conclude the chapter.

¹¹³ <https://www.extractives-baraza.com/resources/legal-corner/community-related> on 24 February 2020.

¹¹⁴ <https://www.extractives-baraza.com/resources/legal-corner/community-related> on 24 February 2020.

¹¹⁵ <https://www.extractives-baraza.com/resources/legal-corner/community-related> on 24 February 2020.

¹¹⁶ <https://www.extractives-baraza.com/resources/legal-corner/community-related> on 24 February 2020.

2.2. The Legal Framework in The Extractive Industry in Kenya

Due to the growth of the mining sector and oil and gas exploration various laws had to be put in place. Some of the laws governing the said sector include The COK, 2016 Mining Act, Petroleum (Exploration and Production) Act 2009, Energy (Complaints and Dispute Resolution) Regulations 2012, Land Act No. 6 of 2012, Land Registration Act No. 3 of 2012, Environment and Land Court Act, Environmental Management & Co-ordination Act, Civil Procedure Act.

2.2.1. The Constitution of Kenya 2010

It is the foremost law governing natural resources in Kenya.¹¹⁷ It categorizes all mineral oils and mineral as part of public land.¹¹⁸ Furthermore, it provides that land should be Managed, used and held in a way that is productive, equitable, sustainable and efficient in addition to encouraging of settlement of land disputes by communities through local initiatives that are recognized and consistent with it.¹¹⁹

The organizing principle for natural resources management in Kenya is the concept of sustainability.¹²⁰ The principle of sustainable development is entrenched as one of the National governance principles and values and by virtue of this, it is the country's organizing ideology in the management of the country's resources.¹²¹ In addition to sustainable development, other include; Sharing and devolution of power. Rule of law, national unity people participation and democracy and rule of law.¹²² They also consists of social justice, human rights, protection of the marginalized, equality, inclusiveness, human dignity, protection of the marginalized and non-discrimination.¹²³ and integrity, good governance, accountability and transparency.¹²⁴

¹¹⁷ Odari E, Osoro D & Omolo M, 'A Primer to the Emerging Extractive sector in Kenya: resource bliss, Dilemma or Curse', Institute of Economic Affairs, November 2014,35.

¹¹⁸ Article 62(1) (f), *Constitution of Kenya* (2010).

¹¹⁹ Article 60, *Constitution of Kenya* (2010).

¹²⁰ Odote C, 'Country report: Kenya constitutional provisions on the Environment', 3 *IUCN Academy of Environmental Law* 1, (2012) ,277.

¹²¹ Article 10 (2) (d), *Constitution of Kenya* (2010).

¹²² Article 10(2)(a) *Constitution of Kenya* (2010).

¹²³ Article 10(2)(b) *Constitution of Kenya* (2010).

¹²⁴ Article 10 (2) (c) *Constitution of Kenya* (2010).

The importance of public participation as provided for under the constitution can be seen in the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* in which among the prayers by the Petitioner was for the determination by the court on whether Article 10 of the constitution was violated in the awarding of the tender to exploit and develop the coal basin and particularly to make a finding that the tender award was carried out without conducting due diligence for purposes of confirming the technical capabilities of the entity awarded and in secrecy and further, that there was lack of public participation as per the provisions of the Constitution.¹²⁵ The court in making its determination stated that one of the national values is public participation which expresses the people's sovereignty as provided under the Constitution.¹²⁶ In addition, the court noted in Kenya, public participation has been established as a foundation to democracy and it is an enforceable right. Courts will therefore abrogate public acts, projects or laws that do not meet the public participation threshold.¹²⁷

The court also made reference to the Rio Declaration on Environment and Development, 1992.¹²⁸ Which defines participation by the public as individual's ability to participate and have access to records in the possession of public authorities that concern the environment particularly information on activities being carried out in their communities and hazardous materials, and have the chance to engage in processes that involve decision making. The court also stated that States shall encourage in addition to facilitating awareness of the public and participation by increasing accessibility to information and that there should be access to effective administrative and judicial and administrative proceedings, including redress and remedy."¹²⁹

As mentioned above, extractives consisting of oil, gas and minerals are categorized as part of Public Land. Public land is determined as a public resource with all public land vested in the

¹²⁵ *Mui coal basin local community & 15 others vs Permanent Secretary Ministry of Energy and 17 others* (2015) eKLR.

¹²⁶ *Article 1, Constitution of Kenya* (2010)

¹²⁷ *Mui Coal basin local community & 15 others vs Permanent secretary Ministry of Energy and 17 others* (2015) eKLR

¹²⁸ Principle 10, The United Nations Conference on Environment and Development: 'Rio Declaration on Environment and Development', 1972.

¹²⁹ *Mui coal basin local community & 15 others vs Permanent Secretary Ministry of Energy and 17 others* (2015) eKLR.

citizens of Kenya. The resultant effect of this is that regardless of whether a natural resource is discovered on private or community land, it will form part of public resources whose ownership and control will be vested in the government for the benefit of all citizens of the country.

In addition, the constitution of Kenya places obligations on the Kenyan government.¹³⁰ The obligations of the state are to; ensure sustainable utilization, exploitation, conservation and management of natural resources and the environment, and ensuring that the benefits accruing are shared equitably.¹³¹ Further, they should establish and monitor environmental audits and engage in environmental impact assessment's.¹³² Elimination of activities that harm the environment¹³³ and that natural resources beneficially in favor of the community.¹³⁴ From the above provision, it can be seen that the constitution requires that investment in natural resources must benefit local communities.¹³⁵

There are other provisions of the Constitution that are relevant in governance of the extractive industry in the country apart from environmental management during the exploration phase. This includes provisions on Human rights and Dispute resolution in relation to conflicts that arise among the government, Investors and local communities found in the areas where exploration and mining is carried out.

The Constitution contains provisions that cater for the protection of groups that face risk of harm as a result of extractive activities.¹³⁶ Under chapter four, the Bill of rights “binds all “persons” and state organs.¹³⁷ The definition of persons includes an association or company. This

¹³⁰ Article 69, *Constitution of Kenya* (2010).

¹³¹ Article 69 (a), *Constitution of Kenya* (2010).

¹³² Article 69 (f), *Constitution of Kenya* (2010).

¹³³ Article 69 (g), *Constitution of Kenya* (2010).

¹³⁴ Article 69 (h), *Constitution of Kenya* (2010).

¹³⁵ Odote C, ‘Country report: Kenya constitutional provisions on the Environment’, 3 *IUCN Academy of Environmental Law* 1, (2012),278.

¹³⁶ Human Rights in Kenya’s Extractives Sector, ‘Exploring the Terrain’, Institute for Human Rights and Business’, December 2016,23.

[https://www.ihrb.org/uploads/reports/IHRB%2C Human Rights in Kenyas Extractive Sector - Exploring the Terrain%2C Dec 2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C%20Human%20Rights%20in%20Kenya%20Extractive%20Sector%20-%20Exploring%20the%20Terrain%20Dec%202016.pdf) on 25 February.

¹³⁷ Human Rights in Kenya’s Extractives Sector, ‘Exploring the Terrain’, Institute for Human Rights and Business’, December 2016,23.

[https://www.ihrb.org/uploads/reports/IHRB%2C Human Rights in Kenyas Extractive Sector - Exploring the Terrain%2C Dec 2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C%20Human%20Rights%20in%20Kenya%20Extractive%20Sector%20-%20Exploring%20the%20Terrain%20Dec%202016.pdf) on 25 February.

differs from the traditional norm where it was perceived that obligations to uphold and respect human rights were only required from the state.¹³⁸ Provisions within the constitution provide for the protection of the rights to property¹³⁹ and rights around communal land¹⁴⁰ respectively. Specifically, the law provides that a person shall not be arbitrarily dispossessed of their property and that where land is compulsorily acquired there shall be just compensation and swift payment, in full.

The use of ADR has been embraced by constitution. They involve negotiation, arbitration, mediation and conciliation. With regard to matters concerning the extractive sector, Mediation requires that engagement is carried out with different groups of actors other than the parties who have the closest nexus to the dispute.¹⁴¹ Through mediation, a mediator is able to assist stakeholders in the identification of 'interests that are shared, maximize benefits that are to be shared and deal with challenges and common problems together.'¹⁴² Within the extractives context, mediation assists in the 'breakdown of impasses and tensions through the use of approaches that include but are not limited to identifying and sharing multiple benefits, focusing talks on technical issues; or using techniques that involve building of scenarios.'¹⁴³ There is also need to realize that once a settlement is reached in the extractive sector, effective implementation of the terms agreed upon is required via a participatory and collaborative action. A benefit derived from the use of mediation is that mediation settlements that are captured in writing and arrived at using the assistance of mediators who are qualified may be enforced by the Court as an order once it is registered.

¹³⁸ Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016, 24.

https://www.ihrb.org/uploads/reports/IHRB%2C_Human_Rights_in_Kenyas_Extractive_Sector_Exploring_the_Terrain%2C_Dec_2016.pdf on 25 February.

¹³⁹ Article 40, *Constitution of Kenya* (2010).

¹⁴⁰ Article 63, *Constitution of Kenya* (2010).

¹⁴¹ https://extractivesbaraza.com/assets/content/PDF/Advancing_capacity_and_access_to_justice/Advancing_capacity_and_access_to_justice_in_Kenyas_extractive_sector_Listening_project.pdf on 15th March 2020.

¹⁴² Kron A and Jensen D, 'From curse to opportunity: Mediation of natural resource conflicts', *Völkerrechtsblog*, 13 July 2016.

<https://voelkerrechtsblog.org/from-curse-to-opportunity-mediation-of-natural-resource-conflicts/> on 15th March 2020.

¹⁴³ Jensen D and Lianna Kaye J, "Natural Resources and Conflict: A Guide for Mediation Practitioners", *United Nations Department of Political Affairs and United Nations Environment Programme*, 2015, 11.

The land policy in complementing the provisions of the constitution encourages communities to settle disputes that are related to land through community initiatives that are consistent with constitutional provisions and are recognized. This therefore requires that before parties use court adjudication, communities should take legitimate steps to resolve any land grievance using local mechanism that are available. The provisions are further supplemented by the fact that the NLC is required to promote the use of TDRM'S in conflicts relating to land.

The Constitution also creates the Legislative arm of the government of Kenya which has a role in supervising natural resource management.¹⁴⁴ Transactions that involve the grant of a concession by or on behalf of any person, including the national government, to another person for natural resource exploration are approved by the National Assembly, While the interests of county governments with regard to sharing of revenues derived from natural resources are overseen by the senate.

International treaties are binding as provided for under the constitution and form part of Kenyan law once ratified.¹⁴⁵ The United Nations charter outlines methods for conflict management in succinct terms and this therefor provides a legal framework for the use of ADR processes in disagreements between parties whether between individuals or the state and individuals.¹⁴⁶ The charter indicates the different mechanisms for management of conflict that parties in dispute may use and dictates that such parties should seek a solution by mediation, negotiation, conciliation ,enquiry, arbitration, judicial settlement, or resort to other means that contribute to the achievement of peace.¹⁴⁷

The government has committed to applying the United Nations Guiding Principles on Business and Human Rights (UNGPs) and under this principles a country has a duty to protect the rights of communities. As a result of oil and gas exploration in Kenya, communities that live around the exploration sites are bound to be involuntarily displaced and in the process loose their

¹⁴⁴ Article 71, *Constitution of Kenya (2010)*,

¹⁴⁵ Article 2 (6), *Constitution of Kenya (2010)*.

¹⁴⁶ Muigua K, "Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation" 13.

¹⁴⁷ Muigua K, "Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation" 13.

land.¹⁴⁸ Resettlement and compensation processes should therefore be implemented in a judicial manner.

The UNGP's are based on three pillars which are; The first pillar which is concerned with the duty of the state to protect human rights and prevent abuse by third parties, including private companies, through a mix of adjudication, regulation and policies.¹⁴⁹ The second pillar which is concerned with the responsibility of companies to avoid violations of the rights of others and addressing of any rights which they have infringed thereby respecting human rights.¹⁵⁰ And the third pillar which contains provisions with respect to access to remedies that are effective where harm is occasioned to people's human rights. Such access is to be provided either through company, multi-stakeholder or State action.¹⁵¹ The state is therefore obligated to guarantee effective participation and access to information by members of a community that will be impacted by the exploration activities and the general public as a whole, security of members of a community, that free prior and informed consent is obtained prior to compulsory acquisition of land, that environmental and social impact assessments are carried out and that the right to benefit sharing of the resource is upheld.

Remedy provision can be done through judicial mechanisms that are state based examples of which include the various types of courts that form part of the Kenyan legal system.¹⁵²

¹⁴⁸ Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016.

[https://www.ihrb.org/uploads/reports/IHRB%2C Human Rights in Kenyas Extractive Sector - Exploring the Terrain%2C Dec 2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C%20Human%20Rights%20in%20Kenyas%20Extractive%20Sector%20-%20Exploring%20the%20Terrain%2C%20Dec%202016.pdf) on 24 February 2020.

¹⁴⁹, Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016, 9.

[https://www.ihrb.org/uploads/reports/IHRB%2C Human Rights in Kenyas Extractive Sector - Exploring the Terrain%2C Dec 2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C%20Human%20Rights%20in%20Kenyas%20Extractive%20Sector%20-%20Exploring%20the%20Terrain%2C%20Dec%202016.pdf) on 24 February 2020..

¹⁵⁰ Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016, 9.

[https://www.ihrb.org/uploads/reports/IHRB%2C Human Rights in Kenyas Extractive Sector - Exploring the Terrain%2C Dec 2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C%20Human%20Rights%20in%20Kenyas%20Extractive%20Sector%20-%20Exploring%20the%20Terrain%2C%20Dec%202016.pdf) on 24 February 2020.

¹⁵¹ Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016, 9.

[https://www.ihrb.org/uploads/reports/IHRB%2C Human Rights in Kenyas Extractive Sector - Exploring the Terrain%2C Dec 2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C%20Human%20Rights%20in%20Kenyas%20Extractive%20Sector%20-%20Exploring%20the%20Terrain%2C%20Dec%202016.pdf) on 24 February 2020.

¹⁵² Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016,72.

[https://www.ihrb.org/uploads/reports/IHRB%2C Human Rights in Kenyas Extractive Sector - Exploring the Terrain%2C Dec 2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C%20Human%20Rights%20in%20Kenyas%20Extractive%20Sector%20-%20Exploring%20the%20Terrain%2C%20Dec%202016.pdf) on 24 February 2020.

Grievance mechanisms that are not judicial which include the labor inspectorates and environmental authorities that collectively play a role in attempting to resolve disputes that arise between disputing parties.

The UNGPs set out the following set of criteria for non-judicial grievance mechanisms, both State-based and non-State based, in order to ensure their effectiveness:

- i. It should be legitimate so as to create trust among the stakeholders and increase accountability for the conduct of the grievance process in a fair manner;
- ii. Accessible and available to all stakeholders and provide adequate assistance for those who may face barriers to having access to the same;
- iii. Appropriate and available outcomes should be predictable as a means for monitoring implementation of the outcome;
- iv. It should be Equitable by ensuring all parties have reasonable access to sources of information and adequate expertise necessary to engage in the process on fair, informed and respectful terms;
- v. Transparent through keeping all parties informed about progress and procedures used in the judicial mechanism; and
- vi. Ensuring that the outcomes are in accordance and respect internationally recognized human rights and are based on dialogue and engagement.¹⁵³

In addition to the Constitution, Parliament has enacted legislation and regulations to protect the extractives industry. Some of the laws are; the Mining Act 2016, the Petroleum (Exploration and Production) Act 2019, The Energy (Complaints and Dispute Resolution) Regulations 2012, the Land Act No. 6 of 2012, The Land Registration Act No.3 of 2012, the Environmental and Land

¹⁵³ Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016,72.

[https://www.ihrb.org/uploads/reports/IHRB%2C Human Rights in Kenyas Extractive Sector - Exploring the Terrain%2C Dec 2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C%20Human%20Rights%20in%20Kenya%20Extractive%20Sector%20-%20Exploring%20the%20Terrain%2C%20Dec%202016.pdf) on 24 February 2020.

Court Act, the Environmental Management and Coordination Act No. 8 of 1999 and The Civil procedure act and rules which I shall discuss in-depth below.

2.2.2. The Mining Act 2016

It is the Legal framework that regulates the mining industry. It provides that the government is clothed with ownership of all minerals and the minerals may only be issued to other persons using the procedures provided under the Act.¹⁵⁴ It further provides that in order to prospect or mine any mineral deposit, a person will need to have been granted a license of permit in compliance with the provisions of the Act.¹⁵⁵

The Act further provides for resolution of disputes via an arbitration or mediation process as may be decided by the parties in dispute or as may be contained in the provisions of an agreement.¹⁵⁶

The mechanisms for handling grievances that are available in Kenya can broadly be grouped into: state-based judicial mechanisms; state-based non-judicial mechanisms; and non-state-based grievance mechanisms.¹⁵⁷ Judicial mechanisms that are state based refer to the conventional dispute resolution mechanisms that include courts and tribunals and form part of the organs of the state. State-based non – judicial mechanisms refer to mechanisms employed by state officers such as Cabinet Secretary, Mining and Petroleum. The CS has been clothed with a quasi-judicial role as by virtue of the office, the CS can make a ruling on dispute that come up due to issuance of mineral rights under the provisions of the act.¹⁵⁸ The disputes which the CS is empowered to probe and make a determination include but are not limited to those which arise with regard to boundaries under prospecting right; a claim regarding water use; a wrongful act done in the course of mining operations; or an assessment and payment of compensation.¹⁵⁹ In addition, the CS can conduct a hearing and determine objections to applications made for

¹⁵⁴ Odari E, Osoro D & Omolo M, 'A Primer to the Emerging Extractive sector in Kenya: resource bliss, Dilemma or Curse', Institute of Economic Affairs, November 2014,39.

¹⁵⁵ Section 10, *Mining Act* (Act No 12 of 2016).

¹⁵⁶ Section 154 (b), *Mining Act* (Act No 12 of 2016).

¹⁵⁷ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 2019.

¹⁵⁸ Section 156 (1), *Mining Act* (Act No 12 of 2016).

¹⁵⁹ Section 156, *Mining Act* (Act No 12 of 2016).

mineral rights. The decision of the CS can be enforced as a court order and the High court is vested with appellate decision over any such decision which should be done within thirty days.¹⁶⁰

Communities have decision making processes that are well established, governance structures, and laws derived from their norms that guide the handling of the affairs of the community, which often include processes that are not judicial based for resolving grievances.¹⁶¹ An example of such mechanisms include hearings by the community and processes based on dialogue that are most times conducted by a trusted individual and an array of mechanisms that consist of a combination of the aforementioned approaches.¹⁶² Most times, they usually will have originated and grown from cultural norms and have advanced as the evolution of the society takes place, but overall, they are recognized and embraced by those who submit to them.¹⁶³ Traditional mechanisms face limitations as the extractive industry involves technical matters and IOC'S may not understand them hence making them unsuitable. However, they can be used to learn and develop channels through which grievances can be expressed by the community efficiently and learning about the actors for community based justice.¹⁶⁴

The procedure by which the Cabinet secretary is meant to follow in determining disputes in the nature listed above has also been provided and includes the following;¹⁶⁵

- (a) An aggrieved party submits a memorandum to the CS. The memorandum is accompanied by a statement of claim in the form provided for by the act;
- (b) On the CS receives the memorandum and statement of claim, he notifies the offender and provides the details of the complaint. He also invites the offending party to file a response to the complaint made.

¹⁶⁰ Section 157, *Mining Act* (Act No 12 of 2016).

¹⁶¹ Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016,76.

¹⁶² Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016,76.

¹⁶³ Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016,76.

¹⁶⁴ Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016,76.

¹⁶⁵ Section 156, *Mining Act* (Act No 12 of 2016).

- (c) Once a response to the complaint is received, the CS informs the parties of the time and venue where the matter will be heard for purposes of making a determination.
- (d) During the hearing, the parties state the facts of their case and are allowed to present evidence on oath in support of their respective facts; and
- (e) The CS thereafter makes a decision in writing.

According to Khalid Salim, the Mining Act has created an over- consolidation of powers to make determinations in the position of cabinet secretary and this has created a loophole as it may lead to abuse of power by an office holder.¹⁶⁶ The public and general citizenry perceive corruption as entrenched in the arms of the Kenyan government leading to distrust in those who wield statutory power.

Professor Migai Akech posits that corruption can be credited to the prevalence of powers that arbitrary in nature, especially those contained in the legislative as opposed to the constitutional order.¹⁶⁷ He further states that the statutory framework in the country grants all the arms of the government with wide –ranging powers without creating mechanisms that regulate exercise of such powers.¹⁶⁸ This loophole often results and aids in the abuse of power as those who wield them end up enriching themselves as opposed to aiding justice.¹⁶⁹

Although Transparency and accountability are strong anti -corruption measures, they have only been used with respect to the reporting on mining and mining related activities. The Cabinet secretary is obligated via the Mining (Reports of Mining and Mineral related activities)

¹⁶⁶ Khalid Salim, “Mining bill 2014 of Kenya -an overview,” 2016.

https://www.academia.edu/7095890/Mining_Bill_2014_of_Kenya_An_Overview on 20 October 2020.

¹⁶⁷ Prof. Akech M, ‘Abuse of power and corruption in Kenya: Will the New Constitution Enhance Government Accountability’, 18 *Indiana Journal of Global Legal studies* 1, 2011 ,383.

¹⁶⁸Prof. Aketch M, ‘Abuse of power and corruption in Kenya: Will the New Constitution Enhance Government Accountability’, 18 *Indiana Journal of Global Legal studies* 1, 2011, 383.

¹⁶⁹ Prof. Aketch M, ‘Abuse of power and corruption in Kenya: Will the New Constitution Enhance Government Accountability’, 18 *Indiana Journal of Global Legal studies* 1, 2011, 383.

regulations to prepare reports on all the mining and mineral related activities.¹⁷⁰ However, there is no requirement to report on the disputes which he adjudicates on which can create room for abuse of this power.

It should be noted that the Act contains a provision which may act as a means of creating checks and balances on the power of the Cabinet Secretary to determine disputes such as the High Court having appellate jurisdiction over decisions made by the CS.¹⁷¹ Furthermore, the Environment and land court at Kitale in Judicial review number 3 of 2019 held that the mere existence of provisions for alternative dispute resolution per se in a statute do not automatically and fully oust the jurisdiction of such a court to handle a dispute once lodged before it by an applicant in the form of judicial review as was the matter before it. The court held that it has jurisdiction notwithstanding such provisions. In addition, the suitability and expedition inherent in that procedure or lack thereof are matters a court is entitled to consider in determining whether it should address the dispute and make a determination thereof.¹⁷²

There also exist regulations under the Mining Act 2016. The said regulations were formulated to cater for grievances that may arise in communities with respect to benefit sharing. An example of such a regulation is The Mining (Community Development Agreement) Regulations, 2017.

2.2.3. The Mining (Community Development Agreement) Regulations, 2017.

Regulation 3 lists its purpose as four-fold;

- (i) ensuring that there is equal sharing of benefits derived from mining between the community and a license holder is achieved;
- (ii) The mining activities are not contrary and do not have a negative impact on the continuing cultural, social and economic viability of the community;
- (iii) There is growth and significant contribution in the welfare of the community

¹⁷⁰ Ministry of Mining, Regulation 5, Reporting of mining and mineral related activities memorandum, 2017.

¹⁷¹ Section 157, *Mining Act* (Act No 12 of 2016).

¹⁷² *Republic v Cabinet Secretary for Petroleum & Mining & 2 others Ex parte Dennis Ruto Kapchok* (Suing on his Behalf and on behalf of the Citizens of Tamkal, Kiwawa, Alale, Ortum Sebit, Pusel and Chepchoi, Iyon Iyang River, Marich and Endough in West Pokot County; County Government of West Pokot & another (Interested Parties) (2019) eKLR.

- (iv) Transparency and accountability is achieved in development arising from mining activities.¹⁷³

As provided under the said agreement, the community development agreement regulations 2017 is meant to take care of;¹⁷⁴ Employment opportunities for community members, Financial support, developments of infrastructure and its maintenance, Assistance to community members in setting up businesses, ecological system protection, Transparency and accountability in use of funds and resolution of Disputes.

The regulation provides for the formation of a committee known as the Community Development Agreement Committee. Its membership includes among others the head of the county government, the County commissioner, MCA representing and electoral are of the community and three agents of a mining license holder.

It contains provisions on the functions of the community development Agreement committee. The committee is empowered to resolve disputes that arise between parties who have entered into an agreement involving any matter provided in the aforementioned agreement or those that are not within its scope but are raised by parties to the agreement.¹⁷⁵

The membership of the committee is diverse and tries to accommodate political and civil leaders, mineral rights holders, members of the community including those with disabilities and representatives of the holder of a mineral right among others. Despite this being a step in the right direction and having included all necessary parties who may be affected by the extractive industry in a given geographical area, having such a high membership may be counter-productive as the views of the minority in any collective decision will not be adequately reflected hence leave out the benefits that mediation may have such as participant satisfaction and efficacy.

¹⁷³ Regulation 3, *Community Development Agreement Regulations*, (2016).

¹⁷⁴ Regulation 3(2), *Community Development Agreement Regulations*, (2016).

¹⁷⁵ Regulation 7 (4), *The Community Development Agreement Regulations*, (2016).

2.2.4. Petroleum Act 2019

Exploration and production of oil is governed by the Petroleum Act 2019.¹⁷⁶ The short title describes it as a framework for the exploration, contracting development and production of petroleum; termination of oil operations in the upstream sector; to operationalize articles of the constitution that apply to petroleum operations in the upstream sector, and to regulate midstream and downstream operations of petroleum.¹⁷⁷ The Act provides that disputes which arise as a result of breach of terms of a petroleum agreement concerning petroleum operations in the upstream sector shall be resolved via the use of ADR or as may be provided by the terms of the agreement.¹⁷⁸ This in essence boils down to the power of the parties to agree on any such mechanisms such as negotiation, mediation, conciliation as recognized under the constitution. In addition, the Energy and Petroleum regulatory Authority (EPRA) is empowered to determine any disputes that arise due to an upstream regulated function as per the provisions of the act in the first instance.¹⁷⁹ EPRA is also required to ensure that any contract for upstream oil activities has fair terms including but not limited to complaint handling and dispute resolution.¹⁸⁰

The Act establishes the National Upstream Petroleum Advisory committee which is comprised of nine members.¹⁸¹ The main purpose of the committee is advisory as it is conferred with a duty to advise the cabinet secretary for mining and Petroleum on upstream operations during the preparation and execution of agreements for petroleum, on revocation, suspension or termination of an agreement for petroleum or the recall of a security given for purposes of guaranteeing the performance of the petroleum agreement.¹⁸² Upon receiving recommendations by EPRA, the CS for mining and petroleum is empowered to make regulations concerning any matter that is permitted by the act in order to give effect to it such as the grievance redress process to the Authority.¹⁸³ This therefore creates room for the Cabinet secretary to use mechanisms such as mediation as a way of resolving grievances and conflicts.

¹⁷⁶ *Petroleum Act (2019)*.

¹⁷⁷ *Petroleum Act (2019)*.

¹⁷⁸ Section 117 (1), *Petroleum Act (2019)*

¹⁷⁹ Section 117 (2), *Petroleum Act (2019)*.

¹⁸⁰ Section 95 (2)(e) *Petroleum Act (2019)*.

¹⁸¹ Section 12, *Petroleum Act (2019)*

¹⁸² Section 13, *Petroleum Act (2019)*.

¹⁸³ Section 126 (1) *Petroleum Act (2019)*.

Additionally, The Petroleum Act 2019 contains a Model Production Sharing Agreement.¹⁸⁴The Production Sharing Contract contains provisions for use of ADR mechanisms in conflict resolution.¹⁸⁵ The cabinet secretary and chief executive officer of a contractor are expected to meet for purposes of resolving any misunderstandings and where no such agreement is reached, either party may refer a dispute for resolution through arbitration in accordance with UNCITRAL arbitration rules adopted by the United Nations Commission on International Trade Law.

The above provision acknowledges ADR mechanisms and its role in settling of conflicts and grievances that may arise between contracting parties such as an international oil company and a government and endorses arbitration as a means of resolving any issue that may arise. However, although it is a step in recognizing the efficacy of such approaches in resolving disputes, with respect to environmental issues, it may be abused such as in the case of *Aguinda vs Texaco*.¹⁸⁶ In this case the Plaintiff's instituted a class action law suit against Texaco and the cause of action was on the basis that pollution and contamination that occurred where Taxaco conducted its oil operation activities had led to the rise of health issues for residents of the region. The judiciary conducted an inspection of the alleged contaminated sites and in the month of August 2004, an expert recommended that chevron should pay between seven to sixteen billion dollars as compensation due to the resultant pollution. The expert further increased the estimate to 27 billion dollars in November 2008 and as retaliation, chevron lobbied the U.S government to end trade preference with Ecuador. The trial judge recused himself following claims of judicial misconduct and was replaced by a judge who ordered chevron to pay 8.6 billion as part of damages and clean up costs and further ordered that the penalty would increase to 18 billion if chevron did not issue a public apology. Chevron considered the ruling illegitimate and filed an international arbitration claim before the permanent court of Arbitration at the Hague. One of the claims made during the arbitration was that the Ecuadorian government had committed acts that were in violation of the bilateral investment treaty and international laws as it had delayed ruling on commercial disputes that were pending in Ecuadorian courts. Chevron was awarded 96

¹⁸⁴ Schedule 2, *Petroleum Act* (2019).

¹⁸⁵ Section 53(1), Schedule 2, *Petroleum Act* (2019).

¹⁸⁶ *Aguinda v. Texaco* (2002), United States District court.

million by the International arbitration tribunal and in February 2013, it ruled that Ecuador had not complied with the interim measure. This clearly shows that where contractual language is not specific on environmental liability, the loophole can be exploited by an investor who may choose arbitration as the appropriate forum for dispute resolution.¹⁸⁷

An example of a Production sharing Agreement that recognizes the use of arbitration in Kenya is one between CAMAC Energy Kenya Limited and the Government of Kenya with respect to Oil block L27. The production sharing agreement was executed in 2012 and it provides that;

“Any dispute arising out of, or in relation to, this contract that cannot be settled amicably shall be referred to arbitration in accordance with the UNCITRAL arbitration rules adopted by the United Nations Commission on International Trade Law. The arbitration shall take place in Cape Town, South Africa and shall be in English. The decision of the majority of the arbitrators shall be final and binding on the parties. Any judgment upon the award of the arbitrators may be entered in any court having jurisdiction”.¹⁸⁸

2.2.5. Energy Act 2019

The Energy and Petroleum Regulatory Authority is established under the Energy Act whose roles include but are not limited to the regulation, generation, exportation, importation, distribution, transmission supply and use of electrical energy with the exception of licensing nuclear facilities.¹⁸⁹ Furthermore, the Authority is empowered to monitor, regulate and supervise petroleum operations in the upstream sector in compliance with Kenyan law.¹⁹⁰

By virtue of the Act, the authority is empowered to make a determination within sixty days once it receives a request from an applicant. The decision by the authority is to be recorded in writing and any order that are made and the rationale of such a decision shall be served on all parties to the proceedings, and thereafter published in the Gazette as prescribed by regulations. In

¹⁸⁷ Cotula L and Kyla T, ‘Reconfiguring investment controls to promote sustainable development’, *Yearbook on international investment law and policy*, Oxford University Press, London, 2013, 307.

¹⁸⁸ <file:///C:/Users/PAVILION/Desktop/LLM%20Strathmore/Second%20Semester/ResourceContracts.org%20-%20CAMAC%20Energy%20Kenya%20Limited,%20L27>, on 15 June 2020.

¹⁸⁹ Section 10, *Energy Act* (2019).

¹⁹⁰ Section 10, *Energy Act* (2019).

addition, the Authority shall, within seven days of making a decision, communicate such decision to the parties involved. All orders of the Authority shall become effective on the date of entry thereof, and shall be complied with within the time prescribed therein. Where the Authority does not make a decision as provided in subsection (1) the appellant may appeal to the Tribunal within seven days of the expiry of the prescribed period.¹⁹¹ The authority therefore operates as a quasi-judicial body.

The Act also establishes the Energy and Petroleum tribunal for purposes of determining disputes and appeals from decisions made by the authority.¹⁹² It is vested with appellate jurisdiction to hear and determine appeals to all disputes arising from decisions of the Authority or licensing authority relating to energy matters and any matter referred to the Authority or any licensing authority.¹⁹³

Kariuki Muigua posits that Tribunals are created by different Acts of Parliament, and currently, there are roughly 60 of them in existence, with their key objects being the resolution of disputes in a simple manner.¹⁹⁴ He thus proposes that for the main objectives of tribunals to be met and fully enjoyed such as the facilitating of expeditious, reasonable, lawful, procedurally fair and efficient mechanism, the use of ADR mechanisms should be increased in dealing with matters before tribunals.¹⁹⁵

In addition to the above mentioned statutes, there are also regulations governing the petroleum industry. As per the provisions of the Petroleum Act 2019, the Cabinet secretary on the advice of the Energy regulatory commission has power to formulate regulations including the grievance redress process for the Authority.

¹⁹¹ Section 23, *Energy Act* (2019).

¹⁹² Section 26, *Energy Act* (2019)

¹⁹³ Section 42, *Energy Act* (2019)

¹⁹⁴ Muigua K, 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management', 8.

¹⁹⁵ Muigua K, 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management', 9.

The Land Acts were passed to operationalize the legal framework for management of land as contained in the Kenyan constitution. These laws include the National Land Commission Act,¹⁹⁶ the Land Act,¹⁹⁷ The Land Registration Act¹⁹⁸ as well as the Environment and Land Court Act.¹⁹⁹ These aforementioned laws have consolidate, elucidated and consolidated the laws that regulate land in the country. They are applicable to private, community or public land, thus apply to mining sector as well as oil exploration by virtue of article 62 of the Constitution²⁰⁰

Despite the existence of the Environment and Land Court which was established for purposes of settling Land disputes, the Environment and Land court act provides that no provision of the act precludes the court from embracing either through its own motion or an agreement by parties any ADR mechanism which it deems as appropriate to resolve a dispute in accordance with the constitution.²⁰¹

2.2.6. The Land Act

The constitution of Kenya provides that land belongs to the people of Kenya collectively as a nation, as a community and/or as individuals.²⁰² Public Land is further defined to consist of all minerals and mineral oils as defined by law and ownership is vested in the national government.²⁰³

Land conflicts in Kenya have a long history and can be traced back to the scramble for Africa by European powers when the British formulated and implemented policies that drove people away from communally owned land and applied the divide and conquer principle when managing the communities.²⁰⁴ Land issues have always been a dark cloud that looms over the national government as it evokes strong emotions hence ADR and TDRM's have been proposed as the

¹⁹⁶ *National Land Commission Act* (2012).

¹⁹⁷ *The Land Act* (2012).

¹⁹⁸ *The Land Registration Act* (2012).

¹⁹⁹ *The Environmental and Land Court Act* (2012).

²⁰⁰ Article 62(1)(f), *Constitution of Kenya* (2010).

²⁰¹ Muigua K, 'Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects', 2019, 9.

²⁰² Article 61 (1), *Constitution of Kenya* (2010).

²⁰³ Article 62 (3)(f), *Constitution of Kenya* (2010).

²⁰⁴ Veit P, "History of Land conflicts in Kenya". 1

best means of management of land conflict.²⁰⁵ This is due to the frequent clashes between neighboring communities over land and natural resources in the country.²⁰⁶

The National Land Commission by virtue of the provisions of the Land Act is empowered to reserve public Land located within natural resources both on or under the surface for any purpose that is in the interest of the public.²⁰⁷ Under the act, the Commission and any state officer is meant to be guided by the values and principles listed when enacting and interpreting any provisions of the NLC Act or making and implementing policy.²⁰⁸ Some of the values include; encouragement of settlement of land disputes by communities through local community initiatives that are recognized and use of mechanisms such as ADR in land dispute management and handling.²⁰⁹ Other functions of the NLC includes the management of public land on behalf of both levels of government and making recommendations on land policy.²¹⁰

The National Land Commission is placed in charge of compulsory acquisition.²¹¹ If either the national, county government or government authority wishes to acquire land already owned by an individual or community, a request must be submitted to the National Land Commission for the commission to acquire the land on its behalf.²¹² The Commission has the right to reject the request if it goes against the prescribed guidelines as provided for in the constitution.²¹³ Most of the areas where minerals have been discovered happen to be communal ownership of land hence the ministry of mining has to request the commission to acquire the said lands for purposes of exploration.

²⁰⁵ Muigua K, “Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects”. 10.

²⁰⁶ Muigua K, “Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects”. 10.

²⁰⁷ Section 15 (d), *Land Act* (2012).

²⁰⁸ Section 4 (2), *Land Act* (Act No 6 of 2012).

²⁰⁹ Section 4(2) (g), *Land Act* (Act No 6 of 2012).

²¹⁰ Article 67, *Constitution of Kenya* (2010).

²¹¹ Section 107 (1), *Land Act* (Act No 6 of 2012).

²¹² Section 107 (1), *Land Act* (Act No 6 of 2012).

²¹³ Section 107 (2), *Land Act* (Act No 6 of 2012).

Although the Act contains detailed provisions with respect to the compulsory acquisition of land, disputes have arisen and been referred to courts for determination on the matter. An example being the case of *Patrick Musimba v National Land Commission & 4 Others* where the petitioners asserted that the compulsory acquisition process as provided for under the Land act was not followed by the National Land Commission for purposes of building of the Standard gauge railway. The matter was filed in the year 2012 and was determined in the year 2016. Through this, it is clear that the use of mediation and its effectiveness and efficiency would have determined the matter hastily and as such reducing the chances of a party filing an appeal in a court of higher jurisdiction.²¹⁴

2.2.7. The National Land Commission Act

It gives further elucidation on the powers and functions of the National Land Commission. It is obligated to encourage use of TDRM'S in conflicts that relate to land ; It is also mandated to compulsory acquire private and community land for public purposes.²¹⁵

The mandate of NLC's extends to the extractive sector and includes addressing issues such as those that concern the acquisition of land to conduct extractive activities and compensation once compulsory acquisition is undertaken.²¹⁶

Promotion of the use of alternative means of solving grievances by the NLC as has been provided for in the Act is further supported by the provisions contained in the Community Land Act 2016 which I shall discuss in detail below.

²¹⁴ *Patrick Musimba v National Land Commission & 4 Others* (2016) EKLK.

²¹⁵ Section 5 (1) (f), *National Land Commission Act* (2012).

²¹⁶ <http://extractives-baraza.com/resources/overview-of-kenyas-extractive-industry/key-institutions> on 24 February 2020.

2.2.8. Community Land Act 2016.

Exploration of natural resources found on community land has led to rise of grievances. This is evident as in 2019 both the Turkana community through its 33 members and the county government of Turkana instituted separate law suits in the Environment and Land Court against a decision by the NLC to compulsorily acquire six thousand, three hundred and forty eight (6348) hectares for oil exploration on behalf of the Ministry of Petroleum and Mining.²¹⁷ The argument of both parties was that they were not consulted nor engaged by the NLC with respect to the acquisition of the land which was not in compliance with COK and the Land Act.

As per the act, any agreement that relates to investment in land that is communally owned shall be prepared in an open and consultative process that is free for members to participate.²¹⁸ And that such an agreement shall only involve the community and investor.²¹⁹

Through its provisions, it has adopted the use of mechanisms such as ADR and TDRM'S in settling grievances, conflicts and disputes with respect to community land.²²⁰ This is clearly provided in the act to enable solving of conflicts that involve land that is communally owned.²²¹

Arbitration and mediation as means of grievance resolution have also been recognized by the act. To give effect to the same, the act states that where a dispute involving land communally owned arises, the disputing parties if in agreement may defer the issues for resolution by mediation.²²² It also allows the parties to refer any such dispute to arbitration.²²³ Kariuki Muigua posits that although it is a positive step, the diversity of ADR and TDRM mechanisms based on communities that are diverse as well as the informal procedures associated with enforcement of

²¹⁷ Jackson Ekaru Nakusa & 32 Others vs National Land Commission & 2 Others (2019) eKLR

²¹⁸ Section 36, *Community Land Act* (2016).

²¹⁹ Section 36 (2), *Community Land Act* (2016).

²²⁰ Section 39, *Community Land Act* (2016).

²²¹ Section 39 (1), *Community Land Act* (2016).

²²² Section 40, *Community Land Act* (2016).

²²³ Section 41, *Community Land Act* (2016).

mediation decisions is bound to be challenge ridden.²²⁴ He further states that the fact that the mechanisms are not binding complicates their use.²²⁵

The aforementioned loophole is however being addressed by the Alternative Dispute Resolution Bill 2019 which is yet to be passed into law.

2.2.9. The Environmental Management & Co-Ordination Act (EMCA) 2012

The Act provides for institutional bodies that are charged with the responsibility of resolving and managing Natural resource conflicts.²²⁶ These institutions include the courts of law, tribunals under various Acts.²²⁷

The legal framework in Kenya for management and conservation of the environment is the Environmental Management and Coordination Act (EMCA). Its aim is to establish a legal and institutional framework that regulates environmental management.²²⁸ The act's objective is also to improve the legal and administrative Co-ordination of the diverse sectorial initiatives necessary in order to improve the national capacity for the management of the environment.²²⁹

Its provisions require public participation and access to justice by members of any community impacted by extractive activities carried out within their environment.²³⁰ It attempts to achieve this through the establishment of the National Environment Council (NEC) as the top policy making body under the Act charged with the responsibility of formulating policy on matters relating to environment management in Kenya, the National Environment Management Authority (NEMA) which is charged with the responsibility of ensuring implementation of all policies that concern the environment, the National Environmental Tribunal (NET), and the

²²⁴ Muigua K, 'Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects', 2019, 12.

²²⁵ Muigua K, 'Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects', 2019, 12.

²²⁶ Muigua K, 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation', 2016,13.

²²⁷ Muigua K, 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation', 2016,13.

²²⁸ Long title, *Environmental Management and co-ordination Act* (2012).

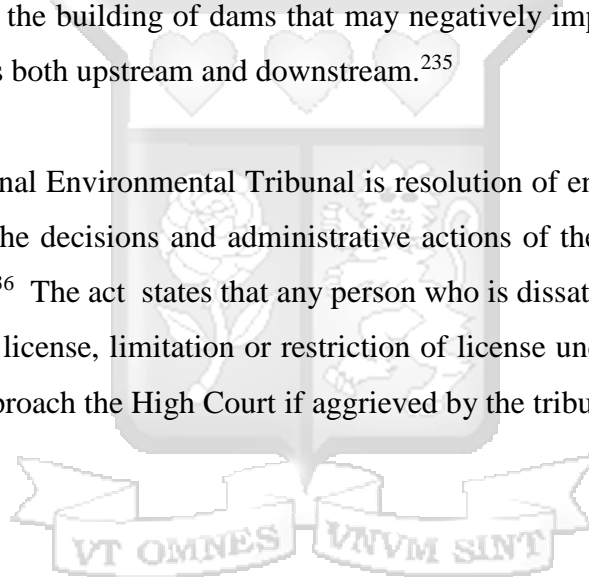
²²⁹. Section 9, *Environmental Management and Coordination Act* (2012).

²³⁰ Mbote K, 'Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunity for intervention', *International Environmental Law Research Centre* (IELRC), IELRC Working Paper, 2005, 3.

Public Complaints Committee (PCC) that focuses on the investigation of complaints relating to environmental damage and degradation.²³¹ Through the National Environment Management Authority, EMCA provides further protection to the land and all its resources as its powers have been listed in the act²³²

A huge percentage of resources such as minerals or oil are found in environments that are fragile, such as areas that have huge forest cover, marine environments and areas that are considered by communities as having great significance culturally.²³³ In situations where there are no policies and enforcement of laws to govern the extractive sector, negative impacts are bound to be experienced on the environment and communities²³⁴. In addition, extraction is heavily reliant on water therefore requiring the building of dams that may negatively impact community members reliant on water resources both upstream and downstream.²³⁵

The purpose of the National Environmental Tribunal is resolution of environmental disputes and conflicts resulting from the decisions and administrative actions of the National Environmental Management Authority.²³⁶ The act states that any person who is dissatisfied with; the refusal for the grant or transfer of a license, limitation or restriction of license under the Act or regulations made thereunder may approach the High Court if aggrieved by the tribunals decision.²³⁷



²³¹ Mbote K, 'Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunity for intervention', *International Environmental Law Research Centre (IELRC)*, IELRC Working Paper, 2005,7.

²³² Section 9, *Environmental Management and Co-ordination Act (2012)*.

²³³ Omedo G and Ali N, 'Strengthening environmental governance within the extractives sector is key to recapping optimal benefits', United Nations Development Programme, 2018.
<https://www.ke.undp.org/content/kenya/en/home/blog/2018/strengthening-environmental-governance-within-the-extractives-se.html> on 19th June 2020.

²³⁴ Omedo G and Ali N, 'Strengthening environmental governance within the extractives sector is key to recapping optimal benefits', United Nations Development Programme, 2018.
<https://www.ke.undp.org/content/kenya/en/home/blog/2018/strengthening-environmental-governance-within-the-extractives-se.html> on 19th June 2020.

²³⁵ Omedo G and Ali N, 'Strengthening environmental governance within the extractives sector is key to reaping optimal benefits', United Nations Development Programme, 2018.
<https://www.ke.undp.org/content/kenya/en/home/blog/2018/strengthening-environmental-governance-within-the-extractives-se.html> on 24 February 2020.

²³⁶ Section 125, *Environmental Management and Co-ordination Act (2012)*.

²³⁷ Section 126, *Environmental Management and Co-ordination Act (2012)*.

Tribunals are designed to be more informal, free from technicalities and accessible.²³⁸ It is important to note that although it has advantages over the traditional judicial mechanism of conflict resolution. Of importance to note is that it does not have original jurisdiction and deals with appeals from administrative organs created under EMCA.²³⁹

Access to justice in decisions concerning the environment is achieved through the inclusion of environmental procedural rights in emerging international and regional instruments which are then adopted in national legislation so as to give them a binding effect.²⁴⁰ Environmental issues as proposed by the Rio declaration are efficiently dealt with once there is participation by concerned citizens at each level. An example is where every individual has sufficient access to environmental information gathered by public authorities and there is a platform to participate in the decision making process.²⁴¹

Despite the existence of the Act, in Kenya, resources as a result of natural resources are still widespread and a major cause of concern. The structures created by the act are faced by limitations such as :

- i. Lack of accessibility by women, marginalized groups, the poor and remote communities due to factors such as political barriers and discrimination; distance, cost, language barriers, illiteracy, failure to consider indigenous knowledge, local institutions and long-term community needs in decision-making and reliance on technical and judicial specialists who do not have the expertise required for natural resource management that is participatory ;²⁴²
- ii. Reliance on Litigation that is adversarial and produce win - lose outcomes; thus limiting decision making by disputing parties;²⁴³

²³⁸ Mbote K, 'Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunity for intervention', *International Environmental Law Research Centre (IELRC)*, IELRC Working Paper, 2005,7.

²³⁹Mbote K, 'Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunity for intervention', *International Environmental Law Research Centre (IELRC)*, IELRC Working Paper, 2005, 7.

²⁴⁰ Mbote K, 'Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunity for intervention', *International Environmental Law Research Centre (IELRC)*, IELRC Working Paper, 2005,1.

²⁴¹ Principle 10, The United Nations Conference on Environment and Development: 'Rio Declaration on Environment and Development',1972.

²⁴² Muigua K, 'Managing Natural Resource conflicts in Kenya through negotiation and mediation',14

²⁴³ Muigua K, 'Managing Natural Resource conflicts in Kenya through negotiation and mediation',14

- iii. Lack of impartiality especially in situations where judicial independence is lacking, as the process may be negatively influenced by corruption or influence by those who wield power ;²⁴⁴and
- iv. Use of complex language mainly understood by the educated, thus creating terms that are beneficial to IOC'S or the two levels of the government over community members.²⁴⁵

2.2.10. Civil Procedure Act

It recognizes Mediation as an ADR mechanism.²⁴⁶ The Act establishes the Mediation Accreditation Committee whose members are appointed by the Chief Justice. Furthermore, the act states that the court may direct cases to mediation where there is request from parties, where appropriate and where the law requires it from them.²⁴⁷The said provisions were introduced by the State law (Miscellaneous Amendment) Act No. 6 of 2009.

According to Kariuki Muigua, Kenya lacks an integrated and comprehensive legal framework to govern the use of mediation in conflict resolution.²⁴⁸ The mediation frameworks currently being used and in force has heavily borrowed from international law and practice.²⁴⁹ There are instances where disputing parties using the formal judicial process engage in mediation outside the court process and then record a consent before a court or opt to engage fully in a mediation process and conclude the mediation agreement as a contract binding to them as long as it complies with provisions of the Law of contract Act.²⁵⁰

With respect to extractive grievances, Kariuki Muigua posits that the provisions on mediation as stated in the act are not binding on the institutions or parties before institutions created under EMCA.²⁵¹ The only way the provisions on mediation would facilitate the mediation of environmental conflicts is if the Public complaints committee and the National Environmental Tribunal opt to adapt the amendments as part of their proceedings and even so, the process may

²⁴⁴ Muigua K, 'Managing Natural Resource conflicts in Kenya through negotiation and mediation',14

²⁴⁵ Muigua K, 'Managing Natural Resource conflicts in Kenya through negotiation and mediation',14

²⁴⁶ Section 59A, *Civil Procedure Act* (2012).

²⁴⁷ Section 59 B, *Civil Procedure Act* (2012).

²⁴⁸ Muigua K, 'Resolving Environmental conflicts through mediation in Kenya' 108.

²⁴⁹ Muigua K, 'Resolving Environmental conflicts through mediation in Kenya' 109.

²⁵⁰ Muigua K, 'Resolving Environmental conflicts through mediation in Kenya' 110.

²⁵¹ Muigua K, 'Resolving Environmental conflicts through mediation in Kenya' 114.

not work smoothly as the provisions deal with directing parties to go for mediation of their matter and not with the process and procedure of mediation of conflicts.²⁵²

Additionally, the Act further states that where one refers a conflict to mediation in compliance with its provisions, the parties thereto shall have the option to choose for that purpose a mediator whose name has been listed in the mediation register maintained by the Mediation Accreditation Committee.²⁵³ Enforceability of any such agreement is also provided for as the act states that an agreement between the parties to a dispute as a result of a process of mediation under this Part shall be recorded in writing and registered with the Court giving the direction and shall be enforceable as if it were a judgment of that Court.²⁵⁴ Appeals based on grievances arising from such agreements have also been limited as the act expressly states that no appeal shall lie against any such mediation agreement.²⁵⁵

Use of Mediation and other ADR mechanisms has been promoted and recognized by the Alternative dispute Resolution Bill 2019 which states that its purpose is to give effect to the provisions of the COK with regard to the use of ADR.²⁵⁶ It further qualifies matters which shall not fall under its ambit and they include;²⁵⁷

- (a) disputes subject to arbitration under the Arbitration Act;
- (b) disputes where a tribunal established under written law has exclusive jurisdiction;
- (c) election disputes;
- (d) disputes involving the interpretation of the Constitution;
- (e) a claim for a violation of fundamental freedoms contained in chapter 4 of the COK ; or
- (f) disputes where public interest involving environmental or occupational health and safety issues are involved.

²⁵² Muigua K, 'Resolving Environmental conflicts through mediation in Kenya', 115.

²⁵³ Section 59 (B) , *Civil Procedure Act* (2012).

²⁵⁴ Section 59 (B) 4, *Civil Procedure Act* (2012).

²⁵⁵ Section 59 (B) 5, *Civil Procedure Act* (2012).

²⁵⁶ Section 3, *Alternative dispute resolution bill* (2019).

²⁵⁷ Section 4, *Alternative dispute resolution bill* (2019).

By virtue of the above provisions, it can be deduced that natural resource conflicts which include extractive grievances are excluded by virtue of the act together with EMCA as EMCA contains provisions on the procedure to be followed in the instance of an environmental dispute. Kariuki Muigua further posits that the Court mandated mediation provided in the Civil Procedure Act is so much linked to the court process and is bound to be met with challenges.²⁵⁸ He further states that mediation in its current form is skewed towards the legal process and the end result is that mediation conducted under the proposed law would only settle and not resolve the conflict as intended.²⁵⁹

Currently, there have been efforts made to develop and include mediation in various statutes of law. For example, the Civil Procedure Act as shown above provides for mediation of disputes,²⁶⁰

2.2.11. Civil Procedure Rules 2010

Under the rules, court ordered arbitration and other ADR mechanisms are recognized and given the force of law through court procedure.²⁶¹ The rule provides that no provision under order 46 Rule 20 shall be interpreted as preventing the court from using ADR mechanisms to attain the oxygen principles as provided for in the civil procedure Act.²⁶² The court has authority to use ADR mechanisms in resolving disputes and shall make such orders as are appropriate to facilitate ADR means for resolution of disputes.

Under the above provision, the court is obligated to use ADR mechanisms in all civil disputes governed by the Civil procedure Act so as to enable the affordable, proportional, just and expeditious resolution of disputes.²⁶³ Environmental issues are covered by virtue of appeals on decisions by the National Environmental Tribunal under EMCA

²⁵⁸ Muigua K, 'Resolving Environmental conflicts through mediation in Kenya', 122.

²⁵⁹ Muigua K, 'Resolving Environmental conflicts through mediation in Kenya', 122.

²⁶⁰ *The Civil Procedure Act* (2012).

²⁶¹ Order 46, *Civil Procedure rules* (2010).

²⁶² Sections 1A and 1B, *Civil Procedure Act* (2012).

²⁶³ Muigua K, 'Court annexed ADR in the Kenyan context', 3.

<http://kmco.co.ke/wp-content/uploads/2018/08/Court-Annexed-ADR.pdf> on 19 June 2020.

2.2.12. The Natural Resources (Classes of Transactions Subject to Ratification) Act 2016

The COK places an obligation on parliament to formulate and pass legislation that ensures property investment benefits trickle down and are experienced by the community.²⁶⁴ This position is further reinforced by its provision that requires any transaction involving the grant of a right or concession on behalf of any person to another person to be ratified by parliament.²⁶⁵

It gives effect to article 71 of the constitution of Kenya 2010 and lists the considerations that are relevant in deciding to either ratify or reject an agreement. The considerations are to recommend relevant regulatory agencies, adequate stakeholder consultation, benefits that are to be derived by the local community and the extent to which an agreement has fairly balanced the interests of the beneficiaries and the interest of society.²⁶⁶

Kariuki Muigua posits that although the provisions are welcome due to the fact that benefit sharing in arrangements involving exploitation of natural resources and the need for participation by the public, the provisions of law on the thresholds necessary for such approval is not clear.²⁶⁷ This has therefore created a loop hole that may be exploited by the political class and influential community figures where exploitation of a natural resource will be approved by a minority to push their own selfish individual interests.²⁶⁸

2.2.13. Alternative Justice Systems Baseline Policy

The Judiciary in collaboration with various stakeholders launched the aforementioned policy on the 27th of August 2020. According to the policy, human society has had justice systems for as long as it has existed and in Kenya and the different communities had their own mechanisms of justice that existed.²⁶⁹ These systems are referred to as Customary or Traditional systems and the

²⁶⁴ Article 66 (2), *Constitution of Kenya* (2010).

²⁶⁵ Section 3, *Natural resources (Classes of Transactions Subject to Ratification)* (Act No 41 of 2016).

²⁶⁶ Section 9, *Natural resources (Classes of Transactions Subject to Ratification)* (Act No 41 of 2016).

²⁶⁷ Muigua K, 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya', 19.

²⁶⁸ Muigua K, 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya', 19.

²⁶⁹ The Judiciary of Kenya, 'Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)', 2020, xiv.

colonial administration in Kenya pursued a dual track approach to justice and dispute resolution, comprising: Native Tribunals, and later Native Courts, which applied “customary law” to the locals, and; the Colonial State Courts, which applied to the settlers and for matters whose jurisdiction was excluded from the Native Courts. This dual Court system attempted to be both stabilizing and transformative.²⁷⁰

Although the traditional systems and mechanisms are often more accessible and trusted by members of a community, they had not been recognized in the legal order before the COK was promulgated.²⁷¹

Court adjudication has taken the center stage in dispensation of justice and a vast majority of disputes among Kenyans’ are resolved through justice systems that are outside the formal court process.²⁷² Some of the advantages of Alternative Justice Systems (AJS) as a mode of dispute resolution include but are not limited to the fact that it is a form of restorative justice unlike the formal court system which is adversarial, that it ensures inclusivity of all the parties since it is participatory in nature, it is affordable and devoid of formalities and technicalities and that it provides for less adversarial & creative solutions and affirms peoples sovereign power.²⁷³

AJS can be categorized into four main models. the first being Autonomous AJS institutions which refers to processes and ADR mechanisms under the full control of a community, whereby members select and approve third parties involved in resolving disputes as well as applicable norms without the intervention of the state.²⁷⁴ The second being third party institution annexed AJS institutions which refers to both state based institutions such as offices of the chiefs, National police, probation officers, child welfare officers and non-state based such as the church leaders or imams with the key defining factor for this model being that the adjudicators are not

²⁷⁰ The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, xiv.

²⁷¹ The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 2020, xiv.

²⁷² The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 2020, ix.

²⁷³ The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 2020, xv.

²⁷⁴ The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 2020, XVI.

part of any judicial or quasi –judicial mechanism.²⁷⁵ The third is court- Annexed AJS institution which refers to processes that are used to resolve disputes outside the formal judicial process but under its guidance & partial involvement and the last model is Regulated AJS institutions which refers to mechanisms created and regulated either partially or fully by state based law or statute. Such bodies can be found in countries such as South Africa or Uganda.²⁷⁶

AJS has been embraced in various towns across the country such as Kericho which following the 2008 Post election Violence (PEV) there were a lot of incidences of crime and violence that erupted following the disputed election over-whelming the police.²⁷⁷ However, the presence of strong elders and chiefs facilitated successful reconciliation efforts and this lead to setting up of a project by the Legal resource –foundation whose aim was to bring justice closer to the people.²⁷⁸ The community paralegals and elders are trained on diverse areas of dispute such as land issues, succession and aspects of civil and criminal matters.²⁷⁹ The members of the community usually select elders to the panel and they do not handle serious criminal offences but refer them to the Police service.²⁸⁰

The policy recognizes that there are challenges that face use of AJS system in Kenya, this is due to the fact that the social context of the African society views women as unequal to men.²⁸¹ This therefore presents a problem in the form of gender justice where traditions have been identified as one of the causes of gender injustice.²⁸² This is due to the fact that most traditional systems are

²⁷⁵ The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 2020, XVI.

²⁷⁶ The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 2020, XVI.

²⁷⁷ The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 12.

²⁷⁸ The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 12.

²⁷⁹ The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 13.

²⁸⁰ The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 13.

²⁸¹ The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 42.

²⁸² The Judiciary of Kenya, ‘Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)’, 42.

male dominated and in most settings, it is men who sit on decision making panels. Consequently chances of them recognizing the rights of women and delivering objective decisions are slim.²⁸³

2.2.14. The Mediation Bill 2020

The bill has been proposed to provide a framework under which mediation in civil disputes will be conducted. Its long title describes it as an Act whose object is to provide for resolution of all civil disputes through mediation; to lay out applicable principles to mediation; render for the establishment of the Mediation Committee; to render for the accreditation and registration of mediators; recognition and enforcement of settlement agreements; and for connected purposes.²⁸⁴

In addition to limiting the scope of the act to only applying to civil disputes,²⁸⁵ the bill has provided that its objective shall be to; provide an effective mechanism for amicable dispute resolution, promote a conciliatory approach to dispute resolution, facilitate timely resolution of disputes at a relatively affordable cost, facilitate access to justice; and enhance community and individual involvement in dispute resolution.²⁸⁶

Further, the bill also provides for the principles that shall bind a mediator and parties to mediation proceedings. The principles include; engagement in mediation process is discretionary and one can pull out from the mediation process at any time, a party to mediation process has the right to resolve a dispute and be informed of this right before mediation process commences, confidentiality of mediation processes in accordance with section 28, the parties and the mediator shall seek to complete the mediation process in accordance with section 28, the parties and the mediator shall seek to complete the mediation process in the shortest time practicable taking into account the nature of the dispute and parties shall take reasonable measures in resolution of disputes as provided for under section 22. Further, other principles include; a mediator shall be impartial and disclose to the parties' circumstances which may affect the mediator's impartiality, a mediator shall facilitate disputes which the mediator is competent,

²⁸³ The Judiciary of Kenya, 'Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)', 42.

²⁸⁴ Long title, *Mediation Bill* (2020).

²⁸⁵ Clause 4, *Mediation Bill* (2020).

²⁸⁶ Clause 3, *Mediation Bill* (2020).

a mediator shall not provide legal advice to a party and a mediator shall not use information acquired during the mediation process for personal gain or to the detriment of any person.

Under the provisions of the bill, the resolution of a dispute through mediation commences when a dispute is referred to mediation by a court or a party accepts an invitation to submit a dispute to mediation from the other party.²⁸⁷ It further provides that the failure by the other party to accept the invitation to mediation within fourteen days after receipt of the invitation or within the period specified in the invitation shall be deemed as a rejection of the invitation.²⁸⁸

Independence of a mediator has also been specified as the bill provides that a mediator shall not without the parties consent or as per the law requirements; act as an arbitrator or as a representative or an advocate of a party in any judicial proceeding in respect of a dispute facilitated by the mediator; and be presented by a party as a witness in any judicial proceedings arising out of or in connection with the mediation process facilitated by the mediator.²⁸⁹

In addition the bill states that a mediator shall not join any judicial proceedings relating to mediation under this Act as a party in which the mediator facilitated and that he/she shall not be liable for any act or omission in the discharge of the functions of a mediator unless the mediator is proven to have acted fraudulently, negligently or in bad faith.²⁹⁰ Advocates as officers of the court shall, prior to initiating judicial proceedings, advise a party to consider mediation.²⁹¹ Furthermore, the disputing parties shall at the time of commencing judicial proceedings file with the relevant court a certificate stating that mediation has been considered.²⁹²

The courts power and discretion to refer a dispute to mediation is limited if there is no dispute between the parties; there is no disagreement in existence between the parties regarding the matter to be referred to mediation by agreement or covered under this Act; the mediation agreement is incurable of its defects, cannot be performed or null; previous mediation attempts were made and failed; substantial public interest involving constitutional, environmental, or occupational health and safety issues are involved; costs are likely be disproportionately high;

²⁸⁷ Clause 18 (1), *Mediation Bill* (2020).

²⁸⁸ Clause 18 (2), *Mediation Bill* (2020).

²⁸⁹ Clause 31, *Mediation Bill* (2020).

²⁹⁰ Clause 32, *Mediation Bill* (2020).

²⁹¹ Clause 33, *Mediation Bill* (2020).

²⁹² Clause 34, *Mediation Bill* (2020).

there is a likelihood of delay; a binding judicial precedent is required; or a party is likely to be prejudiced as a result of power imbalances.²⁹³

Enforceability of settlement agreements arising out of mediation proceedings has been catered for. The bill provides that a settlement agreement, shall be recognized as binding and, upon application in writing to the High Court or the court that referred the matter to mediation, shall be enforced subject to section 39.²⁹⁴ The bill further contains provisions on situations when a settlement agreement may not be recognized as binding. They include the following. If a party to the mediation process was incapacitated and if the settlement isn't valid under the law to which the parties have subjected to. If the mediator was appointed through a process not agreed upon in the mediation agreement and if the settlement agreement was induced by fraud or any other vitiating factors.

The High Court also has power to declare a settlement agreement invalid if mediation of the subject matter would be perverse to Kenya's public policy.

2.3. Analysis of the Mediation Bill and Principles from International Best Practice On the Use of Mediation in Solving Grievances Arising from The Extractive Sector.

The importance of the Mediation Bill to the extractive sector is that it provides a framework as to how mediation shall be conducted in handling grievances in the extractive industry when they fall within the realm of civil disputes. Kariuki Muigua posits that the mechanisms that have been so far used in dealing with environmental conflicts due to activities in the extractive industry have only ended up postponing dealing with causes of the conflict and lead to animosity arising among parties to a conflict.²⁹⁵ The nature of grievances have been caused by a number of variables including scarcity of grazing lands, economic and political marginalization of communal land which leaves communities reliant on such parcels of land at a disadvantage when sharing the benefits of resources derived from the land.

²⁹³ Clause 35 (2) *Mediation Bill* (2020).

²⁹⁴ Clause 38 (3) *Mediation Bill* (2020).

²⁹⁵ Muigua K, 'Resolving environmental conflicts through mediation', Glenwood,2017, 1.

He further posits that there is need to adopt an approach that involves decision making in matters especially those concerning the environment by those who depend on environmental resources.²⁹⁶ The proposal for the use of mediation is on the basis that it tends to narrow down on the interests as opposed to the positions of the parties.²⁹⁷

The current judicial mechanisms used to solve extractive grievances are unable to properly deal with conflicts as courts are adversarial in nature.²⁹⁸ The court process is further bogged down with procedural technicalities which lay men may not understand and also leads to inordinate delay in dealing with disputes and in the process delaying justice. The U.S Institute for Environmental conflict resolution developed a mechanism for evaluation and data collection instrument to assess what contributes to the success of environmental mediation.²⁹⁹ The said study concluded that environmental mediation processes improved relationships among the stakeholders significantly in addition to building trust.³⁰⁰ It also concluded that environmental mediation is a tool that is efficient for solving environmental problems and resolving environmental issues.³⁰¹

Despite there being evidence of successful use of mediation in environmental matters, the mediation bill still excludes environmental grievances from matters that may be determined through mediation.³⁰² An advantage is that the bill recognizes that for mediation of any dispute to work, the mediator must be accepted by the parties and must have expertise in the given field in which a grievance has arisen.³⁰³ The bill also recognizes that the legitimacy of mediation is obtained from fairness, the voluntariness to participate in it as a process, and the autonomy displayed by the parties over the choice of the mediator, the process and the outcome and this is

²⁹⁶Muigua K, 'Resolving environmental conflicts through mediation', Glenwood,2017,2.

²⁹⁷Muigua K, 'Resolving environmental conflicts through mediation', Glenwood,2017,2.

²⁹⁸Muigua K, 'Resolving environmental conflicts through mediation', Glenwood,2017,3.

²⁹⁹ Orr P, Keyes D and Emerson K, 'Environmental conflict resolution practice and performance: An evaluation framework', 2009.

<http://sro.srs.gov/EATC%202009/ecrperformanceevidencefromthefield.Pdf> on 3 July 2020.

³⁰⁰ Orr P, Keyes D and Emerson K, 'Environmental conflict resolution practice and performance: An evaluation framework', 2009.

<http://sro.srs.gov/EATC%202009/ecrperformanceevidencefromthefield.Pdf> on 3 July 2020.

³⁰¹Orr P, Keyes D and Emerson K, 'Environmental conflict resolution practice and performance: An evaluation framework', 2009.

<http://sro.srs.gov/EATC%202009/ecrperformanceevidencefromthefield.Pdf> on 3rd July 2020.

³⁰² Clause 35 (2), *Mediation Bill* (2020).

³⁰³ Clause 5 (g), *Mediation Bill* (2020).

reflected in its principles which if passed will provide a framework for the conduct of mediation in Kenya.³⁰⁴

In order for mediation to be considered as effective, it must be perceived as legitimate by all the parties involved. The process and outcome ought to be equitable in addition to rights compatible by allowing the participation of vulnerable members in society, non-discrimination, accountability, equity and empowerment. Such a mechanism should in addition not compromise access to other grievance resolution processes.

The bill in its current form does not create a center or institution located close to the areas where mining and extractive activities are being carried out that can act as a dedicated pathway for handling complaints and grievances. Although it places an obligation on Advocates to inform their clients on mediation as an option, there is no guarantee that the same will be done as many advocates are not trained on mediation and its procedures.

The bill has dealt with the issue of enforceability of settlement agreements in addition to requiring a mediator to prepare a report on the proceedings he or she carries out. This is a positive step as any agreement executed after a mediation process is considered binding and can be enforced after its adoption as a court order.

Enforceability has also been supplemented internationally through the United Nations Convention on International Settlement Agreements resulting from mediation (Singapore convention on mediation). This is an effort to provide a legal framework for the recognition and enforcement of mediation agreements across country borders. On 7th August 2019, Forty-six countries signed up to the Singapore convention and as of 12th March 2020, fifty-two countries had signed with three countries namely Qatar, Saudi Arabia, and Singapore having ratified the same.

The purpose of the Singapore convention is to provide a general framework for the streamlined enforcement of mediated settlements of disputes between international parties. It ensures that an agreement in writing between two international parties and which is also signed by the mediator, qualifies for enforcement in the courts of a ratifying member state of the Singapore convention. The net effect is that the outcome of an international mediation becomes certain and enforceable

³⁰⁴ Clause 5, *Mediation Bill* (2020).

in disputes between parties from signatory countries thereby removing additional costs incurred when using the court process to make such agreements binding and enforceable. It is important to note that Kenya is yet to be a signatory and the mediation bill has not made any reference to the Singapore convention on mediation.

2.4. Conclusion

As shown above, there exists an institutional and legal framework that provides for mechanisms of solving and managing natural resource based grievances. Despite the existence of the laws and institutions, grievances leading to conflicts between the local community and international investor still arise delaying the production of oil. The use of mediation has not been adequately utilized in resolution of the grievances that have arisen in the conducting of upstream oil activities in Turkana and disputes are still being referred to courts for determination.

Kenyan courts are bureaucratic and due to its adversarial nature, a litigant tends to engage in all manner of procedural technicalities to attempt to frustrate the course of justice. This therefore hinders resolution of grievances and conflicts in a way that is satisfactory and equitable to all parties. There is therefore need for sensitization of members of the public on ADR and in particular mediation in addition to implementing of provisions embedded in various legislations to increase its use and inhibit over-reliance on court processes.

The Judiciary has taken steps in actualizing the provisions of article 159 (2) of the Constitution of Kenya through the formulation of the Alternative Justice system baseline Policy. This is a positive step as it recognizes the role of Non- governmental organizations, church, and chiefs in resolving grievances at the community level. However, there is a risk of such systems contributing to Gender injustice and hence training of due process needs to be done to practitioners of this system of justice.

Although the Mediation Bill 2020 is a positive step towards operationalizing mediation, it has still not fully adopted the principles recognized internationally with respect to use of non-judicial mechanisms such as mediation in solving disputes. One such principle is the issue of accessibility as there is no specific center where mediation matters with respect to mining or

extractive industries grievances accessible to the members of communities has been provided for. In addition, from the provisions of the mediation bill, it envisages a situation where litigants are ordered by a court to use mediation and record consent with the said court. This in principle exposes disputing parties to litigation and its disadvantages such as procedural technicalities and delayed justice as court annexed mediation still needs the court for enforcement of the settlement. The bill further excludes environmental matters from the scope of mediation hence the use of mediation in the extractive grievances is not binding on parties before institutions created under EMCA. There is therefore need for the Bill in its current form to be revised for purposes of ensuring that the legal framework for Mediation as proposed deals with the aforementioned loopholes.



CHAPTER 3

3.0. Principles that guide the successful use of mediation and their application to the extractive Sector in Kenya

3.1. Introduction

This chapter shall discuss best practices such as the UNGPs and other best practices. It will also identify customary law principles and constitutional law principles underpinning the successful use of mediation in Kenya while highlighting the effectiveness of mediation in resolving extractive grievances, thereafter it shall identify lessons learnt and how they can be used to fill in gaps and loopholes in our Kenyan legal framework and lastly conclude the chapter.

3.2.Principles That Guide the Successful Use of Mediation and Their Application to The Extractive Sector in Kenya

John Ruggie prepared a report which set out a framework to guide the interactions between companies and human rights which are comprised of three elements: (i) Corporate responsibility

to respect human rights; (ii) The state duty to protect human rights from abuse by third parties; and (iii) The need for more effective access to remedy.³⁰⁵

UNGP'S on Business and Human Rights: implementing the project, respect and remedy framework refers to a set of thirty one (31) principles creating an obligation on states and corporations and also that identify their responsibilities and duties with regard to respecting human rights in the environment of business activities and to make certain that access to a solution for individuals and groups affected by such activities.³⁰⁶ As part of their duty to protect against business related human rights abuse, appropriate measures need to be formulated and taken to ensure that those impacted by the activities of a corporation have access to not only an effective but also an efficient remedy through the traditional judicial mechanisms of alternative dispute resolution mechanism.³⁰⁷

The third pillar is about approaches to remedy for victims or potential victims of human rights abuses – whether by the state or companies or their business relationships.³⁰⁸ The concept underlying this is to solve any human rights abuses that have happened or to prevent more incidences of harms or foreseeable harms. Remedies include among others rehabilitation, restitution, apologies, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions.³⁰⁹ Procedures used in the provision of remedy should be corruption free, impartial, and free from political or other attempts to impact the result.³¹⁰ Most grievances

³⁰⁵ Rees C, 'Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges', Harvard Kennedy School, Working Paper No.56, 2010, 3.
https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/workingpaper_56_rees.pdf on 7 July, 2020.

³⁰⁶ https://www.ohchr.org/documents/publications/faq_principlesbusinesshr.pdf.5 on 26 September 2020.

³⁰⁷ https://www.ohchr.org/documents/publications/faq_principlesbusinesshr.pdf.8 on 26 September 2020.

³⁰⁸ Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016, 72.
[https://www.ihrb.org/uploads/reports/IHRB%2C Human Rights in Kenyas Extractive Sector - Exploring the Terrain%2C Dec 2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C%20Human%20Rights%20in%20Kenya%20Extractive%20Sector%20-%20Exploring%20the%20Terrain%20Dec%202016.pdf) on 24 February 2020.

³⁰⁹ Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016,72.
[https://www.ihrb.org/uploads/reports/IHRB%2C Human Rights in Kenyas Extractive Sector - Exploring the Terrain%2C Dec 2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C%20Human%20Rights%20in%20Kenya%20Extractive%20Sector%20-%20Exploring%20the%20Terrain%20Dec%202016.pdf) on 24 February 2020.

³¹⁰ Human Rights in Kenya's Extractives Sector, 'Exploring the Terrain', Institute for Human Rights and Business', December 2016,72.

emanating from exploration of natural resources in most instances take the form of breach of human rights.

These principles clearly state that corporate bodies are bound by the laws of the states they run their businesses.³¹¹ In addition, the principles also recognize that situations may exist where a country does not have the technical means to implement its laws and regulations against IOC'S and for such circumstances, the principles provide a framework to effectively address and remedy adverse impacts limited to business activities.³¹²

Marginalized communities are prone to face negative impacts from business activities especially those relating to the extractives industry. The principles place great importance on the states duty to ensure access to remedies including but not limited to removing any hurdles that may hinder victims from having access to justice for infringement of their rights. One way in which International oil companies and states have implemented the guiding principles is through subscribing to the membership of the Organization for Economic Co-operation and Development (OECD).

The OECD consists of thirty-one states whose main objective is to promote economic policies aimed at securing sustainable fiscal growth and the expansion of global free trade. In 1976, the OECD adopted guidelines for Multinational enterprises that bound mining companies incorporated under their respective jurisdictions to ensure that they maintain a level of control over subsidiaries of such mining companies operating abroad.

Mediation has been referred to as an under-exploited and important tool that is often well placed to prevent and manage disputes linked to natural resources.³¹³ Conflicts that arise due to the

³¹¹ United Nations Human Rights, 'Frequently asked questions about the guiding principles on business and human rights',2014.

https://www.ohchr.org/documents/publications/faq_principlesbusinesshr.pdf on 26 September 2020.

³¹² United Nations Human Rights, 'Frequently asked questions about the guiding principles on business and human rights',2014.

³¹³ Jensen D, & Kaye J and Brown M, 'Natural Resources and Conflict: A Guide for Mediation Practitioners', *United Nations Department of Political Affairs and United Nations Environment Programme*,2015, 10.

exploration of natural resources such as oil are usually associated with a number of issues which include but are not limited to;

- I) Natural resources such as oil in the instant case are vulnerable to high levels of price instability that potentially have weakening effects. This has recently been experienced when the economies in the world slowed down as a result of the ongoing Pandemic. Demand for oil reduced heavily leading to a huge decrease in the price of oil barrels hence a decrease in revenues generated for the benefit of countries reliant on it to fund their budgets; and
- II) The conflicts occur at various levels such as the local, regional, national and international levels such as the dispute between Kenya and Somalia with respect to off-shore oil wells with each country claiming ownership as a result of a dispute over the maritime boundary.³¹⁴

Advantages derived from the use of Mediation can be very important to unlock fixed placement and help disputing parties make progress by understanding the other parties rationale for the position that they hold.³¹⁵ An approach involving the use of mediation can play a role in reframing conflict and maximizing mutual benefits to allow greater opportunities for cooperation between stakeholders and strengthening relations across ethnic, community, regional or national divides.³¹⁶ In such an instance, In addition to other peace keeping tools such as dialogue, Mediation can play a complementary role and ought to be used as an only tool when facing complex resource disputes.³¹⁷

³¹⁴ Jensen D, & Kaye J and Brown M, 'Natural Resources and Conflict: A Guide for Mediation Practitioners', *United Nations Department of Political Affairs and United Nations Environment Programme*,2015,10.

³¹⁵ Jensen D, & Kaye J and Brown M, 'Natural Resources and Conflict: A Guide for Mediation Practitioners', *United Nations Department of Political Affairs and United Nations Environment Programme*,2015,14.

³¹⁶ Jensen D, & Kaye J and Brown M, 'Natural Resources and Conflict: A Guide for Mediation Practitioners', *United Nations Department of Political Affairs and United Nations Environment Programme*,2015, 14.

³¹⁷ Jensen D, & Kaye J and Brown M, 'Natural Resources and Conflict: A Guide for Mediation Practitioners', *United Nations Department of Political Affairs and United Nations Environment Programme*,2015, 14.

In Kenya, a majority of the communities have used grievance resolution mechanisms that are akin to mediation in resolving their conflicts for centuries.³¹⁸ It was very common to see people holding informal barasas and concurrence on definite issues, such as the allocation of resources in traditional African societies as disputes had a negative impact on the lives of people in society.³¹⁹ Thus, they fostered unity and sought peaceful coexistence.³²⁰ The role of chief in solving disputes at the communal level can also be considered to be mediation and this is provided for as a means of AJR by the Alternative justice systems baseline policy.

In the African continent, diverse cultures have prioritized harmony/togetherness over individual interests in terms such as Ubuntu in South Africa and Utu in East Africa.³²¹ These norms have contributed to social harmony and have been ingeniously incorporated into formal justice systems and in this way disputes were avoided and where they arose, there were processes that were in place to effectively settle those disputes.³²²

The African Union has accepted the use of mediation as a way of achieving security, peace, and sustainable development in Africa.³²³ According to a report by the AU, the central actors and right holders in any process that addresses security, human rights, sustainable development and peace are women.³²⁴ This thus clearly identifies the existence of the interests of women in a mediation setting therefore avoiding a situation of gender injustice where the interests of women are not considered.

In a setting where mediation is used, the tendency to involve the parties directly, rather than just through their legal advisers, the capacity to put a cap on the number of advisers on both sides to

³¹⁸ Muigua K, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximizing on the Benefits of Mediation', 2018, 4.

³¹⁹ Muigua K, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximizing on the Benefits of Mediation', 2018, 4.

³²⁰ Muigua K, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximizing on the Benefits of Mediation', 2018, 4.

³²¹ Muigua K, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation', P4.

³²² Muigua K, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation', P4.

³²³ ACCORD, 'Towards enhancing the capacity of the African Union in Mediation', a conference organized by the AU Commission in Addis Ababa, Ethiopia, 2009, 9.

³²⁴ ACCORD, 'Towards enhancing the capacity of the African Union in Mediation', a conference organized by the AU Commission in Addis Ababa, Ethiopia, 2009,27.

enable equality, the capacity for human rights to be canvassed in the proceedings (whether or not they are articulated in national law) and the ability of the mediator to pass information equally to both parties, is able to mitigate any imbalance than a single arbitrator or judicial officer is able to.³²⁵

The importance of mediation is that it assists in dealing with power imbalance that is not addressed through the use of judicial mechanisms by; inviting impartial technical assessments by third parties which can be done independently or jointly with parties. This will help by introducing objective data in the mediation process.³²⁶ Additionally, It plays a role in building capacity for community members and state holders to negotiate and of national or county authorities to apply conflict resolution procedures in a fair and standard manner.³²⁷ Furthermore, through the use of benefit-sharing agreements to govern the allocation of benefits, costs and responsibilities from the extraction of a resource, risk of grievances arising is low.

Developing countries face huge problems in the use and management of land and natural resources and exploitation of natural resources usually leads to armed conflict. The discovery of natural resources in sub-Saharan Africa, is characterized by increasing levels of social, technical political, and environmental risk.³²⁸ Developments brought about by extractive investment can negatively impact the social fabric of a community and negative impacts include but are not limited to weakening of traditional social structures, impoverishment and rapid urban growth.³²⁹

³²⁵ Rees C, 'Mediation in Business Related Human Rights Disputes: Objections, Opportunities and Challenges', Harvard Kennedy School, Working Paper No. 56, 2010,13. https://www.hks.harvard.edu/sites/default/files/centres/mrcbg/programs/crj/files/workingpaper_56_rees.pdf on 7th July,2020.

³²⁶ ³²⁶Jensen D and Kaye J, 'Natural Resources and Conflict; A Guide for Mediation Practitioners', United Nations Environmental Programme, 2015, 30.

³²⁷ Jensen D and Kaye J, 'Natural Resources and Conflict; A Guide for Mediation Practitioners', United Nations Environmental Programme, 2015, 31.

³²⁸ Muigua K, 'Reflections on Managing Natural resources and Equitable Benefits Sharing In Kenya' 15 *The law society of Kenya Journal* 1, 2019,3.

³²⁹ Muigua K, 'Reflections on Managing Natural resources and Equitable Benefits Sharing In Kenya' 15 *The law society of Kenya Journal* 1, 2019,3.

The right to access to justice has been codified in a number of international treaties.³³⁰ It has been asserted that “access to justice can and should be enhanced by both access to the courts as well as access to the mechanisms for reaching consensual outcomes outside the courts.”³³¹ It has rightly been observed that whereas concerns for justice are universal, views of what is just and what is unjust are not universally shared, and as such, divergent views of justice often cause conflict.³³²

The process of mediating environmental conflicts can take a number of different approaches depending on the nature of environmental issues at stake.³³³ There are three categories of natural resources issues which tend to degenerate into an environmental conflict. The first being technical and practical problems. These refer essentially to ‘how to’ questions that can be answered by reasoning and the application of existing knowledge. They are susceptible to expert solutions without much consideration of values, and they may not require high levels of involvement by the community being affected. The second category is value-laden problems where people agree on the basic nature of the problem, but not how to resolve it. Here values and interests begin to pull people in different directions and lastly value-laden problems in which people disagree on both the nature of the problem and how to resolve it. The power to address such issues is scattered among a host of players.³³⁴

In recent times, focus has shifted towards the implementation and use of mediation as a means of peaceful management of conflicts resulting from the interpretation or implementation of international law.³³⁵ On 23rd September 2008, the United Nations Security Council convened a meeting on mediation and settlement of disputes and re-affirmed the United Nations role in mediation efforts.³³⁶ During this meeting, council members stressed the importance of mediation for the peaceful settlement of disputes and also focused on the role of the United Nations (UN),

³³⁰ Muigua K, ‘Resolving conflicts through mediation in Kenya’, 2ed, Glenwood, Nairobi, 2017, 135.

³³¹ Muigua K, ‘Resolving conflicts through mediation in Kenya’, 2ed, Glenwood, Nairobi, 2017, 135.

³³² Muigua K, ‘Resolving conflicts through mediation in Kenya’, 2ed, Glenwood, Nairobi, 2017, 135.

³³³ Muigua K, ‘Resolving conflicts through mediation in Kenya’, 2ed, Glenwood, Nairobi, 2017, 135.

³³⁴ Muigua K, ‘Resolving conflicts through mediation in Kenya’, 2ed, Glenwood, Nairobi, 2017, 135.

³³⁵ Muigua K, ‘Resolving conflicts through mediation in Kenya’, 2ed, Glenwood, Nairobi, 2017, 142.

³³⁶ Muigua K, ‘Resolving conflicts through mediation in Kenya’, 2ed, Glenwood, Nairobi, 2017, 142.

the Security Council and the secretary general in working in cohesion to promote the mediation of problem situations and thematic areas such as the environment.³³⁷

Extractive resources can be linked to conflict in many ways, and there is a potential for conflict at each stage in the extractive industry value chain.³³⁸ This potential is dramatically increased in situations where the state lacks the institutional capacity to manage the resource in an effective, transparent and accountable manner.³³⁹ When stakeholders lack access to legitimate and effective mechanisms to address their disputes and grievances, there is a greater likelihood that frustrations will escalate and be expressed through violent means.³⁴⁰

Mediation in the extractive industry requires engagement at different levels or with different groups of actors beyond the immediate parties to the dispute.³⁴¹ Local communities regard mediation as ‘reconciliatory in nature as opposed to litigation which ends up creating sharp division and enmity in the long- run.’³⁴²

The significance of the use of mediation as a dedicated community grievance instrument as opposed to litigation can be summarized as reducing risks and negative social impact as it will assist in the early identification and understanding of concerns raised by a community, it will enable a company involved in mining to get and maintain a social license to operate as through mediation, there will be a platform that can be used to build associations and for discourse, which are critical elements of the social license to operate and through mediation, parties will be able to deal with actual or potential issues before they spiral into dispute or become the issues to be litigated on³⁴³

³³⁷ Muigua K, ‘Resolving conflicts through mediation in Kenya’, 2ed, Glenwood, Nairobi, 2017, 142.

³³⁸ United Nations Environmental Programme (UNEP), Natural Resources and Conflict, ‘A guide for mediation practitioners’, 2015,30.

³³⁹ United Nations Environmental Programme (UNEP), Natural Resources and Conflict, ‘A guide for mediation practitioners’, 2015,30.

³⁴⁰ United Nations Environmental Programme (UNEP), Natural Resources and Conflict, ‘A guide for mediation practitioners’, 2015,31.

³⁴¹ Kariuki F, Kerecha G& James O. Kirwa, ‘Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers’, 68.

³⁴² Kariuki F, Kerecha G& James O. Kirwa, ‘Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers’,68.

³⁴³ Kemp D and Gotzmann N, ‘Community Complaints and Grievance Mechanisms and the Australian Minerals Industry. Centre for Social Responsibility in Mining’, The University of Queensland, 2nd discussion paper, 2009.

In addition to the six principles as stated by Prof Ruggie, which include legitimacy, accessibility, predictability, equitable, rights-compatible and transparency, there are other principles that include: engagement and dialogue, culturally-appropriate, proportional, empowering and continual improvement.³⁴⁴

For mediation, legitimacy is achieved when inclusivity of the views and needs of conflicting parties and/or stakeholders are represented and accommodated into the procedure and results of a mediation endeavour.³⁴⁵ Furthermore, the right to access justice is only as effective as the available mechanism to facilitate it.³⁴⁶ In order for the right to access justice as espoused in the constitution of Kenya to be achieved, there has to be a framework based on the principles of efficacy, proportionality, equality of opportunity, fairness of process, party autonomy, cost effectiveness, party satisfaction and effectiveness of remedy.³⁴⁷ Mediation espouses the above listed principles and achieves the goal of bringing justice closer to members of society including the marginalized as it is affordable and does not consist of complex procedure.

Developments at the industry level have also elevated the discussions around grievance mechanisms and human rights across the world.³⁴⁸ Several major companies, for example BHP Billiton, now require that operations have in place a community grievance mechanism proportional to the operation's level of risk.

Mediation is a form of a more complex process that involves a number of changeables, and it becomes a variable itself in coming up with the final verdict of conflict resolution which is involves a process that is more extensive.³⁴⁹ As a result, difficulty arises when evaluating mediation as either a success or failure as there is little consensus in the theory of mediation on

³⁴⁴Kemp D and Gotzmann N, 'Community Complaints and Grievance Mechanisms and the Australian Minerals Industry. Centre for Social Responsibility in Mining', The University of Queensland, 2nd discussion paper, 2009.

³⁴⁵https://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf on 25/09/2020

³⁴⁶ Muigua K, 'Reflections on the use of mediation for Access to justice in Kenya: maximizing on the benefits of Mediation'7.

³⁴⁷ Muigua K, 'Reflections on the use of mediation for Access to justice in Kenya: maximizing on the benefits of Mediation'7.

³⁴⁸ Kemp D and Gotzmann N, 'Community Complaints and Grievance Mechanisms and the Australian Minerals Industry. Centre for Social Responsibility in Mining', The University of Queensland, 2nd discussion paper, 2009.

³⁴⁹ Sargsyan I, 'International mediation in Theory and Practice: Lessons of Nagorno-Karabakh', The Armenian Centre for National and International Studies,2003,3.

what constitutes successful mediation.³⁵⁰ However, certain criteria to facilitate evaluation are suggested by scholars and practitioners who have attempted to subject mediation to systematic analysis.³⁵¹

Nonetheless, there are five conditions that need to exist in order for the process to be successful. The first being that parties must take cognizance of the fact use of action that is unilateral is not going to assist them to get what they want, that if an agreement is not reached, the alternatives will involve political or economic costs that are unacceptable, that representatives of the parties must have ostensible authority to speak for their members and commit to a course of action, that other international and regional interests with stake in the dispute must exert pressure for resolution, and a mediator must be available who is acceptable to all sides.³⁵²

In the commercial sector of the Kenyan economy, arbitration as one of the ADR mechanisms is the most entrenched mechanism utilized in the commercial sector. However, mediation is catching up through the Court Annexed Mediation project of the judiciary which was set up in the commercial and tax division of the High Court at the Milimani Law courts.³⁵³ Furthermore, the mining Act 2016 provides for mediation.³⁵⁴

Some of the gaps currently being faced in the practice of mediation in Kenya is the lack of adequately trained mediation practitioners in the extractive industry. There are also diverse training institutions that offer poor training to professionals interested in the practice of mediation hence adoption of the UNGP's in legislative frameworks governing ADR mechanisms will anchor the use of mediation in resolution of Extractive grievances that may arise.

³⁵⁰Sargsyan I, 'International mediation in Theory and Practice: Lessons of Nagorno-Karabakh', *The Armenian Centre for National and International Studies*,2003,3.

³⁵¹Sargsyan I, 'International mediation in Theory and Practice: Lessons of Nagorno-Karabakh', *The Armenian Centre for National and International Studies*,2003,3.

³⁵²Sargsyan I, 'International mediation in Theory and Practice: Lessons of Nagorno-Karabakh', *The Armenian Centre for National and International Studies*,2003,4.

³⁵³ Nairobi Centre or International Arbitration, 'Alternative dispute resolution policy (Zero draft),2019, 15.

³⁵⁴ Section 154, *Mining Act* (2016).

3.3.Conclusion

The use of mediation in the extractive sector can be useful to unlock fixed positioning by helping disputing parties understand the other parties' rationale for the position that they hold. The mediation process grants a mediator the ability to limit advisors to equal numbers, engage parties directly and convey information equally to both parties in addition to enabling the disputing parties to come up with a solution agreeable to them.

In order for it to be effective as a grievance handling mechanism, the framework to be enacted for purposes of governing mediation in Kenya needs to embrace the principles of, accessibility legitimacy, equitable, predictability, rights- compatible and transparency.



CHAPTER 4

4.0.A CASE FOR MEDIATION AS THE BEST REMEDY FOR RESOLUTION OF GRIEVANCES IN THE EXTRACTIVE INDUSTRY

4.1.Introduction

This chapter discusses mediation, challenges facing the traditional dispute adjudication process such as the judicial process and how the advantages derived from the use of mediation as a means of handling grievances make a case for it to be considered as the best remedy for solving of grievances in the extractive industry and lastly conclude the chapter.

4.1.1. A Case for Mediation as The Best Remedy for Resolution of Grievances in The Extractive Industry

In Many resource rich- countries, clashes over the specifics and details of mineral contracts are abundant and bear political undertones.³⁵⁵ There has been a series of bitter conflicts in recent years – some ending in expropriation, lengthy litigation or even project cancellation has unsettled investors.³⁵⁶ The production of minerals and oil is increasingly takes place in areas that have ecological, geologically, politically challenged regions, as opportunities for reserves dwindle.³⁵⁷ Scarcity of water and global warming which has led to erratic weather patterns are raising new risks for investors and producers. Mediation which involves negotiations between parties with the assistance of third parties would help in solving such disputes as they arise as the stakeholders in an extractive industry project will be able to identify shared interests and address common conflicting interests.

According to Francis Kariuki, Geoffrey Kerecha and James Kirwa, Extractives related conflicts in Kenya are attributed to various causes which include but are not limited to: (i) land issues such

³⁵⁵ Stevens P, Kooroshy J, Lahn G and Lee B, ‘Conflict and co-existence in the extractive industry’, Chatam House, 2013,8.

³⁵⁶³⁵⁶ Stevens P, Kooroshy J, Lahn G and Lee B, ‘Conflict and co-existence in the extractive industry’, Chatam House, 2013,8.

³⁵⁷ ³⁵⁷ Stevens P, Kooroshy J, Lahn G and Lee B, ‘Conflict and co-existence in the extractive industry’, Chatam House, 2013, 8.

as control, ownership, compensation (ii) inadequate consultation of community members (iii) benefit sharing in terms of job opportunities, revenues and business opportunities and (iv) security concerns as the Turkana area is prone to cattle raids and inter-community conflicts.³⁵⁸

In the past, the local communities have relied on traditional dispute resolution mechanisms to resolve communal grievances such as cattle raiding such as hearings conducted by elders but with the extraction activities gaining momentum, various parties have become entangled and mediation can play an important role in identifying and coming up with a solution that is agreeable to each and every party.

The Extractive Industry value chain involves awarding of contracts, supervising of operations, gathering of royalties and taxes , revenue management and allocation and application of sustainable development policies.³⁵⁹ Several stakeholders are involved in each stage of the extractive industry value chain such as companies (both public and private) including International Oil companies, government agencies, financial institutions, the communities and Non-governmental organizations all of whom have divergent interests which at times clash and cause the rise of grievances.³⁶⁰ As a result the Extractive Industry faces serious grievances due to factors such as poor public participation, poor dissemination of information, feelings of disenfranchisement among others.³⁶¹

In Kenya, county governments are also adopting the use of ADR methods in dealing with grievances arising out of exploitation of natural resources. In Kitui County, Coal based conflicts can be traced to the early 2000 after the first confirmation of vast deposit in the then Kitui and Mwingi Districts.³⁶² Although the conflict was initially among politicians, these conflict issues

³⁵⁸ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 2019, 5.

³⁵⁹ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers' ,2019, 12.

³⁶⁰ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers' ,2019, 12.

³⁶¹ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 2019, 32.

³⁶² Obiri J, 'Extractive industries for sustainable development in Kenya: Assessment Report on the extractive industries for sustainable development in Kenya',2014, 23.

gradually filtered into the local communities.³⁶³ Some of the conflicts as identified include lack of adequate compensation for the community members that have been displaced, lack of involvement of the local communities, poor land adjudication and lack of title deeds, vague benefit sharing formula, lack of proper communication with communities, poor sensitization including politics and differences among various interests in the County.³⁶⁴

With respect to conflict resolution mechanisms, participants of a research carried out by Security, Research and Information Centre noted that conflicts in the extractive industry are mostly solved by Ward Administrators, Members of the County Assembly (MCAs) and Liaison Committee.³⁶⁵ The Kamba Council of Elders are also known for providing leadership to the community on mining and community members are known to trust their county leadership as opposed to other forms of dispute resolutions which may lead to tension amongst the parties involved.³⁶⁶

4.1.2. Why Is Mediation Suitable In Dealing With Extractive Grievances?

Sustainable development, as discussed in the Rio declaration from principle one through 10, involves putting the people of the community at the center of the development process and as such issues that occur are best handled with the engagement and participation of members of society.³⁶⁷ The Mining Law committee of the International Bar Association prepared a model mining development agreement that should act as a blue print for mining contracts.³⁶⁸ It is not an agreement that can be executed between parties but provides sample clauses that can be used by

³⁶³ Obiri J, 'Extractive industries for sustainable development in Kenya: Assessment Report on the extractive industries for sustainable development in Kenya',23.

³⁶⁴ Obiri J, 'Extractive industries for sustainable development in Kenya: Assessment Report on the extractive industries for sustainable development in Kenya',22.

³⁶⁵Musoi K, Muthama T, Kitiku J, 'Natural Resource governance and management of Emerging conflicts arising from the Extractive industries: A case of Kitui, Kwale and Turkana counties', Security Research and Information Centre, 2018,29.

³⁶⁶ Musoi K, Muthama T, Kitiku J, 'Natural Resource governance and management of Emerging conflicts arising from the Extractive industries: A case of Kitui, Kwale and Turkana counties', Security Research and Information Centre, 2018,29.

³⁶⁷ www.un.org/esa/dsd/agenda21/index.shtml on 29 September 2020.

³⁶⁸ Cotula L and Tienhaara K, 'Reconfiguring investment contracts to promote sustainable development', Oxford University Press, London, 2013,284

negotiating parties. For example, clause sixteen provides that if an environmental dispute has not been resolved through negotiations and forty five days have lapsed the dispute shall be subjected to Environmental Management Panel.³⁶⁹ Thereafter, if it still cannot be resolved by the panel within ninety days, they may submit their dispute to arbitration.³⁷⁰ This shows that the mining industry has adopted the use of ADR in addressing grievances. Mediation has been recognized although Arbitration is the most used mode of grievance resolution.

The use of foreign direct investment (FDI) in closing the gap between the wealthy and the poor has been emphasized by various policy makers as well as international development organizations.³⁷¹ In recent times, there has been great debate on the relevance of investment for sustainable development which involves balancing social, economic and environmental considerations so as to meet the present demands without adversely impacting on the ability of future generations to meet their own needs.³⁷² As growth occurs in the extractive industry in Kenya, the resultant effect will be negative to the local communities due to lack of adequate legal frameworks to handle grievances that will arise in the extractive industry cycles.

The life cycle of an oil and gas project being upstream, midstream and downstream while mining involves several stages as provided under the Mining Act 2016. The stages include among others reconnaissance, exploration, feasibility, construction, and mining which may be beneficial to the country as a whole in terms of the amount of Foreign Direct Investment that it shall inject in the economy but expose the indigenous people residing in the area to adverse impacts such as loss of ancestral land due to compulsory acquisition by the government.³⁷³ The ultimate goal for any oil and gas or mining project should be to improve local livelihoods while protecting the environment.

³⁶⁹ International Bar Association, “Model Mine Development agreement: A template for Negotiation and Drafting”, 2011,22.

<https://extractiveshub.org/servefile/getFile/id/1256> on 1 October 2020.

³⁷⁰ International Bar Association, “Model Mine Development agreement: A template for Negotiation and Drafting”, 2011,22.

³⁷¹ Cotula L and Tienhaara K, ‘Reconfiguring investment contracts to promote sustainable development’, *Oxford University Press*, London, 2013, 282.

³⁷² Cotula L and Tienhaara K, ‘Reconfiguring investment contracts to promote sustainable development’, *Oxford University Press*, London, 2013, 282.

³⁷³ Cotula L and Tienhaara K, ‘Reconfiguring investment contracts to promote sustainable development’, *Oxford University Press*, London, 2013,283.

Article 33 of the Charter of the United Nations outlines various conflict management mechanisms which include negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resorting to regional agencies or arrangements, or other peaceful means of people's own choice.³⁷⁴ International investors shelter their business interests from arbitrary host state interference through the protection of property rights and this is extremely important especially when dealing with natural resources and infrastructure projects which mostly involve long term investments and are projects which are and highly dependent on the exercise of the government's regulatory powers.³⁷⁵ Referring disputes to formal adjudication processes such as courts may take a long time for a grievance to be determined and since energy projects such as oil and gas have timelines within which a final investment decision should be made, ADR mechanisms such as mediation offer investors an efficient path through which they can secure their investment and the decisions and input of local communities in resolving grievances can be factored in when making a final resolution.

Throughout the lifetime of a project, there are various structural pressures that tend to challenge the contract between parties. For example, existing contracts can be undermined by commodity price cycles and demand to renegotiate deals is often triggered by transition in power especially where the transition is from a dictatorship to a democracy. The last challenge being any change in bargaining power whereby a company may at the start have high bargaining power due to financial provision and the technical knowledge that comes with a project but towards the end the balance of power can shift.³⁷⁶ There is therefore need to have in place a mechanism of handling grievances arising from the aforementioned challenges that will be able to cater for the interests of all the parties, be efficient and not lead to a break-down of the relationship among the stakeholders involved.

Grievances arise when two or more groups of people interests are in conflict. Nonetheless, some of these grievances can lead to positive change especially if there is no violence involved as this is an essential component of social change and development. This is only possible where groups

³⁷⁴ Muigua K, 'Natural resources and conflict management in East Africa', 2014, 19.

³⁷⁵ Cotula L, 'Property rights, negotiating power and foreign investment: An international and comparative law study on Africa.' University of Edinburgh, 2008-2009, 8.

³⁷⁶ Stevens P, Kooroshy J, Lahn G and Lee B, 'Conflict and co-existence in the extractive industry', Chatham House, 2013, 10.

have trusted their governing structures and necessary institutions to manage the arising conflicts.³⁷⁷ The exploitation of non-renewable natural resources, including oil and gas, has often been cited as a key factor in triggering, escalating or sustaining violent conflicts around the globe.³⁷⁸ However, through the use of a mediator to solve disputes parties are able to agree on the issues before them and settle the matter amicably.

In addition to that, mediation is considered as reconciliatory in nature by local communities as it helps stakeholders identify shared interests, maximize mutual benefits and address common problems and challenges together.³⁷⁹ These are important attributes as in order to get to the root cause of any grievance, a number of techniques can be used such as separating the interests from the technical issues, conducting joint information gathering, identifying and sharing multiple benefits and in the long run come up with a solution that is acceptable to all the parties involved.³⁸⁰

According to the Alternative Justice system baseline policy, mediation as applied by local communities may lead to gender injustice as women are considered inferior and hence infringe on the Bill of Rights as provided in the constitution.³⁸¹ In some cultures, women can't represent themselves in local forums and have to be represented by a male figure of their choice.³⁸² Human rights provides an appropriate language and context for rebalancing of the society and in the context of the bill of rights, it stands out as the most transformative language for our society and judiciary in their quest to advance access to justice.³⁸³ Therefore, in AJS, the duty to respect requires lack of interference by the state in the benefit of rights and freedoms.³⁸⁴

³⁷⁷ United Nations Environment Programme, 'Toolkit And Guidance For Preventing And Managing Land And Natural Resources Conflict',2012,1.

³⁷⁸ United Nations Environment Programme, 'Toolkit And Guidance For Preventing And Managing Land And Natural Resources Conflict',2012,2.

³⁷⁹ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 2019, 68.

³⁸⁰ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 2019, 68.

³⁸¹ The Judiciary of Kenya, 'Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)',2020.

³⁸² The Judiciary of Kenya, 'Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)',2020.

³⁸³ The Judiciary of Kenya, 'Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)',2020.

³⁸⁴ The Judiciary of Kenya, 'Alternative justice systems Baseline Policy: Traditional, Informal and other Mechanisms used to access justice in Kenya (Alternative Justice Systems)',2020.

4.1.3. Benefits of The Use of Mediation In The Resolution Of Natural Resource Conflicts

In Uganda, tension and social conflicts arose as a result of the discovery of oil deposits in the Albertine Garben in 2006. This negatively impacted the community as land and resource conflicts arose due to exploitation of the countries natural resources by the government and private sector's drive.³⁸⁵ Furthermore, the spirits of members of the community were lifted as they were of the view that due to the discovery of oil and gas in the county there would be an influx of money in the local economy.³⁸⁶ However, this did not happen, instead the scramble for and partitioning of land worsened.³⁸⁷ An example can be seen through the reports of the local organization known as Bunyoro Albertine Network of Civil Society Organisations on Environmental Conservation (BAPENECO) who conducted a research and discovered that there were three cases of murder between the Alur community and the pastoralists as they could not agree on how the land ought to be used.³⁸⁸ This, shows how grievances can escalate if there is no adequate medium of resolving them.

Furthermore, in Papua New Guinea (PNG), extensive evidence indicates that land disputes had intensified due to the discovery of large-scale extractive resource industries, accelerating rural-to-rural and rural-to-urban migration, continuing high rates of population growth, and the expansion of smallholder cash-cropping activities.³⁸⁹ Left unattended, land disputes can boil over into interpersonal and inter-group violence, which, in turn, can scale-up and escalate into more widespread armed conflict.³⁹⁰

³⁸⁵ Langer A, Ukiwo Ukoha and Mbabazi P, 'Oil wealth and development in Uganda and Beyond: Prospects, Opportunities and Challenges', *Leuven University Press*,2020,285.

³⁸⁶ Langer A, Ukiwo Ukoha and Mbabazi P, 'Oil wealth and development in Uganda and Beyond: Prospects, Opportunities and Challenges', *Leuven University Press*,2020, 289.

³⁸⁷ Langer A, Ukiwo Ukoha and Mbabazi P, 'Oil wealth and development in Uganda and Beyond: Prospects, Opportunities and Challenges', *Leuven University Press*,2020,289.

³⁸⁸ Langer A, Ukiwo Ukoha and Mbabazi P, 'Oil wealth and development in Uganda and Beyond: Prospects, Opportunities and Challenges', *Leuven University Press*,2020,289.

³⁸⁹ Allen M and Monson R, 'Land and Conflict in Papua New Guinea: The Role of Land Mediation', Institute for Regional Security,2014,1.

³⁹⁰ Allen M and Monson R, 'Land and Conflict in Papua New Guinea: The Role of Land Mediation', Institute for Regional Security,2014,1.

The Land Dispute Settlement (LDS) Act of 1975 governs disputes that occur due to use, ownership and boundaries of customary land in PNG.³⁹¹ The Act establishes a system of land mediation that is intended to be “close to the people” and to provide “an avenue for traditional dispute settlement processes to be utilized” and conducted by state-sanctioned Land Mediators.³⁹² These mediators are intended to have detailed local knowledge of customary land tenure systems, which vary widely from place to place.³⁹³ The Act further states that in the instance the mediation process is deemed unsuccessful the aggrieved party may approach the local Land Courts and if not satisfied with the decision thereafter may appeal to the Provincial Land Court.³⁹⁴ The approach of the courts is intended to be one of arbitration, with an emphasis on mediation and compromise.³⁹⁵

Furthermore, both IOC’S and communities have discovered that resolving such disputes through the local court system does not always lead to a satisfactory result and as such communities prefer an alternative method to ensure their grievances are heard for example through the use of the ‘court of public opinion’, including with help from international NGOs, and, in particular, by taking actions that disrupt company operations such as blocking roads or staging protests.³⁹⁶ An example of this is when on 27th June 2018, the residents of Turkana blocked trucks from transporting oil from Ngamia 8 oil well as they protested over jobs, tenders, insecurity and the community share of proceeds from the oil.³⁹⁷

As a result of the above, mediation has been advanced as a new approach to dealing with conflicts in order to supplement other forms of dispute resolution, providing an out of the box

³⁹¹ Allen M and Monson R, ‘Land and Conflict in Papua New Guinea: The Role of Land Mediation’, Institute for Regional Security,2014,6.

³⁹² Allen M and Monson R, ‘Land and Conflict in Papua New Guinea: The Role of Land Mediation’, Institute for Regional Security,2014,6.

³⁹³ Allen M and Monson R, ‘Land and Conflict in Papua New Guinea: The Role of Land Mediation’, Institute for Regional Security,2014,6.

³⁹⁴ Allen M and Monson R, ‘Land and Conflict in Papua New Guinea: The Role of Land Mediation’, Institute for Regional Security,2014,7.

³⁹⁵ Allen M and Monson R, ‘Land and Conflict in Papua New Guinea: The Role of Land Mediation’, Institute for Regional Security,2014,7.

³⁹⁶ Wilson E and Blackmore E, ‘Dispute or Dialogue: Community Perspectives on Company-led grievances mechanism’, International Institute for Environment and Development, London,2013,22.

³⁹⁷Online: Etyang H, ‘No oil will leave Turkana without security and jobs, protesters say’ The Star, 27 June 2018. <https://www.the-star.co.ke/news/2018-06-27-no-oil-will-leave-turkana-without-security-and-jobs-protesters-say/> on 5 October 2020.

solution to stakeholders which might meet their needs better (needs like timeliness, fairness, a focus on dialogue, more space for creative solutions).³⁹⁸ Prominent mediators have argued that when there is a focus on dialogue between parties and the search for sustainable solutions that meet the core interests of both parties, a win-win situation is more likely to result, thereby saving time and money, and possibly preventing future conflicts.³⁹⁹

In Kenya, there are three types of grievance handling mechanisms with respect to its extractive sector. They include state- based judicial mechanisms, state based non-judicial mechanism and non-state based grievance mechanisms.⁴⁰⁰ State – based judicial mechanisms include courts and tribunals and civil cases take an average of twenty four (24) months to conclude, not only because of the limited number of judicial officers available to hear them, but also because of the long distances between courts and the places where most communities reside..⁴⁰¹ From the pilot project on the use of mediation to resolve disputes in the commercial and tax division, the average timeframe to settle a case was sixty six days.⁴⁰² This shows the efficacy of mediation is resolution of a grievance.

Other advantages of mediation include its ability to address complex issues and the fact that there are no rules of procedure that bind it unlike litigation, allowing parties freedom and space to come up with creative solutions to the grievances that they have while guaranteeing their involvement in the final decision.⁴⁰³ There is also no appeal procedure provided with respect to mediation hence it provides some certainty that a matter will be concluded unless parties do not

³⁹⁸ Wilson E and Blackmore E, 'Dispute or Dialogue: Community Perspectives on Company-led grievances mechanism', International Institute for Environment and Development, London, 2013, 22.

³⁹⁹ Wilson E and Blackmore E, 'Dispute or Dialogue: Community Perspectives on Company-led grievances mechanism', International Institute for Environment and Development, London, 2013, 22.

⁴⁰⁰ Kariuki F, Kerecha G & James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 2019, 39.

⁴⁰¹ <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> on 5 October 2020.

⁴⁰² The World Bank, 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans', 5 October 2017.

<https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> on 5 October 2020.

⁴⁰³ The World Bank, 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans', 5 October 2017.

<https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> on 5th October 2020.

reach an agreement and the matter is referred back to court.⁴⁰⁴ Through mediation, any community affected by the upstream activities being carried out by an IOC can have their grievances expeditiously settled as mediation is simpler and seeks to enhance mutual understanding and communication between parties.⁴⁰⁵

Arbitration as an ADR mechanism has been provided for in the laws governing the extractive sector, such as the Mining Act which provides that a mineral agreement should include terms on determination of disputes through an international arbitration or a sole expert.⁴⁰⁶ However, arbitration may not be an effective mechanism for resolving community based complaints that may arise during exploration and development of a natural resource as pursuant to the doctrine of privity of contracts. This is because it is a private process and mostly available to parties to a mineral agreement or PSC such as the government and an IOC thereby excluding other stakeholders such as the local community and the civil society.⁴⁰⁷ The seat of arbitration also tends to be outside the jurisdiction of most developing nations therefore as a mechanism it will be beyond most of the parties who are stakeholders to the Natural resource that is being explored.⁴⁰⁸

Thus, to resolve disputes mediation would be considered a kinder, more flexible and confidential approach as compared to litigation.⁴⁰⁹

According to Dr. Kariuki Muigua, despite the Judicial organs of governments having the natural mandate to entertain disputes as enshrined in the constitution of various countries, courts in Kenya and the rest of the world have encountered a number of issues related to access of justice.⁴¹⁰ Some of the problems include High court fees, Use of legalese, slow and expensive procedure which defeats the purpose of handling environmental disputes and the fact that

⁴⁰⁴ The World Bank, 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans', 5 October 2017.

⁴⁰⁵ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 2019, 67.

⁴⁰⁶ Mining Act 2016, (s 117 (2) (i)).

⁴⁰⁷ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 2019, 71.

⁴⁰⁸ Kariuki F, Kerecha G& James O. Kirwa, 'Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers', 2019, 71.

⁴⁰⁹ Extractive Baraza, 'Advancing Capacity And Access to Justice in Kenya's Extractives Sector', 22 January 2019,24.

⁴¹⁰ Muigua K, 'Natural resources and conflict management in East Africa', 2014, 20.

litigation is not a process of solving problems but a process of winning arguments.⁴¹¹ Additionally, the cost of lack of an adequate remedy to solve grievances that arise as a result of the extractive industry are high, some of the costs include but are not limited to human costs which are epitomized by loss of life, displacements; long-term injuries which also include psychological effects as a result of trauma suffered especially in case of violent conflicts.⁴¹² Conflict also gives rise to a number of economic costs both as direct consequences of violence in order to fund the conflict and further leads to environmental degradation as it is difficult to justify environmental protection when other more immediate concerns exist as a result of the conflict.⁴¹³

4.3. Conclusion

Extractive projects are capital intensive and in most cases require the compulsory acquisition of huge tracts of land by the government. This therefore leads to grievances arising especially in situations where there are already pre-existing land issues. Where such grievances arise, formal adjudication processes such as courts may not be best placed to solve such grievances due to the complex nature of interests involved.

For there to be a long lasting solution that addresses grievances that arise among parties such as international oil companies, governments and local communities, there is need for the use of a mechanism that involves participation of all the parties. Mediation is one such mechanism and is recognized by Article 33 of the United Nations Charter and Principles as espoused in the Rio declaration for sustainable development.

The attributes of cost effectiveness, party autonomy and flexibility in coming up with creative solutions when handling grievances attributed to mediation comes in handy when solving disputes in the extractive industry due to the investment costs and time frames required to be met for an extractive project to be deemed viable and profitable. It is for this reason that Mediation

⁴¹¹ Muigua K, 'Natural resources and conflict management in East Africa', 2014, 20.

⁴¹² Muigua K, 'Environmental conflict management in the Kenyan context- Enhancing the use of Alternative dispute resolution mechanisms', 14.
<https://land.igad.int/index.php/documents-1/countries/kenya/conflict-3/554-environmental-conflict-management-in-the-kenyan-context-enhancing-the-use-of-alternative-dispute-resolution-mechanisms/file> on 5 October 2020.

⁴¹³ Muigua K, 'Environmental conflict management in the Kenyan context- Enhancing the use of Alternative dispute resolution mechanisms', 14.

should be adopted by IOC's and governments in resolving grievances that arise as a result of extractive activities.



CHAPTER 5

5.0. Findings, Recommendations and Conclusion

5.1.Introduction

This last chapter highlights the findings of the study with respect to proposing the use of mediation in solving grievances arising from oil exploration and extraction in Turkana. It also gives recommendations based on gaps and lessons identified that could aid in implementation of mediation in resolving grievances that arise as a result of mining and the extractive industry as a whole.

5.2.Findings

This section shall deal with the findings of this thesis by responding to the research questions as stated in chapter 1 which were;

- (i) Can mediation play a role in solving grievances facing the extractive industry in Kenya?
- (ii) Is there a legal framework existing in support of the use of ADR mechanisms and in particular mediation to solve grievances that arise as a result of extractive activities?
- (iii) Is mediation the best remedy to solve the grievances that arise in the extractive industry?

A. Mediation as the Appropriate Means of Resolving Grievances Arising in The Extractive Industry.

The study sought to find out if Mediation would be an effective mechanism of enhancing the recognition of rights over community land by the Turkana and whether it could be used to address the grievances that arose as a result of the exploration activities for oil in Turkana county. The resulting grievances that have arisen especially among members of the Turkana Community revolve around local content, information asymmetry, beneficial ownership, land and compensation, revenue sharing, and security risks among others. In addition, incitement due to reports by the political class of irregular acquisition of land where oil was discovered led to protests and came to the forefront when the MP for Turkana South openly told the governor not to step in his constituency.

Another impact has also been the increased division of the different clans in Turkana County which has led to intense competition in the access of resources. This is mostly seen in the areas around Ngamia 1 especially due to the privatization of land to outsiders which contradict the whole idea of communal tenure and use of land. The ongoing land privatization also ignores negative impacts on pastoralists and their rights especially when grazing their cattle, a recipe for more disputes in the future.

One of the results of the aforementioned discovery of commercially viable deposits of oil is that unrealistic expectations arose among the parties being the investors, local community and government at the prospect of economic growth and the creation of jobs. Prior to the discovery, the main economic activity of the Turkana was pastoralism as the community had been marginalized by successive governments since independence until the year 2010 when the constitution of Kenya was promulgated and provided for the formation of devolved governments.

In addition, the Extractive Industry value chain involves the following. Award of contracts and licenses to various parties, regulation and monitoring of operations, collection of taxes and Royalties, revenue management and allocation and the implementation of sustainable development policies and projects. Several stakeholders are involved in each stage of the extractive industry value chain such as companies (both public and private) including International Oil companies, government agencies, financial institutions, civil society organizations and local communities all of whom have diverse interests and expectations which at times clash and cause the rise of grievances and if not checked may escalate to violent protests.

Various communities have Autonomous AJS institutions in the form of council of elders which practice mediation as their form of dispute resolution. Such processes inspire trust among members of the communities and it is therefore advantageous to use mediation as a means to resolve grievances as they will be able to relate to it.

B. Application of Mediation in Resolution of Extractive Grievances and Its Provision in The Kenyan Legal Framework

There have been instances of successful use of mediation in the extractive industry as was seen in the Magarini Inquiry that was conducted in the coastal region. For example, the Kenya Association of Manufacturers (KAM) engaged a neutral third party- Ufadhili Trust, to act as a mediator between the local community and the mining companies. Through this, a common platform for open dialogue was established which helped the parties develop and implement various action plans which would address the conflicts touching on environmental impacts, labour practices, land ownership, community engagement among others. This had a direct impact in improving relations between the parties and the role of the mediator reduced enabling the companies work directly with the communities through their CSR committees hence increasing trust and effective resolution of conflict.

The Mining Act 2016 and its regulations complements the constitution in embracing the use of ADR and in particular mediation in solving grievances. It provides for resolution of disputes through mediation or arbitration processes as may be agreed upon by the disputing parties or as may be stated in an agreement. In addition, the Mining (Community Development Agreement) Regulations, 2017 is supposed to cater for employment opportunities for members from the community, (ii) Financial or other terms of support infrastructural developments and maintenance, (iii) provide Assistance to members of the community in setting up micro-enterprises, (iv) enable the Protection of ecological systems among others.

In addition to the Constitution of Kenya 2010 and the Mining Act, Petroleum Act, Energy Act, National Land commission Act, Civil procedure Act , Civil procedure rules and mediation bill all support the use of ADR mechanisms and in particular mediation to solve extractive grievances.

C. Remedies Available in Kenya For Solving Grievances In The Extractive Industry

This study was able to identify various mechanisms that have been used to resolve grievances, their inadequacies and reason why mediation should be considered as the best method to resolve the grievances that arise.

Remedies for grievances that arise are categorized into, state- based judicial mechanisms which often involve the courts and, non-state based grievance mechanisms which involve various bodies such as the Kenya National Human Rights Commission, labour inspectorates, and environmental authorities who provide remedies, including around emerging extractive operations.

Judicial mechanisms involves litigation in courts and tribunals as quasi-judicial bodies. State-based Non –judicial mechanisms involve bodies created by statutes to enable the efficient settlement of grievances such as NEMA, The National Environmental Complaints Committee (NECC) Agreements entered between companies and communities and Agreements between the National Government and companies while Non- state based grievance mechanism include among others ADR and TDRM.

Projects in the extractive industry such as oil and gas are capital intensive, have strict timelines and hence require a mode of grievance resolution that will not only save time but be cost effective, efficient and deal with grievances in a win-win way where all the parties feel that their input is valued and that they have contribute towards coming up with the solution. It is on this basis that I sought to propose Mediation as an alternative dispute resolution mechanism (ADR) that could be used to resolve the grievances that arise in the extractive industry.

The Ministry of Mining and Petroleum has also adopted ADR mechanisms to resolve grievances faced by the Turkana as a community through the establishment of the Turkana Grievance Management Committee.⁴¹⁴

Between the years 2001 and 2010, disputes arising in the extractive sector have resulted in the use of ADR. For example countries with weak legal frameworks on the protection of the environment or social inequality and land tenure often face various conflicts amongst the community members. This therefore leads to great dissatisfaction and there is therefore need to manage complaints and grievances from communities and other local stakeholders in a systematic, fair, timely and transparent manner in order to promote mutual confidence and trust.

⁴¹⁴ The Kenya Gazette, Gazette Notice No. 8046 , 7 August 2018.
http://kenyalaw.org/kenya_gazette/gazette/download/Vol.CXX-No_.93_pdf_on14 November 19.

Litigation as a means of settling disputes has a couple of challenges which may place a hurdle to access of justice by community members. Some of the hurdles include but are not limited to high court fees, the use of legalese which a layman may not be well versed in, time consuming and expensive as it involves hiring of advocates and experts and the fact that the interests of all the parties will not be considered in the final outcome.

Mediation has also been embraced nationally through statutes, model contracts and internationally through the UN Charter, United Nations Guiding Principles on Business and Human rights, the Rio declaration and the United Nations Convention on International settlement agreements resulting from mediation which is an effort by the global community to provide a legal framework for the recognition and enforcement of mediation agreements across international borders. Therefore, mediation is an appropriate method in solving grievances in the extractive industry as it fills the gaps litigation cannot due to its attributes such cost effectiveness, party autonomy and flexibility in coming up with solutions to grievances that arise, it is highly favored as a mode of grievance resolution as opposed to litigation.

Other advantages of mediation include its ability to address complex issues and the fact that there are no rules of procedure that bind it unlike litigation, allowing parties freedom and space to come up with creative solutions to the grievances that they have while guaranteeing their involvement in the final decision. There is also no appeal procedure provided with respect to mediation hence it provides some certainty that a matter will be concluded unless parties do not reach an agreement and the matter is referred back to court.

Arbitration as an ADR mechanism has been provided for in the laws governing the extractive sector, such as the Mining Act which provides that mineral agreements should include a term on resolution of disputes through an international arbitration or a sole expert. However, arbitration may not be an effective mechanism for resolving community based grievances that may arise during exploration and development of a natural resource as pursuant to the doctrine of privity of contracts, it is a private process and generally available to parties to a mineral agreement or PSC such as the government and an IOC thereby excluding other stakeholders such as the local community and the civil society. The seat of arbitration also tends to be outside the jurisdiction of most developing nations therefore as a mechanism it will be beyond most of the parties who are stakeholders to the Natural resource that is being explored.

Mediation is considered to be kinder, more flexible and confidential as compared to litigation.

5.3. Recommendations

A. Recommendations for The International Companies in The Kenyan Extractive Industry

Lack of communication by companies involved both in the mining and the oil and gas sector leads to miscommunication, misunderstandings and expectations that supersede the reality on the ground. Ease of communication can be achieved through the formation of Community liaison committees and the membership of such committees should involve trusted members who have the confidence of members of the community.

They should also operationalize and participate actively in committees established by virtue of regulations such as the Community Development Agreement committee formed under the Mining (Community Development Agreement) regulations whose purpose is meant to take care of issues such as employment opportunities for community members, financial benefits and infrastructural developments and maintenance.

Adequate communication should be held with the County government when planning the construction of infrastructure for the benefit of company staff and in an instance where there are allegations of violation of the constitutional rights of community members, they should partner with the community members to conduct joint investigations and make appropriate follow ups to gain and maintain the trust of the community and in the process obtain a social license to operate.

In order to avoid land grievances especially where land is communally owned, the company should engage the community before initializing a mining or oil and gas project for purposes of ensuring that land and environmental risks are properly mitigated with the involvement of members of the community and in the event that grievances escalate to a situation where the companies activities are hampered, they should ensure that they still meet their corporate social responsibilities to the community as attempts are made to address the grievances.

Where a community such as the Turkana have traditional dispute resolution mechanisms that incorporate local customs and practices, an IOC should as much as possible adapt such a process in resolution of grievances except in a situation where implementation and incorporation of such a means would be repugnant to justice.

B. Recommendations for Ministry of Energy and Petroleum

As per the provisions of the Mining Act 2016, the Cabinet Secretary in the ministry of Mining and Petroleum has the authority to adjudge any disputes arising as a result of a mineral right' issued under the Mining Act and hence plays a quasi-judicial role. This creates a gap which may be open to abuse as the Mining Act has created an over centralization of powers in the office of the Cabinet secretary. There is therefore need to come up with a solution in the statute to address the gap without having to seek redress via the judicial system where a party is aggrieved. This can be done by forming a committee in which the Cabinet secretary shall chair to determine mining related disputes.

Prior to granting of licenses to prospectors, the ministry should come up with a public participation process that will enable the involvement of all stakeholders. This will be for purposes of enabling the general public and in particular members of the community access to all the information pertaining to a mining or oil and gas exploration project and enable their views to be collected.

C. Recommendations for The Kenyan Judiciary

As per the constitution of Kenya 2010, the High court is clothed with vast supervisory jurisdiction. Courts are also empowered to conduct investigative litigation in the form of site visits in a situation where rights have been infringed upon and the court needs to get a clear picture of the impact that such violations have had either on the community or environment. However, there are situations where grievances arise and courts are slow due to the bulk matters

that they handling and such grievances due to the fact that they involve the mining and extractive sector are very complex in nature and require technical expertise.

In such instances, mediation would play a bigger role in resolving the grievance and as such courts should exercise their power to refer matters to mediation either on its own motion or as a result of the parties.

D. Recommendation to The Mediation Fraternity

The National Land Policy as envisaged in the Constitution encourages communities to settle land disputes through recognized local community initiatives. In addition, there are regulations under the Mining Act, for example the Mining (Community development Agreement) regulations 2017 which provides mechanisms for grievances such as benefit sharing, accountability and transparency.

In as much as EMCA is meant to deal with such conflicts, it has not been able to provide an efficient process to solve grievances that arise as a result of sharing natural resource conflicts due to inadequacies within its provisions. Furthermore, even though The Mediation Bill has geared towards the right direction, it has gaps that need to be addressed before it is passed into law. Some of those gaps are as follows. The first one being accessibility to grievance resolution mechanisms provided for under EMCA to the disadvantaged members of the community, marginalized groups and remote communities. One way this could be solved is by opening offices in the areas where mining and exploration activities are carried out.

Secondly, through the adoption of mediation by EMCA to resolve community grievances as opposed to procedures which are adversarial and produce winner-loser outcomes. They could also include mediation as a way of solving extractive grievances in the Mediation Bill and state that matters will be determined via mediation.

Despite there being evidence of successful use of mediation in environmental matters, the mediation bill still excludes environmental grievances from matters that may be determined through mediation. Due to the fact that extractive grievances usually involve environment and land matters, it is important that they are included as part of grievances that can be resolved through mediation.

There should also be public sensitization of mediation as a form of dispute resolution. This will increase awareness among the members of community as most people in society are only aware of court settlements and not aware of the advantages mediation has to offer.

Although the Mediation Bill 2020 is a good step meant to provide a framework for the practice of mediation, the Bill in its current form does not create a center or institution located close to the areas where mining and extractive activities are being carried out that can act as a dedicated pathway for handling complaints and grievances. There is therefore need for such a provision to be included before it is passed into law.

The mediation Bill also places an obligation on Advocates to inform their clients on mediation as an option. However, there is no guarantee that the same will be done as many advocates are not trained on mediation and its procedures. As a way of filling in the gap, mediation should be introduced into the curriculum of all Law schools.

5.4. Conclusion

This research has highlighted the grievances that have arisen as a result of the interests of the stakeholder being the IOC, national and county government and the Turkana as the local community. It has discussed the lack of public participation in the exploration activities that have been carried out in addition to the disillusionment and lack of satisfaction among members of the community.

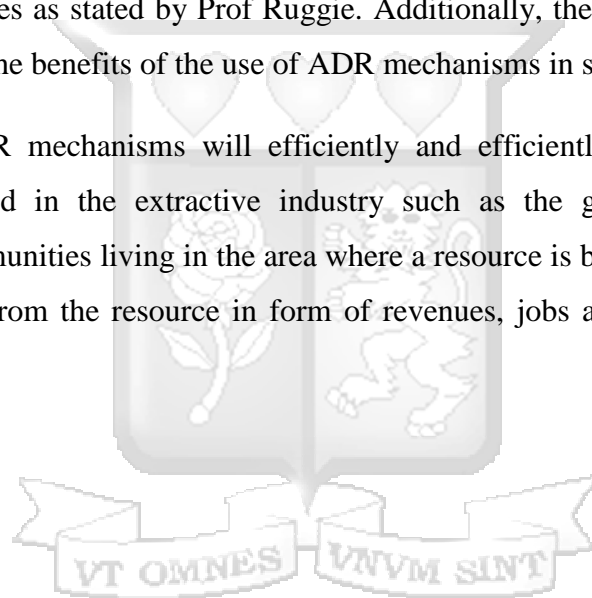
It has further highlighted political incitements that led to severe protests, the land question from a communal perspective and its role in the grievances that arise in the extractive industry. It has examined the use of mediation and identified gaps with respect to operationalization of mediation as a grievance handling mechanism.

Through this study, mediation has been seen as an efficient, people centered and cost-effective means of dispute resolution and as a great substitute for litigation and arbitration in handling extractive grievances. It has pointed to the successful use of mediation in the Magarini inquiry which resulted in improved relations between the company and members of the community. It

has further examined the substantive relationship and procedural issues which lead to the rise of the grievances faced by the Turkana.

It has analyzed the benefits of using mediation as opposed to arbitration and litigation and concluded that the use of mediation is the most appropriate mechanism of resolving the grievances faced by the Turkana community. Structured mediation is a fairly new procedure in Kenya but arbitration has been extensively practiced for years, there is therefore a need to enhance the capacity of various training institutions to ensure mediators are highly skilled through adequate training to meet the demands for ADR mechanisms introduced by the national laws. The International oil companies and companies involved in the mining industry should put into practice the principles as stated by Prof Ruggie. Additionally, the general public should be adequately educated on the benefits of the use of ADR mechanisms in solving their grievance.

The proper use of ADR mechanisms will efficiently and efficiently resolve any animosity between parties involved in the extractive industry such as the government, International Investors and local communities living in the area where a resource is being extracted and ensure that the people benefit from the resource in form of revenues, jobs and infrastructure such as schools and hospitals.



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