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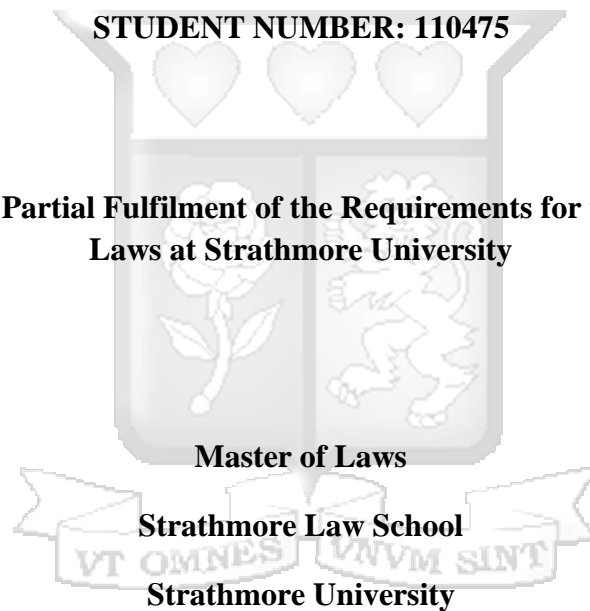
**AN ANALYSIS OF THE LEGAL FRAMEWORK IN ENTRENCHING THE CONCEPT
OF SOCIAL LICENCE ON COMPENSATION FOR COMPULSORY ACQUISITION
OF COMMUNITY LAND IN KENYA**

BY

MERCYLENE WANJIRU NJOROGE

STUDENT NUMBER: 110475

**A Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of Master of
Laws at Strathmore University**



Master of Laws

Strathmore Law School


Strathmore University

Nairobi, Kenya

NOVEMBER, 2021

DECLARATION

I, **MERCYLENE WANJIRU NJOROGE**, declare that this thesis which I submit for the degree of Master of Laws at Strathmore University Law School, is my original work and has not previously been submitted for a degree at another university.

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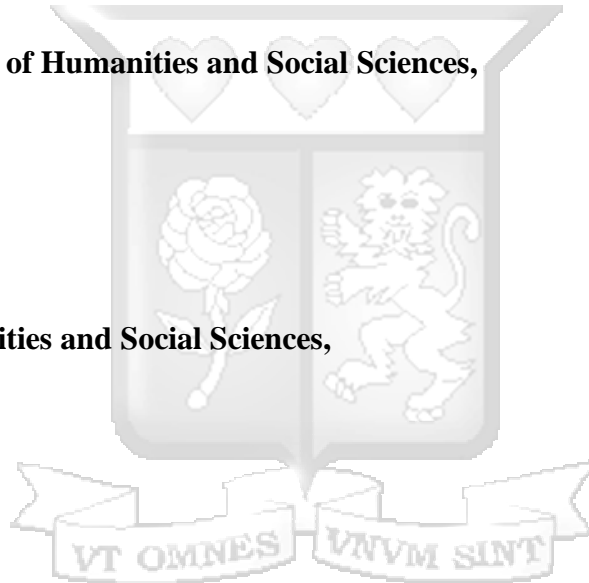
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ABSTRACT

This thesis offers a logical approach to the question of community land and the attendant indigenous land rights. More particularly, it addresses the recognition and protection of non-market values to community land as a means to entrenching social licence among the communities that are affected by extractive excursions, mainly in arid and semi-arid areas. It thus seeks to uncover the failures in legislation in providing for the concept of proportionality and mapping out of unique community and indigenous land rights bordering on the livelihood of indigenous communities in cases of compulsory acquisition and how they relate to social licence.

To achieve this, the research seeks to answer the question on the extent to which the Kenyan legal regime has addressed and mapped out the non-market values in community land as a means of endearing the concept of social licence. Such an inquiry is done to further objectively establish the relationship between such ideal recognition and the seeding of social licences against the global best industry practices in order to distil out the ideal recommendations for the Kenyan framework.

Though the lenses of the above research questions and objectives, the research takes an analytical approach on the legal framework contained in legislation. To further espouse the emerging best industry practices, the research employs a comparative approach looking at the decisions of the major regional judicial organs and tribunals the have taken a counter-majoritarian approach in developing jurisprudence in this area.

At the tail end, the research comes to the conclusion that the recognition of non-market values and consideration in community land, more particularly in cases of compulsory acquisition is lacking. This lacuna validates the hypothesis that the lack of an ideal framework translates to a weak or non-existent social licence framework which eventually leads to aggression of local communities.

To that end therefore, coupling the findings and conclusion that can be distilled from the juxtaposition of the legislative analysis against the comparative jurisprudence, is that Kenya is in need of law reform to map out with specificity the non-market values in community land and provide a matrix for the implementation as a way of seeding and entrenching social licence in Kenya's compulsory acquisition framework in relation to community land.

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LIST OF ABBREVIATIONS AND ACRONYMS

ACtHPR	-	African Court of Human and Peoples' Rights
AU	-	African Union
EAC	-	East African Community
eKLR	-	Electronic Kenya Law Reports
IACHR	-	Inter-American Court of Human Rights
IBEAC	-	Imperial British East Africa Company
IOC	-	International Oil Companies
KLR	-	Kenya Law Reports
OAU	-	Organisation of African Unity



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George Bala v Attorney General [2017] eKLR.

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Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR.

Isaiah Otiato & 6 others v County Government of Vihiga [2018] eKLR.

Joseph Karisa Musonga v Johnson Nyati (1984) eKLR.

Kanini Farm Limited v Commissioner of Lands, (1996) eKLR

Kelly Malenya v Attorney General & another; Council of Governors (Interested Party) [2019] eKLR.

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

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Obiero v Opiyo (1972) E.A 227.

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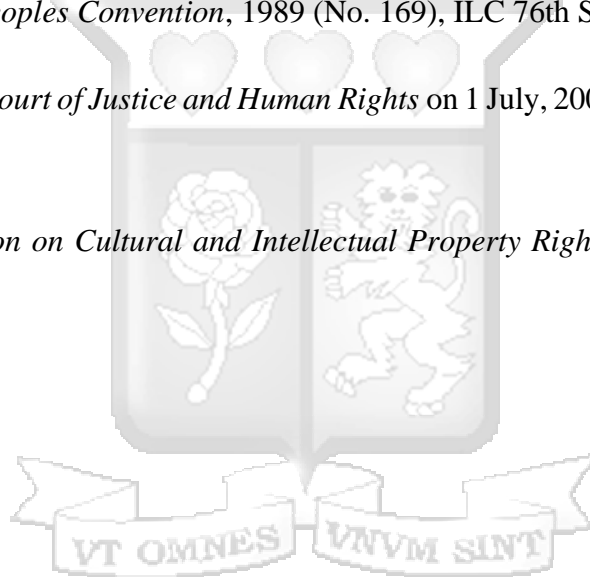
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Petroleum Act No. 2 of 2019

Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016.

The Registered Land Act (Cap. 300)

Canada

Alberta Métis Betterment Act, S.A 1990, c. M-14.3

Constitution Act, 1982

Department of Indian Affairs and Northern Development Act (R.S.C., 1985, c. I-6).

Métis Settlement Act, 1990



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DEDICATION

This work is dedicated to my immediate family, Dad, Mum, Joyce, Mavis, Mark and my nieces Chantelle and Precious Jewel. I dedicate it to all the members of my extended family, relatives, Dr. Maina and finally in loving memory of my beloved Grandmother Grace Ndurumo who inspired all of us to excel and reach for the sky not forgetting to put God first before anything. Her light shines on.....



CHAPTER ONE

1. Introduction

The main aim of this research is to identify and map out rights subsisting in community and indigenous land regime in Kenya. This is achieved by analysing the subject of land and access to land and how their recognition seeds and entrenches the concept of the social licence.¹ In the context of this research, social licence denotes an appeal made to the legitimacy of the exploration process and legitimising the venture among the locals or indigenous people affected, displaced or impacted by oil exploration and production. It encompasses a framework to cushion and absorb potential conflicts, establish a positive relationship between the community, the state and the oil prospecting companies. It is anchored on the rule of law and legitimate concern for the native population based on cooperation and consultation and the recognition of the community's inherent unique non-market considerations. The resultant concept of the social licence is at the core of any venture representing more than just the licence to operate from the host government.²

Thus, the study intends on looking at the historical foundations of the controversy on community land, the development, then audit the available land laws and regulation for their efficacy. Consequently, reliance is placed on international instruments and conventions that map out the unique constituent elements of community land followed by a comparative approach on emerging jurisprudence based on case studies from international and regional judicial bodies. Further, the need for particularity and determinacy in mapping out community land and its unique rights is buttressed across the study.³ Lack of it often negatively impacts non-market considerations which are the building blocks of the social licence to operate for various infrastructure, extractive and conservation agendas. Such an approach is of monumental importance considering that land use and control, albeit being a contentious issue,⁴ is a gateway/enabler for the exercise of many economic, civil and political rights.⁵ Such connection in relation to mineral rights, abut friction

¹ Boone C, 'Land Conflict and Distributive Politics in Kenya' 55(1) *African Studies Review*, 2012, Pp. 75-103.

² See, Nwapi, Chilenye, 'Can the Concept of Social Licence to Operate Find Its Way into the Formal Legal System?' 18 (2) *Flinders Law Journal*, 2016, 349-376.

³ Liz Alden Wily, 'The Community Land Act in Kenya: opportunities and Challenges for Communities' 7(12) *Land* 2018, Pp. 1-25.

⁴ Peter Veit, "History of Land Conflict in Kenya", Focus on Land in Africa, < <http://www.focusonland.com> > on 4th January, 2019.

⁵ Kariuki F, Land rights issues in Kenya's extractives sector, in J Osogo Ambani (Ed), *Drilling past the resource curse?* Strathmore University press, 2018, 140

and conflict⁶ more so, land inhabited by indigenous communities⁷ thus threatening fundamental rights and freedoms.⁸ Further, landlessness due to compulsory acquisition can threaten the realisation of these inherent and cardinal rights⁹ in cases of inadequate compensation for the non-market and cultural attachment to land.¹⁰ This raises questions of efficacy of the compulsory acquisition and compensation regime in taking care of non-economic factors inherent in community land.¹¹ This inquiry into the efficacy of the current regime as well as the experience of other jurisdictions forms the crux of this thesis.

Historically, prior to British rule in Kenya, land was held by communities, clans or tribes subject to customary law and indigenous rights.¹² Individual/private land tenure was introduced by the colonial administration.¹³ This change persisted after independence with dispossession of land being the bedrock of historical land injustices that persist to date.¹⁴ These concerns are at the heart of land reforms as well as guaranteeing security of property rights, which coincidentally is of great importance to the hydrocarbon exploration and production sector considering Kenya's long haul experience from the 1950's.¹⁵ There were no significant progress till 2012 when Tullow Oil discovered commercially viable oil deposits. Up to 2019, oil production was governed by the *Petroleum Exploration and Production Act* Cap 308. Later, oil discoveries in East Africa and Kenya renewed the discussion to address the oil rush.¹⁶ In Turkana County, Tullow Oil Company

⁶ Ali S, *Mining, the Environment and Indigenous Development Conflicts*, The University of Arizona Press, 2003.

⁷ Holden William, and Allan Ingelson, "Disconnect between the Philippine Mining Investment Policy and Indigenous Peoples' Rights." 25(4) *Journal of Energy & Natural Resources Law*, 2007, 375-391; U Idemudia "Corporate-community relations in Nigeria's oil industry: Challenges and imperatives" 13:4 *Corporate Social Responsibility and Environmental Management* at 194-206; M Power & M Gwanyanya, 'The Marikana massacre' (2017) 25:14 *SUR The International Journal of Human Rights* 61-69.; CE Welch Jr, 'Human Rights, environment and the Ogoni: Strategies for non-governmental organizations" (1999) 7 *Buffalo Environmental Law Journal* at 251; Coomans, Fons, "The Ogoni Case Before the African Commission on Human and Peoples' Rights." *International & Comparative Law* 52/3 (2003): 749-760.

⁸ Drohan M, *Making a Killing: How and Why Corporations Use Armed Force to do Business*, Toronto: Vintage Canada, 2004.

⁹Kariuki, Land rights issues in Kenya's extractives sector,140

¹⁰ Jonathan Mills Lindsay, 'Compulsory Acquisition of Land and Compensation in Infrastructure Projects' 1(3) *PPP's Insight*, 2012. These lands are often ancestral with unique cultural attachments and cultural rights.

¹¹ Tsuyoshi K *et al*, 'Taking Land: Compulsory Purchase and the Regulation of Land in Asia-Pacific Countries' 9 (2) *Asia Pacific Law Review*, 2001, 103.

¹² Simon Coldham, 'A Comparative Study of Land Tenure Legislation in Africa' (1985) *Acta Juridica* 189.

¹³ Ngugi Joel M., 'Re-Examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration' 25 *Michigan Journal of International Law*, 2004, 467.

¹⁴ Olanya D. 'Indigenous Peoples and Customary Land Rights: Public Policy Discourse of Large-Scale Land Acquisitions in East Africa.' 10(6) *US-China Law Review*, 2013, 620-638.

¹⁵ Kwaku Martin Ayisi, 'The Legal Character of Mineral Rights under the New Mining Law of Kenya,' *Journal of Energy & Natural Resources Law*, 2016.

¹⁶Koli J and Onyango C, 'A socio-economic and environmental analysis of the effects of oil exploration on the local community in Lokichar, Turkana County',145.

acquired licensed Blocks and embarked on exploration.¹⁷ Within 18 months, the first well drilled, Ngamia-1, became a success with 20 meters net column of oil within the Lokichar Basin. Since then, Tullow Oil Company has discovered 600 million barrels of recoverable oil, with an estimated potential of 1 billion barrels¹⁸

These developments led to the enactment of the *Petroleum Act*¹⁹ to deal with the gaps in the repealed legislation and make Kenya attractive to explorers and developers. It introduced the concept of competitive bidding for oil blocks, local content and training, environmental compliance, provisions on access and entry upon land for purposes of exploration, community rights among others.²⁰ However, lacking in the framework is the concept of protection of community and indigenous land rights and their livelihood as well as balance against the interests of the public that come in the form of infrastructure, extractive and conservation projects which are growing in the continent²¹ on the backdrop that oil exploration and production offer the needed resources and impetus for development,²² which translates an increase in the licences granted.²³ Consequently, Kenya has gazetted 63 oil blocks and 15 of them have been allocated to oil companies²⁴ which increases instances of interaction with the indigenous communities pitting energy as a key tenet of development with indigenous rights.²⁵

Land on the other hand, is captured under Kenya's Vision 2030 as a resource for the socio-economic and political development which should be guaranteed irrespective of tenure which forms a basis for land policy.²⁶ The extractive industry requires sizable land thus further

¹⁷Kenya is divided into blocks as per *Gazette Notice No. 3344 Dated 10th May 2016 and Tullow oil acquired Blocks* 10BB, 13T and 10BA.

¹⁸ Tullow Oil Plc, Ngamia-1 Oil Discovery in Kenya Rift Basin <<https://www.tulloil.com/media/press-releases/ngamia-1-oil-discovery-kenya-rift-basin/>> on 15 August, 2020.

¹⁹ Act No. 2 of 2019.

²⁰ Section 18, *Petroleum Act* No. 2 of 2019.

²¹Stephen A and Patricia B, 'The assessment of policy and institutional arrangements of the upstream hydrocarbons subsector in Kenya: challenges and opportunities, *IOSR Journal of Humanities and Social Sciences*, Vol. 23 Issues 5[2019],60

²²Koli J and Onyango C, 'A Socio-Economic and Environmental Analysis of the Effects of Oil Exploration on the Local Community in Lokichar, Turkana County',145

²³ Stephen A and Patricia B, 'The assessment of policy and institutional arrangements of the upstream hydrocarbons subsector in Kenya: challenges and opportunities, *IOSR Journal of Humanities and Social sciences*, Vol. 23 Issues 5[2019],70

²⁴Sylvia Mwago,"Qatar petroleum signs deal on three Kenyan offshore blocks," <http://www.invest.go.ke> at 30th January, 2020; See, *Gazette Notice No. 3344* dated 10th May 2016.

²⁵Stephen A and Patricia B, 'The assessment of policy and institutional arrangements of the upstream hydrocarbons subsector in Kenya: challenges and opportunities,' *IOSR Journal of Humanities and Social Sciences*, Vol. 23 Issues 5 [2019], 71

²⁶ <<http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf>> on 3rd March, 2020.

precipitating conflict and development opportunities for local communities.²⁷ These developments can be either positive or negative often leading to conflict over resources and land management²⁸ especially in arid areas i.e., border conflicts between the Pokot and the Turkana communities over land, pasture and livestock.²⁹ Land in Kenya is owned under various tenure systems³⁰ i.e. community, public and private.³¹ The land debate also entails natural resource management.³² Natural resources are held in trust of the people of Kenya by the government.³³ Consequently, all land with natural resources are classified as public land which affects protected community and indigenous cultural rights over such parcels.³⁴ This is prevalent in arid and semi-arid areas where big areas of land are required further propagating the sphere of conflict in these lands which are often not registered.³⁵ Furthermore, such land is often under customary tenure passed down generations through clans, villages or community.³⁶ Such tenure is currently governed by the *Community Land Act*³⁷ in most arid and semi-arid areas which are some of the poorest areas in Kenya.³⁸ With the discovery of oil in these regions, conflicts might arise between the local community, government, international oil companies and communities from other regions of the country who might want to partake in the exploration and production of oil.³⁹

It is evident from the above that an inadequate compensation and consultation system in land acquisition,⁴⁰ can lead to conflicts. Moreover, owing to their unique cultural and aesthetic nature

²⁷ Francis Kariuki and Raphael Ng'etich, 'Land Grabbing, Tenure Security and Livelihoods in Kenya' 9 *African Journal of Legal Studies*, 2016, 79. The authors at Pages 89 – 90 acknowledge that 'The oil exploration activities in Turkana County are driving land grabbing. Large parcels of land are being licensed by the government for oil prospecting from community lands yet the communities lack information on the ownership of land in cases of oil exploration.'

²⁸ Koli J and Onyango C, 'A socio-economic and environmental analysis of the effects of oil exploration on the local community in Lokichar, Turkana County', 145

²⁹ Eliza M. Johannes, 'Oil Discovery in Turkana County, Kenya: A Source of Conflict or Development?' *African Geographical Review*, 2014, 1.

³⁰ Article 61(1), *Constitution of Kenya*, 2010.

³¹ Article 61(1), *Constitution of Kenya*, 2010.

³² Article 260, *Constitution of Kenya*, 2010.

³³ Section 50(1), *Petroleum Act* (No. 2 of 2019).

³⁴ Kariuki, 'Land rights issues in Kenya's extractives sector', 153.

³⁵ Liz Alden Wily, *The Community Land Act in Kenya opportunities and challenges for communities* at <https://doi.org/10.3390/land7010012> at 1st February, 2020

³⁶ Angote A. Oscar, 'The Land Control Board Consent and the Doctrine of Constructive Trust' 15(1) *Law Society of Kenya Journal* 2019, 63 – 88.

³⁷ Act No. 27 of 2016.

³⁸ Hannah Kim and Thomas O'Brien, 'Tackling Inequality: Part and Parcel of Kenya's Fight against Poverty' 16 *Georgetown Journal of International Affairs*, 2015, 16.

³⁹ Odote C and Otiemp S, 'Getting It Right: Towards Socially Sustainable Exploitation of the Extractive Industry in Kenya' *East African Law Journal*, 2015, 202.

⁴⁰ Cordaid, 'Oil Exploration in Kenya: Success Requires Consultation: Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya' August 2015, 9
<<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewiJqqfKgZ3rAhVHhRoKHaMjBaAQFjAAegQIAxAB&url=https%3A%2F%2Fwww.cordaid.org%2Fmedia%2Fmedialibra>

and cultural attachment on land, market value does not cater for them adequately. Inevitably, oil and gas exploration may lead to change in land use, including loss of pasture fields, loss of habitats, destruction of livelihood, loss of cultural sites, ancestral rights and heritage among other social and economic interference.⁴¹ These concepts offer a glimpse of the non – market considerations that are not ordinarily taken into account when calculating compensation for the displaced indigenous communities. This oversight often leads to conflict and waning confidence in the oil exploration process thus undermining its legitimacy.⁴² They should therefore not be ignored in paving way for exploration and production of oil without compensation.⁴³

Maintaining the legitimacy of the process is key as demonstrated by the case of the Niger Delta of Nigeria⁴⁴ in which the lack of appreciation and respect for the rights of indigenous people has led to perennial conflict and human rights abuses.⁴⁵ The Niger Delta, one of the world's largest wetlands supports the livelihood of several heterogeneous indigenous communities whose fragile environment has been greatly affected by oil and gas exploration.⁴⁶ These concerns have informed the need for mapping out and protection of unique community land rights.⁴⁷ Further, these concerns have brought to the limelight the role of indigenous communities in sustainability and the protection of the cultural and land rights.⁴⁸ These concerns weigh in with the shifting attention of mining companies to remote areas previously untouched and inhabited by indigenous communities.⁴⁹

ry%2F2015%2F09%2FTurkana_Baseline_Report_DEFLR_Cordaid.pdf&usg=AOvVaw1yqFUSwUG8b89rc5E0fC
Cp> at 15 August 2020.

⁴¹ Oberon Anyango Stephen, Baariu Patricia K., 'The Assessment of Policy and Institutional Arrangements of the Upstream Hydrocarbons Subsector in Kenya: Challenges and Opportunities,' 23 (5) *IOSR Journal Of Humanities And Social Science*, 2018, 74.

⁴² See generally, Francis Kariuki and Raphael Ng'etich, 'Land Grabbing, Tenure Security and Livelihoods in Kenya' 9 *African Journal of Legal Studies*, 2016, 79.

⁴³ Kariuki, Land rights issues in Kenya's extractives sector, 163.

⁴⁴ Okonkwo, Obi Peter. 'Indigenous Rights of Nigerian Oil Producing Communities under International Law.' 19 (2) *Nigerian Law Journal*, 2016, 355-384.

⁴⁵ Neal, Micaela L. 'The Niger Delta and Human Rights Lawsuits: A Search for the Optimal Legal Regime.' 24 (1) *Pacific McGeorge Global Business & Development Law Journal*, 2011, 343-380.

⁴⁶ Worika, Ibibia Lucky. 'Deprivation, Despoilation and Destitution: Whither Environment and Human Rights in Nigeria's Niger Delta,' 8 (1) *ILSA Journal of International & Comparative Law*, 2001, 1-30.

⁴⁷ Fitschen, Thomas. 'Protecting Indigenous Peoples and Communities in the Philippines: The Indigenous Peoples Rights Act of 1997.' 7(2) *International Journal of Cultural Property*, 1998, 526-548.

⁴⁸ Jamieson, Jemima, 'The Role of Indigenous Communities in the Pursuit of Sustainability,' 14 *New Zealand Journal of Environmental Law*, 2010, 161-196.

⁴⁹ Warden-Fernandez, Janeth. 'Indigenous Communities Rights and Mineral Development,' 23 (4) *Journal of Energy & Natural Resources Law*, 2005, 395-426.

The current legal regime advocates for a just compensation.⁵⁰ Despite robust laws on compulsory acquisition and compensation,⁵¹ inadequacy on indigenous land rights erode legitimacy and social licence.⁵² It calls for an assessment of the non-market values being a departure from the market valuation. In that regard, the need to assess the adequacy⁵³ of the legal regime governing land acquisition and compensation in relation to oil exploration, development and production arises. There is also the collateral concern of what constitutes a community and who are entitled to benefit from compensation issued to the community.

1.1 Statement of the Problem

From the foregoing analysis, it is evident that there is a plethora of competing interests in relation to community land rights and more particularly, in relation to compulsory acquisition. The unique land rights that attach to community land is the lifeline of legitimacy and key in seeding, nurturing and cementing the concept of the social licence while being mindful of the rights and the livelihood of these indigenous communities that depend on their native land.

That notwithstanding, at present, the Kenyan legal regime on compulsory acquisition i.e. the *Land Act, 2012* among others focus on the market value of land to the exclusion of non-market values. This focus presents a lacuna that leaves unaddressed the non-market values of community land. Furthermore, there is an unbridged knowledge gap in literature on what exactly constitutes non-market values since they vary from one community to another. Consequently, such a model does not address or take into account the unique and special rights that avail to community and indigenous land which distinguishes it from private land tenure. The procedure applicable for alienation of community land is similar to that applicable in private freehold land⁵⁴ is antithetical to the international consensus on the protection of indigenous community land rights i.e. proportionality, option of return, restitution of livelihood among others.

This research therefore seeks analyse the applicable legal framework in relation to compulsory acquisition of community land in Kenya and audit the extent to which it takes into account the non-market values. Contemporaneously, the study will seek to glean the weaknesses that abound

⁵⁰ Article 40(3) (b) (i), *Constitution of Kenya*, 2010.

⁵¹ *Land Act, 2012* (No. 6 of 2012).

⁵² Koli J and Onyango C, 'A socio-economic and environmental analysis of the effects of oil exploration on the local community in Lokichar, Turkana County', 145

⁵³ i.e. Whether it is all inclusive in that all interests of the stakeholders are properly addressed

⁵⁴ Section 107A, *Land Act, 2012*.

the Kenyan legislation and how such lacunas impact the crystallisation of the social licence to operate for oil exploration companies that operate in community lands and how the lack of social licence impact on the legitimacy of extractive projects. In essence, the study seeks to find the requisite balance which seeds social licence⁵⁵ and averts conflict by balancing competing interests over finite resources.⁵⁶ More particularly for communities that live in areas affected by oil exploration activities.⁵⁷ Thus, the above gaps in the legal framework need to be addressed to create a basis for a social license between the community and International Oil Companies on community land and promote respect for proprietary rights.⁵⁸ More particularly in light of the fact that despite the promulgation of the Constitution and the subsequent enactments on land law and hydrocarbon exploration, challenges still exist as enumerated above. Concerns over adequacy and fidelity of the compensation process still abound with disputes manifesting themselves in constitutional petitions and other legal redress channels. Conflicts still persist.

1.2 Research Hypotheses

This research is based on the hypotheses that: -

1. That despite the enactment of the *Land Act, 2012* and the *Community Land Act, 2016* in relation to land and the *Petroleum Act, 2019*, *Energy Act, 2019* and the *Mining Act, 2016*, there are no adequate provisions on the non-market elements of community land and provisions on endearing social licence in the Kenyan regime.
2. An ideal legal and policy framework that maps out and takes account of the non-market considerations is necessary for the effective management of community land and preventing conflict resulting from compulsory acquisition and compensation.
3. That these gaps could be disastrous to the exploration and exploitation of hydrocarbon resources by incubating vices such as corruption, occasioning injustices and loss of livelihoods as well as cultural heritage and valuable indigenous customs.

⁵⁵ Kristen van de Biezenbos, 'The Rebirth of Social Licence' 14 *McGill Journal of Sustainable Development Law* 2019, 149.

⁵⁶ Ayisi, Martin Kwaku. "Ghana's New Mining Law: Enhancing the Security of Mineral Tenure." 27 (1) *Journal of Energy and Natural Resources Law*, 2009, 66-96.

⁵⁷ Kwaku Martin Ayisi, 'The Legal Character of Mineral Rights under the New Mining Law of Kenya,' *Journal of Energy & Natural Resources Law*, 2016.

⁵⁸ Kariuki F, Ouma S, Ng'etich R, Property Law, *Strathmore University Press*, 2016, 135.

1.3. Research Objectives

The objectives of this research are: -

1. To analyse the extent to which the Kenyan legal framework addresses and maps out the non-market aspects of community land in endearing the concept of the social licence;
2. To analyse the relationship between an ideal legal framework that maps out and identifies specific non-market considerations of community land rights and the concept of the social licence;
3. To explore the industry best practices on mapping out and compensation of intangible and non-market considerations as well as just and prompt compensation and social licence considerations; and
4. To give suggestions and recommendations on making Kenya an attractive destination for international oil exploration companies and upholding fundamental rights and freedoms.

1.4 Research Questions

In light of the foregoing hypothesis and the gaps identified in the problem statement, this research will seek to answer the following: -

1. To what extent does the Kenyan legal framework address and map out the non-market aspects of community land and endear the concept of the social licence?
2. What is the relationship between an ideal legal framework that maps out and identifies specific non-market considerations of community land rights and the concept of the social licence?
3. What are the industry best practices on mapping out and compensation of intangible and non-market considerations as well as just and prompt compensation and social licence considerations?
4. What are the recommendations to making Kenya an attractive destination for international oil exploration companies and upholding fundamental rights and freedoms?

1.5. Literature Review

The land question is an emotive issue in Kenya⁵⁹ with vast literature on interest and title to land acquisition and extinction. However, literature on access and compensation governed by the concept of social licence and the non-economic considerations of community land is lacking. Contemporary literature deals with tenets of compulsory acquisition but fail to address the concept of the social licence which represents the goodwill and the consent of the community. This literature review therefore seeks to point this lacuna and inadequacy in the law which impact on the process of building on the social licence. As a take-off point, David Jakinda Otieno and Willis Oluoch-Kosura point out, that increased developments have elicited controversy and exposed structural gaps in the land laws of developing countries.⁶⁰ They also posit that development has both negative and positive impact. However, they do not address the intricacies and chasms that are often triggered between community interests, including non-monetary interest. This controversies are amplified as exploration shift to remote areas occupied by indigenous communities.⁶¹ Without a clear legal and policy system on management of rights, the benefits targeted may be eroded i.e., as Zoe Cormack and Abdikadir Kurewa notes, lack of proper mechanism lead to discontent and negatively impacting development of social licence.⁶² In essence, there is an established direct correlation between development of the social licence and legitimacy of the process though respect of indigenous and non-economic rights. The means of achieving such is the missing link that this study seeks to address as identified by the existing literature.

Existing literature documents that land tenure problems in Kenya began with the side-lining of native by the colonial administration.⁶³ According to Kameri – Mbote, land tenure reforms at the advent of colonialism, extinguished community land tenure.⁶⁴ Africans were confined to reserves.⁶⁵ On attaining independence as H. W. Okoth Ogendo points out, there was need to make

⁵⁹ See, Tom O. Ojienda, *Principles of Conveyancing in Kenya; a Practical Approach* (LawAfrica, Nairobi 2008).

⁶⁰ David Jakinda Otieno & Willis Oluoch-Kosura, 'Assessment of local stakeholders' preferences for foreign land lease design attributes in Kenya: A participatory choice-based survey approach' 5 *Heliyon* 2019, e02730.

⁶¹ Warden-Fernandez, Janeth, 'Indigenous Communities Rights and Mineral Development,' 23 (4) *Journal of Energy & Natural Resources Law*, 2005, 395-426.

⁶² Zoe Cormack & Abdikadir Kurewa, 'The changing value of land in Northern Kenya: the case of Lake Turkana Wind Power' 10 (1) *Critical African Studies*, 2018, 89-107.

⁶³ Kameri-Mbote, "*Property Rights and Biodiversity Management in Kenya*", African Centre for Technology Studies Press, Nairobi, 2002, 50.

⁶⁴ Kameri-Mbote, "*Property Rights and Biodiversity Management in Kenya*", 50.

⁶⁵ See, Gaston, Jessie R. 'Land Issue in Kenya Politics: Pre-and Post-Independence Development' 9 (2) *Ufahamu: A Journal of African Studies*, 1979, 30.

land available to Kenyans.⁶⁶ Thud, Angote Oscar crediting H. W. Okoth Ogendo's treatise notes that the *Land Control Act*⁶⁷ was enacted to among other things, make agricultural land available to natives.⁶⁸ At present this need is dominated by foreign investment and the right to property. However, the right to property under Article 40 of the Constitution is not absolute and enjoyment of community land rights may be limited. In that regard, the Learned justices of the Court of Appeal of Kenya, Makhandia, Ouko and M'noti JJA, in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* noted that:-

*'For the avoidance of doubt, the framers of the Constitution included a list of rights and freedoms which may not be limited notwithstanding any provisions of the Constitution. These absolute rights are set out in Article 25. It is instructive that the right to property is not one of them. This then leaves the protection of the right to property within the precincts of allowable limitations by the statute.'*⁶⁹

The state through the National Land Commission can compulsorily acquire land for various reasons.⁷⁰ In that regard, various theories and models have been propounded to explain limitation on private ownership of property as Hugo Grotious, argued, rights on private land subsist subject to the doctrine of eminent domain.⁷¹ Further, Zachary Hudson qualifies such limitation on the aegis of just and equitable compensation.⁷² In Kenya, this argument is backed up by the *Community Land Act* on acquisition for a public purpose subject to just compensation.⁷³ World over, a structured and constrained system is advocated.⁷⁴

Economic development and property rights as Carrie B. Keres points out, are inter-linked and protection stimulates growth.⁷⁵ Janpeter Schilling, *et al* note that Turkana County has a long

⁶⁶ See, Prof. HWO Okoth Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Acts Press 1991) page 74.

⁶⁷ Cap. 302, Laws of Kenya.

⁶⁸ Angote A. Oscar, 'The Land Control Board Consent and the Doctrine of Constructive Trust' 15(1) *Law Society of Kenya Journal* 2019, 63 – 88.

⁶⁹ *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR.

⁷⁰ Paul EF, "Property rights and eminent domain", Transactional Publishers, New Brunswick, 1987, 185.

⁷¹ Grotious H, "De jure belli ac pacis" (1652) by Ramanathan U, "A word on eminent domain, *International Environmental law Research Centre*, 2009, 1.

⁷² Zachary Hudson, 'Eminent Domain Due Process' 119 (6) *The Yale Law Journal*, 2010, 1280-1327.

⁷³ Kariuki F, Ouma S, Ng'etich R, *Property Law*, 13.5; Section 5 (4) *Community Land Act*, 2016.

⁷⁴ Article 17, *Universal Declaration on Human Rights*, 10 December 1948, 217 A (III).

⁷⁵ Carrie B. Keres, 'Government Takings: Determinants of Eminent Domain' 13 (1) *American Law and Economics Review*, 2011, 201-219.

history of violent conflicts over land, scarce water, pasture and livestock resources.⁷⁶ Thus the discovery of oil has growth implications and the negative scourge of resource curse. Land is at the heart of such potential conflict. Therefore, compulsory acquisition as Victor Akujuru and Les Ruddock note, ought to alleviate the disruption which vary from one jurisdiction to another.⁷⁷ Thus, lack of requisite data, legal framework and technical expertise to value the non-market aspects of community land and the legal basis to cement the concept of a social licence within the management framework is open for discussion.

The foregoing discussion reveals some of the issues widely in controversy, and which policy and regulatory frameworks do not address. They include: timely compensation; non-monetary aspects of compensation, cultural and indigenous rights on the use of land for religious purposes or otherwise, access to cultural sites and sacred grounds i.e. Lake Bogoria for the Endorois or the Kaya Forests among the Mijikenda among others. Regarding timelines, Nicholas Tagliarino argues for legal timelines on when compensation is to be paid to avoid incubation of social vices like corruption.⁷⁸ In the case of *Franks v Western Australia* it was noted courts have the power to superintend timely compensation.⁷⁹ This concept has been vaguely stated in Kenyan law.⁸⁰ This gap manifests itself in instances of delayed payments.⁸¹ Atul M. Setalvad notes that, such delay taint the process eroding the basis of social licence.⁸²

Additionally, the subject and the scope of just compensation is problematic with no consensus on definition. The High Court Justices Isaac Lenaola (as he then was), Mumbi Ngugi, George Vincent Odunga and Joseph Louis Onguto, whilst addressing the subject of just compensation under the Constitution, equated it to restitution.⁸³ The Courts in Kenya have consistently held that just compensation equals the contract or the market value of the land.⁸⁴ Determining the market or the contract value of private land is quite straightforward. However, Eric T. Freyfogle notes, the legal,

⁷⁶ Janpeter Schilling, *et al*, 'For Better or Worse: Major Developments Affecting Resource and Conflict Dynamics in Northwest Kenya' 60(1-2) *Z. Wirtsch*, 2016, 57-71.

⁷⁷ Victor A Akujuru and Les Ruddock, 'Compulsory Acquisition Practices and the Determination of Compensation Payable in the Niger Delta' 1 (1) *Journal of Land Administration in Eastern Africa*, 2013, 7.

⁷⁸ Nicholas K. Tagliarino, *The Status of National Legal Frameworks for Valuing Compensation for Expropriated Land: An Analysis of Whether National Laws in 50 Countries/Regions across Asia, Africa, and Latin America Comply with International Standards on Compensation Valuation*

⁷⁹ *Franks v Western Australia* [2006] FCA 1811.

⁸⁰ Article 40(3)(b) (i), *Constitution of Kenya*, 2010, Section 111, *Land Act*, (No.6 of 2012).

⁸¹ Wafula Paul, "Court slams brakes on SGR in Compensation Row", *The Standard Newspaper*, 29th June, 2016.

⁸² Atul M. Setalvad, 'A Study into Certain Aspects of the Land Acquisition Act, 1894' 13 (1) *Journal of the Indian Law Institute*, 1971, 1 - 69.

⁸³ *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR, Paragraph 120.

⁸⁴ *Kanini Farm Limited v Commissioner of Lands*, (1996) eKLR.

social and economic anatomy of community land differs from that of private land.⁸⁵ Colonial occupation and land policies were largely inconsistent with community land rights which led to expropriation of previously communally owned land.⁸⁶ However, Kaiya Aboagye notes there has been resurgence of interest.⁸⁷ Charlene Yates notes that despite the resurgence of interest community land rights have not been fully mapped and agreed upon which affects the quantum and nature of compensation⁸⁸ considering there are several non-market values to be considered as well as other peculiarities forming the stratum of cultural attachment to the land.⁸⁹

Further, illustrating the unique anatomy of community land, Lorenza Paoloni & Antonio Onorati,⁹⁰ acknowledge the need for laws that factor in non-tangible value during valuation of land.⁹¹ Further, the International Labour Organization Convention (ILO)⁹² vouches for non-market values by stating that, “*the social, cultural, religious and spiritual values and practices of [Indigenous and tribal peoples] shall be recognized and protected.*”⁹³ In support, the United Nations Declaration on the Rights of Indigenous People and IFC Perform Standard 7 point out that ancestral rights, culture and traditional practices must be protected and respected.⁹⁴ Equally, the guide to good resettlement practice developed by the Asia Development Bank undercores then non market value to land.⁹⁵

⁸⁵ Eric T. Freyfogle, ‘Ethics, Community, and Private Land’ 23 (4) *Ecology Law Quarterly*, 1996, 631-661.

⁸⁶ Catherine Boone, ‘Land Conflict and Distributive Politics in Kenya’ 55 (1) *African Studies Review*, 2012, 75-103.

⁸⁷ Kaiya Aboagye, ‘Australian Blackness, the African Diaspora and Afro/Indigenous Connections in the Global South’ 126 *Transition*, 2018,72-85.

⁸⁸ Charlene Yates, ‘Conceptualising Indigenous Land Rights in the Commonwealth’ 8(4) *Australian Indigenous Law Reporter*, 2004, 96-101.

⁸⁹ Kathryn E. Witchger, "Equality in Process: Community Land Dispute Resolution Mechanism in Kenyan Law," 37 (1) *Columbia Journal of Gender and Law* 2018, 68-[viii].

⁹⁰ Lorenza Paoloni & Antonio Onorati, ‘Regulations of Large-Scale Acquisitions of Land: The Case of the Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests,’ 7 (2) *Law & Development Review*, 2014, 369.

⁹¹ Section 18.2, The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests.

⁹² Article 5, *International Labour Organization Convention 169 (the Indigenous and Tribal Peoples Convention)*, year of adoption, treaty series number.

⁹³ Article 5, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), 27 May 1989, indicate treaties series number.

⁹⁴ International Finance Corporation (IFC). *Performance Standards on Environmental and Social Sustainability, Performance Standard 7: Indigenous Peoples*; IFC: Washington, DC, USA, 2012; See, Article 3, 8, 10, 18, United Nations Declaration on the Rights of Indigenous Peoples, Resolution adopted by the General Assembly on 13 September 2007

⁹⁵ Asian Development Bank, *Hand book on Resettlement: A guide to good practice*,1998.

Karma Tenzing, *et al*⁹⁶ note that some countries have enacted legislation that factor in the non-market value by considering scenic beauty⁹⁷ and historical connection associated with land⁹⁸ when valuing land for compensation. In Africa, Ghana's constitution provides for re-settle on suitable alternative land with regard to their social and cultural values.⁹⁹ These developments and situations as Radin MJ posits, show that monetary value on land only does not amount to adequate compensation as there are other values that have been attached to community land.¹⁰⁰

From the analysis herein, there is need for a holistic approach to evaluating compensation over community land. Mwenda M and Lizahmy N agree that the Legal and policy frameworks ought to reflect a balance between economic, social and environmental considerations.¹⁰¹ The respect for property rights for communities as well as individuals should be observed. The requirement for just and prompt compensation for any property rights expropriated has to be explicitly provided for in the laws with clear provisions on timelines and other non-economic considerations that lend credence to the social licence and acceptance.¹⁰² Compliance with these laws and policies ought to be ensured and where non-compliance arises, corrective mechanisms and deterrent sanctions need to be effective.

In conclusion, it crystallises from the available literature that the regime of compensation, with social license as the guiding value, has not quite been addressed by Kenya's institutional, legal frameworks. There is need for further scholarly enquiry, as this thesis has shown, to deconstruct the anatomy of community land rights, particularly on the question of global standards that ought to govern this process. This thesis notes that Kenya, Ghana and Nigeria as shown by the literature herein, lack a comprehensive legal and policy framework for just and equitable compensation considering that most community rights are anchored in non-market values. It seeks to contribute to the existing literature a critical examination of the concept of just and equitable compensation from a social license perspective.

⁹⁶ Karma Tenzing, Joanne Millar, and Rosemary Black, 'Changes in Property Rights and Management of High-Elevation Rangelands in Bhutan: Implications for Sustainable Development of Herder Communities' 37 (3) *Mountain Research and Development*, 2017, 353–366.

⁹⁷ Section 151, *Bhutan's Land Act*, 2007.

⁹⁸ Section 71, *Philippine's Indigenous People's Rights Act*, 1997.

⁹⁹ Article 20(3), *Constitution of Ghana*, 1992.

¹⁰⁰ Radin MJ, "Property and Personhood", 34 *Stanford Law Review* Press, 2016, 54.

¹⁰¹ Mwenda M, Lizahmy N, *Assessment of legal and policy frameworks affecting land access for extractive projects in Kenya*, World Bank Conference on Land and Poverty, The World Bank - Washington DC, March 19-23, 2018

¹⁰² Extractives Baraza., 2017. Land access and acquisition for extractives projects: balancing different interests.

From the foregoing literature, it is evident that there are gaps that exist with regard to identification, mapping out and recognition of community land rights. These gaps constitute the non-market considerations to land which constitutes a means to the end, a process to the desired result. In that regard, the aim of this research is to fill in that gap in literature with regard to mapping out the non-economic rights and aspects that attach to community land and explore means in which the same can be entrenched in the Kenyan legal fabric. The research will also seek to fill in the gap existing in literature on the relationship between sound compensation framework and social licence entrenchment in Kenya. As a consequence, it will address the gaps that exist in the legal fabric and explore means of patching the same so as to minimise and possibly extinguish conflict in relation to the competing interest of the investors and the indigenous communities as well as entrench the social licence in natural resource management, more particularly community land.

1.6 Theoretical Framework

Owing to the multifaceted and social scope of this research, the study will employ a fusion of three theories i.e. the Communitarianism Theory, Subjective Theory of Value and the Frustration – Aggression Theory. These theories, will inevitably make reference or culminate in the utilitarian approach which postulates that the greatest happiness for the greatest number of persons is the ideal approach in evaluating the law and comprising the interests of all the stakeholders.¹⁰³ They are as follows: -

1.6.1. Communitarianism Theory

This theory emphasises the interests of the community in the functioning of the political and social life.¹⁰⁴ Michael Sandel, a significant contributor to this theory argues that everyone has obligations of membership, solidarity and loyalty inherited from our past and our identity.¹⁰⁵ This theory shows the significance individuals draw from their belonging to a certain network of social units and morals. This theory will be relied on in this study to demonstrate the fierce supremacy, or the necessity of respecting the rights of the community over the economic rights and interests of global

¹⁰³ Harris J, , *Legal philosophies*, 2 ed, Oxford University Press, year,40.

¹⁰⁴ Miyawa Maxwel, *African Approaches to International Law: A Communitarian Critique of the Western Understanding of the Human Rights Corpus*,Pretoria University Press, 2020, forthcoming.

¹⁰⁵ Wanpat Youngmevittaya, ‘A Critical Reflection on Michael J. Sandel: Rethinking Communitarianism’ 15 (1) *Journal of Social Sciences, Naresuan University*, 2019, 83-116.

capital.¹⁰⁶ This theory grounds the non-market value of community land its correlation to the livelihood of indigenous communities being necessary for building on legitimacy.

1.6.2. Subjective Theory of Value

The theory's main proponents William Stanley Jevons, Léon Walras, and Carl Menger¹⁰⁷ bespeak the proposition that the value of a good is not determined by the inherent property of the good, which in the case of land may be the market value of the land, but by the importance the owner or the holder of the good derives from it. In the case of land it is the duty of the government to go beyond the market value of the land of the people they are seeking to resettle to the way this land affects the livelihood of the people who live in it and protecting this livelihood. This theory underscores the foundations of social licence through the respect of non-market values as integral to the creation of a sound legal framework on compulsory acquisition of community land.

1.6.3. Frustration-Aggression Theory

Developed by Dollard and Miller (1939), this theory posits that frustration increases the likelihood of aggression, akin to what the people of the marginalized communities have exhibited over the years against the state and the major oil multinationals operating in the region. According to the Frustration-Aggression theory, all aggression has its origin/root causes in the frustration of one or more actors as a result of another actor's achievement of a goal. Therefore, conflict is as a result of the lack of fulfilment of an individual's or group's objectives and the frustration that this breeds. Generally, human needs have always been insatiable and the failure to meet all these demands informs series of conflicts between political actors.¹⁰⁸ This lack of fulfilment leads to erosion of the building blocks of the social licence.

The sum total of the fusion of the above theories therefore, is that the integration of the non-market values in compulsory acquisition of community land in line with the subjective theory of value is key in chiselling in the theory and tenets of communitarianism. These theories building on the other, culminate in averting the effects of the frustration-aggression theory and in effect seeding the foundation for social licence to operate.

¹⁰⁶ Thigpen, Robert B., and Lyle A. Downing. 'Liberalism and the Communitarian Critique' 31 (3) *American Journal of Political Science*, 1987, Pp. 637–655; Upendra Baxi "Market Fundamentalisms: Business Ethics at the Altar of Human Rights"

¹⁰⁷ Stigler, George "The Development of Utility Theory" 58 *The Journal of Political Economy*, 1950, 207.

¹⁰⁸ Berkowitz, L. (2001). *The Frustration-Aggression Hypothesis*. New York. McGraw Hill.

1.7 Approach and Methodology

In general, this is a desktop-based research relying on secondary data. It derives its data mainly from qualitative research methods that include both primary and secondary sources of data. The primary sources of data that will be relied on include the *Constitution of Kenya, 2010*, Land Laws, Treaties and Case Laws. The secondary sources of data that will be relied on are journal articles and books, quoted references in books, papers presented at conferences, visits to the library and various relevant online sources. This is informed by the fact that policy analysis under consideration is qualitative in nature requiring analysis of available literature to ascertain their efficacy. The research will also employ a comparative approach by looking at the global best practices as well as the practices of other comparable benchmarks i.e. jurisprudence from the African Commission of Human and Peoples' Rights, African Court of Human and Peoples' Rights, Inter-American Court of Human Rights and the Supreme Court of Canada. This will culminate in the deriving of lessons learnt and recommend on how the same can be inculcated for the betterment of the Kenyan legal system on hydrocarbon exploration and compensation of affected communities.

1.8. Limitation and Assumptions of the Study

The research herein will be limited by the available literature on the area which is relatively new and budding. In that regard, reliance will be placed on contemporary discussion and the counter-majoritarian approach taken by judicial and quasi-judicial organs in the delimitation of community land rights. The research will be further limited by the institution's word limit and proceed on the assumption that the literature and legislation analysed are up to date and peer reviewed thus reflecting the contemporary state of affairs.

1.9. Justification of the Study

The study herein is momentous in light of the recent global developments focusing on environmental protection, indigenous community land rights and the bidding regime of the concept of the social licence. In that regard, the research will be instrumental for scholars, policy and law makers in appreciating the developments in community land rights following the promulgation of the Constitution of Kenya, 2010.

1.10. Chapter Breakdown

This research paper is divided into five distinct chapters namely: -

Chapter 1

This is the introductory chapter providing the context in which the study is set and the roadmap of achieving its objectives. It provides the basis and the structure of the study by outlining the background of the study, research problem, literature review, research hypothesis, research questions, theoretical framework and the Approach and methodology. By way of chapter breakdown, the chapter offers a synopsis of the research and the scope that each chapter seeks to accomplish as well as the objectives.

Chapter 2

This chapter will seek to address the nature of land ownership in Kenya and access rights to community land. It will seek to establish the legal, philosophical and historical foundations of the idea of community land and the rights that attach to it. This chapter is important because an understanding of the land ownership system and the various rights and interests that can be held in land is central to the issues and conflicts pertaining to exploration and land access. It will thus lay the basis for auditing the available framework in chapter three taking into account the foundational basis of community land and the attaching rights. It will also answer the question on the relationship between an ideal framework on non-market values and its translation to social licence as well as the gaps that exist in the Kenyan framework.

Chapter 3

This chapter will discuss the legal framework on community land, land access, compulsory acquisition and compensation valuation and methods. In achieving its objective, focus will be on national legislations and international instruments. The analysis will seek to bring out and answer the question on the gaps that exist in the current legal regime on exploration of hydrocarbon rights and compensation of communities for compulsory acquisition of community land.

Chapter 4

In a comparative approach, this chapter will introduce a study of international case studies and jurisprudence. This will provide a yardstick for auditing the Kenyan legal framework in chapter three and provide valuable lessons that can be employed to improve the available framework to improve the scope and modalities of compensation for taking community land. This will answer the research question on the ideal framework.

Chapter 5

This last chapter will entail the synopsis of the findings and give recommendations to the gaps in the legal regime on the overall research problem as well as a conclusion. These recommendations will be of use to policy makers and contribute positively to the development of the law in this area. This will culminate in answering the question on the ideal recommendations in light of the identified global best practices.



CHAPTER TWO

THE EVOLVING ANATOMY OF LAND OWNERSHIP SYSTEM IN KENYA

2. Introduction

In laying the groundwork for the conceptualisation of the social licence in Kenya, this chapter takes a historical approach to the question of historical land tenure system in Kenya. A look at this history is key in appreciating how the developments have stifled the development of the social licence as the non-market values of community land have been thrown on the wayside at the altar of private land ownership. In that regard, to show the unique nature and the bundle of rights that attach to community land, the research delves into the salient community land rights identifiable and therefore laying the basis for an analysis of how respect for the same translates to entrenchment of the social licence in Kenya's compulsory acquisition and compensation of community land as well as respect for indigenous land rights. It will therefore seek to answer the question on the extent to which Kenya prior to the enactment of the Constitution of Kenya, 2010 entrenched non-market values and how the same translated to development of social licence or lack of it i.e. the relationship between an ideal framework and the development of social licence.

2.1. Background to the History of Land Tenure in Kenya

Every person¹⁰⁹ in Kenya has the right, either individually or in association with others to acquire and own property.¹¹⁰ In relation to community land, the rights are recognised formally in the 2010 Constitution on the basis of ethnicity, culture or similar community of interest.¹¹¹ This is a departure from the previous regime that focussed on individual ownership. Private ownership has been beneficial for mainstream agriculture¹¹² which led to increased focus on registration of land leading to conflict between customary trust and private ownership.¹¹³ Customary trust not noted in the register was extinguished in what came to be referred as the Bennet Doctrine.¹¹⁴ During

¹⁰⁹ Article 260, *Constitution of Kenya*, 2010.

¹¹⁰ Article 40(1), *Constitution of Kenya*, 2010.

¹¹¹ Musembi C and Kameri-Mbote P, 'Mobility, Marginality and Tenure Transformation in Kenya: Explorations of Community Property Rights in Law and Practice' 17 (1) *Nomadic Peoples*, 2013, 5-32.

¹¹² Christiansen R, 'Overview of Agricultural Policy,' in United States Department of Agriculture et al, *Agricultural Policy, Trade, Economic Growth, and Development*, 1989, 23; Article 63, *Constitution of Kenya*, 2010; *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR.

¹¹³ *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, Paragraph 24 echoes the decisions in the cases of *Obiero v. Opiyo* (1972) E.A 227 and *Esiroyo v. Esiroyo* (1973) E.A 388.

¹¹⁴ See, *Obiero v. Opiyo* (1972) E.A 227; *Esiroyo v. Esiroyo* (1973) E.A 388; *Joseph Karisa Musonga v Johnson Nyati* (1984) eKLR.

colonialism, land tenure in Kenya underwent several changes. Today it is governed by both enacted legislation and customary practices. However, the legacy of the Bennet Doctrine lives on. Further, the Swynnerton Plan which argued that: -

“Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer, a unit of land and a system of farming whose production will support his family. He must be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security for such financial credits as he may wish to secure.”¹¹⁵

The foregoing conspiracy of history, law and policy stifled the development of community ownership and customary land tenure. It threatened and nearly pushed it to the dustbins of eternity.¹¹⁶

Presently, land tenure system in Kenya is classified as public, community or private with sizable land held under customary tenure.¹¹⁷ The risk of dispossession of community land for oil exploration is thus prevalent. Early exploration took place before the enactment of *Community Land Act*, a relatively recent legislation.¹¹⁸ The issues in contention revolve around compensation and who owns the land.¹¹⁹ Attempts have been made recently to address this concerns through law reform. The land issue in Kenya is historical in nature dating back to colonialism and facets of historical injustices surviving to date.¹²⁰

It is common ground that land was communally owned till 1895 when Kenya became a British protectorate. The Commissioner was allowed to sell and lease land by the *East Africa Order in Council* of 1898.¹²¹ The *Crown Land Ordinance* of 1902 permitted the Commissioner to sell freehold estates in land and gave proprietary rights to settlers and further stated that unoccupied

¹¹⁵ Ngugi J, 'Re-Examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration' 25 *Michigan Journal of International Law*, 2004, 467; *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, Paragraph 36.

¹¹⁶ *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, Paragraph 36.

¹¹⁷ Section 6(1), *Community Land Act* (No.27 of 2016).

¹¹⁸ Pastoralist Development Network of Kenya, "*Triggering the Voluntary Guidelines on the Responsible Governance of Tenure in the context of oil extraction in Kenya's Turkana County*", 2018.

¹¹⁹ Conrad, *Oil Exploration in Kenya, Success requires consultation*, 33.

¹²⁰ *Report of the Truth, Justice and Reconciliation Commission*, Vol IV, 2013, 54.

¹²¹ *The Historical Development of Land Law in Kenya*, at <<http://legalscholarsite.com>> on 8th April, 2019.

native land could be sold or leased.¹²² This legislation was amended by the *1915 Crown Lands Ordinance* which stated that crown land includes land occupied by natives and that which was set aside for natives use and support.¹²³

With the gaining of independence, Kenyan citizens were allowed to own land absolutely, and the colonial legislation changed to accommodate land ownership by Kenyans. The *Constitution of Kenya*, 1963 introduced proprietary rights to land and subsequent land legislation formulated to accommodate the new land laws e.g., *Registered Land Act*, Chapter 300, Laws of Kenya, *Trust Land Act*, Chapter 288, laws of Kenya, *Government land Act*, Chapter 280 laws of Kenya and the recent *Land Act* (no.6 of 2012) as revised in 2016 among others. However, despite this long and arduous history, there are still criticisms on the current land legislations and the tenure system considering the pressure of constitutional timelines. Hence, compromise had to be struck.¹²⁴

This chapter seeks to look at the different types of interests in land as guided by the land legal framework and how they are attained, how rights to the interest in land can be relinquished and the access rights to community land. It also looks at the historical foundations of the various land tenure systems and the attendant interests. It traces the steps on the extinction or otherwise the evolution of community land rights and their renaissance after the promulgation of the *Constitution of Kenya*, 2010. It seeks also to identify the specific features or rights that attach to community land and sets it apart from other land tenure systems i.e., public and private ownership.

2.2. Evolution of Land Ownership and Tenure in Kenya

The concept of private ownership came with the idea of civilised society.¹²⁵ In Kenya, this came with the British conquest.¹²⁶ This was achieved though the scramble and partition of Africa and the subsequent enactment of legislation to alienate land¹²⁷ i.e. the declaration of the East African

¹²²The Historical Development of Land Law in Kenya, at <<http://legalscholarsite.com>> on 8th April, 2019.

¹²³ Valentine Wakoko, “The Evolution of Land Law in Kenya” at <<http://www.academia.edu>> on 8th April, 2019.

¹²⁴ Ambreena Manji, ‘The Politics of Land Reform in Kenya 2012’ 57 (1) *African Studies Review*. 2014, 115 – 130.

¹²⁵ Jean-Jacques Rousseau, *The Social Contract; and, The First and Second Discourses* (Yale University Press) p. 113.

¹²⁶ Smokin W , *Essays on Land Law: The Reform Debate in Kenya* (Faculty of Law, University of Nairbi, 2000).

¹²⁷ Akpan M. B., ‘Liberia and Ethiopia, 1880 – 1914: The Survival of Two African States’ in Boahen A. Adu (Ed.) *General History of Africa VII: Africa under Colonial Domination 1880 – 1935* (UNESCO Publishing, 2000).

Protectorate on 1st July, 1985¹²⁸ and enactment of laws on land alienation.¹²⁹ The laws are detailed as follows: -

2.2.1 Indian Land Acquisition Act, 1895

The Act was initially enacted in India and extended to the protectorate in 1896 limited to a ten-mile coastal strip.¹³⁰ This extension was informed by the opinion that the declaration of protection did not confer powers to alienate land.¹³¹ Such extension allowed invoking the *Foreign Jurisdiction Act* in order to grant titles¹³² and later the promulgation of the *British East Africa Lands Regulations Act*¹³³ in the year 1897. These actions caused friction between the natives and the settlers.¹³⁴ More so, this was due to the use of direct rule that extinguished native title.¹³⁵ All land was declared as belonging to the Crown and alienated at pleasure.¹³⁶ Land was therefore alienated and allocated to settlers without compensation to Africans.¹³⁷ That notwithstanding, there was disquiet and discontent among the settlers over the titles and conditions in the grants pursuant to the *British East Africa Lands Regulations Act* which called for further legislation.

2.2.2. East African (Lands) Ordinance-in-Council, 1901

The *Foreign Jurisdiction Act* conferred the Crown powers to alienate and dispose land in places with no settled form of government – in essence all ‘unoccupied and wasteland’ within its sphere of influence.¹³⁸ This change paved way for the enactment of the *East African (Lands) Ordinance-in-Council*, 1901 which granted power to the commissioner to dispose land. The Crown had acquired a radical title over all land in the protectorate.¹³⁹ The Commissioner/Governor was given discretionary powers to grant leases over the protectorate to the white settlers. The land having

¹²⁸ Kenneth Roberts-Wray, *The Commonwealth and Colonial Law* (F A Praeger 1966) 73.

¹²⁹ Ojienda T *Land Law and Conveyancing: Principles and Practice*, LawAfrica, 2015, 12.

¹³⁰ Section 4 (1) of the *Indian Land Acquisition Act*, 1894; *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR.

¹³¹ Yash P Ghai, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (OUP 1970).

¹³² Act of 1890.

¹³³ Act of 1897.

¹³⁴ Raymond Lesslie Buell, ‘The Destiny of East Africa’ 6 (3) *Foreign Affairs*, 1928, 408-426.

¹³⁵ Raymond Lesslie Buell, 408-426.

¹³⁶ Raymond Lesslie Buell, 408-426.

¹³⁷ Raymond Lesslie Buell, 408-426.

¹³⁸ Ghai Y, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (OUP 1970).

¹³⁹ *In the Matter of the National Land Commission* [2015] eKLR.,

been determined as vesting in the crown, customary interests and cultural rights of the natives were overridden.

2.2.3. Crown Lands Ordinance, 1902

The ordinance allowed for disposition of leasehold interests and gave the commissioner power to alienate land. It also granted interests of occupancy to non-Europeans but limited it to five acres.¹⁴⁰ However, it was faulted as impeding conveyance, the powers of the Commissioner/Governor were skewed in favour of Africans.¹⁴¹ The white settlers wanted the imposition of a segregation from all non-European extractions in the colony.¹⁴² Therefore, to further entrench the colonial foothold in Kenya, the colonial administration enacted the *Crown Lands Ordinance* of 1915 in response to the dissatisfaction by the white settlers. It repealed the *Crown Lands Ordinance* of 1902.

2.2.4. Crown Lands Ordinance, 1915

The Ordinance was enacted to cater for the expanding and deepening colonial domination. It gave wider powers to the Commissioner of Lands to allocate land by direct grants in the name of the Crown. The ordinance is considered by far the most radical and far-reaching colonial land legislation in Kenya. As a consequence, it declared Indigenous Africans as tenants-at-will of the Crown having been dispossessed of their land.¹⁴³ It also nullified all land rights held under African Customary Law. The Governor of the Colony being the plenipotentiary of his majesty King George V was empowered to grant leasehold and freehold titles. Further, all land conveyances between Europeans and Africans had to be sanctioned with the consent of the Governor of the Colony of Kenya. As a consequence, community lands ceased to exist. However, the customary usage to land was retained albeit being subjected to the repugnancy clause i.e. the custom should not be repugnant to justice and morality.¹⁴⁴

Afterwards, a series of enactments followed. With the further entrenchment of British rule, natives were required to live in reserves, where they reside and farm which were governed by board of

¹⁴⁰ Mungeam G. H., *Kenya Selected Historical Documents 1884-1923*, (East African Publishing House, 1978) 325.

¹⁴¹ Hastings R.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (ACTS Legal Studies Series, Act Press 1991), 10.

¹⁴² Simon Coldham, 'Colonial Policy and the Highlands of Kenya, 1934-1944' 23 *Journal of African Law*, 1979, 65.

¹⁴³ Okoth Ogendo H.W.O, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Acts Press 1991).

¹⁴⁴ Okoth Ogendo H.W.O, (1991).

trustees.¹⁴⁵ The *Native Lands Trust Ordinance* of 1938 required the local native council approval before the issuance of leases to non-natives by the governor.¹⁴⁶ After independence, the native council and elected county council leaders were the trustees of the native lands.¹⁴⁷ The *Trust Land Act*, 1968 recentralised control of land vesting the power to the commissioner of lands to be the official administrator. This led to allocation of land to members who were not of the community causing the relocation of clans to meet the demands of elites.¹⁴⁸ This practice increasingly led to the alienation of community land to the disadvantage of the legitimate members of the community. This unfair acquisition of community land led to the enactment of the *Community Land Act*, 2016 in a bid to cure the social and political ills that afflict land tenure and ownership in Kenya.

2.2.5. Swynnerton Plan of 1954

Towards independence, the colonial administration began the registration of the male heads of a household as the proprietors over land in which the natives had access and utility rights.¹⁴⁹ It did not recognize the user rights of widows and further preferred individual private ownership over communal or group ownership.¹⁵⁰ This privatisation process was part of the Colonial government's response on the overcrowding, overgrazing and soil erosion in the reserves which was blamed on African Customary Law. With the recommendations of the Swynnerton plan, land tenure changed and adopted the English model through the enactment of the *Native Land Tenure Rules*, 1956, *Native Land Registration Ordinance*, 1958 and the *Land Control Ordinance*, 1958. This therefore meant that once land had been adjudicated, it fell under the ambit of private land ownership and community and customary rights ceased to apply.¹⁵¹ Soon thereafter, upon gaining independence, the government continued this land reform efforts.

2.2.6. Registered Land Act, Cap. 300 (Repealed)

The Act was enacted as a registration regime for all land previously held under customary law and modelled along the English *Land Registration Act*, 1925. Entrenching the Swynnerton Plan,

¹⁴⁵Liz Alden Wily, *The Community Land Act in Kenya opportunities and challenges for communities* at <https://doi.org/10.3390/land7010012> at 1st February, 2020

¹⁴⁶ Ghai.Y, McAuslain. J, *Public law and political change in Kenya*, Oxford University Press, New York, NY, USA, 1970: ISBN 0 19-644077

¹⁴⁷Liz Alden Wily, (2020)

¹⁴⁸ Liz Alden Wily, (2020)

¹⁴⁹ *In the Matter of the National Land Commission* [2015] eKLR, Paragraph 104.

¹⁵⁰ *Ibid.*

¹⁵¹ Wanjala S, 'Land Ownership and Use in Kenya: Past, Present and Future' in *Essays on Land Law: the Reform Debate of Kenya* (Smokin Wanjala ed., University of Nairobi 2000) pg. 10.

registration under the Act extinguished customary land rights.¹⁵² It retained most colonial concepts.¹⁵³ Further, it favoured privatisation that was disadvantageous to community land.¹⁵⁴ Consequently, it supported registration of five individuals only.¹⁵⁵ This shortfall led to the enactment of the *Land Group Representatives Act (Repealed)*¹⁵⁶ in the year 1968. In the case of *Parkire Stephen Munkasio & 14 others v Kedong Ranch Limited & 8 others* the court underscored the misnomer of community land versus private land in the form of group ranch.¹⁵⁷

In essence, the independence government continued with the privatisation of community and other unalienated land in line with the colonial policy of the 1950s.¹⁵⁸ the process negatively affected community land rights.¹⁵⁹ This led to the introduction of the concept of group ranching which have since been increasingly privatised.¹⁶⁰ Until the promulgation of the Constitution of Kenya, 2010, community land rights remained in limbo.

2.3. Extinction and Renaissance of Community Land Rights in Kenya

The enactment of the *Crown Land Ordinance* of 1915 extinguished community land rights. Native and customary rights survived but were easily extinguished by registration. Natives lost proprietorship rights.¹⁶¹ This extinction defied closure and has persisted to date due to the lack of proper legislation.¹⁶² Globally, the concept of land being ‘wasteland and unoccupied’ i.e. *terra nullius* has been challenged by the twin case of *the Advisory Opinion of the International Court of Justice on Western Sahara*¹⁶³ and the Australian case of *Mabo v Queensland*.¹⁶⁴

¹⁵² *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, Paragraph 36.

¹⁵³ Kieyah, Joseph. ‘Indigenous People's Land Rights in Kenya: A Case Study of the Massai and Ogiek People’ 15(3) *Penn State Environmental Law Review*, 2007, 397-438.

¹⁵⁴ Kieyah, Joseph. ‘Indigenous People's Land Rights in Kenya: A Case Study of the Massai and Ogiek People’ 15(3) *Penn State Environmental Law Review*, 2007, 397-438.

¹⁵⁵ Section 101 (4) of the *Registered Land Act*, Cap. 300.

¹⁵⁶ *Land Group Representatives Act*, Cap. 287 (Repealed).

¹⁵⁷ *Parkire Stephen Munkasio & 14 others v Kedong Ranch Limited & 8 others* [2015] eKLR.

¹⁵⁸ Kieyah, Joseph. ‘Indigenous People's Land Rights in Kenya: A Case Study of the Massai and Ogiek People’ 15(3) *Penn State Environmental Law Review*, 2007, 397-438.

¹⁵⁹ Simon Coldham, ‘Land-Tenure Reform in Kenya: The Limits of Law’, 17 *Journal of African Modern Studies*, 1979, 620.

¹⁶⁰ John G. Galaty, ‘Ha(1)ving Land in Common: The Subdivision of Maasai Group Ranches in Kenya’, 34 *Nomadic Peoples*, 1994, 110.

¹⁶¹ Ojienda T, *Land Law and Conveyancing: Principles and Practice*, LawAfrica, 2015, 16.

¹⁶² PHWO Okoth Ogendo H.W.O, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Acts Press 1991).

¹⁶³ ICJ GL No 61, [1975] ICJ Rep 12.

¹⁶⁴ [1992] HCA 23.

With the foregoing cases taking shape, there has been a ripple effect across the world on indigenous community and native land rights.¹⁶⁵ Closer home, the case of the *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v. Kenya*,¹⁶⁶ offers a glimpse on the budding indigenous rights in Kenya.¹⁶⁷ It offered a new perspective after the case was dismissed in local courts.¹⁶⁸ The Commission made a finding that the Kenyan constitution did not adequately provide for community land rights opening the subject to scrutiny.¹⁶⁹ It made a finding of violation of African Charter.¹⁷⁰ It also pioneered the right to development.¹⁷¹ Thus, without a holistic social acceptance i.e. social licence, dissatisfaction and aggression grows.¹⁷²

The commission found that there was no public participation¹⁷³ and infringement on the right to development.¹⁷⁴ The Endorois case builds on the findings of the Ogoni case¹⁷⁵ giving impetus for the discussion on local community rights, participation and content.¹⁷⁶ The principles were later adopted in the Ogiek Case¹⁷⁷ that made a finding that the eviction of the Ogiek community by the Kenya Forest Service was a violation of the Community's right to development who had lived in the forest for eons.¹⁷⁸ Thereafter, several case have been decided i.e. *Democratic Republic of the*

¹⁶⁵ Mark A. A. Smith Jr., 'Sovereignty Over Unoccupied Territories--The Western Sahara Decision', 9 *Case West Reserve Journal of International Law*, 1977, 135.

¹⁶⁶ *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v. Kenya*, Comm. No. 276/2003.

¹⁶⁷ Oei A., Sing K', and Shepherd J. "In Land We Trust: The Endorois' Communication and the Quest for Indigenous Peoples' Rights in Africa." 16 *Buffalo Human Rights Law Review*, 2010, 57-112.

¹⁶⁸ *William Ngasia and Others v Baringo County Council and Others*, High Court Miscellaneous Civil Case No. 183 of 2000.

¹⁶⁹ Oei A., Sing K', and Shepherd J. "In Land We Trust: The Endorois' Communication and the Quest for Indigenous Peoples' Rights in Africa." 16 *Buffalo Human Rights Law Review*, 2010, 57-112.

¹⁷⁰ Jeremie Gilbert *et al*, 'Indigenous Peoples' Land Rights in Tanzania and Kenya: The Impact of Strategic Litigation and Legal Empowerment Independent Review', *Minority Rights Group International*, 2017.

¹⁷¹ Elizabeth Ashamu, 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: A Landmark Decision from the African Commission' 55 (2) *Journal of African Law*, 2017, 303 – 313.

¹⁷² Camey I *et al*, 'Gender-based Violence and Environment Linkages: The Violence of Inequality' *International Union for Conservation of Nature*, 2020.

¹⁷³ Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Paragraph 281.

¹⁷⁴ *African Charter of Human and People's Rights*, Article 22.

¹⁷⁵ *SERAC & Another v Nigeria*, ACHPR, 2001.

¹⁷⁶ Serges Alain Djoyou Kanga, 'The Right to Development in the African Human Rights System: The Endorois Case' *De Jure*, 2011, 381.

¹⁷⁷ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017).

¹⁷⁸ Lucy Claridge, 'Litigation as a Tool for Community Empowerment: The Case of Kenya's Ogiek' 1 *Erasmus Law Review*, 2018, 57-66.

*Congo v Burundi, Rwanda, and Uganda*¹⁷⁹ and the case *Kevin Mgwanga Gumne et al v Cameroon*.¹⁸⁰

2.4. Community Land and Oil Exploration – No Longer at Ease

The law on oil exploration came to the limelight with the recent discovery of oil and its implication on land rights brought under scrutiny.¹⁸¹ The affected pastoral communities however face marginalisation and discrimination¹⁸² and little effort has been to address these issues.¹⁸³ Without addressing these issues, conflicts are bound to arise.¹⁸⁴ The anatomy of such conflict is multifaceted and may be land related, environmental¹⁸⁵ or touching on other community land rights.¹⁸⁶ They vary on a case by case basis.

Over time, the concept of the social licence has evolved and increasingly being entrenched in infrastructure and exploration projects.¹⁸⁷ These desirables often conflict with the rights of indigenous communities.¹⁸⁸ It negatively impacts livelihood by changing user rights to land.¹⁸⁹ This change is illustrated by the case of *Parkire Stephen Munkasio & 14 others v Kedong Ranch Limited & 8 others*¹⁹⁰ which claimed that geothermal activities were responsible for pollution and disruption of livelihood.¹⁹¹ Without reconciliation of these competing interests, conflicts are

¹⁷⁹ Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* Annex IV, 20th Annual Activity Report of the African Commission, 111.

¹⁸⁰ Communications, 266/2003; *Kevin Mgwanga Gumne et al v Cameroon* 26th Annual Activity Report of the African Commission, Annex IV.

¹⁸¹ Kennedy Mkutu & Anna Mdee, 'Conservancies, Conflict and Dispossession: The Winners and Losers of Oil Exploration in Turkana, Kenya', *Africa Studies Review*, 2020, 1.

¹⁸² Kennedy Mtuku et al, New Oil Developments in a Remote Area: Environmental Justice and Participation in Turkana, Kenya, *The Journal of Environment & Development*, 2019, 1.

¹⁸³ Nanok Josephat Koli & Onyango Christopher Ouma, 'A socio-economic and environmental analysis of the effects of oil exploration on the local community in Lokichar, Turkana County, Kenya' 3 (6) *International Journal of Management, Economics and Social Sciences (IJMESS)*, 2017, 144-156.

¹⁸⁴ *Joshua Mutambuki & 557 others v Cabinet Secretary Ministry of Interior & Coordination of National Government & 6 others* [2018] eKLR.

¹⁸⁵ *Daniel Ngotiek Nchui & 3 others v National Oil Corporation of Kenya & another* [2019] eKLR.

¹⁸⁶ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR.

¹⁸⁷ Esan, Adenike. "Preventing Violent Conflicts Caused by Infringements of Indigenous Peoples' Rights: The Case of the Ecuadorian Amazon." 23 (4) *Journal of Energy & Natural Resources Law*, 2005, 529-549.

¹⁸⁸ Ibid; Upendra Baxi, *The Future of Human Rights* (2006) at 301; Obiora Okafor, Miyawa MaxwelSyvia Bawa & Ibronke Odumosu, "Assessing African Union's 2016-2019 Human Rights Action Planning Process: Embracing, and De-coupling from the Conventional 'Ideal'" (2020) 64:2 *Cambridge Journal of African Law* 143.

¹⁸⁹ Ejims, Okechukwu. "The Impact of Nigerian International Petroleum Contracts on Environmental and Human Rights of Indigenous Communities" 21 (3) *African Journal of International and Comparative Law*, 2013, 345-377.

¹⁹⁰ *Parkire Stephen Munkasio & 14 others v Kedong Ranch Limited & 8 others* [2015] eKLR

¹⁹¹ *Ibid.*

inevitable.¹⁹² In that regard, for development projects to gain legitimacy, the rights of indigenous communities should not be ignored.¹⁹³ It speaks to the concept of environmental justice¹⁹⁴ i.e. availability of redress mechanisms.¹⁹⁵

2.5. Overview of Land tenure and the Salient Community Land Rights and Features

2.5.1. Overview of the Present Land Tenure Systems

Land ownership in Kenya is divided into Public Land, Community land and Private land.¹⁹⁶ The definition of public land includes natural resources including hydrocarbons.¹⁹⁷ Public land tenure has faced numerous problems i.e. land grabbing.¹⁹⁸ This is an existential threat considering that any alienated land is considered public land.¹⁹⁹ Community land on the other hand is identified on the basis of ethnicity, culture or similar community of interest²⁰⁰ or through legislative prescription.²⁰¹ Private land tenure denotes individual proprietary rights which may either be *Leasehold Tenure*²⁰² or *Freehold Tenure*,²⁰³ and any other land declared private under a legislation.²⁰⁴ A freehold²⁰⁵ interest in land means the unlimited right to use and dispose of land in absolute by the registered proprietor.²⁰⁶ These rights can be extinguished by way of compulsory acquisition. Community land is by nature unique as demonstrated by the salient features below.



¹⁹² Manley-Casimir, Kirsten. "Reconciliation, Indigenous Rights and Offshore Oil and Gas Development in the Canadian Arctic" 20 (1) *Review of European, Comparative & International Environmental Law*, 2011, 29-38.

¹⁹³ Seck, Sara L., 'Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty' 26/2 *Transnational Law & Contemporary Problems*, 2017, 12.

¹⁹⁴ Wamukoya D, Kariuki F, and Kariuki M, *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, 2015.

¹⁹⁵ Miranda, Lillian Aponte. "The U'Wa and Occidental Petroleum: Searching for Corporate Accountability in Violations of Indigenous Land Rights" 31 (2) *American Indian Law Review*, 2007, 651-674.

¹⁹⁶ Article 61(2), *Constitution of Kenya*, 2010.

¹⁹⁷ Article 62, *Constitution of Kenya*, 2010; Ojienda T , *Land Law and Conveyancing: Principles and Practice* (Law Africa 2015).

¹⁹⁸ Ombati, Omwanza. "Repossession of Illegally Acquired Public Land in Kenya: Limits of Law and the Prospects for Transnational Justice in Redress." 2 (1) *East African Journal of Human Rights and Democracy*, 2004, 59-72.

¹⁹⁹ Kariuki, Francis, and Raphael Ng'etich. "Land Grabbing, Tenure Security and Livelihoods in Kenya" 9 (2) *African Journal of Legal Studies*, 2016, p. 79-99; Ombati, Omwanza. "Repossession of Illegally Acquired Public Land in Kenya: Limits of Law and the Prospects for Transnational Justice in Redress" 2 (1) *East African Journal of Human Rights and Democracy*, 2004, 59-72.

²⁰⁰ Article 63(1), *Constitution of Kenya*, 2010.

²⁰¹ Article 63(2), *Constitution of Kenya*, 2010.

²⁰² Article 64(a), *Constitution of Kenya*, 2010.

²⁰³ Article 64(b), *Constitution of Kenya*, 2010.

²⁰⁴ Article 64(c), *Constitution of Kenya*, 2010.

²⁰⁵ Section 5(a), *Land Act*, (No.6 of 2012).

²⁰⁶ Section 2, *Land Act*, (No.6 of 2012).

2.5.2. Community Land and the Associated Rights and Interests

2.5.2.1 Cultural and Religious Rights

Culture and religion albeit being integral was heavily disrupted by the Colonial administration a key example being the Maasai.²⁰⁷ During alienation, they sought to retain five acres for traditional, cultural and religious ceremonies including circumcision.²⁰⁸ This was not honoured by the 1911 Agreement seen birthing the first clamour for indigenous rights.²⁰⁹ This gives a glimpse to the non-market value to land. Betrayal as seen in the case of the Maasai breeds mistrust as the colonial, a legacy that endures to date.²¹⁰ These considerations must be taken into account through appropriate safeguards in building the social licence. Such safeguards include the right to self-determination, prior and informed consent, meaningful participation and self-determination in development.²¹¹ Such developments offer significant developments on the right to self-determination and meaningful participation of indigenous communities in development²¹² and the right to access cultural sites.²¹³

The jurisprudence from the Inter-American Court of Human Rights in the case of *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*²¹⁴ illustrates the integral nature of culture and religious rights thus the need for remedial action to remedy injustices visited on indigenous communities. It also calls for the respect of the rights of indigenous communities and their livelihoods cushioned.²¹⁵ Thus, there should be adequate consultation and participation of the indigenous community, environmental impact assessment and sharing of benefits that arise from the exploitation of the natural resources.



²⁰⁷ Mungeam G. H., *Kenya Selected Historical Documents 1884-1923*, (East African Publishing House, 1978) 327.

²⁰⁸ Mungeam G. H., *Kenya Selected Historical Documents* (1978) 328.

²⁰⁹ Kenneth King, 'The Kenya Maasai and Protest Phenomenon, 1900 to 1960', 12 *Journal of African History*, 1971, 121; G. R. Sandford, *An Administrative and Political History of the Maasai Reserve, 186-228* (Waterlow & Sons Limited, 1919).

²¹⁰ Robert L Tignor, 'The Maasai: Pattern Maintenance and Violence in Colonial Kenya' 13 *Journal of African History* 1972, 271.

²¹¹ *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v. Kenya*, Comm. No. 276/2003 (Endorois Case).

²¹² *William Ngasia and Others v Baringo County Council and Others*, High Court Miscellaneous Civil Case No. 183 of 2000

²¹³ *Endorois Case*.

²¹⁴ Inter-American Court Human Rights, *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile* Judgment of May 29, 2014. Series C No. 279.

²¹⁵ *Saramaka People v Suriname* IACHR Series C No 185, IHRL 3058 (IACHR 2008), 12th August 2008, Inter-American Court of Human Rights [IACtHR].

2.5.2.2. Communal Land Grazing Rights

Indigenous communities mainly engage in pastoral activities in which cattle are private but²¹⁶ grazing land is communal.²¹⁷ This model was decimated by the colonial administration. The pastoral economy nonetheless still thrives in arid and semi-arid areas. Thus, a compensation framework has to identify these grazing rights and adequately compensate for the interruption and aid in the identification of those that would benefit from the compensation.

2.5.2.3. Access to Sacred Grounds and Artefacts of Religious and Cultural Importance

Cultural and sacred grounds and artefacts are integral in the practice of religion. The Endorois for example consider Lake Bogoria and the Mochongoi forest as sacred. The African Commission held that they were entitled to protection.²¹⁸ Similarly, in Kenya,²¹⁹ the Ogiek Community consider certain parts of the Mau forest sacred.²²⁰ In both cases, the Commission and the African Court underscored the rights of the Endorois and the Ogiek Communities to access their sacred and cultural places. Therefore, these cases give us hindsight on some of the rights that may not be extinguished once a community is evicted and compensated. There may still be need to chisel these access rights in the compensation and alienation framework.

2.5.2.4. Right to Participation/Prior Informed Consent & Self-determined Development

In the case of *Saramaka People v Suriname*,²²¹ the court noted that the domestic laws of the state of Suriname did not recognise community land rights which were provided for in international instruments and conventions.²²² With its determination, the understanding of the right to self-determination and participation in development gained traction. The case of *Kaliña and Lokono*

²¹⁶ Smokin C. Wanjala, 'Land Ownership and Use in Kenya: Past, Present and Future' in *Essays on Land Law: the Reform Debate of Kenya* (Smokin Wanjala ed., University of Nairobi 2000) pg. 25.

²¹⁷ Kieyah, Joseph. 'Indigenous People's Land Rights in Kenya: A Case Study of the Massai and Ogiek People' 15(3) *Penn State Environmental Law Review*, 2007, 397-438.

²¹⁸ Judgement in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* - 276 / 2003.

²¹⁹ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017).

²²⁰ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017), Paragraph. 158 and 165.

²²¹ *Saramaka People v Suriname* IACHR Series C No 185, IHRL 3058 (IACHR 2008), 12th August 2008, Inter-American Court of Human Rights [IACtHR].

²²² *International Covenant on Civil and Political Rights* (ICCPR); *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and the *United Nations Declaration on the Rights of Indigenous Peoples*.

Peoples v Suriname recognised these rights.²²³ In essence, the foregoing jurisprudence paint a positive picture to the rights of indigenous people to self-determination, participation in economic development and consent, concepts which have been imported into the *Endorois* and the *Ogiek Cases* – enduring legacies of the winds of change blowing across the realm of indigenous rights.

2.6. Conclusion

In conclusion, it is evident community land rights has a long but famished history that has largely been inimical to community land development and customary rights.²²⁴As a result of these historical accidents, private tenure has been glorified over community land. Looking at the historical footprint on community land in Kenya, it is deciphered that it falls short of the international standard. The impact of the new land laws remains to be seen in entrenching the desired values and non-market values detailed herein²²⁵ and create new jurisprudence on indigenous land rights. It also emerges that there is a direct relationship between an ideal legal framework and the development of the concept of the social licence. In Kenya, it can be deduced that the famished jurisprudence on the non-market values has stifled the development of social licence and thus the long-protracted conflicts and dissatisfaction among the indigenous communities as identified in this chapter. This calls for entrenchment of the social licence calling on exploration companies to go beyond mere compliance with domestic legislation. This calls for entrenchment of the values of free, prior and informed consent, participation among others. Recognition and respect for these rights can birth legitimacy and eventually social licence.

²²³ Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Addendum: The Situation of Indigenous Peoples in the United States of America A/HRC/21/47.; Anaya, James, “International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State” (2004) 21:1 *Arizona J of Intl & Comp L* 13; *Kaliña and Lokono Peoples v Suriname. Merits, Reparations and Costs*. Judgment of November 25, 2015 para 122,124.

²²⁴ Owen J. Lynch, ‘Legal Challenges Beyond the Americans: Indigenous Occupants in Asia and Africa’ 9 *Saint Thomas Law Review*, 1996, 93.

²²⁵ *William Ngasia and Others v Baringo County Council and Others*, High Court Miscellaneous Civil Case No. 183 of 2000

CHAPTER THREE

THE LEGAL FRAMEWORK REGULATING ACCESS, COMPULSORY ACQUISITION AND COMPENSATION OF COMMUNITY LAND IN KENYA AND ROLE IN ENTRENCHING SOCIAL LICENCE

3. Introduction

Chapter two sought to lay a historical and conceptual framework on the evolution of community land rights tracking the pulse and path of community land rights from pre-independent Kenya, to its death under colonialism and renaissance. To build up on this previous discussion, this chapter seeks to explore the current legal and policy framework obtaining in Kenya in and around access to, compulsory acquisition and compensation for the non-pecuniary/market value of community land. It seeks to look at whether the concept of social licence obtains in Kenya and whether there exists an entrenchment of non-pecuniary considerations in compulsory acquisition of community land.²²⁶ In that regard, it seeks to analyse and answer the question whether the overhaul of the land laws in the year 2012 that ensued after the enactment of the Constitution of Kenya, 2010 and the subsequent enactment of the *Community Land, 2016* have translated to tangible results i.e. reforming the compulsory acquisition regime in relation to community land and taken into account the non-pecuniary aspects which are at the heart of the concept of social licence in the extractive industry.²²⁷ It takes a multi-disciplinary approach auditing the extent to which the aspirations of the Kenya people have been taken into account.²²⁸ This is further mirrored against the regional and international framework to audit Kenya's extent of compliance with its obligations.

3.1. National Legal and Policy Framework on Compulsory Acquisition and the Concept of Social Licence to Operate

Kenya has a multi-cultural, multi-ethnic population in which about twenty-five (25) identify as indigenous.²²⁹ In Kenyan context, the term 'marginalised' in the Constitution,²³⁰ a definition that

²²⁶ Wily L, 'The Community Land Act in Kenya: Opportunities and Challenges for Communities' 7(1) *Land*, 2018, 12.

²²⁷ Wairimu Karanja & Nduta Njenga, 'Social Licence to Operate in the Energy Transition Era: Case Study of the East African Oil and Gas Sector' in Victoria R. Nalule (Ed.), *Energy Transitions and the Future of the African Energy* (Palgrave Macmillan, 1st Edition 2020) Pp. 341 – 370.

²²⁸ Mutua Eric, Adequacy of Kenya's Legal Framework on Large Scale Extractive Industry In Addressing Interests of Local Community, 14(1) *Law Society of Kenya Journal*, 2018, Pp. 120.

²²⁹ International Work Group for Indigenous Affairs (IWGIA), 'Country Technical Notes on Indigenous Peoples' Issues: The Republic of Kenya' (2012) *International Fund for Agricultural Development (IFAD)* at <<https://www.ifad.org/documents/38714170/40224460/Kenya.pdf/7f70d9b6-5e5c-4628-942c-7ae749a2f262>> on 28 January, 2020.

²³⁰ Article 260, *Constitution of Kenya*, 2010.

corresponds with the context of ‘indigenous’ under the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP). In Kenya, most indigenous communities live in arid and semi-arid areas.²³¹ Considering the focus on private land, community land and these communities have been increasingly marginalised.²³² The *Constitution of Kenya, 2010* and *Community Land Act, 2016*, have made attempts at entrenching community land rights.

Emerging jurisprudence²³³ show that indigenous people possess unique and non-monetary claim to their ancestral and community land that is different from private land. In that regard, there is need for involvement of local communities in nurturing the concept of the social licence.²³⁴ Further, the definite recognition of these rights in contemporary legislation and the mapping out of their unique element, is a key element of legal recognition that guarantees tenure security and gives impetus for enforcement of these non-monetary aspects of community land.²³⁵ The extent to which these rights have been provided for and how they feed into the element of the social licence is thus the focus of the analysis below.

3.1.1. Constitution of Kenya, 2010

The *Constitution of Kenya* is the supreme law of the land and embodies the wishes, fears and aspirations and visions of transformation of the Kenyan people.²³⁶ As a social contract,²³⁷ is a transformative charter instigating social change and the desired national ethos²³⁸ away from control and legitimisation of public power.²³⁹ Riding the crest of constitutional reform that foreshowed the promulgation of the Constitution, was the land question,²⁴⁰ the country’s key fault

²³¹ Abdulahi, Muhammad. ‘The Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities’ 14 (1) *International Journal on Minority and Group Rights*, 2007, Pp. 85-126.

²³² Odote C, ‘The Dawn of Uhuru? Implications of Constitutional Recognition of Communal Land Rights in Pastoral Areas of Kenya’ 17/1 *Nomadic Peoples*, 2013, pp. 87–105.

²³³ *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017).

²³⁴ Reasoning in, *Saramaka People v Suriname* IACHR Series C No 185, IHRL 3058 (IACHR 2008), 12th August 2008, Inter-American Court of Human Rights [IACtHR].

²³⁵ Wily L, ‘The Community Land Act in Kenya: Opportunities and Challenges for Communities’ 7(1) *Land*, 2018, 12.

²³⁶ *George Bala v Attorney General* [2017] eKLR at paragraph 58.

²³⁷ *Miguna Miguna v Fred Matiang’i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others* [2018] eKLR, paragraph 27 and 28.

²³⁸ *Speaker of The Senate & Another v Hon. Attorney-General & another & 3 Others Advisory Opinion Reference No. 2 of 2013* [2013] eKLR.

²³⁹ Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ 14 *South African Journal of Human Rights*, 1998, Pp. 146 – 147; see also Miyawa Maxwel, “The Genesis of Mainstreaming the Theory of Interpreting the Constitution of Kenya 2010” 15 *The Platform*, 2016, 36

²⁴⁰ Kariuki, Francis, and Raphael Ng’etich, ‘Land Grabbing, Tenure Security and Livelihoods in Kenya’ 9 (2) *African Journal of Legal Studies*, 2016, Pp. 79-99.

since independence²⁴¹ more so in relation to community land.²⁴² At present, community land enjoys definite status under the Constitution and the *Community Land Act*.²⁴³ The emerging element of the social licence is backed by the provisions of the Constitution on public participation.²⁴⁴ Public participation is at present a key and important governance tool aimed at achieving a bottom-up approach in decision making hence bolstering the legitimacy of decisions.²⁴⁵ It incubates the social licence²⁴⁶ which is critical in resource governance²⁴⁷ and exercise of trusteeship.²⁴⁸ This forms the appropriate yardstick for auditing the efficacy of the process.²⁴⁹ This calls for synchronisation of legislation.

3.1.2. *Community Land Act, 2016*

Recent mining activities occur in areas predominantly occupied by indigenous communities.²⁵⁰ Thus, the need to address protection of community land takes centre-stage.²⁵¹ This Act gives effect to the aspirations of the Kenyan people with regard to community land.²⁵² It is modelled on the community as the owners or custodians.²⁵³ These are the aspirations that informed the Constitutional provisions.²⁵⁴ These aspirations have faced their fair share of challenges. First, it began with the determination of what constitutes community land which was declared

²⁴¹ Hornsby C, *Kenya: A History Since Independence* (IB Tauris, London, 2012) p.787.

²⁴² Liz Alden Wily, 'The Community Land Act in Kenya Opportunities and Challenges for Communities' 7/12 *Land*, 2018 Pp. 1-25.

²⁴³ Article 63, *Constitution of Kenya, 2010*; Liz Alden Wily, 'The Community Land Act in Kenya Opportunities and Challenges for Communities' 7/12 *Land*, 2018 Pp. 1-25.

²⁴⁴ Article 10, 69 (1) (d), 118 (1) (b), *Constitution of Kenya, 2010*.

²⁴⁵ Mubita A *et al.*, 'The Importance and Limitations of Participation in Development Projects and Programmes' 13 (5) *European Scientific Journal*, 2017, 238; Teodoro Semeraro *et al.*, 'A Bottom-Up and Top-Down Participatory Approach to Planning and Designing Local Urban Development: Evidence from an Urban University Center' 9 *Land*, 2020, Pp. 1 -25.

²⁴⁶ See, *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC); *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR.

²⁴⁷ Article 62 (1) (f), 62 (3), *Constitution of Kenya, 2010*.

²⁴⁸ Mutua Eric, Adequacy of Kenya's Legal Framework on Large Scale Extractive Industry In Addressing Interests of Local Community, 14(1) *Law Society of Kenya Journal*, 2018, Pp. 120.

²⁴⁹ *Ibid.*

²⁵⁰ Schilling J, Locham R, Weinzierl T, The Nexus of Oil, Conflict, and Climate Change Vulnerability of Pastoral Communities in North West Kenya, *Copernicus publications*, (2015),711.

²⁵¹ Agatha W, Monica O, Peter M and Jane N," *Land for Infrastructure Development: Compulsory Acquisition and Compensation of Unregistered/Undocumented Land In Kenya*, 2017 World Bank Conference on Land and Poverty, The World Bank - Washington Dc, March 20-24, 2017.

²⁵² Wily L, 'The Community Land Act in Kenya Opportunities and Challenges for Communities' 7/12 *Land*, 2018 Pp. 1-25.

²⁵³ *Ibid.*

²⁵⁴ Article 63(5), *Constitution of Kenya, 2010*.

unconstitutional.²⁵⁵ The provision was struck down on grounds of legislative inelegance and ambiguity.²⁵⁶ This reflects the long-standing debate of understanding the scope of community and community land.²⁵⁷

At present, community land is registrable as either customary, freehold or leasehold²⁵⁸ with communities as the proprietors.²⁵⁹ Land that is not registered is held in trust for the community by the County Government.²⁶⁰ However, communities are encouraged to register their interest in land²⁶¹ so as to maximise utility and enforcement.²⁶² The Act contemplates that compulsory acquisition should be for a public purpose and compensation should be just²⁶³ and in consonance with the provisions of the *Land Act*, 2012 and Article 40(3) of the Constitution.²⁶⁴ This means that in compulsory acquisition, the *Land Act* is superior to the *Community Land Act* which has no independent provisions to safeguard the salient community land features and is vague on saving the provisions from the overriding provisions.²⁶⁵ This lacuna, does not reflect the special status of community land and the unique bundle of rights that are assigned to them further eroding the foundations of the social licence.²⁶⁶

From the literature analysed herein, it is clear that in any extractive excursion, the local community remains an integral stakeholder in the entire process.²⁶⁷ The recognition of African customary law and community land tenure is a key avenue in reforming the land question in Kenya.²⁶⁸ The Act is a tool at achieving the desired security of tenure.²⁶⁹ With the recognition of community land tenure

²⁵⁵ *Kelly Malenya v Attorney General & another; Council of Governors (Interested Party)* [2019] eKLR.

²⁵⁶ Patricia Kameri-Mbote *et al*, *Ours by Right: Law Politics and Realities of Community Property in Kenya* (Strathmore University Press, 2013) Pp. 17-31; Liz Alden Wily, 'Risks to the Sanctity of Community Lands in Kenya: A Critical Assessment of New Legislation with Reference to Forestlands' 75 *Land Use Policy*, 2018, 661 – 672.

²⁵⁷ *William Ngasia and Others v Baringo County Council and Others*, P. 6.

²⁵⁸ Section 4(3), *Community Land Act* (No.27 of 2016).

²⁵⁹ Section 5, *Community Land Act* (No.27 of 2016).

²⁶⁰ Section 6(1), *Community Land Act* (No.27 of 2016).

²⁶¹ Section 7, *Community Land Act* (No.27 of 2016).

²⁶² Agatha W, Monica O, Peter M and Jane N," *Land for Infrastructure Development: Compulsory Acquisition and Compensation of Unregistered/Undocumented Land In Kenya*, 2017 World Bank Conference on Land and Poverty, The World Bank - Washington Dc, March 20-24, 2017.

²⁶³ Section 5(4), *Community Land Act*, (No.27 of 2016).

²⁶⁴ Section 5(4), *Community Land Act*, 2016

²⁶⁵ Section 13 (3), *Community Land Act*, 2016.

²⁶⁶ Rutherford, Blair, 'Land Governance and Land Deals in Africa: Opportunities and Challenges in Advancing Community Rights' 8 (1) *Journal of Sustainable Development Law and Policy*, 2017, p. 235-258.

²⁶⁷ Mutua E, Adequacy of Kenya's Legal Framework on Large Scale Extractive Industry In Addressing Interests of Local Community, 14(1) *Law Society of Kenya Journal*, 2018, Pp. 117 – 147. REPEATED CITATION.

²⁶⁸ HWO Okoth Ogendo, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion in Land Reform and Agrarian Change in Southern Africa* (2002).

²⁶⁹ Liz Alden Wily, 'The Community Land Act in Kenya: Opportunities and Challenges for Communities' 7 (12) *Land* Pp. 1-25.

and guaranteed protection, the community can secure their right to benefit sharing for investments in community land²⁷⁰ governed by the relevant bylaws.²⁷¹ The legal recognition is necessary for the success of any tenure system.²⁷² The Act however does not map out community rights with specificity²⁷³ on the entitlements.²⁷⁴ With this lack of particularity, the social licence is eroded²⁷⁵ considering that it is a direct consequence of community participation and involvement.²⁷⁶ The sentiments expressed by the local community are an indicator of their acceptance or denial. Hence, the social licence or the lack of it.²⁷⁷ It therefore flows that the Community Land Act, 2016 is inadequate in mapping out the non-market aspects of community land to be taken into account in the process of compulsory acquisition. With this lacuna, the concept of the social licence is greatly hampered. This exposes community land to the injustices suffered in the previous regime as was the case of the Endorois who could not access their ancestral land for religious and cultural reasons.²⁷⁸ Despite the enactment of the Act herein, this deficiency persists as demonstrated by the judgement of the African Court of Human and Peoples' rights delivered in the year 2017 after the enactment of the *Community Land Act*.

3.1.3. Land Act, 2012

The Act provides for the specifics of compulsory acquisition i.e that the National Land Commission²⁷⁹ is mandated to supervise and chaperon the process of acquiring land compulsorily at the request of the county or national government.²⁸⁰ The procedure has time and again been cemented in case law²⁸¹ and the procedures aimed at safeguarding fundamental rights and freedoms.²⁸² Further, the entrenchment of the requirement of prompt compensation seeks to

²⁷⁰ Section 36, *Community Land Act* 2016.

²⁷¹ Section 37, *Community Land Act* 2016.

²⁷² Liz Alden Wily, 'The Community Land Act in Kenya: Opportunities and Challenges for Communities 7 (12) *Land* Pp. 1-25.

²⁷³ *William Ngasia and Others v Baringo County Council and Others*.

²⁷⁴ *Endorois Case*

²⁷⁵ Kathleen M. Wilburn and Ralph Wilburn, 'Achieving Social License to Operate Using Stakeholder Theory' 4(2) *Journal of International Business Ethics*, 2011, 3.

²⁷⁶ Joel Gehman *et al*, 'Social license to operate: Legitimacy by another Name?' 60(2) *New Frontiers*, 2017, 293–317.

²⁷⁷ Cordaid, 'Oil Exploration in Kenya: Success Requires Consultation - Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya, August 2015 at <https://www.cordaid.org/en/wp-content/uploads/sites/3/2015/11/Turkana_Baseline_Report_DEF-LR_Cordaid_1.pdf> on 2 April, 2021.

²⁷⁸ Korir Sing'oei, 'Engaging the Leviathan: National Development, Corporate Globalisation and the Endorois' Quest to Recover Their Herding Grounds' in Kristin Henrard (Ed.), *The Interrelation between the Right to Identity of Minorities and their Socio-economic Participation* (Studies in International Minority and Group Rights, Volume: 6, 2013) Pp. 373 – 401.

²⁷⁹ Article 67 of the *Constitution of Kenya*, 2010 establishes the National Land Commission.

²⁸⁰ Section 107, *Land Act*, No. 6 of 2012.

²⁸¹ *Patrick Musimba vs The National Land Commission and & others* Petition No. 613 of 2014.

²⁸² *Isaiah Otiato & 6 others v County Government of Vihiga* [2018] eKLR.

redress previous lapses.²⁸³ The Act under section 107 (4) (a) provides that land shall be valued in accordance with the criteria mapped out under the Act.²⁸⁴ This valuation criteria includes community land which is to be assessed in the same terms as freehold private land.²⁸⁵ This does not take into account the unique nature of community land as discussed herein.²⁸⁶ It represents the continuing dominance of the philosophy of private ownership.²⁸⁷ With the enactment of the Constitution, it was hoped that these benefits would trickle down²⁸⁸ particularly for arid and semi-arid areas which is predominantly community owned.²⁸⁹ This reveals the fault-line that Kenya has no special consideration for the special status of community land²⁹⁰ and rendering the unique elements incapable or unavailable for valuation.²⁹¹ These unique identifiers are not taken into account.²⁹² Consequently, no compensation is given to alleviate the non-monetary loss²⁹³ which is made worse by their non-consultation or involvement in the acquisition process.²⁹⁴ Furthermore, it is impossible to fully compensate such loss²⁹⁵ or such fundamental rights²⁹⁶ thus stifling the right to development²⁹⁷ prior informed consent and adequate compensation.²⁹⁸

From the foregoing, it is evident that the *Land Act* falls short of recognising and protecting the salient cultural, economic, religious and native land use or aesthetic attachment to community land. There is no distinction between community land and private land and how compulsory acquisition should cater to the unique differences. This lack of distinction, prejudices the unique rights such

²⁸³ *Arnacherry Limited v Attorney General* (2014) eKLR.

²⁸⁴ Section 107 (4) (a), *Land Act*, 2012.

²⁸⁵ Section 107A, *Land Act*, 2012.

²⁸⁶ Wily L, 'The Community Land Act in Kenya: Pp. 1-25.

²⁸⁷ Kibugi, Robert, 'A Failed Land Use Legal and Policy Framework for the African Commons? Reviewing Rangelands Governance in Kenya' 24(2) *Journal of Land Use*, 2009, 314-327.

²⁸⁸ Collins Odote, "The Dawn of Uhuru? Implications of Constitutional Recognition of Communal Land Rights in Pastoral Areas of Kenya" 17(1) *Nomadic Peoples*, 2013, Pp. 87-105.

²⁸⁹ Lenaola, Isaac, "Land Tenure in Pastoral Lands" in J.B. Ojwang and C. Juma (Eds.) *In Land We Trust : Environment, Private Property and Constitutional Development* (Initiative Publishers, Nairobi and Zed Books, London) Pp. 231 – 257.

²⁹⁰ Ondili M, 'Eminent Domain: The Perpetual Rights of the Indigenous People of Kenya to Land Ownership' 2 *Strathmore Law Review* 21, 2017, 35.

²⁹¹ *Ibid.*

²⁹² Maranga M, *Indigenous People and the Roles of Culture, Law and Globalization: Comparing the Americas, Asia-Pacific and Africa*, (Universal Publishers, Florida, 2013) 28.

²⁹³ Ondili M, 'Eminent Domain: 21,

²⁹⁴ *Saramaka People v Suriname*, Inter-American Court of Human Rights (Ser. C) No. 172.

²⁹⁵ Ondili M, 'Eminent Domain: 21.

²⁹⁶ Hayley Garscia, 'Saramaka People v Suriname' 36 *Loyola of Los Angeles International and Comparative Law Review*, 2014, 2304.

²⁹⁷ Espen Sjaastad Daniel W. Bromley, 'Indigenous Land Rights in Sub-Saharan Africa: Appropriation, Security and Investment Demand' 25(4) *World Development*, 1997, 549-562.

²⁹⁸ *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v. Kenya*, Comm. No. 276/2003.

as identity that is pegged on the land as well as other cultural and religious rights that cannot be fully compensated in purely monetary terms. This leaves the unique differences unattended to and instead subjected to a blanket policy that tramples over the unique rights in community land thus perpetuating the skewed system that took root with the glorification of private ownership.²⁹⁹ These fundamental flaws build up with one statute passing on the burden to another and in the long run leaving these essential land rights unprotected.

3.1.4. Land Registration Act, 2012

The Act³⁰⁰ was enacted as the substantive registration statute for registration of interests in land³⁰¹ repealing previously applicable regimes.³⁰² The Act and other land laws enacted after the promulgation of the constitution have been often critiqued for lacking public participation, done in haste and thus the desired output has been a mirage³⁰³ resulting in lack of acceptance and falling short of the desired result.³⁰⁴ Nonetheless, under the Act, community land rights are registrable³⁰⁵ under the community land register.³⁰⁶ The registrable interests are provided for under the *Community Land Act* albeit vaguely and lacking specificity³⁰⁷ on the unique customary rights.³⁰⁸ Being a registration statute, it carries on the flaws of the substantive statute³⁰⁹ thus weakening the basis for enforcement of such rights³¹⁰ in the process of compulsory acquisition. Without any saving clause or special recognition on registrable community rights, the Act is complicit in the non-distinction of the unique status of community land from private and public land.³¹¹ This lacuna has a domino effect that has a direct impact on the concept of social licence³¹² further eroding its

²⁹⁹ Mitchel Ondili, 'Eminent Domain: 21.

³⁰⁰ *Land Registration Act 2012*.

³⁰¹ Preamble, *Land Registration Act, 2012*.

³⁰² Section 109 as read with the schedule of the *Land Registration Act 2012*, repeals the *The Indian Transfer of Property Act, 1882*, *The Government Lands Act (Cap. 280)*, *The Registration of Titles Act (Cap. 281)*, *The Land Titles Act (Cap. 282)* and *The Registered Land Act (Cap. 300)*.

³⁰³ Manji A, 'The Politics of Land Reform in Kenya 2012' *57 African Studies Review*, (2014), Pp 115-130.

³⁰⁴ Harbeson John W, 'Land and the Quest for a Democratic State in Kenya: Bringing Citizens Back In' *55(1) African Studies Review*, 2012, Pp.15 – 30.

³⁰⁵ Section 3, *Land Registration Act 2012*.

³⁰⁶ Section 8, *Land Registration Act 2012*.

³⁰⁷ Section 8, *Land Registration Act 2012*.

³⁰⁸ Ross Andrew Clarke, 'Securing Communal Land Rights to Achieve Sustainable Development in Sub-Saharan Africa: Critical Analysis and Policy Implications' *5/2 Law, Environment and Development Journal*, 2009, p. 130.

³⁰⁹ Ojienda T, *Land Law and Conveyancing: Principles and Practice* (LawAfrica Publishing, Nairobi 2015).

³¹⁰ Ojienda T, *Principles of Conveyancing in Kenya*: P. 60 -68.

³¹¹ Kameri-Mbote P *et al*, *Ours by Right: Law Politics and Realities of Community Property in Kenya* (Strathmore University Press, 2013) Pp. 17-31; Liz Alden Wily, 'Risks to the Sanctity of Community Lands in Kenya: A Critical Assessment of New Legislation with Reference to Forestlands' *75 Land Use Policy*, 2018, 661 – 672.

³¹² Laurence David, 'The Devolution of the Social Licence to Operate in the Australian Mining Industry' *The Extractive Industries and Society*, 2020, 1.

foundational ground.³¹³ Only mainstream user rights associated with private proprietary rights are given prominence³¹⁴ replicating the provisions of the *Community Land Act*.³¹⁵ This vagueness is detrimental to the realisation of these indigenous rights³¹⁶ which remain ghostly tales incapable of realisation³¹⁷ and precipitating the aggression of local communities which undermines the social licence.³¹⁸ This lacuna also locks out most claims that are not recognised in mainstream user rights for private and public land.

3.1.5. Protection of Traditional Knowledge and Cultural Expressions Act, 2016

The Act was enacted to give effect to Articles 11, 40 and 69(1) (c) of the Constitution³¹⁹ aimed at the protection of the indigenous knowledge and cultural expression of Kenya's indigenous communities³²⁰ which is intricately linked to their land and the environment.³²¹ These resources constitute one of the unique community rights in association with community land³²² and constitute user rights over land³²³ and the surrounding environment.³²⁴ It is at the very heart of the livelihood of these indigenous communities³²⁵ mostly being pastoralists, hunters and gatherers living in arid

³¹³ Meestersa M, Behagel J, 'The Social Licence to Operate: Ambiguities and the neutralization of harm in Mongolia' 53 *Resources Policy*, 2017, 274-282.

³¹⁴ Wily L, 'Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa' Brief #1 of 5 *Rights Resources*, 2012, Pp. 1-80.

³¹⁵ Section 10, *Community Land Act* 2016.

³¹⁶ Matteo D, Francesca, 'Community land in Kenya: Policy Making, social mobilization, and struggle over legal entitlement' London School of Economics and Political Science Department of International Development, Working Paper, 17-185.

³¹⁷ Matteo D, Francesca, 'Community land in Kenya: Policy making, social mobilization and struggle over legal entitlement' London School of Economics and Political Science Department of International Development, Working Paper, 17 – 185.

³¹⁸ Lind, Jeremy, Okenwa D, and Scoones I, *Land, Investment & Politics: Reconfiguring Eastern Africa's Pastoral Drylands*. Boydell & Brewer, 2020; Gebre, Yntiso, Itaru Ohta, and Motoji Matsuda, (eds) *African Virtues in the Pursuit of Conviviality: Exploring Local Solutions in Light of Global Prescriptions*, Mankon, Bamenda: Langaa RPCIG, 2017.

³¹⁹ Preamble, *Protection of Traditional Knowledge and Cultural Expressions Act* 2016.

³²⁰ Fredrick Otswang'o, 'Protecting Traditional Knowledge and Associated Genetic Resources in Kenya: What A Community Needs To Know' 31 *Institute of Economic Affairs*

³²¹ Sammy Muriithi Kaburi, and Kimberly E. Medley, 'Community Perspectives on Fuelwood Resources in East Africa: Enrichment and Extraction along the Eastern Slopes of Mount Kenya' 31(4) *Mountain Research and Development*, 2011, Pp. 315-24; Palmberg-Lerche, Christel, 'Conservation and Management of Forest Genetic Resources' 11(1) *Journal of Tropical Forest Science*, 1999, Pp. 286-302.

³²² Schreckenber K, Awono et al, 'Domesticating Indigenous Fruit Trees as a Contribution to Poverty Reduction' 16 *Forest Trees and Livelihood*, 2006, Pp 35-51.

³²³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* - 276 / 2003.

³²⁴ *Mulungusi Muthembwa Mutunga v Managing Director, Kenya Wildlife Service & 2 others* [2017] eKLR

³²⁵ *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v. Kenya*, Comm. No. 276/2003, Paragraph 6.

and semi-arid areas where oil exploration takes place.³²⁶ Furthermore, these resources are the silver bullets in the fight against climate change³²⁷ and adaptation by the local communities.³²⁸ It is important therefore to note that these resources are not factored as among those to be valued or their access to sustain livelihood taken into account during valuation and compulsory acquisition. There is no integration of the provisions of this Act into the compulsory acquisition regime. Thus, without coordination and recognition of these non-market values, the basis for a social licence is eroded as the community views the project that caused their displacement as desecrating their land and their livelihood.³²⁹

3.1.6. Environmental Management and Coordination Act, 1999

Under Kenya law, most communities enjoy as surface rights in land³³⁰ natural resources below it are held in trust by the government for the people of Kenya. However, the discovery and the commencement of exploitation of such natural resources, does not negate the right to a clean and healthy environment that is guaranteed under the Constitution³³¹ and operationalised by the Act.³³² This is where the social licence by the community comes in which is achieved through inclusivity and participation through environmental and social impact assessment.³³³ This takes into account the interests of the local community. The Land Act does not mention the need for Environmental Impact Assessment during compulsory acquisition.³³⁴ Such impact assessment, apart from being environmental in nature also has links to the heritage of the local community and their non-market value to land. The Act provides that the state is under an obligation to protect indigenous property rights of local communities in respect of biological diversity.³³⁵ This biological diversity is the lifeline of indigenous communities and a key element in the fight against climate change.³³⁶ This understanding brings on board the aspect of Cultural Heritage Impact Assessment i.e. the impact

³²⁶ Naomi Kipuri & Lucas Ole Naikuni, 'Indigenous Peoples' Rights to Lands, Territories and Resources Related to Discrimination in Employment and Occupation: Case Study on Practices of Pastoralism and Hunting-Gathering in Kenya' *Report Prepared for the International Labour Organization*, 2008.

³²⁷ Paragraph 33 of *Simion Swakey Ole Kaapei & 89 others v Commissioner of Lands & 7 others* [2014] eKLR.

³²⁸ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017).

³²⁹ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017); *Daniel Ngotiek Nchui & 3 others v National Oil Corporation of Kenya & another* [2019] eKLR.

³³⁰ Section 111, *Land Act*, 2012; Section 26, *Mining Act*, 2016.

³³¹ Article 42, *Constitution of Kenya*, 2010.

³³² *Environmental Management and Coordination Act No. 8 of 1999*.

³³³ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR.

³³⁴ *Daniel Ngotiek Nchui & 3 others v National Oil Corporation of Kenya & another* [2019] eKLR.

³³⁵ Section 50 (f), *Environmental Management and Coordination Act*, 1999.

³³⁶ Bobadoye A.O., 'Assessing Climate Change Adaptation Strategies among Rural Maasai pastoralist in Kenya' (2016) 4(6) *American Journal of Rural Development* 120 -128.

of compulsory acquisition on the livelihood of indigenous community.³³⁷ This lacuna exposes the non-market heritage value of community land to the vagaries generated by the market-oriented considerations of community land automatically eroding the social licence.

3.1.7. Petroleum Act, 2019

The Act was enacted to govern upstream petroleum activities³³⁸ within Kenya's oil exploration blocks³³⁹ which fall within arid and semi-arid areas of the Republic.³⁴⁰ The Act also provides for access to land for purposes of exploration.³⁴¹ Such access has a direct implication or disruption on the local community or environmental pollution.³⁴² To mitigate such, there is the requirement of social impact assessment³⁴³ aimed at safeguarding the host communities.³⁴⁴ However, there is no mention of the specifications of mapping out community land rights. Furthermore, does not provide for proportionality in weighing the impact to the local community. This lacuna exposes the requirement that has been established as a best practice that the limitation of a right of a community in development projects must be justifiable and strictly proportionate and absolutely necessary for the advantages which follow.³⁴⁵ The Act therefore does not provide for proportionality and reasonability in impact assessment.³⁴⁶

Like the foregoing statutes, even though the *Petroleum Act* recognises community land in its definition section, it does not seed any substantive provisions that protect community land rights. This negates any advantages that may be brought about by the recognition of community land rights. Without the substantive and operational clauses to back the recognition and aspirations, then the respect for human rights and community land rights cannot be achieved.³⁴⁷ The provisions

³³⁷ Wycliffe Oloo & Ibrahim Busolo Namunaba, 'Cultural Heritage Impact Assessment in Kenya' in Herman Kiriama et al (Eds.) *Cultural Heritage Impact Assessment in Kenya* (Centre for Heritage Development in Africa, 2010) Pp. 10 – 27.

³³⁸ Preamble, Section 3, *Petroleum Act* No. 2 of 2019.

³³⁹ *Gazette Notice No. 3344* Dated 10th May 2016, the Cabinet Secretary under the repealed *The Petroleum (Exploration and Production) Act* (Cap. 308) divided Kenya into sixty-three (63) Petroleum Exploration Blocks.

³⁴⁰ Nanok Josephat Koli and Onyango, Christopher Ouma, 'A socio-economic and Environmental Analysis of the Effects of Oil Exploration on the Local Community in Lokichar, Turkana County, Kenya' 6/3 *International Journal of Management, Economics and Social Sciences*, 2017, Pp.144 – 156.

³⁴¹ Section 108, *Petroleum Act* 2019.

³⁴² Section 125, *Petroleum Act* 2019.

³⁴³ Section 75, 86, *Petroleum Act* 2019.

³⁴⁴ Section 75, *Petroleum Act* 2019.

³⁴⁵ *X & Y v Argentina* (1996) Report No. 38/96, Case 10.506 (15 October), Para. 60.

³⁴⁶ *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* (1999) African Commission on Human and Peoples Rights, Comm. Nos. 140/94, 141/94, 145/95, Paragraph 42.

³⁴⁷ Pastoralist Development Network of Kenya - Turkana Chapter, 'Triggering the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) in the Context of Oil Extraction in Kenya's Turkana County; A Case Study' *Food and Agriculture Organisation of the United Nations*, 2018.

for balancing the disruption to culture, livelihood and the complex way of life of the indigenous communities and the alternatives that are viable for the protection of indigenous rights is crucial but are not provided for. From the benefit of hindsight, it is now known that the entire livelihood of these indigenous communities that occupy community lands can be shattered and their social and political economy that has sustained them for eons lost.³⁴⁸ As such, the Act does not take any affirmative steps towards achieving the concept of social licence or securing community land rights substantively. This creates a scenario for the repeat of the injustices against the *Endorois* and the *Ogiek People* as enumerated by the respective cases.

3.2. Regional Legal and Policy Framework

The concept of community land is a phenomenon that is common across the African continent where communities from time immemorial were governed by their native customs. With the advent of colonialism, these native customs were dismantled and replaced with a formal regime of land ownership with premium on land ownership. Africa was also divided into separate political entities that transcend communities and ecosystems. In some instances, communities that transcend two political boundaries occupy common land and way of custom. This phenomenon brings to fore the concept of regional protection of community land across political boundaries.

3.2.1. The Treaty for the Establishment of the East African Community

The Treaty under Article 112 provides for the protection of transboundary natural resources including land. Further, Article 114 underscores the broad topic of management of natural resources. More particularly, the treaty advocates for cooperation and joint effort in mining and exploration for mineral resources. However, there has been no translation of these aspirations and embodiments into policy, law or other binding instruments of implementation. In that regard, even though there are indigenous communities within East Africa that transcend political boundaries such as the Maasai that inhabit the lands between Kenya and Tanzania, there is no legal and policy framework that has been formulated to give effect to the provisions. The Treaty only provides for the protection of indigenous technologies and indigenous entrepreneurs but does not extend to protection of indigenous communities. This is despite the fact the communal land tenure is still an

³⁴⁸ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017).

abundant legal and social question in East Africa.³⁴⁹ In essence the Treaty does not make any provision of the rights of indigenous people over community land despite most land in Africa being unregistered community land.³⁵⁰

3.2.2. African Convention on the Conservation of Nature and Natural Resources (Algiers Convention)

Environmental protection and protection of indigeneity in Africa dates back centuries with the advent of colonialism.³⁵¹ The Algiers Convention was adopted as³⁵² the first convention to be independently negotiated by the independent African countries and replaced the London Convention of 1933.³⁵³ It has specific provision on protection of lands that are used for mining or other non-agricultural uses. It provides for the protection of such lands by putting in place measures that prevent the degradation of the land.³⁵⁴ These lands as established in this study, happen to be mostly community land. Further, the Convention requires states to put in place measures and policies to facilitate conservation in mining among other endeavours while taking into account the rights of local communities.³⁵⁵

Kenya acceded to the Convention and thus forms part of the laws of Kenya by dint of Article 2 (6) of the *Constitution of Kenya*, 2010. In that regard, Kenya is under an obligation to put in place measures to ensure that the rights of the local communities where extractive activities are undertaken are well taken care of. So far, from the analysis of the foregoing domestic statutes and legislation, the standard of implementation and mapping out of these community rights is wanting thus hampering their protection.

³⁴⁹ Mugerwa, P. J. Nkambo 'Land Tenure in East Africa - Some Contrasts' 12 *International and Comparative Law Quarterly Supplementary Publication*, 1966, Pp. 101-114.

³⁵⁰ Liz Alden Willy, Estimating National Percentages of Indigenous and Community Lands: Methods and Findings for Africa, *Land Mark: The Global Platform of Indigenous and Community Lands*, 2015 PP. 17.

³⁵¹ Bolanle T. Erinosh, 'The Revised African Convention on the Conservation of Nature and Natural Resources: Prospects for a Comprehensive Treaty for the Management of Africa's Natural Resources', 21 (3) *African Journal of International and Comparative Law*, 2013, Pp. 378-397.

³⁵² *African Convention on the Conservation of Nature and Natural Resources*, adopted in Algiers Algeria on 15 September 1968 and entered into force on 16 June 1969.

³⁵³ *Convention Relative to the Preservation of Fauna and Flora in their Natural State*, adopted on 8 November, 1933 and came into force on 14 January, 1936 (*Algiers Convention*, 1933).

³⁵⁴ Article VI (3) (c), *Algiers Convention*, 1933.

³⁵⁵ Article VI (4), *Algiers Convention*, 1933.

3.3. International Legal and Policy Framework

In Kenya, the principles of international law are applicable³⁵⁶ with several schools of thought contending whether Kenya is a monist or dualist state.³⁵⁷ That notwithstanding, the applicability of the various principles of international law in Kenya is not in doubt more so on protection of indigenous rights.³⁵⁸

3.3.1. *United Nations Declaration on the Rights of Indigenous Peoples*

The declaration is a key instrument in the protection of the rights of indigenous communities.³⁵⁹ It advocates for protection of various individual and community/indigenous rights.³⁶⁰ Article 10 protects indigenous communities from forcible removal, employ free prior informed consent and given the option to return. This is an expanded approach of dealing with rights that are not in Kenya's national legislation.³⁶¹ Article 26 (3) obligates states to put in place measures for the protection of indigenous rights. The *Endorois Case*³⁶² in applying the declaration noted that Article 13 obligates the member states to protect sacred places of indigenous communities and guaranteeing access.³⁶³ This extends to the protection and survival of such rights.³⁶⁴

3.3.2. *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*

The year 1993 was celebrated as the United Nations international year for the world's indigenous peoples and in that regard, the Nine Tribes of Mataatua in the Bay of Plenty Region of Aotearoa New Zealand convened the First International Conference on the Cultural and Intellectual Property

³⁵⁶ Oduor M, 'The Status of International Law in Kenya' 2(2) *Africa Nazarene University Law Journal*, 2014, 97.

³⁵⁷ Mutubwa W, 'Monism or Dualism: The Dilemma in the Application of International Agreements under the South African Constitution' 3(1) *Journal of Conflict Management and Sustainable Development*, 2019, 27; Kabau, Tom, and Chege Njoroge 'The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System' 44 (3) *The Comparative and International Law Journal of Southern Africa*, 2011, Pp. 293–310.

³⁵⁸ Orago N, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' 13 *African Human Rights Law Journal*, 2014, Pp. 415 – 440.

³⁵⁹ Joffe P, 'UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation' 26 *National Journal of Constitutional Law*, 2008, 120.

³⁶⁰ Barnabas S, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law' 6 *International Human Rights Law Review*, 2017, 29.

³⁶¹ United Nations Human Rights Office of the High Commissioner, Indigenous Peoples and the United Nations Human Rights System, Fact Sheet No. 9/Rev.2, 2013.

³⁶² *African Commission on Human and Peoples' Rights v. Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017), (Ogiek Case) Paragraph 83.

³⁶³ *Ogiek Case*, Paragraph 84.

³⁶⁴ *Alexkor Ltd v Richtersveld Community*, Constitutional Court of South Africa, CCT 19/03, (2003).

Rights of Indigenous Peoples that happened between 12th and 18th June 1993.³⁶⁵ Article 2.10 of the Declaration³⁶⁶ provides that countries should prioritise settlement of any outstanding land and natural resources claims of indigenous peoples for the purpose of promoting customary, agricultural and marine production. The issue of re-acquisition of community land lost is also hinted in the Declaration under Article 1.5. Even though not a binding declaration, the Declaration gives insights on the unique bundle of rights and claims that the indigenous communities have over customary land.³⁶⁷ In Kenya, the aspirations of this Declaration in relation to land has not been embodied in the *Community Land Act* and other land legislations. This generally does not reflect the clamour by indigenous communities to better protect their rights and secure them in legislation and principles that guarantee their tenure.³⁶⁸

3.3.3. International Labour Organization Convention 169 (the Indigenous and Tribal Peoples Convention)

The Convention is one of the lesser known instruments on the protection of indigenous people.³⁶⁹ It was formulated to improve the living conditions of indigenous people globally.³⁷⁰ Under Article 13, governments are under an obligation to respect the unique relationship between indigenous people and their land. On compulsory acquisition, Article 16 provides that it can only be done if there is free and informed consent and with just and fair compensation and an option of return. On further safeguarding community land rights, criminal sanction or penalty is recommended under Article 18 which provides that member states shall provide for adequate penalties for intrusion of land that is occupied or held by indigenous people. The provisions herein stated in summary, offer a stark contrast to the general and global terms that are employed in the Kenyan *Community Land Act* and other land laws. The lack of particularisation of these indigenous land rights in the

³⁶⁵ Patrick J O'Keefe, 'First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples' 4 *International Journal of Cultural Property*, 1995, 382; Blakeney, Michael, 'Communal Intellectual Property Rights of Indigenous Peoples in Cultural Expressions' 1 (6) *Journal of World Intellectual Property*, 1998, Pp. 985-1002.

³⁶⁶ *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, June 1993; First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, Whakatane, 12-18 June 1993, Aotearoa, New Zealand.

³⁶⁷ Mead, H. M. 'The Mataatua Declaration and the Case of the Carved Meeting House Mataatua' *University of British Columbia Law Review*, 1995, Pp. 69-76.

³⁶⁸ Jones, Peter W, 'Indigenous Peoples and Intellectual Property Rights' 4 (2) *Waikato Law Review*, 1996, p. 117-140.

³⁶⁹ Peter Bille Larsena and Jérémie Gilbertb, 'Indigenous Rights and ILO Convention 169: Learning from the Past and Challenging the Future' 24 (2-3) *The International Journal of Human Rights*, 2020, Pp. 83 – 93.

³⁷⁰ Swepston, Lee, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989' 15 (3) *Oklahoma City University Law Review*, 1990 Pp. 696-710.

domestic legislation hampers the bid to realise the constitutional aspiration of protection of indigenous land rights and community-based land claims. In essence, it seeks to balance the competing interests and minimising conflict and abuse of these rights seeding social licence.

3.4. Conclusion

In conclusion, it is evident from the analysis herein that the fragmented nature of the law on land and the extractive industry, coupled with the lack of coordination, has taken a toll on community land rights. The lack of co-ordination has stifled the development of these community land rights despite their proclamation under the *Constitution of Kenya, 2010*. The answer to whether the overhaul of land legislation on the year 2012 has had a positive impact is therefore in the negative. Further, the approach to legislation on community land and the attendant land rights has been a top-down approach which has made legitimacy of such laws wanting.³⁷¹ The analysis herein has shown that due to political expediency, the land law reform bore no much fruit as the process was rushed through to beat constitutional timelines and thus there was no time for debate and proper public participation. All these, do not represent the long-term aspirations embodied in the Vision 2030 blue print that recognises the economic, aesthetic and cultural/traditional value of land.³⁷² It can be deduced from the study that the long-term health of tenure rights especially community land tenure lies in the recognition and particularisation of rights with certainty so as to tame the creeping culture of censoriousness mostly through administrative fiat. Without such recognition, the finding in chapter two that there is a direct correlation between the recognition of non-market values to land and a healthy social licence stands. In absence of this recognition therefore, the foundations of the concept of social licence which is parasitic on the recognition of non-market values is eroded and the desired result negated.

³⁷¹ Kamau C, *Principles of Constitutional Law: An Introduction to the Constitution of Kenya with Cases and Materials*, LawAfrica Publishing, Nairobi, 2014, Pp. 1-2.

³⁷² Republic of Kenya, *Vision 2030 Strategy for National Transformations: Accelerating Equitable Economic and Social Development for a Prosperous Kenya*, 2007, Nairobi, Government Printer.

CHAPTER FOUR

COMPARATIVE JURISPRUDENCE

4. Introduction

The foregoing chapter sought to analyse the law relating to community land in Kenya and how it secures the rights of indigenous communities in entrenching among other things, non-market considerations. From the study, it emerged that the Kenyan legal, policy and legislative framework lacks specificity on what constitutes community land rights. In essence, the community land rights are not mapped out. It therefore answered in the negative the question whether Kenya has recognised non-market values to community land as means of entrenching the social licence. Therefore, the aim of this chapter is to analyse the legal, policy and regulatory framework that have been developed and adopted by some of the key regional and international judicial agencies such as the African Commission on Human and Peoples Rights, African Court of Human Rights, Inter-American Court of Human Rights and the Canadian Supreme Court. It seeks to answer the question and objective of identifying the global best practices for protection of community land. This will form the basis for reform recommendations under chapter five. The choice of comparative jurisprudence herein is informed by the nature of the rights under study i.e. counter-majoritarian rights which are best developed by courts and regional judicial organs when they adjudicate on minority rights and adopt a counter-majoritarian approach.³⁷³

4.1. African Commission of Human and Peoples Rights

The Commission is a *quasi-judicial* body with the responsibility of protecting and promoting human and peoples' rights as well as the interpretation of the African Charter³⁷⁴ and adjudicating on its infringement.³⁷⁵ Some of its decisions touch on minority indigenous land rights.³⁷⁶ These decisions have had varied levels of success.³⁷⁷ Notable decisions include the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois*

³⁷³ See, *The State v T. Makwanyane & another* [1995] (3) S.A. 391 CC.

³⁷⁴ Article 30, *African (Banjul) Charter on Human and Peoples' Rights*, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

³⁷⁵ Odinkalu C, 'African Commission on Human and Peoples' Rights: Recent Cases' 1 *Human Rights Law Review*, 2001, 97.

³⁷⁶ Murray R, 'African Commission on Human and Peoples' Rights' 13 *South African Journal on Human Rights*, 1997, 666.

³⁷⁷ Odinkalu C, 'Analysis of Paralysis or Paralysis by Analysis – Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights' 23 *Human Rights Quarterly*, 2001, 327

Welfare Council v Kenya (the Endorois Case),³⁷⁸ is one such key decision on aboriginal and *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria, (the Ogoni case)*,³⁷⁹ all touching on indigenous rights. They centre on the rights of indigenous communities, their environmental right and protection of livelihood and their indigenous uses of land.

4.1.1. *The Endorois Case, 2009*

The complaints presented by the Endorois people before the African Commission is indicative of the injustice that was meted against them by the independence government and the ensuing mistrust that shows the lack of the social licence to operate.³⁸⁰ The complaints were that they were displaced from their ancestral lands without compensation for the loss of property, their pastoral enterprise, denial of the right to practice their culture and their religion as well as denial of the right to development, without prior consultations and adequate and effective compensation.³⁸¹ More so considering that their livelihood was intricately linked to their land and thus they lost green pasture, medicinal salt licks among other uses that were integral in raising healthy cattle, an integral component of their livelihood.³⁸² The grounds around Lake Bogoria also formed their historical prayer sites, places of circumcision rituals and other cultural ceremonies.³⁸³ All these grievances by the Endorois people are the non-economic aspects or value of community land that is not easily quantifiable. At the heart of the controversy were broken promises.³⁸⁴

In deciding the case, the Commission mapped out the specific non-market elements³⁸⁵ i.e. the unfettered access to their cultural and religious sites according to their religious beliefs.³⁸⁶ It also called for proportionality between indigenous rights and legitimate state aim.³⁸⁷ The restrictions

³⁷⁸ *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v The Republic of Kenya*, Communication 276/2003.

³⁷⁹ *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, (the Ogoni case), African Commission on Human and Peoples' Rights, Comm. No. 155/96, (2001).

³⁸⁰ Hanri Mostert & Heleen Van Niekerk, 'Disadvantage, Fairness, Power Crisis in Africa: A Focused Look at Energy Justice' in Yinka Omorogbe & Ada Okoye Ordor (Eds.), *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (Oxford University Press, London 2008) p. 68.

³⁸¹ *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v The Republic of Kenya*, Communication 276/2003, Paragraph 1 – 21.

³⁸² *Endorois Case*, Paragraph 5.

³⁸³ *Endorois Case*, Paragraph 5.

³⁸⁴ *Endorois Case*, Paragraph 5 – 21.

³⁸⁵ Karin Lehmann, 'Aboriginal Title, Indigenous Rights and the Right to Culture' 20 *South African Journal on Human Rights*, 2004, 86; *Amnesty International and Others v. Sudan*, (1999) African Commission on Human and Peoples' Rights, comm No. 48/90, 50/91, 52/91, 89/93.

³⁸⁶ *Endorois Case*, Paragraph 81.

³⁸⁷ *Endorois Case*, Paragraph 119.

imposed should be proportionate to the legitimate public interest or goal³⁸⁸ while giving the indigenous community the right to control their own resources.³⁸⁹ Consultation and involvement is often a sure way of cementing social licence though the delimitation and respect for various competing rights.³⁹⁰ In some instances, positive discrimination and affirmative action are necessary in safeguarding these rights and addressing imbalances and in the cultivation of the social licence.³⁹¹ In doing all these, the delimitation of proprietary status is key in achieving the desired result³⁹² as such registration balances the competing interests and safeguards indigenous rights.³⁹³ This distinction shows the unique nature of community land and the high threshold that must be attained to justify compulsory alienation or encroachment into indigenous or community land.³⁹⁴ This translates to a higher threshold and standard in attaining or achieving the desired social licence to operate. The African commission noting the feeling of disenfranchisement of the Endorois People, suggested that if the indigenous community had been consulted, adequate participation undertaken and free, prior informed consent obtained, then social licence would have been birthed.³⁹⁵

4.1.2. The Ogoni Case, 2001

The Ogoni, an indigenous community in southeast Nigeria³⁹⁶ file the communication alleging violation of Article 14 of the African Charter.³⁹⁷ They decried the lack of participation in decision making and sought protection from the damaging acts of third parties.³⁹⁸ The element of Free Prior and Informed Consent (FPIC) in relation to extractive activities in lands that are occupied by indigenous communities was extensively analysed.³⁹⁹ In that regard, the gist of the Ogoni decision by the African Commission was that in order to comply with the spirit and the dictates of Articles

³⁸⁸ See, *Report of the African Commission's Working Group of Experts* (2005) Adopted by The African Commission on Human and Peoples' Rights at its 28th Ordinary Session, P. 20.

³⁸⁹ *Endorois Case*, Paragraph 129.

³⁹⁰ *Apirana Mahuika et al v New Zealand*, Comm No. 574/1993

³⁹¹ *Endorois Case*, Paragraph 196, 197; *Connors v The United Kingdom*, ECHR, 27 May 2004 (App No 66746/01).

³⁹² *Endorois Case*, Paragraph 204; Articles 8(2)(b), 10, 25, 26 and 27, *United Nations Declaration on the Rights of Indigenous Peoples*, Resolution adopted by the General Assembly on 13 September 2007.

³⁹³ See, Article 14, *African (Banjul) Charter on Human and Peoples' Rights*, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

³⁹⁴ *Endorois Case*, Paragraph 212.

³⁹⁵ *Endorois Case*, Paragraph 297.

³⁹⁶ Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' 52(03) *International and Comparative Law Quarterly*, 2003, 749 – 760.

³⁹⁷ *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* 155/96.

³⁹⁸ *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, Communication 74/92.

³⁹⁹ Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' 10 *Northwestern University Journal of International Human Rights*, 2011, 54.

16 and 24 of the Banjul Charter, on the right to a clean and healthy environment, the government must take steps to realise the right through sound scientific, legal and social tools.⁴⁰⁰ Like the rest of the indigenous communities under study herein, the people of Ogoni rely heavily on their land for survival⁴⁰¹ and the government of Nigeria was faulted for failing to put in place protective measures.⁴⁰² These circumstances, politics and grievances illustrate the ugly face of a project or extractive excursion that lacks social licence.⁴⁰³ They include lack of adequate consultation seeding the political instability and lack of social licence.⁴⁰⁴ This phenomenon is illustrated by other domestic cases.⁴⁰⁵ It lends the analysis that lack of good faith consultation erodes the social licence,⁴⁰⁶ a providential warning on the need for political goodwill and participation of indigenous people in projects.⁴⁰⁷

4.2. African Court of Human and Peoples' Rights

The Court is established under Article 2 and governed by the protocol to the Statute of the African Court of Justice and Human Rights itself and performs both judicial and advisory functions.⁴⁰⁸ It provides an avenue for the protection of rights from the adverse actions of states⁴⁰⁹ through adjudication and enforcement of rights.⁴¹⁰ Since its establishment, the Court has adjudicated on

⁴⁰⁰ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, African Commission on Human and Peoples Rights, Paragraph 53.

⁴⁰¹ Chinedu Reginald Ezetah, 'International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma' 19 *Loyola of Los Angeles International and Comparative Law Journal*, 1997, 811.

⁴⁰² *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, African Commission on Human and Peoples Rights,

⁴⁰³ Anna Zalik, 'The Niger Delta: 'Petro Violence' and 'Partnership Development'' 31 *Review of African Political Economy*, 2004, Pp. 401-424.

⁴⁰⁴ James-Eluyode J, 'The Blurred Lines: Analyzing the Dynamics of States' Duty and Corporate Responsibility to Consult in Developing Countries' 23/3 *African Journal of International and Comparative Law*, 2015, 405.

⁴⁰⁵ See, *Wiwa v Royal Dutch Petroleum*, No. 96 CIV. 8386 (S.D.N.Y. Nov. 1996); *Wiwa v Brian Anderson*, Case 1:01-CV-01909-KMW-HBP (S.D.N.Y. March 2001); *Wiwa v Shell Petroleum Development*, No. 04 CIV. 2665 (S.D.N.Y. April, 2004).

⁴⁰⁶ Anaya J, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedom of Indigenous Peoples*, A/HRC/12/34, 15 July 2009; Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law', 10 *Northwest University Journal International Human Rights* 2011, 54.

⁴⁰⁷ Osogo Ambani (Ed), *Drilling past the resource curse?* (2018).

⁴⁰⁸ Articles 29 & 53, *Protocol on the African Court of Justice and Human Rights* on 1 July, 2008 at the 11th General Assembly of the AU in Sharm El-Sheikh, Egypt.

⁴⁰⁹ Orlu N, 'Toward an African Court of Human Rights: Structuring and the Court' 6 *Annual Survey of International & Comparative Law*, 2000, 27.

⁴¹⁰ Elise G Nalbandian, 'The Challenges Facing African Court of Human and Peoples' Rights' 1 *Mizan Law Review*, 2007, 75.

the indigenous land rights in the *Ogiek Case*.⁴¹¹ The salient features of the determination as detailed below.

4.2.1. *The Ogiek Case (Merits), 2017*

The case herein resulted from the actions of the Kenyan government to evict the Ogiek from the Mau forest on ground that the land was a catchment area.⁴¹² They alleged that the government had failed to take into account that the forest constitutes and was intricately linked to their livelihood and decried not being consulted thus terming the eviction as perpetration of historical injustices.⁴¹³ This grievance informed one of the prayers before the Court for the restitution of Ogiek land and adoption of laws towards its protection through well informed consultations.⁴¹⁴ They also sought to benefit from the activities carried on within what they averred was their indigenous land.⁴¹⁵ The court in further underscoring the unique nature of indigenous rights and their role in environmental protection noted that there was no evidence that any of the practices of the Ogiek was detrimental to the environment.⁴¹⁶

This case illustrated to a great extent the need to recognise, map out and give effect to community land rights and title to indigenous land as a way of protecting or giving a means of protecting livelihoods of indigenous communities who depend on the land in line with the principle of proportionality.⁴¹⁷ It thus made a finding of violation of Article 22 of the Banjul Charter that the evictions were done without participation or consultation.⁴¹⁸ The sum effect of the decision of the Court stresses on the need for recognition of indigenous title as a basis for protection of indigenous rights to land. The Court also emphasises on the need for proportionality by the host states in pursuing development projects in indigenous lands. From the case, it is evident that the African Charter will lean towards the protection of indigenous rights and culture. This in turn creates some semblance of acceptance of the extractive or infrastructure project and thus seeding the social licence to operate.

⁴¹¹ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, ACtHPR, No. 006/2012 (2017).

⁴¹² Paragraphs, 7 & 8, *Ogiek Case (Merits)*, 2017.

⁴¹³ Paragraph 8, *Ogiek Case (Merits)*, 2017.

⁴¹⁴ Paragraph 43 (E) (i), *Ogiek Case (Merits)*, 2017.

⁴¹⁵ Paragraph 43 (E) (ii), *Ogiek Case (Merits)*, 2017.

⁴¹⁶ Paragraph 130 & 131, *Ogiek Case (Merits)*, 2017.

⁴¹⁷ Paragraph 141, 148 & 149, *Ogiek Case (Merits)*, 2017.

⁴¹⁸ Paragraph 208 - 210, *Ogiek Case (Merits)*, 2017.

4.3. Inter-American Court of Human Rights

The court is established under Article 33 of the American Convention on Human Rights⁴¹⁹ and is one of the three global regional human rights bodies.⁴²⁰ Since its inception, it has made decisions geared towards the protection of indigenous rights.⁴²¹ Notable cases under analysis herein revolve around the violation of indigenous rights in the state of Suriname and the cases filed in that regard by the Saramaka People and the People of Lokono & Likono being indigenous people within the territory of Suriname.⁴²²

4.3.1. *Saramaka People v Suriname, 2007*

This case illustrates the negative effects that arise when the rights of indigenous communities are not protected.⁴²³ The case challenged the grant of logging and mining concessions to third parties and the failure of the state of Suriname to recognise the right to communal ownership of property by the people of Saramaka among other allegations of infringement of the Charter. The Court made a determination that the lack of recognition of indigenous peoples places them in a precarious situation where individual property rights may trump over community land rights.⁴²⁴ This shortcoming falls short of the internationally recognised norms and found that in order to adequately protect community land rights, the state must provide and grant protection to title to indigenous community land. The court also made a finding that mining and logging concessions were granted to third parties without participation or the involvement of the people of Saramaka.⁴²⁵ Further, the Court also noted that the people of Saramaka did not need title in order to own the land but possession and utility of the same was sufficient under the American Charter to merit recognition and protection of the Court.⁴²⁶ In its finding on title, the Court directed the state of

⁴¹⁹ Articles 33 - 43, *American Convention on Human Rights*: "Pact of San José, Costa Rica". Signed at San José, Costa Rica, on 22 November 1969.

⁴²⁰ Askin K, 'Issues Surrounding the Creation of a Regional Human Rights System for the Asia-Pacific' 4 *ILSA Journal of International & Comparative Law*, 1998, 599.

⁴²¹ Jeanice L. Koorndijk, 'Judgements of the Inter-American Court of Human Rights Concerning Indigenous and Tribal Land Rights in Suriname: New Approaches to Stimulating Full Compliance' 23(10) *The International Journal of Human Rights*, 2019, 1615-1647.

⁴²² Binder C, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' 12 *German Law Journal*, 2011, 1203.

⁴²³ Brunner L, 'The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights' 7 *Chinese Journal of International Law*, 2008, 699.

⁴²⁴ Marcos A. Orellana, 'Saramaka People v. Suriname' 102 *American Journal of International Law*, 2008, 841.

⁴²⁵ *Saramaka People v Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Set. C., No. 185 (12 August 2008).

⁴²⁶ Paragraph 77 & 89, *Saramaka People v Suriname*, Preliminary objections, merits, reparations and costs, IACHR Series C no 172, IHRL 3046 (IACHR 2007), 28th November 2007.

Suriname to delimit, demarcate and grant collective title over the territory in question to the people of Saramaka in accordance with the customary laws and duly informed consultations.⁴²⁷ This finding and directive demonstrates the unique nature of indigenous/community title of indigenous communities and the extent in which the same should be shielded from other forms of land ownership as a way of creating or seeding the foundation of the social licence.⁴²⁸

4.3.2. Case of the *Kaliña and Lokono Peoples v Suriname*, 2015

This case made a finding that the Kaliña and Lokono people had a protected right to own property as a legally protected indigenous community.⁴²⁹ They alleged that mining in their territory negatively impacting their livelihoods.⁴³⁰ The Court directed the state of Suriname to demarcate and grant title to indigenous land and rehabilitate the damage caused by bauxite mining.⁴³¹ The Court also dispelled the notion that the activities of indigenous communities have a negative impact on the environment but rather the protection of the rights could be beneficial to the environment⁴³² and thus need for complementary rather than exclusionary.⁴³³ It also noted that public and effective participation, access and use of traditional territories and possibility of receiving benefits from conservation or economic activity are key elements in achieving compatibility and harmonising the competing or seemingly competing rights.⁴³⁴

From the analysis and determination of the Court it is evident that the traditional practices of indigenous communities that contribute to the sustainable care and protection of the environment should be maintained.⁴³⁵ This conclusion is in itself a recognition of the unique status of indigenous land rights and indigenous land tenure that need protection *sui generis* independent from the mainstream land tenure systems with the land user rights mapped out in order to build on the social licence.

⁴²⁷ Paragraph 194(b), *Saramaka People v Suriname*, 2007.

⁴²⁸ Joel Gehman *et al*, 'Social license to operate: Legitimacy by another name?' 60/2 *New Frontiers*, 2017, 293 – 317.

⁴²⁹ Lixinski L, 'Case of the Kalina and Lokono Peoples v Suriname' 111 *American Journal of International Law*, 2017, 147.

⁴³⁰ *The Kalina and Lokono Peoples v. Suriname*, Case 198-07, Report No. 76/07, Inter-Am.C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2007), 2015.

⁴³¹ Paragraph 88 -93, *The Kalina and Lokono Peoples v. Suriname*, 2015.

⁴³² Paragraph 173, *The Kalina and Lokono Peoples v. Suriname*, 2015.

⁴³³ International Union for Conservation of Nature and WWF-International, *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Cases Studies*. IUCN, Gland, Switzerland, and Cambridge, UK, and WWF International, Gland, Switzerland, Principle 1.

⁴³⁴ Paragraph 181, *The Kalina and Lokono Peoples v. Suriname*, 2015.

⁴³⁵ Paragraph 181, *The Kalina and Lokono Peoples v Suriname*, 2015.

4.4. Supreme Court of Canada

Canada has specific constitutional provisions and legislation on the protection of aboriginal people, their rights and their livelihood⁴³⁶ and hold a special category of legally enforceable rights⁴³⁷ and handled by the Ministry of Indian Affairs and Northern Development.⁴³⁸ This sub-section will thus analyse the notable cases by the Supreme Court of Canada on protection of aboriginal rights. With this special recognition and the extended protection of aboriginal rights and people, emerges the concept of the social licence as discussed as herein under.

4.4.1. *Tsilhqot'in Nation v British Columbia, 2014*

The facts leading to the case were that the government of British Columbia in the year 1983, granted commercial logging licences to third parties i.e. Carrier Lumber Ltd on land that the Tsilhqot'in nation consider to be part of their traditional territories.⁴³⁹ The Tsilhqot'in people thus sought a declaration prohibiting commercial logging in their land they considered as comprising their territory.⁴⁴⁰ They sought to assert their aboriginal title.⁴⁴¹ The finding thus served as a milestone in the recognition of indigenous rights.⁴⁴² It took into account both aboriginal and common law standard⁴⁴³ more so in exclusive, continuous and sufficient possession as proof of title.⁴⁴⁴ From the decision of the Court on the manner of determining the aboriginal title, the requirement that the aboriginal and the common law standard be taken into account speaks to social licence.⁴⁴⁵ It sought to create a link with the concept of the social rights to operate.⁴⁴⁶ The established requirement to consult in these development agendas further inculcate and cement the culture of the social licence further cemented by the mapped out aboriginal rights such as those recognised in the Tsilhqot'in case in relation to cedar. The existence of a catalogue of these

⁴³⁶ Section 35 (2), *Constitution Act*, 1982.

⁴³⁷ Benedicy C.G, 'The status and rights of indigenous peoples in Canada' in Bernhardt R, *Encyclopedia of Public International Law*, 2, Amsterdam, 1995, 405-442.

⁴³⁸ *Department of Indian Affairs and Northern Development Act* (R.S.C., 1985, c. I-6).

⁴³⁹ *Tsilhqot'in Nation v British Columbia* 2S. C.R. (2014).

⁴⁴⁰ *Ibid.*

⁴⁴¹ Ruru J, 'Lenses of Comparison across Continents: Understanding Modern Aboriginal Title in Tsilhqot'in Nation and Ngati Apa' 48 *UBC Law Review*, 2015, 903.

⁴⁴² *Ibid.*

⁴⁴³ *R v Marshall; R v Bernard* [2005] 2 SCR 220, 247 [58]-[59].

⁴⁴⁴ *Tsilhqot'in Nation v British Columbia* [2014] 2S.C.R. 257.

⁴⁴⁵ Kristen Van De Biezenbos, 'The Rebirth of Social Licence' 14/2 *McGill Journal of Sustainable Development Law*, 157.

⁴⁴⁶ Wyatt S, 'Aboriginal people and forestry companies in Canada: Possibilities and pitfalls of an informal 'social licence' in a contested environment' 89 *Forestry: An International Journal of Forest Research*, 2016, 565 – 576.

aboriginal rights paves the way for better protection and recognition in the negotiation process thus birthing the desired social licence in the long run.⁴⁴⁷

4.4.2. *Haida Nation v British Columbia, 2004*

This case was triggered by the decision of the government of the province of British Columbia to grant to a third party a licence to harvest trees in the area of Haida Gwaii. These concessions were later replaced and transferred. The case made its way to the Supreme Court.⁴⁴⁸ What came up for determination before the Supreme Court therefore was whether the government was required to consult the Haida People about the decisions to harvest the forests and to accommodate them on their claim to the aboriginal title.⁴⁴⁹ The Supreme Court held that the government had a strict duty to consult and accommodate any concern of Aboriginal communities⁴⁵⁰ even in instances where Aboriginal title that has not been proven. In relation to Weyerhaeuser Company Limited, the Court held that the government was legally responsible for its interactions and operations that affected Aboriginal interests.⁴⁵¹ Consequently, the procedures in the industry was key in guaranteeing that the interests of the indigenous people are taken into account and thus the creation or the nurturing of the social licence necessary for conflict resolution and sustainable exploitation and utilisation of natural resources.⁴⁵²

4.5. Conclusion

At the start, this chapter indicated that it sought to deduce from comparative jurisprudence the nature of rights and importance attached to indigenous and community land rights. The comparative experience herein shows some cross-cutting salient features and considerations that surround indigenous rights, the social licence and the exploitation of resources within their territory. They include the rights to development, right to consultation and ideal public participation, respect for indigenous rights, inclusivity and the need to preserve the very essence or survival of indigenous communities. It can further be concluded that indigenous communities depend entirely on their ancestral land for their survival and that in cases where sovereign

⁴⁴⁷Brian Slattery, 'What Are Aboriginal Rights?' 3/2 *CLPE Research Paper*, 2007, 1.

⁴⁴⁸ *Haida Nation v British Columbia (Minister of Forests)* [2002] 99 B.C.L.R. (3d) 209.

⁴⁴⁹ *Haida Nation v British Columbia (Minister of Forests)* 2 C.N.L.R. (2002), 519.

⁴⁵⁰ *Haida Nation v British Columbia (Minister of Forests)* [2004] 99 S.C.R. 532.

⁴⁵¹ *Haida Nation v British Columbia (Minister of Forests)* 99 S.C.R. (2004).

⁴⁵² Darrell W. Podowski *et al*, 'The Global Natural Dispute Resolution Centre and a Practical Guide to its Draft Rules' in Cory H. Kent *et al* (Eds), *Social License and Dispute Resolution in the Extractive Industries* (Koninklijke Brill NV, Leiden, 2021) P. 44.

governments are faced with the challenge of balancing developments of infrastructure projects and extractive excursions that impact on indigenous rights, the least form of disturbance or inconvenience should be occasioned to indigenous communities. Lastly, the need for demarcation of community land the requirement for consultation and participation of indigenous communities in extractive and infrastructure projects is indicative of the building blocks necessary for building social licence.



CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5. Introduction

Chapter four above sought to deduce the comparative jurisprudence and experience from other key judicial and administrative agencies across the globe and analyse how respect for such rights translates to social licence.⁴⁵³ The chapter sought to bring out the industry best practices which are best view through a counter-majoritarian lenses. It has emerged that indigenous land rights takes precedence over extractive and infrastructure interests or public concern⁴⁵⁴ thus introducing the proportionality test.⁴⁵⁵ This requires infrastructure projects to explore alternatives that do not negatively impact indigenous rights.⁴⁵⁶ This is evident from the findings of the *Endorois* and *Ogiek Cases*⁴⁵⁷ and shows the danger posed to other pastoral and hunter gatherer communities⁴⁵⁸ in the wake of discovery of hydrocarbons within their territory in commercially viable quantities. The aim of this chapter therefore, is to serve as a summary of the findings of this research paper and from the identified gaps, recommend from the comparative experience and jurisprudence the appropriate method of remedying the shortcomings. It will also link the hypotheses of the research to the final findings of the research in order to prove or disprove it.

5.1. Conclusion

The main finding of the study is that the Kenyan legal framework does not provide for the effective mapping out of indigenous land rights or guarantee such rights a special status. Further, it does not take into account the doctrine of proportionality and precedence of indigenous land rights over development or infrastructure projects. With this lacuna, there flows from it a consistent neglect of indigenous rights and community land rights which are thrown by the wayside and prominence given to private land ownership. The laws obtaining in Kenya fall short of specifically identifying

⁴⁵³ Almeida Campana, D. X., 'The Social Licence to Operate in the Context of Mining Projects and Indigenous Peoples: Is it Sufficient Just to comply with the Law?' (Unpublished master's thesis), 2019, University of Calgary, Calgary, AB.

⁴⁵⁴ Katja Göcke, 'Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level', 5(1) *Goettingen Journal of International Law*, 2013, 87 – 154.

⁴⁵⁵ Rationale in *Ogiek Case (Merits)*, 2017; *Endorois Case*, 2009; *Ogoni Case*, 2009.

⁴⁵⁶ *Ogiek Case (Merits)*, 2017.

⁴⁵⁷ *Endorois Case*, 2009 at paragraphs 238, 251, 265, 268, 298; *Ogiek Case*, 2017 at paragraphs 214-217.

⁴⁵⁸ African Commission on Human and Peoples' Rights, 'Report of the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights (Copenhagen: IWGIA, 2003).

the community land rights and indigenous attachment to land which often has a relation to the livelihood of the indigenous communities. These shortcomings are manifested in the events and the consistent actions of the Kenyan government leading to the filing of the *Ogiek* and the *Endorois Case* before the African Court and African Commission respectively.

These cases show that with the neglect of community land rights, hostility and aggression is bred as earlier encapsulated by the frustration-aggression theory. This hostility and frustration in turn eats into the foundations of the social licence and in turn corrodes the legitimacy of the extractive, conservation or infrastructure project. In further addressing the objectives of the study, it emerges that there is a direct correlation between an ideal legal policy and regulatory framework that maps out and identifies specific non-market considerations of community land rights and the concept of the social licence. It constitutes the process that seeds and entrenches the social licence. Lastly, it emerges that industry best practice advocates for proportionality and prominence of indigenous land rights over development and infrastructure projects. This is a shortfall in the Kenyan framework as shown in the *Ogiek Case*. The recommendations below sum up the specific legislative and legal inadequacies and the recommended remedies to foster inclusivity and measures aimed at building and inculcating the social licence as well as complementarity between indigenous rights and other disciplines such as development, extractive projects and international environmental law.

These conclusions prove the hypotheses of this research i.e. that Kenya lacks a comprehensive framework on the recognition of non-market values to community land as a means of entrenching the social licence. That being the case, the second limb that there is a direct correlation between the concept of the social licence and the recognition of non-market values is also validated. Finally, as espoused in chapter two, the two foregoing hypotheses having been answered in the affirmative, it follows that the lack of a legal regime that entrenches social licence through the recognition of non-market values to land is disastrous in seeding the ideal framework by incubating vices such as corruption, occasioning injustices and loss of livelihoods as well as cultural heritage and valuable indigenous customs.

5.2. Recommendations

From the conclusions and finding above and those of the foregoing chapters logically pulled together lend itself to the recommendations herein. They are informed by the gaps and the ideal

case studies from comparative jurisprudence. In marrying the pitfalls identified in chapter two and three with the ideal lessons and structure espoused in chapter four, the recommendations below are ideal in remedying the famished framework on indigenous community land rights in relation to extractive and infrastructure projects in Kenya.

5.2.1. Law and Legislative Reform

The findings of this study in chapter two and three analysing Kenya's historical trajectory and its legislative framework, reveals a systemic failure to enact laws that adequately cater and protect indigenous community land rights from the interference by interests riding the crest of the extractive and infrastructure development agenda. These lacunae can be plugged by law reform as recommended below.

5.2.1.1. Amendment of the *Community Land Act*, 2016

This research recommends an amendment to Section 13 (3) of the *Community Land Act* to include salient community land use, rights and instances having a bearing on their livelihood i.e. instances identified in the *Ogiek, Endorois, Saramaka, Haida and Kaliña and Lokono Cases* being use of natural resources within their territory with specific reliance on resources such as cedar, medicinal salt licks among other resources necessary for the survival of these indigenous communities. Further, this research recommends a proviso to the Act to provide that nothing shall fetter the right of access to lands compulsorily acquired from indigenous communities for purposes of performing religious and cultural ceremonies. This recommendation is backed by the findings in the *Ogiek and Endorois Case* over the access of the Mau Complex and the Lake Bogoria region for purposes of fulfilling their cultural and religious ceremonies and in the case of the Endorois for purposes of grazing their cattle. Shielding these rights and creating a vault for their protection, these indigenous rights are secured from the overriding provisions of Section 107A of the *Land Act* will embolden and give impetus to the need for inclusion of non-market values in the valuation of community land which in turn informs the proportionality doctrine as a gateway to the ideal social licence. In essence, the recognition irrigates their assertion and implementation as a means to an end.

5.2.1.2. Amendment of the *Land Act, 2012*

Since the valuation of community land is valued in the same status as freehold property, the salient features are not taken into account as identified in chapter three.⁴⁵⁹ The *Land Act* should be amended to disjoin community land as separate from freehold title to reflect its unique status and attendant bundle of rights. Such a separation will pave way for the unique treatment of community land in terms of valuation creating room for valuation of the non-market values and other indigenous land rights and attachment that border on the livelihood of indigenous communities as identified by chapter four. Upon enacting the legislation separating and making acquisition of community land distinct from freehold tenure, it follows from the findings of this study that there is need for consideration of the impact of compulsory acquisition and proportionality of the same.

5.2.1.3. Amendment of the *Land Registration Act, 2012*

From the findings of the study, this research recommends for an amendment to Section 8 of the act that is vague on what entails ‘user of land’ and what rights are registrable in relation to community or indigenous land.⁴⁶⁰ This study therefore suggests that drawing from the examples of the *Ogiek* and *Endorois Cases*, there is need for both specificity and a saving clause that is open ended on the registrable rights attaching to community and indigenous land. The expansion will serve as a basis for registration of unique user rights of community of indigenous land or specific portions i.e. as medicinal salt licks, religious grounds, cultural and sacred grounds among others. Further, the proviso to the user rights should include the fact that the clause is not limited but rather can be expanded depending on the unique circumstances.

5.2.1.4. Amendment of the *Environmental Management and Coordination Act, 1999*

It emerges from the holding on the case of *Case of the Kaliña and Lokono Peoples v Suriname*, that indigenous land rights are key in environmental conservation. As such international environmental law as well as domestic legislation should co-exist with indigenous land rights. As such, they should be seen as complementary rather than belligerent.⁴⁶¹ In that regard, there is need

⁴⁵⁹ Section 107A (1), *Land Act* No. 6 of 2012.

⁴⁶⁰ Section 8 (a) – (g), *Land Registration Act*, No. 3 of 2012.

⁴⁶¹ International Union for Conservation of Nature and WWF-International, *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Cases Studies*. IUCN, Gland, Switzerland, and Cambridge, UK, and WWF International, Gland, Switzerland, Principle 1.

for an amendment to the Act to reflect the fact that indigenous community land rights as well as other rights and practices should be taken into account in the environmental conservation agenda. In essence by recognizing them, they will not be viewed as a threat to the environment but rather as complementing the efforts employed by the Act.

5.2.2.5. Enactment of Policy and Legislation on Indigenous Land Rights

The Canadian experience espoused by the jurisprudence of the Supreme Court shows that the protection of the rights of indigenous communities are chiselled into the Constitution and thus limiting instances in which they may be derogated. Such constitutional guarantees have laid the ground for ground-breaking jurisprudence on indigenous land rights such as the *Haida Nation Case* and the *Tsilhqot'in Case* that illustrate potential for growth of jurisprudence on indigenous rights when they are constitutionally guaranteed. This study therefore recommends that as a long-term solution to the protection of indigenous communities through the enactment of legislation that guarantees the protection of indigenous land rights and the livelihood of these communities and recognises their efforts and input in conservation of the environment as demonstrated in the *Case of the Kaliña and Lokono Peoples v Suriname*, on interdependence of international environmental law and indigenous rights.

5.2.2. Development of Legal Framework on Mapping out of Community and Indigenous Rights

It is evident from the findings of this research that Kenya lacks a framework on indigenous land rights in general. Even though Article 11 (2) (b) of the Constitution provides for the recognition of the role of indigenous technologies in the development of the nation, there has been no effort in place to actualise it especially as demonstrated by the *Ogiek Case* where it is still the understanding of the state that indigenous communities harm the natural environment without considering that they have been custodians since time immemorial.⁴⁶² This research therefore recommends the development of legal and policy framework on community and indigenous rights and how they interact with other rights such as international and domestic environmental law and infrastructure or extractive or conservation development projects.

⁴⁶² Paragraph 174, *Ogiek Case*, 2017.

5.2.3. Education and Awareness on Indigenous Rights

Education and public awareness is a key tool in the dissemination of information necessary to equip the public for an informed decision making in any undertaking.⁴⁶³ From the comparative jurisprudence under chapter four, it is evident that know-how plays a very vital and pivotal role in empowering indigenous people to assert their rights.⁴⁶⁴ Education, awareness and know-how are essential both in asserting rights as well as in synthesising information necessary for effective and meaningful public participation.⁴⁶⁵ From the *Endorois Case* allegations that the persons who allegedly attended public participation forums on behalf of the community were illiterate were pleaded before the African Commission.⁴⁶⁶ This study thus recommends that Kenya enacts policies aimed at ensuring that in instances of compulsory acquisition under the *Land Act*, there is effective sensitisation on community land rights on the projects and information that is intelligible to the members of the indigenous community given so as to enable them have a meaningful input and inculcate acceptance necessary for the development of the social licence to operate more particularly in areas that resources such as hydrocarbons are discovered.

5.2.4. Further Inter-Disciplinary Research on Indigenous Land Rights

The study herein has shown that the jurisprudence and literature on indigenous land rights among the Kenyan communities is still nascent. The sentiments of the African Commission and the African Court of Human and Peoples' Rights in the *Ogiek* and *Endorois Case* shows the deplorable and famished culture for the respect and protection of indigenous land rights. The arguments of the Respondent State (Republic of Kenya) in the two cases shows that there ill political will to implement and give effect to indigenous land rights. Further, pseudo-science and prejudices still abound on the understanding of indigenous communities, their way of life and their interaction with their environment as well as their role in the conservation efforts. This calls for inter-disciplinary research. Such a study will generate the requisite data for the juxtaposition of the key attributes of the social licence such as participation, proportionality, inclusivity and mapping out of rights that have a bearing on the livelihood of indigenous communities to be granted the highest

⁴⁶³ Desmet E, *Indigenous Rights Entwined with Nature Conservation* (Vol. 8 Antwerp, Belgium: Intersentia, 2011).

⁴⁶⁴ Xanthaki A, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' 10 *Melbourne Journal of International Law*, 2009, 27

⁴⁶⁵ *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [2018] eKLR; *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR.

⁴⁶⁶ Paragraph 282, *Endorois Case*, 2009.

level of protection from the rigors of private land tenure interests and the fiat that accompanies compulsory acquisition.



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APPENDICES

ETHICAL CLEARANCE CERTIFICATE

RHInnO Ethics - SU-IERC1236/21 - 1 of 1 - Date Issued: 2022-03-16

Strathmore University Institutional Ethics Review Committee (SU-IERC)



Final Decision

This document certifies that the study:

\\\"An Analysis of the legal Framework in Entrenching the Concept of Social License on Compensation for Compulsory Acquisition of Community land in Kenya\\\"

Principal Investigator: Ms. NJOROGE, MERCYLENE **Reference number:** SU-IERC1236/21

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\\\"not-approved\\\"

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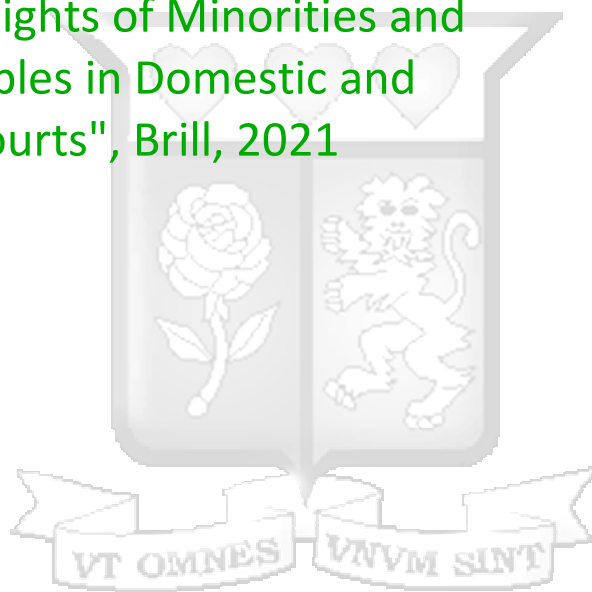
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