

**COMMUNITY LAND TENURE AND EXPLORATION OF OIL
IN TURKANA, KENYA.**

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**By
ASATI BATHSHEBA MONG'INA
077608**

**Prepared under the supervision of
MR. FRANCIS KARIUKI
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DECLARATION

I, ASATI BATHSHEBA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

MR. FRANCIS KARIUKI

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DEDICATION

To God, for His Grace and unconditional love, and to my parents and brothers for their support and inspiration as I pursue my dream.

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LIST OF CASES

1. *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (30 November 2010)
2. *Bhe and Others v Magistrate, Khayelitsha and Others* (2004) AHRLR 212 (SACC 2004).
3. *Case of the Kaliña and Lokono Peoples v. Suriname*, IACHR, 2015.
4. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 Carswell BC 2358.
5. *Isaka Wainaina & another v. Murito wa Indagara & Others* (1922-23) Kenya Law Reports Vol. IX 102.
6. *Kinyanga and others v. Isiolo County Council and Others*. [2006] 1 KLR (E and L) 229.
7. *McIvor v. Canada*, 2009 BCCA 153 (CanLII)
8. *Saramaka v. Suriname*, IACHR, 2007.
9. *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001).
10. *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) (11 May 2010)

LIST OF STATUTES AND POLICY DOCUMENTS

1. American Convention on Human Rights, 1969.
2. Community land Act 2016.
3. Community Land Rights Act South Africa, No 11 of 2004.
4. Constitution of Kenya, (2010).
5. Crowns Land Ordinance, 1902, (Repealed).
6. Crowns Land Ordinance, 1915, (Repealed).
7. Environmental Management and Co-Ordination Act
8. Government lands Act CAP 280, (Repealed).
9. ILO Convention on Indigenous and Tribal Populations Convention, 1957, No. 107.
10. ILO Convention on Indigenous and Tribal Populations Convention, 1989, No. 169.
11. Indian Acquisition Act, 1897, (Repealed).
12. Judicature Act, CAP 8, Laws of Kenya.
13. Kenya Model Production Sharing Contract 2015
14. Land (Group Representative) Act, 1968, (Repealed).
15. Land Act, No.6 of 2012.
16. Land Registration Act 2012
17. Mining Act CAP 306. (Repealed)
18. Ontario Mining Act, 1990.
19. Petroleum (Exploration and Production) Act 1984
20. Public participation Framework for the South African Legislative Sector, 2013.
21. Registered Land Act CAP 300, (Repealed).
22. Registration of Titles Act,1920, (Repealed).
23. Repealed Constitution of Kenya,1963
24. Sessional Paper No. 3 of 2009 on National Land Policy, Laws of Kenya.
25. The Canada Constitution Act, 1982.
26. The Constitution of the Republic of South Africa, 1996.
27. United Nations Declaration on the Rights of Indigenous People (UNDRIPS), (2007), 61/295.

LIST OF ABBREVIATIONS

CLARA- Community Land Rights Act (South Africa)

IACHR- Inter American Court on Human Rights.

IBA- Impact Benefit Assessment

ILO- International Labour Organization

NLC- National Land Commission

NLP- National Land Policy

UNDRIP-United Nations Declaration on the Rights of Indigenous Peoples.

ABSTRACT

Land tenure, which is who owns what interest over what land, has always been a contentious issue, this is because of the finite nature of land.¹ Land in Kenya has been a sensitive issue due to the historical land injustices which date back to colonial times. Discovery of oil in Kenya in 2012, which led to oil exploration activities mainly in the Turkana region, has led to the emergence of new issues concerning land rights in the area.²

Kenya lacks proper legislation to secure community land rights as exploration of oil continues in Turkana. This has led to alienation from land for some communities and also increased competition for the limited natural resources such as water.

This paper shall look into the history of land law in Kenya and the current legislative framework governing the use, ownership and management of community land to identify the gaps in the law. The paper shall also look into best practices from the Inter- American Human Rights System. Canada, and South Africa to identify best practices that can be incorporated in Kenya's legislative framework.

¹ Kameri P, Odote C, Musembi C, Ours by right: Law, Politics and realities of Community Property in Kenya Strathmore University Press,(2013),7.

² Cordaid report, 'Oil exploration in Kenya: Success requires consultation' Assessment of community perceptions of oil exploration in Turkana County, Kenya, (2015), 33

CHAPTER 1

INTRODUCTION

1.1 Background to the problem

Land in Kenya has always been a contentious issue especially after independence because people's expectations were not met. The expectation was that the land previously taken from them by the colonial authorities would be returned was not met as most of the land was distributed unjustly to those in power. The period that followed was marked with many cases of irregular allocation of land where land was mostly distributed by those in power to their supporters to gain political favors.¹

The existing land laws focused mainly on individualization of land rights which sidelined the customary rights to land. This led to undermining of the indigenous culture and conservation systems, and destroyed traditional resource management institutions.² Though customary systems of access to land continued to exist they did so without protection from the country's legal system.

The National Land Policy of 2009³ was created to deal with some of these inadequacies of land law and it recognized that traditional resource management systems had been undermined and there had been widespread abuse of trust in the context of trust land. Some of the recommendations proposed in the Policy include; investing in capacity building for communal land governance institutions and reformation of the land laws to protect the interest of the multiple land users.

The Constitution in Article 60 has also provided for the principles of land policy to include security of land rights, sustainable and productive management of land resources and transparent and cost effective administration of land.⁴

These guiding principles have also been emphasized in the Land Act section 4 which also provides for security of land rights and protection of the marginalized. This Act goes further to provide for the inclusiveness and participation of the people in land matters.⁵ The Land Act also recognizes acquisition of title to land through prescription.⁶

¹ Government Press, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, 2004.

² Dr. Collins Odote, The legal and policy framework regulating community land in Kenya, an appraisal, 2013.

³ Sessional Paper No. 3 of 2009 on National Land Policy, Laws of Kenya.

⁴ Article 60 (1) (b), Constitution of Kenya, (2010).

⁵ Section 4, Land Act, No.6 of 2012.

All these ideally should lead to a society where communities' rights and access to land is secured. Despite the existence of these provisions the rights of the people of Turkana region have been greatly undermined in the process of oil exploration.

One of the issues arising is overlapping tenure between community land and what has been defined to be public land in the Constitution. The Constitution in Article 62 provides that public land shall include all minerals and mineral oils as defined by law.⁷ By this definition land which has been occupied by communities could easily fall under the classification of public land if mineral and mineral oils are found on the land.

The Petroleum (Exploration and Production) Regulations, 1984 have in section 6 given limitations and conditions necessary to be adhered to when obtaining access to land by the contractors.⁸ This section provides that for the areas mentioned the contractors need to get consent from the competent authority before they enter the land. This section does not include community land and in this way community land is left open to entry without the protection these other categories of land have been granted.

It is important to note that the same is the case in the Mining Act (though it does not cover mineral oil which is the subject of this study) where in section 7 certain categories of land have been excluded from prospecting and mining till the requisite consent has been obtained.⁹ This section recognizes private land as part of the areas that consent is needed for but it does not mention community land. This shows how individualization of land rights is still being given priority and also the fact that community land rights remain largely unsecured.

A recent report produced by Cordaid highlighted some of the concerns of the community to be who actually owns the land, what their rights are and the procedure through which the oil companies acquired access to the land.¹⁰ Land in the region is mainly held communally by the communities who mainly use it for pastoral activities. Oil exploration in the area has led to increased competition over resources such as land and water which are essential to the

⁶ Section 7, Land Act, No.6 of 2012.

⁷ Article 62 (1) (f), Constitution of Kenya, (2010).

⁸ Section 10, Petroleum (Exploration and Production) Regulations, 1984.

⁹ Section 7, Mining Act, CAP 306, 2012.

¹⁰ Cordaid Report, 'Oil exploration in Kenya: Success requires consultation' Assessment of community perceptions of oil exploration in Turkana County, Kenya, (2015), 33.

livelihood of the Turkana people. The county is also faced with high levels of poverty and illiteracy.¹¹

A similar study by Kituo cha Sheria¹² conducted in Turkana County found that in relation to land rights, some people have been evicted from their lands and the activities of the oil companies have affected the livelihood of the people of Turkana. The people are largely unaware of the land issues in the community.

The problem arising then is what are the rights of these communities and closely related is the question of the rights of the oil companies over this land they both have laid claim over. The current legal framework is somewhat ambiguous in this regard and this ambiguity has led to conflicts over land tenure rights.

1.2 Statement of the problem

The 2010 Constitution provides in Art.60 for security of land rights as one of the principles of land policy.¹³ This however has not been the case in practice where extractive companies' rights are given preference over the rights of the local community members. A sound policy framework should be developed to adequately protect the rights of both the communities and the investing oil companies.

1.3 Theoretical framework

These theories will form the basis of this study;

- i. **Okoth Ogendo, Tragic African Commons¹⁴**: the author in this article shows how the African commons was based on a system comprising of internal mechanisms of management and determination of access to land. This took the shape of an inverted pyramid where the tip represented the family, the middle the clan or lineage and the base the community. Land was held for the benefit of the community as a whole and it was held as a trans generational asset.

¹¹ Cordaid Report, 'Oil exploration in Kenya: Success requires consultation' Assessment of community perceptions of oil exploration in Turkana County, Kenya, (2015), 8.

¹² Kituo cha Sheria, Report on capacity building session with community representatives, on environmental and human rights issues, 24th and 25th January 2014 at Lokichar, Kapese and Consultative meeting with Turkana County Stakeholders at Lodwar Towns respectively, 2014, 8.

¹³ Article 60(1), Constitution of Kenya (2010).

¹⁴ Okoth-Ogendo HWO, The tragic African commons: A century of expropriation, suppression and subversion, Land reform and agrarian change in southern Africa, An occasional paper series, 2000, 4.

He argues that the customary laws should be legitimized and given a stronger legal status. This study will borrow aspects of this theory as it is important to give more regard to the customs and practice of the people in Turkana.

- ii. **Communitarianism:** The communitarianism theory empathized the interests of the community in the functioning of the political and social life. Michael Sandel who is one of the significant contributors to this theory argues that everyone has obligations of membership, solidarity and loyalty inherited from our past and our identity. 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 show the importance of the livelihood and community practices of the Turkana and why they should be protected even as the economic interests of the country are being promoted through oil exploration.¹⁵

- iii. **Subjective theory of value:** This theory of value speaks to 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 in Turkana it is the duty of the government to go beyond the market value 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 livelihood¹⁶.

1.4 Literature review

This has been divided into three parts; security of property rights, economic costs of poor policies and factors that should influence a country in developing a sound legal framework in protecting land tenure rights.

a) Securing property rights of citizens.

Land in the Turkana region is mainly held communally¹⁷ by the different communities. Community land comes with its own set of challenges which includes lack of documentation

¹⁵ <https://icps.gwu.edu/sites/icps.gwu.edu/files/downloads/Communitarianism.Etzioni.pdf> (accessed on 18th March 2016).

¹⁶ <http://www.econlib.org/library/Enc/bios/Menger.html> (accessed on 22nd February 2016).

¹⁷Schilling 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.

which greatly undermines the strength of these rights against the legally secured public and private rights.¹⁸

Undermining of communal property rights is a popular phenomenon as identified by Nyamu-Musembi who in article points out the social evolutionist bias that assumes private ownership of property to be the goal of property rights¹⁹.

Since the 1950s attempts at tenure reform in Kenya were focused on formal title of property ownership.²⁰ These could be seen through the existing statutes such as the Registered Land Act which in section 4 emphasized formalization of title as above other procedure or practices relating to land.²¹ This ideology has brought about great disregard and marginalization of community land rights.

Okoth Ogendo in his article demystifies the commons concept of property in African society. The article points out several misconceptions held by people regarding communal ownership of property and these include; the perception that property rights must derive from a sovereign, and that communities do not have a legal persona. Another misconception is that a system of access on the basis of inclusivity cannot at the same time define the laws of exclusivity.²²

The commons²³, he explains are *res communis*, this means that they represent private property for the group that controls it and the individual members have clear rights and duties in respect of the resources comprised therein. This is based on the definition of property as a bundle of rights in a specific good vested in an individual or entity that has been recognized under the legal system.²⁴

¹⁸ Kameri P, Odote C, Musembi C, Ours by right: Law, Politics and realities of Community Property in Kenya Strathmore University Press, 2013.

¹⁹ Celestine Nyamu-Musembi, 'Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa' Institute of development studies working paper 272, (2006), 9.

²⁰ Musembi C, Kameri P, Mobility, marginality and tenure transformation in Kenya: explorations of community property rights in law and practice, Nomadic People's Volume 17, Issue 1,(2013), 5-32.

²¹ Section 4, Registered Land Act, CAP 300.

²² Okoth-Ogendo HWO, The tragic African commons: A century of expropriation, suppression and subversion, Land reform and agrarian change in southern Africa, An occasional paper series, (2000), 4.

²³ In Okoth Ogendo's paper the term commons is used to identify resources available exclusively to specific communities or lineages operating as corporate entities.

²⁴ Okoth-Ogendo HWO, The tragic African commons: A century of expropriation, suppression and subversion, Land reform and agrarian change in southern Africa, An occasional paper series, (2000), 5.

Expropriation of the commons happened in three main ways during the colonial period and this was through application of legislation by the British to acquire control over all the land, the second way was the application of English law over the territory and the third was through the crown land ordinance which vested all land in the crown. Customary law was therefore subordinated to these other legal policies.²⁵

Currently disregard for community land tenure has also been seen in cases of eviction where communities are moved out of land which they have lived on for long periods of time. These communities are hardly ever given compensation or alternative places for settlement. These people who are evicted mostly lack title over the land they live on and are of the marginalized sectors of the society.²⁶

In the extractives sector, human rights and the people's welfare especially in developing countries have repeatedly been subordinated to the promotion of commercial interest. This is mainly done by the governments in these regions. This has led to communities bearing the cost of dealing with the affected communities through constant philanthropy to reduce resistance.²⁷

The Ogoni case²⁸ before the African Commission on Human and People's rights is a clear depiction of what could happen if people's rights are disregarded. In an analysis of the case by Fons Coonmans, the positive duty of state to protect and fulfill the rights of the people is clearly shown. In this case, the complaint by the community was that the government of Nigeria had granted too much power to the oil companies placing the communities at a disadvantage. The other complaint was that the community had not been adequately informed of the dangers of oil mining which later had negative consequences on their health. In this paper the author analyses the approach the court took in finding the government of Nigeria liable for failing to

²⁵ Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion, Land reform and agrarian change in southern Africa, An occasional paper series, 2000, 5 & 7.*

²⁶ Ocheje D, "In the Public Interest": Forced Evictions, Land Rights and Human Development in Africa, *Journal of African Law, 51, 2 (2007), 173-214*

²⁷ Dias A, Nwete B, *Good Governance, Business and Human Rights in Energy Exporting Developing Countries: a Supreme Challenge for Corporate Social Responsibility and Corporate Accountability, Oil, gas & Energy law intelligence, (2004).*

²⁸ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001).*

protect the rights of their people as provided for in the African Charter. The court stated that the government has the duty to respect, protect and promote economic, social and cultural rights.²⁹

In an article that compares formal and informal property rights in Kenya, the authors compare formal and informal property rights in Kenya and they look at the formulation of mechanisms for protecting these rights³⁰. This article also looks through the development of these rights from the colonial times. The authors derive the conclusion that informal property rights are embodied in customary law and practices within a community making it hard to enforce them against outsiders of that community. They therefore perceive formal property rights to be better because though they are more costly they offer maximum protection.

b) Economic costs of poor policies or insufficient protection of land rights.

In a report by the Munden project³¹ different risks associated with the extractives industry and one of the mentioned risks is disputed land tenure rights. The report argues that investing on land with disputed tenure rights could cause a threat to stable returns.

This argument can be supported by the theory developed by Coase³² and Demsetz³³ on externalities and the cost this may lead to. Coase in his paper argues that in complete competitive markets where the transactional costs are zero the actors in that markets will work to get to the mutually beneficial solution regardless of how the property rights have been allocated. Coase goes on to explain that allocation of property rights to one party actually creates an incentive to the other party to initiate bargaining and even push the other party towards the optimal solution.³⁴

Merges P, while showing the connection between property rights and enforcement flexibility explains how the party with property rights has more options in enforcing their rights than the

²⁹ Fons Conman's, The Ogoni Case before the African Commission on Human and Peoples' Rights, *International and Comparative Law Quarterly*, Vol. 52, July 2003, 749-760.

³⁰ Mbote P, Keiyah J, *Securing property rights in land in Kenya formal versus informal*, Oxford University Press, 2010, p. 309-328.

³¹ The Munden Project, *the Financial Risks of Insecure Land Tenure: An Investment View*, Prepared for the Rights and Resources Initiative, December 2012.

³² Coase R, *The problem of Social Cost*, *Journal of Law and Economics*, Vol. 3 (Oct., 1960), pp. 1-44

³³ Demsetz H, *Towards a theory of property rights*, *The American Economic Review*, Vol. 57, No. 2, *Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association*. (May, 1967), 347-359.

³⁴ Hahnel R, *Green Economics: Confronting the Ecological crisis*, M.E. Sharpe 2010, 106-108.

one without.³⁵ This argument differs from the one by Coase. He argues that the party with property rights is accorded more protection under the law and can therefore enforce their rights more easily as compared than the one without.

This is the more realistic case because though the party that has not been granted property rights may attempt to initiate bargaining, the other party lacks an incentive to co-operate unless they may gain some benefit from the bargaining process. This argument is presented by Demsetz H, in his paper he uses two main terms to explain the bargaining process; externalities and transactional costs.

Externalities are cost created by one party and borne by another while transactional costs are the costs of internalizing the externalities. Demsetz argument is that in a society of zero transactional cost the actors in an economic system will be motivated to internalize the externalities. He develops this argument further by stating that though in some instances there may be transactional costs, the actors may still attempt to internalize them if the costs of internalization are less than the benefits of it.³⁶

Coase's theorem can therefore still apply if interpreted using Demsetz analysis of it where no matter how the property rights may be allocated the actors in an economic society will be motivated to bargain with each other to internalize the externalities if the result will be beneficial to them.

In the case of disputes over land tenure the externalities may be caused by inadequate protection or provisions for the same in the legal policies. This in some instances may push the contactors and oil companies to attempt to negotiate with the communities. In this way the externalities created by the failure of the government to perform its positive duty to make legislation on land matters is borne by the companies and the communities.³⁷

A study in the Turkana region revealed the community's general perception of the company is that the company has come to take their land. Tullow oil was granted the license to explore for oil in the region and the community originally residing there have not been compensated by the

³⁵ Merges P, A transactional view of property, Berkeley Technology Law Journal, Vol. 20 No. 4 (Fall 2005), 1477-1520.

³⁶Demsetz H, Towards a theory of property rights, The American Economic Review, Vol. 57, No. 2, Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association. (May, 1967), 347-359.

³⁷ Dias A,Nwete B, Good Governance, Business and Human Rights in Energy Exporting Developing Countries: a Supreme Challenge for Corporate Social Responsibility and Corporate Accountability, Oil, gas & Energy law intelligence, (2004).

government. These communities, because of these and the fact that they are politically and economically marginalized, have constantly caused resistance and this has led to instances where Tullow oil has had to suspend operations till things calm down.³⁸

c) Developing sound framework to govern property rights.

Margaret Gruter in her book *Land and the Mind* describes the law as a representation of formalized behavioral rules which reflects behavioral propensities and that offers potential benefit to those who follow them.³⁹ In line with this reasoning it is implied that a law which is not a reflection of the practices of the people will ultimately be disregarded and disobeyed.

Patrick Wieland⁴⁰ while focusing on Peru demonstrates how various challenges can affect a resource endowed country from getting to its full potential. The challenges identified include social inequality and weak government institutions which have led to social unrest. The oil companies have ended up facing a lot of resistance from indigenous communities without formal title who feel like their land is being taken away from them. Some of the recommendations he identifies are mending the administration procedures for transparency and accountability.

A paper by Chatham House also seeking to identify ways in which communities relations can be improved in the extractives industry pointed out that one of the main consequences of a breakdown in the relations is financial cost on the part of the companies. This breakdown is mainly caused by lack of community involvement and their exclusion from key decisions. Engagement with the community is approached using the firefighting mechanism where companies are focused on managing conflicts rather than creating strong partnerships.⁴¹

Patrick Wieland and the paper mentioned above point out certain issues that need are specific to the extractives industry and may need to be addressed when trying to reform the existing legal policies or in developing new policies. Margaret Gruter gives a foundation or starting point where in creating any law to govern a group of people it is important to investigate and know what their behavioral patterns are.

³⁸ 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), 711-713.

³⁹ Gruter M, *Law and the Mind*, Sage 1991, 62.

⁴⁰ Wieland P, Going beyond panaceas: escaping mining conflicts in resource-rich countries through middle-ground policies, Heinonline, 2014, 201-276.

⁴¹ Chatham House, Revisiting Approaches to Community relations in extractives industries: Old problems, New Avenues? June 2013.

Hernando De Soto in his book states that people move out of the law to the extralegal or informal sector because the law does not address what they want.⁴² Meaning though the law may be there it does not address the needs of the people which forces the people to develop practices to fill in the void left by the law. In the paper by Chatham house some of these practices that have come up include giving handouts to communities to curb resistance.⁴³

De Soto also identifies the importance of codifying these practices to be able to depart from the mystery and uncertainty of unwritten law. He identifies the role of law to be, ‘detaching and fixing the economic potential of asset as a value separate from the material assets themselves and allows humans to discover and realize that potential’.⁴⁴

Celestine Nyamu-Musembi while critiquing Hernando De Soto’s Book, identified some of the reasons why De Soto’s theory may not work in some regions of Africa. She identifies five reasons to support her argument and these are; legality only being construed to mean formal legality, the second reason is the social evolutionist bias that assumes privatization of property to be the end goal of every society and therefore greater emphasis is put on individualization of title, the third reason she gives is the presumption that formal title gives the title holders access to credit facilities, her fourth reason is that markets in land are narrowly understood to mean formal markets and the fifth reason is that arguments in favor of formalization of title as the means to secure tenure ignore the fact that formal title could also generate insecurity.⁴⁵

By contrasting different concepts against the social reality she finds that informal rules have become the more immediate points of reference for the people’s land relations and in this way different societies have developed various systems of practice that work for them. Property rights are a social system meaning it should ideally take the shape of the cultural context on which it is rooted.⁴⁶

⁴² Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Transworld (2000), 178.

⁴³ Chatham House, *Revisiting Approaches to Community relations in extractives industries*.

⁴⁴ Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Transworld (2000), 165 & 173.

⁴⁵ Celestine Nyamu-Musembi, ‘Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa’ *Institute of development studies working paper 272*, (2006), 8-9.

⁴⁶ Celestine Nyamu-Musembi, ‘Breathing Life into Dead Theories about Property Rights’, 11.

She states that the mistake that most law makers make is creating laws with the assumption that there exists a property rights vacuum in society and this disregards the existing practices and social norms. This is in agreement with De Soto where he states the same thing.⁴⁷ As can be seen it is clear that as a government fulfils its legislative role it is important to take into consideration the needs of the people and customs that are already in practice that govern how the people relate.

The African Union created a framework to strengthen land rights and in the framework it is stated that one of the ways of improving the legal framework is by designing sound implementation strategies and continuous public engagement.⁴⁸

1.5 Objectives

- To examine the regulatory framework governing land tenure security in Kenya with a special focus on the extractives industry.
- To identify the challenges the local communities and the oil companies are facing due to the inefficiencies of the legal policy framework in securing land tenure on community land.
- To propose recommendations to help mitigate the challenges being faced by the communities and the oil companies as well.

1.6 Assumptions / hypotheses

This study is based on the assumption that the current legal policy framework is inadequate in securing land tenure on community land where oil exploration is taking place.

1.7 Justification

The extractives industry is one of the most lucrative industries. This full potential can only be realized if potential risks are mitigated and protected. One of the risks that companies face is land tenure insecurity especially in areas of community land.⁴⁹ Lack of a proper policy framework to protect community rights or guide the transfer of land rights creates ambiguity as to who owns what rights over what land.

⁴⁷Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Transworld (2000), 180.

⁴⁸ African Union, *Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods*, 2010 at Addis Ababa, Ethiopia.

⁴⁹ The Munden Project, *The Financial Risks of Insecure Land Tenure: An Investment View*, Prepared for the Rights and Resources Initiative, December 2012, 3.

This ambiguity leads to company-community conflict whose consequence may be economic costs on the part of companies and land tenure insecurity in the part of the community. This study seeks to show that this can be avoided if the government takes up its legislative role by creating a proper legal framework.

1.8 Methodology

This research shall derive its data mainly from qualitative research methods that include primary and secondary sources of data. The primary sources of data that will be relied on include statute, case law and the constitution. This will include visits to the library and various relevant online sources.

The secondary sources of data that will be relied on are journal articles and books. News article may be relied on too. The information being sought is largely qualitative and that's why it shall rely on the aforementioned sources of data to be able to investigate better the land tenure systems in the country. It shall be analyzed by examining the relationship between the different legal policies to be able to identify the gaps existing in securing tenure over community land by both the communities and companies seeking to engage in exploration and production of oil.

1.9 Chapter breakdown

This study shall be broken down into five chapters as follows;

- **Chapter one;** this chapter shall contain the introduction to the study; this will have the background to the problem, the statement of the problem and the objectives of this study. This chapter shall also provide the theoretical framework and the justifications and methodology of the study.
- **Chapter two;** this chapter shall look into the history of land law in Kenya for the period leading up to the 2010 Constitution. This history shall show how community land tenure systems were over time sidelined and preference was given to individual land tenure.
- **Chapter three;** this chapter shall come up with the best practice in the issues identified. This will be done through comparative assessment into the practice in South Africa and Canada.
- **Chapter four;** this chapter shall show based on the existing legal framework a keen investigation of the community land law framework and best practice how we should

address the problems identified in chapter two. It will also show the lessons derived from the comparative assessment.

- **Chapter five**; this is the final chapter of the research. It will show the findings and recommendations of the study. It will also show how the study has addressed the objectives and how the assumptions have been tested.

CHAPTER 2

THE HISTORICAL DEVELOPMENT OF THE LEGAL FRAMEWORK RELATING TO COMMUNITY LAND IN KENYA

2.1 Introduction

This chapter will delve into the history of community land in Kenya starting from the pre-colonial and tracing the changes in legislation to the current legal framework. This part shall be divided into three parts that is: The precolonial period, the colonial period, Post-independence and post 2010 which is when the new constitution was promulgated.

This shall show how individualization of title to land was given preference over the years ultimately weakening the legal backing and protection of customary land tenure systems. In the colonial period the focus shall be on the legislation that was enacted to promote individual ownership of property and to alienate the African people from their land.

2.2 Pre-colonial context

Okoth Ogendo gives a clear description of the nature of land holding in the customary setting he describes it as a trans-generational asset that was managed at different levels of social organization and it was used in function.¹ This is to mean that the use of land was specific to activities such as cultivation, grazing, hunting.

It is important to note that land tenure, especially in a community regulates the access to and use of land. It also allocates certain privileges and responsibilities to different members of the community. These privileges are often conditional and they have defined time limits.² Land meant more to the people than just the physical soil and the advantage the members of the community drew from that. Systems of land tenure and use within the different groups reflected the social transformations and the philosophy of the different communities. Traditional philosophies ascribed a sacred significance to land.³

¹ Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion, Land reform and agrarian change in southern Africa*, An occasional paper series, 2000, 4.

² <http://www.fao.org/docrep/005/y4307e/y4307e05.htm> (accessed on 20th September 2016).

³ Ojienda T, *Principles of conveyancing in Kenya, A practical approach*, Law Africa Publishers (2008), 41.

This was also stated in the Njonjo Commission of Inquiry report, 2002, quoting the words of a Nigerian chief, 'land belongs to a vast family of which many are dead, few are living, and countless members are still unborn'.⁴

Land was managed at different levels of the society that can be illustrated using an inverted pyramid. The family is at the tip of the pyramid, the clan in the middle and the community at the base.⁵

Access to land as one of the communities resources was open to individuals and social groups who qualified on the basis of socially defined membership criteria. The quantum of access rights depended on the category of rights of each individual and the specific function for which access to the resources was required.⁶

It is from these that one can see that land reflected both the social relations within the community and the Political organization of the community.⁷Control of the land was therefore concerned with guaranteeing access and regulating the rights of common resources. This also included the resolution of disputes regarding to land. It is important to note that access to land was different from control of land. Control of the land was vested in a select few members of the community.⁸

2.3 Colonial period

The colonialists using a juridical and economic justification introduced legislations and laws to disregard communal approaches to land ownership and instead gave preference to private tenure arrangements.⁹

The goal of this as was later seen was to give the Europeans control of the land and to disinherit the Africans of their land. Customary law was subordinated to colonial enactments and received principles of common law of England.¹⁰

⁴ https://docs.google.com/document/d/1zUMENinpiCbpKdOBmGSAFFQdPciZjj14tCrWVkJ_aE/edit# (accessed on 13th September 2016)

⁵ Okoth-Ogendo HWO, The tragic African commons: A century of expropriation, suppression and subversion, Land reform and agrarian change in southern Africa, An occasional paper series, 2000, 4.

⁶ Teresa Gachagua, Demystifying the concept of Community Land- the New order, The Law Society of Kenya Journal-11(2) (2015), 154.

⁷ Kameri P, Odote C, Musembi C, Ours by right, 23.

⁸ Kameri P, Odote C, Musembi C, Ours by right, 25.

⁹ Odote C, Mbote P, Introduction, Breaking the mould, Strathmore University Press, (2016),1.

¹⁰ Teresia Gachagua, Demystifying the concept of Community Land- the new order, 155.

The colonialists declared Kenya as a protectorate on 15th July 1895 ¹¹after which they enacted laws to gain control over land. These legal instruments gave their transactions over land the requisite binding force. This led to the passage of communal land into private hands and this was one without securing the interests of the people who had access to the land.¹²

a. 1897: Indian Acquisition Act

This was the first Act that conferred some rights to land by the Colonialists. It provided for compulsory acquisition of land on each side of the railway for establishment of government buildings.¹³

b. 1902: Crowns Land Ordinance

In 1902 the Crowns Land Ordinance was enacted. This ordinance defined Crown Land as all public land in the protectorate subject to the control of His Majesty. The definition also included all land occupied by the native tribes of the protectorate and all lands reserved for the use of the members of the native tribe.¹⁴

c. 1915: Crowns Land Ordinance

In 1915 this Ordinance was amended to facilitate dispossession of land occupied by the Africans. The consequence of the amendment was that the land reserved for use by the indigenous communities now vested in the crown. The indigenous land administration systems were replaced by the new regime which was based on the colonial rule. African rights to the land were just mere temporary occupancy rights.¹⁵This as was later seen left them open to constant resettlement to provide more land for the white settlers. In the same year the Government lands Act ¹⁶ was enacted. This introduced the English way of conveyance. The head of Government was at this stage given the discretionary owners to allocate land.¹⁷

¹¹ Teresia Gachagua, Demystifying the concept of Community Land- the new order, 155.

¹² Kameri M, Righting wrongs; confronting dispossession in post-colonial contexts, 2006, Pg. 1 available at <http://www.ierlc.org/content/c0612.pdf>.

¹³ https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA (accessed on 18th September 2016).

¹⁴ Kariuki F, 'Securing land rights in community forests: assessment of article 63(2)(d) of the constitution', University of Nairobi G62/80344/2012, Pg. 52.

¹⁵ Kameri M, Righting wrongs; confronting dispossession in post-colonial contexts, available at <http://www.ierlc.org/content/c0612.pdf>.

¹⁶ CAP 280 Laws of Kenya

¹⁷ https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA (accessed on 18th September 2016).

d. 1920: Registration of Titles Act

The Torrens principle of land registration was introduced in Kenya in 1920 through the Registration of titles Act.¹⁸The Principle developed by Robert Torrens in 1858 is based on a system where an indefeasible title to land is granted upon registration of the rights and interests to the land.¹⁹

*Isaka Wainaina & another v Murito wa Indagara & Others*²⁰ was a landmark ruling in 1923. This case clearly depicts the dispossession of land by the Africans to the White settlers. In this case it was held that Africans were tenants of the crown with no more than temporary occupancy rights to the land.²¹

e. 1933: Carter Commission

The Carter commission was appointed by the colonial government to deal with the emerging land issues at the time. One of the concerns was the growing agitation from the Africans caused by continued loss of land.²²

The second was the growing pressure the white settlers were facing from the growing Indian population. The terms of reference of the commission included inquiring into African Grievances and making recommendations on how to resolve them.²³

Some of the recommendations of the commission included:

- Reservation of the Native reserves for the exclusive occupation of Africans. The commission recommended that there should be no further encroachment.
- Addition of land to the smaller, insecure reserves.
- The white highlands remain exclusively for the Europeans and that they be expanded.
- Africans should be granted leasehold interest like any other racial group.

¹⁸https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA (accessed on 18th September 2016).

¹⁹https://books.google.co.ke/books?id=W17KewWZBW4C&pg=PA229&dq=torrens+principle&hl=en&sa=X&redir_esc=y#v=onepage&q=torrens%20principle&f=false (accessed on 19th September 2016).

²⁰ *Isaka Wainaina & another V Murito wa Indagara & Others* (1922-23) Kenya Law Reports Vol. IX 102.

²¹ Kariuki F, 'Securing land rights in community forests: assessment of article 63(2)(d) of the constitution', 53.

²² Mweseli T, *The Centrality of Land in Kenya: Historical Background and Legal Perspective*, Essays on Land Law, University of Nairobi, 2000, 12.

²³ Carter M, Report of the Kenya Land Commission, 1934.

f. 1954: Swynnerton Plan

The colonial government in 1954 developed the Swynnerton Plan, an agricultural policy whose goal was improving agriculture in the country.²⁴ This plan was a three phase program that involved, adjudication, consolidation and registration. Adjudication of land was aimed at phasing out the customary land tenure system that existed while registration of land rights was to provide security of tenure. This clearly undermined the community land tenure structures that existed before.²⁵

The colonial government's rationale was that an indefeasible title would encourage the Africans to invest on their land. This would in turn promote cash crop farming and agricultural development in general.²⁶ An important thing to note is that the Swynnerton plan was tailored for an agricultural community. The interests and special considerations of pastoralists and the hunter-gatherer communities were not taken into proper consideration²⁷. Individualization of title is very favourable in an agricultural society. This is because of some of the rights that it confers such as the right to exclusion. For pastoralists this makes it harder as they cannot move about as freely as they used to with their animals.

The informal tenure system that existed in the African Communities catered for the different uses of land within the community. The systems of land management and regulation were informed by the customary institutions and the local norms in that society. Titling of land on the other hand provided for primary rights such as cultivation but excluded secondary rights which include grazing and possibly wild-food gathering.²⁸

The plan also failed to address the inequalities in land ownership between the settlers and the Africans and also among the African communities themselves.²⁹

²⁴ Ojienda T, Principles of conveyancing in Kenya, A practical approach, 60.

²⁵ <https://www.scribd.com/doc/315450594/Swynnerton-Plan-1954> (accessed on 25th September 2016)

²⁶ Ojienda T, Principles of conveyancing in Kenya, A practical approach, 61.

²⁷ Kariuki F, 'Securing land rights in community forests: assessment of article 63(2) (d) of the constitution', 62.

²⁸ Kariuki F, 'Securing land rights in community forests: assessment of article 63(2) (d) of the constitution', 24.

²⁹ https://books.google.co.ke/books?id=ZEOyapiHnaEC&pg=PA43&dq=swynnerton+plan&hl=en&sa=X&redir_esc=y#v=onepage&q=swynnerton%20plan&f=false (accessed on 25th September 2016)

2.4 Kenya's Land laws at independence

At the time of independence there were about three substantive regimes in property law regulated by five registration Acts.³⁰ The substantive regimes were based on the Transfer of Property Act of India, 1882, the Registered Land Act and customary law.

i. Multiplicity of laws

The Registered Land Act was intended to be the overall law governing land a goal that was not achieved. It applied to land formerly held under customary law, that is the native reserves and trust land that had been registered.³¹ The encompassed within its provisions the Torrens principle of land ownership.³²

The Transfer of Property Act of India on the other hand regulated transactions under the Land Titles Act and the Government Lands Act. One of its shortcomings was that it was very technical which hindered its efficient applicability by the Africans. An example of this is that it required that documents regarding transactions be drawn according to the 1845 English Real Property Act and the 1881 Conveyancing Act of Victoria.³³

These were the Registration of Documents Act, The Registration of titles Act, The Government Lands Act, The Land Titles Act, and The Registered Land Act.

The effects of this was the creation of a duality in economic systems and the duality was manifest in the neglect of customary property law. The system of holding land advocated for fragmented small holdings.³⁴

There also existed different legal systems instruments for different categories of land and owners thereof. There were also two systems of registration in land and these were; document registration and title registration. At this point it is correct to state that there were too many laws governing property in land.³⁵ At independence there clearly existed too many laws governing property in land.

³⁰ Mbote P, Keiyah J, Securing property rights in land in Kenya formal versus informal, 315.

³¹ <http://www.ielrc.org/content/w0504.pdf> (accessed on 18th September 2016).

³² Section 27, 28 & 30 of the Registered Land Act, CAP 300, Laws of Kenya.

³³ https://docs.google.com/document/d/1zUMENinpiCbpKdOBmGSAFFQdPciZji14tCrWVkJ_aE/edit# (accessed on 22nd September 2016)

³⁴ Mbote P, Keiyah J, Securing property rights in land in Kenya formal versus informal, 315.

³⁵ <http://www.ielrc.org/content/w0504.pdf> (Accessed on 18th September 2016).

ii. The independence constitution and land rights

The independence constitution leaned towards a monolithic system of property rights favouring the states and neglecting the communities.³⁶ The constitution addressed property rights in section 75 which mainly granted protection to cases of derivation of title without compensation.³⁷ Proof of ownership was central to enjoying the rights granted under this constitution. Private ownership was given greater protection as compared to community land rights. This led to many communities seeking to individualize their property.³⁸ In many cases the Africans were not well informed on the process of registration and some thought one member of the family could register on behalf of the entire family. This is a reflection of what customary land tenure systems entailed where the rights to a certain section of the community were granted to one member of the family, the rights however did not belong to the individual exclusively but to the members of his family. This, much to the surprise of the African community members was not the case in the new land regime. The families later found out that the registered individual had acquired absolute title to the land.³⁹

Another weakness of the Constitution was that it gave the president powers of allocation of land.⁴⁰ Though the powers granted under the constitution were not arbitrary the presidents especially Kenyatta and Moi allocated land irregularly and in some cases illegally.⁴¹ This was one of the findings of the Ndung'u Commission of Inquiry. This will be discussed further below.

iii. Post-independence land concerns

There were three recognized categories of Land and these are Government Land, Trust Land and Private Land. Private land was basically that which an individual had registered their interests to the land and gained absolute title.

Crown Land was renamed Government Land at independence. Government Land was governed by the Government Lands Act.⁴² This Act gave the president the power to make grants over any un-alienated government land.⁴³ Some of this land was allocated to private owners.

³⁶ <http://www.ielrc.org/content/w0504.pdf> (Accessed on 20th September 2016).

³⁷ Section 75, Constitution of Kenya (Repealed), 1963.

³⁸ Mbote K, *The Land question in Kenya Legal and Ethical Dimensions*, Strathmore University Press (2009) 17.

³⁹ Kariuki F, 'Securing land rights in community forests: assessment of article 63(2) (d) of the constitution', 65.

⁴⁰ Section 118 Constitution of Kenya (Repealed), 1963.

⁴¹ Manji A, *The grabbed state: lawyers, politics and public land in Kenya*, 484.

⁴² Mbote P, Keiyah J, *Securing property rights in land in Kenya formal versus informal*, Oxford University Press, 2010.

Trust Land was defined in Section 114 of the Repealed Constitution to include the native reserves and other areas that were occupied by the natives during the colonial period but had not been consolidated, adjudicated or registered.⁴⁴ This was governed by the Trust Lands Act. The notion of trust land was to give recognition to group and native rights. The land was to vest in the county councils for the benefit of persons ordinarily resident in that area.⁴⁵

This provision though it seemed to protect community land interests ended up alienating people further from their land as was seen in the case of *Kinyanga and others V Isiolo County Council and Others*.⁴⁶ In this case the Plaintiffs who were members of the Maasai community sought declarations to show that they were the legal occupants of the land held in trust for them by the Council as per Section 115 of the Repealed Constitution. The court rejected this argument stating that division of land into community groups to promote the welfare of that community was unconstitutional and unacceptable.⁴⁷

Trust lands also include Group ranches. Group were defined as ‘*a demarcated area of rangeland to which a group of pastoralists who graze their individually owned herds have official land rights*’.⁴⁸ The 1968 Land (Group Representative) Act had provisions for community ownership. A number of communities registered as Group Ranches under this law however a number of the underprivileged members of the community were excluded.⁴⁹

Group ranches were aimed at formalizing community land rights and creating a unit of land holding that was greater than an individual but smaller than the traditional communities.⁵⁰ Some of the ranches were not registered and this in some cases was because some of the members did not understand the process of registration. Other communities’ attempts to register failed due to corrupt practices. Group ranches however were not a success and this is because of a number of reasons.

⁴³ Section 3, Government Lands Act, Laws of Kenya.

⁴⁴ Section 114(1) Constitution of Kenya 1963.

⁴⁵ Section 115 Constitution of Kenya 1963.

⁴⁶ *Kinyanga and others V Isiolo County Council and Others*. [2006] 1 KLR (E and L) 229.

⁴⁷ Kariuki F, ‘Securing land rights in community forests: assessment of article 63(2) (d) of the constitution’, 66.

⁴⁸ Land (Group Representatives) Act, CAP 287.

⁴⁹ Doyle K, *Customary Land Rights in Kenya in the context of History: From Colonialism through Independence, From Jomo Kenyatta to Kenyatta, Breaking the mould*, Strathmore University Press, (2016), 15.

⁵⁰ Kameri P, Odote C, Musembi C, *Ours by right*, 30.

First the group representatives entrusted with the administration of the land often disposed of the land without consulting the members of that community.⁵¹ The administration also lacked the authority or power that the traditional community leaders had. This led to lack of cohesion in the ranches.⁵² The ranches were eventually subdivided into smaller pieces and individual titles were awarded.

President Kenyatta and President Moi's era in power was marked by a lot of irregular allocation of land rights. The two Presidents made grants to individuals without regard to the public interest as was required by the Repealed constitution. In a number of cases the Commissioner of Lands and the different local authorities sold land that had been reserved for public purposes.

Land

iv. Commissions of inquiry on land injustices

President Kibaki's era was marked with a lot of reforms in the land law regime in the country. First two commissions of inquiry; the Njonjo Commission and the Ndung'u Commission were set up to look into the question of land.

a) Njonjo Land Commission.

The Njonjo land commission was appointed to look into the land law systems in the country and to come up with principles of a National Land Policy.⁵³ It was also supposed to look at the Constitution and make proposals on the same.⁵⁴

The commission found that widespread failure by the authorities to comply with and enforce the law was the principle cause of land problems in the country. Political interference and corruption were also found to be prominent issues in the land sector.⁵⁵

Some of the commission's recommendations included the reformation of the land tenure systems as they had outlived their purpose. The commission also proposed the enactment of

⁵¹ Doyle K, Customary Land Rights in Kenya in the context of History, 14.

⁵² Kameri P, Odote C, Musembi C, Ours by right, 31.

⁵³ Report of the Commission of Inquiry into the Land Law system of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land administration, 2002.

⁵⁴ https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA (accessed on 18th September 2016).

⁵⁵ Ojienda T, Principles of conveyancing in Kenya, A practical approach, 405.

legislation which embodies international and national policies relating to the sustainable use of land and the preservation of environmental values.⁵⁶

b) Ndung'u land commission

This commission inquired into the illegal and irregular⁵⁷ allocation of public land.⁵⁸ It was also to provide for redress for these issues.⁵⁹ The commission made several recommendations to the president some of which were the creation of an inventory for land and the computerization of land records.⁶⁰ Similarly to the Njonjo land commission they proposed the formulation of a national land policy to address the land issues that were growing by the day.⁶¹

In addition to the above findings they identified certain weaknesses in the country's land laws. These weaknesses were; the adoption of the colonial land laws which had been enacted to govern and protect land rights of the white settlers.⁶² These laws were not reviewed to take into account the changed political equation. The second weakness was the lack of a national land policy and the misinterpretation of laws by those in authority.⁶³

c) National land policy 2009

Kenya's National Land policy was published by the Ministry of Lands in 2009 after years of consulting and drafting. It addressed some of the issues raised by the Njonjo and Ndung'u commission. The policy's vision is; *'to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity'*.⁶⁴

This policy addressed land tenure, land use management and land administration issues. One of the findings of the Land policy was that Kenya had many land laws some of which were

⁵⁶ Page 43, Report of the Commission of Inquiry into the Land Law system of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land administration, 2002.

⁵⁷ Illegal allocation of land occurs when the legal safeguards governing the allocation of land are not followed and this includes the allocation of land that is not available for allocation. Irregular allocation occurred when the land concerned was available for allocation but the required legal standard was not met or in other cases the required administrative procedure was not followed.

⁵⁸ Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, 2004.

⁵⁹ Doyle K, Customary Land Rights in Kenya in the context of History, 15.

⁶⁰ Manji A, The grabbed state: lawyers, politics and public land in Kenya, The Journal of Modern African Studies, (2012), 472-474.

⁶¹ Ojienda T, Principles of conveyancing in Kenya, A practical approach, 409.

⁶² Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2004), Page 138.

⁶³ Paul Ndung'u, Tackling land related corruption in Kenya, November 2006.

⁶⁴ Executive summary, Sessional Paper No. 3 of 2009 on National Land Policy, 2009.

inconsistent and incompatible and this resulted in an inordinately complex land administration system.⁶⁵

On the issue of community land the policy clearly outlines how the process of individualization of tenure greatly affected customary tenure. The effect of this as stated in the policy has been the undermining of traditional resource management institutions and ignoring customary land rights not deemed to amount to ownership.⁶⁶

Some of the recommendations made regarding community land include;

- Documenting and mapping existing forms of communal tenure in consultation with the affected groups.
- Defining the term community and vesting community land in the community.
- Laying a clear framework for recognition, protection and registration of community land rights to land.
- Investing in capacity building for communal land governance institutions and facilitating their operations.⁶⁷

Some of the recommendations made have been incorporated in the Acts governing community land such as the Land Act and the Community Land Act. The 2010 Constitution has also addressed the issue of community land.

2.5 The current legal framework.

a) Constitution of Kenya 2010

The promulgation of the Constitution in 2010 brought major reforms to land laws in Kenya. The first notable change was that the Constitution had an entire chapter dedicated to the issues of Land and the environment. The new constitution also embodies some of the recommendations made in the reports by the two land commissions and in the National land policy. Some of the reforms brought by this constitution are;

- Principles of national land policy; The Constitution in Article 60 has listed principles that should guide the use and management of land and they include; *'security of land rights, equitable access to land and the sustainable management of land resources.'*⁶⁸

⁶⁵ Section 1.1, Sessional Paper No. 3 of 2009 on National Land Policy, 2009.

⁶⁶ Section 64, Sessional Paper No. 3 of 2009 on National Land Policy, 2009.

⁶⁷ Section 66, Sessional Paper No. 3 of 2009 on National Land Policy, 2009.

⁶⁸ Article 60(1), Constitution of Kenya, 2010.

- Community land: The Constitution has also acknowledged community land tenure as a system of land holding. It provides that community land shall vest in communities. In this way it recognizes the right to collective property with the community as a body capable of owning land.⁶⁹
- National Land Commission: The National Land Commission has been established in Article 67 of the Constitution to have oversight responsibilities over land use planning throughout the country. This is an independent commission and it was created with the hope of remedying the issue of irregular allocation of land by those in power.⁷⁰

b) Land Act 2012

The Land Act mainly recaps what has been written in the Constitution. On the issue of community land the Act simply provides that Community land shall be managed in accordance with the law relating to community land.⁷¹

The law referred to is the Community Land Act which has been discussed below.

c) Petroleum (Exploration and Production) Act

This is the Act that regulates the exploration, development, production and transportation of petroleum.⁷² Section 10 of this Act has placed a responsibility on the contractors to seek permission from any private land owners before entering the land.⁷³ This section relates only to private land and does not address community land rights. A gap clearly exists where a contractor seeks to enter community land. The effect of this is the undermining of community land rights and this leaves communities at the risk of being alienated from their land.

d) Community Land Act 2016

The Community Land Act mainly promotes the formalization of community land rights through registration. This will protect Community land rights better as the members of the community will have title to their land.⁷⁴

Section 36 of the Act provides that investment agreements relating to community land should be made only after open consultations with the communities. This section goes forth to give issues that must be included in the investment agreement. These include, proper rehabilitation of

⁶⁹ Article 63, Constitution of Kenya, 2010.

⁷⁰ Article 67, Constitution of Kenya, 2010.

⁷¹ Section 37, Land Act, No. 6 of 2012.

⁷² Petroleum (Exploration and Production) Act, CAP 308.

⁷³ Section 10, Petroleum (Exploration and Production) Act, CAP 308.

⁷⁴ Section 10 & 11, Community Land Act, 2016.

land upon completion of the project, continuous environmental and social impact assessment and any other matter determining how the communities shall benefit from the local investment on their land.⁷⁵ These provisions are however lacking in the Model Production Sharing Contract which guides oil investment in Kenya.

2.6 Conclusion

This chapter has tracked the development of community land law from pre-colonial times to the current law. It is evident that the colonial laws caused major land alienation by creating White highlands and settling Africans in the Native Reserves. This issue was also not resolved at independence. The laws at and after independence promoted land injustices where land was allocated irregularly.

President Kibai's era was the start of land reforms in Kenya. The two commission reports greatly influenced the reformation of the land law regime in Kenya and led to among other things the development of the national land policy.⁷⁶ Several other reforms can be seen in the Constitution of Kenya 2010 and the current Acts of Parliament governing land.⁷⁷

Though these reforms have brought a lot of positive changes there still is the need for greater reform of the land laws in the country. Community land tenure needs to be given greater legal protection.

⁷⁵ Section 36, Community Land Act, 2016.

⁷⁶ Doyle K, Customary Land Rights in Kenya in the context of History, 15.

CHAPTER 3

PROTECTING COMMUNITY LAND RIGHTS: INTERNATIONAL AND COMPARATIVE PERSPECTIVE

3.1 Introduction

The issue of community land tenure and the economic prosperity of a country is one that has been grappled with by many countries. This chapter shall look into how community land rights issues have been addressed both regionally and internationally.

This chapter has been divided into two sections; international perspectives and comparative perspectives. The international perspectives part shall focus on international instruments on the rights of indigenous people and the Inter-American Human rights system. The international instruments discussed are the ILO Convention 107 and 169 and the United Nations Declaration on the Rights of Indigenous Peoples.

While discussing on the Inter-American Human Rights System the chapter shall focus on two cases dealing with exploitation of minerals on community land rights. They highlight the obligations of the state in securing community land rights.

The second part explores community land rights in Canada and South Africa. These two countries have provided constitutional protection of community land holding.

3.2 International instruments

Kenya has ratified a number of international instruments that guarantee different human rights and the government is obliged to abide by them. Some of this instruments include the United Nations Declaration of Human Rights; the International Convention on Civil and Political Rights (ICCPR); and the International Covenant on Economic and Political Rights (ICESCR).¹ These three instruments are important in setting a basis for the recognition of community rights. There are however instruments that are more specific to community land rights and these are;

- International Labor Organization Indigenous and Tribal Populations Convention, 1957 (No. 107)
- International Labor Organization Indigenous and Tribal Populations Convention, 1989 (No. 169)
- United Nations Declaration on the Rights of Indigenous People (UNDRIP)

¹ Kameri P, Odote C, Musembi C, Ours by right, 103.

Unfortunately Kenya has not ratified any of these three conventions. They are important to this study as they show some of the principles that should guide community land holding. These include free informed prior consent of the community before allowing any activities on that land by outsiders.

a) ILO Indigenous and Tribal Populations Convention, 1957 (No. 107)

This is an international instrument adopted to protect indigenous people from oppression and discrimination. The convention was adopted on 26th June 1957. It affirms that all human beings have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity or economic security and equal opportunity.²

Article 11 of the Convention provides for the recognition of the right of ownership of the indigenous communities over the lands they traditionally occupy.³ The Convention further protects these communities from being alienated from their land without their free consent. It provides that where the removal is necessary then they shall be provided with lands of quality at least equal to the lands they previously occupied. The communities have the option of choosing different modes of compensation such as monetary compensation.⁴

The issue of free consent has been amended over the years by different international instruments as shall be seen below. This Convention has since been amended by the ILO Convention 169 on Indigenous and Tribal Peoples.⁵

b) ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169)

This Convention replaced the 1957 Convention taking into consideration the developments that had taken place since. It removed the assimilationist orientation of the earlier standards.

The 1989 Convention recognizes the culture and spiritual values of communities related to land. It emphasizes the importance of recognizing land as more than just a physical asset but of cultural significant to the communities occupying it.⁶

Article 15 of the Convention puts greater emphasis on obtaining the consent of the communities. It highlights the importance of states implementing procedures of consultation with

² Preamble, ILO Convention on Indigenous and Tribal Populations Convention, 1957, No. 107.

³ Article 11, ILO Convention on Indigenous and Tribal Populations Convention, 1957, No. 107.

⁴ Article 13, ILO Convention on Indigenous and Tribal Populations Convention, 1957, No. 107.

⁵ <http://indigenousfoundations.arts.ubc.ca/home/global-indigenous-issues/ilo-convention-107.html> (accessed on 13th January 2017)

⁶ Article 13, ILO Convention on Indigenous and Tribal Populations Convention, 1989, No. 169.

the communities.⁷ In addition to consent being free it must be informed. This means that the communities should be given all the information necessary before agreeing to any relocation from their land.

c) United Nations Declaration on the Rights of Indigenous People (UNDRIP)

The main principles relating to land in this declaration are:

- Recognition of indigenous peoples right to land; Article 26 of the Convention states that *‘indigenous people have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired’*.⁸ The Article further provides for the recognition of customary law by government.
- Prevention of land alienation or effective remedies for the same; this has been provided for in Article 8 and 28 of the Declaration. Governments are obligated to prevent actions that may dispossess the communities of their land.⁹
- Free informed prior consent; This declaration further develops the concept of indigenous people consenting to resettlement. The exact wording of the Declaration is *‘free, informed, prior consent of the communities’*. The 1957 ILO Convention 107 provided for free consent of the peoples. An amendment to this Article was reflected in the 1989 ILO Convention which provided for free and informed consent. The issue of consent in compulsory acquisition is a contentious one as most communities may not consent to being moved from their traditional lands.

In addition to this the government should provide just and fair compensation with the option of return of the land where possible. This Article is very important in regulating compulsory acquisition of community land.¹⁰

- Public participation: States are obligated to consult with the communities to obtain their consent before allowing the start of any project affecting their land. The Article specifically mentions the exploitation of minerals as one of these projects.¹¹

⁷ Article 15, ILO Convention on Indigenous and Tribal Populations Convention, 1989, No. 169.

⁸ Article 26(1), United Nations Declaration on the Rights of Indigenous People (UNDRIPS), (2007), 61/295.

⁹ Article 8 and 28, United Nations Declaration on the Rights of Indigenous People (UNDRIPS), (2007), 61/295.

¹⁰ Article 10, United Nations Declaration on the Rights of Indigenous People (UNDRIPS), (2007), 61/295.

¹¹ Article 32(2), United Nations Declaration on the Rights of Indigenous People (UNDRIPS), (2007), 61/295.

d) Inter-American Human Rights System

• American Convention on Human Rights

The American Convention on Human Rights has in Article 21 provided for the right to enjoyment and use of property for all citizens. Deprivation of this right should only be for reasons of public interest, upon payment of just compensation and in accordance to forms established by law.¹²

Article 1 and 2 place an obligation on the States to respect the rights in the Convention and to adopt legislative measures in their Constitutions to give effect to the rights and freedoms in the Convention. Article 1 also provides for non-discrimination of all persons.¹³

• Jurisprudence from the Inter American Court of Human Rights

The Inter-American Court was established in 1979 to enforce and implement the American Convention on Human Rights.¹⁴ The two cases discussed below were heard in this court and they highlight fundamentals aspects of securing community land rights.

I. Kalina and Lokono v Suriname¹⁵

The facts of this case are as follows. The government of Suriname had established three nature reserves within the territory of these communities. In 1958 the government granted a mining concession in one of the reserves. The mining activities did not start until 1997. In addition to this the state in 1975 initiated an urban subdivision on which it granted property titles to non-indigenous third parties. Another issue raised in the Court was that the domestic law of Suriname did not recognize the indigenous people's right to hold collective property titles.

The Court found in favor of the communities and made the following orders against the government, it ordered the state to;

- i. Take appropriate measures to ensure the participation of the indigenous people on matters concerning their territory.
- ii. Create measures of restitution grant the Kalina and Lokono Peoples collective title to their territory.
- iii. Creation of a community development fund for the community members
- iv. Establish domestic remedies to ensure effective access to justice.

¹² Article 21, American Convention on Human Rights “Pact of San Jose, Costa Rica”,(B-32), 1969.

¹³ Article 1 & 2, American Convention on Human Rights, “Pact of San Jose, Costa Rica”, (B-32), 1969.

¹⁴ <http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh> (accessed on 15th January 2017).

¹⁵ Case of the Kaliña and Lokono Peoples v. Suriname, IACHR, 2015.

*II. Saramaka v Suriname*¹⁶

This case is similar to the one of the Kalina and Lokono people. It was an application challenging the granting of logging and mining concessions within the traditional territory of the tribal community. Suriname in 1990 started granting these concessions without consulting the traditional people of this territory or seeking their consent. The Court recognized the community's cultural and spiritual connection to the land.

The Court found that the community's right to property and judicial protection had been violated. It also found that the state had an obligation to respect, ensure and to give domestic legal effect of those rights.

The IACHR made orders to the state to review the concessions already granted and to pay compensation to the community for the violation of their rights.

The people of Saramaka had the right to legal recognition of their collective judicial capacity and the right to be consulted.

3.3 Comparative perspective

i. SOUTH AFRICA

a. Background

South Africa had racially discriminatory laws and practices in place for the larger part of the twentieth century. The result of which was extreme inequalities in relation to land ownership and land use.¹⁷ The society was fraught with some of the worst inequalities in income, education and basic services in the world. The constitution was enacted with a goal to transform this issues in society.¹⁸

b. The Constitution of South Africa and community land rights

The Constitution of South Africa has gone a step further in securing land rights to actually address historical injustices. It has also recognized the application and use of customary

¹⁶ Saramaka V Suriname, IACHR, 2007.

¹⁷ HJ Kloppers and GJ Pienaar, The historical context of land reform in South Africa and early policies, available at: <http://www.saflii.org/za/journals/PER/2014/20.html> (accessed on 3rd January 2017).

¹⁸ Wicomb W, South Africa Experience in Communal Land Rights Act, Breaking the mould, Strathmore University Press, (2016), 109.

law. The validity of customary law can therefore not be trampled by common law or by the fact that it's in conflict with common law.¹⁹

The Constitutional Court in *Bhe and others v Khayelitsha Magistrate and others*²⁰ ruled that customary law is recognised as an independent source of law in the Constitution. More specifically it was held that; '*Certain provisions of the Constitution put beyond doubt the fact that our basic law specifically requires that customary law should be accommodated and not merely tolerated*'.²¹

The constitutional basis for the land restitution programme is found in section 25(7) of the Constitution, which states that: '*A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*'²² This is a move to reverse the damage caused by historical land injustices. People who were previously alienated from their land are given access to land.

Customary tenure security is addressed through section 25(6) of the Constitution which states that: '*A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*'²³

Section 211 of the constitution more expressly recognises the institution and role of traditional leadership in accordance with customary law subject to the constitution.²⁴

The validity of customary law is thus determined with reference to the constitution and not with common law. The rights arising from customary law are therefore protected by Constitution.

In our jurisdiction customary law's validity is determined by its consistency with any written law. This places it down under and therefore if a right is not protected or recognised by written law it may not have legal legitimacy.²⁵

¹⁹ Wicomb W, South Africa Experience in Communal Land Rights Act, Pg 111.

²⁰ Bhe and Others v Magistrate, Khayelitsha and Others (2004) AHRLR 212 (SACC 2004).

²¹ Wicomb W, South Africa Experience in Communal Land Rights Act, Breaking the mould, Strathmore University Press, (2016) Pg. 110.

²² Section 25, The Constitution of the Republic of South Africa, 1996.

²³ Section 25(6), The Constitution of the Republic of South Africa, 1996.

²⁴ Section 211, The Constitution of the Republic of South Africa, 1996.

²⁵ Section 3, Judicature Act, CAP 8, Laws of Kenya.

c. The Community Land Rights Act ²⁶

This Act was enacted as an attempt by the government to implement the constitution by mending the situation in apartheid South Africa which had failed to give recognition to community land rights. ²⁷

One of the issues that came up after the Act came into force was that the Act purported to legally recognise the African traditional system. This was controversial because the recognition is already in the Constitution. It therefore does not need statutory law to do so. ²⁸

The other issues that led to its ineffectiveness were;

- The Act continued with the apartheid system of recognition of community boundaries and leaders. Communities had long before the enactment of this Act protested the system of homogenous ethnic identities that has been created by the apartheid government. The community tenure regime was therefore based on an already troubled community boundaries system. ²⁹
- The Act also committed the mistake pointed out by Prof Okoth Ogendo .The mistake was the assumption that the Africans had no legal system of land administration already in place. The Act did this by providing that the communities have to apply for legal status. ³⁰
- The final reason was that by making it a prerequisite that communities develop and register community rules the Act was impliedly denying the existence of current customary rules. ³¹

The validity of the Act was challenged by four Communities that argued that the Act would replace customary land tenure systems in a way that would undermine the rights of many vulnerable communities. The case has been discussed below;

Tongoane and Others v Minister for Agriculture and Land Affairs and others ³²

²⁶ Community Land Rights Act South Africa, No 11 of 2004.

²⁷ Kameri P, Odote C, Musembi C, Ours by right, 124.

²⁸ Wicomb W, South Africa Experience in Communal Land Rights Act, 120.

²⁹ Wicomb W, South Africa Experience in Communal Land Rights Act, 121.

³⁰ Okoth-Ogendo HWO, The tragic African commons: A century of expropriation, suppression and subversion, Land reform and agrarian change in southern Africa, An occasional paper series, 2000, 4.

³¹ Wicomb W, South Africa Experience in Communal Land Rights Act, 120.

³² *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) (11 May 2010)

In 2006 four communities approached the High Court in South Africa to ask it to strike down the Community Land Rights Act for being unconstitutional. Their reasons were that first there were procedural errors in the enactment process of the CLARA as the public participation requirement was fulfilled. They also challenged the tagging of CLARA in its enactment where it was enacted as accordance to section 75 of the Constitution. Section 75 provides for the enactment of legislation that does not affect the provinces.

The other grounds of opposition were that; by centralizing ownership in the hands of the traditional council, the Act would rob the communities of their rights as it will justify the local chief's assertion of ownership over their land. Another ground of opposition was that the Act would replace customary land tenure systems in ways that would undermine the rights of many vulnerable people.

The Constitutional Court while determining the issue of tagging found in favour of the community. The Act had not been enacted procedurally. The Act was therefore rendered void in totality. This therefore made it unnecessary to determine the other issues raised by the community.

This case shows the role of the court in protecting the rights of communities. The court took a bold step in putting the rights of the community members first. It also highlights the importance of public participation in the making of legislation. Adherence to laid down procedures in the creation and enactment of legislation is important in securing the rights of a nation.

d. Public Participation Legislative Framework

South Africa has enacted a comprehensive public participation framework that guides the process. Historically as can be seen from the decision in *Tongoane and Others v Minister for Agriculture and Land Affairs and others*³³ public participation in South Africa has been taken seriously. It was one of the grounds for the CLARA being declared invalid by the courts.³⁴

The framework contains four levels of public participation and these are: inform, consult, involve, and collaborate.

³³ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC) ; 2010 (8) BCLR 741 (CC) (11 May 2010).

³⁴ See discussion in Chapter 2.

The figure below is a representation of the ladder of participation as it is called in the Framework.

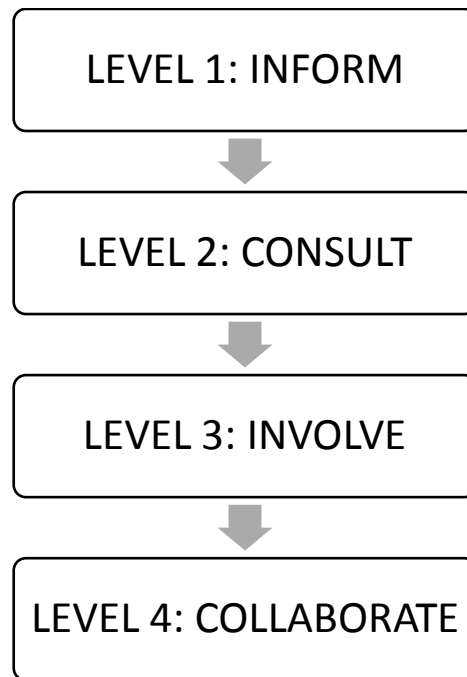


Fig.1³⁵

Informing the public is basically providing them with necessary and sufficient information to aid them in getting better understanding of the situation at hand. The consulting level is where the public is invited to provide feedback or their perspective on the issues being discussed. The third level which is to involve is one where the public is provided with an opportunity for dialogue and interaction and their opinion is considered. The final step is collaboration, the public at this level is given the chance to work jointly with the decision makers to identify the most preferred solution.³⁶

With such a comprehensive policy framework it is easier to track the process of public participation and to ensure the involvement of the community in decisions affecting their livelihood.

³⁵ Public participation Framework for the South African Legislative Sector, 2013, Page 25.

³⁶ Public participation Framework for the South African Legislative Sector, 2013, Page 28.

e. The Constitutional Court and Community Land Rights

The Constitutional Court of South Africa on different occasions made decisions promoting and securing community land rights. One such case is that of *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*³⁷

The main issue in this case was the granting of prospecting rights to a mining firm, Genorah Resources. The land over which the rights were granted was occupied by the Bengwenyama-ye-Maswazi community. The community's chosen investment vehicle was Bengwenyama Minerals and not Genorah Resources.

The court laid down a more rigorous standard in relation to the consultation requirements. In the judgment it was stated that prospecting rights represent "*a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen*". It further stated that consulting demonstrated serious concern for the rights and interest of landowners or the lawful occupiers of the land. The court further pointed out that consultation served two main purposes:

- The first is to see whether there is some accommodation possible between the prospecting right applicant and the rights of the land owner
- The second is to provide the land owners the necessary information about the prospecting operation.³⁸

ii. CANADA

a. Background

Land in Canada is owned by government, native groups, individuals and corporations. There is an estimated 1,172,790 Aboriginal individuals in Canada, this is about 3.8% of the population.³⁹ Their community land rights are protected by the Constitution in Sections 25 and 35 discussed below, this however has not always been the case, and aboriginal communities have

³⁷ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) (30 November 2010)

³⁸ <http://www.saflii.org/za/cases/ZACC/2010/26.html> (accessed on 15th January 2017)

³⁹ Kameri P, Odote C, Musembi C, Ours by right, 120.

had to fight to come to terms agreeable especially regarding mining and exploration activities. An example of such was the Innu Nation and Inco's Voisey's Bay Nickel Mine.⁴⁰

b. Innu Nation and Inco's Voisey's Bay Nickel Mine.

In this case mining and exploration activities were being conducted on the communities land without their consent. This mining site had been home to the Innu and Inuit for thousands of years. This led to protests from the members of the community. They were mainly demanding an environment and cultural protection plan.⁴¹ They were also against the fact that the exploration had begun without their being consulted. What followed was the establishment by the Innu leadership to get the opinion of the members of the community. The people took strong measures to ensure their voices were heard. The consultations resulted was a report titled “*Between a Rock and a Hard Place*”. This report gave the people a very clear basis on how to deal with the company and the government.⁴²

The members stood firm in their claim that they would not consent to the mining activities until an impact benefits agreement (IBA) had been created and the land rights negotiations were finalized.⁴³ Eventually after many negotiations and cases, Innu Nation developed specific guidelines of conduct for companies operating in Innu Territory, and these guidelines can now be enforced due to threats from protests and legal action, and the panel recommendations on land rights and IBAs. Failure to recognise Innu rights could lead to eviction of a company from the community land. An exploration company called Donner Minerals Ltd was evicted for the same even though it was in the advanced stages of exploration.⁴⁴

c. Constitutional protection of indigenous communities

⁴⁰ <http://miningwatch.ca/blog/1999/9/1/aboriginal-peoples-and-mining-canada-six-case-studies> (accessed on 8th January 2017)

⁴¹ <http://arcticcircle.uconn.edu/SEEJ/voisey/innu.html> (accessed on 9th January 2017)

⁴² <http://miningwatch.ca/blog/1999/9/12/keynote-speech-daniel-ashini-between-rock-and-hard-place-aboriginal-communities-and> (accessed on 9th January 2017).

⁴³ <http://miningwatch.ca/blog/1999/9/1/aboriginal-peoples-and-mining-canada-six-case-studies> (accessed on 8th January 2017).

⁴⁴ Aboriginal People and Mining in Canada; six case studies, Mining Watch Canada, available at: <http://miningwatch.ca/blog/1999/9/1/aboriginal-peoples-and-mining-canada-six-case-studies> (accessed on 9th January 2017).

The Canadian Constitution ⁴⁵ has made several provisions to protect the interests and the rights of aboriginal people. There has been an attempt to remedy the historical injustices and the previous land claims that the aboriginal people have brought claims on. There was a gap as to the rights recognized by the Crown and this has been remedied by the Constitution. Section 25 and 35. ⁴⁶

Section 25 of the Constitution of Canada

This section protects Aboriginal rights of the people by providing that the guarantees provided in the Charter shall not be construed to derogate from any aboriginal, treaty or any other rights or freedoms pertaining to the aboriginal people of Canada. This included any rights or freedoms existing by way of land claims agreement. ⁴⁷

Section 35 of the Constitution of Canada

- **Recognition of Aboriginal rights**

Section 35 goes further to recognize the existing aboriginal and treaty rights. It also identifies aboriginal peoples of Canada to include the Indian, Inuit and Metis people of Canada.

The recognition of Aboriginal rights was discussed in the case of *Delgamuukw v. British Columbia*⁴⁸ where the court made a landmark decision concerning the aboriginal title to land. The Court discussed the inalienability of the aboriginal title where it was stated that the title can only be transferred to the Crown. It also went further to state that the source of title is not sovereignty but occupancy. This decision emphasized the recognition given in Section 35(1) of the Constitution. ⁴⁹

The court went further to state that the title may only be infringed in furtherance of a legislative objective that is compelling and substantial. The infringement must also be consistent with the special relationship between the aboriginals and the crown. ⁵⁰

This means that both common law and aboriginal traditions must be considered before making any decisions. This includes considering any existing land rights claims agreements

⁴⁵ The Canada Constitution Act, 1982.

⁴⁶ <http://indigenousfoundations.arts.ubc.ca/home/land-rights/aboriginal-rights.html> (accessed on 9th January 2017).

⁴⁷ The Canada Constitution Act, of 1982, Section 25.

⁴⁸ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 Carswell BC 2358.

⁴⁹ The Canada Constitution Act, 1867, Section 35.

⁵⁰ <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do> (accessed on 9th January 2017)

- ***Land Claims Agreements***

Subsection 3 of Section 35 gives further credibility to land claims agreements by including rights existing by virtue of land claims agreements as part of treaty rights. Land claims agreements arise in areas where the Constitution or existing treaties has not dealt with aboriginal land rights.⁵¹

They shed light on the terms of the ongoing relationship between Aboriginal peoples and the government. More specifically they define how resources on communal lands can be used and co-managed to the benefit of all citizens.⁵²

- ***Aboriginal land rights and gender balance***

Section 35 (4) provides that the constitution also provides for equality which deals with which has also been careful to deal with any gender issues that may arise from this.⁵³ This section provides that the aboriginal and treaty rights are guaranteed equally to male and female persons.

The issue of Gender inequality has also been discussed by the courts.

One such case is that of *McIvor v. Canada*⁵⁴; this was a petition to amend the Indian Act to eliminate discrimination against the wives and children of non-status Indians.

Indians are accorded protection by Section 35 of the Constitution as they are identified as one of the aboriginal communities.

Aboriginal women, before 1985, who married a non-status Indian lost their status while men who married a non-status woman remained status Indians and could confer this status onto their wives and children. The court found that a 1985 amendment to the Indian Act eliminated this provision but left in place provisions that still discriminated against some children of non-status Indians by conferring status to those whose Indian grandparent was a man but not to those whose Indian grandparent was a woman. The Court found in favor of the plaintiff and ordered for the legislation to be amended within one year. This was to provide equal protection to both genders in recognition of their children as status Indians.

⁵¹ <https://www.aadnc-aandc.gc.ca/eng/1100100030285/1100100030289> (accessed on 9th January 2017).

⁵² <http://www.landclaimcoalition.ca/> (accessed on 9th January 2017).

⁵³ The Canada Constitution Act 1982, Section 35(4).

⁵⁴ *McIvor v. Canada*, 2009 BCCA 153 (CanLII)

d. Rehabilitation of mining sites

Rehabilitation has been defined in the Ontario Mining Act section 139 as the measures including protective measures taken in accordance with prescribed standards to protect public health, safety, property and the environment to ensure restoration of the site to its former condition or to a condition that the director sees fit.⁵⁵

Closing of mines normally involves the removal of site facilities and infrastructure which supported the process of mineral extraction, processing and transportation.⁵⁶ The closing is closely followed by the modification of the site by making improvements to the vegetation and surface water features. The mining company must come up with a closure plan that outlines how this will be carried out.⁵⁷ A mine closure plan ensures the restoration and rehabilitation of the mining area to its original state or to at least deal with the hazardous effects of mining activities on the land.⁵⁸ This plan has to be approved by the ministry before it is implemented.⁵⁹

A mine closure plan ensures that the land may even be assigned back to the community to which it initially belonged in a state that it can be put to good use. This prevents cases where the mining companies ups and goes leaving behind ruined land full of pits and waste. This also mitigates the potential harm to the environment and land where the sites were.

3.4 Analysis of comparative models

The discussion above highlights the importance of protecting community land rights. It also goes forth to describe how different states should or have protected these rights.

The main matters identified are:

- *The recognition of community land rights and customary law*

The two ILO Conventions and UNDRIP have greatly emphasized the recognition of indigenous communities rights to the land they occupy. The Inter American Court on Human

⁵⁵ Section 139, Ontario Mining Act, 1990.

⁵⁶ <http://www.mndm.gov.on.ca/en/mines-and-minerals/mining-sequence/closure/mine-closure> (accessed on 8th January 2017).

⁵⁷ <http://www.mndm.gov.on.ca/en/mines-and-minerals/mining-sequence/closure/mine-closure#simple-table-of-contents-1> (accessed on 8th January 2017).

⁵⁸ <http://www.mndm.gov.on.ca/en/mines-and-minerals/mining-sequence/development/mine-development/closure-plan> (accessed on 8th January 2017).

⁵⁹ <http://www.mndm.gov.on.ca/en/mines-and-minerals/mining-sequence/development/mine-development/closure-plan> (accessed on 8th January 2017).

Rights (herein after; IACHR) in the two cases has also highlighted the importance of the same. The Court found against Suriname as it had failed to recognize the community's right to collectively hold property.

Both Canada and South Africa have recognised community land holding in their constitutions hence securing these rights. Constitutional recognition and protection of community land holding promotes the validity of community land rights.

- *Free informed prior consent of the communities before approving any projects on the land*

The issue of consent has been consistently reflected through the international instruments and even the judgements of the IACHR. Consent developed through the years from free consent to free, informed, prior consent of the communities. This means that before any project affecting community land can be approved by the state the consent of the communities should be obtained. South Africa and Canada have both taken important steps in facilitating this. The South African Public Participation Framework provides a guideline on how communities or affected people should be consulted. The four steps ensure effective public participation. The communities are able to make informed decisions.

Land Claims Agreements in Canada are a way of obtaining the aboriginal people's consent before any activities take place on the land. They also provide the communities with a basis of bringing any claims against violating companies. This was seen in the Innu Nation case study

3.5 Conclusion

Both Canada and South Africa have taken positive steps in their approach to community land rights. The most significant of these is the recognition and protection of customary law in their constitutions. It is also important to see the level of attention given to public participation and its role in the legislative process.

The best practises identified in this topic shall be discussed further in the next chapter. The chapter shall focus on how these best practises apply in the Kenyan Context.

CHAPTER 4

SECURING COMMUNITY LAND RIGHTS

4.1 Introduction

It is important to find a good balance to be able to promote development while at the same time protecting the land rights of any affected communities. The Current legislative framework in Kenya has fallen short of securing community land rights in Turkana as has been shown in Chapter 2. This chapter shall focus on five best practises, picked from the comparative perspectives in Chapter 3, which promote protection of community land tenure. The five practises identified are:

- Recognition and protection of community land rights
- Registration of title
- Public participation
- Securing and defining land tenure systems during oil exploration and production
- Environmental and natural resource management

4.2 Recognition and protection of community land rights

The hierarchy of laws in Kenya puts customary law and practices in an inferior position compared to other sources of law such as common law and Acts of parliament. This is evident from the Constitution of Kenya Article 2(4) where it states that the validity of customary law is determined by its consistency with the Constitution which is the supreme law of the land. ¹The Judicature Act goes further to state that the courts may use customary law if it is not inconsistent with any written law. ² This means that the status or applicability of customary law comes down below after all written laws in the country. Being placed that low in the hierarchy in itself promotes the undermining of customary law yet many communities still adhere to their customary values and practices.

The suppression of community land rights has mainly been through legislation. This has been through the statutory preference for individualization of land rights.³ It is important to use legislation to reverse the adverse effects of these on community land. This can be through greater recognition of community land in written law.

¹ Article 2(4), Constitution of Kenya, 2010.

² Section 3, Judicature Act, CAP 8, Laws of Kenya.

³ See discussion in Chapter 2.

The recently enacted Community Land Act has defined customary land rights as. ‘*Rights conferred by or derived from African customary law, customs or practices provided that such rights are not inconsistent with the Constitution or any written law*’⁴

This does not solve the problem identified above. In South Africa and Canada communal land holding has been protected expressly in the Constitution. In South Africa the constitution recognized customary land holding to be equal to the other systems of land holding.⁵ This has secured customary land rights from being trampled simply by being in conflict with Common law. The same is the case with Canada and the recognition of Aboriginal land holding in Section 35 of the Constitutional Act of 1982.⁶

Okoth Ogendo in his Article⁷ made recommendations that emphasized the recognition of African customary tenure systems where he proposed that customary law should be restored and strengthened as the commons law of African jurisdictions. He further proposed that land rights should be reconstructed and security systems be drawn upon community values and principles.⁸

The strengthening of customary law is important as it provides a proper governance framework especially in land and resource management matters between the community and outsiders.⁹ The community by being accorded the necessary protection is able to negotiate for better deals and have more control over their land.

It is also important to streamline the different legal policies to promote consistency. The Community Land Act in Section 5(3) provides that, ‘*Customary land rights, including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer.*’¹⁰ Despite having this provision in place the access to land principles or duties of a contractor only focus on Trust land and Private land. In the Petroleum (Exploration and Production) Act a contractor is under the obligation to consult with the holder of privately held land before accessing the land.¹¹ The same is not required of

⁴ Community Land Act, No. 27 of 2016, Laws of Kenya.

⁵ Section 25, The Constitution of the Republic of South Africa, 1996

⁶ Section 35, The Constitutional Act of Canada, 1982.

⁷ Okoth-Ogendo HWO, The tragic African commons: A century of expropriation, suppression and subversion, Land reform and agrarian change in southern Africa, An occasional paper series, (2000), 4.

⁸ Okoth-Ogendo HWO, The tragic African commons: A century of expropriation, suppression and subversion, Land reform and agrarian change in southern Africa, An occasional paper series, (2000).

⁹ Mbote P, Keiyah J, Securing property rights in land in Kenya formal versus informal, 315.

¹⁰ Section 5(3), Community Land Act, No. 27 of 2016.

¹¹ Section 6, Petroleum (Exploration and Production) Regulations, 1984.

community land. This Section therefore needs to be amended to include Community Land. The same is the case in the Model Production Sharing Contract.¹²

From the discussion above it is evident that greater recognition of community land rights and treating them as equal to other land tenure systems secures these rights better. These two changes will accord greater protection to the communities in regions such as Turkana from land alienation.

4.3 Registration of community land rights

Informal systems of land tenure such as customary land tenure have several benefits such as flexibility and protection of individual tenure within the community. These systems have been praised for their effectiveness and high levels of organization as was demonstrated by Prof. Okoth Ogendo.¹³ Informal systems have also proven to be very cost efficient as no complex legal processes are required. Belonging to a certain community earns the members certain rights to the land held as community land.

Despite these benefits informal tenure systems are narrow in their scope of application and it is often hard to enforce these against outsiders.¹⁴ Due to historical statutory preference and protection for individualization of title informal systems also lack legal legitimacy.¹⁵ In certain cases community members may lack an avenue of bringing any claim if they are denied access to land within the community.

The process of formalization of land rights through registration of title is important to communities as it ideally should secure their rights to land better. Registration of title has been provided for in the Community Lands Act 2016.¹⁶ The procedure of registration described in Section 7 of the Act provides for a register of all members of the community which prevents leaving out of women and children.¹⁷

In addition to reducing boundary disputes registration of title enables communities to fight as a unit if their rights are violated. It also encourages consultation with the members of the community before the granting of a license to any investing companies as ownership of the land

¹²Section 5(7), Kenya Model Production Sharing Contract 2015, available on: <http://www.nationaloil.co.ke/site/6.php?id=1> (accessed on 9th January 2017).

¹³ Okoth-Ogendo HWO, The tragic African commons, 17.

¹⁴ Mbote P, Keiyah J, Securing property rights in land in Kenya formal versus informal, 318.

¹⁵ Mbote P, Keiyah J, Securing property rights in land in Kenya formal versus informal, 319-320.

¹⁶ Community Land Act, No. 27 of 2016.

¹⁷ Section 7, Community Land Act, No. 27 of 2016.

is clear. It is clear that from the Innu Nation case the fact that they were acting as a unit with good organization and leadership contributed significantly to their securing of land rights.¹⁸

For the government and the oil companies knowing who the land owners are makes negotiation easier as the members can easily be gathered together and negotiations can begin. It would also make the process of coming up with a land claims agreement even smoother. Being able to ascertain who the land belongs to also helps in the process of compulsory acquisition in recording interest and therefore amount of compensation payable to the community as a whole.

Formalization of these land rights should however not be construed as the replacement of existing social norms in the community. The process should be aimed at protecting the land rights of the community but it should also not dictate the systems of land use and holding by the community members.¹⁹

Registration of community land rights is therefore very important as it ascertains and gives legal legitimacy to the land rights of the community members. It also increases the probability of the government including the community in the investment negotiations as it is clear who the land belongs to.

4.4 Public Participation

Public participation has been described as a communication and a collaborative problem solving mechanism that involves consultation with the people. The people in this case may be affected individuals, government entities or organizations. The goal of public participation is to arrive at better and more satisfactory decisions.²⁰

The Constitution of Kenya promotes public participation in Articles 35, 69 and 196. In Article 35 it provides for the right to access information. According to that Article every citizen has the right to access information held by the state.²¹

Under its duty to protect the environment and natural resources the State also has the obligation to encourage public participation in the conservation of the environment.²² The same is echoed in Article 196 as one of the duties of the County Assembly in law making.²³

¹⁸<http://miningwatch.ca/blog/1999/9/1/aboriginal-peoples-and-mining-canada-six-case-studies>(accessed on 8th January 2017)

¹⁹ Celestine Nyamu-Musembi, 'Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa' Institute of development studies working paper 272, (2006),9.

²⁰ Public participation Framework for the South African Legislative Sector, 2013, Page 25.

²¹ Article 35, Constitution of Kenya, 2010.

²² Article 69, Constitution of Kenya, 2010.

Public participation is also provided for in other Acts of Parliament and pieces of legislation such as the National Land Policy that speaks about developmental control.

Though public participation has been provided for in various statutes it is more often than not ignored. Its strict implementation is therefore very important to create a proper public participation legislative framework.

South Africa has enacted a comprehensive public participation framework that guides the process. Historically as can be seen from the decision in *Tongoane and Others v Minister for Agriculture and Land Affairs and others*²⁴ public participation in South Africa has been taken seriously. It was one of the grounds for the CLARA being declared invalid by the courts.²⁵ The framework contains four levels of public participation and these are: inform, consult, involve, and collaborate.

Informing the public is basically providing them with necessary and sufficient information to aid them in getting better understanding of the situation at hand. The consulting level is where the public is invited to provide feedback or their perspective on the issues being discussed. The third level which is to involve is one where the public is provided with an opportunity for dialogue and interaction and their opinion is considered. The final step is collaboration, the public at this level is given the chance to work jointly with the decision makers to identify the most preferred solution.²⁶

With such a comprehensive policy framework it is easier to track the process of public participation and to ensure the involvement of the community in decisions affecting their livelihood.

4.5 Securing and defining land tenure systems during oil exploration and production.

The Kenya Model Production Sharing Contract (MPSC) has in section 17 spelled out one of the obligations of the government as securing land for the oil company.²⁷ This ideally should involve the government carrying out all the processes necessary be it compulsory acquisition or

²³ Article 196, Constitution of Kenya, 2010.

²⁴ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).

²⁵ See discussion in Chapter 2.

²⁶ Public participation Framework for the South African Legislative Sector, 2013, Page 28.

²⁷ Kenya Model Production Sharing Contract 2015, available on: <http://www.nationaloil.co.ke/site/6.php?id=1> (accessed on 9th January 2017).

negotiation with the people occupying the area. The oil companies should ideally be able to utilize the area and carry out exploration activities without having to deal with the land issue. This however has not been the case as Tullow Oil has on several occasions had to deal with community land issues in Turkana. The people of Turkana have protested their operations and from studies carried out in the area they feel like the companies have come to take their land.²⁸

The land tenure system in Kenya is already complex especially considering the overlapping of tenure that occurs when minerals are discovered on land. Public land in the constitution is defined as all minerals and mineral oils.²⁹ Land which may originally have been community land falls under the category of public land by virtue of discovery of mineral oil.

It is important for the government at this stage to carry out the process of compulsory acquisition as provided for in Article 40 of the Constitution³⁰ and Section 107 of the Land Act.³¹ Compulsory acquisition will secure the land for the incoming investors while at the same time compensate the community for the land lost. This will prevent or at least significantly reduce the protests over land in the area of extraction.

The government could also make use of land claims agreements as have been used in Canada. Land Claims Agreements are modern treaties negotiated between the aboriginal groups and the territorial government in Canada.³² These agreements are more specific than the existing legislation on the rights of the members of the community. They are modeled to secure the livelihood and interests of the communities over the land. The agreements can be used as a negotiating basis between the government, the community and the oil companies especially in cases where compulsory acquisition is not necessary. Issues such as use and management of the natural resources of the land are addressed in the agreements.

Some of the concerns raised by the people of Turkana involved the competition over the already scarce resources with the oil companies.³³ Sometimes the structures set up by the companies bar the communities from accessing grazing areas for their animals. A land claims agreement is therefore a good way to negotiate and codify these agreements over the use of land

²⁸ See discussions in Chapter 1 on the Kituo Cha Sheria and Cordaid report.

²⁹ Article 62, Constitution of Kenya, 2010.

³⁰ Constitution of Kenya, 2010.

³¹ Land Act, No. 6 of 2012.

³² <https://www.aadnc-aandc.gc.ca/eng/1100100030285/1100100030289> (accessed on 9th January 2017).

³³ Cordaid report, 'Oil exploration in Kenya: Success requires consultation' Assessment of community perceptions of oil exploration in Turkana County, Kenya, (2015), 33.

between the companies and communities that may be too specific to include in the Acts of parliament. The agreement is also customized to the needs and livelihood of the community making it more effective.

4.6 Environment and natural resource management

Land has historically been a sensitive issue mainly due to its finite nature. Expansion of communities has led to several conflicts over land as it is not seen to be enough for everyone. One of the principles of Compulsory Acquisition is that the right of return held by the original owner of the land. Meaning if the use for which the government obtained the land ceases the initial owner of the land can ‘buy’ his land back from the government.³⁴

Land that has been used for extraction of oil may not seem appealing to the initial owner as these activities lead to the degradation of the land. Most mining sites are full of pits and this reduces the quality and land use options.

In Ontario, Canada, the Mining Act provides for a mine closure plan.³⁵ This is a comprehensive plan of land rehabilitation with the aim of restoring the land back to its former state or at least something close. It involves the sealing of pits and the planting of vegetation to reverse the negative effects of oil extraction that may have affected the land.³⁶ The plan has to be approved by the minister and at the end of it the company has to present a report showing how they have rehabilitated the land in question.

Kenya’s Model Production Sharing Agreement contract ought to include this as one of its clauses.³⁷ Mandatory land rehabilitation, will promote the sustainable use of land and at the end of the exploration and production communities can be resettled back on their former pieces of land if they so wish. A mine closure plan will also enable the land to be put to good use even after the oil mining operations have come to an end rather than just leave the land in its damaged state.

Benefit sharing from the profits of the natural resource is another issue that raises contention. Though the National Government has entered into agreements with the companies on the shares of the profit each should get the communities surrounding the mining site also feel

³⁴ Section 110 (2), Land Act, No. 6 of 20102.

³⁵ See discussions in Chapter 3.

³⁶ <http://www.mndm.gov.on.ca/en/mines-and-minerals/mining-sequence/development/mine-development/closure-plan> (accessed on 8th January 2017).

³⁷ Kenya Model Production Sharing Contract 2015, available on: <http://www.nationaloil.co.ke/site/6.php?id=1> (accessed on 9th January 2017).

entitled to some form of compensation. This is because they have to deal with the negative effects of oil exploration near their land.³⁸ Some of these issues include limited natural resources, loss of land and not being able to access grazing land they initially had access to.

The Natural Resources (Benefit Sharing) Bill, 2014 has addressed this use in Section 31 where it has provided for the establishment of a Local Benefit Sharing Forum. This Forum shall negotiate with the county government for the purpose of entering into a local benefit sharing agreement on behalf of the community and also identifying community projects to be supported by the money allocated.³⁹

The Bill is however not in force as it is still being discussed in Parliament.

4.7 Conclusion

Securing land rights amidst massive development is important in any society. In Kenya community land rights have historically been undermined due to their informal nature and perceived lack of legal legitimacy. It is important to recognize community land rights and to treat them as equal in status as other land holding systems. The government should also formulate and enact a proper public participation framework to promote consultation with the communities before decisions are made. Another important factor is land claims agreements and mine closure plans. These practices have been successful in Canada and South Africa and they would work well if implemented in Kenya and they will bring good reforms to the land system.

³⁸ Cordaid Report, 'Oil exploration in Kenya: Success requires consultation' Assessment of community perceptions of oil exploration in Turkana County, Kenya, (2015), 33.

³⁹ Section 31, The Natural Resources (Benefit Sharing) Bill, 2014.

CHAPTER 5

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This chapter outlines the findings, recommendations and conclusions of the study. The study was undertaken to show the challenges community land holders face in light of exploration activities in Turkana.

5.2 Findings

a. The status of community land rights in Kenya

Community land rights in Kenya are accorded insufficient protection. Chapter one and two have shown how historical preference for individualization of tenure undermined communal land holding. Chapter two also shows how colonial land laws greatly undermined communal land holding and this was not remedied at independence. The other chapters have also demonstrated how this protection is lacking especially if compared to countries such as South Africa and Canada which have made great steps in protecting community land tenure.

b. The legal protection of community land tenure

This study has shown that although several reforms have been made in the protection of community land rights the laws are still lacking in many aspects. The validity of community land rights is determined against all written laws both national and county. This places community land rights vulnerable to being undermined by these other laws. This is also expressed in Section 38(2) of the Community Land Act. The section states that the management of community land is subject to, among other things, national and county policies.¹The inadequate protection is reflected in the Petroleum (Exploration and Production) Act where the contractor is not required to give notice to community land holders before entering the land. Notice is however required if the contractor is entering private land.²

¹ Section 38(2), Community Land Act, No.27 of 2016.

² Section 10, Petroleum (Exploration and Production) Act, CAP 308.

c. Community participation in projects affecting their land

Public participation and consultation with the communities is one of the shortfalls of the state in securing community land rights. Public participation involves informing the communities of the proposed projects on their land and getting their input before making decisions affecting their land. The reports discussed in chapter one show that the people of Turkana were not made aware of the exploration projects. The national government also failed to consult them before granting the licenses to companies.

5.3 Recommendations

a. Enhancing legal protection for community land

The enactment of a community land Act has brought some reform to community land holding. There still is the need to develop the protection given to these rights. Canada and South Africa have accorded constitutional protection to communal land rights. The effect of this is that the validity of communal land rights is therefore determined against the constitution and not all written law as the case is in Kenya.

b. Public participation and community consultations

Most Acts of parliament provide for public participation or for the state to consult with the communities before reaching decisions affecting them or their land. These provisions are barely adhered to as most agreements are reached to without the involvement of the communities. Consultation with the communities should embody the principle of free prior informed consent embodied in the ILO Conventions and UNDRIP.³ There should be implemented a public participation framework to properly guide the process of consultation and public participation. This will form a system of checking whether proper consultation has been conducted.

c. Encouraging faster and more inclusive registration of community land rights

The formalization of community land rights through registration will grant communities more protection over their land. This protection will also enable them to deal with outsiders. Communities should therefore be encouraged to register their lands. They should be sensitized and educated on the importance of the same so that they may be more informed on the rights they hold.

³ S.36, Community Land Act, No.27 of 2016.

d. Need to create land rights agreements

It is important to have land rights agreements where community members and the state can negotiate on the potential projects that may affect their land. These agreements form a basis of negotiation over the natural resources on the land and how they will be used and managed by both the communities and the oil companies. These agreements also promote public participation in investments over community land.

e. Mine closure plan

Mine closure plans ensure rehabilitation of mining sites at the end of operations. Including this in the production sharing contract will promote restoration of the land at the end of the mining operations. This will make the right of return of compulsorily acquired community land more effective and appealing. It will also promote conservation and non-degradation of land which is already a scarce resource.

5.4 Conclusion

The study has achieved its objectives and responded to the statement of problem. The objectives were:

- i. To examine the regulatory framework governing land tenure security in Kenya with a special focus on the extractives industry.
- ii. To identify the challenges the local communities and the oil companies are facing due to the inefficiencies of the legal policy framework in securing land tenure on community land.
- iii. To propose recommendations to help mitigate the challenges being faced by the communities and the oil companies as well.

Objective i

The study in Chapter two has shown the historical development of the law governing community land and other forms of land holding and how this affected community land rights. In examining the current legal framework the study has brought out different ways in which community land rights have not been sufficiently protected by the existing laws.

Objective ii

The challenges faced by the communities and the oil companies have been brought out in the first two chapters of this study. They have also been highlighted in the fourth chapter which compares the best practices discussed in Chapter 3 and their application in the Kenyan context.

Objective iii

The study has proposed several measures that can be taken to promote community land tenure in the progression of oil exploration.

Hypothesis

This study is based on the assumption that the current legal policy framework is inadequate in securing land tenure on community land where oil exploration is taking place.

The hypothesis has been tested and proven in this study by examining the laws and legal policies governing community land rights and oil exploration and production in Kenya. Chapter one and two have shown the historical preference for individualization of tenure and how that undermined Community land holding. The chapters have also shown the unequal treatment given to community land holding in terms of access to land by the oil contractors. These among others go to prove that the legal framework for securing community land tenure is lacking.

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