



## BRIEF

# HANDLING EXTRACTIVES RELATED GRIEVANCES IN KENYA

## A Guide for Judicial Officers





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## INTRODUCTION

This Brief is a summary of the Judiciary Guide on Extractives, which is a culmination of a three-phase project on “Advancing Capacity and Access to Justice in Kenya’s Extractives Sector” that commenced in March 2018.

- **Phase 1.** A qualitative study (dubbed “Listening Project”) on “Tracing and Documenting Grievances and Grievance Handling Mechanisms in the Oil and Gas Sector in Kenya”. The study was conducted between June and August 2018 in the Lokichar Basin of Turkana East and South and applied participatory research method.
- **Phase 2.** Judiciary Training on Extractives, 5th–9th November 2018. Based on the findings of the Listening Project, the EB, in partnership with the Judiciary Training Institute (JTI) and IDLO, conducted a two-part training workshop for High Court judges and legal researchers to strengthen their capacity regarding key legal aspects in the extractives sector; including the interface between different dispute resolution avenues within the sector.
- **Phase 3.** Development of a Judiciary Guide on Extractives based on the feedback from the Judiciary Training, Listening Project findings (including validation workshop of the findings) and an in-depth desk review of relevant literature, laws and policies on extractives. The Guide adopts a value chain design which: identifies potential grievances at each stage of the value chain; proposes diverse grievance handling options for the Judiciary to undertake at each stage; and establishes the interface between judicial and non-judicial mechanisms (i.e. ADR). The Brief seeks to provide an overview of the extractives sector; its attendant grievances and existing judicial and non-judicial grievance handling mechanisms. It should be noted that the Judiciary Guide which forms the basis of this Brief does not seek to prescribe any preferred or appropriate mechanism for addressing existing and emerging grievances in the sector; but to provide a detailed guidance to aid the Judiciary in addressing these grievances.

## BRIEF OVERVIEW OF THE EXTRACTIVES INDUSTRY IN KENYA

Kenya’s extractives industry (EI) has experienced increased investments following the discovery of more commercially viable mineral resources (such as iron ore, gold, coal, rare earths, etc.), and hydrocarbons (oil and gas). The oil and gas sector has existed since the 1950’s, but it was not until 2012 when the first commercial oil discovery was made in Lokichar Basin, Turkana, which on current estimates holds 560 million barrels of recoverable oil. The launching of flagship projects, such as oil and gas exploration and development in Turkana, Lamu (offshore) and Mandera, and the Kwale titanium project, signal a strong potential for economic growth in the country. The Government has recognized this and included the sector in the country’s Vision 2030, as one of the priority sectors with a high potential of spurring economic growth.

Exploration continues further with significant gas discoveries in the Lamu Basin, and there are good prospects of new finds elsewhere in the county. Presently, there are four prospective sedimentary basins in Kenya: Anza, Lamu, Mandera and the Tertiary Rift, with the Lamu Basin extending off-shore. To date, over 86 wells have been drilled with a majority within the Tertiary Rift. Following the discovery, the Government of Kenya has shown commitment towards supporting the sector by creating an enabling legal, policy and institutional framework to maximise benefits from exploitation of oil and gas. Moreover, the country has started transporting stored crude oil, produced from injection and production testing at the Ngamia and Amosing fields, by road to Mombasa under the Early Oil Pilot Scheme (EOPS) which seeks to establish enabling commercial, physical and logistical infrastructure that will facilitate future Full Field Development of the petroleum resources.<sup>1</sup>

On the other hand, the mining sector has been active in Kenya for over 80 years, with diversity of minerals. The Mining Act 2016 generally classifies the mining sector into three categories: artisanal mining; small-scale mining; and large-scale mining operations (LSM).<sup>2</sup> Artisanal mining’ refers to ‘traditional and customary mining operations using traditional or customary ways and means’<sup>3</sup> while ‘small scale mining’ is labour-intensive, with mechanisation being

<sup>1</sup> <<https://www.delivery.go.ke/flagship/earlyoil>> on 28 January 2018.

<sup>2</sup> Mining Act 2016, s 4.

<sup>3</sup> Mining Act 2016, s 4.

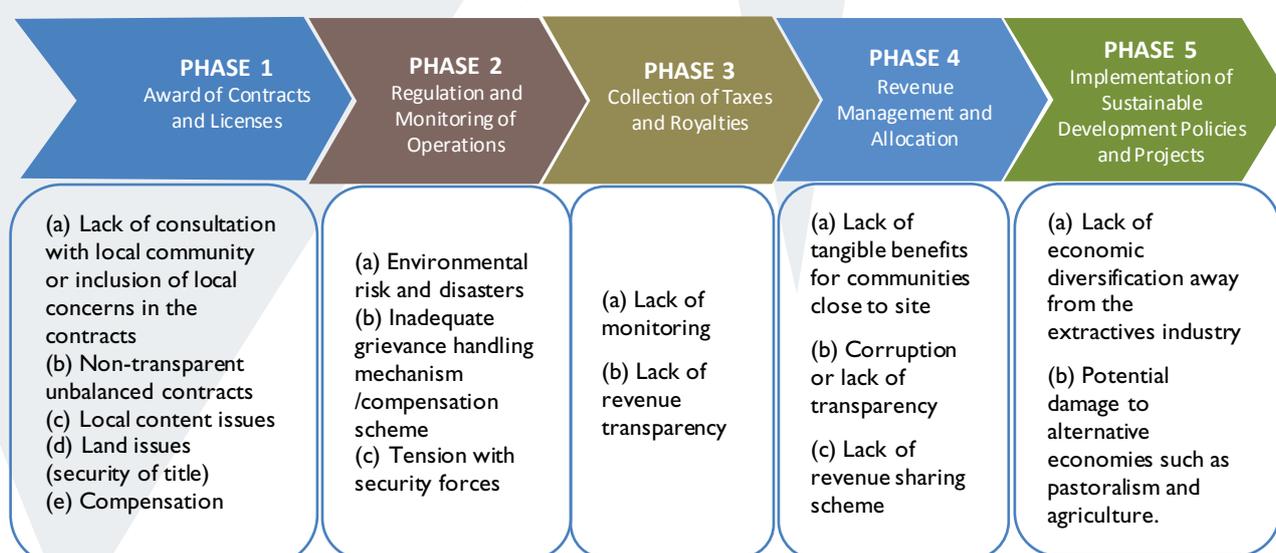
at low level and simple.<sup>4</sup> LSM refers to capital-intensive mining operations carried out by large public or private companies using heavy and sophisticated machinery, advanced technology and with a higher revenue turnover.<sup>5</sup>

## GRIEVANCES ALONG THE EXTRACTIVES INDUSTRY VALUE CHAIN

As Kenya's EI transforms, with actual oil production expected in 2021, the magnetic effect of a prospective petroleum and mineral economy is already being seen: an influx of businesses and job seekers in the resource producing regions, and high expectations and vested interests by different stakeholders on the sector; particularly regarding revenues, jobs and tenders. The expectations raised by the oil and mineral finds have not been as effectively managed as thought, and the problems experienced in other resource-rich economies especially in Africa are already evident: anxieties among local communities about increased competition for (grazing) land, water, and employment and business opportunities; high risk of speculation; and incipient grievances and insecurity characterized by a series of community protests.<sup>6</sup>

Extractives grievances emerge at every step along the extractives value chain. Some of the grievances are unique to each phase of the value chain while others emerge at every phase of the value chain.

**Figure 1: Potential drivers of grievances along the extractives value chain**



### PHASE I: Award of Contracts and Licenses

Awarding of contracts and licenses leads to a number of conflicts pitting the government and the contractors as well as government and the public. These conflicts are precipitated by a number of factors, key among them being:

#### (a) Lack of transparency in the awarding of contracts and licenses to investors

Transparency in the awarding of contracts and licenses remains a challenge for most resource-rich countries, and Kenya is not an exception. Conflicts can arise when decision-making, especially during the awarding stage, is secretive.<sup>7</sup> In Kenya, there have been complaints that the award of contracts and licenses has been extremely secretive and opaque from the general public. This has led to the push for more openness in the award of

<sup>4</sup> See the distinctive features of small-scale mining under the Second Schedule of the Mining Act (Act No. 12 of 2016).

<sup>5</sup> Mining Act 2016, s 4; Bernd Dreschler, *Small-scale Mining and Sustainable Development within the SADC Region* (London, IIED & WBCSD 2002) 20; International Labour Office, *Harnessing the Potential of Extractive Industries: Decent Work in the Rural Economy* (Policy Guidance Notes) <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_policy/documents/publication/wcms\\_437199.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/documents/publication/wcms_437199.pdf)> accessed 20 February 2018.

<sup>6</sup> Cordaid, 'Oil Exploration in Kenya: Success Requires Consultation – Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya' (2015) <[https://www.cordaid.org/media/medialibrary/2015/09/Turkana\\_Baseline\\_Report\\_DEF-LR\\_Cordaid.pdf](https://www.cordaid.org/media/medialibrary/2015/09/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf)> on 23 January 2019.

<sup>7</sup> *ibid.*

contracts and licenses. However, while the Constitution 2010 sets a strong framework for access to information,<sup>8</sup> much needs to be done to ensure transparency in the negotiation and signing of EI contracts.

### **(b) Land related grievances**

Due to the importance of land to the social, economic, cultural and political lives of communities in Kenya, it has potential to evoke grievances. Such grievances could arise after the award of contracts, and include ownership contestations, loss of land, land degradation, loss of source of livelihoods (grazing sites, watering points and sacred sites), lack of community consent in land acquisition, fear of displacement, and land and crops valuation which affects amount of compensation. These grievances are raised by the community against the extractive company and the government.

### **(c) Renewal and revocation of contracts/licenses**

Investors in the EI are required to apply either for extension or renewal of contracts and licenses. In Kenya's mining sector, for instance, investors are required to apply for different licenses at different phases of the project. These licenses include reconnaissance licence, prospecting licence, retention licence, and a mining licence in large scale mining operations. Grievances may arise either in the delay in renewal or actual revocation of the license or awarding of a new contract. Further, grievances may arise when the government or even investors want to renegotiate certain provisions in the contract. This is common when there is transition from one government to another and the new government wants to renegotiate contracts.<sup>9</sup>

### **(d) Corruption in the awarding of contracts and licenses**

Awarding of contracts and licenses has potential corruption risks. Governments employ different approaches in the awarding of contracts and licenses. Some can take an open-door policy for the allocation of rights (either through a first come, first served basis or by entering into direct negotiations with one or more interested investors).<sup>10</sup> Grievances related to corruption may be as a result of bribery, interference in the negotiation processes through political interests or extortion so as to influence the decision-making process. This may also include compromise of public officials to circumvent or relax certain provisions in contracts that may relate to key aspects like environmental preservation, protection of land rights and land access restructurings to protect sources of livelihoods for local communities, including indigenous peoples. Apart from award of contracts and licenses, corruption can be manifested in securing of consent from community members to access land for operations.

### **(e) Inadequate engagement and access to information**

The EI generates high expectations and concerns especially among community members on the potential opportunities and direct benefits. There is, however, potential for grievances arising when there is little or no engagement of different stakeholders, especially the communities. For communities, this raises the concern that they will face immediate environmental, social, health or other impacts of the operations without any form of compensation or protection.<sup>11</sup> In Kenya, the EI has experienced grievances around consultation in the areas of determining compensation, access to land and available opportunities.<sup>12</sup> This is despite the fact that as much as EI companies are legally required to consult local communities before an extractive project begins, there is no substantive definition and/or threshold of what constitutes 'adequate' consultation. There is however an emerging jurisprudence in Kenya to inform how public participation should be conducted as well as measuring the adequacy of public participation.

<sup>8</sup> Constitution of Kenya 2010, art. 35.

<sup>9</sup> Paul Stevens, Jaakko Kooroshy, Glada Lahn and Bernice Lee, *Conflict and Coexistence in the Extractive Industries* (A Chatham House Report, 2013).

<sup>10</sup> OECD, 'Corruption in the extractives value chain: Typology of risks, mitigation measures and incentives' OECD, 2016.

<sup>11</sup> Extractives Hub, 'Conflict and Extractives' <<https://extractiveshub.org/topic/view/id/5/chapterId/509>> accessed 20 February 2019.

<sup>12</sup> Extractives Baraza, Strathmore University, *Tracing and Documenting Grievances and Grievance Handling Mechanisms in the Oil and Gas Sector in Kenya: Experiences from Turkana County* (Listening Project Report, 2018) 4, 15.

## **(f) Local content issues**

Benefits associated with the EI can potentially generate grievances when they are not forthcoming.<sup>13</sup> As extractives operations start, companies and governments tend to overpromise the positive impacts of the projects e.g. job opportunities, training, alleviation of poverty as well as access to basic services and business opportunities. These promises raise expectations and when not met, tensions arise over lack of participation of the local workforce in the EI activities. In Turkana, for instance, the issue of jobs and tenders has been one of the most contentious issues from the beginning of oil exploration. The demand for jobs and tenders was at the core of protests in October 2013 that resulted in the suspension of oil operations,<sup>14</sup> as well as those experienced after the launch of the EOPS in June 2018.<sup>15</sup> Further, accusations of skewed employment opportunities between the locals and those from the rest of Kenya have been constant due to perceived bias.<sup>16</sup>

## **PHASE 2: Regulation and Monitoring Operations**

Regulation and monitoring operations is the second most important stage in the EI value chain. Common grievances in this phase relate to:

### **(a) Environmental risks and disasters**

The EI has potential for environmental impacts and risks that can trigger disputes between companies, communities and governments.<sup>17</sup> These concerns can well be addressed through elaborate and consultative/participatory EIAs, environmental audits and monitoring. Concerns generally revolve around environmental conservation and protection, health and safety, mitigation, consultation and compensation aspects. For instance, in *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited*,<sup>18</sup> the plaintiffs were concerned not only that Tiomin Kenya was not offering them adequate compensation, but also that mining activities would result in numerous environmental and health problems which could not be adequately compensated in damages. The critical concerns always revolve around what is the acceptable risk to be borne to pave way for EI operations to proceed even in situations where certain projects may be viewed as highly risky and with inevitable negative impacts to land, water, livelihoods and communities among others. Other grievances relate to poor waste management by the companies, degradation of land and natural ecosystems due to increased human activities that put pressure on available water and land resources.

### **(b) Inadequate institutional and legal frameworks**

The EI requires diverse legal and institutional frameworks to manage the sector. Conflicts/grievances are dramatically increased when governments enter into agreements with investors when they have inadequate or weak institutional and legal frameworks to regulate and monitor the sector operations. Therefore, governments are not able to effectively and efficiently regulate the EI in a transparent and accountable manner.<sup>19</sup> Grievances arise more when the existing institutions do not have the capacity and robust standards to protect property rights, compensation, inaccessible dispute resolution mechanisms among others. In Kenya, for instance, a modern petroleum law has just been enacted and there are several regulations needed for effective implementation. This creates gaps when it comes to key institutions to provide oversight and address emerging grievances. Lack of clear grievance channels that incorporate traditional grievance mechanism as well as those that easily compliment the judicial mechanisms can be seen as creating opportunities for more grievances as those affected resort to protests.

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<sup>13</sup> Stevens et al (n 8).

<sup>14</sup> Jeremy Lind, 'Governing Black Gold: Lessons from Oil Finds in Turkana, Kenya', *Research Briefing*, 2017, 6 <<https://assets.publishing.service.gov.uk/media/5bd87163e5274a6e28771674/briefidssaferworldturkanaweb.pdf>> accessed 23 January 2019.

<sup>15</sup> Hesboun Etyang, 'No oil will leave Turkana without security and jobs, protesters say' *The Star* (27 June 2018) <[https://www.the-star.co.ke/news/2018/06/27/no-oil-will-leave-turkana-without-security-and-jobs-protesters-say\\_c1778927](https://www.the-star.co.ke/news/2018/06/27/no-oil-will-leave-turkana-without-security-and-jobs-protesters-say_c1778927)> on 3 February 2019.

<sup>16</sup> Extractives Baraza, *Listening Project Report* (2018) 16.

<sup>17</sup> Stevens et al (n 8) 26.

<sup>18</sup> *Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited* [2001] eKLR.

<sup>19</sup> *ibid.*

### (c) Apportioning Liabilities and Risks

When a disaster happens as a result of extractives operations, questions on who should take liability arises, which can lead to complex disputes. Apportioning of risks and liabilities raise concerns around whether due diligence was properly conducted to establish the risks associated with a project before failures occurred, and about who knew what and when. The potential outcome of such is long, costly legal battles between companies and their subcontractor especially.<sup>20</sup> Claims from those affected including the impact to the environment and costs related to restoration are huge and therefore easily lead to disputes among business partners. In the case of state participation, this becomes even more complex when serious failures occur leading to mutual accusations in cases of negligence or failure to adhere to contractual obligations. Apportioning of liabilities also becomes quite complex in situations that the legal frameworks governing the operations are either unclear or overlapping. In Kenya, the Model Production Sharing Contract 2019 (MPSC) provides for joint liability and indemnity. Where the contractor consists of more than one person the MPSC provides that their liability shall be joint and several. Further the contractor is required to indemnify, defend and render the government harmless from all claims and damage which, but for the conduct of petroleum operations by the contractor or sub-contractor, would have arisen or occurred.<sup>21</sup>

### PHASE 3: Revenue and Tax Collection

At this stage, a number of grievances and disputes arise related to actual collection of revenues and taxes. Disputes may arise at different levels of governance on mandate as well as between government and investors on how to share revenues. In relation to revenue/tax collection grievances mainly revolve around: inadequate tax collection (possibly due to lack of capacity and enforcement failures by the revenue authority); lack of monitoring which occasions skimming and corruption; mismatch of laws and policies to local realities; lack of clarity in fiscal regimes which results in misinterpretations, uncertainties and loopholes; and lack of transparency.<sup>22</sup> Disputes can be precipitated when government or government entities do not reveal how much they are collecting from EI projects. In Kenya, there have been perceptions on mismanagement of revenues by county governments where the EI operations are situated and the national government. This has been complicated by perceptions that revenue benefits should be flowing since, in the case of petroleum, movement of oil (Early Oil Pilot Scheme) from Turkana to Mombasa has started.<sup>23</sup> Equally, accountability loopholes that pave way for corruption, tax evasion and avoidance, and money laundering, exacerbates grievances.<sup>24</sup>

### PHASE 4: Revenue Management and Allocation

Revenue management and allocation (or distribution/sharing) in extractives are closely intertwined. Potential conflicts revolve around actual sharing of resources between government, community and company as well as proper management of the revenues. Due to the huge revenues that are generated from EI, rapid decisions on how to spend them may introduce unexpected consequences including poor planning, allocation and due diligence that may lead to serious disputes.<sup>25</sup> The situation is made worse when there is no transparency of revenues and spending from the sector:

How the revenues are spent can also lead to risk of corruption in situations where large sums of money are under supervision of a few individuals without strong procedures and controls. The other aspect is what is generally referred to investing in 'white elephants' or 'vanity infrastructure projects.' This can easily be construed as mismanagement of funds and can easily exacerbate conflict.<sup>26</sup> Other conflicts revolve around how the government shares the revenues collected. In Kenya, there are endless concerns and disputes about how to share revenues from both petroleum and mining. These concerns have been more prevalent in the petroleum sector between national government, county government and community.

<sup>20</sup> Stevens et al (n 9) 31.

<sup>21</sup> Model Production Sharing Contract, Petroleum (Exploration, Development and Production) Bill 2017.

<sup>22</sup> Mauricio Rios, Florian Bruyas and Jodi Liss, *Preventing Conflict in Resource-rich Countries: The Extractive Industries Value Chain as a Framework for Conflict Prevention* (World Bank 2015) 8.

<sup>23</sup> Extractives Baraza, *Listening Project Report* (2018) 19.

<sup>24</sup> UNDP and IHRB, 'Promoting human rights, ensuring social inclusion and avoiding conflict in the extractives sector' (Brasilia, 3-5 December 2014) 34.

<sup>25</sup> Paul Stevens, Glada Lahn and Jaakko Kooroshy, 'The Resource Curse Revisited: Energy, Environment and Resources' (August 2015).

<sup>26</sup> Extractives Hub, 'Conflict and Extractives' <<https://extractiveshub.org/topic/view/id/5/chapterId/509>> accessed 20 February 2019.

Apart from the revenue sharing formula, there are concerns over how and on what projects the allocations should be disbursed and spent. Community members in Turkana want the 5% given directly to the community of Turkana East and Turkana West through a clear framework. Some are afraid that if they do not get the 5% directly through cash transfers, the monies will be captured by the politicians or rich local contractors.<sup>27</sup>

## PHASE 5: Implementation of Sustainable Development Policies and Programmes

Considering that EI resources are finite in nature, grievances can potentially arise when governments do not put in place robust plans for sustainable investment of the revenues collected. Failure to strength other sectors and diversify the economy may lead to impaired development of the economy when revenues cease to flow from the EI. Therefore, overdependence on revenues from EI tends to lead to stiff competition over limited opportunities and resources. Reduction in the revenues from EI tends to create competition from other sectors such as manufacturing or agriculture as governments recognise their potential. As the EI resources reduce, this should create further incentives and opportunities to diversify resource dependent economy.<sup>28</sup>

Unmet expectations also flare up as the economy goes through the boom and bust cycles without proper planning to put in place stabilization funds when revenues dry up. A key dimension of vulnerability to commodity busts in the short to medium term relates to the level of revenues saved before the downturn, along with investments made to reduce resource dependence.<sup>29</sup> Unfulfilled promises from the government and companies to the community can create discontent. For instance, when key services such as healthcare, education, water, and transport are not met as promised, grievances are likely to emanate. Others would revolve around a lack of anticipated employment opportunities or the failure to improve the delivery of public services.<sup>30</sup> When certain regions or populations are viewed to having benefited more than others, particularly in the producing areas, tension easily builds up and can lead to conflict. This is more exacerbating in the absence of a macro and micro-level approach that prioritizes national level development and development in producing regions, as well as securing a political buy-in. Grievances could also arise at this phase if decommissioning and transfer of assets after the project is completed is not done.

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<sup>27</sup> Extractives Baraza, *Listening Project Report* (2018) 16.

<sup>28</sup> Philippe Le Billon, Elizabeth Good, 'Responding to the Commodity Bust: Downturns, Policies and Poverty in Extractive Sector Dependent Countries' (Elsevier Ltd 2015) 207.

<sup>29</sup> *ibid* 207.

<sup>30</sup> Extractives Hub, 'Conflict and Extractives' <<https://extractiveshub.org/topic/view/id/5/chapterId/509>> accessed 20 February 2019.

## EXISTING GRIEVANCE HANDLING CHANNELS IN KENYA

Stated-based Judicial Mechanisms	
<b>I. Litigation in Courts</b>	(a) <b>Environment and Land Court (ELC)</b> - The ELC hears and determines disputes relating to environment and land including environmental planning and protection, land use planning, compulsory acquisition, and mining, <i>minerals and other natural resources</i> . <sup>31</sup>
	(b) <b>Employment and Labour Relations Court (ELRC)</b> -The ELRC has exclusive original and appellate jurisdiction to hear and determine all disputes relating to employment and labour relations <sup>32</sup> including those that arise in the EI.
	(c) <b>High Court</b> - Plays a quintessential role in the handling of human rights related grievances arising from the extractives sector. Under the Constitution 2010, every person has the right to institute court proceedings in the High Court claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. <sup>33</sup>
	(d) <b>Magistrates' courts</b> - In appropriate cases, magistrates' courts have original jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights, <sup>34</sup> which means that due to their close proximity to areas where extractive activities take place, they are suitable fora for the adjudication of human rights related violations arising from the extractives sector.
<b>2. Tribunals</b>	(a) <b>Energy and Petroleum Tribunal (EPT)</b> - EPT is established under the Energy Act 2019 to hear and determine all disputes and appeals relating to the energy and petroleum sector under the Act or any other written law. <sup>35</sup> It has appellate jurisdiction over the decisions of the Energy and Petroleum Regulatory Authority (EPRA) and any other licensing authority, and may refer any matter back to those authorities for re-consideration. <sup>36</sup> Persons aggrieved by the EPT's decision may within 30 days from the date of the decision or order, appeal to the High Court. <sup>37</sup>
	(b) <b>National Environment Tribunal</b> - NET is established by EMCA <sup>38</sup> and deals with appeals against the decisions and actions of NEMA in the grant, refusal or transfer of a licence or permit; imposition of any condition, limitation or restriction on a licence; revocation, suspension or variation of a license; amount of money to be paid under the EMCA; or imposition of an environmental restoration order or environmental improvement order by NEMA. <sup>39</sup>
	(c) <b>Water Tribunal</b> - The Tribunal hears and determines appeals against the decision or order of the Cabinet Secretary (responsible for water), the Water Resources Authority and Water Services Regulatory Board or of any person acting under their authority. <sup>40</sup>
	(d) <b>Tax Appeals Tribunal</b> - The Tribunal is established to hear appeals filed against any tax decision made by the Commissioner before any appeal can be made to the High Court. <sup>41</sup> In view of the existence of tax related grievances in the extractives sector, the Tribunal is a critical forum for interpreting tax issues in the sector.

<sup>31</sup> Employment and Labour Relations Court, Act No 20 of 2011, s 12(1).

<sup>32</sup> Constitution of Kenya 2010, arts 22(1), 23(1), 165.

<sup>33</sup> Constitution of Kenya 2010, art 23(2). See also Magistrates' Courts Act No. 26 of 2015, s 8(1).

<sup>34</sup> Energy Act No. 1 of 2019, s 25 and 36(1).

<sup>35</sup> Energy Act No. 1 of 2019, s 37(3).

<sup>36</sup> EMCA 1999, s 125(1).

<sup>37</sup> EMCA 1999, s 129(1).

<sup>38</sup> Water Act 2016, s 121(1).

<sup>39</sup> Tax Appeals Tribunal Act, No. 40 of 2013, s 3.

	(e) <b>Public Procurement Administrative Review Board (PPARB)</b> - It is relevant in the resolution of procurement disputes in the extractives sector; since the Mining Act 2016 requires the tendering for mineral rights should comply with the Public Procurement and Disposal Act. <sup>42</sup>
	(f) <b>Public Private Partnership Petitions Committee</b> - established under Section 67 of the Public Private Partnerships Act, 2013 to consider petitions and complaints submitted by private parties during the process of tendering and entering into project agreements under the Act.
<b>State-based Non-judicial Mechanisms</b>	
1. Cabinet Secretary, Ministry of Petroleum and Mining	The CS plays a quasi-judicial role as he/she can determine 'any dispute arising as a result of a mineral right' issued under the Mining Act. <sup>43</sup> Some of the disputes the CS can inquire into and determine include those touching on boundaries under a mining or prospecting right; a claim to water priority; a wrongful act committed or omitted in the course of mining operations; a claim by any person to be entitled to erect, cut, construct or use any pump, line of pipes, flume, race, drain, dam or reservoir for mining purposes; or an assessment and payment of compensation. <sup>44</sup>
2. Energy and Petroleum Regulatory Authority	The Energy Act 2019 establishes the Energy and Petroleum Regulatory Authority. One of the Authority's powers is to 'investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under the Energy Act.' <sup>45</sup> However, from the Act, it seems the Authority will only handle grievances arising from energy and upstream petroleum operations.
3. National Environmental Complaints Committee (NECC)	NECC has the mandate to investigate allegations and complaints against any person or NEMA in relation to the condition of the environment, or even on its own motion, suspected cases of environmental degradation. <sup>46</sup> It can undertake public interest litigation on behalf of citizens in environmental matters <sup>47</sup> making it an appropriate avenue for resolving matters touching on the right to a clean and healthy environment on behalf of communities impacted by extractives operations.
4. National Land Commission (NLC)	NLC has extensive mandate to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. <sup>48</sup> Through its Natural Resources Directorate, NLC has identified and mapped out key resource use conflict hot spots, causes of such conflicts, and opportunities to mitigate them.
5. Kenya National Commission on Human Rights (KNCHR)	KNCHR has the power to adjudicate on matters relating to human rights, <sup>49</sup> and to endeavour to resolve any matter brought before it by conciliation, mediation or negotiation. <sup>50</sup> It has undertaken numerous investigations touching on the extractives industry.
6. Ombudsman (Commission on Administrative Justice, CAJ)	CAJ has the mandate to address all forms of maladministration, promote good governance and efficient service delivery in the public sector by enforcing the right to fair administrative action. <sup>51</sup> It also investigates abuse of power, manifest injustice and unlawful, oppressive, unfair or unresponsive official conduct by any State organ or public officer in National and County Governments. <sup>52</sup>

<sup>40</sup> Mining Act 2016, s 154(a).

<sup>41</sup> Mining Act 2016, s 155.

<sup>42</sup> Energy Act No. 1 of 2019, s 11(i).

<sup>43</sup> EMCA 1999, s 32(a).

<sup>44</sup> EMCA 1999, s 32 (bb).

<sup>45</sup> Constitution of Kenya 2010, art 67(2) (e).

<sup>46</sup> Kenya National Commission on Human Rights Act No. 14 of 2011, s 26(c).

<sup>47</sup> Kenya National Commission on Human Rights Act No. 14 of 2011, s 29(2).

<sup>48</sup> Kenya National Commission on Human Rights Act No. 14 of 2011, s 29(2).

<sup>49</sup> Constitution of Kenya 2010, art 59 (4). See also Commission on Administrative Justice Act No. 23 of 2011.

<sup>50</sup> Commission on Administrative Justice Act No. 23 of 2011, s 8.

<sup>51</sup> Standing Order 227(2) of the Senate Standing Orders.

<sup>52</sup> Labour Institutions Act No. 12 of 2007, s 44(1).

7. Turkana Grievance Management Committee (TGMC)	TGMC is a multi-stakeholder platform established in 2018 by the National Government specifically for Turkana County to provide the host community and the contractor (Tullow Oil) with avenues for addressing any emerging issues and concerns.
8. Inter-ministerial (Escalation and Support) Committee	Committee was created by the National Government to, inter alia: resolve matters, concerns or issues escalated from the TGMC; and provide policy direction on enabling policy, legal, regulatory and institutional frameworks to support and facilitate resolution of grievances and address cross-cutting ministerial issues affecting petroleum operations in Turkana County. <sup>53</sup>
9. Departmental committees of parliament	The Constitution 2010 guarantees Kenyan citizens the right to petition Parliament to 'consider any matter within its authority, including to enact, amend or repeal any legislation.' <sup>54</sup> Parliamentary committees, such as the National Assembly can commit the petition to the Standing Departmental Committee on Environment and Natural Resources (National Assembly) and the Senate Committee on Lands, Environment and Natural Resources, <sup>55</sup> can upon receiving the petition, investigate, inquire into, and report on all matters, including those relating to extractives.
10. Local Administrators	Chiefs, assistant chiefs and headmen, appointed by the national government as local administrators, play a significant role in settling community-based disputes in areas where access to police and courts is restricted.
11. County Government Institutions	Some of the county ministries are vital forums for handling extractives related grievances including the Ministry of Environment, Energy and Natural Resources, the Ministry of Land, Physical Planning and Urban Areas (land access and land use) and the Ministry of Finance and Economic Planning (revenue collection and distribution). Some counties such as Turkana, have also established Peace Directorates that deal with peace and conflict resolution.
12. Intergovernmental Relations Technical Committee (IGRTC)	IGRTC was established to provide a framework for consultation and co-operation between the National and County Governments and amongst county governments. The IGRTC its sectoral forums/committees are viable venues for addressing extractives related grievances between the national and county governments.
13. Labour Institutions	There are several labour institutions that can be involved in the resolution of labour related grievances. The CS in charge of labour is empowered to establish Sectoral Wages Council, which can investigate the remuneration and conditions of employment; and invite and consider representations from interested parties. <sup>56</sup>
14. Community Development Agreement (CDA) Committees	Established under the Mining (Community Development Agreement) Regulations 2017. Their roles include, <i>inter alia</i> : facilitating continuous engagement and serving as the link between the community and the mining company; settling all disputes that may arise between stakeholders; and settling any other issue, matter, grievance or complaint that is not related to the CDA that may be raised by the mining corporation or the community.
<b>Non-state-based Grievance Mechanisms</b>	
1. International and regional mechanisms	<b>(a) The East African Court of Justice</b> - established by the East African Community Treaty whose objectives, inter alia, includes the "promotion of sustainable utilisation of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States." <sup>57</sup> The Court can hear cases brought against a State that involve the management of natural resources that could involve extractive companies.

<sup>53</sup> Treaty for the Establishment of the East African Community, art 5(3).

<sup>54</sup> African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986), article 30.

<sup>55</sup> *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application No. 006/2012, Judgment 26 May 2017 [131].

<sup>56</sup> IHRB, *Human Rights in Kenya's Extractive Sector: Exploring the Terrain* (London, IHRB 2016) 81.

<sup>57</sup> Constitution of Kenya 2010, arts. 159(2) (c) & 189(4).

	<p>(b) <b>African Commission on Human and Peoples' Rights</b> - The Commission seeks to promote and protect human and peoples' rights in Africa.<sup>58</sup> It hears complaints from individuals and CSOs, concerning violations by a State party to the Banjul Charter of one or more of the rights covered therein, rather than against companies. Kenya is a state party to the Banjul Charter.</p> <p>(c) <b>The African Court on Human and Peoples' Rights</b> - the Court has found Kenya in violation of the land rights of the Ogiek community as guaranteed in the Charter and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by 'expelling the Ogieks from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need.'<sup>59</sup></p> <p>(d) <b>Mechanisms within Development Finance Institutions (DFIs)</b> - They provide access to remedy for individuals and communities that are adversely affected by DFI- nanced activities, and to hold them and their clients accountable to the DFI's own policies.<sup>60</sup> These include, inter alia: the Inspection Panel and Compliance Adviser Ombudsman (CAO) of the World Bank; the CAO of the International Finance Corporation; the Project Complaint Mechanism of the European Bank for Reconstruction and Development; the Accountability Mechanism of the Asian Development Bank; and the Independent Review Mechanism of the Africa Development Bank.</p>
2. ADR	ADR refers to all those mechanisms that are used in handling disputes or grievances outside the court, and they include negotiation, mediation, conciliation, arbitration, expert determination and traditional dispute resolution mechanisms (TDRMs). These mechanisms, recognised under the 2010 Constitution, <sup>61</sup> can empower communities, who are often in a weaker bargaining position compared to the government and investors.
3. Site-level mechanisms	Site-level mechanisms are established by a company, alone or in conjunction with other stakeholders, to allow for early and direct remediation of grievances from individuals and communities. <sup>62</sup> They must meet the effectiveness criteria for non-judicial grievance mechanisms in principle 31 of the United Nations Guiding Principles on Business and Human Rights (UNGPs).
4. Liaison Committees	County and Sub-County Liaison committees have been established to act as a link between companies and local communities who may be aggrieved. For instance, Base Titanium has the Mining Project Liaison Committee, <sup>63</sup> Likoni Liaison Committee, <sup>64</sup> and the Kwale Liaison Committee. <sup>65</sup>
5. Peaceful demos/ protests	Protests are seen as an effective means of getting the attention of both the government and the oil company by communities. Indeed, it is through protests leading to operation shut downs, that the national government has created the TGMC, and the Inter-Ministerial (Escalation and Support) Committee.
6. CSOs	CSOs play a key role in monitoring the protection and promotion of local communities' rights. They also encourage communities to resolve disputes through mediation and reconciliation. CSOs can also play a role in sensitizing communities on available grievance mechanisms at the county and national level for ease of accessing remedies.

<sup>58</sup> Principle 29, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31.

<sup>59</sup> Acts as the primary channel of communication for affected stakeholders in Msambweni and Lunga Lunga Sub-Counties.

<sup>60</sup> Provides links to communities near the Likoni ship loading facility.

<sup>61</sup> Represents communities affected by the transport corridor between Ukunda and Likoni.

<sup>62</sup> Principle 29, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31.

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## ROLE OF THE JUDICIARY: INTERFACE BETWEEN JUDICIAL AND NON-JUDICIAL (ADR) MECHANISMS

### 1. Upholding Human Rights in the Extractives Sector

Kenyan courts, as the custodians of justice, have a huge mandate in remedying human rights violations in extractives. The courts have developed robust jurisprudence underscoring the importance of consultations with communities before undertaking development activities in their territories. For instance, in *Francis Chachu Ganya & 4 Others v Attorney General & Another*<sup>66</sup> the Commissioner of Lands had set aside 60,705 hectares of land in Bubasi location for Gitson Energy without consulting the people of North Horr Constituency.<sup>67</sup> The said allocation was found to be unjustifiable in a democratic society as it would adversely and irreversibly affect the communities' environment and cultural lifestyles.

In matters of public interest (e.g. extractives), the Constitution 2010 has enhanced and equipped the High Court with adequate powers and jurisdiction that can be used to offer appropriate reliefs to concerned stakeholders. A motion for enforcement of human rights can now be introduced not just by the aggrieved party but also by any other person (s), group(s), and associations or by the court acting *suo motto*.<sup>68</sup> The High Court is vested with vast supervisory jurisdiction over any person, body or authority exercising a judicial or quasi-judicial function,<sup>69</sup> which can be used to oversee the work of different judicial and quasi-judicial bodies in the extractives sector and hence improve management and administration of the sector.

Courts can also conduct 'investigative litigation' by appointing socio-legal commissions of inquiry or depute court officials to carry out the necessary investigations when matters are informally brought to the courts' attention. The courts may even enlist the help of the human rights commission to offer expertise in the inquiry. In appropriate cases (in the extractives context), courts can issue structural interdicts (post-judgment supervisory orders) to supervise the implementation of a judgment.<sup>70</sup> This could be apt where, for instance, a government agency or investor has a proven record of non-compliance with court orders.

### 2. Promoting ADR in the Extractives Sector

One of the ways of promoting access to remedy is through ADR, and the Constitution 2010 requires the Judiciary to encourage and promote the use of ADR and TDRMs. It is therefore critical that the interface between the court and ADR processes is managed well to ensure effective grievance management in the extractives sector. This mandate requires courts to *inter alia*, uphold ADR clauses in extractives contracts; stay legal proceeding if there is an ADR clause in a contract; stay proceedings and refer matters to ADR and other administrative bodies in appropriate cases; and ensure that ADR processes comply with the effectiveness criteria of the UN 'protect, respect and remedy' framework for business and human rights.<sup>71</sup> The effectiveness criteria requires non-judicial grievance mechanisms to be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, and continuous improvement. Currently, there is a framework for court-annexed mediation in the Family and Commercial Divisions of the High Court. Establishing a similar court-annexed mediation framework for extractives grievances in all courts could provide an excellent platform for courts to interface with ADR. A framework may also be established for the recognition and adoption of decisions made by TDRMs.

<sup>66</sup> [2013] eKLR.

<sup>67</sup> Other cases include: *Peter Makau Musyoka & 19 others (Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others* [2014] eKLR; *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR; *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR; *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited* Civil Case No. 97 of 2001.

<sup>68</sup> Busalile Jack Mwimali, 'Public interest litigation and the judicial enforcement of socio-economic rights: prospects and challenges under the constitution of Kenya' in Japhet Biegon and Godfrey Musila (eds), *Judicial enforcement of socio-economic rights under the new constitution* (ICJ 2011) 262.

<sup>69</sup> Article 165(6), Constitution of Kenya 2010.

<sup>70</sup> *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR.

<sup>71</sup> UN Working Group on Business and Human Rights, *The UN Guiding Principles on Business and Human Rights: An Introduction* (UN 2011)

## WAY FORWARD

Owing to the high likelihood of grievances arising in the EI, the importance of proactive interventions to pre-empt, avoid, prevent and/or manage grievances cannot be gainsaid. The Judiciary and other relevant actors in the EI must therefore conceptualize and develop appropriate and effective mechanisms for preventing and managing grievances, in a fair and efficacious manner; but also by taking parallel action to create lasting conditions for social peace.

These measures may include:

1. Promoting the use of ADR, for instance, through a court-annexed framework that facilitates referral of grievances to courts from other mechanisms including TDRMs and the reverse in appropriate cases.
2. Establishing an independent ombudsman in the extractives industry to independently investigate allegations of human rights violations and general business conduct to enhance access to justice.
3. Whereas the Energy Act 2019 has established the Energy and Petroleum Tribunal, there is no tribunal with the mandate of handling technical grievances arising in the mining sector. There is therefore need to establish a specialised tribunal for all technical issues arising from the extractives industry or alternatively a tribunal for the mining sector.

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## About The Extractives Baraza

The Extractives Baraza (“EB”) is a multi-sector advocacy neutral public platform that aims to facilitate access to information and foster meaningful stakeholder engagement in the extractives industry in Kenya and the broader African region. EB is hosted by Strathmore Extractives Industry Centre (SEIC), which is an autonomous research Centre based at Strathmore University Law School. SEIC seeks to bridge theory and practice in Kenya’s (and the broader East African region’s) extractive sector and support constructive dialogue and collaboration among companies, relevant agencies of government, civil society, and local communities through its key activity of action research.

SEIC together with the EB aim to bridge the gap between state and non-state actors by acting as a neutral go between various industry players. Our neutrality allows free and unbiased engagement with the industry stakeholders.

**Our Approach:** We have taken a three pronged approach built around three key streams that we deem fundamental to good governance in the extractives sector.

**Inform:** Informing stakeholders and citizens about development and activities in the extractives sector

**Connect:** Connecting actors in the sector from the highest policy national levels to grassroots efforts in counties through in-person workshops, forums and online means.

**Transform:** Transforming dialogue and perceptions around the extractives sector through generating new insights and approaches on meaningful stakeholder engagement, from methodologies to reporting approaches that drive both transparency and performance.

Innovatively, we use social media as a real-time tool to reach a wider stakeholder base and spur conversations on important issues affecting the sector including engaging the youth. This approach has attracted cross-learning and sharing of information within the region and globally from jurisdictions with both advanced and developing extractives sectors.

Our team brings together diverse stakeholders to build consensus and foster transformative dialogue that enables real change to happen. It cannot be overemphasized that our foundation of neutrality (being hosted in an academic institution) speaks to our success in pulling a diverse stakeholder base to dialogue.



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