UNIVERSITY OF NAIROBI

CENTRE FOR ADVANCED STUDIES IN ENVIRONMENTAL LAW AND POLICY

(CASELAP)

CHALLENGES AND PROSPECTS OF EQUITABLE BENEFIT SHARING IN MINING SECTOR:
A CASE STUDY OF TITANIUM MINING IN KWALE COUNTY, KENYA

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Reg. No. Z51/80943/2012

Thesis submitted in partial fulfilment of the requirements for the degree of Masters of Arts in Environmental Law of University of Nairobi, Kenya.

NOVEMBER 2014
DECLARATION

Declaration by the candidate

I KAYUMBA ANGELANI ANGE do hereby declare that this is my original work and that it has neither been presented nor is it currently being submitted for a degree in any other University. No part of this thesis may be reproduced without the prior written permission of the author and/or University of Nairobi.

Kayumba Angelani Ange

Z51/80943/2012

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Signature Date

Declaration by supervisors

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................................................ ................................................
Signature Date
DEDICATION

I firstly dedicate this work to God for His grace;

To Prince, Carrie, Stephanie and Jesse Ngongo for always being there for me;

Que Dios los bendiga.
ACKNOWLEDGEMENTS

I would like to sincerely express my gratitude to God for giving me the strength to complete this thesis. I also express my gratitude to each and every one who had a hand in the accomplishment of this enormous task. The completion of this thesis has depended to a large degree on support and encouragement from my supervisors, family, classmates, colleagues and friends.

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Finally, I offer my special regards to my house group members particularly to Doreen for their useful encouragements and supports during my studies.
ABSTRACT

The Kenyan constitution, under Article 69 urges the state to manage natural resources in an equitable way for the benefit of Kenyans. However, in Nguluku, communities have voiced their concerns about the titanium mining project that has led to loss of land, displacement and environmental degradation. This study therefore sought to analyse the concept of equitable benefit sharing and review its mechanisms in Kenya. In particular, it examined the regulatory framework of benefit sharing in the mining sector. It used the analysis of impacts of the titanium project on Nguluku community as a case study. Specifically, the study examined local community’s perceptions on benefit sharing and the extent to which they have benefited from the project. In a stratified sampling procedure, one hundred and fifty households, randomly identified, were interviewed using a semi-structured questionnaire. Key informants were also interviewed and three focus group discussions conducted. Data collected show that there has been more loss than gains and 77% of respondents estimate that they have benefited from the titanium mining project to a very low extent since its commencement. The lack of adequate benefit sharing regime applied to the titanium mining project is due to weak policy and legal framework in the sector. There is an urgent need to reform the mining sector and align it to the spirit of the constitution. This will require enactment of a new regulatory framework that embraces the principles of equitable benefit sharing to ensure sustainable management of minerals in the country.

Keywords: Benefit Sharing, Community, Equity, Legal Framework, Titanium
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<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>ABS</td>
<td>Access to Benefit Sharing</td>
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<tr>
<td>AMV</td>
<td>Africa Mining Vision</td>
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<tr>
<td>BS</td>
<td>Benefit Sharing</td>
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<tr>
<td>BTC</td>
<td>Base Titanium Company</td>
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<tr>
<td>CASELAP</td>
<td>Centre for Advanced Studies in Environmental Law and Policy</td>
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<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<tr>
<td>CSR</td>
<td>Corporate Social Responsibility</td>
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<tr>
<td>EIA</td>
<td>Environment Impact Assessment</td>
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<td>EMCA</td>
<td>Environment Management Co-Ordination Act</td>
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<tr>
<td>FPIC</td>
<td>Free, Prior and Informed Consent</td>
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<tr>
<td>HDP</td>
<td>Historically Disadvantaged Persons</td>
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<td>KCM</td>
<td>Kenya Chamber of Mines</td>
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<tr>
<td>MPRD</td>
<td>Mineral and Petroleum Resources Development Act</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<tr>
<td>NLP</td>
<td>National Land Policy</td>
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<tr>
<td>PNGSDP</td>
<td>Papua New Guinea Sustainable Development Program Ltd</td>
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<tr>
<td>RBN</td>
<td>Royal Bafokeng Nation</td>
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<tr>
<td>SDPT</td>
<td>Sustainable Development Plan Trust</td>
</tr>
<tr>
<td>TNC</td>
<td>Tiomin Resources Inc. of Toronto Canada is a transnational corporation</td>
</tr>
<tr>
<td>TMP</td>
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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The African continent is blessed with abundant natural capital. The extractive sector, including minerals, oil and gas production, is a major source of investment and revenue in most African countries. Africa’s natural resources have been a source of power and wealth for the ruling elites and multinational corporations, and less often for local communities. Unfortunately, control of revenues from mining and oil sector has nurtured cycles of corruption, conflict and poverty, forestalling opportunities to boost economic growth and social development due to the absence of strong, transparent, accountable governing institutions; or sound policy, legal and regulatory frameworks for sustainable resource management and benefit sharing.

Benefit sharing systems have been developed across the natural resources sector for oil, gas, mines, water, and forests.\(^1\) There are many factors to consider in sharing benefits especially in mining sector. One of the obvious considerations is the size and profitability of the mine itself.\(^2\) Moreover, the amount of ore extracted, exchange rates; world metal prices, the level of transparency of investors, the value addition to maximizing revenues, equality of provinces, the need of communities affected by the mining project, the economic impact of the project on the community, the population of each of the potential participant groups, the future potential development of the affected area as well as the degree of the impact on the environment and population must be considered.

Benefit Sharing appears to be interpreted in different ways by different actors.\(^3\) A particular concern from the public is that benefits accruing from mining will be captured at higher levels, without reaching those affected by the mining projects. From the perspective of affected communities, it allows them to become partners in projects and potentially

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empowers them in decisions that affect them. From a government perspective, benefit sharing is a practical tool to achieve greater social inclusiveness and balance social, economic and environmental factors in planning, design, implementation and operation of different projects in the mining sector. It has been interpreted broadly to include many types of benefits (e.g., direct payments such as royalties; indirect such as employment, community investment etc.) and sharing equitably at different scales such as national and local levels.4

Kenya is endowed with renewable and non-renewable resources including minerals. Among minerals found in Kenya in significant quantities, are titanium in Kwale, coal in Kitui and soda ash (Trona) around Lake Magadi. Fluorspar, Gold, Iron, Manganese, Diatomite and natural carbon dioxide are also found in different parts of the country.5 Concerning the exploitation of its minerals, the government of Kenya is determined to expand the mining sector and support growth by creating enabling policy framework to attract investment. The Second Medium Term Plan 2013-2017 of Vision 2030 makes the development of the mineral resources a priority and states that exploitation of these resources will benefit the people of Kenya.

Kenya started exporting titanium minerals to China in February 2014.6 This is a flagship project that is expected to have a major direct impact on Kenya's economy7 either directly or indirectly over its lifetime. However, local communities have not benefited from the project since inception.8 Ten years after the project started, communities living in both Nguluku and Maumba do not have access to basic needs such as clean water, electricity, education and healthcare. Furthermore, the project has displaced communities causing a sudden break in social continuity. This break has resulted into impoverishment of the relocated people.9

The Mining Act 1940 is inadequate in addressing the issue of equitable benefit sharing. However, Article 69 of the constitution bestows the obligation upon the State to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. It also espouses equitable sharing of the accruing benefits and utilization of environment and natural resources for the benefits of the people of Kenya. It is worthwhile to note that Kenya has embarked on the process of reviewing the Mining Act1940 Cap 308 that

4 Ibid
5 Kenyan Ministry of mining website www.mining.go.ke
7 Base Titanium Company web site www.basetitanium.com
8 Data collected during the Focus group discussions held in Nguluku, January 2014
governs the mining sector. As a result there is the Mining Bill 2014 which recognises that benefit accruing from mining sector shall be shared in an equitable way. It also provides an allocation formula of 70%, 20% and 10% of royalties to the national government, county government and communities respectively. This allocation formula has sparked a debate among stakeholders involved in the sector and might be source of conflicts if not well implemented. Therefore, there is a need to enact a regulatory framework on benefit sharing mechanisms in the extractive sector to give effect to article 69 of the Constitution. The expected regulatory framework should clearly offer mechanisms for sharing accruing benefits in mining sector in a way that balances the interests of government and investors as well as communities.

1.2 Statement of the Research Problem

Monetary and non-monetary benefits accruing from mining exploration have potential to improve welfare of communities if well managed. However, lack of a legal framework on benefit sharing in the mining sector might lead to conflicts among local communities and stakeholders, degradation of the environment, lack of transparency and accountability, and inadequate compensation to the landowners. This is evidenced in Nguluku where local communities have been complaining about various environmental challenges since the beginning of the titanium mining project. In Nguluku, communities believe that apart from not benefiting from the project; they have experienced losses due to displacement. Although the government and the company are convinced that the project is expected to have a major direct impact on the country’s economy by bolstering its export revenues, communities here do not have access to basic needs including clean water, electricity, education and healthcare. Few schools and one dispensary built by Base Titanium Company in Bwiti cannot be counted as benefits because they have been built in exchange of schools and dispensaries that were destroyed in Nguluku and Maumba to provide space for the mining project. Moreover, the compensation given by Base Titanium Company to displaced communities in Nguluku cannot either be considered as a benefit because they gave away ownership of land and were also inconvenienced.

11 Hosting village where some households moved from Nguluku and Maumba due to Titanium Mining Project.
12 Focus group discussions organised in Nguluku, January 2014
Since the Mining Act 1940 does not provide for benefit sharing mechanisms in the sector, there is a need to harmonize it with Article 69 of the constitution of Kenya. This will provide mechanisms to guide the sharing of revenues accruing from mining projects. This study therefore sets out to advocate for a comprehensive regulatory framework on benefit sharing mechanisms in mining sector that will provide benefit sharing mechanisms balancing the interests of the Government, investors and communities in accordance to the spirit of the Constitution in order to avoid environmental degradation and any conflict over resources in Kenya.

1.3 Research Questions

a. Main question
What is the current benefit sharing regime in mining sector in Kenya and how has it been applied?

• Specific question
(i) To what extent does the current regulatory framework on mining sector promote benefit sharing in Kenya?
(ii) What are the gaps in regard to benefit sharing regime in the mining sector in Kenya?
(iii) What are local communities’ perceptions regarding benefit sharing in mining sector in Nguluku?
(iv) How have the communities in Nguluku benefited from the titanium mining project?

1.4 Research Objectives

The main objective was to evaluate the current benefit sharing regime in mining sector in Kenya.

b. Specific objective
To achieve the broad objective, the study undertook the following specific objectives:

(i) To assess the current regulatory framework in regard to benefit sharing in mining sector in Kenya.
(ii) To assess gaps in regard to benefit sharing mechanisms in mining sector in Kenya.
(iii) To examine local communities’ perceptions on the share of benefit from titanium project in Nguluku.
(iv) To determine from affected communities in Nguluku whether they have benefited from the titanium mining project.

1.5 Justification

The study draws its justification from different discoveries undertaken in the extractive sector in Kenya. These discoveries have raised excitement among Kenyans because they have potential to boost the economy of the country and improve welfare of communities. However, mining activities have potential to affect the environment and degrade ecosystems. It is better to consider balancing economic, social and ecological considerations to promote sustainable development in the sector. Resource curse has trapped many African countries and people have become poorer due lack of effective mining legal framework, lack of proper benefit sharing regime, bad governance, corruption, lack of transparency and accountability. In Kenya, there is an urgent need to enact laws that will guarantee and entitle local communities to benefit from mining activities undertaken on their land in accordance to the spirit of Article 69 of the Constitution. The need of such legal framework is justified by the fact that Kenya must avoid tensions and conflicts due to poor engagement of communities and inadequate benefit-sharing. These tensions can paralyse the economic, social and political stability of the country. Moreover, enacting such laws is to achieve commutative justice in which all Kenyans benefit both directly and indirectly from mining activities. The study therefore makes a useful contribution in demonstrating how legal reform can contribute to sustainable management of mining sector and promote equitable benefit sharing in the sector. Due to the ongoing policy and legal reforms, the study provides recommendations to facilitate and promote equity in sharing gains accruing from mining.

1.6 Thesis Structure

The thesis has five chapters. Chapter one is an introductory chapter that includes the background to the study, summarizes the problem under investigation, research objectives and justification of the study. Chapter Two analyses in depth the concept of equitable benefit sharing in the mining sector. It provides theories and concepts that apply in this study. Chapter Three describes the study area and the methods used in undertaking this research. In Chapter Four, qualitative and quantitative results of the study are presented and discussed;

and finally Chapter Five draws conclusions and useful recommendations oriented to ensuring sustainable benefit sharing mechanism in mining sector in Kenya.
CHAPTER TWO

LITERATURE REVIEW

2.1 Introduction

This chapter provides an in-depth discussion on the concept of benefit sharing in the mining sector at global level, and an analysis of the evolution of the titanium mining project in Kenya since its inception. It then presents a conceptual and theoretical framework applicable to the study as well as gaps in literature.

2.2 Concept of Benefit Sharing

The notion of benefit sharing in natural resources management was first formalized in international law in 1992 through the Convention on Biodiversity, a move that was expected at the time to address problems with the governance of socio-ecological systems in developing countries. The concept of benefit sharing has since evolved and has been mentioned in many international and regional instruments such as the Africa Mining Vision, 2009. Whereas benefit sharing was originally understood as referring to the distribution of financial benefits, the concept has come to encompass broader forms of social accountability and responsibility. Various projects exploiting natural resources including mining sector must contribute to the development and welfare of the affected communities in addition to resettlement and rehabilitation. One way to achieve this is to share benefits from the project with those affected communities using monetary or non-monetary options. The latter includes most of the Corporate Social Responsibility (CSR) components like educational/medical facilities set up by the company, employment generated by the project, access to better services, facilities like road. Monetary benefit sharing mechanisms are based on the premise that natural resource exploitation generates significant economic rent. Some of this economic rent can be shared with the project affected population. Monetary mechanisms also act as a relationship bridge between the project proponent and the concerned communities. The various kinds of monetary benefit sharing mechanisms that can be used are revenue or profit

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14Pham Thu Thuy and al. Approaches to benefit sharing: a preliminary comparative analysis of 13 REDD+ countries CIFOR. Indonesia. 2013
sharing, development funds, equity sharing and tax sharing with government. Mining projects can contribute to development through a number of channels, ranging from employment and tax payments to community investment projects. Sharing benefit and compensating for damages generated by mining operations within communities is widely recognized as a necessity. Recently, many changes in the mining industry and in community expectations have led focus on benefit sharing approaches. Many developing countries have experienced challenges concerning the three benefit sharing mechanisms that include royalties, compensation and community development projects.

2.2.1 Royalties

Royalty is a key concept that determines the share of benefits in mining sector. Although the structure and rates of mineral royalties vary widely internationally, most are collected for the same reason - a payment to the owner of the mineral resource in return for the removal of the minerals from the land. The royalty, as the instrument for compensation, is a payment in return for the permission that, first, gives the mining company access to the minerals and second, gives the company the right to develop the resources for its own benefit. In contrast, in some civil law nations, the legal basis for a royalty paid to the state is a payment for a continued right to mine, with no actual or implied mineral ownership by the state. The evolution of royalty instruments has become more complex over time as the legal description of mineral right ownership developed alongside the separate tenure for mineral developers under mineral law. The owner of the mineral rights is defined in property law, which varies from country to country. An owner could be a community as a group of people, whose communal ownership stems from ancient customary law, individual, as is the case in countries where there are traces of civil law, or a government exercising sovereignty over the mineral resources within its territory in terms of international law. As states started to take control of mineral resources, they introduced mineral royalty. There is no type of tax on mining that causes as much controversy as royalty tax. It is a tax that is unique to the natural resources sector and one that has manifested itself in a wide variety of forms, sometimes based on measures of probability but more commonly based on the quality of material produced or its value. Mining normally created wealth or economic

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16 Elizabeth Wall and Remi Pelon. *Sharing Mining Benefits in Developing Countries: Experience with Foundations, Trusts and Funds*. World bank group’s Oil Gas and Mining Unit. USA. 2011. p 7
18 Ibid
19 Ibid
surpluses. This potential provides the incentive for private companies to explore for, develop and then exploit mineral deposits. Although companies generally are driven by the pursuit of profits, the goals and objectives of the sovereign governments that control the terms and conditions under which private interests have access to mineral deposits are quite different. Their actions and policies, including the taxes they impose on the mineral sector, are designed and meant to promote various social goals, economic development, for example as determined through the prevailing political processes.  

A mine differs from other businesses because it exploits a non-renewable resource that, in most cases, the taxpayer does not own. In the majority of nations, minerals are owned by the state, by the people generally or by the crown or ruler. In other instances, mainly European civil law nations, the owner of the land where the minerals occur form of the real property, has an interest in receiving payment for the taking of the property interest. Such a payment, in effect an ownership transfer tax, is often used as the justification for a royalty. Thus, industries that exploit resources such as timber, petroleum and minerals often enjoy the types of special tax incentives but in some cases, they also must pay an additional discriminatory tax, to ensure that the mineral owner receives at least some compensation for the transferred property right. Some nations forgo such a tax, perhaps recognizing that compensation for the owner’s loss may take forms other than fiscal revenues such as employment and infrastructure among others.  

(i) Types of royalties

The term mineral royalty has traditionally been applied in mining legislation when referring to specific, ad valorem and, in some cases, mining taxes based on an accounting profit base. In effect, all of the forms set out above are alternative ways for governments to appropriate economic rents unique to mining and are applied in addition to the general corporate income tax and other forms of taxation that cover all sectors of an economy. The following are the types of royalties:

- **Unit-based (specific royalty)**: In this case, a fixed monetary rate is applied to a physical rather than a financial base, for example as dollars per tonne or dollars per cubic metre. Provisions may be incorporated in the regulation for progressive adjustments of the fixed royalty rate to inflation or to changes in commodity prices. This type of royalty

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20 Ibid
21 Ibid, 18
generates stable revenue and is administratively efficient and easy to audit. However, it can also be highly economically inefficient and distortionary. For these reasons, specific royalties are generally applied to bulk, low-value commodities.

- **Value-based (ad valorem) royalty**: In its simplest form, an ad valorem royalty consists of a uniform percentage (the rate) of the value (the base) of the mineral(s) in the products sold by the miner. As already discussed, the value of the resource should be at the point of extraction, but very few sales of crude ore take place, after crushing and screening at the “mine gate”. The first at-arm’s-length sale is generally in the form of a product to which some value has been added by downstream processing, for instance with sales of mineral concentrates or refined metals.

- **Profit-based royalty and/or tax**: A percentage rate is applied to a measure of accounting profit realised by the project. The accounting profit base is computed at the project level and may not be consistent with the contribution that the project makes to the consolidated profit of the holding entity on which corporate income tax is levied. An accounting profit based tax has greater economic efficiency, but results in unstable government revenue and high compliance costs for both government and industry.

- **Hybrid royalty/tax**: This type of royalty or tax incorporates a minimum specific or ad valorem royalty component generally in a profit based or economic rent based tax to limit the risk that government may collect no revenue if in any year there is no taxable profit or rent. This ensures a modicum of revenue stability.

- **Resource rent-based tax**: This type of tax consists in the application of a percentage tax rate on the economic rent produced by a project. Although the general concept is relatively simple, its practical implementation may be complex, often misunderstood and can potentially lead to significant compliance costs and disputes. This is largely the reason for the poor rate of adoption in spite of its very high level of economic efficiency. Aside from the petroleum industry, at the time of writing there are no resource-rent based taxes in force in the mining industry, though a number of jurisdictions have plans for their introduction in the near future.

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23 Ibid
24 Ibid
25 Ibid
26 Ibid
• **Windfall tax:** tax levied by governments against certain industries when economic conditions allow those industries to experience above-average profits. Windfall taxes are primarily levied on the companies in the targeted industry that have benefited the most from the economic windfall, most often commodity-based businesses. It is variable rate royalty that can be a useful tax instrument that provides some advantages of a standard fixed rate royalty while avoiding some of the disadvantages. To avoid a regressive tax regime, it is a good idea to have a low royalty rate and levy a profit-based tax. However, if the capacity of the tax authority for levying profit-based taxes is low, alternative solution is to use a royalty whose rate varies according to the market price of the mineral. With such rule, a variable-rate royalty cab be made to be less regressive than affixed-rate royalty: if the price falls, the royalty rate also falls; conversely, when the prices rise, the royalty rate rises. As the base is still revenue, rather than costs, a variable royalty still shares other characteristics with a fixed-rate royalty. On the plus side it is comparatively easy to administer. However, it is still not as progressive as a progressive as a profit-based tax27.

(ii) **Royalties in Kenya**

In Kenya, royalty’s charges are pegged on gross earnings of an exploration firm in addition to a 30 per cent corporate tax on profits. The government has increased royalties on gold to 5% of gross sales value from 3% while those for rare earth, niobium and titanium ores rose to 10% of gross sale value28. The increase of royalties done by the Cabinet Secretary has sparked debate in the sector. The figure comprises of 10% per cent royalties, 10% per cent free earned interest, 30% income tax and other taxes. This is far above the 41% global average and 30% in most other countries. At the third annual mining business and investment conference in 2013, a representative of Kenya Chamber of mines stated that some of the rates will make Kenya a very expensive destination for extraction of some these minerals.29 At this point, the government did not take into consideration the impact on the country’s competitiveness and attractiveness to investors. Furthermore, the Finance Act 2012 has introduced a withholding tax on transfer of shares or property in the mining sector. A sale of a mining company will now attract a withholding tax of up to 20% (locals involved in such a transaction will be required to pay a reduced rate of 10%). 30

28 Legal notice n 187. Mining Act Prescription of Royalties Minerals Regulations. Paragraph 2
29 Macharia wa Mugo and Peter Kiragu. Miners Oppose Plans to Increase Royalty Charges. The Star. 2013
The fiscal regime for mining is a key element of the regulatory framework under which mining companies invest in exploration and exploitation projects. From the perspective of an investor, the regime must be internationally competitive and provide a basis for commercial viability of mining. Whereas from the perspective of the host country, the revenues that it hopes to obtain through the fiscal regime must be maximized for the economic benefits of the country. To balance the interest of mining investors with those of Kenyans, there is need for special fiscal arrangement that takes into account the particular risks and economic characteristics associated with mineral operations.31

2.2.2 Compensation

(i) Overview

Many development projects intended to alleviate poverty end up increasing poverty by displacing large numbers of people without re-establishing them viably, despite the use of compensation payments for assets lost. Large scale mining projects lead to displacement and involuntary displacement of communities in many cases. The government may under specific circumstances, compulsorily acquire land under which minerals occur.32 The compulsory acquisition of land has always been a delicate issue and is increasingly so nowadays in the context of rapid growth and changes in land use. Governments are under increasing pressure to deliver public services in the face of an already high and growing demand for land. Many recent policy dialogues on land have highlighted compulsory acquisition as an area filled with tension. From the perspective of government and other economic actors, the often conflictual and inefficient aspects of the process are seen as a constraint to economic growth and rational development.33 The process also brings tension for people who are threatened with dispossession. The compulsory acquisition of land for development purposes may ultimately bring benefits to society but it is disruptive to people whose land is acquired. It displaces families from their homes, farmers from their fields, and businesses from their neighbourhoods. It may separate families, interfere with livelihoods, deprive communities of important religious or cultural sites, and destroy networks of social relations. If compulsory acquisition is done poorly, it may leave people homeless and landless, with no way of earning a livelihood, without access to necessary resources or community support, and with the feeling that they have suffered a grave injustice. If, on the other hand, governments carry out

31 Kenyan Ministry of Mining. Zero Draft Mining Policy. 2013
compulsory acquisition satisfactorily, they leave communities and people in equivalent situations while at the same time providing the intended benefits to society. The power of compulsory acquisition can be abused. Unfair procedures for the compulsory acquisition of land and inequitable compensation for its loss can reduce land tenure security, increase tensions between the government and citizens, and reduce public confidence in the rule of law. Unclear, unpredictable and unenforceable procedures create opportunities for corruption. Good governance is necessary to provide a balance between the need of the government to acquire land rapidly, and the need to protect the rights of people whose land is to be acquired. Conflict is reduced when there are clear policies that define the specific purposes for which the government may acquire land, and when there are transparent, fair procedures for acquiring land and for providing equitable compensation. Effective and fair compulsory acquisition cannot exist without good governance and adherence to the rule of law. Countries should apply principles that ensure the use of this power is limited, i.e. it is used for the benefit of society for public use, public purpose, or in the public interest. Legislation should define the basis of compensation for the land, and guarantee the procedural rights of people who are affected, including the right of notice, the right to be heard, and the right to appeal as well as the right to fair procedure of resettlement that better the one who are displaced. It should provide for fair and transparent procedures and equivalent compensation. Compulsory acquisition is inherently disruptive. Even when compensation is generous and procedures are generally fair and efficient, the displacement of people from established homes, businesses and communities will still entail significant human costs. Where the process is designed or implemented poorly, the economic, social and political costs may be enormous.34

(ii) Compulsory Land Acquisition in Kenya

Pursuant to the constitution of Kenya, the Land Act, Land Registration Act and National Land Commission Act have been enacted and came into force on 2nd May 2012 and have repealed the Indian Transfer of Property 1882, the Government Lands Act, The Registration of Titles Act, Land Titles Act, the Registered Land Act, the Wayleaves Act and Land Acquisition Act. It is worth noting that there is a Kenyan National Land Policy which contains explicit guidelines that have been reflected in new land laws.

The Constitution of Kenya, 2010 protects the sanctity of private property rights and states that no property can be compulsorily acquired by the Government except in accordance with law. It empowers the state to exercise the authority of compulsory acquisition. Land Act 2012 (LA) designates the National Land Commission (NLC) as the agency empowered to compulsorily acquire land. Article 40 of the Constitution provides that the state may deprive owners of property only if the deprivation is "for a public purpose or in the public interest," which includes public buildings, roads, way leaves, drainage, irrigation canals among others. The state's exercise of this power is left at the discretion of National Land Commission, and requires the state to make full and prompt payment of "just compensation" and an opportunity for appeal to court. Article 40 (3) (a) refers to acquisition and conversion of all kinds of land in Kenya (private, public, community land and foreign interests in land). The Constitution further provides that payment of compensation shall be made to “occupants in good faith” of land acquired by the state who do not hold title for such land [Article 40 (4)]. An occupant in good faith is a “bona fide” occupant. On the other hand, under the Constitution, those who have acquired land illegally are not regarded as deserving any compensation [Article 40 (6)].

The Land Act 2012 is the Kenya’s framework legislation regulating compulsory acquisition of land (i.e. land, houses, easements etc.). The Land Act was provides for sustainable administration and management of land and land based resources including compulsory acquisition. Section 107 (1) provides for the power of entry to inspect land. Sub-section (1) states that whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf. Sub-section (2) requires that the Commission prescribe a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land. Sub-section(5) stipulates that upon approval of a request under sub-section (1), the Commission shall publish a notice to that effect in the Gazette and the county Gazette, and shall deliver a copy of the notice to the Registrar and every person who appears to the Commission to be interested in the land. Sub-section (8) states that all land to be compulsorily acquired shall be geo-referenced and authenticated by the office or authority responsible for survey at both the national and county government. Section 110 (1) stipulates that land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for fulfilment of the stated public purpose. Section 111 (1) states that if land is
acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined. Under Subsection (2), The Commission shall make rules to regulate the assessment of just compensation. At least thirty days after publishing the notice of intention to acquire land, the Commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land, and shall cause notice of the inquiry to be published in the Gazette or county Gazette at least fifteen days before the inquiry; and serve a copy of the notice on every person who appears to the Commission to be interested or who claims to be interested in the land. Section 113 (1) requires that upon the conclusion of the inquiry, the Commission shall prepare a written award, in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land. Under Part III, the Land Act 2012 states that “the Commission shall determine the value of land with conclusive evidence of (i) the size of land to be acquired; (ii) the value, in the opinion of the Commission, of the land; (iii) the amount of compensation payable, whether the owners of land have or have not appeared at the inquiry.” Market value of the property, which is determined at the date of the publication of the acquisition notice, must be taken into account when determining compensation. Determination of the value has to take into consideration the conditions of the title and the regulations that classify the land use e.g. agricultural, residential, commercial or industrial.

Section 114 (2) stipulates that upon acquisition of land, and prior to taking possession of the land, the Commission may agree with the person who owned that land that instead of receiving an award, the person shall receive a grant of land, not exceeding in value the amount of compensation which the Commission considers would have been awarded, and upon the conclusion of the agreement that person shall be deemed to have conclusively been awarded and to have received all the compensation to which that person is entitled in respect of the interest in that land. Section 115 stipulates that upon the conclusion of the inquiry, and once the NLC has determined the amount of compensation, NLC will prepare and serve a written award of compensation to each legitimate claimant. NLC will publish these awards which will be considered “final and conclusive evidence” of the area of the land to be acquired, the value of the land and the amount payable as compensation. A notice of award and offer of compensation shall be served to each person by the Commission. Section 120 provides that “first offer compensation shall be paid promptly” to all persons interested in land. Section 119 provides a different condition and states that the NLC “as soon as
practicable” will pay such compensation. Where such amount is not paid on or before the taking of the land, the NLC must pay interest on the awarded amount at the market rate yearly, calculated from the date the State takes possession until the date of the payment. Once the first offer payment has been awarded, the NLC will serve notice to landowners on the property indicating the date the Government will take possession. Upon taking possession of land, the commission shall ensure payment of just compensation in full. When this has been done, NLC removes the ownership of private land from the register of private ownership and the land is vested in the national or county Government as public land free from any encumbrances (Section 115 & 116). It appreciate that the constitution of Kenya 2010 as well as the Land Act 2012 entails modern principle that applies to the compulsory acquisition of land but does not offer opportunities to the concerned people to contest or challenge the necessity for land acquisition and the amount of the compensation. Safeguards on resettlement and eviction are needed for an effective benefit sharing in mining sector in Kenya. These safeguards will reinforcement the rights of displaced people to a just and fair compensation so that they are left better off by the mining company and the government.

In regards to titanium mining project, communities living in Nguluku were first relocated to Bwiti without being involved the process. When base titanium company arrived, the company chose the compensation options over the relocation because those who are displaced by Tiomin to Bwiti settled back into the mining site area and were satisfied by what was done by Tiomin ltd in regards to relocation. Even with the compensation given by Base Titanium Company, community mentioned that they did not have a negotiation power and the market value of the land was not taken into account. As consequence, most of them were not able to buy land elsewhere.

2.2.3 Community Investment Programmes

(i) Overview
Community investment programmes are associated with the concept of corporate social responsibility. Extractive industry companies often operate in emerging and frontier economies where local communities come face to face with foreign companies, sometimes without the presence of a strong central/local government, or governance structure. In order to be a good neighbour, manage high expectations of governments and host communities, access land and manage risks, many extractive industry companies invest millions of dollars in local communities to support sustainably environmental, social, governance and economic
programs that develop infrastructure, provide vocational training and support a variety of local institutions and stakeholder groups. These investments create both benefits to the local communities as well as significant business value to companies.\textsuperscript{35} Companies have to meet a variety of responsibilities assigned to them by law, shareholders, other stakeholders and the society at large in order to undertake their duties legitimately. Such responsibilities are categorized into the following four broad types:

- Economic responsibility requires a company to be productive and produce goods and services that are desirable by society;
- Legal responsibility requires a company to follow set legal requirements to pursue its business;
- Moral and ethical responsibility requires a company to follow the acknowledged ethical norms and values; and
- Social (sometimes referred to as philanthropic) responsibility requires a company to be proactively involved in practices that benefit the society beyond its economic legal and ethical responsibilities.

The concept of Corporate Social Responsibility goes beyond the narrow economic, technical and legal requirements of the firm, beyond profitable production of goods and services. It is increasingly being seen as helping to solve important social and environmental problems, especially those that the companies have helped to create. One important thing that contributed towards the development of CSR concept is a view that firms can no longer be seen as purely as private institutions but as social institutions. Firms are expected to operate in full understanding of the general welfare of society and to share benefits from their economic activities with society.\textsuperscript{36} Therefore, firms retain their social role within the society by responding to society’s needs and giving society what it wants. CSR in the mining industry is viewed as a mechanism for maximization of positive and minimization of negative social and environmental impacts of mining while maintaining profits. The liberalisation of investment regimes in many developing countries, has contributed to the expansion of the mining industry in remote areas of the world, thus raising more concerns relating to social and environmental issues. There is no universally accepted definition of CSR but the various


definitions reveal several essential principles upon which CSR is based. These principles include accountability, responsiveness and voluntarism.

- Accountability: according to the CSR concept, businesses are held responsible for actions that have an effect on their stakeholders. Accountability implies that companies are obliged to demonstrate the reasonableness of their actions to a community of others through the activity of giving accounts.

- Responsiveness: in some sense, legitimacy theory and stakeholder theory suggests a degree of reaction from businesses to social concerns and demands. Responsiveness implies a capacity of business to acknowledge social pressures and make actions to respond. Responsiveness also suggests a two-way relationship between business and society. Proactive corporate behaviour being proactive reflects the degree to which corporate behaviour is planned in anticipation of emerging economic, political, social, cultural and environmental trends and in the absence of crisis conditions. Therefore, businesses have capacity to anticipate and prevent negative consequences using proactive measures.

- Voluntarism: voluntarism of corporate actions indicates the scope of discretionary decision-making by a company in the absence of regulatory or economic pressure. CSR often implies voluntary actions which aim to bring social good that not only go beyond economic interests of a company but which are predominantly not required by law. In the context of CSR, those companies that exceed minimum standards set by legislation exhibit voluntarism.

On the other hand, the concept of socially responsible investment (SRI) can be defined as an investment process that both from the positive and the negative viewpoints assesses the social and environmental consequences of investment through conducting accurate financial analyses. Socially responsible investment is defined as an investment management method that integrates the social, environmental and governance criteria into a conventional financial analysis. Similarly to the CSR, the roots of the SRI go back to ancient times where already in the mediaeval Christian times certain restrictions concerning lending and extortion were in force. The modern socially responsible investment is based on the growing social awareness on the part of investors. Socially responsible investment is based on the understanding that common responsibility and social interests represent a weighty part of any investment decisions while simultaneously taking into consideration the financial needs of investors, and,
eventually the public needs and the impact of investment upon the society. Investors seeking to follow the principles of social responsibility promote enterprises to further improve their performance in environmental protection, social area and governance. Within the ‘CSR world’ it is almost taken as axiomatic that there is no contradiction between Socially Responsible Investment (SRI) and Corporate Social Responsibility (CSR). Investors will act responsibly looking at responsible and impact investment to make their money count for a better world as well as just obtain a financial return. Meanwhile enlightened companies will recognise that an increasing number of investors will look at not just their raw financial numbers but also their CSR engagement and scores, and act to improve their CSR performance to attract more investment and lower their cost of capital. There is already suggested evidence that companies are able to attract investment less expensively if they perform well in certain CSR indicators. A virtuous circle is almost inevitable, as progressively more investment is directed on a socially responsible basis and the pressure on companies to perform better in CSR mounts accordingly.

Critics of Corporate Social Responsibility argue that a single goal of business is to maximize profit for their shareholders. Nobel Prize winner economist Milton Friedman argued, in 1962, that “Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible.” Friedman believed that government agencies, not corporations, were responsible for social development. By businesses addressing social responsibilities, they were interfering with the effective and efficiency economic activity of firms. However, Friedman’s argument can be disputed as inapplicable and outdated. First, Friedman’s argument holds in a well-ordered controlled state, but cannot be translated to an area defined by widespread poverty, illiteracy, weak and corrupt national governments, monopolization, and inadequate international regulatory bodies. Second, the globally evolving sustainability agenda requires an integrated effort from the private sector and civil society. Consequently, companies are expected to be increasingly accountable for their operations. Third, more and more studies are being conducted showing that CSR is good for profits. By being socially and environmentally conscious, businesses become more

38 Julian Roche. Socially Responsible Investment or Corporate Social Responsibility, Two Halves of The Same Coin or Quite Different Currencies. USA. MCHI International Journal. May 2012.
efficient in terms of production since less energy and material needs are required. Consequently, bottom line profits increase. Lastly, Friedman sees economic self-interest as the only motivation for businesses. However, business ethics has become increasingly important in terms of operations and decision-making. Generally, while advocates believe CSR is the solution to addressing social issues that the public sector has neglected or failed to accomplish, critics view CSR as an empty promise designed to appease the public. Critics aim to expose the flaws of CSR, such as the gap between the rhetoric of CSR and pursuing corporate interests driven by profit. Overall, opponents to CSR advocate for a stronger role for the state in ensuring corporate accountability and that CSR in businesses is used to mask the true impact of business activity.

(ii) Corporate Social Responsibility in Kenya

Corporate social responsibility is a relatively new topic in Kenya. United Nations programs have been among the first to introduce the concept of CSR to Kenya. They include UN Global Compact, the UNDP Growing Sustainable Business Initiative and the UNIDO project for the electrification of rural areas. Many foreign companies are the engine of corporate social responsibility as they apply international standards on the ground. Every company comes up with its own community development programmes to support different community initiatives in a particular area. There is no uniform pattern of Corporate Social Responsibility in Kenya and therefore, there is a need to strengthen and develop CSR institutions in the country in order to create more awareness of the potential of CSR, and for the implementation of CSR processes that benefit both business and society.

2.3 Global Experience of Benefit Sharing

2.3.1 Overview

Profit sharing refers to the practice of sharing a part of a company’s profits with the employees or the affected communities. The super-profit mining industry has considerable impact on people, environment and resources of the region. Thus it becomes imperative for profits from mining activities to flow to the affected groups/communities.


A number of countries across the globe have incorporated the provision of benefit sharing in their mining legislations to enable local communities to benefit from mining activities in their region. Provisions may include compensation, benefit sharing, area development, special rights or a combination of these.

Papua New Guinea incorporated the concept of Free, Prior and Informed Consent (FPIC) into their Mining Act, 1992. FPIC recognises the rights of indigenous people over land and resources where a project can be implemented only once these indigenous people give their consent. This is to be implemented in the form of a “Development Forum”. This Forum should have representatives of different stakeholders including mine lease applicant, government and landholder/s whose land are sought or tenants on such land. There is a laid out procedure under which all the stakeholders are to be consulted prior to the grant of a mine lease. The Mining Act also has provisions under which the mine lease holder is to provide compensation to the landholders on whose land mining is to take place. The compensation is dependent on the negotiating skills of the community/landholders. A non-profit company called the Papua New Guinea Sustainable Development Program Ltd. (PNGSDP) receives compensation on behalf of the affected community. The PNGSDP focuses on a number of areas like community investment, environment and conservation, investment in renewable, electrification, infrastructure and minimising impact of mine closure among other things. There also exists another Development Programme which is non-profit formed for managing and implementing compensation payments on behalf of the affected villages. Similarly, a Sustainable Development Plan Trust (SDPT) has been formed to deliver the benefit package as agreed between the gold mine (operated by Rio Tinto) and the landowners. The package works through the landowners having bought shares in the Gold Ltd through the government support. It is this equity fund that forms the core of the SDPT. The Trust operates in different areas including compensation, capacity building, infrastructure development, town and village planning and trust fund payments. The SDPT also receives part of the funds from the royalties received by the landowners and provincial and local governments.42

As per South Africa’s Mineral and Petroleum Resources Development (MPRD) Act, 2002; the Minister has the power to assist ‘historically disadvantaged persons’ (HDPs) in acquiring a prospecting or mining lease. The MPRD Act also has provisions under which a community may obtain a ‘preferential right’ to prospect or mine a mineral on land registered under the name of the community. The Impala Bafokeng Trust is a case in point. The Trust is a result of

42Ibid
a black economic empowerment transaction for HDPs between Impala Platinum and the Royal Bafokeng Nation (RBN), a Northwest province in South Africa. Under the transaction, RBN exchanged their royalty rights for shares in the mining company. The Trust was thus formed to manage and implement the promised corporate social investment during the period 2007-2016. The Trust’s focus is on education, capacity building, health, sport, enterprise development, etc.

In Peru, the Law of Mining Royalty, 2004 mandates that 50% of the income taxes paid by the mining companies be channelled to regional (25%) and municipal (75%) governments as royalty\(^4^3\). The regional government then forwards a small amount (5%) to national universities in the region. The municipality where the mining operations are located receive a larger portion of this royalty. The Yanacocha gold mines run by Newmont Mining Corporation (major shareholder), in northern Peru is considered the world’s second largest gold mine. The mining royalty tax ensures that 50% of the income tax remains in the Cajamarca area where the mines are operational. This is used for building infrastructure, educational facilities, encouraging tourism, etc. A number of non-profits have been formed to look into proper management and implementation of these initiatives.

In north-western provinces of Canada\(^4^4\), special mining regulations are in place to recognise rights of the Nunaviks (Inuits)\(^4^5\). For example, Xstrata a global mining company has an agreement with Makivik Corporation, which represents the Inuit’s, to share 4.5% of its Raglan nickel mine’s operating profit with local communities. Raglan has delivered more than Cdn$65.4 million back to the community in this way. Similarly, Musselwhite agreement was signed by Joint Venture Partners, the four communities and two First Nation (FN) Councils (Shibogama and Windigo), closest to the mine. In this process, the signatory First Nation (FN) agreed to a revenue sharing agreement, which involves a fixed amount per ounce of gold produced, implementation monies, environmental monies, etc. Musselwhite gold mine, operated by Placer Dome in joint venture with TVX, is located near the territory of four FN villages: Cat Lake, Round Lake, Wunnumin Lake and Kingfisher Lake. The Musselwhite agreement also stipulates that the company aims to employ 30% the staff from the signatory communities. The FN tribal councils manage the money provided annually to them. Both the FN councils have employed implementation officers to monitor implementation of the

\(^4^3\) Ibid
\(^4^4\) Ibid
\(^4^5\) Nunaviks, people from Nunavik, the northern third of the province of Quebec, Canada. Covering a land area of 443,684.71 km\(^2\) north of the 55th parallel, it is the homeland of the Inuit of Quebec.
agreement on a permanent basis. Working committee, an environmental committee and an implementation review committee have been established to discuss the agreement and ongoing issues periodically.

2.3.2 Principles of Benefit Sharing

(i) Principle of Derivation

The revenue is shared by derivation when a percentage of the revenues are allocated upfront to the producing territory (this can apply to both regional and local governments). The remainder of the revenues are either retained by the central government or partially redistributed. Bolivia, Brazil, Indonesia, Nigeria, Mexico, Papua New Guinea and Ghana have adopted derivation principle in sharing the benefit among stakeholders involved in extractive sector. The choice of derivation principle in sharing benefits is justified by the fact that there is need to compensate for the depletion of the natural resources of the land belonging to its inhabitants; to replace the existing revenues with sources for economic development for the future generations; to redress environmental damages caused by the extraction and preserve harmonious political relations between the central government and the periphery.

In Bolivia, the royalties (18% of the production) is in most part assigned according to derivation rules to the producing regions. Out of the 18% of the value, central government receives 33%, the locally producing regions receive 61% and 6% is allocated to non-producing regions. On the other hand, the direct hydrocarbon tax represents 32% of value and is intended for economic development and poverty alleviation of the entire country includes a large number of beneficiaries: municipalities, regions, universities, old age citizens and a number of special funds. Concerning the direct hydrocarbon tax, 12.50% is allocated to central government, 9.50 to four producing regions and 10.0% to the five non-producing regions. While the royalty distribution has remained unchanged since 2005, the allocation of the direct hydrocarbon tax has changed several times; it is still the object of more political bargain. Producing regions receive a percentage of the value extracted, while producing municipalities receive equal treatment with non-producers within the same producing region. However, the law assigns 50% of the extraction license to the originating municipality,

specifically for environmental mitigation. A tax of 0.5% on the value of any capital investment in exploration and extraction is attributed to the environmental protection agency, presumably increasing its resources as the demand for auditing and mitigation expands. The final distribution below takes into account the weights of the two taxes, and incorporates the division of the revenues among sub-national entities that is prescribed in the presidential decrees. Bolivia is the only country where there are both a high level of distribution by derivation and a (moderate) level of re-distribution to non-producing regions (which receive about 20% of the revenues the take of the central government is relatively small 37%). It is also unique that the re-distribution does not take into account region specific characteristics, such as population, size and fiscal capacity. To partially redress the resulting imbalances, the central government instituted, out of its own share of revenues, a special fund for the largest cities, and also a departmental compensation fund financed by 10% of the fuel products excise tax. Even after this grant, the final per capita distribution remains very unequal, with the lowest populated departments receiving almost twenty times the per capita share of largely populated departments.

In Nigeria\textsuperscript{47}, the revenue distribution is regulated by Article 162 of the 1999 Civilian Constitution. The law requires all revenues from the production of oil and other shared taxes (representing 72% of the budget) to be channelled in a “Federation Account”. The other revenue source of the Federation Account is VAT. 13% of the Federation Account pool is paid to producing states by derivation and 87% shared among central government, federal states and municipalities. The 87% is distributed according to a formula, which is decided by an ad hoc commission, and never changed since 1999. Out of 87%, all municipalities receive 20%, 26% allocated to all 36 states and 52% to the central government. The distribution among states and municipalities is done according to this formula: 40% equally shared 30% population, 10% extension and 10% revenue raising effort.

The statutory formula plays a fundamental role in the allocation of revenues across sub-national governments. Only 40% of the formula allocation is based on the states’ population and social development levels, so that the current revenue-sharing mechanism benefits mostly middle and high-income regions, and it does not target the regions with the highest population or poverty levels. Also, since the allocation to municipalities is first allocated to each region, and then shared across municipalities, regions with more

\textsuperscript{47}Ibid
municipalities are further penalized. Including the effect of derivation, in the final horizontal distribution 9 of 36 regions receive 41% of the resources allocated to SNGs. Secondly, oil producing communities and local governments argue for direct control over the oil derivation fund which is currently controlled and apportioned by State Governments. Since its latest reform in the 1999 civilian constitution, the distribution arrangement has not changed, but its legitimacy is constantly challenged. Though it is recognized that the current formula should be improved, the issues is so contentious that the most recent reform proposal from the ad hoc Commission did not move forward in parliament. The failure to generate economic development, employment and poverty reduction through oil revenues is at the base of the high level of instability that the producing regions are experiencing. For large sections of the population, including ethnic groups such as the Ogoni people, the costs in terms of environmental damage, institutional deterioration and economic inequality far exceed the benefits of relatively high oil revenues. This in turn legitimizes the requests for increasing substantially the derivation share, often accompanied by vandalism of infrastructure, rioting and violence, carried out by organized groups such as the Movement for the Emancipation of the Niger Delta (MEND).

In Ghana, the extractive industry consists mainly of mining operations, which provide 12% of total government revenues. The mining legislation was updated through the Minerals and Mining Act 2006 (703), which sets royalties at a rate between 3% and 6% of the value extracted, depending on the return on the investment. The distribution arrangement of revenues across levels of government has remained unchanged, and it is regulated by Chapter 22 of the 1992 Constitution and by an Administrative Fiat of 1999. Overall the system centralizes most resources, assigning by derivation only 9% of the royalties. However part of the central government’s shares are redistributed through the District Assemblies Common Fund, which by law should be no less than 7.5% of the total central revenues. These funds are then redistributed to the formula agreed by parliament every year. Concerning the mining royalties, 80% is allocated to the central government funds, 10% to the mineral development fund, and 2.25% to the customary land title holders, 1.80 to the producer traditional council and 4.95% to the producer district. In 2004, royalties represented about 89% of revenues from mining, the remainder deriving from Corporate Tax (3%), Property Tax (1%), Dividends Tax (7%) and Ground Rent. Given the distribution arrangement of royalties, the government effectively receives almost the whole of the revenues from mining. In fact one of
the reported challenges to the current legislation is that SNGs feel the shares that they receive are just too small, in particular the owners of stool land.

All the countries mentioned under this section share some of their revenues from extractive activities with sub-national governments on a derivation basis. However, a high level of decentralisation of revenues at subnational level may lead to inefficient and inequitable allocations, due to the specific challenges that such atypical revenue streams present. These include the Dutch disease, revenue volatility, planning and expenditure capacity constraints of local agencies, lack of functional responsibilities proportional to the revenues, absence of external controls and institutional deterioration. At the same time, hosting extractive activities in a territory generates by itself economic and social costs and for many local actors the net effects of these operations have been negative. In this context, compensating producing regions with a share of the total revenues is more than legitimate. However, a mere transfer of resources at the local level is not a sufficient remedy against the negative externalities of extractive activities and in absence of an explicit strategy that can spur economic development and employment, and safeguard institutions and the environment, these resources may in the long run even become counterproductive forces for development (resource curse). 48

(ii) Principle of Need
A second principle is the principle of need, which suggests that resources should be distributed based on need so that those with greater need will receive a greater share. 49 Goods should be distributed in accordance to people’s needs, the principle of need is again subject to different interpretations of its basic concept: What should be considered as “needs.” However, this is not overly problematic in this case as most interpretations agree at least on the inclusion of the basic material necessities for human life, like food, shelter, and medical care. Indeed, there is a need to refer here to the Universal Declaration of Human Rights. 50 These “ideal rights” are directed towards providing a minimum standard of decent living, and should not, therefore, be confused with “entitlements”. 51 A similar connection between benefit-sharing and the principle of need can be found in the Convention on Biological Diversity (CBD). The CBD Preamble states that “conservation and sustainable use of

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50 Universal Declaration of Human Rights, UN 1948
biological diversity is of critical importance for meeting the food, health and other needs of the growing world population, for which purpose access to and sharing of both genetic resources and technologies are essential”. 52 The third objective of CBD is generally considered that the prospect of benefit-sharing constitutes an important incentive for developing countries to protect their potentially valuable plant genetic resources, and that benefit-sharing operates as an instrument that assists these countries in gaining access to the means for conservation by promoting the flow of technology, information, and financial resources. So even though benefit-sharing in the CBD is set up as a model of commutative justice, it employs the distributive justice notion of need: both in relation to the universal requirement to conserve biodiversity in order to meet fundamental needs of humankind, and with respect to the special needs of developing countries and traditional communities in so doing. The principle of need thus has an important role in CBD. In mining sector, few countries including Botswana have used principle of need to share benefit accruing from mining activities. Although other countries focus on allocating revenues from mining and oil sector at different level of stakeholders, Botswana focuses on allocating benefits according to the need of the population. There is no allocation formula reflecting how much the central government, provinces and municipalities are supposed to receive but allocate the revenues to meet development strategies. The effectiveness of the central government’s success in allocating resources strategically followed by disciplined budget releases in accordance with such strategic considerations benefits from the tracking resources received by front line service delivery units such as primary, secondary schools and primary health care facilities.53

It is worth noting that Norway has used a different approach in managing wealth from extractive industries. The country has become one of the wealthiest in the world mainly by refusing to spend its huge oil revenues and placing them instead in a sovereign wealth fund. Norway’s sovereign wealth fund is the biggest in the world at 460 billion Pound sterling.54 The principles are not new and many mineral-rich countries have been following it for years without impacting the genuine profitability of mining companies. Kenya shall get inspired from best practices to shape its benefit sharing mechanisms in mining sector.

52 Convention on Biodiversity, 1992
54 Philip Inman. Norway Sovereign is The Example for Oil-Rich Countries. The guardian. 2013
2.4. Titanium Mining Project in Kwale

2.4.1 Overview of the Project

The Titanium mining project was first initiated back in the mid-1990s by the Canadian company Tiomin Resources\(^{55}\), which carried out the initial exploration, environmental, resettlement and feasibility work. The firm applied for and was granted a number of Exploration Leases in Kenya in the mid-1990. After a number of years of moving the project forward, Tiomin Inc suffered a series of setbacks. Later on, a Chinese company Jinchuan Group acquired the mines until an acquisition agreement with the publically listed Australian company Base Resources was concluded in July 2010\(^{56}\). Base Resources registered a wholly-owned Kenyan subsidiary, Base Titanium. It is this local entity in which the Kwale Project assets exist as its flagship development. The project was officially launched in late 2011 after following an update of the feasibility study, and the successful raising of equity and debt financing.\(^{57}\) The Kwale mining sands project located approximately 65 km from Mombassa and 10 km inland comprises two areas that contain economically viable concentrations of heavy minerals. These two deposit areas are the central dune at Maumba and south dune at Nguluku with a mineral reserve of 140.8 million tonnes.\(^{58}\) Base Titanium Company data base has revealed that titanium deposits found in Kenya account for 40% of the world’s known unexploited titanium reserves and are claimed to be worth to deliver approximately 300 million in tax and royalty payments over lifetime of the mine, together with considerable indirect taxation benefits.\(^{59}\) According to Schwarz the general manager in charge of external affairs at Base Titanium Company, the Kwale Project has helped in creating opportunities for local economic development, one of which being a focused local employment programme. Through formalised agreements with the government and local communities, the company is committed to maximising local recruitment from among project affected and neighbouring communities. While production has started in Kwale, the Company has also invested in community and social infrastructure in Kwale County including investment of Kshs 4 billion in a port facility at Likoni, a dam, power line and roads.

\(^{55}\) Tiomin Resources Inc. of Toronto Canada is a transnational corporation (TNC) with various mining operations all over the world
\(^{57}\) Ibid
\(^{58}\) Osoro M.K. Radioactivity in Surface soils around the Proposed Sites for Titanium Mining Project in Kenya. *Journal of Environmental Protection*. 2010 p 460-464
\(^{59}\) Base Titanium Company website [www.basetitanium.com](http://www.basetitanium.com)
An Environmental Impact Assessment (EIA) was carried out by Coastal and Environmental Services of South Africa on behalf of Tiomin Kenya Ltd, the local subsidiary of Tiomin Resources Inc, a Canadian multinational. According to the Coast Mining Forum\textsuperscript{60}, The EIA plan did not, however, address adequately the impact of released toxic substances, including radioactive emissions from the mining operations on the coastal ecosystem, nor the need for continuous rehabilitation of the mining area. In July 2002, the National Environmental Management Authority (NEMA) conditionally approved the Environmental Social Impact Assessment and an Environmental Impact Assessment (EIA) Licence was received in June 2005.\textsuperscript{61} After Base Titanium Company bought the mines from Tiomin Limited, several supplemented reports were prepared and approved by NEMA. A number of specialist studies were undertaken over the last decade. These studies include assessments of the ecosystems services, soils and land use, ground and surface water, vegetation and floristics, terrestrial and aquatic fauna, air quality, radiation, noise, social and health. Moreover, a series of environmental and social management plans were prepared and approved by NEMA. A comprehensive environmental monitoring programme covering a number of applicable environmental criteria has been developed by Base Titanium Company. It is informed by Kenyan legislation and IBP guidelines on environmental monitoring requirements and recommendations.

The company has recently shipped\textsuperscript{62} the three distinct products streams processed from the mine and going forward, it will produce 33,000 tonnes of ilmenite, 80,000 tonnes of rutile and 30,000 tonnes of zircon annually over 13-year period.

2.4.2 Environmental and Social Challenges

(i) Radioactivity

At the initial stage of the titanium mining project, there were a lot of controversy on environmental challenges over the project in Kwale. A previous environmental assessment report presented by the mining firm to the previous government had received much criticism with stakeholders dismissing it. They argued that the foreign environmental assessment report was not done well and favoured the mining company. It would have been better to have an EIA done by independent bodies for more transparency. However, Tiomin Inc argued that initially the company contracted the Kenyatta University to undertake an

\textsuperscript{60} Centro Documentazione Conflicti Mabientali. A report on Titanium Mining in the Kwale District in Kenya. 2006
\textsuperscript{61} Base titanium Company website www.basetitanium.com
\textsuperscript{62} Base Titanium Company website www.basetitanium.com
environmental impact assessment (EIA) but the company realised that at that time, Kenya lacked environmental consultants who had the necessary experience to manage the EIA for the Kwale project. In 2003, a second study led by Dr. Wamicha of Kenyatta University raised key queries on the level of radioactivity and presence of sulphur during the mining. Later on, a study on radioactivity in surface soils around the proposed sites for titanium mining project in Kenya was undertaken by Kenyatta University and the Institute of Nuclear Science of University of Nairobi in 2010. The study reveals that activity concentrations of naturally occurring radionuclides are low in the area’s surface soils. Likewise, the absorbed dose rates in air due to the observed radionuclides concentrations in soils are also low to affect workers or communities living around the mining site. At this point it is worth to note that the potential issue of radioactivity and its impact is not clearly addressed in the Environmental Social Impact Assessment Report while the summary of the Environmental Social Impact Assessment does not mention the issue at all. If even activity concentrations of radionuclides are low, the report should have better mentioned it and demonstrated mitigation measures to tackle the low level of radionuclides.

(ii) Air pollution

Large-scale mining has the potential to contribute significantly to air pollution, especially in the operation phase. All activities during the ore extraction, processing, handling and transport depend on equipment, generators, processes and materials that generate hazardous air pollutants such as particulate matter, heavy metals, carbon monoxide, sulfur dioxide and nitrogen oxides. Community members who took part in different focus group discussions held in Nguluku pointed out that dust is the biggest environmental challenge. The Company has put in place dust monitor (Figure 1) in compliance to its environmental management plan in order to monitor the level of dust in the area. However, this does not stop the impact of dust on community’s health at all. There is an urgent need for the company to undertake mitigation measures to reduce air pollution due to dust in the area as stipulated in the Environmental Management Plan and for the National Environment Management Authority

to make sure that Base Titanium Compliance with the mitigation measures stipulated in the environmental management plan.  

**Figure 1: Dust Monitor in Nguluku**

(iii) **Water Pollution**

The 2002 Titanium EIA report indicates that the development of the mineral sands mine will impact on the physical, natural and socio-economic environments in Kwale. The mining operations have resulted in permanent changes to the topography of the Central and South dunes and the tailings dam area. Changes to the topography do not really affect the local surface drainage pattern and the mining operations do probably not affect the main deep aquifer in the mining area, but some of the springs have experienced a change in yield, change position and others have disappeared.

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66 “During the mineral processing some dust will be generated, which will be collected by a dust extraction system to maintain air quality within the plant at a level in compliance with Kenyan and international standards” Environmental Impact Assessment Kwale Titanium Minerals Project. 2002. p 9
(iv) Soil degradation

The EIA report stipulates that operations have no effect on the soil hardness or its susceptibility to erosion. However, community members living in Nguluku pointed out that the soil erosion is one of the environmental degradation occurred due to titanium mining activities.

2.4.3 Displacement and Compensation

Involuntary resettlement can have a dramatic impact on the lives of the people living in the area of influence of development projects. The displacement may provoke changes, which could dismantle settlements patterns and modes of productions, disrupt social networks, cause environmental damage and diminish people’s sense of control over their lives. When the Tiomin Inc announced its intention to extract titanium from the sands in the Kwale District at the beginning of 2001, local communities strongly opposed the project but Kenyan Government approved it and gave a special mining license to Tiomin Inc later on. A group of scientists67 with the support of Action Aid Kenya published an environmental impact assessment that revealed several environmental challenges unmentioned in the studies commissioned by Tiomin Inc. Meanwhile, Kwale farmers suspended negotiations on compensation and re-settlement with Tiomin Inc in 2002. The suspension was due to the initial offers of 9,000 and 2,000 (100 euro and 24 euro respectively) proposed by Tiomin Inc to communities. The company went further pointing out that the compensation plan included the construction of two primary schools and several churches and mosques. However, Kwale farmers rejected the offers and pointed out that they would not accept less than 50,000 Kenyan shillings (about 600 Euros) per year for every acre, in compensation for their displacement, and no less than 10,000 shillings (about 120 Euro) per year for land rental.68

In 2003, The Kenyan High Court ordered NEMA not to grant licenses to Tiomin for its environmental impacts assessment, until NEMA complies with Section 59 of the Environmental Management and Coordination Act which obliges the public re-examination of the Environmental Management Plan (EMP). Meanwhile, the Centre for Environmental Legal Research and Education (CREEL) appealed to the High Court asking NEMA to publish the plan by claiming that an EMP is a public document and therefore must be available for consultation. However, the Kenyan Government gave the go ahead for its

67 From Kenyanatta University
titanium mining project in Kwale, scheduled to start in September 2005. The company signed a tax agreement with the Kenyan authorities including a 50 percent tax reduction on company income from the tenth year of activity onward and the payment of 25 percent gross tax to the Kenyan Government.69

In 2006, eight farmers opposed the seizure order, rejecting the compensation offered by Tiomin Inc. and began a campaign against their displacement. Among them is Rodgers Mwema Nzioka, who reported the violation of his fundamental land rights. Tiomin Inc. requested the State to pay 200 million shillings in compensation. The State then used the Land Acquisition Act to obtain the farmers’ displacement and summoned the eight protesters to appear in court. Later on, the Nairobi High Court Judge, Joe Nyamu, ruled that farmer Rodgers Mwema Nzioka couldn’t oppose the contract as, according to it, farmers will rent their land to Tiomin Inc. for 80,000 shillings (950 euros) per acre. The Judge also pointed out that the Government had already purchased land where the farmers will be re-settled for 3 billion shillings (36 million Euros) and it could displace the farmers according to the Mining Act and Land Acquisition Act. Although the progress made to tackle the issue of compensation, Tiomin Inc. announced the suspension of its mining project in 2007, due to unforeseen circumstances, and that increasing delays and costs led sponsors to withdraw US$ 155 million from the project. However, the Kenyan Government forcibly displaced seven farmers who refused to accept compensation. The start of mining activities, scheduled for mid-2008, was postponed until the first half of 2009.

Later on, Tiomin Inc. cut US$ 200,000 per month from its investment and announced further reductions. Tiomin coordinator claimed that at the end of 2007 representatives of the Jinchuan Group, a Chinese partner holding 20 percent in Tiomin, visited Kenya and considered cutting costs. The Jinchuan Groups intended to definitely solve the problems with Kenya.

In 2008, Tiomin Inc. said that it had to face several obstacles over the last 10 years mainly the opposition from displaced residents and this led to the dismissal of all engineers and local mining experts as well as delays in their 2007 operations that cost US$ 40 million. Tiomin Inc stressed that the mining project was suspended because of circumstances out of their control and the bureaucratic procedure was often unpredictable and took longer than

69 Ibid
expected. Tiomin Inc declared that the major problem was the re-settlement of the residents affected by the project. A Judge ruled in favour of Tiomin Inc. in its land property rights case, while Tiomin Inc claims it spent US$ 7 million for resettling hundreds of families.

Many phases of resettlement have been undertaken since 2005 following a Resettlement Action Plan done by the company in accordance with Africa bank of development involuntary resettlement policy 2003. Compensation was paid for land, agricultural crops and forest trees. The first resettlement action plan (RAP) was prepared for the Project in 2005. This covered the resettlement of the households occupying the Special Mining License (SML) area including Nguluku and Maumba. Following disclosure and consultation households were resettled from the SML area between 2006 and 2008. 381 households were resettled from within the SML. Base Titanium Company affirmed that a post-resettlement monitoring and audit report was prepared in June 2011. The second and the third resettlement action plan were also prepared for the access road and water pipeline and Mukurumudzi Dam Site in August 2011. Affected households included 112 associated with the Mukurumudzi Dam and 86 in the access road and water pipeline routes were resettled from these areas in 2011. Of these a total of 486 were physically relocated. Also as part of the programme 255 graves were exhumed and reinterred in a specially created cemetery adjacent to the SML. Moreover, Base Titanium Company has engaged Kenya Power and Lighting Company Limited to undertake resettlement of communities associated with the 132kV transmission line from Galu to the mine site. KPLC is mandated to implement resettlement linked to power reticulation in Kenya. The RAP was prepared in accordance with KPLC’s resettlement framework which follows IFC’s Performance Standards. 159 households were affected by the 14km trace.

Many challenges have been pointed out by the communities during different focus group discussions held in Nguluku. According to the community members interviewed, around third quarter of the population from Nguluku was displaced. Few have been left behind and wish to be resettled. Homes are scattered, schools, hospitals and markets were moved from Nguluku. Wildlife from Gogoni and Buda forest has migrated to Nguluku because the place has not been occupied. Insecurity has increased due to the human-wildlife conflicts. Those who are left behind believe that they have been forgotten and have suffered from environmental issues.
2.5 Gaps in Literature

The management of wealth from mineral sector has raised concerns due to recent discoveries in Kenya. Previous studies related to mining sector do not cover the issue of benefit sharing in the sector. Some focus on the impact of mining on the ecosystems and on the effectiveness of Environmental Impact Assessment undertaken in regards to different mining projects in Kenya. On the other hand, others focus on analysing the current Mining Act by ignoring other legal instruments related to mining in Kenya including Diamond Industry Protection Act and Gold Mines Development Loan Act, Trading in Unwrought Precious Metal Act. Little Kenyan literature gave an in-depth discussion on the issue of benefit sharing in regards to genetic and no-genetic resources as well as in regards to Redd+ project in forest sector without any link to the mining sector. This study aims at assessing the current benefit sharing mechanisms in mining sector in Kenya. It seeks to understand the current legal and policy gaps in regards to benefit sharing mechanisms in Kenya and how they can be addressed through policy and legislation reforms. Further, the study voices community’s concerns in regards to the current benefit sharing mechanisms. It deeply analyses the current reform in the mining sector and seeks to understand whether these reforms really address community’s interests and concerns in regards to the share of wealth in mining sector.

2.6 Analytical Framework

This section discusses the theoretical and conceptual framework relevant to this study.

2.6.1 Theoretical Framework

Equity is about fairness and it is derived from a concept of social justice. It represents a belief that there are some things which people should have, there are basic needs that should be fulfilled; that burdens and rewards should not be spread too divergently across the community, and that policy should be directed with impartiality, fairness and justice towards these ends.\(^70\) It simply means that there should be a minimum level of income and environmental quality below which nobody falls. This implies that everyone should have access to community resources and opportunities, and that no individuals or groups of people should be asked to carry a greater burden than the rest of the community as a result of government actions. It is generally agreed that equity implies a need for fairness (not

necessarily equality) in the distribution of gains and losses, and the entitlement of everyone to an acceptable quality and standard of living.\textsuperscript{71}

The concept of equity is well entrenched in international law. The Universal Declaration of Human Rights acknowledges that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Further, the concept of sustainable development embodies ethical principles. The Brundtland Commission's definition of sustainable development is based on intergenerational equity: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. The Brundtland Report not only insists on intergenerational equity but also intra-generational equity within existing generations. Equity can be applied across communities and nations, and across generations.

The distribution of benefits among stakeholders is the most common measure of equity in the Community Based Natural Resources Management (CBNRM) programs in terms of the distribution and allocation of socio-economic benefits and resources.\textsuperscript{72} The relevance of this principle of fair and equitable benefit-sharing is manifested by the fact that poor communities deserve extra support in order to satisfy their fundamental needs and protect their resources and also raise their negotiation capacities. According to Bram De Jonge\textsuperscript{73}, the principle holds that due to the existing inequalities, extra efforts have to be undertaken if a fair and equitable benefit-sharing mechanism is to be realized. Many rich-mineral countries across the world have put in place the benchmark for measuring equity determined to account for social contexts, norms and values. Some of these countries share revenues from mining based on the principle of need. It simply means that these countries recognise that benefits need to be shared among stakeholders in an equitable way but went further to determine that the need will inform the share of wealth. As result, poor communities deserve extra support in order to satisfy their fundamental needs - the case of Botswana.\textsuperscript{74} On the other hand, some focused on derivation while sharing the benefit accruing from the mining sector. The revenue is shared by derivation when a percentage of the revenues are allocated upfront to the producing territory (this can apply to both regional and local governments). In this scenario, the

\textsuperscript{71} Ibid
\textsuperscript{73} Bram J. Op. cit., 127-146
\textsuperscript{74} Republic of Botswana. \textit{Public Expenditure and Financial Accountability Report}. p 12
producing territory is favoured because it bears more environmental and social burdens. This is the case of Nigeria, Bolivia and Brazil. However, Norway came up with a different way of managing wealth from extractive industry. The country does not use or distribute the wealth, it keep all wealth in a sovereign fund for future generations.

2.6.2 Conceptual framework

The below conceptual framework has guided this study. Kenya is endowed with natural resources that can boost the economic growth and enhance the social welfare of its citizens. Good governance of natural resources is strongly required to promote sustainable development and encourage benefit sharing in extractive sectors. The legal framework governing the exploration and exploitation of mining in Kenya does not provide for benefit sharing mechanisms and there is an urgent need to enact such regulatory framework according to the spirit of article 69 of the Constitution of Kenya. The Mining Act of 1940 specifies procedures and parameters for granting of concessions and other rights of access, general conditions for exploitation, royalties, taxes, and incentives related to the extractive industries without addressing key modern issues in mining sector such as benefit sharing. Meanwhile the Environment Management Coordination Act requires an Environmental Impact Assessment prior to the grant of the mining lease to make sure that mining activities are not interfering with the environment. Currently, there are no benefit-sharing mechanisms in place that provide an appropriate allocation of revenues accruing from mining activities among stakeholders. However, Article 69 of the constitution vests natural resources in the people of Kenya but grant the government the authority to manage those resources on their behalf and for their benefit. This study advocates for an appropriate regulatory framework on benefit sharing mechanisms that seeks to balance economic, social and environmental interests to promote sustainable development in the mining sector; the expected regulatory framework that promotes equity in sharing benefit accruing from mining sector and set structures that attract investors and consider ecological challenges. The study assumes that to reach equitable benefit sharing in mining sector in Kenya, there is a need for a comprehensive legal framework on benefit sharing mechanisms that will promote sustainable development in the mining sector in Kenya.

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2.7 Conclusion

From the analysis of the three benefit sharing channels, authors agree that a comprehensive legal framework is a starting point towards achieving sustainable benefit sharing in mining sector. It has demonstrated that to set up effective benefit sharing mechanisms in mining sector, there is a need of a comprehensive legal framework on benefit sharing in Kenya that will channel accruing proceeds to meet the need of the affected communities. Concerning the royalty, Kenya should learn from other countries experiences where they do not only share royalty but also every tax related to mining activities for an effective benefit sharing in mining sector. The compulsory land acquisition provisions require safeguards on resettlement.
and eviction so that the ones who are displaced due to large scale mining operations are not left worse off due to the involuntary displacement. Corporate social responsibility in mining industry is viewed as a mechanism for maximization of positive and minimization of negative social and environmental impacts of mining while maintaining profits. It is important that mining firms retain their social role within the society by responding to society’s needs. The study has demonstrated that there have been a lot challenges in regards to titanium mining project in Kenya since its inception: environmental challenges such as air pollution due dust and soil pollution as well as soil erosion as well as social challenges due to involuntary displacement have been considered among the negative challenges related to titanium mining project.
CHAPTER THREE

STUDY AREA AND METHODS

3.1 Introduction

This chapter provides a background of the study area where the research was conducted and describes the research methods used to undertake the study.

3.2 Study Site

This study was undertaken at the titanium mining project because it is considered to be one of the flagship mining projects with the high economic potential. The project is expected to offer around $350 million dollars in tax\textsuperscript{76} over its lifetime. Nguluku village within Kwale was selected because it is one of the villages mostly affected by mining project. Nguluku village is divided into three sub-villages: Kibwanga, Nchingirimi and Mkurumji. The area is traversed by Mururimusi River and currently home for local Digo and other settlers such as the Kamba, distributed in two villages of Maumba and Nguluku. Islam is the dominant religion with mosques in most villages but there are also several traditional Christian churches based on the teachings of local preachers. Indigenous religion, mostly based on the idea of a supreme God, continues to play a major part in the lives of many people with sacrifices and rituals taking place. The total population before the displacement was around 4500 people but currently the population is estimated around 1300 people. 2769 people\textsuperscript{77} have been displaced from the mining site in Nguluku. Among the displaced people, a few of them moved from Nguluku to Mrima Bwiti and other settled in Kibwanga, in Fingirika and Mivuvoni.

3.3 Research Design

The study was broadly qualitative and combined desk and field research. The field research was undertaken to meet the fourth research objective of the study on collecting communities’ perceptions on the issue of benefit sharing in mining sector in Kenya. These perceptions provided useful information and data on the current benefit-sharing regime in mining sector and helped to measure the level of awareness of laws related to mining activities in the area.

\textsuperscript{76} Base titanium company web site

\textsuperscript{77} Base Titanium Company. Titanium Mining Project Resettlement Action Plan. p 21
3.4 Target Population and Sampling Size

The study used purposive sampling. This type of sampling technique refers to the process by which a researcher selects a sample basing on the experience or knowledge of the group that is to be sampled. It was applied to identify the study site of Nguluku and to select key informants from Base Titanium Company, Ministry of Mining, Kenya Chamber of Mines and National Environment Management Authority. For the household interviews, the respondents were selected by the use of stratified random sampling methods whereby stratification was based on the the duration of residence in Nguluku (+10 years) and the age of respondents (+18 years old). That was to make sure that respondents have experienced different challenges due to titanium mining activities in Nguluku. One hundred and fifty respondents were selected using stratified random sampling from a population of around 1300 habitants to administer the survey questionnaire. Using 0.05% of the margin error and 1.6% level of confidence, Barlett proposes that the minimum required sample size is estimated to 112 for a population of 1300 people. Three focus group discussions were held in Nguluku with a group of twelve women, twelve men and twelve youth respectively. The purpose of the FDGs was to collect in-depth information useful to analyse quantitative data. All respondents were above 18 years old and were selected randomly and interviewed on a first encounter basis.

3.5 Data Sources and Data Collection Instruments

The study relied on both primary and secondary sources of data. The primary data comprised information collected from communities affected by the titanium mining project in Nguluku to answer the forth objective of the study. Questionnaires were administered to one hundred and fifty respondents among a cross-section of women, men and youth balancing factors such as age, marital status, socio-economic status and level of education. The survey examined perceptions of community on the issue of benefit-sharing, the awareness of laws in regards to mining sector, land holding system in the area and public participation. Key informant interviews were held with officials from Base Titanium Company, Kenya Chamber of Mines, National Environment Management Authority and Ministry of Mining and Focus Group. Secondary data included data collected from relevant literature in libraries such as journals.

annual reports, books, case records, workshop proceedings and periodicals. Observations helped to determine the unbearable levels of dust.

3.6 Data Analysis

Data processing was undertaken before analysis. It included manual editing, coding, data entry, data cleaning and consistency checking. Qualitative data from FDGs and interviews were analysed and used to complement the discussion of quantitative data. Descriptive statistical tools such as percentages bar and pie charts were employed to present result.
CHAPTER FOUR

RESULTS AND DISCUSSIONS

4.1 Introduction

The first section of results analyses the current legal framework guiding the mining sector in Kenya. The second section analyses data generated from questionnaires designed to meet the third and fourth objectives. It also presents qualitative data collected from the three focus group discussions conducted with women, men and youth on the issue on benefit sharing in mining sector in Kenya.

4.2 Qualitative data

4.2.1 Legal Framework in Mining Sector in Kenya

Kenya is one of the country in Eastern African that is endowed with various types of minerals including gemstones, gold and industrial minerals (titanium ores, gypsum, iron ore, limestone, diatomite, fluor spar, vermiculite, soda ash or trona, carbon dioxide etc)\(^79\). Mineral exploration, exploitation and trade are presently carried out under the Mining Act of 1940, the Trading in Unwrought Precious Metals Act, Cap 309, the Diamond Industry Protection Act, Cap.310 and Gold Mines Development Loan Act Cap 311.\(^80\) Further, Kenya has witnessed considerable legal and policy reforms relevant to extractive industry in the recent past. Key among these is the promulgation of the constitution of Kenya in 2010. The constitution introduced progressive provisions aimed at improving good governance of natural resources in Kenya. This section provides a brief overview of the legal and regulatory framework applicable to the mining industry in Kenya.

\(\text{(i) The Constitution of Kenya}\

The constitution is the supreme law and the backbone upon which all laws and regulations are based. There are several legal reforms undertaken in Kenya in order to align to the spirit of the constitution of Kenya. The Constitution \(^81\) obligates Parliament to enact legislation to give full effect to Part 2 of Chapter Five which provides for matters of environment and natural resources. The current Mining Bill will be officially published as one of the laws

\(^79\) Kenyan Ministry of Environment website www.environment.go.ke/archives/1773

\(^80\) Kenya Chamber of Mines. Mining Investment Road Map available on www.kenychambermines.com

\(^81\) The Constitution of Kenya, Article 72
required to give full effect to the above provisions of the Constitution. Article 10(2) of the constitution enshrines national values and principles of governance. These include good governance, transparency and accountability that bind public officers in the performance of their functions. They are considered pillars of an effective equitable benefit sharing and are preventive remedies to avoid resource curse in mining sector. They facilitate dialogue, help prevent commercial confidentiality and make officers accountable to the public.\textsuperscript{82}

Article 40(3) as well as article 60 (1) (b) of the Constitution set out the principle of compensation in respect of land access. When a community and individual’s rights over land for the purposes of mineral development are infringed upon, the owner or the lawful occupier must be compensated for any loss or damages that may be caused by the holder of the mineral right. Article 60 of the Constitution goes further by stating that “\textit{land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable}”. Many mineral-rich countries particularly those in Africa have called for beneficiation or the addition of value to the minerals that are exploited. This is to maximize the contribution of the industry to the local economy especially where the deposits of some minerals are very large and the exploitation could last for decades. African examples include the cutting and polishing of diamonds in Angola\textsuperscript{83}, Botswana, Namibia, South Africa and attempts by Ghana and Guinea to ensure that their large reserves of Bauxite are smelted and refined in the country.

Under Article 62(1) (f) of the Constitution, all minerals and mineral oils as defined are categorized as public land. Additionally, Article 62(3) of the Constitution goes further by stating that \textit{all minerals and mineral oils vest in and shall be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission}. Meanwhile the current Mining Act 1940 and the Mining Bill 2014\textsuperscript{84} have given much power to the Cabinet Secretary in charge of mining over the management of the mining sector. These include negotiation of mining agreements, oversight of mining activities, grant, revocation and suspension of licenses and the establishment of directorates. Under the Mining Bill 2014, the Cabinet Secretary shall seek the consent of the National Land Commission before granting a mineral right in regards to public\textsuperscript{85} and unalienated

\begin{flushright}
\textsuperscript{82} Commission for The Implementation of the Constitution, comments made by CIC on the Mining Bill 2012, \\
\textsuperscript{84} Mining Bill 2014, Part 4 \\
\textsuperscript{85} Mining Bill 2014, Paragraph 34 (2)
\end{flushright}
community land.\textsuperscript{86} The Commission shall also keep the cadastre system for mineral rights\textsuperscript{87}. While article 67(2)(a) of the Constitution gives powers to the National Land Commission to manage all public land on the behalf of the national and county governments, the Mining Bill 2014 only mentions cases in which the Cabinet Secretary requires consent from the National Land Commission. In case minerals are found under a private land, the Cabinet Secretary must seek the consent of the National Land Commission before granting a mineral right to an investor. The relationship between the Cabinet Secretary in charge of mining and the National Land Commission in the management of the mining sector need to be clearly defined. There is risk of overlap and duplication of functions between the National Land Commission and the Cabinet Secretary in the management of the mining sector.

Article 69(1)(a) and (h) of the Constitution of Kenya 2010 puts an obligation on the State to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits and utilize the environment and natural resources for the benefit of people of Kenya. Taken together with article 71 which provides that agreements relating to natural resources have to be approved by parliament, the Constitution seeks to ensure that transparency exists in natural resources exploitation and revenues are shared equitably. The Constitution further makes provision for access to information (article 35) and public participation under article 69(1) (d) which is important in environmental governance.

Article 159(2)(c) recognises that alternative disputes resolution mechanisms shall be promoted and goes further to provide that they shall not be used in a way that contravenes the bill of rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; is inconsistent with the constitution or any written law.\textsuperscript{88} For Kenya to be able to compete globally and attract investment, the possibility of allowing international arbitration (which has become an international practice) for disputes between the holders (foreign investors/companies) of mineral rights and the government will enhance security of tenure.\textsuperscript{89}

Article 174 of the Constitution outlines the principles of devolution and promotes democratic and accountable exercise of power; gives powers of self-governance to the people and

\textsuperscript{86} Mining Bill 2014, Paragraph 36 (1) \\
\textsuperscript{87} Mining Bill 2014, Paragraph 165(5) \\
\textsuperscript{88} Constitution of Kenya, Article 159(3)(c) \\
\textsuperscript{89} Commission for the implementation of the constitution, comments on Mining Bill 2012
promotes the participation of the people in the exercise of the powers of the State. The devolution of power among sub-national government structures should be at the heart of a fair distribution of oil, gas and mining revenues in Kenya, both as a guarantee against abuse of power by central elites, and to improve social service delivery by better connecting public policies with the needs of local population.\(^{90}\) Devolution is expected to guarantee, among other things, that efficient and transparent resource allocation mechanisms will be in place to ensure that incomes from oil and gas are distributed in an equitable manner.\(^{91}\) There are forty-seven new sub-national government structures that have been set up at the county level, and political and economic decision-making has been transferred to them from the central government. It is expected that, because local governments are closer to their constituencies than central government authorities in Nairobi, they are able to meet local needs in a more timely and efficient way, and will be held directly accountable by local communities.\(^{92}\) It is important to note that the management of mining sector has not been devolved and it is mainly managed by the central government through the Cabinet Secretary in charge of mining.\(^{93}\) However, devolution is a key determinant that informs the share of revenues accruing from natural resources between national and county government. These constitutional provisions offer modern principles that drive an effective benefit sharing mechanisms if well captured by a specific mining law in regards to benefit sharing in mining sector in Kenya.

\textbf{(ii) Mining Act 1940}

Since independence, mining in Kenya has been governed by the Mining Act 1940 which was an adopted version of the Mining Ordinance of 1933.\(^ {94}\) Since its commencement, the Act has been revised twice in 1972 and 1987. The Commissioner of Mines and Geology heads the Department of Mines and Geology and is responsible for overseeing mining research and policy as well as implementing the Mining Act. The ownership of all mineral deposits vests in the Government. As set in the Mining Act, an investor must apply to the Commissioner for the necessary right, licence or lease as set out in order to carry out mining activities.

\(^ {92}\) Patricia I. Vasquez, \textit{Op.cit.}
\(^ {93}\) Ibid
a. Mineral Exploration

- **Prospecting Right**: Prospecting means operations carried out offshore and on land to search for and define the extent of a mineral deposit and to determine its economic value. The Commissioner of Mines has the power to grant prospecting rights through a prospecting license. Any person may apply for a prospecting right which will provide the holder the right to carry out exploration activities in any land prospecting for diamonds, however, requires a special endorsement from the Commissioner. License holders must restrict their work to specified lands. Prospecting in a forest area or protected wildlife area is subject to any lawfully imposed conditions. Holders of prospecting rights are eligible for exclusive prospecting rights.

- **Exclusive Prospecting Licence (“EPL”)**: A person who holds a prospecting right may apply for an EPL which provides the holder with the exclusive right to prospect in a designated land. An EPL is initially issued for one year and may be renewed at the discretion of the Commissioner for further terms of one year each up to a maximum of five years. An EPL is not transferable without the consent of the Commissioner. EPLs normally relate to prospecting in a large area of land. Alternatively “Mining Locations Licences” may be obtained for mineral exploration in a smaller area of land (up to four square kilometres). However, certain lands are excluded by law from prospecting and mining. These lands include cemeteries, urban areas situated within municipalities, townships or trading centres, land subject to a lease, lands subject to subsisting prospecting or mining right, railway reserves, lands within a hundred metres of any dam or canal belonging to the national or county government, public street or road reserve, salt lick, trust lands, land within five hundred meters of a public airfield, and a private land except with owners consent.

b. Mineral Exploitation

- **Mining lease**: A mining lease is issued to a holder of any prospecting right and provides the lessee the right to extract deposits within the land area of the mining

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95 Mining Act of 1940, Cap 308, Article 13  
96 Mining Act of 1940, Cap 308, Article 18  
97 Mining Act of 1940, Article 7  
98 Mining Act of 1940, Cap 308, Part IV
lease, including the right to remove and dispose of the minerals as specified in the lease. A mining lease may be granted for a term of five to twenty-one years, and will set out the applicable terms and conditions for such mining.

- **Special Mining Lease (SML):** Where the Commissioner of Mines is satisfied that there are special costs or other reasons applicable to a particular deposit, the Commissioner may grant a SML to any person. SML may be granted and be renewed for such a term and upon such conditions as the Commissioner may determine. All mining leases must be registered with the Commissioner and can only be transferred with the Commissioner’s written consent.

- **The process of obtaining a mining lease:** The Mining Investment Road Map published by Kenya Chamber of mines sets out following steps to get a mining lease:
  - Carrying out a mining feasibility study and an approved cadastral survey of the deposit.
  - Preparation of an Environmental Impact Assessment Study (EIA) in accordance with the requirement of the Environmental Management and Co-ordination Act No. 8 of 1999. This must be approved by the National Environment Management Authority. The EIA is subject to public comments before such approval.
  - Submitting a formal application for a mining lease (which will include information in (a) and (b) above, and any compensation agreements payable to landowners) must be published in the Kenyan Gazette and a local newspaper inviting any objections.
  - Registration of the mining lease under the Mining Act 1940 and the Registration of Documents Act, and the applicable stamp fees must be paid.
  - Parliamentary ratification of any right or concession for the exploitation of any natural resource. The above process typically might take long to complete.

- **Royalties**

  Section 38 of Mining regulations under the Mining Act 1940 embodies provisions on royalties. All royalties shall be payable on demand to the Commissioner, who may, if so requested and after payment has been made, issue a permit to export the mineral on which royalty has been paid. Concerning the rate of royalties, the Minister may, from time to time by notice in the Gazette, prescribe the rate of royalty that shall be payable on minerals. Within three months of the export of any minerals originating in Kenya, or within such
extended time as the Commissioner may allow, a sales account in respect of such minerals shall be produced to the Commissioner, and any adjustments which may be necessary to ensure payment of the full amount of royalty due shall be made. Moreover, resident and non-resident corporations in Kenya are liable to pay corporation tax on all income generated within Kenya. Under the Income Tax Act, corporate tax rate is 30%. Following the Finance Act 2012, the government introduced a withholding tax on transfer of shares or property in the mining sector. The Mining Act 1940 does not provide for any provisions on benefit sharing mechanisms in mining sector in Kenya and the lack of a comprehensive legal framework on benefit sharing mechanisms weaken the sector and as consequences communities do not benefit fully from what may accrue from mining exploitation.

(iii) The Trading in Unwrought Precious Metals Act (Cap 309)

The Act was first published in 1987 and then revised in 2012. It is an Act of Parliament regulating the Trade of Unwrought Precious Metals in Kenya. Unwrought precious metal means precious metal in any form which is not manufactured or made up into an article of industry or of the arts, and includes amalgam, slimes, slags, gold-bearing concentrates, pots, battery chips, sweepings from reduction works and scrapings and by-products of unrefined precious metal and precious metal which has been smelted into the form of bullion but does include ore in situ. A person willing to trade unwrought precious metals is required to apply for a licence issued by the Commissioner authorizing him to be in possession of the metal. The license costs ten thousand Kenya shillings and expires on 31st December the following year. Concerning the exportation of precious metals, no person shall export unwrought precious metal, whether by land, sea or air, unless he holds a certificate granted by the Commissioner and he has paid all royalties or secured to the satisfaction of the commissioner or that no royalties are payable.

(iv) The Diamond Industry Protection Act (Cap.310)

It is an Act of Parliament that provides for the protection of the diamond industry. It was first published in 1949 and then revised in 2012. The Act makes restriction on who is supposed to sell or buy diamond in Kenya. No person, other than an authorized diamond miner or a

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100 The Trading in Unwrought Precious Metals Act, Cap 30, Article 2 on Interpretation
101 The trading in Unwrought Precious Metals, Article 5
102 The Trading in Unwrought Precious Metals, Article 14
license diamond dealer, shall sell or otherwise dispose of any diamond or shall buy or otherwise acquire, except by lawful mining, any diamonds.  

(v) **Gold Mines Development Loan Act (Cap 311)**

The Act was first published in 1952 and revised in 2012. The Act provides for the granting of financial assistance for the underground development of gold mines in Kenya and for purposes incidental thereto or connected therewith. The Act has established a board known as the Gold Development Loans Board. The Board is responsible for granting a loan to the owner of any gold mine for the underground development of the gold mine.

In conclusion, the mining sector is currently governed by many fragmented pieces of legislation. However, the Mining Bill 2014 clearly express that it will repeal the Mining Act of 1940, the Trading in Unwrought and Precious Metals Act of 1933 and the Diamond Industry Protection Act of 1949 without mentioning the repeal of the Gold Mines Development Loan Act of 1952. The question raised is how the Gold Mines Development Loans Act would coexist with the coming of the new mining law in Kenya.

(vi) **Environment Management Co-ordination Act, 1999**

Environment Management Coordination Act provides for a mandatory Environmental Impact Assessment (EIA) before undertaking any project specified in the Second Schedule. A project proponent shall submit a project report to NEMA prior to the commencement. The Second Schedule sets out projects that require an EIA prior to commencement including any project that affects land use such as mining. The Environmental Impact Assessment and Audit Regulations sets out what an EIA study should primarily address. They include an inquiry into the available technology and alternatives; potentially affected environment; and the environmental effects including socio-cultural impacts. It should also include an environmental management plan to eliminate or mitigate adverse environmental impacts. They must also address the issue of timeframe, cost and identify who bears the overall responsibility to implement this plan. In mining sector, EIA license is a pre-condition to the granting of mining lease. In order to mine, the licensee will be required to acquire a mining lease. The prerequisite for obtaining lease include preparation of a mine feasibility report, undertaking an Environmental Impact Assessment (EIA) Study in accordance with the

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103 Article 7 of Diamond protection act revised version 2012
104 Mining Bill 2014, Paragraph 198
106 The Environmental Impact Assessment and Audit Regulations 2006, Regulations 18
requirement of the Environmental Management and Co-ordination Act No. 8 of 1999 and submission of a cadastral survey of the area applied for. However, the focus has always been on the large scale mining to take all measures to protect the environment. It creates an impression that small scale mining is exempt from conducting an EIA. Although the current mining law makes no reference to environmental management during mining operations, the EIA regulations require an EIA study that incorporates details of project activities, impacts, mitigation measures, time schedule, costs, responsibilities and commitments proposed to minimise environmental impacts of activities, including monitoring and environmental audits during implementation and decommissioning phases of a project.

- **Environmental Restoration Plan**

The EIA regulations require an EIA study to incorporate an Environmental Management Plan (EMP) defining all details of project activities, impacts, mitigation measures, time schedule, costs, responsibilities, including monitoring and environmental audits during implementation and decommissioning phases of a project. Environmental restoration plans are another imperative for mining operations, especially action after the mining operations have ceased. In many cases, disused mines are left bare, with open pits an obvious environmental and public health hazard. The Mining Bill 2014 sets out that the Cabinet Secretary shall not grant a prospecting licence, a retention licence or a mining licence to an applicant, unless the applicant has submitted site rehabilitation and mine closure plans for approval. It makes the restoration plan prior a mandatory requirement to the grant of a prospecting licence. The proponent is required to identify the kinds of environmental damage their operations are likely to cause, and set out a comprehensive plan of action on how to rehabilitate the destroyed ecosystem and leave the area environmentally better off than it was prior to the mining operations. This is a positive step, but it is also important to understand that mine closure and reclamation plans (and financial estimates) change throughout the life of a mine. At the project licensing stage, a mining company cannot anticipate all of the issues that will affect clean-up and restoration efforts. Therefore, the Act should require mineral rights holders to continually update and revise their reclamation plans and, additionally, their environmental protection bonds.

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108 Ibid
109 Mining Bill 2014, Paragraph 154
• Environment Protection Bonds

Section 28 of EMCA empowers NEMA to register all activities and undertakings with a potential for significant adverse effects on the environment if operated contrary to good environmental practice. This should enable the Finance Minister with advice from the National Environment Council (NEC), to require deposit bonds from these undertakings as sufficient security for good environmental practice. If there is compliance to the satisfaction of NEMA, the deposit bond will be refunded without interest. After paying taxes and other fees required, it is not fair for NEMA to refund the deposit bond without refunding the interest that has been accumulated from the deposit. The Mining Bill 2014 requires a license applicant to provide an environmental protection bond sufficient to cover their potential environmental restoration costs. The Cabinet Secretary may release in part an environmental protection bond upon the satisfactory completion of rehabilitation measures undertaken within the duration of a licence and shall release the bond in full following the successful completion of all environmental and rehabilitation obligations. Having similar provisions in two different statutes (EMCA and Mining law) will result in institutional conflict because there will be a confusion on which institution is supposed to receive the deposit bond or release it upon the satisfactory completion of rehabilitation obligations. There is need for clarification on the institution in charge of managing environment protection bonds.

• Environmental Restoration Orders

Section 108 of EMCA provides for issuance of environmental restoration orders on any person by NEMA or by a court of law. In the latter case, issuance is only where proceedings have been instituted by an aggrieved person. When issued, such an order would, inter alia, require restoration of the environment to the condition it was in prior to the degrading action and award compensation to any person harmed by the degrading action. In this case, the perpetrator of the degrading action is liable to meet the full cost. In mineral resource utilisation, this provision when enforced effectively has the potential to mitigate the nightmare of non-rehabilitation of disused mining sites.

111 Mining 2013, Paragraph 161
**Environmental Management Plan**

Environmental Management Plan is the key to ensure that the environmental quality of the area does not deteriorate due to the operation of the plant under study. In regards to the titanium mining project, a feasibility and design phase plan, construction phase, operational phase and the decommissioning phase management plans were prepared and approved by Nema in 2005 as part the Environmental Impact Assessment Report. Air pollution due to dust generated during the mining and product transport and within the plants is one of the environmental challenge in Nguluku. The Environmental Management Plan annexed to the Environmental Impact Assessment mentions the following mitigation measures to mitigate the air pollution and these include dust abatement measures (watering programme), installation of dust extraction, ventilation systems. From the findings, none of the above mitigation measures have been put in place yet except for the dust monitors that have been set up to ensure that the SO2 levels remain low. These dust monitors do not stop the dust that has became unbearable by communities living in Nguluku and causes lung infection and respiratory challenges to children living in the area as report by community members.

**Environmental Audit**

There are two types of environmental audit under EMCA that includes the control auditing and the self auditing. A control audit shall be carried out by the Authority whenever the Authority deems it necessary to check compliance with the environmental parameters set for the project or to verify self-auditing reports while the self auditing is undertaken by the proponent in ensuring that the criteria used for the audit is based on the Environmental Management Plan (EMP) developed during the environmental impact assessment process or after the initial audit. In regards to Titanium Mining Project, an annual environmental audit done by Base titanium Company is submitted to the National Environment Management Authority annually. Unfortunately the recent environmental audit related to titanium mining project from 2009 to date were not available at the National Environment Management Authority. From the discussion with officials from the National Environment Management Authority, Nema has never undertaken a control audit due to lack of capacity in term of personnel and finances; It review the environmental audit based on what the mining company submits to the Authority.
Land Act 2012

Land is of great significance and numerous benefits to humankind, whose value may be classified into five broad categories namely: value as a source of food, economic value, ecological value, socio-cultural value and political value. Concerning the economic value of land, it is a principal source of livelihood and material wealth to humans by providing them with the means to meet their needs and wants. The Constitution of Kenya and the Land Act 2012 classify land tenure in Kenya into three broad categories, namely, public ownership, communal ownership and private ownership. Land that is under public tenure may be described as public land. That which is collectively owned by the community under customary tenure is communal land while that which is privately owned may be described as private land. Minerals are essentially related to land and the Constitution considers minerals as a public land. Therefore, Article 62(3) stipulates that minerals shall vest in and be held by the national government in trust of the people of Kenya and shall be administered on their behalf by the National Land Commission. Part II of Land Act 2012 embodies provisions on the management of public land as mentioned under Article 62 of the Constitution. Part VIII of the Land Act embodies provisions related to compulsory acquisition of land. Within the common law world, laws on land acquisition are usually separate from other laws dealing with land since the law deals with the exceptional powers granted to government to take the citizens’ land away from them against their will. It is not clear why provisions dealing with this compulsory acquisition of land matter have been incorporated into the Land Act. Yet what is in the Land Act is more or less the same legal framework as the Land Acquisition Act stigmatised in the National Land Policy as being either abused or not adhered to. In one or two important respects, the provisions in the Land Act are less beneficial to the land owner than those in the Land Acquisition Act. Neither in the old, new nor in these provisions are there any opportunities to contest or challenge the necessity for land acquisition per se or the necessity for the amount or the specific parcel of land being acquired. The Land Act only offers opportunities to persons interested in the acquired land to deliver a written claim of compensation to the commission, not later than the date of the inquiry. In comparison with the Kenyan and World Bank Policies on Resettlement and Compensation, there are a number

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114 Constitution of Kenya, Article 61
115 Constitution of Kenya, Article 62(1)(f)
117 Land Act, Section 112
of differences between the Kenyan laws and World Bank Safeguard policies, such as: The World Bank OP\textsuperscript{119} 4.12 favors avoidance or minimization of involuntary resettlement while the Kenyan laws say that, as long as a project is for public interest, involuntary resettlement is considered to be inevitable. World OP 4.12 stipulates that Displaced persons should be assisted in improving livelihoods or at least restoring them to previous levels. Kenyan legislation (Land Act) provides for ‘just and fair compensation’. However, ‘just and fair compensation’ is not clear and can only be determined by NLC which can be subjective. It is does not talk about improving livelihood or restoring them to pre-project status. It is important that the concept of fair and compensation be clearly defined for an effective benefit sharing mechanisms. The resettlement must be done in a way that assists the project affected persons instead of leaving them worse off.

\textbf{(viii) The Mining (Local Equity Participation) Regulations\textsuperscript{120}}

The Mining (Local Equity Participation) Regulations was promulgated on 12 October 2012 and it aimed at increasing Kenyans participation in mining companies. The regulation states that it shall be a condition of every mining licence that the mineral right in respect of which the licence is issued shall have a component of local equity participation amounting to at least thirty five per cent (35\%) of the mineral right. The Regulation has been interpreted to mean that at least 35\% of shareholders in mining companies must be Kenyan nationals. This requirement is not a new concept in the natural resource extractive sector. Such laws are fast becoming common in mining economies, with similar laws being adopted in Botswana, Zimbabwe, Tanzania, Guinea and Indonesia. However, for such laws to reach their intended aim there must be adequate finance and financial infrastructure available to local investors. This is a challenge Kenya will need to address, given the potential for large scale mining operations in the near future.

\textbf{(ix) Local Equity Participation Regulations}

The Mining Bill 2014\textsuperscript{121} states that the Cabinet Secretary may from time to time gazette different minimum levels of local equity participation for certain minerals. Furthermore, the Government has recently introduced the Mining (Local Equity Participation) Regulations of 27 September 2012 (LE Regulations).\textsuperscript{122} It shall be a condition of every mining license that

\begin{itemize}
  \item \textsuperscript{119} World bank, operational policy on involuntary displacement OP4, 2011
  \item \textsuperscript{120} Mayer brown. \textit{Mining in Kenya: the start of a new era}. p 1-3
  \item \textsuperscript{121} Mining Bill 2014, Paragraph 147
  \item \textsuperscript{122} Amar Mehta and Candice Kola. \textit{Might the Kenyan government be killing the goose that lays her golden eggs}. Bowman Gilfillan. 2013
\end{itemize}
the mineral right in respect of which the license is issued shall have a component of local equity participation amounting to at least 35%. According to the former Minister of Environment Chirau Ali Mwakwere\textsuperscript{123}, this regulation will reduce the influence of foreign investors in Kenya’s mining sector as well as promote the interest of local investors. The Regulations impose a 35\% minimum local equity participation in ‘mineral rights’ over which a licence is granted, as a requirement for every ‘mining licence’ falling under the Mining Act. The regulations have been heavily criticised by industry players, financiers and legal practitioners for their arbitrariness and silence over a number of critical issues. The regulations do not specify whether existing or just new licensees were affected by the 35\% equity requirement. They also make no mention as to how the equity requirement is to be implemented by the government, licensees, and local industry stakeholders, nor do they address any compliance timeline or time limits by when affected licensees must have attained a 35\% local equity ratio. The Regulations further fail to provide any specifications relating to consequences for non-compliance and whether there will be any exemptions as provided for by other industries. The regulations are silent as to which stages of the mining lifecycle are affected, whether reconnaissance, prospecting, or mining and exploitation.\textsuperscript{124} However, the only guidance given to date by the government on the exact play-out of the local equity requirement is an informal statement by the Ministry for Environment and Mineral Resources that the equity requirement is to be determined on a case-by-case basis. A number of foreign investors have now been left with the unpleasant choice of either pulling out their investments altogether, or engaging the government through protracted court cases.\textsuperscript{125}

4.2.3 Institutional Framework in Mining Sector in Kenya

(i) Ministry of Mining\textsuperscript{126}

The Ministry of Mining is a quite new Ministry formed by the government after the general elections held in March to look into mining activities in the country. Part of the Ministry’s mandate is to formulate legislation and mining policies and expand the industry by making Kenya a mineral and metal hub for the region. Previously, mining activities in the country were handled by the Ministry of Environment and Natural Resources through the Mines and Geology Department. Kenya in its efforts to trim government ministries in line with the

\textsuperscript{123} Mugambi Mutegi, Foreign Mining Firms to cede 35 pc share to Kenyans. Business Daily, 2012
\textsuperscript{124} Amar Mehta and Candice Kola, Op.cit, p 17
\textsuperscript{125} Ibid
\textsuperscript{126} Kenyan Ministry of Mining website
constitutional requirements and ensure efficiency established the Ministry of Mining and appointed a Cabinet Secretary to head the country’s first ever mining ministry.

(ii) Mining and Geological Department

The Mines and Geological Department was established in the Ministry of Local Government, Lands and Settlement on 1st January 1933, through the Mining Ordinance of 1933. The ordinance came into effect on February 6th, 1933 and its Regulations on March 1st 1934, replacing Mining Ordinance of 1931 adopted from the code prevailing in the then Tanganyika Territory. A Commissioner was appointed to head the Department in 1934. During that time, Mining in Kenya was at its early stage of prospecting and development. The Department was therefore charged with overseeing prospecting activities, which also entailed supporting prospectors to join forces and form partners, syndicates and companies. Among the first mining activities was for gold in Western Kenya. In the current organization of Government, the department falls under the Ministry of Mining and has the mandate to carry out geological survey and research on geo-scientific database and information; administration of legislation relating to mineral resources development; mineral and mining policy formulation; advising government on mineral policy matters; supervision of quarry and mine safety; and security of commercial explosives.\footnote{127 Republique of Kenya, Ministry of Mining website}

(iii) Kenyan Chamber of Mines

The Kenya Chamber of Mines (KCM) is the Ministry’s body which regulates mining in Kenya. It was established in 2000 to represent the interests of Kenya’s mines, exploration companies and mineral traders. Kenya Chamber of Mines also seeks to associate these interests with national and local community interests (such as the objectives of Vision 2030), and to involve other stakeholders in order to ensure that these interests do not cause harm to the environment and communities.\footnote{128 Kenya Chamber of Mines website} Through the achievement of its objectives, the Kenya Chamber of Mines is determined to contribute to the creation, maintenance and improvement of a conducive business environment for the successful development and benefit of its members’ businesses, and of the mineral industry in Kenya as a whole.
4.2.4 Innovations under the Mining Bill, 2014

The Bill seeks to create a new dispensation in the management and utilization of mineral resources in Kenya and it aims to revitalise the mining sector by ensuring transparent and efficient management, benefit sharing and disputes resolution. Key features are principles of sustainable development including value addition; the reclassification of certain mining rights (retention license), the parliamentary oversight over mining agreements, and the concept of strategic minerals, small scale operations, free carried interests, the creation of mining disputes resolution tribunal and National Mining Corporation and the sharing of benefits with local communities. However, the Mining Bill 2014 still has challenges that could hamper the management of mining sector in Kenya.

(i) Role of Cabinet Secretary

The current Mining Bill 2014 vests much power in the Cabinet Secretary and there is no provision to hold the Cabinet Secretary accountable of non-compliance to the Act or restricts his power in case of abuse. The burdens of compliance have been put upon mining right holders, investors and small scale miners. The Bill requires persons to apply for the licenses directly to the Cabinet Secretary. It gives him the right to suspend, revoke, grant, or negotiate mining rights on behalf of the country. In the interests of transparency and accountability, this should be done by a panel to ensure transparency. He has the discretionary power for declaring some minerals to be strategic minerals for national socio-economic development and national security to make regulations generally for purposes of the personalization of Kenya Mining Company. Paragraph 28 of the Mining Bill 2014 gives the Cabinet Secretary power to establish a mineral commodity exchange and may from time to time gazette different minimum levels of local equity participation for certain minerals and determine royalty rates. He is empowered to appoint an ad hoc tribunal to arbitrate on any matters relating mining rights. To add to that, paragraphs 129 and 130 give the party to the dispute room to refer the matter to the Cabinet Secretary for determination in accordance with paragraph 128 of this Act. The Cabinet Secretary has the power to settle matters over minerals rights and also has the power to appoint an ad hoc mining tribunal to settle matters. It would be better to confer the power of settling disputes to another institution so as to ensure transparency and accountability in the sector.

129 Mining Bill 2014, Paragraph 12
130 Mining Bill 2014, Paragraph 16
(ii) Royalties and Rate Amendments
The holder of a mineral right shall pay *ad valorem* royalty on various mineral classes won by virtue of the mineral right at rates which shall be determined by the Cabinet Secretary through regulations published in the Kenya Gazette.\(^{131}\) The regulations made may be renewed and amended every two years. The Cabinet Secretary has power to determine the rate of royalties and amend rates for royalty every two years. According to an article written by Wanga Odongo\(^{132}\), this can be used for mischief. It also creates uncertainty, with companies still paying off massive debts required in setting up the mine being at the mercy of the Cabinet Secretary.\(^{133}\) It is important to note that, there is no proposed process that the Cabinet Secretary must follow to increase the rate of royalties. The Directorate of mines may recommend reduction or suspension of a royalty rate. At this point, the directorate can make recommendations but the question raised is to understand to what extend recommendations from Directorate bind the Cabinet Secretary. What will happen when the Cabinet Secretary does not consider recommendations made by the Directorate of Mines? The Bill allows the Cabinet Secretary to amend rates for royalty paid by companies every two years. It would be better to have mechanisms in place that will guide the amendment of royalty rate. Otherwise, the power of amending can be abused and then create instability in oil and mining sector.

(iii) Free Carried Interest
Paragraph 46 of Mining Bill 2014 has introduced the concept of free carried interest owned by the government in the right and obligations of mining operations without defining the concept. According to the South African Mineral and Petroleum Resources Development Amendment Bill of 2013, free carried interest is defined as a share in net annual profits derived from the exercise of an exploration or production right despite the state not contributing to the capital expenditure. In this case, the mining company bears 100% of costs and government gets its interest for free.

(iv) Deadline to commence the mining
The requirement that mining should start after six months unless otherwise stated seems to be not realistic. Tiomin Resources (which was acquired by Base Titanium) was granted a licence to mine Titanium in Kwale in 1998. It has taken them 15 years to get the project underway. It is, therefore, farcical to imagine any serious mining is going to be done after six months of

\(^{131}\) Mining Bill 2014, Paragraph 156
\(^{133}\) Ibid
preparation. There are expensive drills to be imported, finances to be raised, highly trained personnel to be hired, infrastructure to be built, and often a local population to appease before you can begin mining. It is hard to imagine that mineral ore could start being mined so quickly.\textsuperscript{134} The timing is relatively short.

\textit{(v) Prospecting Budget Declarations}

The Bill also requires a mineral prospector to declare at the beginning the amount he intends to use. If not fully used up, the remainder shall be seized by the government. The question raised is ‘\textit{why risk declaring a large budget for exploring when any savings investors make shall be government property}’. Perhaps it stems from the government’s inability to put forward a balanced budget or deliver a project under budget. This provision will only encourage explorers to devalue their budgets or even lie to the Ministry of Mining. Large-scale, capital-intensive explorations will be discouraged.\textsuperscript{135} This is an unjust punishment for efficiency and innovation in prospecting.

\textit{(vi) Dispute Resolution over Mining Interests}

The Cabinet Secretary is authorised, under paragraph 30, to assemble “an ad-hoc tribunal to arbitrate on any matters relating to mineral rights. It does not provide for any detail or description of the types of disputes that this tribunal is authorized to hear. It simply means that its jurisdiction is very broad and it could potentially interfere in matters that would normally be handled by domestic courts. Moreover, the bill calls for each of the members of the tribunal to be appointed by the Cabinet Secretary. This provision virtually ensures that the Cabinet Secretary will be able to exercise influence over decisions made by the tribunal. Paragraph 30 should be redrafted to provide clear boundaries to the scope of this tribunal’s authority and to declare that all of the tribunal’s decisions are subject to judicial review.

According to paragraph 128 of Mining Bill 2014, any dispute arising as a result of a mining right issued under the Act, may be determined by four following mechanisms including by the Cabinet Secretary or by an ad hoc tribunal established by the Cabinet Secretary, through mediation or arbitration or through a judicial process. The Mining Bill 2014 does not mention potential conflicts that may arise between the government and foreign investors. Most of the time, the issue is addressed in the mining agreement that is mostly kept confidential. The question raised at this point is about the capacity of Kenyan courts to settle disputes between

\footnotesize{\textsuperscript{134} Waga Odongo, \textit{Op.cit.}}

\footnotesize{\textsuperscript{135} Ibid}
the government of Kenya and the foreign investors. To be able to compete globally and attract investment, Kenya needs to put in place the possibility of allowing international arbitration (which has become an international practice) for disputes between the holders (foreign investors/companies) of mineral rights and the government as a way of enhancing security of tenure cannot be over-emphasized.\(^{136}\)

\textit{(vii) Benefit Sharing}

The Mining Bill 2014 defines the concept of benefit sharing by defining it as the distribution of a portion of proceeds and gains derived from mining and related activities to communities affected by mining operations and those in whose locality mining takes place. Moreover, it sets up a formula allocating 70\% of royalty to the national government, 20\% to the county Government and 10\% to the community. Apart from defining and offering an allocation formula, The Mining Bill 2014 does not address the issue of lacking a comprehensive legal framework on benefit sharing in Kenya. It is silent in for instance showing how the 20\% given to the county will be shared between the sub-counties and other constituencies within the producing county. This allocation formula offered by the Mining Bill 2014, if not well managed will be source of conflicts over resources that may paralyse the economic, political and social stability of the country. Moreover, the concept of benefit sharing entails monetary and non monetary benefit that must clearly be captured in legal framework on benefit sharing that will align with mining related frameworks. In other jurisdictions, figures allocating revenues between national, federal and community have been based on principles. They have clear benefit sharing framework that sets up a system of sharing benefits among the national government, county and communities and these frameworks entails innovative approach to benefit sharing such assisting historical disadvantaged persons to have a prospecting or mining lease in the name of affected communities or to exchange the royalty right in shares within the mining company.

4.3 Quantitative data

4.3.1 Household Survey

Data generated under this section clearly showed that communities living in Nguluku have limited access to basic needs including clean water, electricity. There are inadequate health facilities and schools in the area.

\(^{136}\) Commission for the Implementation, Mining Bill 2012.
4.3.2 Household Characteristics

(i) Population and Sample Size

50.9% of respondents have been in Nguluku for more than 20 years, 15% have settled there for more than 10 years and 19% of respondents have been there for around 10 years (Table 1). The duration of residence is a key determinant to identify community members that went through displacement and knew the area before the titanium mining project started.

Table 1: Household Size and Duration of residence

<table>
<thead>
<tr>
<th>VARIABLE</th>
<th>Duration of residence (year)</th>
<th>Household size</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0-10</td>
<td>10-20</td>
</tr>
<tr>
<td>PERCENTAGES</td>
<td>19%</td>
<td>15%</td>
</tr>
</tbody>
</table>

(ii) Household Gender and Level of Education

The survey showed that 74% of household heads were male compared to 26% of female household heads. More male household heads took part in discussions on the compensation issues and EIA process in 2002 than female household heads. Furthermore, the study showed that women are the more illiterate in Nguluku. Out of 26% of female respondents, 40% attended primary school, 11% attended secondary schools and 4% went to college. 45% of female respondents have never gone to school (Table 2). The level of education and language barrier may have contributed to the fact that women were really not willing to take part of some important discussions on mining project.

Table 2: Household level of Education by Gender

<table>
<thead>
<tr>
<th>GENDER</th>
<th>LEVEL OF EDUCATION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Primary</td>
</tr>
<tr>
<td>Male</td>
<td>(74%)</td>
</tr>
<tr>
<td>Female</td>
<td>(26%)</td>
</tr>
</tbody>
</table>

The gender variable is a key determinant to consider when gauging the availability and willingness to actively attend discussions on the issue affecting male and female members of
the community in Nguluku. Gender-inclusiveness was not emphasized during public consultations organised by NEMA to explain titanium mining project in 2002. It is important to note that mining, oil drilling and gas extraction all have environmental, social and economic impacts that change women’s lives, often in ways that are dramatically different from their effects on men. There is a need to ensure that men and women have equitable access to benefits of resource development and this requires commitment to understanding and acting on the gender dimensions of the sector. This means including women in community-level project consultations, and national-level policy dialogues on extractive industries. Women must have an equitable access to jobs, education and participation. The gender variable is a key determinant to consider in sharing benefit in mining sector to promote equity in sharing and avoid conflicts.

(iii) Socio-Economic Factors

- **Access to Water**

Communities living in Nguluku do not have access to tap water but draw water from boreholes, wells and river located in Nguluku. Out of 42% get water from boreholes, 42% from wells, 13% from streams and 3% from the river. Even though they have access to water, it is not potable (See Figure 3).

**Figure 3: Water Quality in Nguluku**

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Concerning the access to electricity, there are high electric voltage lines from Kwale town to Shimba hills passing through Nguluku. Only 6% of community living in Nguluku are connected to high electric voltage. However, 94% of communities in Nguluku do not have access to electricity. Base Titanium Company built a nursery school, Bwiti Primary, Kiruku Secondary Schools as well as Dormitories in Nguluku, Bwiti and Kiruku respectively in compensation for schools that were destroyed due to mining project in Nguluku. Concerning the access to health services, there is no hospital and dispensary in Nguluku. Out of 50% of people interviewed walk around 4-7 km to find the nearest hospital in the neighbour villages while 19% walk up to 8-11 km. For instance, they have to walk with a relative who is sick for a long to Msambweni hospital, the nearest hospital.
Table 3: Household access to electricity, schools and hospitals

<table>
<thead>
<tr>
<th>VARIABLES</th>
<th>Percentage Of households</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Access to electricity</strong></td>
<td></td>
</tr>
<tr>
<td>Have access</td>
<td>6%</td>
</tr>
<tr>
<td>Do not have access</td>
<td>94%</td>
</tr>
<tr>
<td><strong>Distance from nearest school</strong></td>
<td></td>
</tr>
<tr>
<td>0-3 KM</td>
<td>68%</td>
</tr>
<tr>
<td>4-7 KM</td>
<td>28%</td>
</tr>
<tr>
<td>8-11 KM</td>
<td>3%</td>
</tr>
<tr>
<td>Above 12 KM</td>
<td>1%</td>
</tr>
<tr>
<td><strong>Distance from nearest hospital</strong></td>
<td></td>
</tr>
<tr>
<td>0-3 KM</td>
<td>25%</td>
</tr>
<tr>
<td>4-7 KM</td>
<td>50%</td>
</tr>
<tr>
<td>8-11 KM</td>
<td>19%</td>
</tr>
<tr>
<td>Above 12 KM</td>
<td>2%</td>
</tr>
<tr>
<td>Do not have a hospital nearby</td>
<td>4%</td>
</tr>
</tbody>
</table>

- **Household Monthly Income**

The data generated shows that 61% of respondents earn below 5000 Kenya Shillings, out of the 18% earn between 5, 000 to 10,000 Kenya Shillings, 14% earn between 10,000 to 20,000 Kenyan Shillings and 7% earn above 20,000 Kenya Shillings monthly. Community members are trapped in poverty and investment in mining sector for example is seen as a potential opportunity to lift communities out of poverty.
(iv) Awareness of Laws Related to Mining Sector

Concerning the Constitution, 63% of respondents are aware of the promulgation of the constitution but they do not know what it entails (Figure 6). They pointed out that the need to increase awareness on the bill of rights embodied in the constitution and the need of a Kiswahili version of the constitution of Kenya 2010. During the survey, 71% of the respondents were aware of the promulgation of EMCA 1999 and right to a clean and health environment embodied under the Act (Figure 7). They took part in discussions on the Titanium Mining EIA process organised between 2002 and 2004. Comparing the awareness of the two laws, respondents are more aware about the EMCA because of various workshops and consultations on titanium mining project organised by Tiomin Inc, then NEMA and later Base Titanium Company. Concerning the awareness of the Constitution of Kenya, they were not involved in any meetings or workshops. However, some of them heard about the constitution from the village elders who took part in different meetings organised at county level and from guests who visited the area for whatever reason. The study showed that 88% of the population were not aware about the reforming process of the Mining Act (Figure 8). However, 12% of them took part in discussions on the Mining Bill 2013 when they were in Kwale town for work. Assessing the awareness of laws related to mining sector in a key determinant to meet one of the objectives of this research on reviewing gaps in the current mining regimes in Kenya. It shows that there is a need to increase awareness of laws related
to mining project among communities. The awareness will empower communities to actively participate in any discussion on mining projects that affect them.

Figure 6: Household level of Awareness of the Constitution of Kenya

![Pie chart showing 37% awareness and 63% unawareness of the Constitution of Kenya.]

Figure 7: Household level of awareness of the right to a clean and healthy environment under EMCA, 1999

![Pie chart showing 29% awareness and 71% unawareness of the right to a clean and healthy environment.]
(v) Land Holding System and Compensation

Madhivan group\textsuperscript{138} occupied Nguluku for a long period of time. The ownership dated back to 1911 when Madhivan group designed an agreement of ownership with the colonial government without any reference to the indigenous communities. Later on, the group stopped its activities and the area was abandoned. Then the land was acquired for the purposes of building a dam but was settled by squatters after that original plan fell through in 1965. Kisko, a sugar company purchased the aforementioned land from the government around 1980’s. In 2000, Nguluku mine site was occupied by people who have freehold title deeds as well as people currently designated as squatters. Title deed holders and bona-fide squatters received the same compensation of 80,000 Kenya shillings per acre for the land acquired and other compensation for crops.

Out of the statistical data collected, 57\% of respondents are squatters, 30\% purchased land from landowners while 3\% of them rent and 9\% have inherited (Figure 9). Most of them are squatters; the understanding of the land holding system is critical to benefit sharing because it had informed compensation received by communities. In case of titanium mining project, Base Titanium Company compensated bona fide squatters and title deed holders in

\textsuperscript{138} Indian Company
accordance to the African Development Bank involuntary resettlement policy because Kenya has not enacted a law on involuntary resettlement.

The compensation covered land ownership, crops and trees found on the land. 65% of the respondents were fairly satisfied with the compensation and 35% were not satisfied (Figure 10). Both groups do not consider the compensation given as a benefit but an exchange. They have given away their land and received in exchange money to buy land somewhere else to compensate. Respondents who were fairly satisfied pointed out that they were not able to buy the size of land they have given away because land was expensive.

**Figure 9: Household Land Holding System in Nguluku**
(vi) Benefit Sharing

The survey measured benefit sharing through job opportunity, education and training, health facilities, schools, infrastructures such as roads built in Nguluku. According to 42% of respondents, affected communities have not benefited from titanium mining project and the project has caused a lot of losses. Infrastructures including schools and private small clinic hospitals have been moved from Nguluku and communities lost their ancestor graves. 34% of them think that the project has increased job opportunities in the area and 6% believed that the project has increased training opportunities. Another 6% of the respondents recognized that the access to health services has improved due to community health workers trained by Base Titanium Company. Only 12% recognized that Base Titanium Company has built school for them. Finally, 77% of them came to a conclusion that they have benefited from the project at low extent. The titanium mining project affected around 381 household in the special mining lease area including Nguluku and Muamba villages and 112 associated with the Mukurumudzi dam and 86 in the access road and water pipeline routes. Before the project, there was a primary school, some private clinics and two markets in Nguluku. Communities lost these abovementioned facilities because of the resettlement occurred in the area. However, the company built a Bwiti primary and Kiruku secondary schools and a community hall in Bwiti where most of the affected communities were supposed to move initially. It has funded the construction of Bwiti dispensary and boreholes at Mivumoni, Bwiti and Kiruku for community uses. Affected communities do not get access to facilities
constructed by the company because they have been built so far away from them. Schools and health facilities have been displaced from Nguluku to Bwiti where only around 10 households moved whereas most of the displaced communities settled in other areas in Nguluku and its neighborhood. Furthermore, the rest of communities who are not displaced but still in Nguluku suffered from serious air pollution and no concrete plan of action has been put in place to tackle the issue. Perceptions on benefit sharing from communities in Nguluku has shown that affected communities in Nguluku have not really benefited any more from the titanium mining project but they have lost the deal.

Figure 11: Household Extent of Benefit Sharing

(vii) Negative Impacts of Titanium Mining Project

Water pollution, air pollution, health issues, soil degradation, noise and vibration are the main challenges occurred due to the titanium mining project in Nguluku. Concerning water pollution, 16% of respondents estimated that the Titanium mining has contaminated ground water bodies, increased competition for water resources, and degraded water quality. More damage has been observed due to the open-cast mining, strip mining, method to be used, which involves clearing all vegetation, stripping and stockpiling the topsoil and lead to soil erosion. 16% of the respondent pointed out that soil erosion has become a challenge since the mining started. For 29% of respondents, air pollution represents the biggest challenge of the project in the area. It has affected communities and leads to health issues such as chronic sinusitis and repeated coughing. Noise pollution associated with titanium mining includes
noise from vehicle engines, loading and unloading of rock into steel dumpers, chutes and power generation. Cumulative impacts of shovelling, ripping, blasting, transport, crushing, grinding, and stock-piling has significantly affect wildlife living in Buda and Gogoni forest as well as residents in Nguluku. 13% of respondents believe that negative impact are low and do not impact them.

Figure 12: Negative Impacts of Titanium Mining Project

![Figure 12: Negative Impacts of Titanium Mining Project](image)

4.4 Data Collected from Participatory Appraisal Methods

Key informants interviews and focus group discussions were conducted to meet the third and the fourth objectives. Fifty community members took part in the focus group discussions with women, youth and men. The focus group discussions focused on five themes including the issue of legal framework in mining sector, land holding system, benefits accruing from titanium mining project, environmental challenges and community involvement.
4.4.1 Legal Framework

- **Youth**: Most of them are aware of the promulgation of the constitution but they ignore the content of the supreme law. They have affirmed that there is lack of awareness of laws in the area. They have failed to read the constitution because it is in English and suggest having a Swahili version of the constitution so youth can better be aware of their rights. One of them had a copy of the constitution but he indicated that he could not fully understand the contents. However, most of them are aware of their right to a healthy and clean environment under EMCA and believe that the Base Titanium Company has infringed it. This is because residents of the area suffer from air pollution due to dust and water pollution since the onset of the project. Moreover, they are aware of their compensatory rights in case of displacement due to development project. However they believe that the money they received did not take into account the land market value in the area. The displacement for their family was tough in that they have to start life all over again and the lands they are resettled into are not productive. For the ones who receive money to buy land of their choice, the land they bought was expensive. The youths are neither aware of the Mining Act nor any reform to undertake to it. Most of the youths were aware of the constitutional provision\(^\text{140}\) that urges that natural resources shall be managed for the benefit of Kenya but they believe that structures must be put in place to enforce the provision.

- **Men**: They are aware of the constitution such as the right to a health and clean environment, the right to life and right to property but little details about the content are known. They confirmed that they have heard about the Mining Act but the contents are completely unknown to them. However, Most of them are not aware of the different reforms undertaken to repeal to the current Mining Act. One out of the group confirmed that he was aware of the Mining Bill 2013 and took part to some discussions at county level in Kwale. He remembered discussions they had on the issue of defining local communities or affected communities that should benefit from mining resources jointly with the government.

- **Women**: Some of the women are aware of the constitution but they ignore most of the content. They believe that there is a need of increasing awareness of the laws in the

\(^{139}\) Between 18 to 30 years old

\(^{140}\) Constitution of Kenya, Article 69
Nguluku especially for women because they have been left behind. Women are aware of the right to a clean and health environment under EMCA because most of them attended meetings on EIA Report of titanium mining project in Nguluku ten years ago. They are aware of this right but they do not enjoy it. They brought up the issue of water in the area. The quality of water is mediocre but they have nothing to do about that. They live in such condition and feel that they have been forgotten by the government and base titanium company. One of the ladies added that roads, schools, dispensary are good but they need food. Their children are starving and dying of hunger.

4.4.2 Description of the Area

- Youth, Women and Men

The place was vegetative and the rainfall was plenty. Crops production such as oranges and cashew nuts were high. The water was clean and easily accessible. There were no human-wildlife conflicts as opposed to now. Most of the households in Nguluku have been moved away from the area. Communities were happier with neighbors close to them. Health facilities, schools, markets were closer to them. The presence of the bush in the area has increased insecurity from thieves and has attracted animals from Buda forest and Gogoni forest to settle there. Men declared that they have voice their concerns about environmental challenges that they have faced in Nguluku but they have never received any feedback neither from government nor Base Titanium Company.

4.4.3 Environmental Challenges

- Youth

There were not really involved because they were not of age.

- Women

Most of them were involved in The EIA process but they were told that the mining project will not have any impact of the community and the environment. The company ensured them that it has put in place in mitigation measures to deal with all environmental challenges in case they occur. They have suffered from dust in the area and the company has not yet tackled the matter.

- Men
They confirmed that they attended meetings explaining the titanium project. The language used in the EIA study report was technical and most of them did not understand anything. They wished that the meeting was in Kiswahili so that they could give input and make useful comments. Residents of the area suffer from air pollution due to dust and water pollution since the onset of the project. At this particular point, the general manager in charge of community and environmental affairs within Base Titanium Company affirmed that mitigation measures have been put in place to tackle air pollution. I personally saw the dust monitor in Nguluku but the tool does not reduce the dust. He went further by saying that the issue of water is not related to titanium mining project and community living has experienced droughts due to climate variability and they should not take the company responsible for that. According to the general manager in charge of community and environmental affairs, the company is planning to build new boreholes in Nguluku as they have done elsewhere across the county.

4.4.4 Community and Benefits

- Youth

They affirmed that there are some benefits that the titanium mining project has brought in Nguluku. A nursery school has been built and the company has trained community health workers. Concerning job opportunities, youth complained that the company offers short term causal works. However, they felt that long term high paying jobs are given to people from others counties. At this particular point, the general manager in charge of community and environmental affairs explained the job distribution system within the company. The system is divided into five fences. The first fence includes community that has been displaced due to the mining activities in Nguluku and Maumba. The second fence includes community living in the neighborhood of the mining site in Nguluku and Maumba. The third fence includes other community from Msambweni, the fourth is potential candidates from Kwale and the fifth is potential Kenyan candidates. When a job is available, the company initiates the recruitment in respecting the order of fences abovementioned. The General Manager highlighted that communities in Nguluku and Maumba lack skills and experience they need. The consequence is most of the engineers and staffs are from Mombasa. He acknowledged that the company has not yet come up with a programme to train and build capacity of community. However, he affirmed that capacity building is one of the main goals under their community programme.
• **Women**

They shared the same views with the youth. They acknowledged that the company has built nursery school. Some of the women believe that compensation they have received has benefited them. The land from where they have been displaced was no longer productive but they have new lands that are fertile. They think compensation has been a benefit while other community members think that compensation is a kind of exchange where communities give away the land to investors and in return receive money for the inconvenience.

• **Men**

They have not received any benefit from company and believe that they have received loses instead. They acknowledged that the company has built a nursery school but does not compensate the number of schools they had before.

2. 5 **Land**

• **Youth**

People do not have title deeds tough they believe that they own land because they purchased it. Youth said that for those who were being resettled; they were each given 80,000 KSHS per acre plus amount of the trees and house. They think that the amount was not enough because the land they bought was sold at higher price (100,000 KSHS).

• **Men**

Most of them are squatters and lack of title deeds despite living there in the area since 1965. Curiously, some men complained that compensation for land by title deed holders was the same even for those with no title deeds. Displaced communities were not involved in the land survey and believe that it was easy to manipulate them. The compensation should have considered the current living standards and the price of land.

• **Women**:

Some of their husbands have purchased land and others have inherited it though most of them lack title deeds. The resettlement plan was not clear since ¾ of the village were moved while few were left behind. Resettlement was random and no formulas were used. Cases of some
peoples’ land being submerged in the constructed dam were reported and some women said that the owners of the submerged lands were not compensated.

4.5 Conclusion

The statistical data and data collected from participatory appraisal methods confirm the desk research finding discussed in Chapter Two and satisfy the third and the fourth objectives of the research set out in Chapter One. The finding in this chapter demonstrates that there is no adequate benefit sharing regime in Kenya and highlights benefits and losses the titanium mining project has generated in Ngulu. After analyzing communities’ perceptions on benefit sharing, it shows that communities living in Ngulu have not really benefited from the titanium mining project and still lack access to basic needs 10 years down the line since the titanium mining project started. Although Base Titanium Company is the position that it is working to socially assist the titanium project affected persons, 77% of the affected communities think that they have not benefited from the titanium projects. They have lost a lot due to displacement. They received compensation that did not take into account the market value of the land and most of them were not able to buy back land elsewhere. They were left worse off. Schools that have been built by base titanium company can be count as benefit because they have been built in exchange to schools and dispensaries that were destroyed to give space to the titanium mining activities. Air pollution due to dust causes lung infections and respiratory challenges to children living around the mining site. From these above, what is the role of National Environment Management Authority through environmental audit to check whether the base titanium company activities comply with the Environmental and Social Management Plan done by Tiomin Ltd.
CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

This chapter includes the conclusion of the study, recommendations and suggestions for further research.

5.1 Conclusion

Drawing from the analysis of the current mining legal framework in Kenya as presented in Chapter Two and the research findings from the field in Chapter Four, the overall conclusion that emerges from the study is that there is lack of regulatory framework that addresses the concept of equitable benefit sharing in mining sector in Kenya. There is no benefit sharing mechanism to channel revenues for the benefit for of people of Kenya. The Mining Act as well as Trading in Unwrought Precious Metals Act and Diamond Industry Protection Act are outdated and do not embody the concept of benefit sharing in mining in the sector. It is worth noting that Kenya has initiated the process of amending the current Mining Act. However, the study calls for greater consideration of the need of affected communities into regulatory framework governing the mining sector in Kenya because benefit sharing has not been promoted poorly promoted over the years and the community has not been actively involved in mining sector in Kenya. Doing so will promote sustainable development in mining sector in Kenya in which economic, social and environmental considerations are balanced. The conclusion of this study also refers to the three benefit sharing channels analysed in the previous Chapters. Concerning royalties, investors have been paying royalties to the government and the government has never been held accountable to people of Kenya. Royalties are considered as any other taxes and the government is not really accountable on the use of these revenues whether they meet the need of people of Kenya in accordance to Article 69 of the constitution 2010 or not. The study concludes that there is need to put in place transparency and accountability mechanisms so that community members can fully benefit from royalties. Therefore, Kenya should improve legislation requiring disclosure of revenues activities of both government and corporate actors as recommended by the Extractive Industries Transparency Initiative and Publish What You Pay campaign. Furthermore, the study calls for the share of all revenues accruing from mining exploitation with the community especially the ones affected by the mining project. The government
should not only share royalties but also all the income tax accruing from mining activities in the sector.

It is appreciated that the current Land Act 2012 incorporates provisions on compulsory acquisition of land. However, the study concludes that Kenya needs to enact safeguards on resettlement based on the World Bank operational policy on resettlement so that the process of displacing communities due to development programmes will be clearly undertaken. Currently investors submit their own resettlement plan action done in accordance to international best practices. It will be better to have clear set guidelines to give effect to Part VIII of the Land Act 2012 on compulsory acquisition of land and promote sustainable displacement and resettlement in regards to mining projects.

The study concludes that corporate social responsibility is not regulated in any law in Kenya and investors voluntarily support different community development projects. At this point, it is worth noting that there is need to regulate corporate social responsibility in Kenya so that investor’s efforts are channelled to meet the need of the affected community. Currently, Base Titanium Company has set their own community investment programme to support affected communities living around the mining site. There is a need for the government to act as a driver of Corporate Social Responsibility as its influence is currently very limited. There is no uniform pattern of Corporate Social Responsibility in Kenya, there is a need to strengthen and develop CSR institutions in Kenya to create more awareness of the potential of CSR, and for the implementation of CSR processes that benefit both business and society.

The study also calls for the enactment of a comprehensive regulatory framework on benefit sharing mechanisms that will clearly set a system of benefit sharing mechanisms in mining sector in Kenya that will give effect to the allocation formula provided by the Mining Bill 2014 that is waiting for the presidential assent. The need of having such comprehensive regulatory framework will promote sustainable development in mining sector in Kenya in balancing the interests of the government, the investors as well as community and its surrounding.
5.2 Recommendations

Drawing from the above conclusions, this study makes recommendations oriented towards the enactment of a new Mining Act as well as a regulatory framework on benefit sharing mechanisms in mining sector, safeguards on Eviction-Resettlement, a legal framework on access to information and rules on Corporate Social Responsibility. An effective engagements of communities is also required to promote sustainable development in mining sector in Kenya.

5.2.1 Adoption of a New Mining Act

Kenya has attempted to develop a national mining policy for long but the discussions have reached the stage of developing the minerals and mining policy 2010. Since 2010, the discussions have shifted from drafting policy to drafting a new Mining Act. In light of the lack of a mining policy in Kenya, the study recommends the development of a new Mining Act to guide the management of this sector and address the challenges presented by both local and global economic dynamics. The recommended development of the new mining law will be responsive to contemporary challenges of ensuring equitable benefit sharing in the mining sector in Kenya.

5.2.2 Adoption of regulatory framework on benefit sharing mechanisms in mining sector

Strong and effective legal frameworks are essential for the development and management of the minerals resources. The Mining Act 1940 is outdated and does not apply to standard mining regulation procedures. The industry wants to see a new law that aims to remedy the problems by stating the timeframes and procedures to be followed when access to land is unreasonably denied. The current Mining Act, which dated back to the 1940, has been termed as major block in the development of the mining industry. The Mining Bill 2014 provides for the 70-20-10% royalty allocation formula to be share to government, county and communities respectively. However, the need of a regulatory framework will give effect to the above allocation formula in order to avoid conflicts over the management of benefit accruing from mining sector. This regulatory framework would ensure that minerals found in Kenya are managed on a sustainable economic, social and environmental basis and that there is an equitable sharing of financial and developmental benefits of mining between investors and all Kenyan stakeholders. The regulatory framework in regards to benefit sharing should
provides for a benefit sharing regime that will help to channel accrued revenues to meet the people need. At this point Kenya shall get inspired from the Botswana, South Africa and Papua New Guinea’s ways of sharing of revenues accrued from mining sector that empower affected communities. The new regulatory framework in regards to benefit sharing must align to the constitution of Kenya and the Mining Bill 2014 (that is waiting for the presidential assent) to ensure that all participants in the mining sector observe internationally accepted standards of health, mining safety and environmental protection. The regulatory framework on benefit sharing mechanisms would encourage mining companies to develop a participatory and collaborative approach to mine planning and development, taking into account the needs of local communities, thereby fulfilling their role as socially responsible corporate citizens and it would apply principles of transparency and accountability to the administration of mining regulation and, to facilitate community participation in such processes.

5.2.3 Enactment of Safeguards on Eviction and Resettlement

Kenya lacks safeguards on eviction and resettlement. Although Part VIII of the Land Act 2012 regulated the compulsory acquisition of an interested land, there is still a need for safeguards that includes guidelines on resettlement in accordance with the Constitution and internationally acceptable standards. Safeguards on resettlement should give opportunities to the affected communities to contest or challenge the necessity for land acquisition per se or the necessity for the amount or the specific parcel of land being acquired. Such safeguards will support the regulatory framework on benefit sharing mechanisms in promoting the right of people to be compensated when their lands have been compulsory acquired and the right to sustainable resettlement.

5.2.4 Enactment of Transparency and Freedom of Information Law

Secrecy laws and inadequate freedom of information provisions present a significant obstacle to right to information citizens benefit from article 35 of the constitution of Kenya. Kenya should improve legislation requiring disclosure of revenues and activities to give effect to article 35 of the constitution and as recommended by the Extractive Industries Transparency Initiative.

5.2.5 Effective Engagements of Communities through Sustainable Public Participation

From the survey undertaken for the purpose of this study, there is no effective participation of communities in mining sector. In the case of compensation, no negotiations were undertaken
between the company and communities or between communities and the government. The company together with the government impose their decisions on the communities and any attempt to voice concerns was totally annihilated as the case Rogers Nzioka and others versus Tomin Kenya Limited. Kenya has indeed incorporated public participation regime in most of its policy and legal frameworks related to natural resources. However, the public participation is not really effective in the natural resources management because it is used as a mere administrative tool rather than a tool to promote sustainable development. It is time for the country to rethink or reconceptualise the concept of public participation so to promote sustainable share of benefit accruing from mining sector.

5.2.6 Rules on Corporate Social Responsibility

Kenya lacks regulations on Corporate Social Responsibility for companies. Every company comes up with its own community development programmes to support different community initiatives in a particular area. There is no uniform pattern of Corporate Social Responsibility in Kenya and therefore, there is a need to strengthen and develop CSR institutions in Kenya to create more awareness of the potential of CSR, and for the implementation of CSR processes that benefit both business and society.

5.2.7 Recommendations for further researches

Benefit sharing is a key issue in mining sector across the world including Kenya. Therefore, further researches on the issue are recommended. The study focused on the benefit sharing in mining sector under Mining Act but there is need to expand the research in Oil sector and collect the views of communities in Turkana. Further researches on a large sample will be recommended. Due to limited funds and time, the study targeted affected communities in Nguluku, it would have been better to target large sample from Nguluku and Muamba as well as from Mrima Bwiti.
REFERENCES

9. Elizabeth Wall and Remi Pelon. _Sharing Mining Benefits in Developing Countries: Experience with Foundations, Trusts and Funds._ (USA. World Bank Group’s Oil, Gas and Mining Unit: 2011)


ANNEX: QUESTIONNAIRES AND MAP

1. HOUSEHOLD QUESTIONNAIRE

A. IDENTIFICATION

<table>
<thead>
<tr>
<th>Name of Respondent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Place</td>
</tr>
<tr>
<td>Nguluku</td>
</tr>
<tr>
<td>Time for Start of questionnaire</td>
</tr>
<tr>
<td>Finishing time</td>
</tr>
<tr>
<td>Telephone No.</td>
</tr>
<tr>
<td>Email Address</td>
</tr>
</tbody>
</table>

B. CONSENT FORM

The survey is undertaken to meet an academic purpose. I am Kayumba Angelani and I am expected to submit a thesis as partial fulfilment requirements for the degree of Masters of Arts in Environmental Law at the University of Nairobi, Kenya. My Research topic focuses on challenges and prospects of equitable benefit sharing in mining sector: a case study of titanium mining project. The study site chosen is Nguluku because it is one of the villages affected by titanium mining project.

Please note that your participation is voluntary and information collected will be kept confidential. It cannot be traced back to you and you will not be personally identified in any reports.

Signing this consent indicates that you understand what will be expected of you and are willing to participate in this survey.

Signature

Date:
C. BASIC HOUSEHOLD QUESTIONS

1. Are you the head of the household? Yes ☐ No ☐

2. What is the respondents’ gender? Male ☐ Female ☐

3. What is the number of family members for each of the respondent?
   - 0-4 ☐
   - 5-9 ☐
   - 10-14 ☐
   - Above 15 ☐

4. What is the highest level of education received? Primary ☐ Secondary ☐ College ☐

D. FACTORS CONSIDERED IN EQUITABLE SHARING AND BENEFIT IN THE MINING OF TITANIUM (SOCIO-ECONOMIC FACTORS).

1. For how long has your family lived in Nguluku? (Year)
   - 0-10 ☐
   - 10-20 ☐
   - 20-30 ☐
   - Above 30 ☐

2. What benefits have you gotten since the mining of Titanium mining project started?

3. Which of the following is the source of income? Public sector ☐ Private sector ☐ Self-employment business ☐ Self-employment agriculture ☐ Self-employment hawking ☐ Social pensions ☐

4. What is the monthly household income? (KSHS)
   - Below 5000 ☐ 5000-1000 ☐
   - 10001-20000 ☐ 20001-50000 ☐
   - Above 50000 ☐

5. Do you think the Titanium mining project has increased job opportunities in the area? Yes ☐ No ☐

6. If yes, specify

   …………………………………………………………………………………………………………………

7. Do you think the Titanium mining project has increased economic opportunities in the area? Yes ☐ No ☐
8. If yes, specify

........................................................................................................................................

9. Do you have access to water? Yes □ No □

10. If yes, what is your source of water? Boreholes □ Wells □ River □ Streams □

11. How far do you have to travel to access water? (Km) 0-3 □ 4-7 □ 8-11 □

   Above 12 □

12. Is the water you have clean? Yes □ No □

13. Do you have access to electricity? Yes □ No □

14. How far is the nearest school? 0-3 □ 4-7 □ 8-11 □

   Above 12 □

15. Do your children attend school? Yes □ No □

16. Do you have a hospital in the neighborhood? Yes □ No □

17. If no, how far is the nearest hospital? (Km) 0-3 □ 4-7 □ 8-11 □

   Above 12 □

18. If no, how far is the nearest hospital and how do you get there? (Km)

   0-3 □ 4-7 □ 8-11 □

   Above 12 □

E. LEGAL AND POLICY GAPS IN THE MINING SECTOR IN KENYA

1. Are you aware that Kenya passed a new Constitution in 2010? Yes □ No □

2. Are you aware of the right to a clean and healthy environment embodied in the constitution? Yes □ No □

3. Where would you complain when the environment is either about to be damaged or has been damaged? Court □ Local authorities □ Public agency □ Others □

   Specify ………………….
4. Are you aware of the Constitutional provisions on equitable share of benefit accruing from natural resources? Yes □ No □

5. Are you aware of the existence of Mining Act? Yes □ No □

6. Are you aware of any efforts to amend the Mining Act? Yes □ No □

7. If yes, how did you know about it? Public meeting □ Newspapers □ TV □ Radio □ Friends □ Others □ if others, specify……………………………………………………………………………….

8. Have you ever been involved or participated in any effort aimed towards the drafting of the Mining Bill? Yes □ No □

9. Are you aware of the formula allocation 75-20-5% under Mining Bill? Yes □ No □

10. If yes, do you think 5% is enough to meet the need of affected communities in Kwale?

11. If no, how much do you think should have been allocated to communities?
   10% □ 15% □ 20% □ 25% □

12. Have you ever been involved in any EIA public comments on titanium mining project? Yes □ No □

G. LAND TENURE

1. What is the land holding system in Nguluku? Rent □ Lease □ Purchased □ Squatter □ if Others □ Specify………………………………………………………………………………………………

2. Do you own land? Yes □ No □

3. If you own land, do you have a title deed? Yes □ No □

4. Were you displaced from your land due to titanium mining project in Nguluku? Yes □ No □

5. If yes, were you compensated? Yes □ No □
6. How much did you receive? Specify

7. Were you satisfied? Yes ☐ No ☐

8. If no, what do you think should have been done?
   Specify.................................................................

F. COMMUNITY PERCEPTION TO BENEFIT SHARING (TITANIUM MINING)

1. Could you describe the area before the commencement of the mining activities?
   Specify
   ........................................................................................................

2. At what stage of the EIA process were you called to make comments on titanium mining project? At the initial stage ☐ At the design stage ☐ At the time of preparation of the EIA ☐ At the decision making stage ☐ At the implementation stage ☐

3. Do you think comments made by communities have been addressed by NEMA?
   Yes ☐ No ☐

4. What are the barriers to effective community participation?
   Lack of knowledge and ignorance of the law ☐ Refusal by stakeholders to engage ☐ High costs and time factor ☐ Absence of trust between the stakeholders and the community ☐

5. What are some of the benefits that the community has received from the mining project?

6. Job opportunity ☐ Education and training ☐ Health facilities or hospital ☐ School ☐ if Others ☐ infrastructures ☐ Specify
   ........................................................................................................

7. What are some of the negative impact of the mining on the community? Displacement ☐ Deforestation ☐ Water Pollution ☐ Air Pollution ☐ Health issues ☐ Soil ☐

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degradation □ Noise and vibration □ if others □ Specify

8. To what extent has the environment been damaged?

Low extent □ Medium extent □ High extent □

9. To what extent has the base titanium company collaborated with the community in terms of sharing benefits?  Low extent □ Medium extent □ High extent □

10. Are you aware of Mining Project Liaison Committee?

11. If yes, have you ever been involved?

12. Are aware of the Kwale Liaison Committee?

13. If yes, have you ever been involved?

14. What are your expectations as a mining project is being undertaken? Specify

15. Is there anything else you would like to add?

I wish to thank you most sincerely for your participation in this focus group. Your efforts are very much appreciated and will allow us to focus on critical issues that make it difficult for communities to benefit from the resources found within the local community.
2. TITANIUM MINING PROJECT MAP