

**UNIVERSITY OF NAIROBI
SCHOOL OF LAW**

A RESEARCH PAPER SUBMITTED TO THE UNIVERSITY
OF NAIROBI SCHOOL OF LAW IN PARTIAL
FULFILMENT OF THE REQUIREMENT OF THE AWARD
OF BACHELOR OF LAWS (LLB) DEGREE.

THE PLACE OF COMMUNITY'S RIGHT TO
COMPENSATION IN PRIVATE SECTOR INVESTMENTS:
THE CASE OF TULLOW OIL AND THE TURKANA
PEOPLE OF NORTH-WESTERN KENYA.

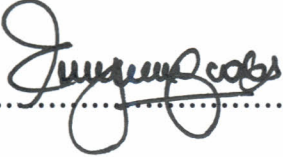
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APRIL 2015

DECLARATION

This research project is my original work and has not been submitted for the award of any higher learning for the award of an academic certificate.

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G34/2858/2011

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This project has been submitted with my approval as University supervisor.

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DEDICATION

The research project is dedicated to the pastoralists in Turkana County whose traditional way of life has been adversely affected by the Oil and Gas exploration and to my parents Mr. and Mrs. Nabenyo for their continued support and motivation throughout my academic journey.

ACKNOWLEDGEMENT

My gratitude goes to my supervisor Dr. Collins Odote for his guidance in ensuring the successful completion of this project. I also wish to thank all the local community members in Turkana who agreed to be interviewed for this research and for narrating their first-hand experience in dealing with Tullow Oil. I also wish to give credit to all my friends for their constructive criticism of my research which made this study a success.

I also want to recognize my classmates Joram and Smith among others who gave me the motivation and encouragement to finish the project, and being there always for me. Special thanks also to my parents and siblings back at home for their encouragement, time and moral support.

TABLE OF CONTENTS

Acknowledgement.....	i
Dedication.....	ii
Declaration.....	iii
Chapter One:	
1.0 Introduction.....	1
1.0.1 Background.....	1
1.0.2 Private Investments and Land.....	2
1.1 Statement of Problem.....	3
1.2 Justification of the Study.....	5
1.3 Statement of Objective.....	5
1.4 Research Questions.....	6
1.5 Hypothesis.....	6
1.6 Theoretical Framework.....	6
1.6.1 Theory of Livelihood Perspective and Rural Development.....	6
1.6.2 Frustration Aggression Theory.....	7
1.7 Research Methodology.....	8
1.8 Literature Review.....	9
1.9 Assumptions.....	12
1.10 Limitations.....	12
1.11 Structure of this Dissertation.....	12

3.6 Conclusion.....43

Chapter Four:

4.0 The Scope and Applicability Of The Right To Compensation: AComparative Analysis.....44

4.1 The Scope and Applicability of the Right to Compensation.....44

4.2 International Legal Framework on Compensation.....48

4.3 Community Compensation: A Comparative Analysis of the Ghana Experience.....50

4.4 Defining Who Will be Compensated For What.....52

4.5 Determining the Quantum of Compensation.....54

4.6 The Practice in Turkana.....55

4.7Conclusion.....57

Chapter Five:

5.0 Conclusion and Recommendations58

5.1 Conclusion.....58

5.2 Recommendations.....60

LIST OF ACRONYMS

PLC	Public Limited Company
H. E.	His Excellency
GDP	Gross Domestic Product
GoK	Government of Kenya
KES	Kenya Shilling
NOCK	National Oil Corporation of Kenya
USA	United States of America
BPD	Barrels Per Day
CoK	Constitution of Kenya
UN	United Nations
IMF	International Monetary Fund
NLC	National Land Commission
LDGI	Land Development and Governance Institute

CHAPTER ONE:

1.0 INTRODUCTION

1.0.1 BACKGROUND

In almost all communities in Africa, including Kenya, land is considered to be the main asset in as far as livelihoods and culture is concerned. The land question in Kenya has been emotive and the fact that there have been historical injustices on land in Kenya perpetrated by foreign investors and politicians cements the argument that there is need for policy makers to straighten land related laws¹ especially those relating to compensation of displaced communities or groups of people. In November 2011, Tullow Oil PLC, an Irish company prospecting for oil and gas in North-Western Kenya announced that it had struck oil and gas reserves in Turkana County. Kenya is expected to begin oil production in 2017 with an estimated production of over 10,000 barrels per day (bpd). These large amounts of oil and gas will undoubtedly boost the Kenyan economy which has relied on agriculture for long. On the other hand, the oil discovery in Turkana has exposed the socio-economic challenges faced by the local pastoralists in Turkana, a marginalized community occupying the hot and dry northwestern region of Kenya.

The often militarized inter-tribe and conflicts competition over the scarce pastures and natural resources by the Turkana and the neighbouring communities will likely increase and as a result the local community may experience the effects of the dreaded 'oil curse' "that has brought untold devastation on the livelihoods of communities elsewhere in Africa."²In order to secure community land rights, the Constitution of Kenya 2010 and other land-related laws such as Land Act 2012 prohibit arbitrary eviction of individuals out of their land without "payment of prompt compensation."³

¹ Currently, the laws relating to land in Kenya are contained in The Land Act, The National Land Commission Act, Land Registration Act, The Constitution of Kenya 2010,

² Eliza M. Johannes, Leo C. Zulu & Ezekiel Kalipeni (2014): Oil discovery in Turkana County, Kenya: a source of conflict or development?, African Geographical Review, DOI: 10.1080/19376812.2014.884466

³ Article 40 of the Constitution of the Republic of Kenya 2010

In addition, the impact of large-scale oil and gas projects on the human rights and fundamental freedoms of local peoples and their communities has necessitated the need for a review of the protection the law has accorded to communities affected by private investments. These communities have had limited input into the investor and state-driven development model imposed upon them.⁴ It is important to note that, when land is expropriated for oil exploration, the original residents are displaced, livestock watering points are destroyed and community forests and shrines are cleared. The practice in other jurisdictions⁵ that earlier experienced the so called “oil curse” indicate that despite the legal requirement to compensate local communities, most investors do not take the concept of community compensation into account when working in communities that host private investment projects. It is clear from the current assessment of the situation that there is a growing international consensus on the need for local communities to participate in the formulation and implementation of development projects that may affect them.⁶

1.0.2: Private Investments and Land

Investments, whether public or private, require land for putting up the project and establishing staff quarters or base/fly camp in cases of oil companies. Land is also often required as roads to facilitate the entry and exit of the investors into and out of their base of operations. Private investments contribute a lot to boosting the economic prosperity of a country, environmental sustainability when undertaken as part of the Corporate Social Responsibility by the investor as well as reduction in poverty levels. However, this can only be realized if private investors observe laid down legal requirements, such as developing the local economies of host communities and respecting community rights, employee rights and other duties placed on them by the law. All over the world, oil has become a critical aspect in as far as the politics, rhetoric and diplomacy of states is concerned. The late secretary of Organization of the Petroleum

⁴ International Labour Organization Convention 169

⁵ A good Example in this area is Nigeria

⁶ Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolpho Stavenhagen, Submitted in Accordance with Commission Resolution 2001/57, U.N. ESCOR, Commission on Human Rights., 59th Sess., Agenda Item 15, U.N. Doc. E/CN.4/2003/90 (2003)

Exporting Countries (OPEC), Chief M. O. Feyide, stated in a paper titled “Oil in World Politics”;⁷

“All over the world, the lives of people are affected and the destiny of nations is determined by the result of oil explorations. Oil keeps the factors of the industrialized countries working and provides the revenues, which enable oil exporters to execute ambitious national and economic development plans.”

Despite the positive aspects of private investments, it is also important to note that host communities often suffer as a result of negative effects of those investments to their land, livelihoods, culture and economy. Apart from environmental degradation through clearing of community forests and grazing lands, there are other issues that often affect the relationship between the oil companies and their host communities. Erosion of culture, land expropriation, eviction and negative effects on property rights and land tenure are some of the concomitant challenges that arise as a result of private investments generally. The dispossession of the community’s ancestral lands and resource rights, distortion of their livelihoods as a result of the establishment of oil exploration sites as well as human rights violations on the part of the oil company have resulted into constant altercations between the oil company and the local community.

This dissertation aims at analyzing private investor’s adherence to the concept of community compensation currently existing under the Kenyan legal regime, and to assess the benefit, if any, that the communities hosting private investments on property get. The benefit may include employment opportunities to community members, building of schools, roads and infrastructure, promotion of education through academic scholarships among others.

1.1 STATEMENT OF PROBLEM

In as much as oil and gas contribute to national development and economic prosperity of a country such as Kenya, it is also important to understand the fact that local communities that host private investment projects suffer damage as a result of the activities of these projects. In Turkana, the local community is exposed to health hazards arising out of emission of noxious fumes during oil exploration. Much of the environmental degradation that is done by oil

⁷ Feyide, M.O. (1986) “Oil in World Politics” Being text of a Lecture Delivered at the University of Lagos, P.7

companies usually affects the local community's way of life, livelihoods and culture. Destruction of communities may result in loss of biological diversity, including plants and animals species that are important to the local community's livelihoods and their livestock. These injurious activities on the part of private investors have adversely affected pasture land used by indigenous people for grazing their livestock.

In Turkana County, as the experience in other parts of the world has indicated, the oil company focuses on maximizing profit by reducing expenditure without much concern to the benefit for the host community. This practice has been a source of conflicts between the oil company and the community as the latter views the intrusion into their pastoral life as a threat. It is in this context therefore that the study seeks to determine the benefits of oil and gas projects in Turkana with special emphasis on the concept of compensation. The paper assesses whether the rights of local communities in North Western Kenya are guaranteed adequate protection and whether the laws and policies are strong enough to advance the rights of communities affected by oil and gas exploration in Kenya.

The shortcoming that exists in the current land laws in regards to compensation of the local community is lack of a clear legal framework that will provide for a mandatory community compensation policy.⁸ There has also been an observation that the compensation paid by the investors to the county government does not benefit the pastoralists who are directly affected by the oil and gas exploration and production activities. The need for a review of the existing legal structures to ensure adequate and prompt compensation for local communities and individuals affected by oil and gas investments is the foundation of this research paper.

In conclusion, this dissertation will focus on the concept of compensation as a benefit to communities evicted from their ancestral lands by investors. The process of determining the quantum of compensation payable to affected community members and the extent to which they ought to be compensated is currently not as clearer as it ought to be. The legal protection that

⁸ Girma Kassa, *Issues of Expropriation: The Law and the Practice in Oromia*, 2011, Pg VI

lacks due to the fact that the Kenyan Parliament is yet to enact the law envisaged by Article 66(2)⁹ renders affected communities helpless in cases of non-compliance on the part of investors.

1.2 JUSTIFICATION OF THE STUDY

This dissertation will have academic as well as practical relevance. Apart from pointing out the lacuna that exists in the current law as regards to compensation of individuals and communities adversely affected by private investments, it will also make a contribution to the debate on the place of community rights in contradistinction with a state's sovereign power to compulsorily acquire private or community land for a public purpose.

It is my opinion that this research will enrich the existing legal framework and enable the relevant stakeholders to not only adopt practical procedures when ascertaining the quantum of compensation to be paid to communities but also to provide a foundation for further academic research on the same area. The findings of this research will enable the local communities to clearly understand their right to compensation.

In addition, by identifying short comings in the existing law, this study proposes amendments which, if taken into account, will remedy the existing deficiencies. In line with the above, the study may also provide investors, policy makers and government with researched information as far as the concept of community compensation and its application in private investments in Kenya is concerned.

1.3 STATEMENT OF OBJECTIVE

1. To ascertain whether or not the existing laws on compensation of individuals and communities affected by private investments are water tight.
2. To analyze whether the requirement for investments to benefit local communities is backed up by both Kenyan and International law.
3. To assess the adequacy of the legal and the practical protection of local communities in the face of oil and gas exploration and production in Kenya.

⁹ Article 66(2): *Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.*

4. To examine the challenges and prospects on the enforcement of local community's rights to compensation in Kenya and provide possible solutions.

1.4 RESEARCH QUESTIONS

The study seeks to address the following questions:

1. Are the existing Kenyan laws on compensation of individuals and communities affected by private investments water tight to ensure compliance?
2. Is there a legal ground under Kenyan and international law for affected communities to claim and obtain reparation for damage caused to them by private investors?
3. To what extent has the law protected the rights of vulnerable local communities such as the Turkana of Northern Kenya that are affected by private sector investments?
4. What are the challenges and prospects on the enforcement of local community's rights to compensation in Kenya and what are the possible solutions to those challenges?

1.5 HYPOTHESIS

This research proceeds on the presumption that local communities have a right to benefit from private investments and individuals can claim and obtain reparation for damage caused to them by private investors.

1.6 THEORETICAL FRAMEWORK

In the area of compensation, there are two relevant theories: The *Theory of Livelihood Perspective & Rural Development* and *The Frustration Aggression Theory*.

1.6.1: Theory of Livelihood Perspective and Rural Development

The theory of Livelihood Perspective and Rural Development was propounded by Ian Scoones and is based on the suggestion that livelihood perspectives are at the center of rural development. This particular theory is vital to this research as it helps in pointing out the role of livelihood development in economic development in a rural setup such as Turkana County, the region under study. Ian Scoones argues that "there is need to think of rural perspective in a broader view and focused on understanding complex, local realities livelihoods approaches that are an ideal entry

point for participatory approaches to inquiry, with negotiated learning between local people and exploration projects based in the marginalized communities.”¹⁰

It is based on this theory therefore that the researcher seeks to assess the impact of private investment projects in the petroleum industry on the local population as well as help the various stakeholders directly or indirectly involved in these exploration projects to better appreciate the dynamics from local perspectives. This is beneficial in order to make sustainable development in local communities becomes a reality.

1.6.2: Frustration Aggression Theory

One other theory that is related to the concept of Compensation is the Frustration Aggression Theory, developed by Dollard and Miller.¹¹ This theory is based on the fact that frustration increases the likelihood of aggression. Conflicts may sometimes arise out of non-compensation of some of the damage to the local community. Conflicts arise out of grievances caused by direct impacts on communities and their environment, as any extractive project brings about massive changes in land cover and use, as well as in the economic, social and cultural relations of the people concerned. Conflicts may also occur around the compensation process itself, around the level of compensation, around the distribution of benefits.”¹²

Communities that host private investment projects especially in the oil and gas sector all over the world have faced oppression by oil companies and their governments. Local communities in turn adopt violent ways of voicing out their grievances and this is often witnessed in form of community protests, disruption of private investment projects.¹³

The failure by the private investors and government to meet the expectations of the local communities in areas that host private investments results in frustration and then aggression.

This theory explains why conflicts, in some instances, arise between the local communities and private investors.

¹⁰ Charem, Alice C. Influence of oil exploration projects on the social/economic development of communities in marginalized areas in Kenya: a case of Turkana community. Diss. University of Nairobi, 2014.

¹¹ Anderson, Craig A and Brad J. Bushman. "Human Aggression." *Psychology* 53.1 (2002): 27.

¹² Lena Guesnet and Moremi Zeil, *Why Compensation: Compensation Matters* Page 6

¹³ See Note 10 Above

The researcher will analyze these theories in attempting to point out the deficiencies in the law relating to Corporate Social Responsibility generally and payment of Compensation to community members affected by investment projects specifically.

There is no legal position on the concept of determining the quantum of compensation to be paid to individuals that suffer damage. Some scholars argue that for a lawful expropriation, only *damnumemergens* is payable as compensation; that is, the value of the property in question, however established, *lucrumcessans* (lost future profits) and other consequential damage not being taken into account. For an unlawful expropriation, damages and not merely compensation are payable they include *damnumemergens* (value of the property), *lucrumcessans* (lost profits) and any other consequential damage found that is directly connected with the taking of the property.¹⁴

1.7 RESEARCH METHODOLOGY

a) Interviews

The researcher will interview Civil Society organizations that have in the past challenged Tullow Oil to compensate community members affected by oil exploration activities and those that have documented human rights violations on the part of Tullow Oil in Turkana County. The respondents will be identified by the researcher on the basis of their work in the community and focus shall be on Civil Society Organizations working in the area of Human Rights. This will be critical to the research as these organizations are community-based and have firsthand information in regards to the benefits, if any, brought about by the oil company to the community. The data obtained from these interviews will then be tabulated and analyzed by the researcher for future use and referencing purposes.

b) Survey

The use of Questionnaire is one of the Data Collecting Tools that will be used to obtain the relevant data from community members in Turkana County. Questionnaires will be distributed to select members of the Turkana Community especially those affected by the Oil and Gas

¹⁴ C. F. Amerasinghe, Some Aspects of the Quantum of Compensation Payable upon Expropriation, Available at <http://www.jstor.org/stable/25658766> Accessed: 02-03-2015 11:40 UTC

exploration process undertaken by Tullow Oil. The researcher will mainly focus on pastoralists initially resident in the lands now demarcated as Oil Exploration Sites. The respondents will represent different age groups, occupations, and experiences with the oil company. It is hoped that this will source information that is critical to the research from the community members who have been adversely affected by activities of the oil company and who have not benefited from any reparations from the government or the oil company.

c) Desktop Research

An effort will also be made to scrutinize existing materials both hard and soft copy that are relevant to the subject of this research paper and which will serve as reference point on the current conceptual and legal framework on the right to compensation of local communities affected by development projects. This will also enable the researcher to understand the existing views on whether the Kenyan law is well equipped to deal with the issue of compensation for damage caused by private investors and also to develop a new position that will inform the contents of this study.

A number of relevant international, regional and national legal instruments such as Conventions, Declarations, Visions, Treaties, Conference Reports, Acts and Bills that are considered to be relevant to the subject of the research will be considered, scrutinized and referred to so as to understand their provisions in as far as mitigating the issue of compensation to damage resulting from private development projects is concerned.

1.8 LITERATURE REVIEW

A lot of research has been undertaken in the area of Corporate Social Responsibility and there exists a wealth of literature on this topic. However, there is not much information regarding the specific area of Compensation as an element of Corporate Social Responsibility, which is what this study seeks to address. A number of Kenyan authors have attempted to address the issues raised by this research with focus mostly on the quest for indigenous peoples' rights in Africa and the place of community rights in private sector investments generally. Most of the discussion in this paper has been enriched by reference to the already existing literature on the topic. Reference has been made to Articles, Conference Reports, Dissertations and Theses and Academic Journals among many others addressing the topic of research.

Gregory Akall has examined the livelihoods among the Turkana and the relationship between the pastoral economy and land. In his treatise, Imagining Land: Significance of Land in African Economies, Politics and Culture. Akall notes that the “pastoralists’ livelihoods are severely undermined by the new threats of declining access to resources resulting from insecure land rights, droughts, resourced-based conflicts and urbanisation.” The threats facing local communities are identified by this author as the increased irregular allocation of land to foreign investors, land of secure land administration among others. In addition, the author identifies the opportunities that are currently available and which can be utilized in as far as securing community land rights is concerned. Such opportunities include proper implementation of the Land Act No. 6 of 2012 and other relevant laws on land, including establishment of County Land Management Board.

Charemo Chelimo Alice examined that oil and gas investments in Turkana County have had a number of negative effects on the socio-economic developments of the local community in marginalized areas. She also criticizes the practice of the state acquisition and expropriation of land owned by local communities to private investments without considerations to the public purpose requirement as well as the requirement of payment of “*commensurate*” compensation.¹⁵ The author argues that the duty to pay compensation in cases of expropriation is founded upon the justification that the private investor or the state should not enrich itself to the detriment of its citizens and that payment of compensation also introduces disciplined taking. In her article, Influence of Oil Exploration Projects on Socio Economic Development of Communities In Marginalized Areas, this author notes that the law must provide adequate measures in order to minimize the damage experienced by host communities.

Collins Odote discusses the legal and policy framework governing community land in Kenya and points out that prior to colonialism, communities in Kenya had their own systems of land ownership. The author notes:

“The land law in Kenya has thus focused on individualization of land rights at the expense of customary/community rights to land. This has undermined indigenous culture and conservation

¹⁵ Daniel W. Gebriel, Land Valuation for Expropriation in Ethiopia: *Valuation Methods and Adequacy of Compensation*, 7th FIG Regional Conference, Spatial Data Serving People: Land Governance and the Environment – Building the Capacity Hanoi, Vietnam, (October 2009)

systems, and destroyed traditional resource management institutions. Despite this however, many local communities in Kenya continue to manage land. This is attributable to the resilience of customary tenure, which has withstood sustained subjugation, suppression and denial of juridical content in official parlance.”¹⁶

The history of the development of the current laws is highlighted, with special emphasis on the changes brought about by transition from customary land tenure system to the private ownership system of land. The impact this has had to the culture and livelihoods of pastoralist communities. (such as the Turkana).

Helen Quane opines that private investments and the current trend on the place of community rights in private investments could result in a more systematic integration of the rights of indigenous peoples into development programs.¹⁷ The author analyzes the rights of indigenous populations in contradistinction to development and proceeds to highlight the scope of some of the applicable rights that must be enjoyed by host communities in as far as development projects are concerned. The author also assesses the possible impact that these entitlements can have on the process of development generally as well as the duty placed on the countries in which local communities occupy, on developed countries that often serve as donor states, and lastly on financial institutions such as World Bank and the International Monetary Fund (IMF).

Patricia Mbote addresses environmental management in relation to sustainable development and points out that environmental degradation and depletion of resources such as land, water and forests is likely to generate social turmoil. She notes that effective management of the resources can benefit the local economy of host communities as well as nationally. The author points out the fact that the Kenyan government has previously made mistakes in dealing with forests and

¹⁶Collins Odote, *The Legal and Policy Framework Regulating Community Land In Kenya: An Appraisal*, 2013.

Available at

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.fes-kenya.org%2Fmedia%2Fpublications%2FLegal%2520and%2520Policy%2520Framework%2520Regulating%2520Community%2520Land%2520in%2520Kenya%25202013.pdf&ei=Y4cnVcScLvKy7Qa9l4CYCg&usg=AFQjCNEzyquXCoG3tG_jhZgrqGxB5kNJ0A&sig2=vBRel6IVwMw1ef-tQQPuiA&bvm=bv.90491159,d.ZWU Accessed on 20th March 2015

¹⁷ Helen Quane, *The Rights of Indigenous Peoples and the Development Process*, Human Rights Quarterly, Vol. 27, No.2, (2005), pp.652-682)

wildlife and warns that engagement with local communities before a public or private investment project is undertaken should be taken into account. The need to build the capacity of local communities to claim from mining companies has also been highlighted.

Benson Ochieng highlights the governance of community land in Kenya and the traditional structures in the management of land in communities in Kenya. The settlement of disputes relating to land by use of village elders and clan elders has been indicated. The author analyses the governance of community land in Kenya in the context of the traditional land governance institutions and the role of the newly created governance arrangements. The categories and manifestation of community land in Kenya as well as the governance arrangements of community land starting with traditional governance institutions is discussed and the interface with the National Land Commission and then the role of Country Governments.

1.9 ASSUMPTIONS

This paper proceeds on the assumption that a number of pastoralist members of the Turkana Community in Northern Kenya have been evicted from their ancestral lands and forced to migrate elsewhere due to the oil and gas exploration currently undertaken by Tullow Oil and in which huge tracts of land previously used as pastureland have been demarcated as Oil Exploration Sites by the authorities and the oil company.

1.10 LIMITATIONS

Undertaking this research will be a challenging task; specifically, sourcing the relevant information for the study will be a difficult task due to the bureaucracy in the government departments concerned with land expropriation and compensation.

Another limitation will be the lack of readily available organized data that indicates for instance the total size of land expropriated and the number of family affected by oil and gas exploration in Turkana County.

1.11 STRUCTURE OF THIS DISSERTATION

This thesis is presented in five chapters. Chapter one provides an introduction to the research paper titled, The Place of Community's Right to Compensation in Private Sector Investments:

The Case of Tullow Oil and the Turkana People of Northern Kenya. The Chapter starts by introducing a brief discussion of the place of community's right to compensation in private investments, with a view to providing the foundation and introducing the discussion on the topic under research. It then narrows the research focus down to a review of the existing literature before it introduces a more extensive discussion of the nature of the research problem while providing a rationale for the choice of the research topic. Chapter one concludes by briefly introducing to the reader, the Turkana people of North-Western Kenya, their history, culture and way of life.

The discussion on chapter two will focus on analyzing the way of life and source of livelihood among the Turkana with specific focus on their land ownership system and culture. The reader will be able to understand the communal land tenure system of the local community hosting the private investment under study as this will be relevant to the rest of the discussion. The community's pastoral way of life of moving from one place to another in search of greener pastures and water will be highlighted in order to prepare the reader for an engaging discussion on the changes brought about by the influx of "outsiders" and foreign companies into the community after the announcement of oil discovery. Chapter Three will delve into pointing out the effects of oil exploration activities with specific reference to Property Rights among the Turkana Community. Destruction of community forests, demarcation of traditional grazing lands as oil exploration blocks and eviction of community members will be the main focus of this Chapter. The chapter will also introduce the reader to the traditional land tenure system among the Turkana community before and the negative impacts brought about by the discovery of oil and gas deposits in 2011. This will be relevant in introducing a rationale for compensation that will be highlighted throughout the rest of the discussion.

Chapter Four will focus on the scope and applicability of community's right to compensation. The basis of compensation, the quantum as well as the criteria for identifying community members to be compensated will be highlighted. An analysis of both national and international laws on the area of compensation of communities by private investors will be done in order to determine the legal position in this area and whether or not local communities benefit from private investments as envisaged by the law. The researcher will also look into a comparative study of local community compensation regimes in other countries. Two case studies will be selected, Ghana and Nigeria. The two countries have been selected because of their experience

with private investors in oil and gas and how local communities were compensated will be valuable to this discussion. The researcher will also analyze the legal position on the area of compensation and whether or not Tullow Oil has adhered to the legal requirement in its operations in Turkana County.

The final chapter, chapter five, provides a concluding discussion of the findings of this study in relation to the research questions, which the previous four chapters have attempted to explore. This discussion will provide a summary of the key findings of this research project, and bring together the four chapters of the findings discussed above. The discussion will also identify implications of the findings, present key lessons learnt from this research work, and suggest possible ways of improving the quantum and manner of compensation of the local community by Tullow Oil, a private investor in Turkana County.

CHAPTER TWO:

2.0: LAND TENURE SYSTEMS AND IMPLICATIONS FOR LIVELIHOODS IN TURKANA

2.1: Introduction

Turkana County occupies a land mass of about 77,000 km² and is located in the dry parts of North-Western Kenya.¹⁸ According to the 2009 Population and Housing Census,¹⁹ the Turkana constitute about 855,399 of the entire population of Kenya. Lake Turkana (formerly Lake Rudolf) is the most prominent feature and greatest natural asset in the region considered a World Heritage Site by The United Nations Educational, Scientific and Cultural Organization (UNESCO).²⁰ The climate of Turkana County is arid and semi-arid and drought-prone with

¹⁸ Mkutu Agade, Kennedy. "'Ungoverned Space' and the Oil Find in Turkana, Kenya." The Round Table 103.5 (2014): 497-515.

¹⁹ The Kenya National Bureau of Statistics is a department in Kenya's Ministry of Planning which collects and compiles regular cross-sectoral data for the government

²⁰ Eliza M. Johannes, Leo C. Zulu & Ezekiel Kalipeni (2014): Oil discovery in Turkana County, Kenya: A Source of Conflict or Development?

desert-like vegetation with scattered grasslands consisting mostly of shrubs and other vegetation.²¹

The harsh climatic conditions in Turkana County have posed a major challenge to development and supports mainly pastoralism (cattle, with some camels, sheep, and goats) supplemented by fishing (for the Turkana living near the lake) and small scale subsistence farming. Pastoralism specifically is unreliable due to the constant droughts and famines in which pastoralists usually lose a considerable number of livestock. Unlike other parts of the country, no major developments have taken place in Turkana despite the region's potential for geothermal, solar and wind energy in addition to available extractive natural resource deposits.²² This can be attributed to the land tenure practices among the Turkana as well as the culture of the community that often conflicts with private investments. This chapter will analyze the land tenure system and livelihoods among the Turkana.

2.2: The Concept of Land Tenure

Land tenure has been as “the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land that is aimed at regulating the relationship between the different parties and their relation to land.” The concept of land tenure defines the manner in which property rights to land are to be allocated within societies as well as how access is granted to the various tenure rights, that is the right to use and transfer the land. Prof Patricia Mbote notes that “in simple terms, land tenure systems determine who can use what resources for how long, and under what conditions.” Land tenure is regarded as a critical aspect in as far as social, political and economic structures in society are concerned. It is important to note that land tenure systems are usually well-defined and enforceable in a court of law and in quasi-judicial community structures.

Land tenure is usually classified into four broad categories:

a) Private:

²¹ See Note 2 Above

²² Watson, D.J., Binsbergen, J. van - Review of VSF-Belgium's 'Turkana emergency livestock off-take' intervention 2005 ILRI (also known as ILCA and ILRAD), 2008 Retrieved 2012-07-08 ISBN 9291462098

Private tenure involves an assignment of rights to a private individual for his or her use to the exclusion of the rest. However, other members of the public may enjoy these rights but with the consent of the private owner. The term private may also be extended to refer to legal persons such as corporate bodies and Non-Governmental Organizations.

b) **Communal:** (*ResCommunes*)

Communal tenure applies to assignment of rights to a group of persons. A right of commons usually exists within a community where each member has a right to use independently the holdings of the community. In the case of a pastoralist community such as the Turkana, for example, communal tenure may mean that members of a community have the right to access grazing lands on a common pasture for their livestock.

c) **Open access:** (*TerraNullius*)

In an Open Access system, specific rights are not assigned to any individual and the concept of exclusivity does not therefore apply. The best example in such a case may include access to the high seas which is generally open to anyone and may also include rangelands, forests where there may be free access to the resources for all. The distinctive difference between open access and communal systems is that under communal system non-members of the community are excluded from using the common areas.

d) **Public**

Under the land tenure system property rights are usually assigned to an authority in the public sector. For example, in Kenya, gazette forests may fall under the realm of the national government state.

2.3 Importance of Tenure to Livelihood

Land tenure is important to livelihoods and economic and poverty reduction in both rural and urban areas in Kenya and all over the world. Security and certainty of land tenure provides that a person's entitlements to land are secured and recognized by others. Insecurity of tenure may mean that a person's or a community's right to land will be interfered with by competing claims, and sometimes even lost. Without adequate security of tenure, individuals are incapable of

maximizing the enjoyment of their rights in land due to the uncertainty of the protection of the person's interests in land.

The productivity and efficiency of land-based activities such as pastoralism and agriculture require effective and secure land tenure systems. The communal land tenure system in Turkana ensures that community members have access to land, subject to the regulations set by the council of elders. Individuals can therefore practice agriculture on a piece of land and produce adequate food as they enjoy the protection of the communal land tenure system.

Land policy and land institutions affect the way in which land is used and that equality in the ownership of land and other assets gives room for faster, more equitable growth. For several decades, attempts to improve security of tenure have been based on models of land titling with the aim of encouraging investment and higher productivity. Formal titles have been seen as a way of assuring access to credit and of opening up markets to transfer land from less to more efficient users. But titling is an expensive and long-term process, one that is not yet complete in any of the leading economies. Few titling programmes in developing countries have succeeded. The main disadvantage of this is that they can disadvantage poor people who lose the security provided by customary tenure whilst being unable to complete the bureaucratic process of registration. In the worst cases this has created opportunities for the powerful to override customary or informal rights. In Turkana, titling programmes have seen tenants and other vulnerable land users displaced. In Turkana, customary land rights and systems of land management are based on the clan system with secure and hereditary rights. These customary structures are often flexible and essentially permit people to transact in land and support a range of derived or secondary rights, not only within the household but also within the clan.

2.4: Turkana's Source of Livelihood

The Turkana live in small households consisting of a man and his wife or wives, their children and possibly workers who look after the livestock (this applies to rich Turkana men only). The family unit is referred to as *awi* and the size of a typical Turkana family varies considerably according to the wealth of the man, the number of the children and workers. However, the usual average is about 20-25 people. All livestock are "owned" by the man who also doubles up as the head of the household, but within the *awi* they are allocated to specific women. The first wife

gets a bigger share because of the seniority and the number of children that the first wife has to take care of. The duty of women includes milking those animals that are allocated to them by the family head and the offspring of these livestock will be the basis of the sons' future herds.²³ Decisions-making in regards to livestock management is the duty of the household head. However, if the herd is separate from the *awi*, the decision rests with the herd manager. This enables every household in the family to make decisions based on who can work on a particular day, the size of the herd to be kept at a particular time and perceptions of the environment and proper herd management.²⁴

As with all other pastoralist tribes in Kenya, livestock, especially cattle, and pasture are at the core of Turkana culture and livelihood. The Turkana live a nomadic life, always moving from one place to another depending on the availability of pasture and water for their animals.²⁵ The livestock sub-sector is the backbone of Arid and Semi-Arid Lands (Commonly known as ASAL) community's economy and the means of livelihood for most of the Turkana pastoralist population. Livestock therefore plays an important economic and socio – cultural role among the Turkana community. Apart from being a source of livelihood, livestock is used as a medium for social exchange in the payments of bride price, fines, and gifts. Livestock is also used by the Turkana to perform traditional ceremonies such as rain making, initiation and cleansing rites.

2.4.1: Pastoralism

The main economic activity in Turkana is Pastoralism which is practiced by over eighty percent (80%) of the population. The Turkana keep five species of livestock: camels, cattle, goats, sheep and donkeys. Each species has different food and water requirements as well as grazing habits. Camels are browsers; sheep, cattle and donkeys are grazers; and goats can be classified as either. The grazing behavior of browsers includes the consumption of a large amount of leafy vegetation in their diet, while grazers prefer grasses. The pastoralist Turkana do not practice any agriculture and live exclusively off the products of their livestock - milk, meat, blood and skins. During the

²³Omiti, John, and Patrick Irungu. "Institutional and Policy Issues Relevant to Pastoral Development in Kenya." (2002).

²⁴ See Note 6 Above

²⁵ <http://www.kenya-information-guide.com/turkana-tribe.html>

rainy season when milk and meat are in plenty, it is common practice for the Turkana to sell surplus produce in urban settlements. The Turkana also sometimes trade their animals in towns for money and the resulting money from the sale of livestock is usually little, used to buy basic items such as sheets, maize meal, sugar, tobacco, tea leaves, rubber tire sandals, and cloth.²⁶

It is important however to note that among the Turkana, livestock products are majorly for consumption within the family or the clan and not for sale. Turkana pastoralists' livelihoods are adversely affected by the threats of limited access to resources resulting from insecure land rights due to the communal land ownership system, persistent resource-based conflicts and urbanisation. Statistics indicate that 80% of the land of the Turkana is arid, 32% is arable land that can support agriculture during the rainy season. This explains why Turkana County is largely a pastoral economy.

The type of pastoralism practised by the majority of Turkana pastoralists is commonly pastoral transhumance- the practice of moving from one place to another in search of water and greener pastures and splitting of different species of herds. This means that the Turkana do not have full control over specific land and related natural resources. Livestock keeping plays a number of “social, economic and religious roles in pastoral livelihoods, such as providing a regular source of food in the form of milk, meat and blood for household members, cash income to pay for cereals, education, basic health care and other services.”²⁷

2.4.2: Agro-Pastoralism and Fishing

A small number of the Turkana, especially those who live near Lake Turkana or permanent rivers,²⁸ engage in agro-pastoralism and small scale fishing. There are two permanent rivers in Turkana; River Kerio and River Turkwel and they flow throughout the year. Farming along these two rivers is reliable but a majority of the community members have no access to the farmland as fertile grounds might belong to a particular clan. Farming in this area is not mechanized and the

²⁶Gregory Akall, *Imagining Land: Significance of Land in African Economics, Politics and Culture*. University of Cambridge, 2013

²⁷JanpeterSchiling, Francis Opiyo and JurgenScheffran, *Raiding Pastoral Livelihoods: Motives and Effects of Violent Conflict in North-western Kenya*

farmers use the traditional methods of farming which involves the use of a traditional farming stick called *akuta*. Most of the farm produce is however used for consumption by family and clan members during the dry season. Storage is done by use of traditional store houses called *epem* where farm produce is kept till the dry season and then consumed.

The harsh climatic conditions in Turkana impose constraints on the way in which the Turkana people manage their livestock. The climate of the area is classified as arid and semi-arid with high ambient temperatures a "rainy season" that usually lasts about two to three months. The amount of rainfall varies from place to place, with some areas receiving more rain than others. During the short rains, the Turkana migrate to areas with greener pastures and water for their animals. One tactic adopted by the Turkana in exploiting an environment where the availability of food is inconsistent, sparse, and scattered is the management of herds composed of many species.²⁹ As water and pasture diminishes during the dry and hot season, it is common for the Turkana to divide their animals into different herds. A herdsman may therefore have milking and non-milking herds of camels and cattle, sheep and goats - sheep and goats are herded together. At the onset of the rainy season the milking and non-milking herds are joined, with all the people and animals together in one *awi*.³⁰

2.5: Land Tenure in Turkana

Land is a critical asset in as far as the livelihood and the culture of the Turkana is concerned. It provides pasture lands (grazing areas), livestock watering points, food, shelter, shrines and cultural sites, medicinal plants, wealth and prestige for the Turkana. Land tenure determines land ownership, transferability of land from one person to another and adjudication of conflicts relating to land. Land ownership among the Turkana is on a communal basis through kinship, lineage and clans.³¹ Land does not belong to a particular individual but to the clan and different clan members occupy specified pieces of land depending on the sizes of their families or herds.

²⁹Food and the Turkana in Kenya, available at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/kenya/food-and-turkana-kenya>. Accessed On 3/3/2015

³⁰See Note 11 above

³¹Oba, Gufu. "The Importance of Pastoralists' Indigenous Coping Strategies for Planning Drought Management in the Arid Zone of Kenya (1)." *Nomadic Peoples* 5.1 (2001): 89.

“The carrying capacity of the land may affect the resilience of pastoral households by placing limits on options with respect to size, diversification and dispersal of their herds.”³² Land is regarded as a community asset and only a small number of the Turkana privately own land and thus possess legal title deeds. This small number is often restricted to major towns like Lodwar, Kakuma and Lokichoggio. This is the private land tenure system. However, in the areas occupied by the pastoralist Turkana which is majorly in the outskirts of towns, the communal land tenure system is majorly applied.

This research focuses on the communal land tenure system since it is the system in Turkana that has been adversely affected by the oil and gas exploration under study. This resulted from the fact that most base camps for the oil company are established on land that has historically been used as grazing lands by the community. As a pastoralist community, the Turkana are dependent on land and other natural resources for their cultural practices. It is the duty of every community member to take good care of the land and use it productively. This requirement is reinforced by the belief by the Turkana that the ancestors will punish the community if the communal land is put into improper use. Ekwee Ethuro³³ notes: “Land rights are reserved to communities rather than to individuals and land is an undivided part of the social system where rightful use is determined by affinity, common residence, social status or these in common”.³⁴

Individuals are not allowed to transact on the community land and conveyance of part of the communal land that is possessed by specific family heads to a purchaser is unheard of in this community. Women do not have powers to own land and can only farm pieces of land allocated to them by the man, the family head, through the clan. Among the Turkana, disputes relating to land in this community are adjudicated by the council of elders, a respected section of old men in the community. Decisions of the council of elders are binding on the disputing parties. Such

³² *Juma, Richard Otiemo, Turkana Livelihood Strategies and Adaptation to Drought in Kenya, 2009.*

³³ Ekwee Ethuro is the current Speaker of the Senate of the Republic of Kenya

³⁴ As quoted in *Juma, Richard Otiemo, Turkana Livelihood Strategies and Adaptation to Drought in Kenya, 2009.*

disputes may for instance include disputes over grazing lands, disputes over watering points among others.³⁵

There are grazing lands among the Turkana that are set aside for livestock grazing purposes and which do not belong to any clan but to the entire community. Construction of traditional huts and any other structures is prohibited in these grazing lands as the same threaten livestock. The council of elders occasionally formulates regulations governing livestock grazing such as the time of grazing and the species of livestock to graze in a particular area. This is informed by the fact that some species of animals among the Turkana such as donkeys have different grazing styles.³⁶

The village and clan elders develop regulations governing the use of the communal land. For instance, it is improper for any member of the community to burn or cut down green trees and pastures for building materials or charcoal. The greener trees are considered sacred and an indication of blessings from the ancestors and cutting them would amount to destroying the community's heritage. However, these rules did not apply to drier trees which could be used for firewood, erecting temporary livestock sheds during the rainy season among others. The council of elders would summon community members who defied these regulations and fines in form of livestock would be imposed on them to deter others. The council of elder's regulations required a community member not to erect residence structures in the grazing fields. This rule ensured that the grazing fields were exclusively for use by the community for livestock grazing purposes.

On wildlife, it was against the community norms to kill "big" wild animals such as elephants, zebras and lions. Hunting among the Turkana is restricted to smaller wild animals such as wild cats, gazelles and others whose controlled killing, according to the community, was not disastrous. This has helped conserve wildlife and the environment generally in this region.

Watering points among the Turkana are considered communal property and the council of elders sets regulations for their use especially during the drier seasons when the water for livestock is

³⁵ Ibrahim Mwathane, 2012. Land policies in East Africa: Is there way and goodwill for Implementation? A paper presented to the International Conference on Land policies in East Africa held in Kampala, Uganda on 4-5 October 2012. Land Development and Governance Institute (LDGI), Nairobi, Kenya

³⁶ See Note 15 Above

scarce. However, during the rainy season, most of the rules governing watering points are not observed as the water is available in large quantities and can be accessed from anywhere. The Turkana also developed regulations regarding this and it is not uncommon for pastoralists to water their animals using stagnant water in open fields referred to as *etawarwar* that accumulates during the rainy season.

During the dry season, the rules on the use of watering points become strict and community members have a duty to exercise care when using the water wells. The council of elders may also require community members to water their animals in turns on particular days when the water is scarce in order to ensure that the water is accessible to all pastoralists and their animals. This practice requires pastoralists to drive their animals to the grazing fields and back to the shed in the evenings without taking them for watering till the following day.

Two notable systems of the land tenure among the Turkana are the concept of *Amaire* and *Ekwar*.³⁷ *Amaire* refers to the system of land use in which a portion of pastureland is set aside in the rainy season for future communal use during the dry season. These reserves act as grazing lands when there is scarcity of pasturelands and consist mostly of drought-resistant vegetation. During the rainy season therefore when there are green pastures in plenty, the community members do not use *Amaire* for their livestock. *Amaire* may be huge tracts of pasturelands existing especially away from homes or livestock sheds. The management of *Amaire* is the responsibility of the council of elders whose regulations on the governance of *Amaire* are binding on all community members. In the dry season, the community's use of *Amaire* is regulated by restricting access to it by other Turkana pastoralists who have depleted their *Amaire* in their areas of residence. It should be noted therefore that *Amaire* is not a *terra nullius* but rather a quasi-communal property that is available to an identified section of the community. It is common therefore to have a number of *Amaire* set aside by different clans or group of clans in Turkana for their use during the dry season.

The system called *Ekwar* involves allocation of riparian pastureland along rivers to specific families for their exclusive use, subject to terms set by the council of elders.

³⁷ *Amaire* means reserved grazing areas, while *Ekwar* means family owned areas of important trees

The *Ekwar* system is beneficial to a Turkana family during the dry season when the only available pasture for livestock is along river banks. A family cannot access the *ekwar* of another family without the prior permission of that family's head, the man. It should however be noted that the system of *ekwar* does not alienate any land to any particular individual or family.

Conflicts occasionally arise between different family heads over boundaries of different *Ekwar* and in such a case the council of elders is responsible for demarcating boundaries and settling conflicts. It can be argued that the system referred to as *Ekwar* among the Turkana provides for a quasi-private land ownership rights.

An *Ekwar* may however be allocated to another family head by the council of elders when the family head that initially owned the *Ekwar* migrates out of the community or is excommunicated. However, in cases of death, the *Ekwar* remains under the control of the elder son of the deceased family head.

Among the Turkana, families that have large herds of livestock may move frequently comparable to families with a considerably smaller number of livestock. Sometimes movement of families may be constrained by labor shortages especially for families with large number of livestock, thus unable to manage a number of different herds. Families with only one type of species of livestock may differ in their movements from families whose herds are dominated by another species. The pattern of livestock movements thus varies seasonally, annually, and among individual herd owners.

The Turkana have designed proper strategies that enable them to manage their land effectively on a sustainable basis. It is an offence in this community for one for example to cut down trees for any reason. This community policy system makes best use of the vegetation both in time and space through a system of grazing as well as setting aside grazing reserves for use during the dry season. (*Amaire*). This system of land management is now threatened by the numerous investments in land taking place in this community. The Turkana however have a well-developed knowledge of their flora and its uses. In practice, the families and clans in Turkana possess the land, but traditional huts and constructions on the land such as livestock sheds are privately owned. A traditional hut shows that a specified family head or clan member has user rights of the communal land where they occupy. Most of the construction of houses is usually performed by

women and the role of the men is limited to defense and taking care of the animals in the grazing fields.

The Turkana and their livestock largely depend on land based natural resources such as pastures, water and forests. Land tenure determines land ownership, transfer of land from one person to another and adjudication of conflicts relating to land. Insecure land tenure system as a result of the non-transferability of land is common in this area. Women in Turkana do not hold primary rights to land: they do not own nor control land and natural resources but mainly gain access to either common or private property resources such as forests, lakes or farmlands through a male relative. Charles Lane notes, “The Turkana have evolved a tenure system which responded to the dry conditions of their territory and recurrent drought.”³⁸

2.6: Implications of Oil Discovery on Land Tenure in Turkana

Rules of tenure not only define an entitlement that is enforceable in law but also determine how property rights to land are to be enjoyed by the “owners.” However, property rights are wider and are not limited only to those written down in the constitution, statutes or those enforced by courts of law. Land tenure encompasses those property rights that are recognized and enforced under customary tenure systems. Among the Turkana, customary property rights may include rights over clan-owned communal pasturelands, rights over community forests, shrines or livestock watering points. Pastoralist communities like the Turkana have developed various ways of controlling the enjoyment of rights to land in different situations. The Council of Elders sets rules and structures that determine the manner in which “land is managed in relation to members of communities; how land rights can be transferred within the group; and how land rights can be transferred to other persons outside the group.”³⁹

Until the commencement of oil and gas exploration, the Turkana had abundant pasture lands and communally owned property that was majorly administered by a “loosely defined set of norms”. The Turkana resources have become scarce since the Kenyan government expropriated large tracts of land to Tullow Oil PLC and its partners for the purposes of oil exploration. In many

³⁸ Charles Lane, *Custodians of the Commons: Pastoral Land Tenure in Africa*, Page 35

³⁹ *ArkoAdjel*, *Adapting Land Administration to the Institutional Framework of Customary Tenure: The case of Peri-urban Ghana*, Amsterdam, Page 20.

other parts of the county, the government and international Non-Governmental Organizations have established irrigation schemes and national parks, denying the community access to their once accessible pastureland. With the oil and gas industry growing bigger in Kenya and its exploration encroaching into villages and towns, many vulnerable community members have had to deal with the challenges associated with such investments including but not limited to loss of land, environmental degradation and noise pollution that hampers peaceful enjoyment of property, noxious air emissions, all without any compensation.

The customary land tenure and property rights systems in Turkana evolved along two main routes during the pre-colonial and the colonial period. The system of *ekwar* and *amaire* defined most aspects of property rights enjoyment. The concept of *ekwar* involves riverine pasture land that is owned by a specific family head while *amaire* is concerned with pasture land set aside by the entire community for livestock use during the dry season. It can be argued that the system of land “ownership” according to the Turkana therefore had two limbs; the private land ownership aspect and the communal land aspect. An undertaking negatively impacting on the “privately owned” piece of land referred to as “*ekwar*” is considered an injury to a specific person while that affecting community forests, shrines and pasturelands generally are injurious to the entire community. Compensation processes should therefore take this into account when dealing with compensating the Turkana pastoralists for loss of land to the Oil Company and interference with the enjoyment of such rights.

The traditional Turkana communal-grazing system allows access to pasture and water to every livestock-owning member of the Turkana society. As the case with most pastoral societies in Africa, private property ownership among the Turkana is not absolute and is only limited to resource use and management as land is considered to be the property of the clan and the larger community by extension. In this community, people's property rights have been ignored and the community land has been expropriated to oil companies and the environment degraded in the search for oil and gas raising the question as to the place of local community rights in private investments. International laws such as International Labour Organization Convention No.

169⁴⁰ enshrine the right of ownership to indigenous and tribal peoples over their traditionally occupied land. It places a duty on the part of governments to not only recognize but also protect customary property rights. In addition, governments and private investors are required to obtain the Free Prior Informed Consent⁴¹ of the local communities when exploring for extractive natural resources such as oil and gas from their traditional lands.

While most of the pastoralists are used to the communal land ownership system, politicians and the elite from other parts of Kenya are reported to have acquired the land and privatized it using the statutory system of private land ownership to safeguard their interests. Interviews conducted by the researcher in December 2014 in Lokichar area, where Tullow Oil PLC have set their oil and gas exploration base camp, indicate that most pastoralists believe that their land has been sold to private investors.⁴² This places the local community at a disadvantage and informs the altercations that have been evident between the Turkana and Tullow Oil PLC throughout the period of oil and gas exploration. Fencing of grazing fields by Tullow Oil for use as oil exploration sites in areas such as Ngamia 1, the community members observe, has negatively impacted on the traditional way of life of the Turkana as the local pastoralists still wish to “access the land now and in the future based on their understanding of their customary property rights. The land grabbers may use their registered rights to acquire community land and have the state to support them in preventing access by local community.”⁴³

The local community, practices pure pastoralism and agriculture during the rainy season on the communally owned land majorly because they have property rights over the land. With the illegal acquisition of the communally owned land by private investors and politicians as well as use of the land for oil and gas related projects by Tullow Oil PLC, displacement of populations and conflicts are likely to occur in Turkana. Furthermore, with the high illiteracy levels and non-

⁴⁰ Convention No.169 is a legally binding international instrument open to ratification, which deals specifically with the rights of indigenous and tribal peoples.

⁴¹ Free prior and informed consent’ (FPIC), is the principle that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use. FPIC is now a key principle in international law and jurisprudence related to indigenous peoples

⁴² Interview with Ekeno Esekon, a Turkana Pastoralist in Lokichar, Turkana on 29th December 2014

⁴³ Note 6 Above

exposure to the dynamics of the oil and gas sector, a majority of the Turkana may not in any way benefit from these projects that would otherwise empower them economically.

2.7: Conclusion

The Turkana communal land system and the community's way of life have been highlighted. As indicated, the Turkana are a people whose traditional life is pegged on land and natural resources. Any effect on the community land therefore adversely affects the way of life of the Turkana. The influx of foreign populations into Turkana after the discovery of oil and gas deposits has negatively affected the Turkana culture. This has led to a breakdown of the system of social ties and obligations which has enabled generations of Turkana pastoralists to cope with the hardship of living in a climatically harsh environment. The irregular allocation of land to the oil company by the county and national governments has affected the traditional land tenure system of land ownership of the Turkana. Chapter Three will focus on analyzing the Scope and Applicability of the Right to Compensation while drawing a distinction between the legal position and the Turkana-Tullow Oil experience.

CHAPTER THREE:

3.0: THE EFFECTS OF OIL EXPLORATION ACTIVITIES ON PROPERTY RIGHTS AMONG THE TURKANA

3.1: History of Oil Exploration in Kenya

The Petroleum industry in Kenya has developed over time from early 1950s up to date. The first oil and gas exploration in Kenya was undertaken in the 1950s by British Petroleum (BP) and Shell.⁴⁴ However, the first well was drilled in 1960. The two oil companies drilled ten wells in present day Lamu County in the Coast. Adobe Oil and Frobisher Oil PLC are reported to be the

⁴⁴Mutuma, Dennis Kibanga. Kenya's petroleum exploration and production law: challenges for investors, the government and local communities. Diss. University of Nairobi, 2012.

first companies to have undertaken general and seismic survey works in the North Eastern region of Kenya. However, which did not actually materialize into drilling programs afterwards.⁴⁵

In 1975, a number of oil companies obtained licenses to explore for oil and gas in the upper part of Lamu Basin.⁴⁶ Texas Pacific et al drilled Hargaso-1 in 1975 and encountered oil and gas shows in the Cretaceous rocks. In 1976 Chevron and Esso drilled Anza-1 and Bahati-1 wells in the southern part of Anza Basin.⁴⁷ The drilling mud of both tests was suspected of having hydrocarbons and microfossils that contaminated the geochemical and cuttings respectively.⁴⁸

An interest in the offshore portion of the Lamu Basin resulted in the drilling of three deep wells, Simba-1, Maridadi-1 and Kofia-1 by a consortium of Cities Services, Marathon and Union in 1982.⁴⁹ Seismic data however revealed that salt diapiric structures were present along the Kenyan margin. In 1986, the petroleum exploration and production legislation in Kenya was revised to provide suitable incentives and flexibility to attract international exploration interest in the country. In 1986 the Government of Kenya entered into a joint venture exploration program with Petro-Canada International Assistance Corporation. Seismic work was conducted and Kencan-1 was drilled to test deeper strata on the structure adjacent to Garissa-1 well.⁵⁰

A group of companies led by Amoco and Total drilled ten wells, eight of them in Anza Basin and two in Mandera Basin between the years 1985 and 1990. Although the wells were dry, they had indications of commercially viable oil and gas quantities. Total exploration drilled Ndovu, Duma and Kaisut in North Anza Basin while Amoco drilled Sirius, Bellatrix and Chalbi in the

⁴⁵*St Claire Estates Ltd*, Kenya Oil Exploration History. Available at <http://stclaireke.com/index-8.html> Accessed on 1/04/2015

⁴⁶KIBANGA, MUTUMA DENNIS.SCHOOL OF LAW.Diss. UNIVERSITY OF NAIROBI, 2012.

⁴⁷CHERUIYOT, CHARITY. Analysis of oil exploration plays in Anza Basin from a trap-type perspective. Diss. University of Nairobi, 2012.

⁴⁸National Oil Corporation of Kenya official website <http://www.nationaloil.co.ke> last accessed 24/04/15

⁴⁹Imana, David Kamar. ECONOMIC IMPLICATIONS OF OIL DISCOVERY IN KENYA (CASE STUDY OF TURKANA COUNTY). Diss. Webster University, 2013.

⁵⁰ *ibid*

Northwest of Anza Basin and Hothori well in South Anza Basin.⁵¹ Amoco farmed out 50% of its interest to Shell who drilled Eliye Springs and Loperot located west of Lake Turkana in a Tertiary Rift Basin. The Loperot well penetrated a lacustrine source rock with high Total Organic Carbon content (TOC) and recovered water and waxy oil on a repeat formation test (RFT) from Miocene sandstone interval.⁵² While none of these wells encountered commercial reserves, fluorescence and gas shows were reported in Hothori, Endela, and Ndovu wells. Biostratigraphic studies suggest that these wells may not have penetrated deep to test the Neocomian-Lower Albian sediments which comprise the source reservoir, and seal within Sudan rift basins.⁵³

In 1991, National Oil initiated an in-house study of the Lamu Basin as part of a long-term strategy to re-evaluate the existing geological, geophysical and geochemical data relating to each of the sedimentary basins in Kenya.⁵⁴ The Lamu Basin study was completed in 1995. Based on the above reports Kenya subdivided the Lamu embayment (both onshore and offshore) into ten exploration blocks, each with a specific exploration play.⁵⁵ Two more exploration blocks have been created since the year 2001. Promotion efforts generated new interests in the offshore Lamu Basin, and resulted in the signing of seven Production Sharing Contracts between 2000 and 2002.⁵⁶ A total of seven thousand eight hundred and eighty four (7884) kilometers of seismic data covering the blocks under exploration was acquired offshore Lamu Basin by Woodside between August and October 2003. In August 2000 the National Oil Corporation commissioned the Tertiary Rift Study, which was completed in March 2001 and led to quantification of

⁵¹Heya, M. "Overview of Petroleum Exploration in Kenya." Presentation to the 5th East African Petroleum Conference and exhibition by Ministry of energy (Kenya). 2011.

⁵² Talbot, M. R., et al. "Hydrocarbon potential of the Meso-Cenozoic Turkana Depression, northern Kenya. II. Source rocks: quality, maturation, depositional environments and structural control." *Marine and petroleum geology* 21.1 (2004): 63-78.

⁵³ Supra Note 1

⁵⁴ Supra Note 3

⁵⁵ *ibid*

⁵⁶ Nyamwaya, Christabel. "Benefits Sharing on Extractive Natural Resources with Society In Kenya." (2013).

potential source and reservoir rock units in the study area as well as the availability of petroleum in the sub-basins.⁵⁷

In 2011, Tullow Oil PLC and Africa Oil Corporation announced the discovery of oil and gas reserves in the Lokichar and Kerio Basins in Turkana County. The exploration and production following this discovery is ongoing and is set to boost Kenya's economy when actual production starts. This is however dependent on the commercial viability of the oil.

3.2: Legal Framework Governing the Petroleum Industry in Kenya

In Kenya, the laws governing oil and gas and the petroleum industry in Kenya include the Constitution of Kenya 2010, Petroleum Development Fund Act, Chapter 426C of the Laws of Kenya and The Petroleum (Exploration and Production) Act Cap 308 Laws of Kenya, as well as auxiliary Regulations that the Minister (now Cabinet Secretary) is mandated to make under the Act.⁵⁸

a) International Framework

There is no specific existing legal framework at the international level that governs the petroleum sector in Kenya. However, adoption of international best practices is imperative and the practices in other oil producing countries in the world majorly influence the legal framework governing the petroleum industry in Kenya. The European Union adopted new laws in 2013 with a view to encouraging transparency and accountability in the management of income from oil and gas. As a result, European oil and gas companies are under an obligation to "report payments of more than €100,000 made to the government in the country they are operating in, including taxes levied on their income, production or profits, royalties, and license fees."⁵⁹ The disclosure of payments is however restricted to payments made at the project level only. In

⁵⁷ Supra Note 3

⁵⁸ *Khalid Salim*, Overview of the Legal Framework Governing the Exploration of Oil and Gas in Kenya. Available at https://www.academia.edu/6349654/Overview_of_the_Legal_Framework_Governing_the_Exploration_of_Oil_and_Gas_in_Kenya Accessed on 2/04/2015

⁵⁹ *Justus Omollo*, Oil And Gas Sector In Kenya: The Legal Status On Exploration And Extraction 2013. Available at https://www.academia.edu/9571301/OIL_AND_GAS_SECTOR_IN_KENYA_THE_LEGAL_STATUS_ON_EXPLORATION_AND_EXTRACTION Accessed on 2/04/2015

2010, the United States enacted Dodd-Frank Wall Street Reform and Consumer Protection Act. In a bid to encourage transparency in the oil sector, section 1504 of this Act places disclosure requirements on United States companies carrying out mining and petroleum operations in other countries. This is aimed at fostering transparency in the sector.⁶⁰

Countries like Kenya adopt the transparency standards set by the European Union and the United States in their petroleum operations.⁶¹ These standards therefore inform the Kenya's legal framework and although not binding, they form part of international best practices.

b) The Constitution of Kenya.

The Constitution of Kenya seeks to address issues surrounding the exploration and production of natural resources in Kenya and provides that “all minerals and mineral oil vest on the National Government. The Constitution defines natural resources to include rocks, minerals, fossil fuels and other sources of energy.⁶² All minerals and mineral oil are classified under Public Land which shall vest in and 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.”⁶³ The Republic of Kenya is under an obligation to ensure “sustainable exploitation, utilization, management and utilization” of the environment and natural resources. The sharing of the benefits of natural resources should be equitable taking into account factors such as the economic status host communities.

The constitution has empowered parliament to play a critical role in the petroleum through ratification of any grant of license to a party to exploit natural resources in Kenya. Parliament is however expected to formulate legislation specifying the limits of the transactions that will require parliamentary ratification.⁶⁴

⁶⁰Acharya, Viral V., et al. *Regulating Wall Street: The Dodd-Frank Act and the new architecture of global finance*. Vol. 608. John Wiley & Sons, 2010

⁶¹ibid

⁶² See article 260 of the Constitution of Kenya

⁶³ Note 1 Above

⁶⁴ See Article 71(1)(a) of the Constitution of Kenya. According to the 5th schedule of the Constitution, this should be done within a period of five years from the effective date, 2010.

c) **Petroleum (Exploration and Production) Act Cap 308**

The Petroleum (Exploration and Production) Act and the auxiliary Petroleum (Exploration and Production) Regulations that the Minister (now Cabinet Secretary) is empowered to make under the Act are the main pieces of legislation that governs the petroleum industry in Kenya. This Act came into force in 1986 and repealed the Mineral Oils Act (Cap 307) and the Oil production Act (Cap 308) and their respective Regulations.⁶⁵

The main objective of the enactment of this Act was the need to regulate the exploration and production of petroleum products in Kenya. The Act therefore governs explorations works and production of oil in Kenya provides a framework that regulates the grant of license, allocation of exploration blocks to oil companies as well as negotiation and conclusion of Production Sharing Contracts (PSC) with potential investors. Under the Act, the Minister in charge of Energy has been given powers to determine the grant of license to companies and to carry out negotiations with the different stakeholders in the petroleum sector as the chief government representative. Such license, if granted, does not allow that to prospect and mine any other minerals or other natural resources (other than petroleum) in that area.⁶⁶

The Act requires contractors in whose favour an exploration license is granted to sign a Petroleum Agreement. A Petroleum Agreement is defined as “an agreement, contract or other arrangement between the government and a contractor to conduct petroleum operations in accordance with the Act.”⁶⁷ A petroleum operation is also defined to include operations relating to the explorations for, extraction, production, separation and treatment, storage, transportation and sale or disposal of petroleum up to the point of export and it includes natural gas processing operations.⁶⁸ It is important to note that under this Act, refining of petroleum operations are limited only to upstream and midstream activities but excludes downstream operation such as refining of crude petroleum products. The Government of Kenya can only grant an exploration license to a company registered or incorporated in Kenya, as provided for under the Companies Act.

⁶⁵ Supra Note 15

⁶⁶ Section 5 of the Petroleum (Exploration and Production) Act

⁶⁷ Supra Note 15

⁶⁸ *ibid*

d) The Income Tax Act (Ninth Schedule to the Income Tax Act)

In the advent of oil exploration and production in Kenya, it is important for the government to formulate a legal framework relating to petroleum valuation and tax assessment. This Act acting as a framework on matters concerning oil discovery, drilling and revenue management will enable Kenyan government to manage issues related to oil discovery and management of oil revenues.

The Income Tax Act, Cap 470 provides for taxation in the petroleum sector under the ninth schedule to the Act. After the discovery of commercially viable oil and gas in Kenya in 2012, the government has introduced changes to the provisions of the ninth schedule to the Income Tax Act through amendments to the Finance Bill 2014 to ensure that the government benefits from the exploitation of its natural resources by investors. The gains and benefits of petroleum companies in Kenya are subject to the Kenyan taxation regime. Under Paragraph 2 of the Ninth schedule, the taxable income of a petroleum company is equated to the value of the production to which a petroleum company is entitled under a petroleum agreement in a particular year.⁶⁹ As a result, each of the oil exploration blocks allocated to a licensee shall be taxed as an independent unit and the Kenya Revenue Authority will consequently collect large amounts of tax. It is noteworthy that the ninth schedule of the Income Tax Act provides incentives to oil and gas companies including a capital allowance of a hundred percent (100%). The government has however failed to promote the participation of Kenyan companies in the local petroleum industry as it has not provided a similar incentive to Kenyan companies sub-contracted by petroleum companies to for instance, carry out supplies.⁷⁰

e) Environmental Management & Coordination Act 2000

The Environmental Management and Coordination Act is an Act of Parliament of the Republic of Kenya which governs the management and conservation of environment in Kenya. This Act is

⁶⁹ Supra Note 16

⁷⁰ Lydia Ndirangu, Changing Fortunes for the Petroleum Industry, Available at

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.kpmg.com%2Festafrica%2Fen%2FDocuments%2FChanging%2520fortunes%2520for%2520the%2520petroleum%2520industry.pdf&ei=Fg0dVaCoKMOtU5zxgMAI&usg=AFQjCNHU6sVrbFTpJsXHWWA95w9biboXjg&sig2=eRrFrqnB6T9zCUmkc9BcWA&bvm=bv.89744112.d.d24> Accessed on 2/04/2015

related to the petroleum industry in Kenya on the aspect of Environmental Impact Assessment (EIA) study and report that is required of oil and gas companies. The Act requires licensees *inter alia* to undertake an environmental audit on the impact of their activities on the environment and the necessary mitigation measures. The National Environmental Management Authority (NEMA) states that an Environmental Impact Assessment is conducted in order to achieve the following objectives:⁷¹

- a) Identify impacts of a project on the environment
- b) Predict likely changes on the environment as a result of the development
- c) Evaluate the impacts of the various alternatives on the project
- d) Propose mitigation measures for the significant negative impacts of the project on the environment.
- e) Generate baseline data for monitoring and evaluating impacts, including mitigation measures during the project cycle.
- f) Highlight environment issues with a view to guiding policy makers, planners, stakeholders and government agencies to make environmentally and economically sustainable decisions.

Environmental Impact Assessment is carried out during the early stages of the project development and it is an important tool in decision making on the implementation or non-implementation of the project whose impact is under study. In the petroleum sector, a licensee shall not carry out an oil and gas exploration project that may adversely affect the environment unless an Environmental Impact Assessment has been done and approved by the National Environmental Management Authority.⁷²

f) Petroleum Development Fund Act, Chapter 426C of the Laws of Kenya

⁷¹ See National Environmental Management Authority official website

http://www.nema.go.ke/index.php?option=com_content&view=article&catid=123&id=332 Accessed on 2/04/2015

⁷² *ibid*

Petroleum Development Funds are common in most oil producing countries. The Petroleum Development Fund Act is an Act of Parliament enacted in 1991 to provide for the establishment of a Petroleum Development Fund and the imposition of a petroleum development levy in Kenya. Under this Act, The Minister (now Cabinet Secretary) is empowered to formulate a petroleum development levy regulation which imposes a levy on all petroleum fuels consumed in Kenya to be collected by the Commissioner.⁷³ The order by the Minister may also amend a previous petroleum development levy regulation.

The Act also establishes the Petroleum Development Fund which consists of moneys appropriated by Parliament for that purpose and which shall be administered by the Permanent Secretary to the Treasury or any person appointed by him in writing for that purpose.⁷⁴ The Act provides that there shall be paid out of the Fund such monies as are necessary for the development of common facilities for the distribution or testing of oil products and for matters relating to the development of oil industry as the Minister may direct.⁷⁵ Currently, the Government of Kenya proposes to establish a “Sovereign Wealth Fund to which the Central Government share of petroleum revenues will be transferred. This Fund will be used for budgetary support, stabilization of the budget and for future generational equity. However, it is not clear yet what fiscal rule the Government will adopt to determine the size of annual spending from the Fund.”⁷⁶

Kenya’s Sovereign Fund is provided for in Section 136 (1) of the current Energy Bill. It provides as follows:

“The Cabinet Secretary shall determine, with the approval of parliament

(a) the amounts payable into the Fund;

(b) the asset manager to manage the Fund; and

⁷³ The Commissioner means the Commissioner-General appointed under section 11(1) of the Kenya Revenue Authority Act.

⁷⁴ Section 4(1) of the Act

⁷⁵ Section 4(4) of the Act

⁷⁶ Kenya Civil Society Platform on Oil and Gas: Setting the Agenda for the Development of Kenya’s Oil and Gas Resources – The Perspectives of Civil Society. 2014.

(c) the withdrawals made from the Fund – provided that the amount payable into the fund shall be at least 5% of the government share of proceeds.”

3.3: Proposed Laws and Policies in the Petroleum Sector in Kenya.

Since the discovery of oil in Turkana in November 2011, the government of Kenya and other stakeholders has sought to introduce changes to the legal framework existing in Kenya. As a result, new laws have been proposed, among them; The Draft National Energy Policy of 2012, The Petroleum Exploration, Development and Production Bill 2014 and the Energy Bill 2014. The petroleum sector and the in Kenya is a fast developing area and the need to make the necessary changes to the existing laws cannot be overemphasized. The government seeks to put into place policies and a robust legal framework that will regulate the petroleum sector in Kenya. Companies that have been granted exploration rights or those that wish to apply for grant of license shall be required to adhere to a number of proposed requirements.

a) The Draft National Energy Policy of 2012.

The Ministry of Energy of the Government of the Republic of Kenya formed a Taskforce, made up of experts in the energy sector to review its Energy Policy on the 28th January of 2011. The duty of the Task Force was *inter alia*; to review the Energy Policy (Sessional Paper No. 4 of 2004), the Energy Act 2006 and related auxiliary legislations and to align the said Acts and policies to the Constitution of Kenya 2010.⁷⁷ The Energy Act has been reviewed and aligned with the Constitution of Kenya and a draft Energy Policy has also been finalized for adoption.

The Task Force has involved stakeholders and members of the public in the policy formulation process in compliance with the constitutional requirement of public participation. The draft Kenya Energy Policy seeks “to facilitate provision of clean, sustainable, affordable, reliable and secure energy services at least cost while protecting the environment.” The principal objective of this policy is to increase the Kenya’s energy supply and reduce the energy demand gap as well ultimately spur economic growth in the country.⁷⁸

⁷⁷ *ibid*

⁷⁸ *ibid*

b) The Petroleum Exploration, Development and Production Bill 2014

This Act, also known as The Upstream Bill, intends to repeal the Petroleum (Exploration and Product) Act 1986 and proposes a number of changes to the current Act. The Bill proposes a national policy for upstream petroleum operations and requires the government to review the said policy periodically, after every five years. Another important proposal under this Bill is the formula on sharing of resource revenue. It provides that seventy five (75%) of the revenue shall be allocated to the national government while twenty percent (20%) is allocated to the county government and 5% to the local community that hosts the oil project.

The Bill also has provisions for promotion of local content which means that the host community shall be given priority in as far as employment and local contracts are concerned. The Bill also proposes the establishment of a Training Fund which will be a fund that will facilitate the training of Kenyans on petroleum related courses. On Free Prior Informed Consent of the local community, the Bill makes it mandatory for investors to engage the local community before carrying out oil exploration. The grant of license to explore shall be through a public tendering process and shall no longer be a prerogative of the Minister of Energy as the practice currently is. In my view, the proposed Bill will safeguard the interests of the local community and has addressed the lacuna that existed in the previous oil and gas framework in Kenya.

c) The Energy Bill, 2014

The proposed Energy Bill 2014 is a Bill that amalgamates all energy related laws into one and addresses the entire energy sector but does not cover the upstream sector in which petroleum industry falls in great detail. The Petroleum Exploration, Development and Production Bill 2014 is however specific on upstream petroleum operations only. This bill seeks to amend and consolidate the laws relating to energy and to provide for national and county government functions in relation to energy. The Bill also seeks to provide for the establishment, powers and functions of the energy sector entities and promotion of renewable energy.⁷⁹ It can be noted that while the Petroleum Exploration, Production and Development Bill is a pre-petroleum products production Bill, the Energy Bill 2014 is evidently a post-production Bill that majorly focuses on the regulation of use of petroleum products among others. The Bill provides for the development

⁷⁹ See Preamble to the Draft Energy Bill 2014

and publication of a national energy policy by the Cabinet Secretary which shall be reviewed every six years.⁸⁰

Current Exploration Blocks in Kenya (as of 2015)

Tullow:	5 Blocks
Origin Energy:	1 Block
Flow Energy:	1 Block
Camec	1 Block
Africa Oil Corp	1 Blocks
Vanoil Resources	2 Blocks
AFREN (EAX)	2 Block
Lion Petroleum	1 Blocks
Sohi Gas Lamu	1 Block
Sohi Gas Dodori	1 Block
Anadarko Petroleum	5 Blocks
NOCK	1 Block

3.4: Oil Exploration in Turkana County

In 2011, Tullow Oil PLC entered into a production-sharing agreement (PSA) with Africa Oil Corporation (AOC) to explore for oil and gas in Turkana County after obtaining licenses from the Ministry of Energy of Government of Kenya.⁸¹ This process was however undertaken in

⁸⁰ See Section 5 of the Draft Energy Bill 2014

⁸¹ Africa Oil Corporation-Operations Update, 13th March 2015, Available at www.africaoilcorp.com/s/operations-update.asp, Accessed on 16/03/2015

violation of both national and international laws,⁸² without consulting the Turkana communities or seeking their free, prior and informed consent or mitigation mechanisms put in place to avert any damage to the host community.

Oil and gas exploration in Turkana has had adverse effects on the property rights of the local community. In Nigeria, the Ogoni people were victims of forcible evictions, oil spills and erosion of culture. This resulted in environmental degradation, destruction of community shrines and pollution has been rampant since the oil discovery, sometimes resulting in militant resistance from the community.⁸³ The Turkana however attribute such conflicts not only to the injurious activities of oil and gas companies but also to the inadequacies of government policies and regulations. Article 66(2) of the Constitution of Kenya 2010 has provided for private investments to benefit local communities but the government and oil companies have stripped local people of the necessary benefits they would have obtained.

Oil and gas exploration and production in any community is followed by a number of environmental, economic and social challenges.⁸⁴ In Turkana, destruction of community forests and pasture lands began when Tullow Oil PLC started the process of seismic (also known as land survey) which involves the use of bulldozers to clear way for oil and gas exploration machines referred to as *Vibrators*. Seismic survey which is the initial stage in oil exploration involves sending signals into the ground and the reflections of the waves that are returned are studied to determine the presence or absence of hydrocarbon-bearing rocks in that specific location. The law in many countries including Kenya provides that the “right of occupancy could be revoked in the public interest which includes the requirement of land for mining purposes or oil pipelines or for any purpose connected therewith.”⁸⁵ Evictions of the local community from their

⁸² International laws on human rights such as the Universal Declaration on Human Rights of 1948 emphasize on the need to respect the human rights of all human beings

⁸³ *Emily Greenspan*, Will oil bring promise or peril to the communities of Turkana, Kenya? Available at <http://politicsofpoverty.oxfamamerica.org/2014/03/will-oil-bring-promise-peril-communities-turkana-kenya/> Accessed on 16th March 2015

⁸⁴ *Australia, Eco Logical*. "Proposed Framework for Assessing the Cumulative Risk of Mining on Natural Resource Assets in the Namoi Catchment." Project 11COFNRM-0006 prepared for Namoi CMA (2011).

⁸⁵ *Akinlabi, Akintomide Joseph*. "A Study Of Adequacy Of Compensation For Land Acquisition Under The Land Use Act." (2012).

aboriginal lands that they have historically used as pasture lands and grazing fields without any compensation is therefore, as indicated, not backed up by law.

It should be noted that land among the Turkana, land is the main foundation upon which people's productive systems, commercial activities, and livelihoods are constructed. Disruption of the traditional way of life and the interference with the social structures of the host community in the process of forcing them to move out of these regions to pave way for oil companies to conduct oil and gas exploration is injurious to enjoyment of property rights in this community. Oil and gas has now become the prime driver for a wave of land leasing and illegal conveyances in land in Turkana County. Business people, companies and politicians and are reportedly colluding with the local administrators to purchase land in suspected oil-rich areas with the intention of selling back to the community in the future at inflated prices.⁸⁶

Buying and selling of land in Turkana County has resulted in the domination of the community land ownership by the elite, real estate and their partners, in disregard of the law protecting community property rights. The illegal acquisition of land is accompanied by eviction of the "illegal occupants" from their community lands by the purported "private rights holder(s)". The practice has been that individuals whose private property is affected or the whole community that is indirectly dispossessed of its rightfully owned communal property receives no compensation at all. This results in the "alienation of the locals from their lands, despite the fact that their way of life involves moving freely with their animals in search of greener pastures."⁸⁷

Prof Okoth Ogendo notes; "the extensive exploration and exploitation of oil in the marginalized territories further aggravates the pressure on the land which results to alienation and impoverishment of the local community who are denied access to environmental resources."⁸⁸

In most instances, oil exploration concessions in Turkana are given without the Free Prior Informed Consent of the local community that traditionally owns the land.⁸⁹

⁸⁶ Kibagendi, Assa M. Nyakundi. The problem of land rights administration in Kenya. Diss. University of Nairobi, 2012.

⁸⁷ Posey, Darrell Addison, and Graham Dutfield. Beyond intellectual property: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities. IDRC, 1996.

⁸⁸ Okoth Ogendo 2012, as cited in Note 6 Above

As the community is dispossessed of their pasture lands and community shrines to pave way for oil drilling and pipelines, enjoyment of their property rights by the host community is infringed. Oil and gas companies such as Tullow Oil PLC should strive to maintain social stability in host communities. The need for the Kenyan government and Tullow Oil PLC to involve local communities in land expropriation to the oil company cannot be overemphasized. The government of Kenya also ought to formulate policies for “a proper community land acquisition law which should include a requirement for multinationals to pay local taxes in exploration and exploitation of oil.”⁹⁰ Failure to do so will exacerbate the already existing conflicts between the local community and private investors in as far as property rights are concerned.

3.5: Impact of Land Expropriation and Oil Exploration on Property Rights

3.5.1: Displacement of Local Community

Oil and gas exploration in Turkana County has had numerous negative impacts on the property rights of the Turkana pastoralists. The customary systems and structures that have existed among the local community for a long time have broken down in favour of a land tenure concept that is alien to the local community. However, sufficient controls to safeguard the property rights of the local community have not been developed by the concerned authorities.

Exploration in Turkana has resulted in displacement of the local communities which leads to communities losing their land and having to resettle elsewhere. It is important to note that some of the places the local pastoralists are forced to migrate to may not be conducive for pastoralism. Involuntary resettlement can be particularly unfavorable to the Turkana, a pastoralist community that relies on the security of property rights for all aspects of their way of life. When the community’s strong cultural and spiritual ties to their pasture land and grazing fields are interfered with, the Turkana find it challenging to cope with the new system and as a result, conflicts arise.

⁸⁹Article 63 of the Constitution of Kenya 2010.

⁹⁰ Supra Note 13

3.5.2: Influx of Foreign Populations

Following the discovery of oil and gas deposits in Turkana County in 2011, there has been an influx of people from other parts of Kenya especially to towns in Turkana County that are adjacent to the oil exploration sites. One pastoralist in Nakukulas Village noted:

“Since the time the people of Tullow Oil came to our land, we have seen many people coming here. We see new faces every day and we hear they have come to take away our land. So we do not know what will happen and where we will go. We will just wait and see.”⁹¹

Disputes have arisen over irregular buying and selling of community land to the “foreigners” with the local leaders and administrators being accused of colluding with the oil company to deprive the local community of its land. The influx of “new comers” to Turkana has also led to the erosion of culture of the local community, disruption of the traditional source of livelihood among others.

3.5.3: Destruction of Community Forests and Private Property

The right to property is one recognized in John Locke’s famous human rights tripod of “life, liberty and possessions.”⁹² One other major effect of the ongoing exploration to the Turkana is the destruction of community forests and private property. In the process of oil exploration, seismic lines may pass through a forest or homestead and when this happens, the oil company brings down trees to create a route for the *vibrator* to pass through. This system of oil and gas exploration that involves clearing of bushes, trees, community shrines and destruction of pasture land is a threat to the lives of the local community who depend on land for livelihoods and culture.

The researcher observed that most community forests especially around the Tullow Oil base camp in Turkana had been affected by oil exploration. This destruction extends to private property such as land privately owned by families and through the system of *ekwar*. With the

⁹¹ Interview with Lokinei Edo, a Turkana pastoralist in Lokichar, Turkana on 29th December 2014

⁹²J Locke, Two Treatises of Government, available at <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm>.(Accessed 21 January 2011).

help of the local security officers, the community points out issues of harassment and threats from the oil company workers when seismic lines pass through privately owned pasture land especially along rivers. This has majorly affected the property rights in this community and the pastoralists are living in the fear that more land will be taken away.

3.6: Conclusion

This chapter has discussed the relationship between property rights among the Turkana and the changes that have been brought about by the discovery of oil in that region. The chapter has also briefly delved into pointing out the genesis of oil and gas exploration in Turkana as well as bringing out the land-related challenges that have been experienced by the host community. This Chapter will provide a basis for the next chapter which will discuss the concept of compensation of the local community given the negative impacts on their property rights highlighted above.

CHAPTER FOUR:

4.0: THE SCOPE AND APPLICABILITY OF THE RIGHT TO COMPENSATION: A COMPARATIVE ANALYSIS

4.1: The Scope and Applicability of the Right to Compensation:

Expropriation is defined as “the right of the state, through its regular organizations, to assert, either temporarily or permanently, its dominion over any portions of the soil of the state on account of public exigencies and for the public good”⁹³ As the custodian of the radical title to land, it is the duty of the national government to regulate all property rights in land. This explains why it is not uncommon for the state to acquire land traditionally belonging to a community for a project that promotes public good.⁹⁴ As a result of establishing operations in a country, an oil company such as Tullow Oil PLC subjects itself to the obligations placed on it by the domestic legal frameworks of that country. When a foreign investor acquires rights over property in land for example, the legal regulatory framework seeks to protect the rights of the

⁹³Blacks Law Dictionary

⁹⁴ Bothwell, Stephanie E., Raymond Gindroz, and Robert E. Lang. "Restoring community through traditional neighborhood design: a case study of Diggs Town public housing." Housing Policy Debate 9.1 (1998): 89-114.

local community by limiting the enjoyment of the rights by the oil company as well as requiring oil companies to pay local taxes and compensation to affected communities.

As earlier discussed, the oil and gas exploration in Turkana involves activities that directly and indirectly negatively impact on the way of life of specific individuals and the community at large. It should be noted that the effects of the oil exploration are not limited to direct damage alone but extends to indirect damage on the community's pastoral lives and economy.

C. Nyamweya notes:

“Compensation for landholders and populations affected by the granting of a mining lease is typically a legal obligation that the leaseholder must fulfill on top of regular tax payments.”⁹⁵ Payment of compensation to local communities in the oil and gas exploration process is a statutory obligation provided for under the Constitution⁹⁶ and other laws of the Republic of Kenya⁹⁷ and set to achieve a number of objectives; the control of environmental pollution and safeguarding the interests of local communities by putting them in the position they were before the investment. The manner in which compensation of the local community is done therefore is of great concern just as much as the aim it seeks to fulfill.

Individuals and the local community negatively affected by oil and gas exploration can rely on the common law rule in *Rylands v Fletcher* as well as Negligence to seek for compensation. The rule in the *locus classicus* case of *Ryland v Fletcher* states that “anyone bringing onto land, in the course of a "non-natural" use of land something "likely to do mischief if it escape... is prima facie answerable for all the damage which is the natural consequence of its escape.”⁹⁸ The three-stage rule of ascertaining negligence provides that a claimant must satisfy three conditions if they are to succeed in a negligence claim.

(1) The party owed him or her duty of care

⁹⁵ Nyamwaya, Christabel. "Benefits Sharing on Extractive Natural Resources with Society in Kenya." (2013).

⁹⁶ Article 40 of the Constitution provides for the Right to Compensation

⁹⁷ Such as the Land Act, Petroleum (Exploration and Production Act) 1986

⁹⁸ Stallybrass, W. T. S. "Dangerous Things and the Non-Natural User of Land." *The Cambridge Law Journal* 3.03 (1929): 376-397.

(2) The party breached that duty

(3) As a result of the breach, the claimant suffered damage

In most cases, the authorities and the local community in Turkana have failed to pursue this argument in seeking for sufficient and relatively fair compensation as a result of the damage done to them and to their environment.

The debate on the sufficiency of the compensation, if any, paid by Tullow Oil PLC to the local community in Turkana County is informed by the inability of the oil company to adhere to statutory requirements. While the oil company argues that it pays adequate compensation to the victims of their oil and gas exploration work in Turkana, it is the position of the local community that the quantum of compensation paid by the oil company is in most cases inadequate even when claims are backed up with concrete evidence by the individual or group claimants. The researcher observed that the compensation laws currently in place in Kenya do not adequately take into account the interests of local communities that suffer harm as a result of damage done to them by oil companies and other private investors and the need for reforms cannot be overemphasized.

The inadequacy of case law in the area of oil and gas is one of the limitations that hamper the implementation of policies and laws relating to adequate compensation in the Petroleum industry in Kenya. The experience of the Turkana in their dealings with Tullow Oil PLC, in which large tracts of land have been expropriated to the company and community members evicted without compensation, suggests that the issue of compensation of individuals and communities that suffer harm out of oil exploration has not been properly observed. The actual payment of compensation is analyzed by the researcher in the light of the experience on the ground in Turkana. It should be noted that payment of adequate compensation to the local communities for the damage they suffer helps create good relationship between the host community, government and the oil company. As earlier discussed, the legal framework relating to compensation of individuals and local communities affected by private investment projects lies within but is not limited to the Land Act, the Petroleum Act of 1986 and the auxiliary regulations made by the Minister, as provided for under the same Act. The Turkana experience indicates that failure to pay adequate compensation to local communities can be a major source of conflict.

In other jurisdiction such as Ghana, the issue of compensation has been a challenge. In Ghana for example, compensation of local communities and farmers affected by the oil exploration is done through professional valuation done by valuers trained to assess the value of land and deprivation of land use. In addition, representatives from the local community are involved in this process. The failure to apply uniform and universally acceptable modes of calculating the amount of compensation that ought to be paid essentially makes the compensation process conflictive. It can therefore be argued that the compensation process is the most complicated and challenging part of oil and gas operations.⁹⁹

A number of factors ought to be considered in as far as compensation in oil and gas operations is concerned; the role of the local community in the determination of compensation amount; the formula to be applied in determining beneficiaries and what compensation entails. The existing laws and national policies, the compensation guidelines adopted by the oil company as well as the existing structures in the communities in which the oil company operates are some of the major factors that inform the mode of compensation to be adopted and the quantum of the compensation paid. In most cases, the stakeholders in the compensation process include the national government, local communities (or their representatives) and the oil company. It should however be noted that most contact takes place between the oil company and the local community as the company operates in the communities where the national government is not present. The “absence” of the state on the ground therefore means that a power imbalance will arise between the oil companies and the local communities with the local community being in an inferior position. The inability of the state to represent the interests of the local communities in such cases means that the local community will most likely defend its own interests.

Another challenge that often arises in the compensation process oil and gas is community representation in negotiating a compensation agreement with the oil company. Although the national government and the oil company in most cases assign specific officials the duty of dealing with all compensation related matters, identifying community representatives to spearhead the interests of individuals and the local community is often a challenge. It might be proper to consider that the village elders and the local chiefs as the obvious representatives of the

⁹⁹Ross, Michael L. "Nigeria's Oil Sector and the Poor." Position Paper for DFID-Nigeria, UCLA, Los Angeles (2003).

local community in negotiations for compensation. However, the local community may not feel adequately represented as most of the village elders and the local chiefs are often enticed with money and other material benefits and in the process, pursue their own interests. This in turn affects the oil company as it most often comes into contact with the specific individuals or a section of the local communities in its operations that are not necessarily the local chiefs or village elders.

4.2: International Legal Framework on Compensation

International law is a very important part of the legal framework governing the aspect of compensation and it informs municipal laws on oil and gas. Universal Declaration on Human Rights of 1948,¹⁰⁰ United Nations Declaration on the Rights of Indigenous Peoples, African Charter on Human and Peoples' Rights, ILO Convention Number 169 on the Rights of Indigenous and Tribal Peoples¹⁰¹ are some of the relevant international instruments that govern the concept of compensation of local communities and indigenous populations. Article 2(6) of the Constitution of Kenya 2010 mandates states to implement international obligations and provides that international conventions and treaties such as those named above that have been ratified by Kenya form part of the laws of Kenya.

The Preamble of the Universal Declaration on Human Rights of 1948, based on the United Nations Charter of 1945 which "reaffirmed faith in fundamental human rights, and dignity and worth of the human person" and committed all member states to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"¹⁰² Article 17 of the United Nations Human Rights Guidelines on Development Based Displacement, adopted in June 1997 also provides that expropriation should occur as a matter of last resort in local communities.¹⁰³

¹⁰⁰ Morsink, Johannes. *The Universal Declaration of Human Rights: origins, drafting, and intent*. University of Pennsylvania Press, 1999.

¹⁰¹ Swepston, Lee. "New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989, A." *Okla. City UL Rev.* 15 (1990): 677.

¹⁰² United Nations Charter, Preamble and Article 55, Accessed on 30th March 2015

¹⁰³ Alemu, Belachew Yirsaw. "Expropriation, Valuation and Compensation in Ethiopia." *Read and Write* 20 (2014)

Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples; “recognizes the wide range of basic human rights and fundamental freedoms of indigenous peoples. Among these are the right to unrestricted self-determination, an inalienable collective right to the ownership, use and control of lands, territories and other natural resources, their rights in terms of maintaining and developing their own political, religious, cultural and educational institutions along with the protection of their cultural and intellectual property.”¹⁰⁴ “The Declaration highlights the requirement for prior and informed consultation, participation and consent in activities of any kind that impact on indigenous peoples, their property or territories. It also establishes the requirement for fair and adequate compensation for violation of the rights”¹⁰⁵ African Charter on Human and Peoples’ Rights is also known as the Banjul Charter is a human rights instrument adopted by African states with the main aim of promoting human rights in the continent.¹⁰⁶

It is noteworthy that even in cases where the oil company agrees to the payment of compensation to affected individuals and local communities, many other procedural challenges may arise. Such issues may comprise the assessment of the direct and indirect damage caused; determination of the quantum compensation to be paid, the rate of compensation and identification of specific beneficiaries to be paid. In jurisdictions such as Ghana and Nigeria, the practice in the payment of compensation was similar. Despite the inadequacy of the legal regimes on compensation in the two countries, Tullow Oil PLC preferred direct payment of compensation to the local community members who suffered harm as a result of oil and gas exploration and exploitation.¹⁰⁷ This can be a viable option to the oil company as it is comparatively less costly to pay directly to the affected individuals. The other question that arises from this is the exclusion of local community members that do not directly suffer harm from the oil exploration but are indirectly

¹⁰⁴ International Work Group for Indigenous Affairs , UN Declaration on the Rights of Indigenous People, Available at <http://www.iwgia.org/human-rights/international-human-rights-instruments/undeclaration-on-the-rights-of-indigenous-peoples> Accessed on 30th March 2015.

¹⁰⁵ Supra Note 3

¹⁰⁶ Kiwanuka, Richard N. "The Meaning of" People" in the African Charter on Human and Peoples' Rights." (1988): 80-101.

¹⁰⁷ Martin, Adrian, et al. "Whose Environmental Justice? Exploring Local and Global Perspectives in Payments for Ecosystem Services Scheme in Rwanda." *Geoforum* 54 (2014): 167-177.

affected such as by loss of grazing land. As earlier discussed, a license to the oil company to undertake oil and gas exploration confers a number of powers to the oil company. As a result, a discussion on community and individual compensation for the damage occasioned by activities of the oil company in Turkana must include Article 40 of the Constitution of the Republic of Kenya.

4.3: Community Compensation: A Comparative Analysis of the Ghana Experience

The past and the current legal frameworks in The Republic of Ghana regulating expropriation of land to oil and mining companies have expressly provided for the payment of compensation to victims of oil and mining activities. Article 20(2) of the 1992 Constitution of Ghana, requires that compulsory acquisition of property by the state shall only be made under a law which makes provision for the prompt payment of fair and adequate compensation.¹⁰⁸ Professional valuers, carrying out valuation as regards land expropriated to mining companies in Ghana have developed standards on the quantification of land and the quantification of the damage arising out of the deprivation of use of land. In Ghana, the professional valuers usually find it difficult to assess the quantum of compensation as regards deprivation of the use of land that is bare or fallow during valuation.

Newmont Mining Corporation is one of the world's largest gold producers with operations on five continents.¹⁰⁹ In Ghana, Newmont paid a total of \$14,309,050 (US) crop compensation to three thousand claimants from approximately one thousand seven hundred households.¹¹⁰ The company in addition paid compensation for crops grown on the affected farm lands and the claimants received the compensation package after which they were evicted from their farmlands, following due process. The payment of this compensation was quite prompt, as required by Ghanaian law. In ascertaining the quantum of compensation, a committee, made up

¹⁰⁸ Larbi, Wordsworth Odame. "Compulsory land acquisition and compensation in Ghana: searching for alternative policies and strategies." presentation, FIG/FAO/CNG International Seminar on State and Public Sector Land Management, Verona, Italy. 2008.

¹⁰⁹ Jenkins, Heledd, and Natalia Yakovleva. "Corporate social responsibility in the mining industry: Exploring trends in social and environmental disclosure." *Journal of cleaner production* 14.3 (2006): 271-284.

¹¹⁰ Ayitey, J. Z., J. K. Kidido, and E. P. Tudzi. "Compensation for Land Use Deprivation in Mining Communities, the Law and Practice: Case Study of Newmont Gold Ghana Limited." (2011).

of local community representatives that were adversely impacted by the activities of the project, traditional authorities, Newmont and the local government authorities, was established with the aim of arriving at a fair and adequate compensation for affected individuals. The duties of the said committee included *inter alia* the determination of the value of each of the particular types of crops.¹¹¹ It is important to note that in Ghana, the rates of the different crops were assessed and determined with the supervision of the Ghana's Land Valuation Board. As a practice, the mutually agreed crops rates determined by the company, community members negatively impacted as well as other stakeholders are multiplied by the "applicable crop density for each farm field to arrive at compensation due."¹¹²

The experience of Newmont in compensating the local community indicated that two professional valuers, one being a representative of the mining company while the other acted for the individuals negatively affected by the company's project, were both part of land valuation and compensation generally. "Market survey was conducted in thirteen communities in the Akyem Newmont Project area to collate data on land transactions for the various types of interest prevailing in the area which presented the basis for valuing land deprivation. Information gathered from the people (chiefs, plot allocation committees members and farmers) included the recent land transactions, types of tenurial arrangement being practised and sharing arrangement regarding major farm crops in the area."¹¹³

The mining company has developed a Public Consultation and Disclosure Plan that sets out a complaints procedure that enables local communities to channel their grievances. This process "aims to engage with local communities in order to ensure interactions are relevant, conflicts are resolved quickly and to the mutual benefit of both parties. The project has also established a grievance mechanism, which is dedicated to resettlement and compensation issues."¹¹⁴ As

¹¹¹Hilson, Gavin, and Frank Nyame. "Gold mining in Ghana's forest reserves: a report on the current debate." *Area* 38.2 (2006): 175-185.

¹¹² *Supra* Note 24

¹¹³Ocran, Louis Kwame. *An Assessment of the Level of the Adequacy of Paid Compensation and Lost Livelihood in Mining Communities*. Diss. School of Graduate Studies, Kwame Nkrumah University of Science and Technology, 2010.

¹¹⁴Hutton, R. Bruce, William Zisch, and Vice President Africa. "Integrating Corporate Citizenship into Mnc's Risk Assessment and Management Processes: A Case of Newmont Mining In Ghana."

highlighted, the involvement of the local community in the determination of compensation in addition to the robust legal framework has reduced conflicts relating to compensation in Ghana.

In addition to the Constitution, the other laws relevant to compensation of local communities in Ghana include Petroleum Revenue Management Act (PRMA) and the National Petroleum Corporation Act, 1983. The Petroleum Revenue Management Act provides for the consolidation of oil revenue into a Petroleum Holding Fund. The Act establishes 2 committees that are charged with the responsibility of managing the petroleum revenue. One committee is the Investment Advisory Committee which monitors the use and efficacy of the petroleum fund. The other committee is the Public Interest and Accountability Committee (PIAC) that is in charge of auditing the compliance of the use of the fund with the Act.¹¹⁵ The National Petroleum Corporation Act of 1983 establishes Ghana's National Petroleum Corporation whose chief responsibility is to oversee the management of Ghana's revenue from petroleum operations and to safeguard the government's interest on the same.

In Nigeria, Schedule 36 and 37 of the Petroleum Act of 1969 provides that the holder of an oil exploration license shall ensure payment of a "fair, prompt and adequate compensation" for the deprivation of land use rights or other land rights to any person who at the time of oil exploration was in lawful occupation of the area affected by license or lease area. The compensation rates paid by the oil companies are usually based on the valuation recommended by the buyer or Subcommittee of the Oil Producers Trade Section (OPTS) of the Lagos Chamber of Commerce.¹¹⁶

4.4: Defining Who Will Be Compensated for What

The amount of compensation to be paid to individuals and the local community ought to be definite. This means that the specific compensation formula ought to define the beneficiaries, the quantum of compensation and the procedure adopted in arriving at the same. The existing Kenyan legal framework specifically the Petroleum (Exploration and Production) Act of 1986 and the Land Act 2012 do not provide for a clearly defined procedure and quantum of compensation in the petroleum sector. This impliedly means that determination of compensation is left to the oil company, the national government and the local community, represented by their

¹¹⁵*Vicente Garcia Claver*, Oil extractive emerging industries operating in Ghana and its consequences for the local population and environment, 2011.

¹¹⁶*LegborsiSaroPyagbara*: The Impact of Oil spills on Biological Diversity-The Ogoni Experience, 2005

leaders. This is however not reliable due to the power imbalance among the three. In most cases, the community is represented by community elites or leaders that focus on their own interests to the detriment of the local community.¹¹⁷

In determining who will be compensated, Michael Cernea defines compensation as “the usual operational ‘remedy’ employed universally as a means of restitution for project-caused asset dispossession, economic disruption, and income loss.”¹¹⁸ This definition is notably restricted to direct losses and damage only and disregards indirect damage to the community such as the loss of spiritual and social values that are intangible but very important to the community. In the area of compensation, the most popular approach is concerned with damage that is suffered by specific persons within the community. Such will include, destruction of *Ekwar* that is “owned” by a particular family head in the community or accidental killing of livestock belonging to a specific pastoralist by the oil company. Contrary to this stance, communities, families or social groups can be affected as a whole, especially when it comes to holy sites or other non-tangibles, which cannot be referred to an individual.

It is the researcher’s position that as regards compensation, the concerned authorities ought to adopt a two-pronged approach; individual-specific compensation on one hand and community compensation on the other. Individual-specific compensation entails the process of compensating individuals who suffer direct damage as a result of the activities of the oil exploration. Such direct individual damage may include destruction of a family’s *Ekwar*, eviction of a particular community member from their land, destruction of crops (for the Turkana that engage in agriculture as a source of livelihood) among others. Since this damage is limited to an individual, it is important for the oil company to compensate them while excluding the rest of the community members who have not suffered any harm. On the other hand, community compensation entails compensating the entire community for the damage that indirectly negatively impacts on the entire community. Such damage include, destruction of community forests and shrines, livestock watering points, erosion of culture and way of life, influx of foreign

¹¹⁷Obi, Cyril. "Nigeria’s Niger Delta: Understanding the complex drivers of violent oil-related conflict." *Africa Development* 34.2 (2009).

¹¹⁸Cernea, Mihail M., and Ravi Kanbur. *An Exchange on the Compensation Principle in Resettlement*. Cornell University, 2002.

populations into the community, expropriation of community land for oil exploration and environmental degradation among others.

Determining the beneficiaries of individual-specific compensation is more straightforward as the individual claimants are definite. However, a controversy exists as regards community compensation.¹¹⁹ For the purposes of compensation, some scholars have argued that a community in oil and gas operations should not be restricted to the section of the community that hosts the project but to the entire community. This therefore means that in Turkana County, for example, the whole community ought to benefit from the benefits of compensation especially for the indirect impacts of the project. The practice in other jurisdictions indicates that the payment of compensation in such cases has traditionally been channeled through the authorities that are the representatives of the local community. Under the new dispensation, the County Government of Turkana is therefore the legal entity to whom the compensation ought to be paid by the oil company.

4.5: Determining the Quantum of Compensation

Determination the quantum of compensation to be paid by the oil company is a complicated process due to the absence of a clear legal framework on this area. Without a formula to be adopted, it is therefore hard for oil companies to pay compensation since valuation and monetization. In some cases, there are considerable controversy and differences that may exist between the “market values, replacement costs, and beneficial estimates but all seem somewhat viable in light of compensation.”¹²⁰ Market value is defined as s the price at which an asset would trade in a competitive auction setting and Replacement Costs refers to the amount that an entity would have to pay to replace an asset at the present time, according to its current worth.¹²¹

Coming up with a compensation formula that result in adequate compensation requires a multi-stakeholder approach in order to avoid the resulting conflicts that may arise from the inadequacy

¹¹⁹ Supra Note 11

¹²⁰ Downing, Theodore E. *Avoiding new poverty: mining-induced displacement and resettlement*. Vol. 52. International Institute for Environment and Development, 2002.

¹²¹ Brunnermeier, Markus K. *Asset pricing under asymmetric information: Bubbles, crashes, technical analysis, and herding*. Oxford University Press, 2001.

of the compensation. The interests of the host communities have in most cases been ignored by the government and the oil company. The determination of the quantum of compensation should be based on a consideration of many factors including the market value of land and crops or trees, the replacement costs of community property destroyed among others. It is however difficult to determine the value, in monetary form, attached to intangible aspects of the community such as culture or disruption of a community's way of life. Compensation relating to such will thus be determined by mutual consent by the three major stakeholders.

The lack of a standard formula for compensating claimants and the use of non-experts in determining the valuation of land is a major problem in compensation in the oil and gas sector. Delays in making of payments were also cited by the local community in Turkana County as a major source of conflict between the company and the host community. The Constitution of Kenya 2010 provides that the payment of compensation should be prompt.¹²² Current practice indicates that the oil company dictates the rates at which it is willing to offer without giving the claimants chance to negotiate for an increase. Marcus notes that "it is not by accident that provisions for compensation are found in the basic laws of some countries, rather than left to the will of the legislature or the executive, but to protect private property from the latter's arbitrary actions." Compensation is justified by the public right to land. However, the most problematic concerning expropriation is the question of compensation as a contention exists as to what amounts to compensation.

4.6: The Practice in Turkana

In Turkana County, the oil company's adherence to the legal requirement to compensate the local community has not been witnessed.¹²³ Pastoralists interviewed by the researcher in Lokichar, Turkana County, near Tullow Oil's base camp pointed out the difficulties the local community faced after the oil discovery and the irregularity of the dealings of the oil company with the community.

One pastoralist noted:

¹²² Provided for under Article 40 of Constitution of Kenya 2010

¹²³ The legal requirement refers to the requirement under Article 40 of the Constitution of Kenya that requires private investors to "promptly compensate" individuals when their land is expropriated

“The people of oil came with a letter from Nairobi and told us they had been given permission to look for oil in our grazing land. We therefore had no option but to obey because the government could have come and forced us out.”¹²⁴

The compensation process in Turkana for the local community is controversial. While the local authorities argue that the oil company has never paid any compensation to the county government as a result of the grazing lands expropriated to Tullow Oil, the oil companies argues it has adhered to all legal requirements.¹²⁵ The researcher found out that the amount of money paid by Tullow Oil PLC to the county government of Turkana was local government land taxes and not compensation as argued. This confusion exists due to the lack of clear and participatory mechanisms for compensating local communities.¹²⁶ The inadequacy of the safeguards provided by the law makes it difficult for the Turkana to put Tullow Oil into task for adherence to the legal requirement to fairly and adequately compensate the local community.

The inadequacy of the existing legal framework has meant that the interests of community members affected by the oil exploration in Turkana are not taken into account in compensating victims of damage. The payment of compensation is one of the major challenges that have been a source of conflict between Tullow Oil and the Turkana.¹²⁷ In some instances, the oil company engages in negotiations with the community elite to compensate the local community. This payment does not however benefit the victims of oil and gas exploration. This raises the question as to community representation in compensation arrangements especially community compensation.

In Turkana, the oil company engages directly with community members directly affected by the oil exploration and compensates them using rates adopted by the company. The company also employs local community elites as Community Liaison Officers (CLO) whose duty is to guide

¹²⁴ Interview with Ekeno Lorot, Turkana Pastoralist, Lokichar, Turkana County on 29th December 2014

¹²⁵Wambugu, S., and M. Moronge. "Determinants of Petroleum Exploration in Kenya." *International Journal of Social Sciences and Entrepreneurship* 1.7 (2013): 304-315.

¹²⁶ Van Noordwijk, Meine, et al. "Criteria and indicators for environmental service compensation and reward mechanisms: realistic, voluntary, conditional and pro-poor." (2007).

¹²⁷Johannes, Eliza M., Leo C. Zulu, and Ezekiel Kalipeni. "Oil discovery in Turkana County, Kenya: a source of conflict or development?." *African Geographical Review* ahead-of-print (2014): 1-23.

the operations of the oil company in the local community and to forward community grievances to the relevant company department.¹²⁸ This approach enables the company to compensate individual claimants affected by the project. While this is straightforward, a controversy exists in community compensation due to the need to have community representatives and also the absence of a transparent legal framework on compensation of local communities. There is also the need to differentiate between Corporate Social Responsibility (CSR), Payment of Local Taxes and Rates from Compensation. It is the position of the researcher that the three are distinct and different concepts. Evidence on ground suggests that the issue of compensation needs a re-assessment.

In Turkana, assessment of the compensation package to be paid to victims of oil exploration is done using subjective valuations that are, in most cases, not objectively arrived at. This therefore places the community at the mercy of the oil company as the valuations provided are in most cases undervalued and do not reflect the actual valuations of the land.

The method of identification of beneficiaries of the company's compensation has also been controversial and allegations of favoritism towards relatives of the employees of the Oil Company and politicians are common. These challenges can be attributed to the inadequacy of the legal framework in as far as community compensation is concerned. No policy or law in the Kenyan laws adequately addresses the issue of community compensation to take into account the interests of the victims of damage.

4.7: Conclusion

This chapter has analyzed the concept of compensation in Kenya and the fact that there exists no robust legal framework on compensating individuals and local communities that suffer damage as a result of private investment projects has been highlighted. The researcher has also pointed the position of the law and contrasted it with the practice in Turkana as well as analyzing the compensation procedure adopted by oil and mining companies in Ghana with specific reference to Newmont Mining Corporation. Determination of quantum of damages was also highlighted and the need to quantify the harm suffered by host communities was brought forward. The

¹²⁸ Mkutu Agade, Kennedy. "'Ungoverned Space and the Oil Find in Turkana, Kenya." *The Round Table* 103.5 (2014): 497-515.

researcher has also delved into the process of identifying the relevant beneficiaries of compensation paid by the oil company. It should be noted that this is important as failure to do so will result in fraudulent claims for compensation by non-members. The next Chapter on Recommendation and Conclusions will conclude the research and recommend ways of addressing the lacunae existing in the legal framework on compensation in Kenya.

CHAPTER FIVE:

5.0: CONCLUSION AND RECOMMENDATIONS

5.1: CONCLUSION

This research has highlighted a number of issues that arise in private sector investments and specifically the oil and gas exploration projects such as one that is currently being undertaken in Turkana County. The study has critically examined the different approaches towards compensation and has highlighted how some of the numerous challenges related to compensation can be addressed by government and policy makers. The presented approaches encompassed community participation in determination of the quantum of compensation and the need for private investments to benefit local communities and their economies among others. This research has also pointed out the lacuna existing in the different laws and government policies on land and the petroleum industry while exposing the damage that local communities suffer as a result of these investments. The research also suggested the different channels that can be adopted by local communities that suffer harm due to oil and gas exploration projects to obtain reparation.

This study argues that the national government of the Republic of Kenya ought to prioritize its engagements with the host communities in as far as oil exploration and production is concerned.¹²⁹ This will not only reduce the information gap and power imbalance that currently exists between the local pastoralists in Turkana and the oil company but also reduce the numerous conflicts associated with the petroleum industry. Using the case study of Newmont

¹²⁹Owusu-Ansah, Matilda. "Risks and impacts of oil exploration and production on local communities in the western region of Ghana." (2012).

Mining Corporation in Ghana¹³⁰ to assess the operations of Tullow Oil PLC in Turkana County, this study has made an important contribution to the understanding of the damage caused by oil companies to local communities in Kenya. The study specifically focuses on four major thematic areas highlighted in this study: Involvement of the local community in the compensation process; private investments to benefit local communities and their economies; and development of a clear, participatory legal framework to govern the process of community compensation and the determination of the quantum of compensation. The discussion in this research will be of great importance to government, students, and many other stakeholders in the petroleum sector in Kenya.

The ongoing oil and gas exploration in Turkana County has generated debate on the place of the rights of the local community in oil and gas investments and this study has attempted to address those concerns. Pastoralists interviewed in Lokichar in Turkana County indicated that the local community has suffered damage due to the oil exploration. The community's social organization, customary land tenure system and source of livelihoods have grossly been affected by the activities of the oil company. The evident non-involvement of the local communities in determining the compensation for the damage, irregular acquisition of land by politicians and community elites to the detriment of the local community, has exposed the pastoralists to vulnerability and further marginalization.¹³¹

In addition, the study has highlighted the impact of oil and gas projects in Turkana on the human rights and fundamental freedoms of local peoples and their communities and also reviewed the protection the law has accorded to communities affected by private investments.¹³² These communities have had limited input into the investor and state-driven development model imposed upon them and the need to safeguard their rights cannot be overemphasized. The study has recommended a new compensation model that is all inclusive, participatory, fair and adequate which if adopted will safeguard the interests of the local community.¹³³ It should however be noted that compensation of individuals and the community does not adequately solve

¹³⁰Banchirigah, Sadia Mohammed. "Challenges with eradicating illegal mining in Ghana: A perspective from the grassroots." *Resources Policy* 33.1 (2008): 29-38.

¹³¹Johannes, Eliza M., Leo C. Zulu, and Ezekiel Kalipeni. "Oil discovery in Turkana County, Kenya: a source of conflict or development?." *African Geographical Review* ahead-of-print (2014): 1-23.

¹³²Howard, Rhoda. "The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa." *Human Rights Quarterly* (1983): 467-490.

¹³³Okoh, Rosemary N. "Conflict management in the Niger Delta region of Nigeria: A participatory approach." *African Journal on Conflict Resolution* 5.1 (2007): 91-114.

the damage caused by oil exploration and production. The relevant authorities ought to take other measures to ensure the host communities benefit from the oil and gas projects.

5.2: RECOMMENDATIONS

Based on the discussion and the findings highlighted in this research paper, the researcher notes that the local community in Turkana County has suffered damage as a result of the activities of Tullow Oil PLC that is engaging in the ongoing oil and gas exploration. The failure to safeguard local community rights in the face of private investors can be attributed to the lack of a robust legal framework in Kenya to provide for compensation. In addition, non-observance of the existing laws on community land and compensation by the government and the oil company has largely contributed to the environmental degradation and land use deprivation among the local community in Turkana County. The researcher therefore recommends the following for consideration by academics, students, Tullow Oil PLC and other private investors, government agencies concerned with land and compensation and the local communities affected by private investment projects:

a) Amendment of Petroleum (Exploration and Production) Act of 1986 to include a Clear, Participatory Community Compensation Procedure.

In light of the inadequacies of the safeguards provided by the existing legal framework on oil and gas, the researcher recommends an amendment to the Petroleum (Exploration and Production) Act 1986 to include a Compensation Procedure for victims of the damage caused by private investments in oil and gas exploration operations.¹³⁴ In the existing legal framework, there is no provision for the procedure to be adopted in compensating the victims of damage. This lack of a community compensation procedure under the Kenyan laws as well as the laws enacted by the County Assembly of Turkana has disadvantaged the local community and exposed it to exploitation by the community elite and the oil company. The influx of foreign populations from other parts of Kenya into the local community with the intention of getting jobs and other benefits raises another legal question as to who the local community includes. The amendment of

¹³⁴Obi, Cyril I. "Global, state and local intersections: power, authority, and conflict in the Niger Delta oil communities." *Intervention and Transnationalism in Africa. Global-Local Networks of Power*, Cambridge (2001): 173-193.

the Petroleum (Exploration and Production) Act to include a Community Compensation Procedure will clearly set out the nature of beneficiaries of compensation paid by the oil company. Apart from reducing conflicts and providing transparency in the compensation, the incorporation of compensation procedure and formula for identifying the quantum of compensation is likely to reduce the complications and ambiguities that currently characterize the compensation process in Kenya.¹³⁵

The Compensation Procedure suggested here provides that the compensation process begins from valuation of land or land use deprivation by professional valuers and with the representatives of the local community being involved. Identification of specific beneficiaries of the compensation amount to be paid ought to be considered next. The third step should then be the payment of the compensation amount to the beneficiaries and handling of complaints, if any, through a complaint handling mechanism.

b) Involvement of Communities in the Determination of the Quantum of Compensation.

The researcher recommends that the government and the oil company should involve host communities in Turkana in the determination of the quantum of compensation. The current practice is dictated by the non-negotiable rates provided by Tullow Oil PLC which is not only injurious to local communities but may also create conflicts that may negatively impact on the oil and gas exploration. A mutually-agreed valuation of expropriated community land as well as land use deprivation should be adopted, taking into account, the interests of the local community.¹³⁶ As the case in Ghana, the determination of the quantum of compensation ought to be done by professional valuers, especially the aspect of valuation of crops and land. This is expected to benefit the local community as it will receive professionally-defined amounts of compensation.

Involvement of the local community encompasses dealing with the designated community representatives such as village elders, local chiefs or county government. It is common for the oil

¹³⁵Kolstad, Ivar, and Arne Wiig. "Is transparency the key to reducing corruption in resource-rich countries?." *World Development* 37.3 (2009): 521-532.

¹³⁶Manby, Bronwen. *The price of oil: corporate responsibility and human rights violations in Nigeria's oil producing communities*. Human Rights Watch, 1999.

company in Turkana to deal with community elites who spearhead their own interests in negotiating for compensation to the detriment of the community.

c) Minimize the Number of Oil Exploration Camps

Most of the conflicts arising between the Turkana pastoralists and Tullow Oil PLC in Turkana have been land-related. The local community considers the expropriation of their traditional grazing lands by the government for oil and gas exploration as an infringement on their land rights and tenure systems. In order to reduce the numerous conflicts, this study recommends that Tullow Oil PLC should minimize the number of oil exploration camps that it establishes so as to reduce the effect on the pastoral economy and livelihood. Currently, Tullow Oil has established fly camps and base camps in each of the six sub-counties in Turkana County. This has created a county-wide revolt against the oil company by the pastoralists affected. The researcher observes that reduction in number of camps will lead to a reduction in the amount of compensation that the oil company may have to pay to the local community.¹³⁷

d) Oil Company Should Obtain the Free Prior Informed Consent of the Local Community

As is the case with other local communities in other parts of the world, it was noted during this research that Tullow Oil did not obtain the consent of the local community before and during the oil exploration. The pastoralists interviewed pointed out the fact that the “oil company came with a letter from Nairobi” and evicted the local pastoralists from their lands without compensating them as required. Consent obtained by the oil company before the beginning of the oil exploration and production should not be limited to the grant of license by the national government. The oil company should engage local communities and their leaders and obtain their consent for it to be given the “social license” to operate by the local community. Regular conflicts and demonstrations against the oil company can be attributed to the failure to obtain the consent of the local community. Consent should also be free and informed and should not be obtained under threats or enticements. It was evident throughout this research that in some cases, Tullow Oil PLC enticed the local village elders with money to give consent for the expropriation of the community land for oil exploration without the consultation of the rest of the community.

¹³⁷Wasser, Samuel K., et al. "The influences of wolf predation, habitat loss, and human activity on caribou and moose in the Alberta oil sands." *Frontiers in Ecology and the Environment* 9.10 (2011): 546-551.

e) Environmental Impact Assessment (EIA)

Oil and gas exploration is a land-related activity which adversely degrades the immediate environment. Activities such as *flaring* that involve the burning of crude oil in order to determine the commercial viability of the oil under exploration pollute the environment and affects the flora and fauna as a result. This study recommends that a comprehensive Environmental Impact Assessment study ought to be undertaken by the Tullow Oil in liaison with the National Environment Management Authority (NEMA) in order to provide information on how the environment in Turkana County will be affected by the oil exploration and how the same can be mitigated. In some jurisdictions such as Canada and Ireland, an oil company is not allowed to proceed with oil exploration without a comprehensive Environmental Impact Assessment report.¹³⁸ The said report ought to be a public document that is accessible to any member of the public. The researcher observed that no adequate Environmental Impact Assessment study had been done by National Environment Management Authority (NEMA) on the effects of the Tullow Oil exploration project in Turkana County. It is therefore recommended that the Petroleum Act should be amended to require oil companies to provide a comprehensive Environmental Impact Assessment report to the relevant government departments and to the public in order for the local community to understand the impact of the project on their environment and how best they have been safeguarded against those effects.

f) Establishment of a Community Compensation Fund (CCF)

This study recommends that a Community Compensation Fund be established by the County Government of Turkana. This fund will be established out of the compensation paid by Tullow Oil to the local community as community compensation for land use deprivation and land expropriated for oil exploration. The fund will be used to benefit the local community affected by the oil and gas exploration and it will promote transparency and accountability in the payment of community compensation. It is the researcher's view that the establishment of this fund will reduce controversies associated with the payment of compensation by Tullow Oil. The Community Compensation Fund should be separate from local taxes paid by the oil company to

¹³⁸Olsgard, Frode, and John S. Gray. "A comprehensive analysis of the effects of offshore oil and gas exploration and production on the benthic communities of the Norwegian continental shelf." *Marine ecology progress series*. Oldendorf 122.1 (1995): 277-306.

the county government. The fund will help in mitigating impacts to local communities as a result of oil and gas exploration and production.

g) Disclosure of Payments Paid by the Oil Company to the Local Community:

“Publish As You Pay”

Transparency in the payment of compensation to the local community in Turkana will be realized if the oil company publishes the amount of compensation it pays to the county government and individual claimants. The principle known as “Publish What You Pay” will enable the local community to claim for benefits from the government with the knowledge that the oil company has compensated them for land loss and deprivation of land use. The local radio stations, newspapers and televisions should be used to inform the community on the amount of compensation paid to the county government on behalf of the local community. Disclosure will bring an end to the “blame-game” between the oil company and the county government with the county government alleging non-payment while Tullow argues that it compensated the local community.

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