



KENYA NATIONAL COMMISSION ON HUMAN RIGHTS



PUBLIC INQUIRY REPORT ON MINING AND IMPACT ON HUMAN RIGHTS

TAITA TAVETA COUNTY, 2016





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ISBN: 978-9966-040-43-5

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This publication was made possible by the financial support of the Royal Norwegian Embassy

COVER DESIGN AND LAYOUT



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PRINTED IN KENYA BY

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PUBLIC INQUIRY REPORT ON MINING AND IMPACT ON HUMAN RIGHTS

TAITA TAVETA COUNTY, 2016

Hon. Justin Muturi, E.G.H.
The Speaker, National Assembly.

Hon. Kenneth Lusaka
The Speaker, Senate.

10 January 2018

LETTER OF TRANSMITTAL

Pursuant to Article 254(1) of the Constitution of Kenya, 2010 and Section 53(1) of the Kenya National Commission on Human Rights Act 2011, I have the honor of submitting to you this Commission report titled: ***Public Inquiry Report on Mining and Impact on Human Rights, Taita Taveta County.***

The purpose of this inquiry report was to unearth human rights violations in Taita Taveta County's mining sector, with a view of enhancing the realisation of human rights in the mining sector in Taita Taveta County.

Please accept, your honor, the assurances of our highest regard.

Yours Sincerely,



Kagwiria Mbogori
Chairperson, Kenya National Commission on Human Rights

Cc,

Cabinet Secretary, Ministry of Interior and Coordination of National Government
Chair, Parliamentary Committee on Administration and National Security
Chair, Senate Committee on National Security and Foreign Relations.

FOREWORD



“National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors”.

The extractive sector in Kenya has become a major theatre of human rights violations especially in the last few years. In the wake of this significance and the development of new standards on human rights in business, there is hence a critical focus on the extractive sector as a key violator of human rights, not just in Kenya but the world. In this regard and in exercise of its mandate, the Kenya National Commission on Human Rights responded to various human rights complaints from the mining sector in Taita Taveta.

In order to address these issues, the Commission developed a four point strategy to address the problem. Capacity strengthening and knowledge building in the community would build a bottom up demand for human rights and transparency and accountability in the extractive sector and also empower the community to conserve the environment, participate fully in the economic activities in mining and help in informing the laws and policies necessary for the mining industry.

Based on the complaints received, it was necessary then to carry out sufficient investigations on the allegations brought before the Commission, to document the investigations ascertained and to report on the findings of these violations in order to come up with the necessary interventions.

For sustainability, adequate outreach and for effective engagements, the Commission took steps to build partnerships and networking with all the key actors, from the community, the CSOs, businesses and government agencies. This was done with the view of coming up with synergized approach to addressing the recommendations coming out of the interventions.

Ultimately a public inquiry was carried out, in August 2016, to open up the investigations to the general public and all interested parties to make presentations on the status or experiences in regard to the enjoyment of fundamental human rights and mining activities in Taita Taveta County. This report documents the Public Inquiry that was held in Taita Taveta and makes recommendations that KNCHR believes will contribute to a transparent and accountable extractive sector in which human rights are protected and respected.



Kagwiria Mbogori

CHAIRPERSON

ACKNOWLEDGEMENTS



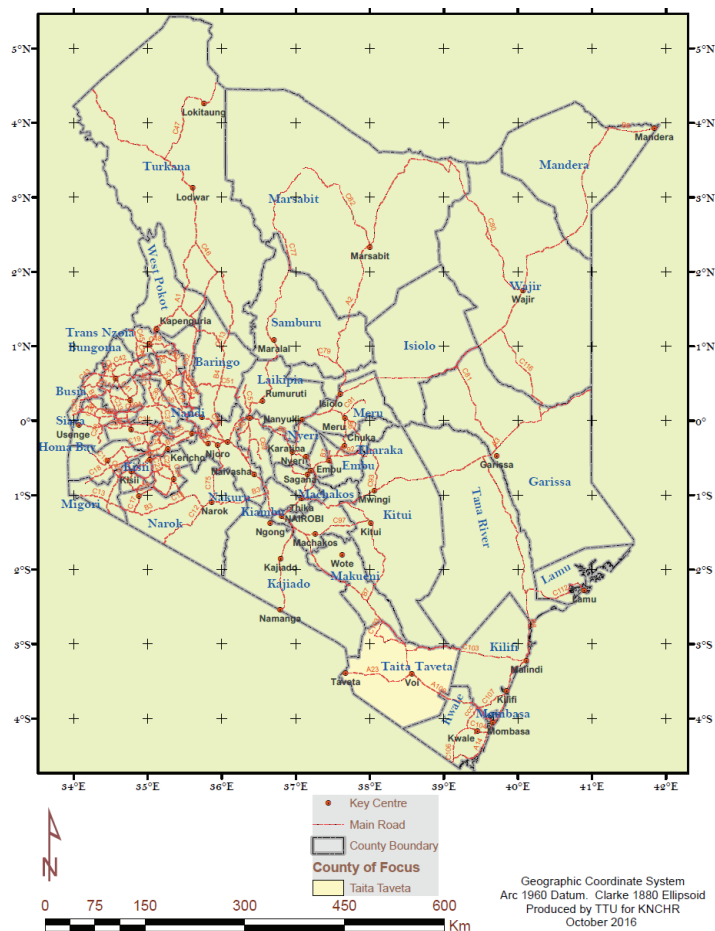
The Kenya National Commission on Human Rights (KNCHR) is grateful to the residents of Taita Taveta County, community and faith-based groups, professionals and investors in the mining business who participated in this public inquiry into the status of human rights in the region's mining sector. This public inquiry could not have succeeded without their courage and generous offer of key information, which formed the basis of this report. The German Corporation for International Cooperation (GIZ) receives special thanks for funding this public inquiry.

The KNCHR highly appreciates the role played by the members of the Public Inquiry Panel: Commissioner Kagwiria Mbogori (KNCHR, Chairperson), Commissioner George Morara (KNCHR Vice Chairperson), Commissioner Shatikha Chivusia, Commissioner Simon Ndubai (NGEC Vice Chairperson), Leonard Omullo (Director of Natural Resources and Environment- NLC) and Engineer Arthur Ndegwa (Mining Expert and Chairman of Department Taita Taveta University College). The competent team received the oral and written submissions in public and in camera from witnesses drawn from Voi, Mwatate and Wundanyi Sub-Counties. The records of the submissions provided a solid base for the violations of human rights identified in this study. Taita Taveta University is acknowledged for providing the core expertise used in data collection, data analysis and technical reporting on the public inquiry process and related key findings. The team from Taita Taveta University was made up of Prof. Hamadi Boga as the Team Leader, Dr. Maurice Ogada as Research Coordinator, Dr. Justin Maghanga as Field Coordinator, Mr. Arthur Ndegwa as Panellist and Mining Engineer, Mr. Nashon Adero as Surveyor and Technical Report Manager, and Mrs. Amina Ndinya and Mr. Shadrack Mwagandi as Research Assistants.

The following leaders deserve special gratitude for sacrificing their busy schedules

to attend the inquiry sessions in person or through their nominated representatives: The Governor of Taita Taveta County, H.E. John Mruttu, and the Deputy Governor, H.E. Mary Ndigha; Josephine Onunga, the County Commissioner, Taita Taveta County; Hon. Thomas Mwadeghu, the Member of Parliament for Wundanyi Constituency; Hon. Mwandawiro Mghanga; Hon. Elijah Mwandoe; Hon. Raymond Mwangola; Hon. Mary Mghanga Mngola; Hon. Omar Ahmed; Hon Mercy Mwakera; Madam Shufaa Mwichuma (DCC Mwatate); and Boniface Kimuzi (Ward Administrator Chakua Ward) among others. They were important key informants and facilitated the acquisition of the key county data, historical records and maps that enriched the contents of the report.

Taita Taveta County Chief Officers and Technical Officers in charge of Lands and Mining, Environment, Security, Administration, Intelligence, Education, Health, Agriculture and Livestock, are acknowledged for their crucial information and administrative support to the inquiry.



Map 0-1: Location of Taita Taveta County within Kenya

ABBREVIATIONS AND ACRONYMS



CBO	Community Based Organisation
CS	Cabinet Secretary
CSR	Corporate Social Responsibility
DCC	Deputy County Commissioner
DPP	Director of Public Prosecutions
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
EMP	Environmental Management Plan
FBO	Faith-Based Organisation
GIS	Geographic Information System
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit (translated German Corporation for International Cooperation)
GNSS	Global Navigation Satellite Systems
GPS	Global Positioning System
ICMM	International Council on Mining and Metals
ISK	Institution of Surveyors of Kenya
KNCHR	Kenya National Commission on Human Rights
KII	Key Informants Interviews
LIS	Land Information System
LSK:	Law Society of Kenya
MCA:	Member of County Assembly
MDA:	Ministries, Departments and Agencies
NACADA	National Campaign Against Drug Abuse
NEMA	National Environment Management Authority
NHIF	National Hospital Insurance Fund
NLC	National Land Commission
NSSF	National Social Security Fund

PFM	Public Finance Management Act
PID	Preliminary Index Diagram
PR	Prospecting Right
RDAP	Rehabilitation and Decommissioning Action Plans
RIM	Registry Index Map
RTK	Real Time Kinematic
TTU	Taita Taveta University
WCED	World Commission on Environment and Development
WRI	World Resources Institute



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EXECUTIVE SUMMARY

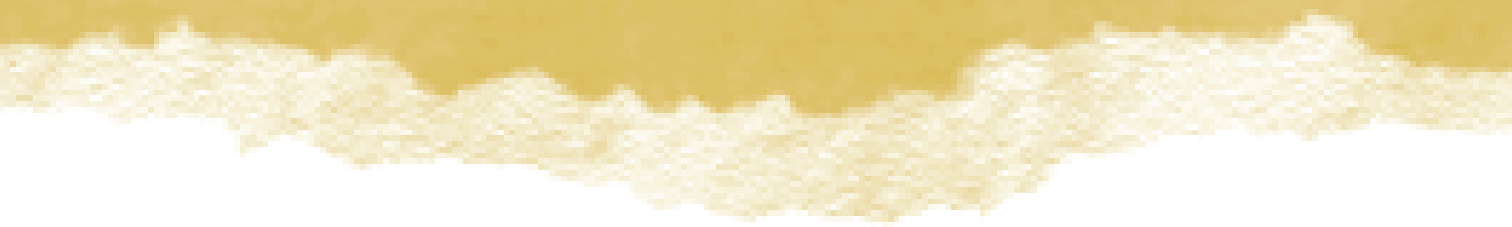


The Kenya National Commission on Human Rights (KNCHR) is an autonomous national human rights institution established under the Kenya National Commission on Human Rights Act, 2011 to promote and protect the rights of people living in Kenya. The 2011 legislation succeeded the earlier Act of 2002 which established the KNCHR. Under Article 59 of the Constitution, there was established the Kenya National Human Rights and Equality Commission. Article 59 further provided for the establishment of several Commissions. The 2011 legislation restructured and assigned the equality function to a new National Gender and Equality Commission (NGEC) and the administrative justice to the Commission on Administrative Justice (CAJ), thereby re-establishing the KNCHR as a separate human rights institution.

As a National Human Rights Institution, the Commission's independence is guaranteed by the Constitution and the operationalizing Act such that it may offer advice to public and private bodies (including the Government) and adjudicate on complaints alleging human rights violations without fearing the possibility of direct or indirect influence or other pressure. Public inquiry into human rights violations is provided for under the Kenya National Commission on Human Rights Act, 2011.

The KNCHR had previously received and documented complaints from individuals and groups in the larger Taita Taveta County in relation to mining activities and the attendant violation of human rights. In response, the Commission deployed several investigative missions to ascertain the veracity of the complaints as a first step in addressing the issues and concerns that had been shared. This Report details the outcome of a public inquiry process on the impact of mining activities on the enjoyment of human rights in Taita Taveta County.

The purpose of the Taita Taveta Public Inquiry was to unearth human rights violations



in the County's mining sector, with a view to enhancing the realisation of human rights in the mining sector in Taita Taveta County. The public inquiry was between August the 22nd and September the 1st, 2016, in the Sub-Counties of Voi, Mwatate and Wundanyi. The exercise involved all the key stakeholders; the community, investors in mining, government and non-governmental stakeholders.

By focusing the analysis and synthesis of the study findings on the pursuit of clear and actionable recommendations, this public inquiry report will help set a baseline for human rights protection in the mining sector, which is among the priority sectors in the Second Medium Term Plan of Kenya Vision 2030.

The key findings and recommendations of the Taita Taveta Public Inquiry are summarised below, under five thematic areas.

Land Rights

Non-inclusivity in decision making and conflicting claims to land rights were evident.

Communities complained of non-involvement in the land ownership decisions affecting potential and active mining areas.

Compromised accuracies in determining the spatial extent of land rights. This finding exposed the gap in implementing accurate land surveys and access to accurate and up-to-date land records.

Delayed and denied enjoyment of claimed land rights. Due to the land ownership disputes that have remained unresolved for long, the communities affected, in Kishushe for example, cannot enjoy the right to use the lands they claim to be theirs, neither for subsistence nor for economic reasons.

Loss of entitlement to land due to irregular practices has given room to some miners to operate without a licence. Double licensing was also noted, with some cases already in court. Most land owners did not have title deeds.



The following recommendations were preferred as a way of effectively addressing violations of land rights:

Spatial planning and land adjudication processes in Taita Taveta County ought to be highly participatory in nature, executed by actively involving local communities in an open, fair and transparent process. Policies and systems must be established and implemented for accurate land surveying and mapping in Taita Taveta's mining areas before allocating any rights to mining on the lands in question. National and County Governments should expedite the establishment of a functional Land Information System (LIS) with seamless digital integration of county-level land records and national land parcel data; such a system is essentially a Geographic Information System (GIS). The judiciary should also speed up the resolution of court cases on land and mining rights, in order to allow mineral investors and land owners to enjoy the economic benefits of the land sections that are rightfully theirs.

Environmental Rights

People are exposed to environmental health and safety risks from the mining activities in Taita Taveta. The open pits and weak support in underground mines have claimed many lives and caused serious injuries to people and animals, with reported cases of collapsing mines, flood waters entering the mines with miners inside, and thugs using the uncovered pits as hideouts. Reports of lack of safety gear for workers meant that they were highly exposed to harmful particles and gases. Pollution of water, soil and air arising from mining activities was observed to be a key source of health problems in the County. Blasting activities cause noise pollution and weakening of the built structures/buildings near the mining areas.

Diminishing environmental benefits and opportunities due to land degradation. Soil erosion from mining activities has claimed farmlands and accelerated siltation of watercourses. Food production has been adversely affected as a result.



Violation of the rights of the present and future generations to sustainable ecosystem.

Deforestation and land clearance to pave way for mining have been key drivers of habitat fragmentation, biodiversity loss and annihilation of the regenerative capacity of the life-supporting ecosystem in Taita Taveta.

The following recommendations were preferred as a way of effectively addressing the findings on violations of environmental rights:

There should be a well-designed health and safety programme for miners and the investors, including mining safety plans, especially underground. There should be strict implementation of a policy on rehabilitation of mine sites after mining activity has stopped. Since some mines could be having radioactive materials, it is important to establish the properties of the minerals in a mining area before embarking on mining. The investors should consider improved mining technologies such as mechanisation of mining activities to reduce risks to workers.

A framework for corporate environmental reporting for the mining sector is required. Strengthening the capacity of Taita Taveta County's Environment Committee and Community-Based Organisations dealing with environment at the grassroots is key. There is a need to develop and implement appropriate Rehabilitation and Decommissioning Action Plans (RDAP), especially for systematic rehabilitation of degraded areas. The idea of establishing a Mining Restoration Fund is worthy of attention. This will support the rehabilitation of degraded areas and addressing other environmental issues in mining.

There is also a need to come up with an Environmental Management Plan (EMP) for the mines. NEMA should ensure compliance with the Environmental Management and Coordination Act of 2015, such that an EIA study is carried out and the mine investors are then licensed. The EIA report normally entails Environmental Management Plan (EMP) which outlines clearly the impacts and the mitigation measures during all the phases of operation including decommissioning. Reclamation practices can then be put in place.

Labour Rights

Subjection of mine employees to sub-optimal pay and violation of employee rights.

The mine workers reported that besides poor pay and long working hours (12 hours a day), they were denied basic rights such as contract letters, leave days, statutory deductions such as NHIF and NSSF, and health insurance. Compensation of injured workers or their families in cases of death was also reported to be lacking.

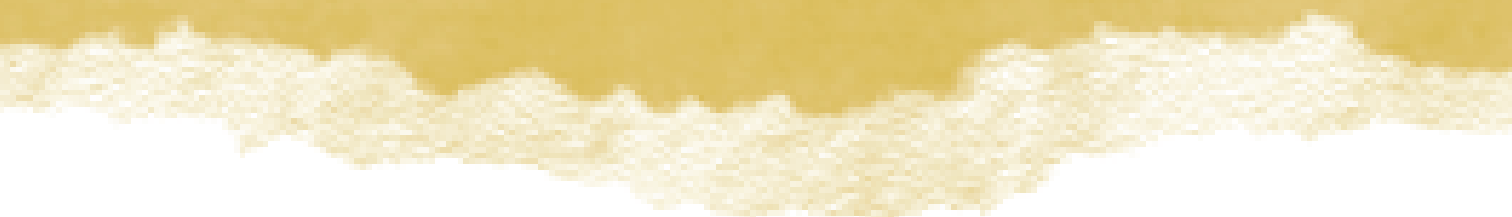
The mine workers reported that they were subjected to risky and unhygienic working environment. They were not getting protective gear to shield them against harmful objects and substances, and against cold nights. Clean water and sanitation facilities were generally missing, most cases being simply deplorable. Poor nutrition of the workers on the mine sites, with cases of unclean foods cooked in dilapidated drums, were cited as part of the evidence.

The following recommendations were preferred as a way of effectively addressing the findings on violations of labour rights:

The welfare of the mine workers should be taken seriously by their employers. The employers should observe strict adherence to labour laws and the relevant provisions for remuneration, written contract, working hours, safety gear, hygienic and safe working conditions, worker compensation policy, leave days, medical insurance and statutory deductions. The mining companies should prepare and strictly implement plans for CSR activities and skills transfer to their employees, since the mine workers have a right to skills transfer and enhancement.

Children Rights

Violation of the right of children to (quality) education, sound nurturing, sound care and respectful treatment. In Kamtonga, for example, it was reported that children dropped out of school to work in the mines. They were also sexually abused by mine workers in various social places due to the allure of money. Their parents, who stay away



on the mine sites for long hours but get poor pay in return, have not been able to accord them quality parenthood and emotional care as a result.

As a key recommendation, it was proposed that there be regular and enhanced monitoring, awareness creation on rights violations and administration of justice with particular focus on identifying violations of children rights to education, to protection against child abuse and sexual harassment and to quality healthcare and parental care. Banning all forms of child labour in the mines and closing bars and businesses that entertain the abuse of children within their premises was also strongly recommended.

Gender Rights


Violation of rights to non-discrimination through equal opportunities. Women reported discrimination against them for the jobs in the mines. They cited cases where they got chased away from the mines by their male colleagues.

Sexual abuse and harassment on the mining sites was noted as well, men not spared. Cases of sodomy were cited. Women have particularly been bearing the brunt of sexual abuse. Extreme cases of assault were reported where women had their private parts searched using hand gloves to remove allegedly “hidden minerals” - an ordeal that forced them to stop working altogether.

Interference with rights in marriage. The cause was reported to be the long absence of some spouses (especially husbands) while working in the mines, leading to denial of conjugal rights. This has forced the abandoned spouses (mainly women) into risky multiple sexual liaisons.

The following recommendations were preferred as a way of effectively addressing the findings on violations of gender rights:

Measures are needed to ensure regular and enhanced monitoring, awareness creation on rights violations, and administration of justice with particular focus on identifying the



plights of the assaulted workers and gender discrimination, especially among female workers. Compensation of the victims of sexual abuse and assault deserves top priority. The cases of sexually abused workers are grave and need to be heard and resolved speedily to avoid impunity and repeated occurrences. The employers of mine workers and the workers/workers' unions need to agree on, come up with, and enforce mutually agreed work policies (in addition to the existing labour regulations). Work schedules should be reformed, to be friendly to sustainable family re-(union).

In conclusion, the Inquiry was able to establish important first-hand information on the violation of human rights in mining in Taita Taveta County. Having come out in the study as an influential determinant of decisions on mining in the County, political will in favour of working with, and for, the local communities holds the promise of transforming the mining sector. The judiciary also has a critical role to play in addressing historical injustices in mining and land rights, supported by alternative dispute resolution mechanisms. This will ensure effective long-term settlement of mining disputes.

Land ownership, the central axis of the reported mining disputes, deserves critical attention. Accurate land surveying meeting the minimum professional standards for cadastral and mine surveying remains the key source of the reliable and objective boundary information essential to administering justice in assigning rights to mining and land ownership. Consequently, local capacity development for proper spatial planning including environmental management plans, and for the impartation and competent application of geo-engineering and resource management expertise, is among the top agenda for positively transforming Taita Taveta's mining sector.

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Chapter 01 **Background to the Public Inquiry Process**

1.1 Introduction

Over the last one year, the Kenya National Commission on Human Rights (KNCHR) has been investigating complaints of alleged human rights violations in the extractive sector in Taita Taveta. The Commission consequently conducted a situational analysis of the sector in the County between 24th and 28th of August 2015 with a view to informing key interventions essential to promoting transparency and accountability in the extractive sector. The ensuing situational analysis identified weighty and complex human rights issues which are cross-cutting and systemic. These issues, converging to form a critical barrier to transparency and accountability, included lack of land titles, labour-related human rights violations, environmental degradation, and lack of citizen participation – aggravated by insufficient information among the citizens on their rights to social and economic justice in benefits sharing.

The KNCHR continued to receive documented complaints from individuals and groups in the larger Taita Taveta County in relation to mining activities and the attendant violation of human rights. In line with its constitutional mandate and strategic objectives, and also in response to the complaints received, the Commission deployed several investigative missions to ascertain the veracity of the complaints as a first step in addressing the issues and concerns shared. A focused analysis and synthesis of raw facts from stakeholders on the ground was therefore justified in the pursuit of clear and actionable recommendations. From the national public policy outlook, this study was meant to



provide a resourceful baseline for informing human rights protection in Kenya's mining sector as a whole.

Towards generating evidence-based insights to inform the recommendations which would be channelled to all the relevant state Ministries, Departments and Agencies (MDAs) as well as non-state actors, the KNCHR scheduled a public inquiry process for the period from 22nd of August to 1st of September 2016. The public inquiry was announced widely through media briefing, community radios activations and agent-based messages throughout Taita Taveta County. The field visits and inquiries took off as scheduled and covered the Sub-Counties of Voi, Mwatate and Wundanyi, within Taita Taveta County. Besides providing clear and actionable recommendations arising from the study, this report sets a firm baseline for further research on mining and human rights beyond the scope that was covered by the public inquiry.

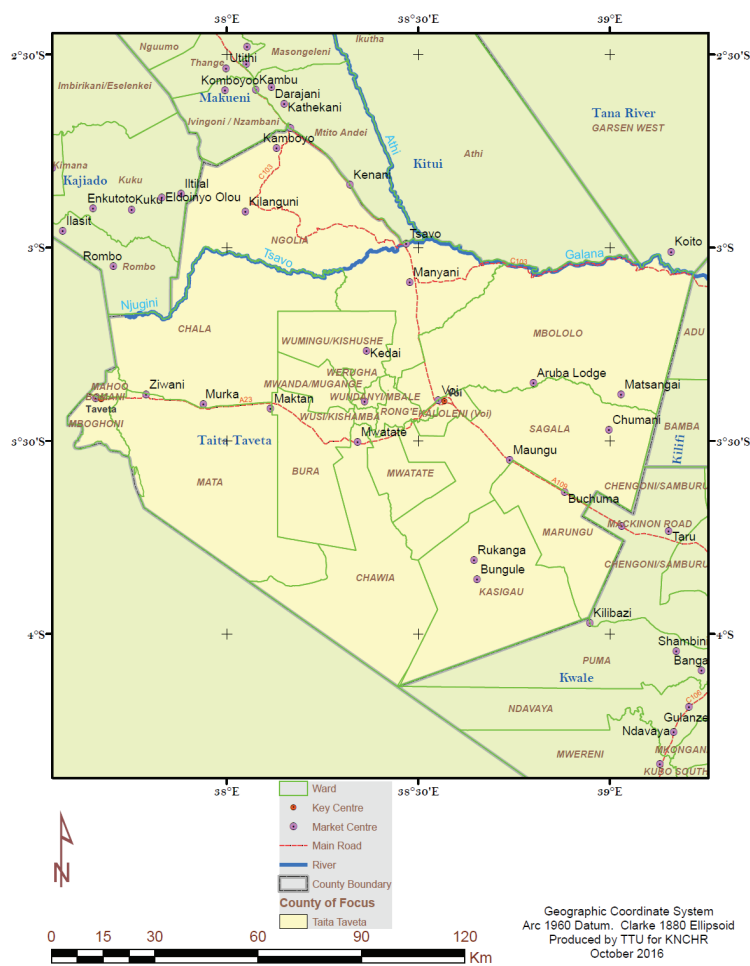
1.2 Basic Socioeconomics of Mining in Context

Many writings decry the failure of the political class to chart sustainable investment choices for economies in the face of mineral discoveries, thereby neglecting the wisdom of investing in renewable substitutes while developing traditional sectors such as agriculture and other well-thought-out alternatives. This skewed increase in the economic development of a specific sector (mining in this example) and the related decline in other sectors has been referred to as the Dutch disease by economists. Any other development that attracts a large inflow of foreign currency and appreciation of the local currency can yield similar consequences. The paradox of poverty amidst vast mineral wealth, including the precious Tsavorites not found elsewhere, is real in Taita Taveta County as this Inquiry established.


Exploitation in the market for minerals can be exacerbated by quality uncertainties that thrive under imbalance of information about a product between the seller and the buyer of the product. This situation is referred to in economics as information asymmetry. Quality uncertainty and how it influences market mechanisms to disfavour parties with less knowledge about product quality was well researched on by economist George



Figure 1-1: Taita Hills decorating the scenic landscape viewed from the cold Ngerenyi area



Map 1-1: Taita Taveta and her neighbouring counties



Akerlof in the 1970s, and documented in his seminal paper, “Market for lemons: Quality Uncertainty and the Market Mechanism”. Uninformed miners, especially the artisanal miners in the County, are not likely to get a fair exchange value for the minerals under such asymmetry of information.

Informed by undesirable experiences, the market for minerals has often been qualified as black or grey. “Black market” or underground/shadow economy is a market which is illegal, hence noncompliant with the laid down institutional set of rules. A “grey market” has commodities getting distributed through channels which, while legal, are unofficial, unauthorised, or unintended by the original producer. The Public Inquiry was therefore keen to observe as well how the stakeholders in Taita Taveta County viewed the minerals market, as shaped by their unique experiences.

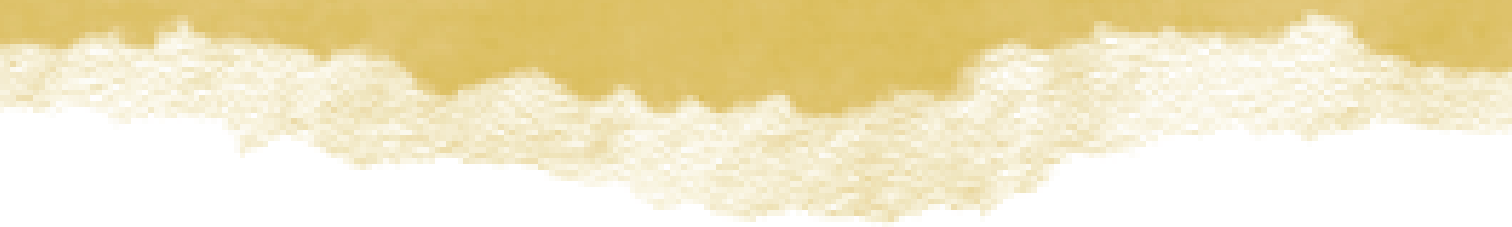
1.3 Study Area

Taita Taveta County is strategically located in Kenya’s coastal mineral belt. It has a rich stock and variety of natural resource endowments which are threatened by human activities, mining included. The strategic location and natural wealth are manifested in the following ways.

1.3.1 Physical Location and Topographical Features

Taita-Taveta County lies in the south-western part of Kenya’s coast between longitudes 37° 30’ and 39° 30’ East and latitudes 2° 30’ and 4° 30’ South. It is approximately 200 kilometres northwest of Mombasa and 350 kilometres south-east of Nairobi. It borders Makueni, Kitui and Tana River Counties to the North; Kilifi and Kwale Counties to the East; Kajiado County to the Northwest; and the Republic of Tanzania to the Southwest (see Map 1-1).

The topography is undulating with altitudes ranging from 500 metres to almost 2,300 metres above sea level. The County is divided into three major topographical zones. The upper zone, suitable for horticultural farming, comprises Taita, Mwambirwa and Sagalla



Hills regions with altitudes ranging between 304 metres and 2,208 metres above sea level (Figure 1.1). The lower zone consists of plains where there is ranching, national parks and mining. The third topographical zone is the volcanic foothills zone which covers the Taveta region with potential for underground water and springs emanating from Mt. Kilimanjaro.

1.3.2 Administrative Divisions, Economic Activities and Demography

The former Taita Taveta District was split into two districts in 2007 to form Taita District and Taveta District. The two were then merged to form Taita Taveta County. This consists of four constituencies: Voi, Mwatate, Wundanyi and Taveta. There are 20 county wards: Mwanda/Mugange, Werugha, Wumingu/Kishushe, Wundanyi, Mwatate, Bura, Chawia, Wusi/Kishamba, Sagala, Kaloleni, Kasigau, Ngolia, Mahoo, Bomani, Mboghoni, Ronge, Mbololo, Marungu, Chala, and Mata.

The lowland areas outside the national parks are divided into about 25 ranches, estates, and wildlife sanctuaries. The ranches are used for grazing as well as wildlife conservation and tourism. The famous Saltlick Lodges sanctuary is located in the County. The economic activities in the County include livestock keeping, small- and large-scale mining, small-scale subsistence farming and small- and micro-enterprises (Rop, 2014).

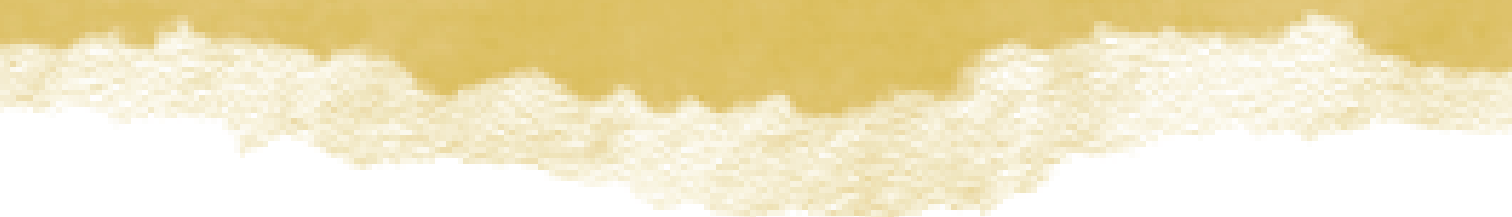
Taita Taveta County's population was estimated at 284,657 persons in 2009 (KNBS, 2009) with population densities ranging from 3 persons per km² to more than 800 persons per km². Tribal groups including the Watta, Taita, Taveta, Orma, Maasai, and Kamba have used the land in the Tsavo ecosystem for thousands of years. Today, there are almost 400,000 people in the Tsavo ecosystem with the majority being subsistence farmers who are dependent on small plots of land for their livelihoods. In the centre of the ecosystem are the Taita Hills, which are densely populated due to much higher rainfall and therefore more agricultural potential in addition to the fact that lower lands are largely designated as a national park. Due to poor climatic conditions, poverty and limited income-generating opportunities, people are often forced to engage in illegal activities such as poaching, bush meat trade and unsustainable charcoal burning.

1.3.3 Ecological and Environmental Characteristics

Taita Taveta County is characterised by a number of ecological regions based mainly on relief and different climatic conditions. The Taita Hills, which cover an approximate area of 1,000 km², rise to a maximum elevation of 2,208 m above sea level (Vuria peak). The mean annual rainfall in these hills ranges from 500 mm in the lowlands to over 1,200 mm in the upper mountain zone. These basically form the highlands. Generally, there are two rainy seasons: one between November and December and the other from March to May. Rainfall is erratic and low and natural permanent water sources are limited, with the Galana, Tsavo and Athi rivers being the only permanent sources. Mzima springs is the major water supplier to Voi town and Mombasa, while small springs and streams include Njukini, Njoro kubwa, Kitobo, Sanite, Maji Wadeni, Humas Springs and Lemonya Springs. There are some permanent artificial water points within Tsavo National Park which were established to prevent wildlife from moving out of the park and to improve the tourist potential within the park.

Out of the County's area of 17,083.9 km², 62% is within Tsavo East and Tsavo West National Parks. Taita Taveta County together with Tsavo East and Tsavo West National Park make up the Tsavo Ecosystem. The Tsavo ecosystem is located at an altitude range between 200m and 1,000m above sea level. The ecosystem comprises distinct elements including rivers, springs, plains, plants and vegetation, and wildlife. The park is an open savannah and bush woodland that supports elephants, buffaloes, lions, antelopes, gazelles, giraffes, zebras, rhinos and a wealth of birdlife. Crocodiles and hippos can be found in riparian areas. The rangeland that is not part of the parks supports livestock, grazing mammals and other wildlife species. The County is one of those classified as having very high average wildlife density. The average wildlife density in Topical Livestock Units (TLU) per km² stood at 4.35 (WRI et al, 2007). The remaining area is mainly occupied by ranches, sisal estates, water bodies such as Lakes Chala and Lake Jipe in Taveta and Mzima springs, and the hilltop forests.

There are about 48 forests which have survived on hilltops in the County of which 28



are gazetted and are under government protection and management. They range in size from small 500 square metres with a few remnant trees to modestly vast 2 square kilometres of indigenous and exotic forest mountains. These forests are part of a unique Eastern Arch range of forests which are found mostly in Eastern Tanzania with the Taita Hills forming the only Kenyan Eastern Arc forest type in East Africa (Rop, 2014).

There are three major vegetation types in the Tsavo ecosystem:

- Mixed Commiphora-Acacia woodland
- Grassland and
- Riverine vegetation.

Mixed woodland dominates the ecosystem. Previously, the Taita Hills were once capped by rich montane forests which comprise the only portion of the eastern arc range of forests in Kenya. The once extensive indigenous forests have been encroached onto, leaving small remnants on the peaks of the hills and ridges. The indigenous cloud forests found there are home to a variety of flora and fauna. This ecosystem, like many others worldwide, is threatened by the dynamics of increased population, socio-politics and economics. The gradual disappearance of these forests can be attributed to the demographic pressure for agriculture, firewood, timber and other wood-related demands from the forests.

Tsavo East and Tsavo West National Park together make up one of the largest national parks in the world, with one of the most spectacular diversities of animals ranging from the large cats to over 200 species of birds. The Tsavo National Park was gazetted in 1959 and has since been one of the major tourist attractions in the country. Unfortunately, local populations have benefited little from tourism and therefore hold negative attitudes towards the wildlife perceiving them more as a burden that destroys crops than anything else.

The natural vegetation of Chunga-Unga area is an isolated block of shrubs and wooded grasslands. These are characterised by different species with dense or moderate stands

of short trees. Many open areas have stands of grass, used for fattening animals in Chunga-Unga. Kishushe has a dense population of tall trees with good undergrowth cover. The area was initially intended for ranching; however, mining came in at a later stage with the discovery of iron ore.

The soil types are red volcanic types of low fertility and contain calcic rocks that normally contain high calcium levels. There is possibility of leaching of these minerals to the underground water as reported by Davies Mining Company in Mkuki, which found high calcium levels in underground water above the recommended NEMA levels.

1.3.4 Economic Geology of Taita Taveta

Taita Taveta County is situated within the Mozambique Belt, which is one of the key geological features of Africa. The belt consists typically of high-grade metamorphic rocks. Geological reports of surveys show the region's mineralogical splendour, rich in precious stones and industrial minerals, and the world's main source of Tsavorites. Pohl and Horkel (1980) documented that Taita Taveta County has gemstones such as Tsavorites (green garnets), red garnets, ruby, blue sapphire, pink sapphire, green tourmalines, yellow tourmalines, rhodolites, and kyanites. The Tsavo region, which forms a large part of the County, is the main gemstone mining area in Kenya (Bridges, 1974). Small-scale mining operations are located along a fault system extending from the Taita Hills of Kenya to the Uмба Valley in northern Tanzania, passing through the Tsavo, Kasigau



Figure 1-2: Products of various gemstones found in Taita Taveta County




Figure 1-3: Training session on gemology, Taita Taveta County

and Kurase areas. Campbell Bridges discovered Tsavorite in 1971 in this place and his company still carries out mining in this area.

Graphite, particularly from the Chawia deposit, may prove economically feasible. Less promising mineralization, mainly with a potential for domestic markets, are magnesite and asbestos occurrences in ultramafic bodies or kaolin and magnetite deposits. The development of bulk commodities such as marble and structural stone depends mainly on an adequate local market potential (Rop, 2014). In Figure 12 is shown a sample of precious products of the gemstones found in Taita Taveta County. Regular training on the County's mineral wealth is regularly conducted (Figure 1-3).

1.4 Rationale of the Public Inquiry Process

Citizen participation has a long history in decision making, dating back to the conceptual “Ladder of Citizen Participation” (Arnstein, 1969). Depending on the power structures in society, citizens may be relegated to the level of non-participation at the bottom of the ladder, tokenism in the middle steps, or they can become active players in exercising citizen power at the upper rungs of the ladder. Then, as now, and into the foreseeable future, the process used to arrive at the recommendations meant to address societal and environmental issues remains a central variable in the equation of finding long-term, people-centred, and ultimately sustainable solutions.



Regarding the public inquiry process, the philosophy encapsulated in Kantian deontological ethics is applicable. The philosophy asserts that the means to an end is no less important than the end; hence, the end does not automatically justify the means. The affected public and other stakeholders in Taita Taveta's mining sector must therefore be part of the decision-making process as active participants whose issues and ideas are both heard and heeded in an open, fair and transparent process. This approach has the advantage of proactively generating key insights for preventive measures, as opposed to reactions that usually come long after expressed public concerns.

To fulfil the requirements for an effective public inquiry, the KNCHR staff provided the required skills and experience in legal issues and human rights. Consultants who possess the requisite qualifications and policy research experience in the subject matters related to mining engineering, geospatial surveys, geology, economics and social sciences contributed technical knowledge. This multidisciplinary team was key to securing a systems understanding of the weighty and systemic issues in the mining sector, as well as scrutinising the technical issues that demand exactitude.

1.5 Objectives of the Public Inquiry

The key objectives of the Inquiry were:

- To hold community forums in Kishushe, Kasigau, Kamtonga and Mwatate area and listen to their submissions on human rights violation in the extractive industry;
- To review and document the environmental, social, legal, regulatory and institutional framework under which the mining sector in Taita Taveta operates at both national and county levels;
- To assess the adequacy of the framework and the capacity of public agencies at national and county levels to address the potential environmental and social impacts of mining sector development in accordance with principles of rule of

law and human rights and

- To analyse the information collected and prepare a technical report.

1.6 Organisation of the Report

This Public Inquiry Report starts with a foreword by the KNCHR, followed by acknowledgement of the key contributors to the study. The Executive Summary highlights the goal of the Inquiry and the key findings that came out of the inquiry process. The first chapter provides the background to the study, which includes a description of the study area, the rationale of the public inquiry, and the objectives. In the rest of the report, we explore the legal and regulatory framework governing the mining sector (Chapter 2); the methodology used to obtain and analyse data (Chapter 3); and the findings of the inquiry with specific reference to violation of human rights and suggestions for dealing with them (Chapter 4). Additional information on the public inquiry is provided in the appendices. The report ends with a list of the reference materials that informed the facts articulated therein.





The public inquiry panel visit to the Chawia Community Based Organization mining site at Mkuki.

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Chapter

02


Legal and Regulatory Framework

1.7 Introduction

Human Rights are those entitlements that every human being possesses and is entitled to enjoy by virtue of being human. The definition of a human being in this context traverses biological and social differences of sex, gender, race, colour, language, national origin, age, class, religious and political beliefs, disability, and minority status, among others. Human rights are internationally guaranteed, legally protected, focus on dignity of the human being, protect individuals and groups, oblige State and Non-State actors and are universal and indivisible.

Mining has positive effects on human rights through wealth creation and alleviation of poverty, development of infrastructure that facilitates social and economic growth, provision of minerals and metals consumed to maintain humanity's modern lifestyles in transportation (making cars, trains, aeroplanes), in communication (making telephones, televisions, computers), in agriculture (making machinery, fertilizers), in energy production (generating electricity from coal, and from nuclear minerals), and in building and construction.

However, by their very nature, mining activities also have the potential to infringe on human rights. Firstly, mining requires use of land and water which are both basic requirements for communities and such use could interfere with their right to an adequate standard



of living. Where mining requires resettlement of the communities, there are chances of their rights being violated in case the resettlement process is not properly executed. Community access to clean water could be adversely affected by mining depending on the degree to which the area is a water-deficit region or not, or whether the mineral processing operations use toxic chemicals or not.

Any alleged violation of human rights in the mining sector should therefore be checked against the provisions of the governing legislations and policies. The legal, regulatory and political aspects of the mining sector in Kenya and their implications for people's rights were therefore reviewed to provide key information for decision making.

As specified in the Mining Act 2016, mineral resources are vested in the Government of Kenya, in trust for the people of Kenya. Articulation of mining rights at the county level, as per the scope of this study, needs to be contextualised within the national legislative framework. The following cross-cutting questions, consequently, guided the interpretations and reflections on the actions that would qualify as human rights violations:

- a) What are the key legal and policy provisions for rights to mining as an economic activity, land ownership, and access to a healthy, safe and secure work and living environment?
- b) With the new Mining Act 2016, how can old mining and land disputes be retroactively and effectively resolved?
- c) How can decision-making processes on rights to mining and land be made more inclusive so as to ensure the parties affected can actively participate in the processes?

1.8 The Policy Framework and Guiding International Agreements

1.8.1 Kenya Vision 2030


Based on the known geology of the country, it can be concluded that Kenya has a great mineral potential. However, since independence mining has been contributing minimally to the country's economy, between 0.5 – 1% of the GDP. As a result, mining did not catch the attention of the country's planners who concentrated on tourism and agriculture. It is in this context that the Mining Sector was not captured in the First Medium Term Plan (2008 – 2012) of the Kenya Vision 2030. It took the discovery of oil in March 2012 and gas in September 2012 to focus attention on the Mining, Oil and Gas Sector. This has led to its inclusion in the Second Medium Term Plan (2013 – 2017) as the 7th Priority Sector of the Economic Pillar of Vision 2030.

Accordingly, the contribution of the Mining Sector to Kenya's GDP has the potential to increase from 1% to 3% by 2017 and to 10% by 2030. The entry of production at the Kwale Mine of Base Resources Ltd has already added 1% to the country's GDP. There are plans by the Ministry of Mining for airborne geophysical survey of the country in 2017. This is expected to intensify mineral exploration once completed, leading to possible discovery of new economic mineral deposits.

1.8.2 The Mining and Minerals Policy (2016)

Kenya Government recently formulated the Mining and Minerals Policy (2016) to enable the country to derive maximum benefits from its mineral potential. The Policy has comprehensively addressed the gaps that have existed in the Mining Sector thereby providing the basis for the review of its almost obsolete legal framework. The Policy has aligned the country's Mining Sector to the aspirations of Kenya Vision 2030, the Constitution of Kenya 2010 and the Africa Mining Vision (2009).

The Policy has provided a firm foundation and basis for the establishment of an enabling framework for accelerated and sustainable development of Kenya's Mining and Mineral



Resources Sector. It also ensures that benefits from the growth of this emerging sector accrues to all stakeholders, including the investors, the local artisanal and small scale miners (ASM), the National Government, the County Governments, the local communities and the people of Kenya. The Policy informed the recently enacted Mining Act 2016.

1.8.3 National Environmental Policy

The National Environment Management Authority (NEMA) is the principal regulatory authority that ensures compliance and enforcement of environment-related legislations in Kenya. The National Environmental Policy of 2013, provides for mineral resource development and exploitation based on the principles of sound management and local participation. There are three main dimensions of the interrelationship between human rights and environmental protection. First is the environment as a pre-requisite for the enjoyment of human rights (implying that human rights obligations of States should include the duty to ensure the level of environmental protection necessary to allow the full exercise of protected rights). Secondly, certain human rights, especially access to information, participation in decision-making and access to justice in environmental matters, are essential to sound environmental decision-making (implying that human rights must be implemented in order to ensure environmental protection). Third is the right to a safe, healthy and ecologically-balanced environment as a human right in itself (this is a debatable approach).

1.8.4 Environmental Rights and Agreements in Global Context

Over the past decade, human rights and environmental sustainability has been given considerable attention. Much attention has been given to States that tolerate human rights and environmental abuses which are brought under international sanction. This has been reflected in the policies of the UN and other international agencies. In 1999, the UN Secretary General launched a Global Compact calling on industries to support and respect the protection of international human rights as well as the environment. Most industries have now appreciated that environmental legislation in the countries they operate in plays a key role in their day-to-day activities, hence cannot be ignored.



International agreements in the form of conventions and protocols have been adopted in areas relevant to sustainable development. These instruments are aimed to oblige governments to pass national legislation and implement their commitment(s) to clean and sustainable environment. Kenya is a signatory to the key international, regional and sub-regional instruments regulating biodiversity conservation and sustainable environmental management. The principles underpinning these international instruments are:

- a) Integration, which entails the management of competing uses in a given area. It requires that compatibilities and trade-offs between and amongst users be dealt with;
- b) Public participation, which highlights three ways in which the public can be facilitated to participate: access to information, participation in decision-making and access to justice;
- c) Inter- and intra-generational equity, which is premised on fairness, thus obligating present generations not to leave future generations worse off by the choices they make today regarding development;
- d) Polluter Pays Principle, which essentially holds that the costs imposed on society and the environment by pollution, must be borne by the polluter. Thus, it promotes the notion that those who burden or harm the environment are required to bear the costs of avoiding, eliminating or compensating for these injuries;
- e) Precautionary Principle, which is premised on the fact that it is better to prevent pollution than to depend on costly control strategies or clean-ups later;
- f) Duty to conduct an environmental impact assessment obligates investors to introduce appropriate procedures requiring environmental impact assessment with a view to avoiding or minimising such effects; and

- g) Subsidiarity, which entails decentralisation and devolution of decision making to the grassroots level.

The Stockholm Declaration of 1972 set out 25 common guiding principles for the preservation and enhancement of the human environment. Principle 1 underlined that:

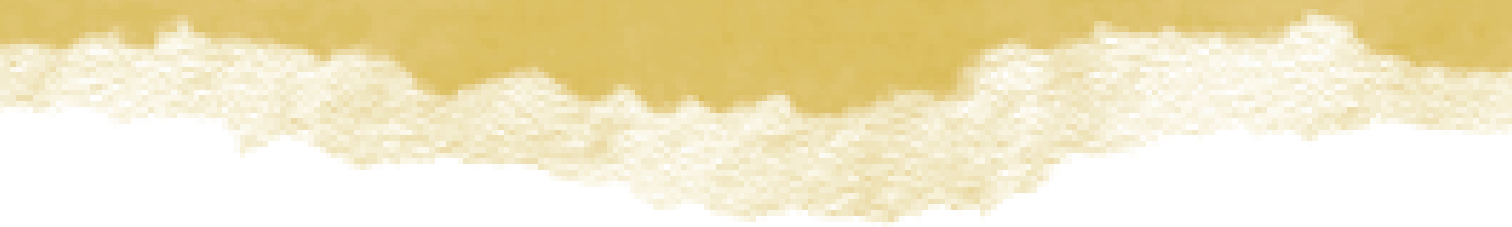
“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

The focus was on the procedural rights of access to environmental information, public participation in decision-making, and access to justice and remedies in the event of environmental harm.

The World Commission on Environment and Development (WCED) in the 1987 Brundtland Report, Principle 1 holds that:

“All human beings have the fundamental right to an environment adequate for their health and well-being.”

The Brundtland Report [4] of 1987 stressed the need for an integrated approach to development policies and projects that, if environmentally sound, should lead to sustainable economic development in both developed and developing countries. The Report emphasised the need for assigning higher priority to anticipating and preventing problems and also defined sustainable development as development that meets present and future environment and development objectives. It concluded that without an equitable sharing of the costs and benefits of environmental protection within and between countries, neither social justice nor sustainable development can be achieved.



The Rio and Johannesburg Summits were key UN conferences on environment and sustainable development. Notably, the 1992 Rio Earth Summit (Rio Declaration and Agenda 21), the 2002 World Summit on Sustainable Development (Johannesburg Summit), and the Millennium Summit, reflected on the relationship between human rights and environment.

The Rio Declaration recognised the critical role that the exercise of human rights plays in sustainable development by public participation, access to information and access to judicial remedies, and well-recognised procedural rights in environmental matters. Principle 10 emphasised this in stating that:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

The relationship between human rights and environmental rights was affirmed by the International Court of Justice opinion in *Gabcikovo-Nagymaros Case* (Hungary–Slovakia) of 1997, in which Judge Weramantry stated:

“The protection of the environment is a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.”

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) imposes a duty on the State parties to ensure that women “enjoy adequate living conditions, particularly in relation to water supply”.

“The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal, and domestic hygienic requirements.”

On 25 March 2009, the Human Rights Council adopted its second resolution on human rights and climate change. It reinforced the importance of applying a human rights-based approach to the global response to climate change. This resolution affirmed that:

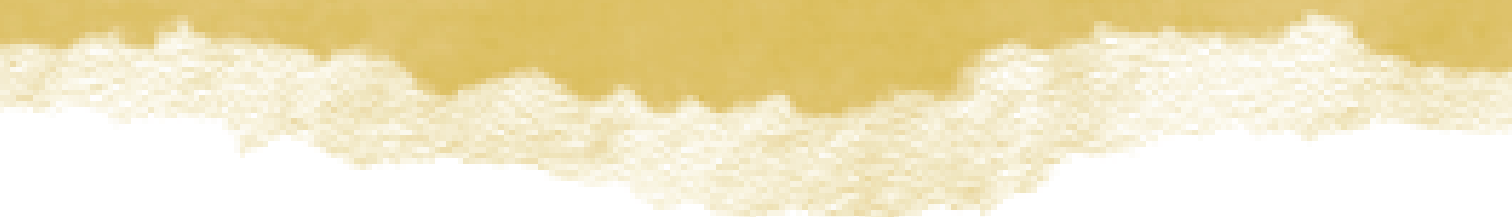
“...human rights obligations and commitments have the potential to inform and strengthen international and national policy making in the area of climate change...”

1.8.5 The UN Guiding Principles on Business and Human Rights

Mining is a business like any other business, even though it could be more complex and larger in scale with greater and far-reaching impacts on human rights if not well managed. Accordingly, mining falls directly under the auspices of all international initiatives on human rights. Among these are the “UN Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”. The Human Rights Council endorsed the Guiding Principles in its Resolution 17/4 of 16th June 2011.

The Guiding Principles are grounded in recognition of:

- A. States’ existing obligation to respect, protect and fulfil human rights and fundamental freedoms;
- B. The role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights;



The need for Rights and Obligations to be matched to appropriate and effective remedies when breached.

A. The State Duty to Protect Human Rights


Foundational principles

- States must PROTECT against Human Rights abuse within their territory and/or jurisdiction by third parties, including Business Enterprises. This requires taking appropriate steps to Prevent, Investigate, Punish and Redress such abuse through effective policies, legislation, regulations and adjudication;
- States should set out clearly the expectation that all Business Enterprises domiciled in their territory and/or jurisdiction respect Human Rights throughout their operations.

Operational principles

In meeting their duty to Protect, States should:

- Enforce laws that are aimed at, or have the effect of, requiring Business Enterprises to Respect Human Rights, and periodically to assess the adequacy of such laws and address any gaps;
- Ensure that other laws and policies governing the creation and on-going operation of Business Enterprises, such as corporate law, do not constrain but enable business respect for Human Rights;
- Provide effective guidance to Business Enterprises on how to respect Human Rights throughout their operations;
- Encourage, and where appropriate require, Business Enterprises to communicate



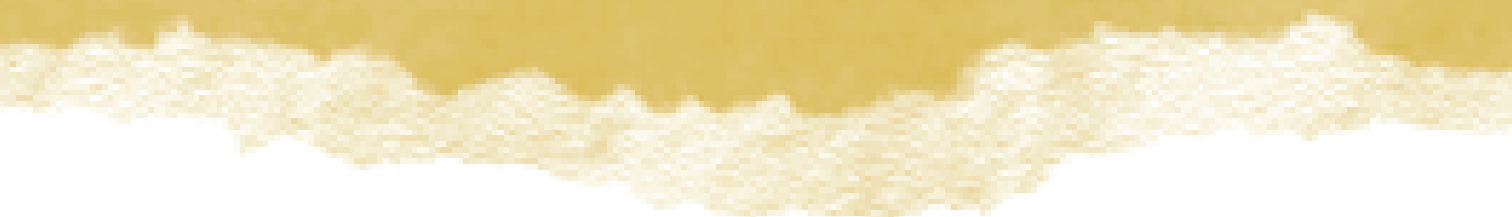
how they address their Human Rights impacts.

- States should take additional steps to protect against Human Rights abuses by Business Enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring Human Rights Due Diligence.
- States should exercise adequate oversight in order to meet their international Human Rights obligations when they contract with, or legislate for, Business Enterprises to provide services that may impact upon the enjoyment of Human Rights.
- State should promote Respect for Human Rights by Business Enterprises with which they conduct commercial transactions

B. The Corporate Responsibility to Respect Human Rights

Foundational principles

- Business Enterprises should Respect Human Rights. This means that they should avoid infringing on Human Rights of others and should address adverse Human Rights impacts with which they are involved.
- The Responsibility of Business Enterprises to Respect Human Rights refers to internationally recognized Human Rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s declaration on Fundamental Principles and Rights at Work.
- The responsibility to Respect Human Rights requires that Business Enterprises:

- 
- a) Avoid causing or contributing to adverse Human Rights impacts through their own activities, and address such impacts when they occur;
 - b) Seek to prevent or mitigate adverse Human Rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.
- The Responsibility of Business Enterprises to Respect Human Rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that Responsibility and may vary according to these factors and with the severity of the enterprise's adverse Human Rights impacts.
 - In order to meet their Responsibility to Respect Human Rights, Business Enterprises should have in place policies and processes appropriate to their size and circumstances, including:
 - a) A Policy Commitment to meet their Responsibility to Respect Human Rights;
 - b) A Human Rights Due Diligence Process to identify, prevent, mitigate and account for how they address their impacts on Human Rights;
 - c) Processes to enable the Remediation of any adverse Human Rights impacts they cause or to which they contribute.

Operational principles

- As the basis for embedding their Responsibility to Respect Human Rights, Business Enterprises should express their Commitment to meet this Responsibility through a Statement of Policy that:

- a) Is approved at the most senior level of the Business Enterprise;
 - b) Is informed by relevant internal and/or external expertise;
 - c) Stipulates the Enterprise's Human Rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
 - d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
 - e) Is reflected in operational policies and procedures necessary to embed it throughout the Business Enterprise.
- In order to identify, prevent, mitigate and account for how they address their adverse Human Rights impacts, Business Enterprises should carry out Human Rights DUE DILIGENCE. The process should include assessing actual and potential Human Rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human Rights Due Diligence:
 - a) Should cover adverse Human Rights impacts that the Business Enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
 - b) Will vary in complexity with the size of the Business Enterprise, the risk of severe Human Rights impacts, and the nature and context of its operations;
 - c) Should be on-going, recognising that the Human Rights risks may change over time as the Business Enterprise's operations and operating context evolve.

- Where Business Enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their Remediation through legitimate processes.

C. Access to Remedy

Foundational principle

As part of their duty to Protect against business-related Human Rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have ACCESS to effective REMEDY.

Operational principles

- States should take appropriate steps to ensure the effectiveness of domestic JUDICIAL Mechanisms when addressing business-related Human Rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to Remedy.
- States should provide effective and appropriate NON-JUDICIAL grievance mechanism, alongside judicial mechanisms, as part of a comprehensive State-based system for the Remedy of business-related Human Rights abuse.
- States should consider ways to facilitate access to effective NON-STATE-based grievance mechanisms dealing with business-related Human Rights harms.

To make it possible for grievances to be addressed early and remediated directly, Business Enterprises should establish or participate in operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

1.8.6 International Council on Mining and Metals (ICMM)

The mining industry, being desirous of promoting its image as a contributor of minerals and metals to sustainable development, formed the International Council on Mining and Metals (ICMM) in 2001. Today, ICMM brings together 23 mining and metals companies, 34 national and regional mining associations and global commodity associations to maximise its contribution of mining, minerals and metals to sustainable development. ICMM Member companies employ close to 1 million of the approximately 2.5 million people working in the mining and metals sector worldwide. Among them these companies have some 800 operations in over 60 countries producing 30 – 40% of the world's hard mineral commodities including iron ore, gold, platinum and nickel.

The ICMM commissioned a series of publications to describe the contribution of mining and metals to sustainable development, setting out some of the more important benefits, costs, risks and responsibilities related to mining and metals in today's world. The series was launched at the Rio+20 Summit in June 2012 and comprised the following publications:

1. "Mining's Contribution to Sustainable Development", which provided an overview of the Series and introduced the concept of Contribution Analysis.
2. "The Role of Mining in National Economies", which examined the contribution of mining activities in all countries with an overview of the contribution to the global economy.
3. "Trends in the Mining and Metals Industry", which provided a forward-looking discussion of trends likely to govern the evolution of the Industry over the next decade.
4. "Uses of Minerals and Metals", which offered a treatment of the current and future contribution of minerals-based and metals-based products to sustainable development.

- 
5. “The Role of Minerals and Metals in a Low Carbon Economy”, which focused on the materials needed for the technologies to address the Climate Change challenges.
 6. “Human Rights, Social Development and the Mining and Metals Industry”, which focused on the role of business in contributing to the realization of Human Rights.
 7. “Mining and the Environment”, which looked at how mining companies are tackling the challenge of achieving a net positive contribution from their activities.

Extracts from the ICMM Publication of “Human Rights, Social Development and the Mining and Metals Industry” of June 2012:


The Publication stated that:

There is international consensus that Business has a responsibility to respect human rights, distinct from State’s duty to Protect and help realize the Rights of its citizens. Mining and Metals Sector has an extraordinary potential to contribute to the realization of Human Rights by playing an important role in Social Development and Poverty Alleviation.

1.8.7 The Respective Roles of States and Business with Respect to Human Rights

There is wide acceptance that the primary responsibility for social development, poverty alleviation and the protection and realization of Human Rights lies with Sovereign States. It is the States that have ratified International Conventions and adopted UN Resolutions relating to Human Rights, Development and Environmental Protection. States are also responsible for developing Legal Frameworks in Support of Development, the Management of Natural Resources on which development depends, as well as protecting the Human Rights of citizens.

However, it is increasingly recognized that Business has both a Responsibility to Respect



Human Rights and an important role to play in contributing to social development and poverty alleviation. The concept that Business has Responsibilities with respect to Human Rights has evolved significantly over the past two decades. The complete absence of any explicit acknowledgement of Human Rights as a Business issue in either the Rio Declaration or Agenda 21 in 1992 has given way to a global consensus on a baseline responsibility for Business to Respect Human Rights. This global consensus found expression in the United Nation's **“Protect, Respect and Remedy”** Framework and endorsed by the Human Rights Council in 2008, which outlined the Duty of States to Protect and Promote Human Rights.

It also outlined Corporate Responsibility to Respect Human Rights – not to infringe on the Rights of others and to remediate any negative impacts arising from Business activities. The Responsibility to Respect Human Rights – and to discharge this Responsibility through Human Rights DUE DILIGENCE – was further elaborated in the UN **“Guiding Principles on Business and Human Rights”**, formally endorsed by the UN Human Rights Council in 2011.

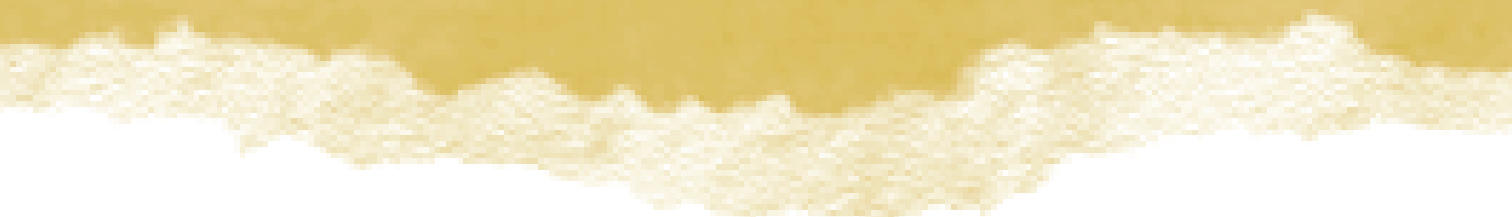
1.8.8 Human Rights Risks and the Mining and Metals Sector

Human Rights Due Diligence Processes identify potential human rights risks and impacts that need to be addressed. An additional benefit of the Due Diligence Process is the building of internal awareness and understanding about where a company's activities have the potential to intersect with human rights and infringe upon the enjoyment of rights by others. Once risks and impacts have been identified, actions can be taken to prevent or mitigate potential human rights impacts and remediate actual impacts that have occurred.

1.8.9 Mining and Gender

Some key gender terminologies are:

Gender: Gender refers to the social differences between females and males throughout



the life cycle that are learned and, though deeply rooted in every culture, are changeable over time and have wide variations both within and between cultures. Gender determines the roles, power, and resources for females and males in every culture.

Gender roles: Gender roles are reflected in activities ascribed to men and women on the basis of perceived differences, which are reinforced through the gender division of labour. This arises from the socialization of individuals from the earliest stages of life through identification with specific characteristics associated with being male or female.

Gender equality: Gender Equality or equality between women and men refers to the equal enjoyment by females and males of all ages, and regardless of sexual orientation, of rights, socially valued goods, opportunities, resources, and rewards. Equality does not mean that women and men are the same but that their enjoyment of rights, opportunities, and life chances are not governed or limited by whether they were born female or male.

Gender equity: Gender Equity is the process of being fair to women and men. To ensure fairness, measures must often be available to compensate for historical and social disadvantages that prevent women and men from otherwise operating on a ‘level playing field’. Equity leads to equality.

Gender-based Violence: Is an umbrella term for any harmful act that is perpetrated against a person’s will, and that is based on socially ascribed (gender) differences between males and females. Acts of GBV violate a number of universal human rights protected by international instruments and conventions. Many forms of GBV are illegal and criminal acts in national laws and policies.

International Instruments that specifically address gender-based violence and related issues include: Declaration of Human Rights; Convention of the Rights of the Child; Convention on Elimination of All Forms of Discrimination against Women; African Charter on Rights and Welfare of the Child; United Nations Declaration on the Elimination of Violence Against Women; Beijing Declaration and Platform for Action; and International Humanitarian Law (Geneva Conventions).

United Nations Initiatives

a) United Nations Entity for Gender Equality and Empowerment of Women (UN Women)

The United Nations General Assembly established the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) in July 2010, with the mandate to assist countries and the UN system itself to progress more effectively and efficiently towards the goal of achieving gender equality and women's empowerment and upholding women's rights. In Kenya, UN Women is partnering with the National Gender and Equality Commission (NGEC) in improving the ability of the Commission to carry out its mandated oversight role.

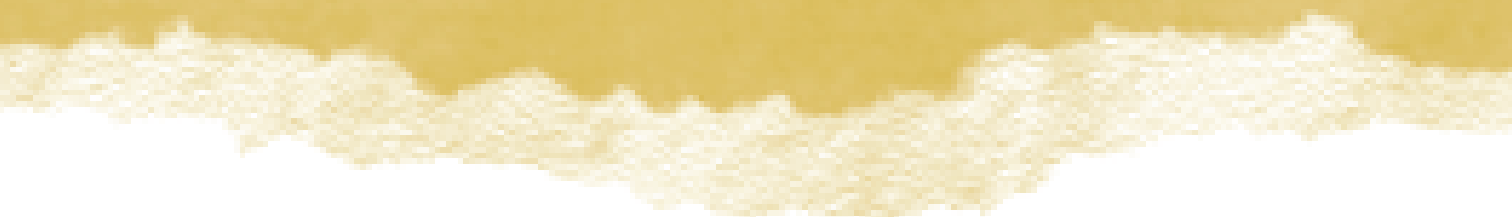
b) UN Development Assistance Framework (UNDAF 2014 – 2018)

The UN Development Assistance Framework (UNDAF) for Kenya 2014 – 2018 is an expression of the UN's commitment to support the Kenyan people in their self-articulated development aspirations. The UNDAF has been developed according to the principles of the UN's 'Delivering as One' initiative. It is aligned with the Government of Kenya's Vision 2030 and Medium-Term Plans. The UNDAF is also internally coherent with the programmes of UN agencies operating in Kenya. In Kenya, the UN Vision on Gender is to contribute towards the achievement of gender equality by 2018. The UN Women has also partnered with the Ministry of Mining to mainstream gender into its Mining Policy, Mining Act and the Mining Regulations currently in draft form.

1.9 The Legislative Framework

1.9.1 The Constitution of Kenya

The Constitution of Kenya 2010 is the umbrella instrument in the administration of natural resources. It classifies "minerals" as "Public Land" under Article 62 (1) (f) and then Article 63 (3) vests them in the National Government. This classification has the



advantage that when it comes to compulsory acquisition of Private Land for mining, there will be no difficulties experienced in the previous Constitution under which it was nearly impossible to acquire Private Land for Mining because acquisition was only permitted for a “Public Purpose” while the said Constitution did not list mining as a public purpose.

Article 69 (1) (a) gives the State the responsibility for sustainable exploitation, utilisation, management and conservation of the Environment and Natural Resources and ensure the equitable sharing of the accruing benefits. It also gives (in 69 (1) (h)) the State the responsibility to utilise the Environment and Natural Resources for the benefit of the people of Kenya (69 (1) (h)). In the Fourth Schedule where the Functions are distributed between the National Government and the County Governments, the Constitution again gives the National Government the responsibility for: “Protection of the Environment and Natural Resources with a view to establishing a durable and sustainable system of development...” This reinforces Article 69 (1) (a) and (h).

Article 209 (1) (a) provides that only the National Government may impose Income Tax, but some counties have attempted to impose income tax on mining.


Article 10 (b) provides for “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized.

Article 20 (4)(a): In interpreting the Bill of Rights, a Court, Tribunal or other authority shall promote: the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.

Article 21 (3): All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons living with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

1.9.2 The Mining Act 2016

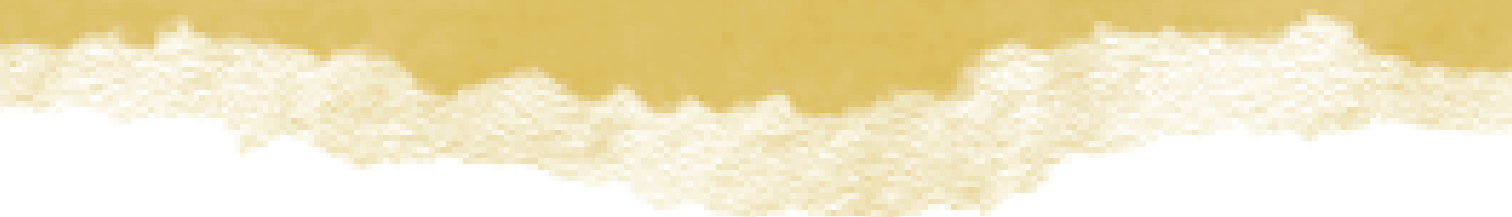
The (new) Mining Act, 2016 was signed into law by the President on 27th May 2016. The



Mining Act gives effect to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution of Kenya 2010 in so far as they apply to minerals and further provides for the prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes. The Act states that every mineral is a property of the Republic, vested in the National Government in trust for the people of Kenya, be it in, under or upon land/water body – including in the exclusive economic zone and areas covered by the territorial sea or continental shelf. This definition gives mining rights an important spatial context.

Besides breathing life into the respective Constitutional provisions, the Act introduces key aspects that seek to streamline mining operations in the country. For instance, the Act provides for the recognition and legalization of artisanal miners; the use of the Online Mining Cadastral portal for the licensing and management of mineral rights and permits as a way of enhancing transparency and accountability in the Mining sector. The recognition of small scale and artisanal miners provides an important platform for local communities to directly engage and benefit from mining activities. Under Section 4 of the Act, Artisanal mining is defined as traditional and customary mining operations using traditional and customary ways and means. The Cabinet Secretary in charge of Mining is tasked with establishing offices in the Counties headed by a representative of the Director of Mines. This representative is vested with the power upon seeking advice from the Artisan Mining Committee to grant, renew and revoke artisan mining permits as stipulated under Section 95 of the Act. The representative is further required to supervise and monitor artisanal mining operations to ensure they conform to the law.

The Act further establishes several key offices each with distinct and clearly defined mandate for purposes of oversight and proper functioning in the sector. For instance, Mining Act 2016 establishes a state mining corporation to undertake commercial activities on behalf of the government whilst the Directorate of Mines is mandated to regulate the sector and the Directorate of Geological Survey to develop the national geological database and promote interest in the mining sector. Notably, the Cabinet Secretary in charge of Mining is mandated to oversee the general administration of the Act including policy matters. In addition, other key players include the county governments, the National



Land Commission, the community among others. This separation of administration, regulation, oversight is intended to enhance accountability and streamline operations in the Mining sector.

The Act also introduces Community Development Agreements (CDAs) which are mandatory for all holders of large scale mining rights before commencing operations. The CDAs provide for a mode of sharing of royalties among the national government, the county governments and the local communities neighbouring mining zones.

Notably, the Act replaces the pre-independence Mining Act Cap. 306 which was enacted in 1940. The repealed Act was critiqued for containing archaic provisions and further centralizing more powers in the office of the Commissioner of Mines and Geology. For instance, the Commissioner of Mines was responsible for the policy matters, overseeing mining research and further implementation of the Act. The Act did not also make any provision for technological, economic and environmental advancements.

1.9.3 The Environment Management and Co-ordination (Amendment) Act, 2015

In Kenya, the Environmental Management and Coordination Act (EMCA) of 2015 recognises the right to a clean and healthy environment and requires every person in Kenya to safeguard and enhance the environment. The EMCA, 2015, is the principal regulatory instrument that governs environmental management and utilisation of natural resources. The following principles of sustainable development are the main focus of this recent legislation:

- Public participation;
- Social and cultural concerns;
- Intra and intergenerational equity;
- International cooperation;

- The polluter pays principle and
- Precautionary principle.

The legislation further provides for various environmental management tools, including planning, impact assessment, audit and monitoring, quality standards and good record keeping, as frameworks for sustainable environmental management. Unfortunately, NEMA is yet to promulgate any of these environmental quality standards. The Government is also committed to protection of the health and safety of employees in the workplace (Employment Act, Occupational Safety and Health Act, Work Injury Benefits Act).

The Environmental Management and Coordination (Amendment) Act, 2015 is an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. The main objectives of the Act are to:

- a) Provide guidelines for the establishment of an appropriate legal and institutional framework for the management of the environment in Kenya;
- b) Provide a framework legislation for over 77 statutes in Kenya that contain environmental provisions; and
- c) Provide guidelines for environmental impact assessment, environmental audit and monitoring, environmental quality standards and environmental protection orders.

The Act empowers the National Environment Management Authority (NEMA) to exercise general supervision and co-ordination over all matters relating to the environment, and to be the principal instrument of government in the implementation of all policies related to the environment.

1.9.4 Environmental Impact Assessment & Audit Regulations (2015) Legal Notice No. 101


The Environmental Impact Assessment and Audit Regulations state in Part III Rule No. 6 that an environmental impact assessment study shall be conducted in accordance with the terms of reference developed. Part III Rule 16, takes into account environmental, social, cultural, economic, and legal considerations, and shall:

- a) Identify the anticipated environmental impacts of the project and the scale of the impacts;
- b) Identify and analyse alternatives to the proposed project;
- c) Propose mitigation measures to be taken during and after the implementation of the project;
- d) Develop an environmental management plan with mechanisms for monitoring and evaluating and
- e) Ensure compliance and environmental performance which shall include the cost of mitigation measures and the time-frame of implementing the measures.

1.10 Legal Provisions for Shared Roles in Natural Resource Management

The Constitution of Kenya 2010 under Article 69 (1) (a) bestows on the State the responsibility to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and to ensure the equitable sharing of the accruing benefits and revenues raised nationally among national and county governments. The concept of equitable sharing is also extended to the burdens and benefits of the use of resources between present and future generations.

Assigning the role of management of mineral resources is, however, heavily dependent



on how “land” is defined in spatial context and material contents. This fact positions the land question at the centre of public inquiry into human rights violations in the mining sector. This central position is manifested in the number of land-related laws. These are the National Land Commission Act, the Land Act, the Land Registration Act and the Environment and Land Court Act. These laws were enacted in 2012 with the aim of revising, consolidating and rationalising land laws in Kenya.

The National Land Commission (NLC) has the overall mandate to manage public land on behalf of the national and county governments. Mineral resources, being part of the definition of land, invoke the question of involving the NLC as a key stakeholder in the shared role of mineral resource management. County governments are also empowered under the Constitution to make important decisions on land and natural resource management, thereby giving them a key role to play in natural resource management at the county level.

The management of public finance at the county level to ensure public policy goals are met without discrimination is enunciated in the Public Finance Management Act (PFMA). The Act is meant to align the management of public funds in line with the new principles of financial management in Article 201 of the Constitution of Kenya 2010. At the county level, the institutional architecture for public finance management includes County Assemblies, the County Executive Committee, County Treasuries, the County Executive Member in charge of finance, accounting officers of the county government, receivers and collectors of revenue and the County Budget and Economic Forum. The County enacts its Financial Bills that inform fees, rates, licences, charges, levies, benefits sharing, cess and all other revenue streams.

From the above discourse, it is notable that obligation has been placed on Kenya’s state organs (Government Ministries, Departments, Agencies), County Governments, and the public to help formulate, review and implement policies and regulations that conform to the agreed local, national and international provisions for protecting human rights, environmental sustainability, and mainstreaming gender and disability issues into policies and legislations.



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Chapter

03

Methodology

1.11 Introduction

This chapter examines how the public inquiry was conducted: pre-inquiry hearings and identification of witnesses; types and sources of data; data collection and analysis; and quality control. It also briefly examines the technical foundation underpinning land demarcation for rights in mining, which is a critical issue in the assignment of rights to enjoying the utilisation and benefits of any given space with respect to mineral extraction.


1.12 Pre-Inquiry Hearing and Identification of Witnesses

Prior to the launch of public hearing, there were pre-inquiry hearing sessions in the following areas between 13th July, 2016 and 29th July, 2016 (Table 3-1).

Table 3-1: Pre-inquiry hearing sites in Taita Taveta

Place of hearing	Sub-County
Kasigau	Voi
Kishushe	Wundanyi
Chunga-Unga; Kamtonga; Mariwenyi; Mkuki	Mwatate

The aim of pre-inquiry hearing fora was to provide an opportunity to the local communities



to raise the issues afflicting them as a result of the mining activities in each respective areas.

The team further had courtesy calls and held meetings with duty bearers from both the national and the county governments. Discussions were also held with representatives of large mining companies in the Sub-Counties. Overall, pre-hearing was done through site visits, individual and group interviews and Key Informant Interviews (KII).

Victims were encouraged to record statements, indicating the violators, whether ordinary members of the community, companies or government officers. Other members of the communities, who may not have been victims but had information relating to violations, were also encouraged to volunteer information to support the public inquiry process. The victims discussed their experiences with the legal officers of the KNCHR. Credible witnesses were identified and prepared to present their evidence to the inquiry panel, detailing the nature and depth of the violations. The details of these witnesses, complete with telephone contacts, were recorded. The agreed hearing venues and other logistical arrangements for the public hearing were, thereafter, communicated to this set of witnesses.

1.13 Public Inquiry Locations

The public inquiry was held over the period from 22nd August to 1st September, 2016. The Sub-Counties covered were Voi, Mwatate and Wundanyi. Specific inquiry venues were Kasigau, Kamtonga and Kishushe. Community members, mining companies, and stakeholders from both government and non-governmental institutions participated in the inquiry.

The exercise was complemented by actual visits to the mines at the centre of the issues raised by the public. The mine investors also shared their views as part of the intended transparent framework for active and inclusive stakeholder participation. Map 3-1 provides an overview of the areas visited during the public inquiry, including Wanjala Mine (see Figure 3-1), Chawia Minerals CBO in Mkuki, Aqua Mine, Lillian Mercy's mine

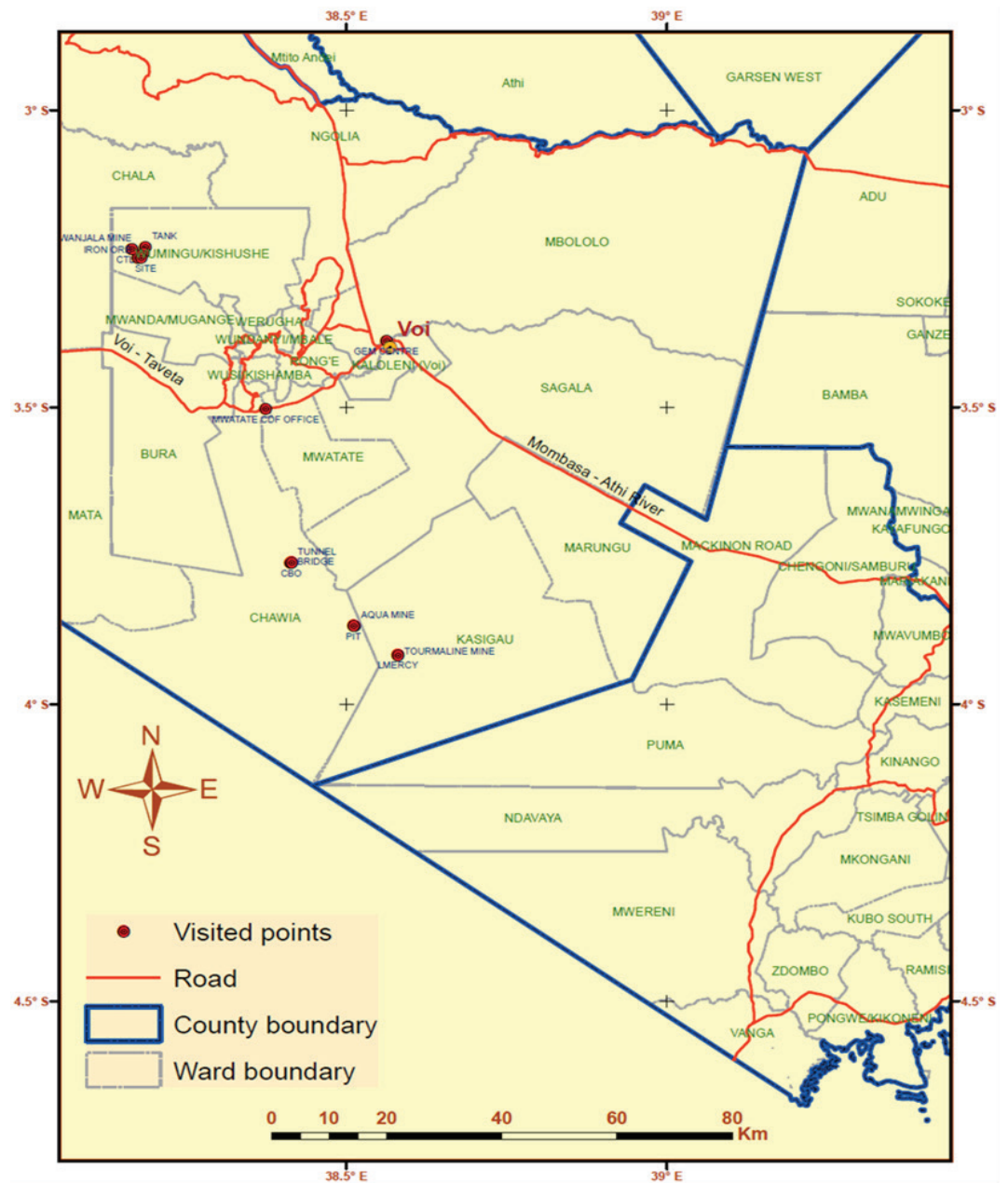
site, Mwatate CDF office, and the Gem Centre in Voi. The specific locations were mapped during the inquiry using hand-held GPS.



Figure 3-1: Iron ore at Wanjala Mine



The on-going construction works of The Gem Centre in Voi Town.



Map 3-1: Points visited during the public inquiry

1.14 The Conduct of Public inquiry

The public inquiry had two distinct sessions: Public hearings and In-Camera hearings.

1.14.1 Public Hearings

Before the start of each hearing session, the Chair of the Panel informed the public and witnesses of the possibility of having in-camera hearings. The public hearings were presided over by a panel of KNCHR and NGEK commissioners, a representative from the NLC Secretariat and co-opted experts in mining. The panel listened to the evidence presented by individual or group witnesses and probed for detailed understanding or clarification. A total of 48 witnesses were listened to, six of them female. Table 3-2 provides a summary of the number of witnesses listened to by the locations visited.

Table 3-2: Number of witnesses interviewed by location and gender

Inquiry venue	Number of witnesses		
	Female	Male	Total
Kasigau	2	13	15
Kamtonga	3	23	26
Kishushe	1	6	7
Total	6	42	48

During the public hearings, the panel received and recorded evidence, petitions and memoranda from the affected individuals/groups. Witnesses who were yet to present their statements were not allowed to attend on-going sessions. After making their presentations, witnesses would be free to attend the rest of the sessions. Individuals adversely mentioned by the witnesses for the cited violations were later invited to clear their names and/or provide clarifications on the accusations levelled against them.

1.14.2 In-Camera Hearings

Witnesses who had sensitive and/or confidential information, or those who expressed safety concerns, were granted the opportunity to make their presentations in camera. Nine witnesses presented their evidence in camera.

1.15 Data Collection Methods

For triangulation of information, a combination of data collection methods was applied. The methods included abstraction from secondary sources, individual and group interviews, site visits and observation, and Key Informant Interviews (KII).

1.15.1 Document Reviews

Among the documents reviewed were:

- a) The Constitution of Kenya 2010, especially Chapter 4, part 2 which explains the fundamental human rights that Kenyans are entitled to. This was useful in determining whether, indeed, a violation had been committed;
- b) The Mining Act 2016, which specifies how the mining sector should be governed with respect to ownership, rights and benefits sharing;
- c) Environmental Management and Coordination Act (EMCA, 2015), which recognises the right to a clean and healthy environment, and requires every person in Kenya to safeguard and enhance the environment;
- d) International regulations and standards on human rights, mining, and the environment;
- e) Peer-reviewed articles and grey literature and
- f) Written memoranda submitted to the Commission

1.15.2 Interviews

The aim of the interviews was to triangulate the findings from the documents reviewed, interrogate the submissions of the witnesses, and corroborate accounts of different witnesses. Where appropriate, the interviews were used to quantify the levels of violation, and/or obtain proof of violation. The interviews were based on submissions by the witnesses and statements earlier recorded during the pre-hearing sessions. Key Informants (KIs) drawn from the both National and County governments were interviewed on broad technical areas to shed light on regulation, licensing and mapping with respect to mining in Kenya, in general, and in Taita Taveta, in particular. Among the Key Informants interviewed were: head teachers and deputy head teachers of primary schools in the mining areas, County Geologist, County Chief Officer for Lands and Mining, and a Standard Newspaper journalist.

1.15.3 Site Visits

The panel made site visits to areas where conflict and human rights violations had been reported. The areas visited were: Wanjala Mines in Kishushe; Bridges Exploration Limited in Kambanga; Chawia Minerals CBO in Mkuki; Davis Mining in Kamtonga; Classic Mines in Kamtonga; Lilian Mercy in Kasigau; and Aqua Mines in Tsavo West National Park. The land of Ms. Mukami Teresia Chege, reportedly being trespassed for mining, was also visited.

During the visits, keen observations were made to identify the details of violation. Interviews were also conducted to get a clearer understanding of the happenings at the mines.



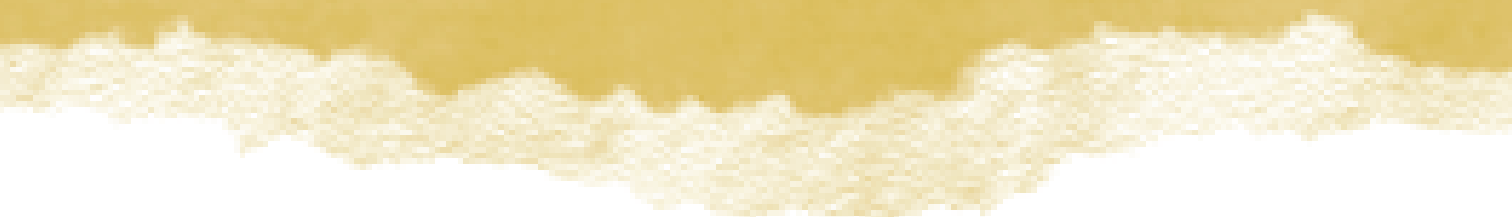
Mr. Haden Sinapius of Bridges Mining Exploration Ltd in Kambanga explains a point to KNCHR officials during mining site visit. Photo Courtesy-KNCHR Public Affairs and Communications

1.16 Surveying and Mapping for Mining Rights: Key Methodical Tenets

The methodology adopted was also informed by the need to effectively address the land question, which was central in the public inquiry hearings. The premise is that accurate land surveying and the products of the process namely, accurate cadastral plans and thematic maps, hold the key to achieving exactitude in demarcating land and related mining rights. Transparent, open, fair and just resolution of land disputes therefore heavily depends on sound surveying and mapping outcomes. The new Mining Act 2016 outlines the standards recommended for surveying and mapping land in mining areas, which need to be understood for proper guidance and judgements.

1.16.1 Technical and Technological Aspects of Surveying and Mapping for Mining

Advances in surveying and mapping technologies have improved the achievable spatial accuracy in demarcating land-related rights. Exactitude in settling land-related conflicts, however, depends on a well-informed choice and competent application of survey




instruments and methods. In light of the land and mining issues critical to the Inquiry, the following question on surveying and mapping standards emerges:

How can survey and mapping technologies and methods be applied to effectively resolve the problems of uncertainty in determining the correct spatial extents for allocating land and mining rights in Taita Taveta County?

In answering the question above, reference must be made to the approved survey standards guiding surveying practice (in Kenya). The standard positional accuracy recommended for cadastral surveys (for accurately determining the boundaries of land parcels) should be to the centimetre level ($\pm 2\text{cm}$) for fixed boundaries. Beacons with known location coordinates connected to existing survey control network are used to demarcate the spatial extent during fixed boundary surveys.

For general boundaries, features such as rivers, roads and planted hedges are used for demarcation, but with lower accuracies in the order of metres ($\pm 3\text{m}$). Aerial photography has traditionally been used in Kenya to derive geometric information on general boundaries for land parcels in rural areas, yielding a drawing known as Preliminary Index Diagram (PID). PIDs are based on aerial photographs that have not been corrected for displacement errors. Upon effecting certain rectifications on the aerial photographs informed by ground truthing, an improved map known as Registry Index Map (RIM) is produced, which is the commonly used cadastral map for general boundaries. RIMs are subject to approval by the Director of Surveys before they can be used to prepare title deeds.

Caveat: The PIDs and RIMs are not authoritative on boundaries because of the large errors that usually accompany them. These errors can accumulate systematically to several metres. Fixed boundaries, owing to the accurate survey measurements used to create them, are therefore the preferred source of accurate information on land parcel boundaries and achieving exactitude in resolving sensitive land disputes. Mining is an exemplar of the areas where accurate land boundary determinations can be critical, especially where the locations of minerals are contested. Mining engineers agree that

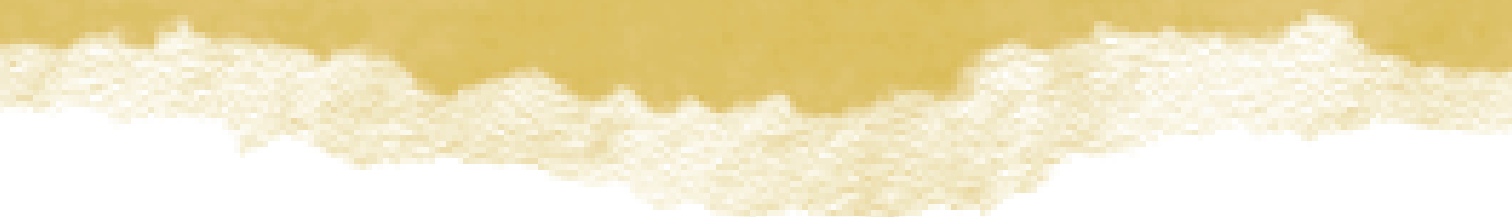


in the case of gemstones, for example, an error of one metre can be too serious. The implication is that the standard accuracy and equipment for cadastral surveys must guide the determination of land boundaries to avoid mistakes.

Technology Advances: Modern survey techniques using Global Navigation Satellite Systems (GNSS) or the US-based subset known as the Global Positioning System (GPS) are gaining acceptance as cost-effective means of land surveying for producing cadastral maps. The choice of the GNSS/GPS equipment and configuration for measurements must, however, be correct, in order to avoid large errors in locating land parcel boundaries. The so-called geodetic GNSS/GPS – when used in an improved mode known as “differential or Real Time Kinematic (RTK) mode” can generally be relied upon to locate beacons within a few centimetres. Geodetic GNSS/GPS is therefore practical for reliable beacon location during cadastral surveys, but it requires high professionalism for accurate outcomes. Mobile or handheld GNSS/GPS applications, however, give typical positional accuracies of 5 – 10 metres. Their application is therefore limited to mapping specific points of interest, and not for surveying sensitive features such as fixed land boundaries. Land information management is migrating from analogue to digital systems with the advent of Geographic Information Systems (GIS), which is a computer-based system for capturing, managing, analysing and visualising geographically referenced data in various ways.

When mapping features of interest, the reference system and map projection adopted is of the essence. Failure to use a locally relevant datum, projection and/or coordinate system can lead to immense displacement errors in location. Around equatorial regions like Kenya, some errors propagate much faster. For example, an error of only ten seconds (10”) when using hand-held GNSS/GPS around the equator is equivalent to a displacement of approximately 300 metres. Unfavourable weather conditions and obstructions when using GNSS/GPS can easily cause errors of this magnitude.

In conclusion, it is instructive to note that ground surveys using modern optical instruments such as electronic theodolites and Total Stations still remain the first choice for accurate cadastral surveys. They are highly suitable for relatively small spatial extents



typical of land surveys, but are too expensive for surveys of extensive geographical areas due to slower speed and high labour intensity. Satellite imagery, airborne laser scanning and airborne geophysical surveys are among the key products of technological advances in mine surveys. Their applications are, however, specifically designed for mine site assessments – for purposes of exploration, planning, development and monitoring.

1.16.2 Implications of the Mining Act (2016) for Surveying and Mapping

Approval procedures precede the exploration and extraction of mineral resources. They form the basis for acquiring a mining permit and land property. Geospatial surveying (through professionally recognised geospatial surveyors) plays a critical role in achieving the planning, analyses, and documentations required. Cadastral plans are required for mining permits. The requisite surveying competence consists of collecting, processing, storing and analysing spatial information, and visualisation by cartographic illustrations. These information sets are used to orientate, navigate, inform, document and plan.

The Mining Act 2016 recommends a map of scale 1:50,000 obtained from the Survey of Kenya. On this scale, the minimum size of the ground detail that can be mapped comes to approximately 15 metres. This scale is an improvement from the 1:100,000 that was specified in the Mining Bill 2014, which would translate into a resolvable ground detail of approximately 30 metres. This improvement places a higher demand on the accuracy of the required geospatial surveys. The Act further stipulates that geometric sections constituting a mining block are to be bound by 15" of parallels and meridians and falling wholly within Kenya, or part thereof. This means that around the equator, the geometric section constituting a mining block measures approximately 450 metres by 450 metres.

The preceding technical expositions are justified for shedding more light on the study findings. They do lay a solid foundation for understanding and critiquing the findings on land-related mining rights. Issues directly bearing on the accuracy of land surveys form a principal part of Chapter 4.



Workers drilling a mine pit in search of gemstones at Lilian Mercy Mines in Kasigau



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Chapter

04 Findings and Recommendations on Violation of Human Rights

1.17 Introduction

This chapter documents the findings of the inquiry, especially those that relate to violation of human rights. The findings are discussed under five broad themes: land rights; environmental rights; labour rights; children rights; and gender rights. Recommendations relating to specific violations have been suggested.

1.18 Violation of Land Rights

Land came out strongly as a key factor in the scope of human rights violation in Taita Taveta's mining sector. The political environment was observed to be skewed with vested interests that hinder impartial decision making on disputed cases of land use and ownership, while the public remains vulnerable because of high levels of unawareness of the legal provisions in the Mining Act. The Inquiry was able to collect detailed records of evidence defending various claims of land right violations. The following section gives an extensive chronology of the declared land disputes, dating back to the 1970s, and then narrows down on the technical and legal details used in administering land rights.

1.18.1 Chronology of Disputes and Records on Land and Mining Rights

For some years now, a dispute has been running between a mine known as Wanjala

Mining Company Ltd (hereinafter referred to as “Wanjala”), and a Ranch known as Kishushe Ranching Co-operative Society Ltd (hereinafter referred to as “Kishushe Ranch”). The two are situated within Kishushe area of Kishushe Sub-location, Kishushe Location, Wundanyi Sub-County/Constituency of Taita Taveta County. Kishushe Ranch claims that Wanjala Special Licence No. 251 is partly inside their Ranch and, therefore, Wanjala should obtain their consent as prescribed) (by Section 37(1) of the Mining Act 2016). Wanjala, on the other hand, claims that their licence is not inside the Ranch nor does it overlap with the Ranch and consequently it does not require the consent of the Kishushe Ranch.

a) Background Information on Kishushe Ranching Co-operative Society Ltd

Kishushe Ranching Co-operative Society was registered on 4th May 1966 by the Registrar of Co-operative Societies vide Certificate of Registration No. CS/1682. Purportedly, a Gazette Notice was issued in 1973 to grant the ‘setting apart’ of an area of approximately 24,282 hectares (60,000 acres) of land for the Kishushe Ranch. Some residents claim that the original area set apart actually measured approximately 78,000 acres out of which 18,000 acres was hived off for community use, but there is no record of this anywhere other than occasional mention in minutes of some meetings.

According to his witness statement of 19th May 2016 to the KNCHR, the Chairman of the Kishushe Ranch gave the statement next page:

Statement of the Chairman, Kishushe Ranch, to the KNCHR on 19th May 2016:

“Kishushe Ranch has Allotment Letters issued to us on 1/01/1974 being Plan No. 9/2/1/16/44A and approximately 24,282 hectares (60,000 acres) on leasehold tenure of 20 years....and on 1/07/1996 for a renewed period of 99 years and being No. 9/2/1/16/48 and approximately 24,282 hectares (60,000 acres). The


Ranch officials gave 18,000 acres of its land to be used by the community (and also to be adjudicated) ...”

According to a letter from Wanjala Mining Co. Ltd, dated 21st August 2014 and addressed to the Commissioner of Mines and Geology, Kishushe Ranching Cooperative Society (LR No. 28984) measures 49,564.60 acres. A letter from the District Surveyor of Taita Taveta (Mr. A. M. Machogu) dated 18th November 2014 to the District Cooperatives Officer of Taita Taveta confirmed that Kishushe Ranching Cooperative Society Ltd is the rightful owner of an area of 24,282 hectares (about 60,000 acres), granted via legal notice 518 of 1962, and delineated on toposheets 189/1 and 189/2. It can be noticed that the area in the District Surveyor’s letter is slightly above 10,000 acres more than the area stated in the letter from Wanjala Mining Co. Ltd to the Commissioner of Mines and Geology, dated 21st August 2014. Earlier, while writing on 25th May 2011 to the District Co-operative Officer, Taita Taveta, to inform him of the need for the Kishushe Ranch to be involved in sanctioning the mining by Sanghani Ltd and Wanjala Mining Ltd, the District Surveyor of Taita Taveta District gave the statement below:

Statement of the District Surveyor, Taita Taveta District, written on 25th May 2011:

“The parcel of land mentioned above belongs to Kishushe Ranching Co-operative Society, having been granted via a legal notice numbered 518 of 1962, issued allotment letters (a) Reference Number 9/2/1/16/48 of 15th December 1973 and (b) Reference Number 9/2/1/16/48 of 16th July 1996 and delineated on Topographical Sheet numbers 189/1 and 189/2. The land measures Twenty-Four Thousand and Two Hundred and Eighty-Two (24,282) hectares, approximately.”

It is generally claimed that approximately 18,000 acres out of the 60,000 acres set apart was subsequently hived off for use by the community, leaving the area under the Ranch to be 42,000 acres. The community in question is reported to comprise 13 villages, each with its own head. Mr. Stephen Mwamela Mwanyama, the head of Daku Village, was elected Chairman of the Adjudication Section by the Community. This area later became




part of the Kishushe Adjudication Section declared in 2001 by the Taita Taveta Land Adjudication Officer vide Notice LAS.31/19 Vol.V/44 of 28th December 2001 (before the establishment of the County Government).

On 2nd December 2013, the Director of Surveys signed a Deed Plan which was later used to issue Kishushe Ranching Co-operative Society Ltd with Title Deed No. CR.65748 on 24th August 2015 for a term of 99 years with effect from 1st August 2015 over an area measuring 23,629.800 hectares (or 60,000 acres) and being Land Reference No. 28984 as delineated in Land Survey Plan No. 331167. With the area of land under this title being the original 60,000 acres set apart for the whole Ranch, it means the 18,000 acres returned to the Ranch without the knowledge of the community, the majority of whom are not members of the Ranch. The Ranch is reported to have 710 members while the community is made up of about 1,500 residents (Mwamela Mwanyama); some community members are also Ranch members.

Demarcation of the Adjudication Section into individual parcels/farms commenced immediately after the period allowed for objection to the declaration lapsed on 28th April 2002 until it was interrupted in March 2015. According to the Chairman of the Community Adjudication Section, the interruption was precipitated by fresh information brought up by the Taita Taveta County Government's Chief Lands and Mining Officer. The information was in the form of a map containing so much detail that it caused confusion among the community in the adjudication section.

The 18,000 acres is not without its own controversy. The current Chairman of Kishushe Ranch, Mr. Elistone Mbela (aka Alui Mbela), alleges in his written testimony to the KNCHR of 19th May 2016 that the Ranch officials gave 18,000 acres of its land to be used by community (and also be adjudicated) but did not enter any agreement with the community over it but instead retained the management of the 18,000 acres. This allegation could have been made to explain why the 18,000 acres ended up back in the Title Deed of Kishushe Ranch, contrary to earlier arrangement with the community.

From the time Wanjala started mining, Kishushe Ranch started opposing the mining




activity on the Ranch's land as being illegal without the Ranch's consent. The matter escalated into actual demonstration and blocking of Wanjala's lorries from collecting iron ore in mid-August 2015 until about the time the Title Deed was issued to the Ranch on 24th August 2015.

b) Background Information on Wanjala Mining Company Ltd

The company which started prospecting for iron ore in Kishushe was Maktau Mining Ltd, owned by one Gafur Abdalla. In 1995, Mr. Mahmood Kassam acquired 100% shares in Maktau Mining Ltd. In 1996, Mahmood decided to operate under the name Wanjala Mining Company Ltd and obtained a Certificate of Incorporation No. C73739 on 19th November 1996. Accordingly, he sought fresh rights in the name of this new company to be able to operate as Wanjala Mining Company Ltd. On 28th December 2001, the boundaries of the Kishushe Adjudication Section of Kishushe Sub-Location, Kishushe Location, were declared and a deadline for receiving objections to this was set for 28th April 2002. Notably, no objection by Kishushe Ranching Co-operative Society Ltd is on record.

Wanjala Mining Company Ltd (Wanjala) applied for and obtained the Consent of the County Council of Taita Taveta on 8th January 2003 to enable it to prospect and/or mine within the jurisdiction of the Council in the then Taita Taveta District as required then by Section 7 (1) (m) of the Mining Act Cap 306(now repealed). About 4 years later, following the approval of a full Council meeting held on 22nd March 2007, Wanjala entered into a Lease Agreement with the County Council of Taita Taveta on 28th March 2007 to cover 64 km² at Kishushe for a term of 10 years, renewable. This reportedly came after 3 years of exhaustive consultations between the Commissioner of Lands, the District Physical Planning Office, the County Council of Taita Taveta, the District Commissioner, the District Land Adjudication Office, the Mapping Office, the District Lands Office, the District Surveyor, the Director of Land Adjudication & Survey Office confirmed that the intended mining area is fully on Trust Land.

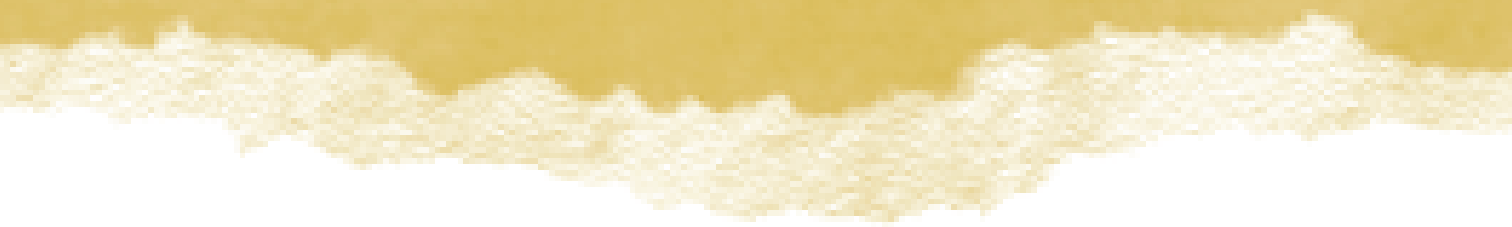


Subsequently, on 27th October 2007, Wanjala Mining Company Ltd was granted Special Licence No. 251 by the Commissioner of Mines and Geology over 64km² of Kishushe. As above, because the land was Trust Land, no consent of any land owner was required, other than that of the County Council, before the Commissioner of Mines could issue a Special Licence. Wanjala relied on the aforementioned confirmation that their licence is fully on Trust land and hence did not need any consent from the Ranch.

Earlier in May 2007, Wanjala Mining Company Ltd entered into an Agreement with R.K. Sanghani to be the operator of the mine on behalf of Wanjala. This was followed by a public baraza held with the community, where Wanjala undertook to implement an agreed set of CSR activities, including acquiring an ambulance for Kishushe Dispensary; building 2 classrooms at Mbela High School; building 2 rooms at Kishushe Dispensary; providing iron sheets for several churches; granting full scholarships for the best performing students to pursue university education; paying KES 70 per tonne of iron ore extracted to a Kishushe Development Fund (Kishushe Development Trust Fund was thus formed); rehabilitating Gisheni Dam Pipeline to Kishushe; and developing 4 football grounds.

Accordingly, in the same year 2007, Sanghani mobilised equipment, constructed a 50-km road from the Nairobi-Mombasa Highway junction to Kishushe, sank 2 boreholes and activated the mine reportedly at a cost of KES 1 billion while employing 400 people. Of the 400 employees, 30% were permanent staff; 60% were women and 40% were men. However, in 2008, Kishushe Ranching Co-operative Society Ltd filed a suit at the High Court in Mombasa against R. K. Sanghani, Wanjala Mining Company Ltd and the County Council of Taita Taveta complaining that Wanjala was mining on their land illegally having not obtained the consent of the Ranch in accordance with Section 7(1) (m) of the Mining Act cap 306(now repealed). For eight (8) years since the suit had been filed, there had been no court hearing nor case determined and Kishushe Ranch had not followed up on the case. However, Kishushe Ranch maintained that Wanjala had been mining from within their Ranch and must get the Ranch's consent.


Over the period 2007 – 2013, R. K. Sanghani reportedly mined 150,000 tonnes of



iron ore for export and 20,000 tonnes for the domestic market and paid all due taxes, royalties, County Cess and paid the community an equal amount as the County Cess, thereby meeting its obligations to the Government (National and County) and to the community. The CSR activities were implemented as earlier agreed with the community. On 19th August 2010, Kishushe Ranch wrote to the Commissioner of Mines reiterating that Wanjala never got consent from them and that the Ranch had decided it would not issue any consent to the Company but instead endorsed the new company by the name Samrudha Resources Kenya Ltd. The Commissioner subsequently wrote to Wanjala on 6th October 2010 vide SPL/430/1/ (77) regarding the consent issue raised by Kishushe Ranch.

On 16th August 2013, the Cabinet Secretary (CS) of the newly created Ministry of Mining, Hon. Najib Balala, suspended all mining companies from operating and appointed the Mohamed Nyaoga-led Task Force to investigate alleged irregularities in issuance of mining licences and in the mining sector in general. The Task Force submitted its Final Report in January 2014. Wanjala was cleared of any irregularity. Accordingly, Wanjala wrote to the CS on 15th September 2014 vide the letter WAN/05/01/2014 requesting for authority to dispose of iron ore material mined in 2012/2013 prior to suspension of their operations. The CS vide his letter MOM/CS/WAN/VOL.1 (11) of 26th September 2014 granted Wanjala permission to transport the already mined and processed iron ore of approximately 150,000 tonnes and to process and transport the mined material subject to payment of all agreed Cess to the County Government of Taita Taveta, the agreed funds to the Community and appropriate royalties to the National Government. In addition, Wanjala was directed not to undertake further extraction of iron ore material pending the confirmation of boundaries and land ownership by the National Land Commission and the acquisition of consents from the land owners thereof.

Meanwhile, the term of Wanjala's Special Licence No. 251 expired on 31st August 2013. On 14th November 2014, the Commissioner of Mines issued a renewal of SPL 251 for a further term of three years with effect from 1st September 2013 but with the area covered now reduced from 64km² to 40km². The renewal transaction was entered into the mining titles register by the Registrar of Mines as No. B7295/10670 on 25th November



2014. According to the letter from the Commissioner of Mines and Geology Ref. No. EPL/971/ (21) dated 29th August 2014, the reason for reduction/variation in the licence area was to remove any portions of land for which there were disputes over land owner consents. By their letter of 22nd August 2014, Wanjala had submitted only consents from the Community living within the Kishushe Adjudication Section in response to the Commissioner's letter SPL/430/30 of 11th March 2014, reiterating that they were not interested in operating within Kishushe Ranch. The undisputed land is within the Kishushe Adjudication Section owned by the Community measuring 2,200 hectares (22 km²) while the rest measuring 2,121 hectares (21.21 km²) lies within the Adjudication Section as declared on 28th December 2001 without objection from Kishushe Ranch, but now disputed by the Ranch as per F/R No.516/161 to be within their Title Deed No. CR.65748 issued on 24th August 2015, being Land Ref. No. 28984.

On 10th June 2015 vide letter ref. no. GOV/LND.10Vol.1 (141) the Governor of Taita Taveta County, H.E. Eng John Mruttu, wrote to the CS for Mining, Hon. Najib Balala, saying that the boundary disputes at Kishushe have been sorted out. The Chairman of Kishushe Ranch, Mr. Elistone Mbela, insisted that the mining area partly falls under Kishushe Ranch and partly under Community land hence Wanjala must seek the Consent of the Ranch before transporting iron ore from Kishushe. Towards the middle of August 2015, some of the residents blocked the road so the trucks carrying iron ore could not transport the iron ore (permitted by the CS as mentioned above).

Through the Kenya Gazette Notice No. 5437 dated 27th July 2015, the Cabinet Secretary for Mining appointed an eight-member Task Force chaired by Ibrahim Khamis to advise him on issues surrounding mining at Kishushe in Taita Taveta County. For three (3) years previously the mining of iron ore at Kishushe had stopped due to an on-going row between the community and mineral rights holders. The Task Force was required to document and review the organisation of mining communities within the area to identify legitimacy and legality of interest groups and their leaders and submit a report to the CS for Mining on or before 30th October 2015.



The Terms of Reference for the Task Force were:

- a) To document and review the organisation of mining communities within the area to identify legitimacy and legality of interest groups and their leaders;
- b) To document and review mining boundaries and claims on the same and establish their legitimacy and legality;
- c) To document and review history and status of mineral rights holders in the area and their relationship with mining communities;
- d) To identify and make findings on issues, factors and actors underlying conflicting community perceptions on mining in Kishushe; and
- e) To make proposals to the Cabinet Secretary for Mining on or before 30th October 2015.

The Task Force completed its work and submitted its report to the then CS for Mining, Hon. Najib Balala. At the time of this Public Inquiry extending from 22nd August to 1st September 2016, the Report had not been released for public consumption by Hon. Balala's successor, Hon. Dan Kazungu.

Meanwhile, on 24th August 2015, Kishushe Ranching Co-operative Society Ltd was issued a Title Deed No.CR.65748 for a term of 99 years over 23,629.800 hectares (60,000 acres) of land in Kishushe, now containing part of the Wanjala Special Licence No. 251. This forced Wanjala to go to Court to challenge move. Vide their letter dated 1st February 2016 and addressed to the CS for Mining, Hon. Dan Kazungu, Kishushe Ranch informed the CS that at their Annual General Meeting (AGM) held on 4th December 2015, members endorsed a company by the name Samrudha Resources Kenya Ltd (which was given a Consent by an earlier AGM held in 2014) to start mining immediately.

c) Court Cases Between Kishushe Ranching Co-operative Society Ltd and Wanjala Mining Company Ltd

i. ELC 340 of 2008 (Formerly HCCC 340 of 2008)

This case was filed by Kishushe Ranch against Wanjala Mining Company Ltd (Wanjala Ltd), Sanghani Investments Ltd, County Council of Taita Taveta (succeeded in 2010 by the County Government of Taita Taveta) following the County Council's grant of a 10-year lease to Wanjala which lease extended to a 12,000-acre portion of the 60,000 acres allocated to Kishushe Ranch following the 1973 “setting apart” of Trust Land. This case is still pending. Representatives of Wanjala Ltd informed the inquiry that Kishushe had not followed up to have it heard.

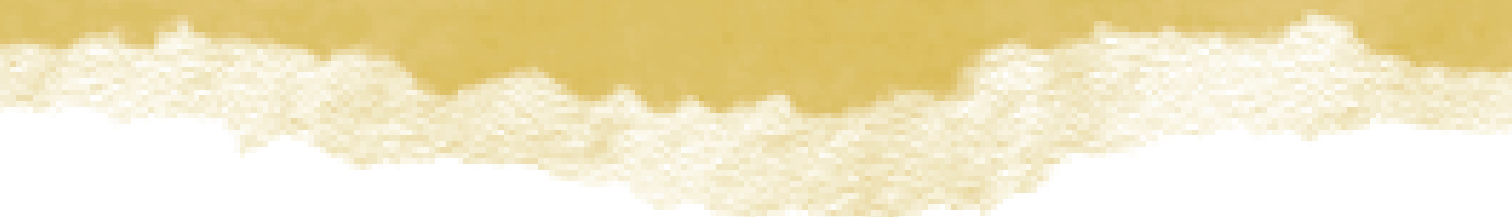
ii. HC. JR 42 of 2014

This was an application for judicial review filed by Wanjala Ltd against several government departments, including the Ministry of Mining. The proceedings were, however, automatically terminated as no substantive motion pursuant to grant of leave was filed within the 21-day period prescribed by the rules of procedure governing judicial review.

iii. ELC 260 of 2014

The case was filed by Wanjala Ltd against the National Land Commission (NLC), Ministry of Land, Housing and Urban Development, the Chief Land Registrar and Kishushe Ranch – seeking an injunction to bar issuance of Title to Kishushe Ranch without its “interest” being noted on the Title. The intended interest is the lease that is subject of the suit in ELC 340/2008.

Though an ex-parte order was in the first instance issued in favour of Wanjala Ltd on 24th October 2014, it was allowed to lapse and was vitiated by inadequate service, and Title was granted in August 2015 to Kishushe Ranch without notation of any “interest” as was intended by Wanjala Ltd. As a result, Wanjala Ltd filed an application seeking to commit



the Chief Executive Officer of the NLC, the Chief Land Registrar and the Chairman of Kishushe Ranch to Civil Jail for contempt of Court.

According to Kishushe Ranch, this application should be resolved quickly as it is holding back other substantive applications in which Kishushe Ranch seeks to bar Wanjala Ltd from accessing its land (now under Title CR 65748) and further seeks the eviction of Wanjala Ltd and Sanghani Investments Ltd from the land, including charges of unlawful entry upon and use of the Ranch's land.

iv. **HC JR 28 of 2016**

This is an application by Kishushe Ranch for judicial review filed on 9th May 2016, the effect of which is to seek to prohibit the Cabinet Secretary of the Ministry of Mining and the Commissioner of Mines and Geology from varying Wanjala Ltd's Special Licence No. 251, which was purported to overlap the 12,000-acre portion of the land covered by the Ranch's Title and which is the subject of ELC 340/2008. The variation was anticipated on account of the Commissioner's letter to Wanjala, prompted by complaints by Kishushe Ranch, which letter required Wanjala to seek the consent of the Title holder in respect of those areas of its Special Licence No.251 that fell within Kishushe Ranch's Title. Though the substantive motion was filed, this application was overtaken by events because the variation of the licence area was complete prior to 9th May 2016, such that Special Licence No. 251 now excludes the titled area under Kishushe Ranch.

v. **HC JR 40 of 2016**

Following the variation of the area of Special Licence No. 251 and convinced that the Commissioner of Mines had backdated his decision to vary the licence so as to defeat the application in HC JR 28 of 2016, and further cognizant of the effect of what was now fait accompli on its proceedings in HC JR 28 of 2016, Wanjala Ltd. moved to file proceedings about the 24th May 2016 which in substance is a near replica of the proceedings in HC JR 28 of 2016. Here though, the leave to commence proceedings was allowed (by a different Judge) to operate as a stay so as to bar the Commissioner of

Mines from licensing anybody else over the area subject of the dispute until the matter has been heard and determined. It should be remembered that an investor approved by Kishushe Ranch by the name Samrudha is waiting in the wings.

The two applications came up in Court on 31st May 2016, when it was ordered that the orders in HC JR 40/2016 remain in force but that the parties in the meantime exchange documents and file advance written submissions before they returned to Court for further directions on 19th July 2016.

d) Key Findings on the Kishushe Land and Mining Rights Disputes

i. Gazette Notice on the “Setting Apart” of Land for Kishushe Ranch

The original Gazette Notice for the ‘Setting Apart’ of land for Kishushe Ranching Co-operative Society Ltd could not be traced in any of the files and official records of the concerned government ministries and departments, neither at the district/county government level nor at the national government level. The available Gazette Notice is a mere photocopy. On close scrutiny, the photocopy document is actually a “fabricated” document consisting of a top portion superimposed on a different bottom portion containing signatures.

The presence of the photocopy of the “fabricated document” in the relevant files of concerned departments points to a deliberate and well-coordinated scheme by certain unknown person(s) to conceal the real content of the original “Setting Apart” document and hence make it difficult, if not impossible, to determine the boundaries, points or beacons and the actual location of the parcel of land originally set apart. It is also not clear if the Gazette Notice was in 1973 as widely assumed or if it came earlier in 1962. A letter dated 25th May 2011 addressed to the District Cooperative Officer, Taita Taveta, by one Mr. A. M. Machogu, District Surveyor Taita Taveta District, referred to Legal Notice No. 518 of 1962 to be the one via which the Kishushe Land had been granted. According to the Chief Officer of Lands and Mining of the Taita Taveta County Government, a “Setting

Apart” document has been used many times to irregularly change the location of parcels of land.

Statement of the Chief Office of Lands and Mining, Taita Taveta County:

“...Setting Apart document has been used many times to irregularly change the location of land parcels.”

ii. **Conflicting References and Dates on Kishushe Letters of Allotment**

The information regarding the original Letter of Allotment and the renewal Letter of Allotment to Kishushe Ranch as quoted by the Chairman of Kishushe Ranch and by the then District Surveyor of Taita Taveta differ in details, as shown in Table 4-1.

Table 4-1: Mismatch of Allotment Letter details from the Chairman of Kishushe Ranch and the District Surveyor

Information	Chairman, Kishushe Ranch	District Surveyor, Taita Taveta
Legal Notice	518 of 1962 (as per the letter to CS of Mining dated 1 st Feb. 2016)	518 of 1962
Ref. No. of original Allotment Letter	9/2/1/16/44A	9/2/1/16/48
Date of original Letter of Allotment	01/01/1974	15/12/1973
Ref. No. of renewal Allotment Letter	9/2/1/16/48	9/2/1/16/48
Date of renewal Allotment Letter	1/07/1996	16/07/1996

These differences could mean that two sets of Letters of Allotment were generated and issued on different dates, bearing different reference numbers. The question that remains seeking answers is why this was so.

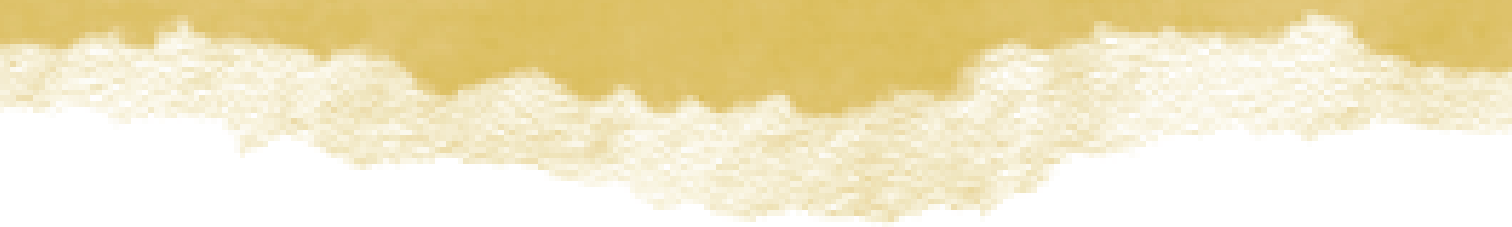
iii. **Production of the Deed Plan of 2nd December 2013 for the “Set Apart” Kishushe Land**

The National Government Ministry in charge of Land has four (4) Departments: Physical Planning; Survey; Adjudication and Settlement; and Land Administration. No one Department can effect or complete the titling process without the others being involved.

Situational Irony – Contradictions in issuing of Title Deed No. CR. 65748 in Kishushe

There are four Departments under the National Ministry in charge of Land, namely: Physical Planning; Survey; Adjudication and Settlement; and Land Administration. No one Department can effect or complete any titling process without involving the others. In the case of Kishushe Ranch, the “Setting Apart” document could not be plotted to give the points (beacons), boundaries and actual location of the concerned parcel of land. This document was, however, used to produce a Deed Plan for Kishushe Ranching Cooperative Society Ltd.

At the Allocation Stage in the normal process of producing a Deed Plan, either of the following two documents should be attached: the “Setting Apart” Document, or the Signed/Approved Part-Development Plan. In the case of Kishushe Ranch, the “Setting Apart” document could not be plotted to give the points (beacons), boundaries and actual location of the concerned parcel of land. When questioned by members of the Kishushe Mining Task Force appointed by the CS of Mining to investigate mining issues at Kishushe regarding the basis on which he produced the Deed Plan for Kishushe Ranch, the Director of Surveys said he relied on the Letter of Allotment presented to



him. Accordingly, he used a “Setting Apart” document which could not show exact boundaries, points and actual location of the parcel of land granted to Kishushe Ranch to produce the Deed Plan, which is a legal document on the basis of which the Kishushe Title Deed was issued.

iv. Issuance of Title Deed No. CR 65748 F/R 516/161 to Kishushe Ranch

Title Deed No. CR. 65748 was issued to Kishushe Ranching Co-operative Society Ltd on 24th August 2015 based on a Deed Plan whose production from the Letter of Allotment was faulty, since the “Setting Apart” document was non-existent and the available photocopy of the Gazette Notice purporting to set apart the land was fabricated from more than one document, and therefore, fake.

Furthermore, the officials of Kishushe Ranch were away in Nairobi procuring the Title Deed while the members of the Kishushe Mining Task Force appointed by the CS for Mining were on the ground in Taita investigating the matters related to the legitimacy of the land and mineral rights issued by some of the offices being visited in Nairobi by the said officials.

v. Community Land of 18,000 Acres from Kishushe Ranch Land

It has all along been stated that Kishushe Ranch hived off 18,000 acres from its 60,000 acres (or 78,000 acres). In his Witness Statement to the KNCHR dated 19th May 2016, Mr. Elistone Mbela (aka Alui Mbela), the Chairman of Kishushe Ranch stated: “The Ranch officials gave 18,000 acres of its land to be used by the Community (and also be adjudicated) but did not enter into any agreement with the Community.”

The Chairman of the Kishushe Adjudication Section, Mr. Stephen Mwamela Mwanyama, during his testimony before the KNCHR sitting at Mwatate CDF Hall on 29th August 2016, confirmed the existence of the 18,000 acres given to the Community (currently numbering about 1,500 people) by Kishushe Ranch. His written Witness Statement to KNCHR dated 27th August 2016 has attached to it the “Notice of establishment of an

Adjudication Section: Kishushe Sub-Location of Kishushe Location Ref. No. LAS.31/19/VOL.V/44 dated 28th December 2001” issued by the Land Adjudication Officer, Taita Taveta Adjudication Area, Ministry of Lands and Settlement.

Attached to the said Notice is a photocopy of handwritten minutes of a meeting held on 20th November 2001 by leaders of Kishushe Location chaired by the Assistant Chief of Kishushe Sub-Location, Mr. David Mwandaghina. The minutes contained the following information:

- (a) The leaders were informed that the officers of Land Adjudication visited Kishushe on 11th November 2001 to prepare the Community for boundary demarcation in Kishushe location at the beginning of 2002 (after expiry of period on 28th April 2002 for receiving objections to the declaration contained in the Notice of 28th December 2001);
- (b) Minute MIN1/2001 states that the leaders agreed to the adjudication/demarcation of the land to the Community;
- (c) Minute MIN2/2001 states that the leaders went ahead to identify the boundaries for their areas;
- (d) Minute MIN3/2001 stated that these boundaries are based on those 18,000 acres near the (Kishushe) Ranch. During his verbal testimony before the KNCHR, the Chairman stated that between the Community’s 18,000 acres and the Ranch there is a road so the Community never goes beyond the road into the Ranch.

In conclusion, after the Kishushe Ranch gave away the 18,000 acres to the Community it should have remained with only 42,000 acres. However, the Title Deed issued on 24th August 2015 still related to the original 60,000 acres. The land disputes characterising this epic example have been responsible for immense wastage of investments in capital equipment and other valuable resources, as shown in Figure 4-1 by comparing the

operational machinery in Kishushe before the disputes, and the rotting machinery in idle state after land disputes exacted their toll.



Before: Operational machinery in Kishushe, fully engaged



After: Rotting machinery in Kishushe, in idle state

Figure 4-1: Operational versus rotting machinery in Kishushe, after land disputes had stalled operations at Wanjala Mining Company


e) Tragic Costs of Land and Mining Rights Disputes: Luka Kitumbi's Agonising Story of Murder, Maiming and Callous Dispossession following the Discovery of Gemstones on his Land, Mwachabo Area, Mwatate Sub-County, Taita Taveta County

Mr. Luka Kitumbi of Mwachabo Location, Mwatate Sub-County of Taita Taveta County discovered gemstones while digging a pit latrine in his homestead on 14th January 2009. The following day the homestead was swamped by the illegal miners known as “zururas” from all over the gemstone mining belt. As he made arrangements to apply for a mining right, he was informed someone else had already applied over the area. In a span of three weeks he suddenly found his rights violated through denial of a mineral right over his own land, dispossession of his gemstone-bearing area by a stranger who applied for a mineral right over his land without his consent as land owner, and attempts on his life by gunmen who raided his home on 23rd April 2009. They shot his 13-year old daughter dead and shot his wife on the chest thereby breaking three of her ribs and leaving her paralyzed.

i. Application for Registration of Mining Locations on his Family Land

Luka Kitumbi's home is part of the larger family land situated at Dighai Village of Mwachabo Settlement Scheme, Mwachabo Location, Mwatate Sub-County of Taita Taveta County. Originally, the yet unsurveyed land was settled by his father, Kitumbi Sivu, beginning in the late 1970s to early 1980s. He later distributed portions to his children, among them Luka Kitumbi. On 14th January 2009, while Luka Kitumbi was digging a pit latrine within the compound of his home, he discovered gemstones of different types, including the valuable alexandrite (change colour). The following day, 15th January 2009, freelance illegal miners, known as “zururas”, invaded his home from as far as Mkuki Ranch, Wananchi Ranch and other places and began to mine in his compound and shamba for gemstones.

The Kitumbi family decided that in order to protect their land and also mine the gemstones, Luka Kitumbi should urgently apply for a mining right over the entire family land, not his portion only, as the gemstones could be in the whole land. Luka Kitumbi



moved swiftly. The Clerk to the County Council of Taita Taveta issued Mr. Luka Kitumbi with “consent to prospect and/or mine” within jurisdiction of the County Council of Taita Taveta on 15th January 2009, upon payment of a consent fee of KES 15,000. Section 7 (1) (i) of the then Mining Act Cap 306 required that before one could enter Trust Land to prospect and/or mine, he must obtain consent from the responsible County Council.

ii. Revelations of Dispossession by Strangers Claiming Ownership of Luka Kitumbi’s Gemstone-Rich Land

On the same day Luka Kitumbi was given a letter by the Mines and Geological Department of Coast Province, Mombasa Office, to deposit KES 2,000 with the Provincial Commissioner of Coast, as required by Section 13(7) of the Mining Act Cap 306 (deposit a security/guarantee with the PC) before one may be issued a Prospecting Right (PR). He paid the KES 2,000 deposit to PC of Coast vide Official Receipt No A2524254 of 16/1/2009. Luka Kitumbi then paid the fee for issuance of a Prospecting Right vide Official Receipt No. A0732192 of 16/01/2009 for KES 250 and was subsequently issued with a PR No.10149 on own account by the Office of the Commissioner of Mines at Wundanyi.

Armed with the PR, the County Council Consent, and the Deposit receipt for KES 2,000, Luka Kitumbi filed two applications (Registration Notices) on 19th January 2009 to Mines and Geological Department office in Nairobi for registration of two Locations he named WIKWATYO I (5 Claims) and WIKWATYO II (10 Claims) using PR No. 10149. Vide letter M/7470(3) of 27th January 2009, the Commissioner acknowledged receipt of and advised Luka Kitumbi in regard to his applications for registration of mining locations Wikwatyo I and II that the “area applied for overlaps an area of an earlier application. However, your application can be considered for the remaining free area after a ground verification exercise has been undertaken...In the meantime, submit to us written consents from the land owners.”

Vide his letter of 4th February 2009 (inadvertently dated 4th January) to the Commissioner with regard to the Commissioner’s letter M/7470(3) of 27th January 2009, Luka Kitumbi

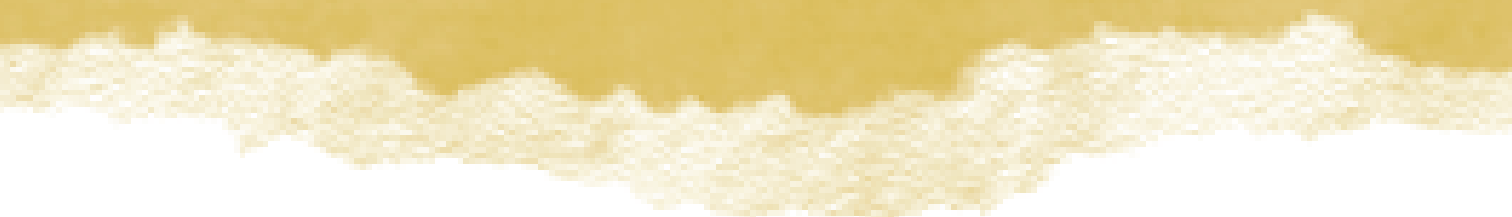
informed the Commissioner that “the area applied for lies on my piece of land; and I have not issued any consent to any prospector....Attached please find copies of the Chief’s and Councillor’s letters confirming that the land belongs to me.” The Commissioner vide M/7470/950 of 17th February 2009 acknowledged Luka’s letter of 4th February 2009, reminds him of planned ground verification, and (strangely) tasks him with the responsibility to check with the office when the verification would take place.

iii. Attacks and Murder by Gunmen over Luka’s Land and Worrying Letters from the Commissioner of Mines and Geology

In the night of 23rd April 2009, the family of Luka was attacked by gunmen, but he happened to be away from home. His 13-year old daughter was shot dead, his wife survived gunshot wounds on the chest (with 3 ribs broken and cannot carry a pregnancy). She remains paralysed and cannot do domestic chores. In a case of mistaken identity and confusion during the attack, one gunman was shot dead by a colleague and they had to blow off his head to make his identification difficult. About 1 kg of gemstones (alexandrite or change colour) worth KES 2 million was stolen.

The Commissioner of Mines vide letter ref no. M/7470(10) of 27th May 2009 to Luka Kitumbi in reply to his letter of 24th March 2009 concerning amendments on Wikwatyo I and II mining locations stated: “I wish to inform you that the Department has a complaint from Mrs. Agnes Mwakamba that you pegged on her piece of land without her consent. Consequently, you are advised to obtain a written consent from her in order for us to take further action on your applications.” Mrs. Mwakamba became the first neighbour purported to have objected to Luka’s application.

The Commissioner vide letter M/7470(11) of 4/06/2009 wrote again to Luka Kitumbi informing him that verifications carried out between 6th and 20th March 2009 by his officers “established that the area you had applied for overlaps an area of extant title and an earlier application contrary to Section 7(1)(d) of the Mining Act Cap 306... Consequently you are required to resubmit an amended sketch plan of the free area whose GPS readings are as follows:- Peg A....Peg B...C...D...E....F. Further, I draw your



attention to our letter to you dated 27th May 2009...to which you have not responded to date. Please take necessary action within 21 days from date of this letter failure to which your application will be considered lapsed without further reference to you". It appears from this letter that Luka may have not been alerted of the verification exercise. On the other hand, how could the Commissioner's officers be on the ground 15 days without his knowledge? Luka's applications on re-submission only occupied about 0.5 km², not a big area where strangers would go unnoticed in half-a-month.

On 9th June 2009, Luka Kitumbi, Mrs. Agnes Mwakamba and Lawrent Mghanga (son to Agnes as witness) wrote and jointly signed a letter to the Commissioner to inform him that "the area I (Luka) have pegged Wikwatyo I and II Mining Locations lie within my piece of land and Mrs Agnes Mwakamba has confirmed that no pegging has been to her land. I therefore kindly request your office to consider my application as the delay is causing a lot of anxiety and INSECURITY in the area. I have already lost my daughter who was shot by my enemies who want the area by force."

The Commissioner wrote back to Luka Kitumbi vide M/7470/(15) of 19th June 2009 advising him that "whereas you successfully sorted out your dispute with Mrs. Agnes Mwakamba, the Department has received a fresh complaint from Mr. Gibson Kirubai alleging that you and others not mentioned have pegged on his shamba. Please note that our instructions to you in our previous letter dated 4th June 2009 still stand unless you show proof of ownership of land by furnishing us with a copy of your Title Deed of the land in question or a letter from the Lands Office. The same shall be required of Mr. Gibson Kirubai." Mr. Gibson Kirubai became the second objector to Luka's application.

If the verifications took place between 6th and 20th March 2009 as reported by the Commissioner, should his office not have known of the presence or not of Agnes Mwakamba and Gibson Kirubai on the disputed site by now? Were other landowners not invited to the site to show their pieces of land during the verification exercise? Was there no drawing made after the verification to show the general lay-out of all applications (Luka Kitumbi's and Daniel Muturi Kimani's included), extant titles and affected lands at the site and their owners? What did the officers do on the ground for 15 days (1/2 a

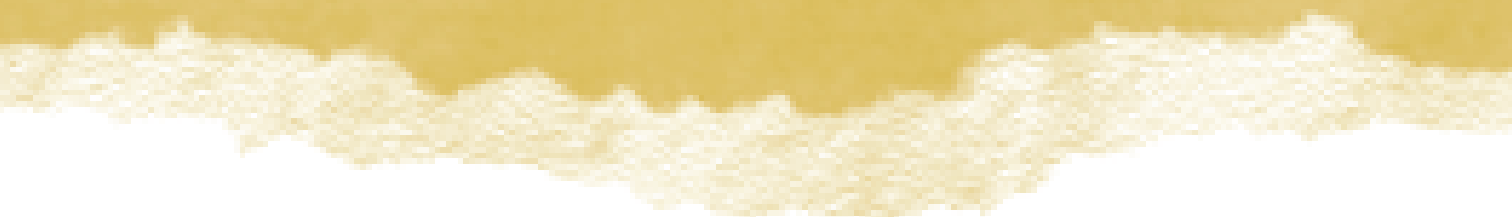
month) from 6th to 20th March 2009 if they did not pick parcels of land in addition to extant titles and applications? Work with a GPS giving the points A, B, C, D,...F used in their letter of 4th June 2009 should have picked these lands out for the application area of only 0.5 km².

It appears that there was no goodwill or intention to extend fairness to Luka Kitumbi. To begin with, he has no capacity to order Government Ministries to issue him with letters which are not based on their land tenure titling process/system, yet this is what the Commissioner was asking him to do after he had written repeatedly that the area has no title deeds and is a Settlement Scheme where demarcations are yet to start. If his officers could not pick the details of the land parcels, with goodwill the Commissioner would have asked Luka to hire a surveyor at his expense to do this work.

The Commissioner vide M/7470/19 of 2/09/2009 to Luka in response to letter of 11th August 2009 from Ministry of Lands: "As we had communicated earlier to you vide M/7470(15) of 19th June 2009, we need proof of the actual extent of your shamba from the Ministry of Lands to avoid any further disputes with your neighbours. The letter referred to above (11/08/2009) does not have the necessary evidence. Failure to furnish us with official documentary evidence of your shamba or at least a joint agreement with all your neighbours duly signed, as to the extent of your boundaries, would mean having to wait for the land demarcation exercise by the government to be completed."

In response to the Commissioner's letter of 2nd Sept 2009 Ref No. M/7470/19, Luka Kitumbi wrote to the Commissioner on 14th Sept 2009 in which all his neighbours Agnes Mwakamba/Thomas Musyoki/Mutie Munya/Domnic Ndunde/Zimalu Sivu and George Mwatughanga appended their signatures attesting to his ownership of the land in question.

After several months, the Commissioner, under his own signature, wrote vide letter Ref No. M/7300/(77) of 2/03/2010 to Daniel Muturi Kimani and Luka Kitumbi summoning them to his office for arbitration on Thursday 11th March 2010 at 10 am for formal deliberations. It is not clear what happened at this arbitration meeting but from his



Supporting Affidavit to Civil Suit No. 190 of 2010, Mr. Luka Kitumbi states at paragraphs 33 and 34 that the Commissioner merely informed him of his powers under the Mining Act to grant the licence for mining to Mr. Muturi and if he (Luka) did not allow Muturi to mine he would be arrested and charged in Court. Three months later, the District Geologist of Taita Taveta wrote to Luka vide his letter Ref No. TT/MG/D/30/VOL.2/43 of 2nd June 2010 that: “The Commissioner of Mines has instructed me to put beacons at Mr. Muturi’s Location so that he can start his mining activities. You are therefore required to avail yourself at Mwatate DC’s Office on 8th June 2010 at 8:00 am for a meeting to resolve the issue so that Mr. Muturi can commence his mining.”

From the District Geologist’s letter above, it is now clear that Mr. Daniel Muturi Kimani actually had already been granted a mining location. The question is why would the Commissioner ask his own officer to put beacons for a mining location holder, in this case where there is a dispute and his office should be a neutral and a fair arbitrator? Why did the Commissioner not use his powers under Mining Regulation 30 of the then applicable Mining Act Cap 306 to order for a survey by a licensed surveyor?

**The Mining Act Cap 306, Subsidiary Legislation, Mining Regulations
[Regulation 30(1)] states:**

“The Commissioner, if satisfied that a survey is necessary for the prevention of differences as to the boundaries of the land included in any location or licence or for securing a proper definition of the area therein, may give notice to the holder of such location or licence that a survey in strict conformity with the requirements of the regulations made under the Survey Act (Cap 299) and at the expense of the applicant is required to be made of the land included in such location or licence, and that a plan thereof must be furnished to the Commissioner...”

In response to the continually deteriorating situation, Luka Kitumbi, his father Kitumbi Suvi, and his brothers and sisters filed Civil Suit No.190 against the Commissioner of Mines and Geology (CMG) and Mr. Daniel Muturi Kimani (DMK) at the High Court Mombasa praying for judgement against the two for, among others:

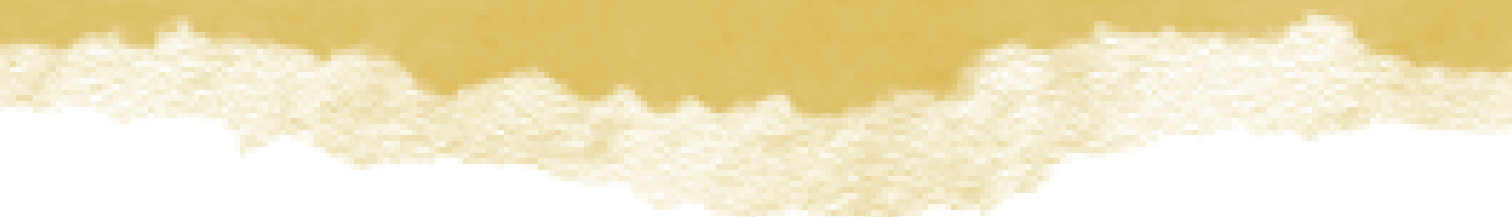
- (a) A permanent INJUNCTION restraining CMG/DMK from Trespassing or encroaching/Interfering/Alienating/Evicting/Disposing off or Entering upon/ or in any manner dealing with the KITUMBIS' well-fenced but unsurveyed shamba within Daghai Village.
- (b) A Declaration that granting of mining licence by CMG to DMK without the consent of Kitumbis was illegal, unlawful, unprocedural, contrary to the law and in violation of the Kitumbis constitutional rights to property and that the said mining licence to DMK be declared defective & revoked.

During his verbal testimony before the KNCHR on 22nd August 2016, Mr. Luka Kitumbi stated that, interestingly, the Court ruled that the land under dispute is his but did not make a determination on who owns the mining rights over the area.

f) Non-Inclusivity and Denial of Benefits Sharing By CBO Officials

During the hearings at various venues in Taita there were repeated allegations by members of Community Based Organizations (CBOs) operating in the mining areas of Taita Taveta that officials have hijacked the CBOs and made them personal to themselves, to the exclusion of the members. Members are kept in the dark as to the goings-on in the day-to-day activities of their CBO and are not involved in benefit sharing of any nature. Officials are enriching themselves from presumed CBO earnings by acquiring properties personal to them and leading lavish lifestyles while ordinary members continue to wallow in poverty. Any member courageous enough to ask questions on how their CBO is managed is met with threats of death. One member narrated how CBO officials punished him by covering his mining pit with earth when he started asking questions. Later they agreed to open the pit if he provided fuel for the excavator machine but even after he did so, the CBO officials refused to have the earth scooped out.

The idea of CBOs had been proposed as a way of eliminating the problem of illegal artisanal miners, commonly referred to as 'zururas', who operated without any form



of licence nor a specific licensed area. They often eke out a living using rudimentary tools, implements and bare hands to scour through abandoned or even operational pits of formally licensed operators, ending up being victims of police arrests for their illegal activities. Being indigenous to the locality and having numbers, they attract the interest of politicians who try all ways and means to help them.

One solution to potential CBO mismanagement is by enlisting the assistance of Civil Society Organisations (CSOs). A possible CSO entry point could include acquisition of mining machinery and equipment for and financing of operations of a given CBO, which of necessity would require the CSO to provide and help build the managerial capacity of the CBO.


1.18.2 Nature and Variety of Identified Land Rights Violations

The oral testimonies and written submissions informed the nature and variety of the following identified land right violations.

a) Non-inclusivity in decision making and conflicting claims to land rights

Communities complained of non-involvement in the land ownership decisions affecting potential and active mining areas. This scenario has given rise to serious and prolonged conflicts pitting communities against investors and other organisations claiming land ownership rights in the mining zones. Major examples were cited, key among them being the conflict pitting Kishushe Ranching Cooperative Society Ltd against Wanjala Mining Co. Ltd, Oza Group Ranch, the declared Kishushe Adjudication Section and the community.

The parties involved in this conflict of alleged overlap of interests between the ranch and the other complainants such as land dispute committees showed evidence of bitter exchanges, both orally and in writing. The Advocate for Wanjala Mining Co. Ltd, for example, had already addressed several letters of complaint to Government agencies, including the Police and the National Land Commission. The various complainants



appealed for cancellation of the title deeds given to other parties in the disputed areas. Investors also appealed that the large tracts of land left lying idle by the alleged owners should instead be put into economic use by investors.

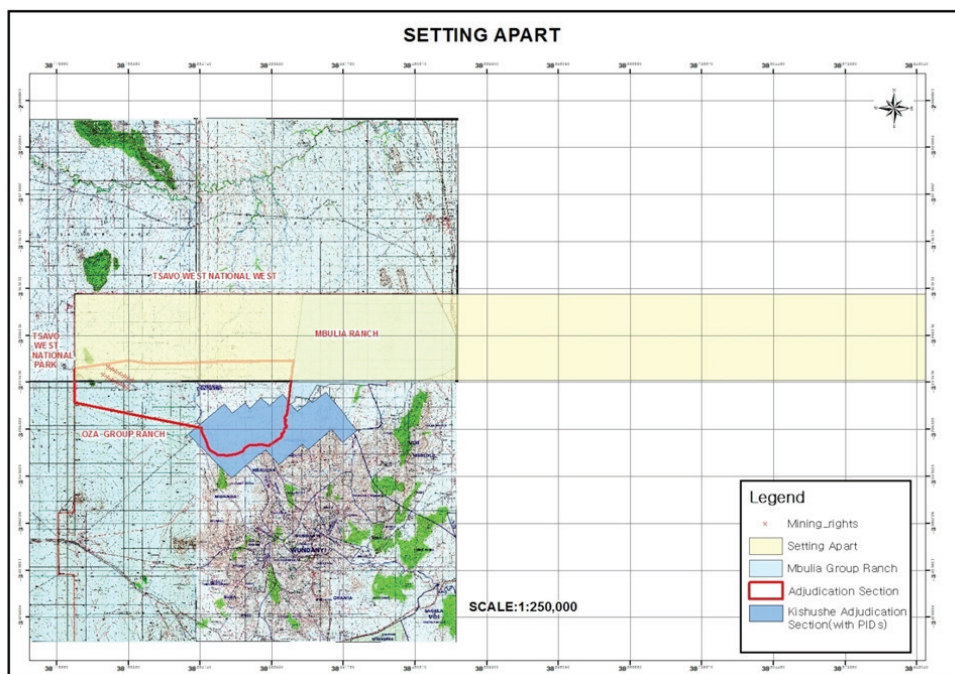
b) Compromised accuracies in determining the spatial extent of land rights

The gap in local expertise for the mining sector was reported to be characterised by a shortfall in geologists, mining surveyors, and mining engineers. In terms of technology, geospatial and geo-engineering technologies were presented as key areas for capacity development. Through these technologies, accurate demarcation of the lands in mining areas is possible, thereby contributing to reduced boundary conflicts. Maps 4-1 and 4-2 show the geographical context of the long-standing land disputes in Kishushe, which have affected the land rights claimed by different parties in the area.

Map 4-1 shows that the declared Adjudication Section overlaps the area that was set apart in the 1970s for possible alternative uses, with Mbulia Ranch to the East and Wanjala Mining Co. Ltd to the West. As shown by the dark blue section, the Preliminary Index Diagrams (PIDs) available do not cover the entire adjudication section. The map shows that a large part of the adjudication section cannot benefit from a historical record of PIDs that could have depicted the original general boundaries in the disputed area. Lack of sound mining plans, boundary demarcations not guided by accurate land surveys, and declaration of adjudication sections through the less accurate visual inspection approaches, were also to blame for the uncertainties in the spatial extent of claimed land rights. Exactitude in land parcel demarcations has been compromised as a result of the combination of these factors.

The section shown as “Setting Apart” in the legend of Map 4-1 was subjected to thorough verification. In this regard, the County Chief Officer in charge of Lands and Mining informed the Inquiry that the coordinates of the area indicated to have been set apart plotted outside the intended section, landing as far away as Tana River County. He said that there were a lot of superimposed signatures, making it hard to trace the original surveys. This finding implies that for Map 4-1 to be relied upon for sound and fair

land-based decisions, the details on it ought to be verified and validated by professional surveyors using ground surveying techniques, besides relying on accurate historical records on how the land was set apart.



Map 4-1: Setting apart done in Kishushe in the 1970s

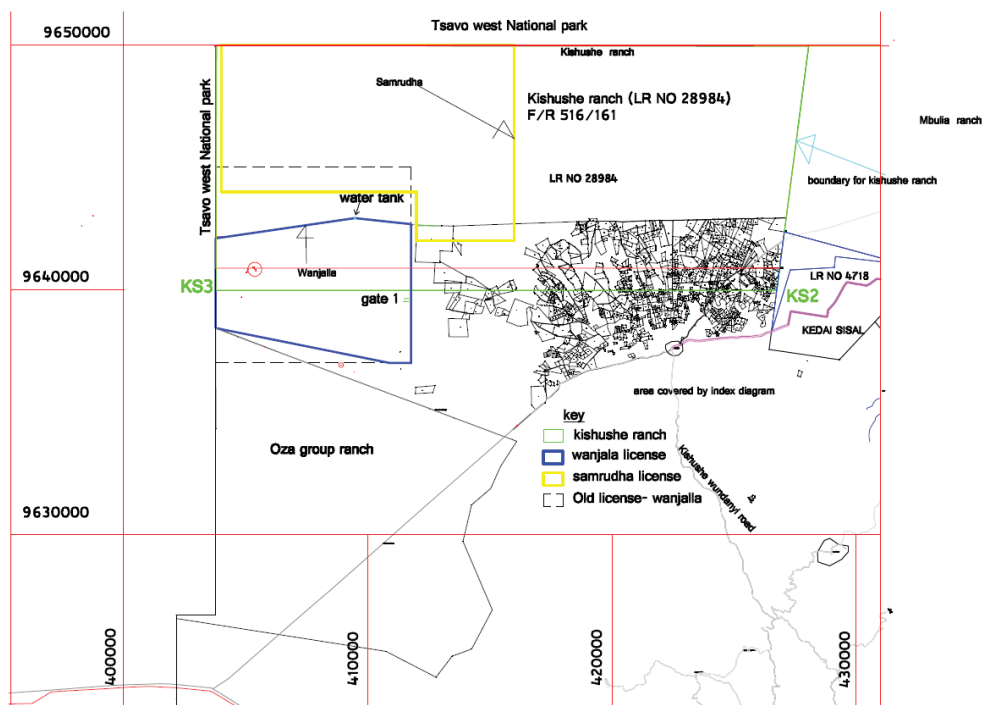
Source: Lands and Mining Department, Taita Taveta County

Witness records on disputed land rights in Kishushe:

“Wanjala Mine is not located inside Kishushe ranch,” said a witness on the adjudicated land. He further stated in Kiswahili, “*Wananchi wako na hasira sana kwa sababu ya haya maneno.*”

“...setting apart showed that some points plotted as far as Tana River,” declared the County Chief Officer in charge of Lands and Mining. “You can’t get original surveys because there is a lot of superimposing of signatures,” he further declared.

Map 4-2 was compiled from the toposheets covering the areas of Manyani and Taita Hills, aided by additional points of interest captured using GPS.



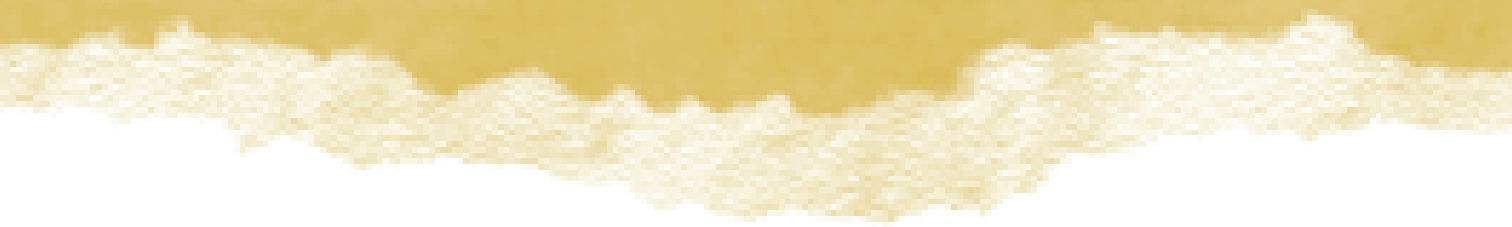
Map 4-2: Spatial overlaps between licensed mining areas and a ranch in Kishushe
Source: Produced by TTU based on selected toposheets and GPS surveys

Witness records on loss of entitlement to land in Kamtonga:

“KNCHR should recommend a solution to the lack of tittle deeds in this area,” said Governor John Mruttu.

“I discovered minerals on my land while digging a pit latrine, but before I could get authority to mine, my neighbor rushed to the mining department and pegged my land section as his,” said one man in Kamtonga.

“My neighbour grabbed my land and has been mining in it since 1987 despite a ruling by the County Government,” said one woman.




The coordinates shown in Map 4-2 are in the projected UTM coordinate system based on Zone 37 South. The green line marks the boundary of Kishushe Ranch, coinciding with the red grid line of 9,650,000 metres North at the northern boundary. The yellow line marks the spatial extent covered by the mining licence for Samrudha, while the blue line marks the spatial extent of Wanjala Mining Co. Ltd. Map 4-2 now gives a clearer display of the spatial overlaps between the pieces of land claimed by the ranches and the areas claimed by the licences issued to the mining companies in Kishushe. These spatial overlaps have been the source of long-standing land right conflicts in Kishushe.

The issue of area overlaps between Kishushe Ranch, Kishushe Adjudication Section and Wanjala Special Licence after variation of the licence generates the following informed discussion:

From a keen interpretation of Map 4-2, the following can be deduced:

- The green line joining the points marked KS2 and KS3 represents the southernmost boundary of the Kishushe Ranch according to the plan accompanying the Title Deed issued on 24th August 2015;
- The blue line marks the near-trapezoidal boundaries of Wanjala's Special Licence after the variation of the Licence area from 64 km² to 40 km². As can be seen from the map, the green-lined boundary of Kishushe Ranch divides the new area of the Licence into two almost equal parts. The upper part falls within and overlaps with the Kishushe Ranch area and measures approximately 2,121 hectares (21.21 km²) or 5,241 acres. This could also be a portion of the 18,000 acres hived off for the Community from the 60,000 acres. The bottom part falls within the Community's Kishushe Adjudication Section and measures approximately 2,200 hectares (22 km²) or 5,436 acres. The two combined total 43.21 km², slightly more than 40 km² (more precisely 39.5144 km² on the varied Special Licence 251 area).
- The yellow line marks the boundaries of the Mineral Rights Licence of Samrudha



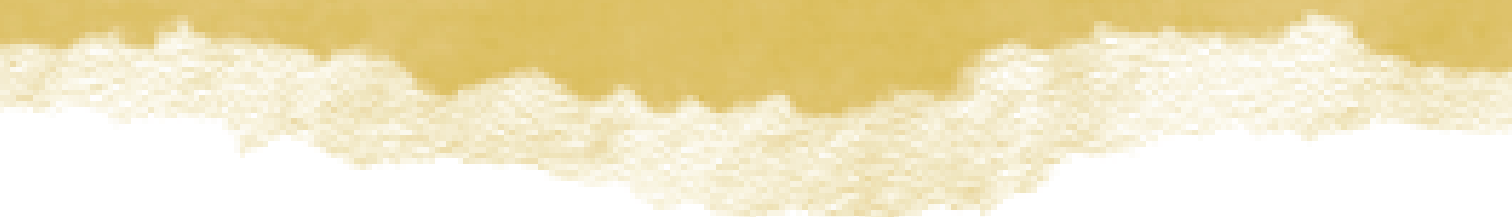
Investments Ltd. It partly overlaps the northernmost part of the original Wanjala Special Licence No 251 area, but after variation of the Wanjala licence the two areas are separate. It is a normal trend that wherever an existing mine is producing ore, new licences are staked around them in the hope of catching the same reefs or ore formation. However, Wanjala Ltd had confirmed the ore deposits through an Airborne Geophysical Survey and Drilling campaign, and equipped with this information must already have known well where to locate its boundaries.

c) Delayed and denied enjoyment of claimed land rights:

Due to the land ownership disputes that have remained unresolved for long, the communities affected, in Kishushe for example, cannot enjoy the right to use the lands they claim to be theirs, neither for subsistence nor for economic reasons. Mlilo Community Land Dispute Committee, for example, submitted a written complaint on this matter on not involving communities in land ownership decisions and communities going without planting crops on disputed land despite favourable rainfall.

Another key rights issue is the feeling of “denial of right to ancestral land” among the local communities in Taita Taveta: that the Tsavo National Park had taken up a large land portion of the County (62%), and that the people they considered to be non-natives (referred to by them as “outsiders”) had been getting access rights to using the land in the national park. The local communities felt alienated from their ancestral land in this sense.

It should be noted that all national parks in Kenya, being wildlife conservation areas, are out of bounds to surrounding communities. The only way to remove or reduce the feeling of denial of rights to ancestral land under national parks is through benefits sharing arrangements with the affected communities and counties. Regarding the grievance that “outsiders” access national park land for mining while the natives are denied, it is a fact that all national parks in Kenya were closed to prospecting and mining around October 1974 except for those who were already licensed. This explains the presence of the so-



called “outsiders” in Tsavo West National Park, where in fact a company partly owned by a Taita also remained.

Mineral investors have had to wait for long, at the expense of opportunities for returns on their huge capital investments. Wanjala Mining Co. Ltd presented a case in point in May 2016, when it complained through Mwakiteri Ndumia & Company Advocates about police presence on the site, barring entry. Going by the cited scenario in Kishushe, the consent of the ranch owners is required before producing any subdivision scheme plan based on which land portions can be delineated from the titled areas, before transferring any ownership rights to would-be beneficiaries.

d) Loss of entitlement to land due to irregular practices

The public inquiry exposed cases where miners operate without a licence, SimVest cited as an example. Double licensing was also noted, some examples already forming court cases. Most land owners did not have title deeds.

Concerns were also raised over the cases where miners used to abuse the old mining law by pegging land without the consent of the land owners. The Inquiry was informed that mining consents were sometimes being given in Nairobi without the concurrence of the legal land owners. Cases of miners selling their claim to other miners without the consent of the land owners were presented. Most agreements by land owners and miners, it was alleged, were not signed. An accusing finger was pointed at the Nairobi office of the Commissioner of Mines for complicity in issuing licenses without the involvement of the rightful land owners, which licences were then used thereafter as instruments for dispossessing the real land owners of their land. These irregularities do cause serious violations of rights to enjoying the full benefits of mineral-rich lands by the rightful owners. The Mining Act 2016 has made provisions (Sections 191 and 192) for licence applications henceforth to be made online at the Mining Cadastre Portal; this will help minimise or eliminate the human element accused of collusion and ensure more transparency in issuance of mineral rights.

Recommendations on Land Rights Violations

- a) **Spatial planning and land adjudication processes in Taita Taveta County ought to be highly participatory in nature, executed by actively involving local communities in an open, fair and transparent process.** The local communities should be sensitised more on the basic issues of land administration and how various policies and legislations affect the claim of rights to land ownership and economic utilisation of land resources. Civic education needs to be conducted for the local stakeholders, covering the cadastral issues in the context of land administration and land management in the mining areas, and how they can actively and meaningfully contribute to the due processes of land adjudication. Sensitisation on the provisions of the new Mining Act is also urgent. These measures will help ensure harmonious and environmentally responsible practice of mineral extraction on the lands, based on sound mining plans.

Responsible: National and County Ministries in charge of Lands, Urban Development, Mining, and Spatial Planning; CBOs; FBOs; local political leaders.

- b) **Policies and systems must be established and implemented for accurate land surveying and mapping in Taita Taveta's mining areas before allocating any rights to mining on the lands in question.** It should be noted that sound cadastral records and mining plans are products of accurate land surveying and regional analysis. These products strictly require the input of adequately trained surveyors who exercise professionally approved standards of: equipment choice, technology, spatial data quality control, and survey reference system (datum) fitting Kenya's territory – such as the Arc 1960 datum. The surveyors conducting new surveys on the disputed land parcels need to control for error propagation by exercising the strict spatial accuracy requirements for cadastral surveys (locations marked within 2 centimetres on the ground) preferably using optical survey instruments such as a Theodolite or a Total Station). It is only by adhering to the professionally prescribed cadastral survey accuracy that the large cumulative errors typical of using quicker but less accurate techniques

such as hand-held GPS (usually accurate to 3 – 5 metres on the ground) can be eradicated.

Witness records on mining-related environmental risks:

“Mining by Universal Recourses International near my house has caused the walls of my house to crack. They have also made the environment dusty and leave their mining holes open,” one woman lamented in Mariwenyi.

“...floors of school buildings have cracked due to blasting by a miner within one kilometre radius from the school,” testified a teacher in Kamtonga.

“Animals sometimes fall into the open holes and die,” said one man in Kwakele.

“When the miners are blasting, the blast is so loud that it scares the pupils in Standard One. One of these mines is Canan Mine,” testified one man in Kamtonga.

Responsible: Survey of Kenya; Institution of Surveyors of Kenya (ISK); National Land Commission; National and County Ministries in charge of Lands, Urban Development, Mining, and Spatial Planning; political leaders.

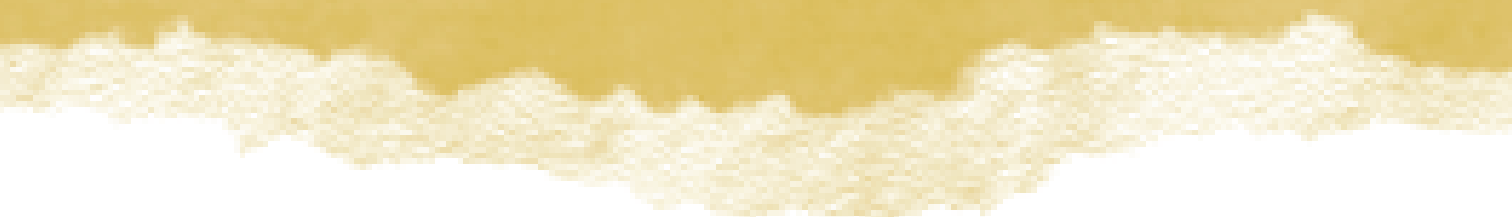
- c) **National and County Governments should expedite the establishment of a functional Land Information System (LIS) with seamless digital integration of county-level land records and national land parcel data; such a system is essentially a Geographic Information System (GIS).** The County Government of Taita Taveta consequently needs to utilise GIS technology and surveying expertise to expedite the achievement of county-wide physical planning and land adjudication goals. The grant of title deeds in the County should be expedited, especially for areas with active prospecting and mining activities. Achieving these milestones will lay the foundation for efficient and transparent resolution of the land-related rights violations.

Responsible: Survey of Kenya; National Land Commission; National and County Ministries in charge of Lands, Urban Development, Mining, and Spatial Planning; political leaders.

- d) **The judiciary should speed up the resolution of court cases on land and mining rights, in order to allow mineral investors and land owners to enjoy the economic benefits of the land sections that are rightfully theirs.** The sanctity of title deeds and illegality of double registration position courts as the most effective arbitrators in the cases of overlapping claims to land rights, with the support through alternative dispute resolution mechanisms where necessary. To execute balanced judgement, the courts need to treat as critical the historical evidence of pre-existing land allotments that were not based on accurate surveys, and the information on exact boundary locations revealed by new accurate land surveys.

In the outstanding case of land disputes in Kishushe, the following specific recommendations arise:

- Since Kishushe Ranch holds Title Deed No. CR.65748 containing the area indicated to overlap with the licence of Wanjala Mining Co. Ltd, the resolution of this matter lies with the High Court;
- Because Kishushe Ranch Title Deed still has the land at 60,000 acres instead of 42,000 acres, it means the 18,000 acres originally given to the Community have been recouped back by the Ranch. This is a likely source of major conflict between the Community and the officials and/or members of Kishushe Ranch and therefore needs a quick and effective resolution;
- There is need for a thorough investigation to be carried out to trace and find the original authentic Gazette Notice document (most likely Legal Notice No. 518 of 1962) for the “Setting Apart” of Kishushe Ranching Co-operative Society Ltd. This would include the confirmation of the true details of the Letters of Allotment



for Kishushe Ranch and their description of the boundaries, points and location of the parcel of land set apart for Kishushe Ranch; and

- There should be a forensic audit of how the titling process for Kishushe Ranch land was undertaken among all the concerned government Ministries and Departments, both at District/County level and at National level.

On Luka Kitumbi's land case, the following specific recommendations apply:

- Once the Court determined that the land over which Luka Kitumbi applied for mining locations belonged to him and his family at the time Daniel Muturi Kimani applied for a mining location, it follows that Mr. Muturi needed to have obtained consents from the land owners or lawful occupiers: Luka Kitumbi, his father Kitumbi Suvi, and his siblings in accordance with Section 7(1) (m) of the Mining Act Cap 306 then applicable.
- Mr. Luka Kitumbi should be granted mining locations applied for over the lands owned by him and his family members. He had fulfilled the requirements but formally may need to give himself a written consent and obtain written consents from the rest of the family members.

Responsible: The Judiciary/courts; National Land Commission; Licensed Surveyors; National and County Ministries in charge Lands, Mining, Natural Resources and Wildlife; Law Society of Kenya (LSK); affected complainants and/or their Advocates.

1.19 Violation of Environmental Rights

The key environmental question evoked by this Inquiry was:

How can we reconcile the broader environmental conservation goals with the local development agenda and the rights and expectations of the inhabitants in mining areas?

1.19.1 Committee Report on the Broader Mining and Environmental Issues

A special committee constituted by the County Assembly of Taita Taveta looked into the broader issues of mining, environment and natural resources in the County. The following memorandum was subsequently presented at the Inquiry on 29th August 2016. It exposes crucial cross-cutting mining and environmental problems, which also bear strong linkages with the question of land.

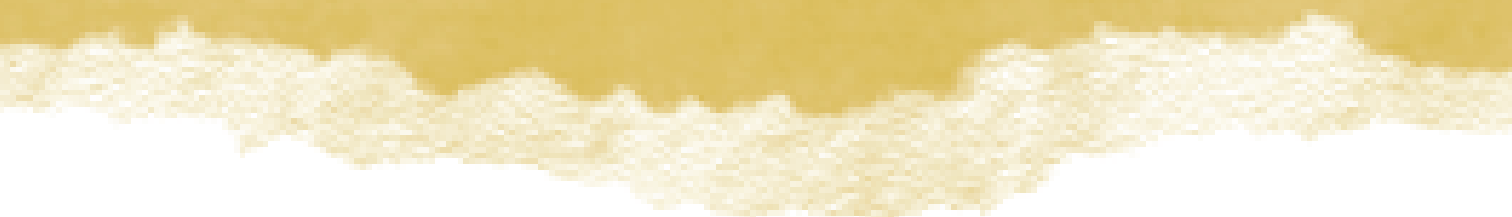
Memorandum by the Committee on Mining, Environment and Natural Resources of the Taita Taveta County, Chaired by Hon. Raymond Mwangola**

(*Verbal testimony at the public hearing on 29th August 2016)

a) Introduction

The Chairman of the Committee on Mining, Environment and Natural Resources who was also Member of the County Assembly (MCA) of Taita Taveta County appeared before the KNCHR for the Hearing at Mwatate CDF Hall on 29th August 2016 to present a Joint Memorandum. He was accompanied by Hon. Mary Mghanga Mngola, an MCA, and also a member of the Committee on Mining, Environment & Natural Resources and of the Committee on Transport and Infrastructure, and by Hon Omar Ahmed, an MCA, who was likewise a member of the Committee on Mining, Environment & Natural Resources and also a member of the Committee on House Rules and Procedures, amongst other committees.

The Chairman started by painting a picture of how Taita Taveta County (TTC) is one of the richest counties in resources in Kenya but remains one of the poorest counties in the country when it comes to actual economic potential on the ground. He stated that TTC has got a variety of mineral resources whose potential is enormous, if extracted properly and utilised to the benefit of Taita Taveta citizens. This is what set off the County Assembly Committee on Mining, Environment and Natural Resources to undertake a situation analysis. This entailed going to all mining sites and areas within the County



and find out what were the problems existing there, why the natural resources were not benefitting the County citizens directly within the County, and how come much of this economic potential was not being felt and seen on the ground.


While going around, the Committee established that one of the biggest issues in the sector is the conflict between indigenous communities and the so-called ‘outsiders’ with regard to legal and human rights. According to the Committee, when mining started in the 1950s, the population of the indigenous communities in Taita Taveta was very low. Today, as in other places in Kenya, the population in Taita Taveta has grown exponentially especially of the youth. This has resulted in a high rate of unemployment which has forced the indigenous population to now start getting interested in the natural resources. However, before the indigenous “Wa-Taita” people started getting into mining, these areas had basically been taken up by people who were ahead of them in the mining field. In fact, the indigenous people had entered into agreements with these other people not knowing the full consequences those agreements would have on the community at a later stage. This state of affairs stems from the fact that the indigenous communities had made agreements with the outsiders without knowing the consequences thereof.

b) Specific Issues Raised by the Committee

The Committee highlighted the following issues as being critical in relation to mining in Taita Taveta County:

(i) Consents

The Committee stated that there has been a serious issue of consents and accordingly believe as an Assembly, as a Government and as a Community that mining should not and cannot be done unless express consent has been given by the people who own that land. “Owning” should be interpreted not to mean owning by paper, the Title Deed, but by a being a legal occupant. One does not have to hold a title deed to be legal but can be legal by virtue of having lived there, by his grandparents having been buried there, by his community having been staying there for a long time. Lack of this recognition has



been the source of major conflict between the community and other people. There are numerous instances where consents have been given in Nairobi, with people coming from Nairobi with documents and claiming they are the legal owners of certain tracts of land, mining claims or mining locations within lands in Taita while the ‘mwananchi’ on the ground has no idea where these documents originated from. The Committee alleged that in fact most of the big mining companies in Taita Taveta had not gotten consents from the land owners, the community and even the County Government.

(ii) **Residents of Taita Taveta Live on a Tiny Portion Only of the County**

The Committee reported that Taita Taveta County is the only county in Kenya where only 12% of the County is what the citizens are left with to settle on and use. 62% of the County land is under the national parks, Tsavo West and Tsavo East National Parks. 11% is under Ranches while 15% is hills and rocks which cannot be settled on or utilised, leaving only 12% of the County for human settlement and human utilisation. Furthermore, the Committee reported that it is out of this 12% that there were large tracts of mining areas which the community is supposed to share with the people who purportedly obtained mining rights from the national office in Nairobi. The majority of the mining belt within that 12% does not belong to the indigenous people.

(iii) **Mining and Grazing in the National Parks in Taita Taveta County**

The Committee stated that some mining is going on in the National Park (understood to mean Tsavo West National Park) but those mining claims, mining locations and exclusive prospecting licences belong to a few well-connected individuals. When the local indigenous person asks to mine in the National Park somehow that consent is never given. However, the current position with mining in the Parks was explained to the Committee; this is the fact that mining in all national parks in Kenya had been banned in late 1974 by an amendment to the Wildlife (Conservation and Management) Act to require that prior consent be granted by the Minister responsible for wildlife before a mining right may be given in the park. As a matter of policy, no consent to mine in the national parks was to be given since that time. Those who were already licensed in

Tsavo West National Park were ring-fenced to continue, and included such companies as Equator Gemstones, Aqua Mines, and Rockland Kenya Ltd (former John Saul/Stones Ltd). However, it is known that consent was given in the 1990s in the Tsavo West National Park to a company known as Megalith Mining Company Ltd which has since lapsed.

The Committee also highlighted the fact that National Parks in Taita Taveta are being used for grazing livestock but that, again, this is mostly allowed to outsiders only. When a normal M-Taita goes into the park he will find himself in Court and fined heavy amounts and sometimes even beaten up. Grazing of cattle, camels, and goats in Tsavo East and Tsavo West National Parks is known to occur despite frequent operations by combined forces of KWS and the Police to flush them out. Every now and then there have also been skirmishes between these outsiders and the indigenous communities of grazing rights not only in the parks but also over the lands belonging to indigenous communities.



Aqua Mines in Tsavo West National Park

(iv) **The Serious Problems Created by the Office of the Mines and Geology Department in Nairobi to Mining in the County**


The Committee claimed that the Nairobi Office of Mines and Geology has made a serious contribution to problems bedeviling mining in Taita Taveta County through the recently launched Mining Cadastre. The system was introduced to enable online application for mineral rights. It shows a map of all licensed areas so that one can see free unstaked areas and apply for a licence. However, once one applies over an area shown on the cadastre to be free, they are advised after three weeks that the area had already been taken. The case given by the Committee was that of Omweri CBO which after applying over a free area was later told that the area belongs to Davis Mining. According to the Committee, all the problems with the cadastre appear deliberate. The Taita Taveta County Government recommends that it be allowed to have a cadastre of its own which is enjoined to the national cadastre.

The Committee was, however, requested to give the cadastre a chance as all these problems could be genuine failures of introducing a new system. Probably, the Ministry of Mining should shut it down until it is done with fine-tuning of the system. Overall, it is a great improvement on the old titles system and will have more transparency once well established.

(v) **Other Issues of Concern to the Taita Taveta County Government**

The Committee also expressed concern over the following matters:

- Charcoal burning in mining areas, especially Kambanga area of Mwatate Sub-County. Part of the problem is with the Kenya Forests Service who issue licences for charcoal burning.
- The County should develop a Charcoal Policy.
- Extensive environmental degradation is taking place in the mining areas and



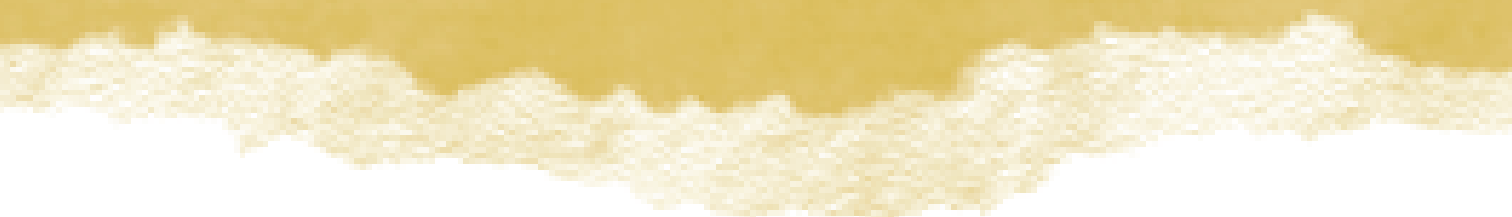
landscapes are dotted with abandoned mining waste dumps, excavations, pits and deep holes all of which are a danger to humans, livestock and wildlife.

- Health and Sanitation concerns in the mines. Some big mines do not even have a toilet.
- Basic Rights of workers should be taken care of.
- Physical abuse of women and children are reported to law enforcement authorities but never followed up
- KWS has failed to manage human versus wildlife conflicts, with elephants presently going right into mining camps to take ‘unga’ (flour).

Recommendations by the Committee Regarding Mining in Taita Taveta County

- (i) Consents: must be given by indigenous persons or the community in whose area mining is to take place.
- (ii) Mineral Rights in Dormant Claims: should be revoked and given to new applicants. People have been holding large areas of Exclusive Prospecting Licences or Special Licences yet they are working on a very small portion of the area.
- (iii) Marketing of Gemstones: illegal foreign buyers, such as Sri Lankans, come right inside the mining areas but instead of causing the prices to go up the prices go down so miners do not get value for the gemstones. Accordingly, such foreign buyers should not be allowed into the mining areas but should be made to stay and wait in the big towns such as Mombasa and Nairobi.

- (iv) Gem Centre Under Construction in Voi
- (v) The management of the Gem Centre coming up in Voi must involve the Taita Taveta County Government.
- (vi) Safety Health Human Rights and CSR Regulations Being Drafted
- (vii) The Regulations should be well done to ensure the basic human rights of workers are taken into account. Currently some big mines in the County do not even have one toilet for the workers.
- (viii) Environmental Restoration: NEMA should follow up on restoration of mined lands by miners. Probably place a deposit with the County Government for later Rehabilitation work. N/B: The Mining Act 2016 has taken care of this and all will depend on implementation by those charged with the responsibility (see Sections 180 and 181) at the Ministry of Mining and at NEMA
- (ix) Unauthorised blasting should be controlled
- (x) Unauthorized blasting at the mines is causing damage to properties such as school and residential buildings but no compensation is made to the owners. The Ministry of Mining should control illegal use of explosives and assist establishing which damages actually arise from explosives blasting so that the owners can be made to pay compensation.
- (xi) Disciplinary Action for Human Rights Violations
- (xii) Action should be taken against County and National Government officials found breaching human rights. Regular and Administration Police Posts should be set up in mining areas.

- 
- (xiii) Child Labour in the Mines: Should be strictly prohibited and monitored in the mining areas as this is a major cause of school drop-out.
 - (xiv) Violators of Human Rights in the County: Their licences should be revoked. Taita Taveta County Assembly met in 2014 and condemned one such violator. During a demonstration held in Kasigau against the violator, the violator shot in the air. To date, no action has been taken against the violator while those violated bear the trauma.
 - (xv) Case of 40 Citizens of Taita versus First Green Garnet Mining Co. Ltd
 - (xvi) The Court ruled in favour of the citizens that FGGMCo was mining for so many years in Taita without consent from the land owners. The KNCHR should help effect the determination of the Court.
 - (xvii) KNCHR: Should open an office in Taita Taveta County to handle the many cases of human rights violations.
 - (xviii) County Mining Bill: Bill has already been discussed in the County Assembly. It is waiting for a Bill Number and then it will be taken for Public participation. KNCHR assist with this public sensitization on this Bill, the newly enacted Mining Act 2016 and its Regulations currently in draft form.

1.19.2 Nature and Variety of Identified Environmental Rights Violations

The main community grievances presented were directly attributable to the operations of mining in Chunga-Unga, Mkuki, Sagalla and Kishushe areas. The violations of environmental rights in the contexts were identified as follows:

a) **Exposure to Environmental Health and Safety Risks from Mining.**

The local communities presented cases of exposure to serious dangers, and even death, due to the mining activities that end up leaving wide-open and deep pits (some more than 100 metres deep), weak ground support structures, weakening built structures due to blasting and polluting soil, water and air. Sound ground support is essential, as shown in Figure 4-2.

People reported the cracking of the walls of their houses caused by blasting. Noise pollution from mining machinery and blasting is also a key distraction to the comfort of residents and concentration of school children. The mining activities therefore contribute directly to violation of the rights to a healthy, clean, safe, and secure environment. These rights are firmly embedded in the Constitution of Kenya (2010, Article 42, Article 70), EMCA (2015), Kenya Vision 2030 (Social Pillar), and the National Environmental Policy (2013). The open pits endanger the lives of miners/people and their livestock; inadequate underground safety plans aggravate the hazard, with cases of miners getting injured or buried underground, or drowning when it rains and flood water enters the mines. Poisonous gases or particulate matter from mines cause diseases and death to the miners. As reported by the County Commissioner, Madam Josephine Onunga, thugs also use the open mining pits as hideouts during their criminal activities. This is a threat to security.

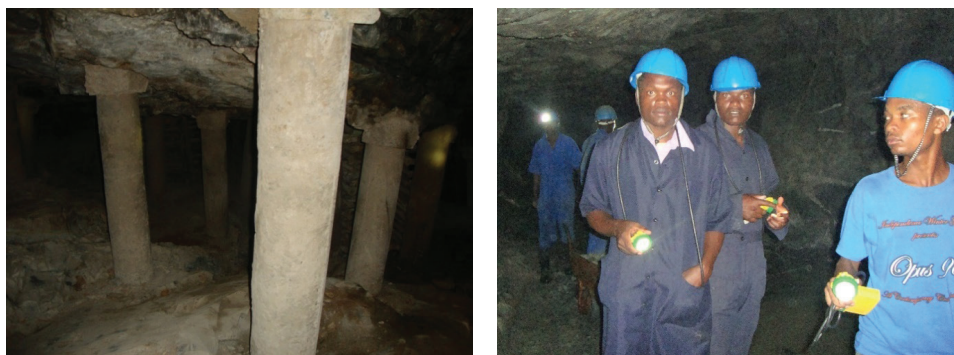
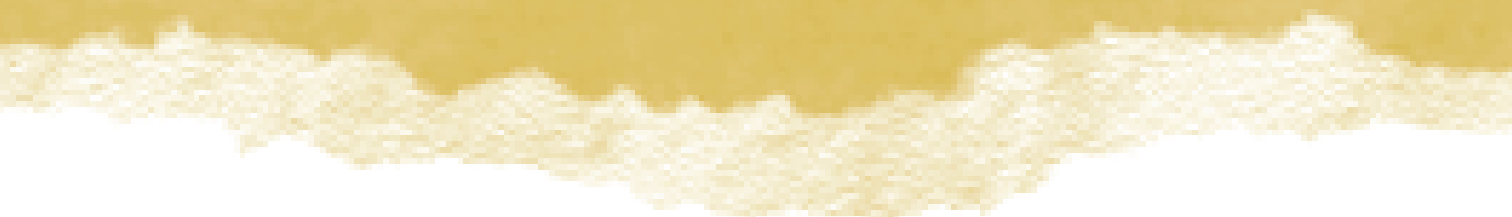


Figure 4-2: Support structures in an underground mine (Left). Mining students in an underground mine as part of their training (Right)



Some mining companies were blamed for having no personal protective gear for employees to be used for control of dust, particulates and gaseous emissions. Some complainants testified that some former workers in the mines had been diagnosed to have cancer and tuberculosis, which was suspected to have been as a result of the air pollution in the mines. In the quarries in Sagalla, the miners do not use protective gear when handling the rocks they chisel out thereby exposing themselves to dust-related illnesses and physical injury.

b) Diminishing Environmental Benefits and Opportunities Due to Land Degradation.

There was evidence, both reported and witnessed on the ground, of immense land degradation from mining activities in Taita Taveta (see Figure 4-3). Soil erosion removes the rich top soils, compromises soil structure, accelerates loss of nutrients, and leads to infertility. The people living on the affected pieces of land are therefore exposed to famine and food insecurity because of loss of agricultural productivity. Siltation of rivers and water reservoirs is another threat from the accelerated soil erosion caused by the land-degrading mining activities. The denuded land sections are an eyesore, compromising the beauty and attraction of the former natural landscape. In Chunga-Unga, for example, mining has left an excavated area in one of the CBOs covering a 2-kilometre strip of about 30 metres deep from the soil surface. A lot of soil and rock debris from the area is eventually dumped in the area. The habitat fragmentation caused by land-degrading mining activities has led to human-wildlife conflicts since the habitats, food and watering sources, and the original migratory routes of wildlife are interfered with, so the animals end up invading people's farms and homesteads.



Figure 4-3a: Evidence of land degradation through excavations and clearance, leaving open pits and accelerating soil erosion






Figure 4-3b: Evidence of land degradation through forest clearance and charcoal burning

c) Violation of the Rights of the Present and Future Generations to Sustainable Ecosystem Services.

Deforestation was noted to be a key problem resulting from land clearance to pave way for mining. Woodlands including natural vegetation, shrubs and grasslands useful for grazing continue to diminish with increasing mining activities. In Kishushe, the threat of further land clearance with further prospecting of iron ore became evident. The loss of forest cover and other vegetation types due to mining in the County weakens the regenerative capacity of the natural resource base. Forests are important habitats for biodiversity, carbon sinks, and form a critical component of a healthy and productive ecosystem that can sustainably regenerate ecosystem services. Continuing deforestation from mining in the region therefore denies the present and future generations the right to full enjoyment of ecosystem services such as clean air, clean water, rains, rich endemic biodiversity, and cutting down on global warming.

Witness records on social activities that negatively affect children:

“Kamtonga town, as small as it is, has more than 15 bars and lodging,” decried the deputy head teacher at Kamtonga Primary School. He added, “... mining has caused school drop-outs, early pregnancies... (among others).”



Traditionally, the forested areas are important sources of food, herbal medicine and also act as rangelands for pasture. The deprivation resulting from loss of biodiversity without meaningful alternatives has contributed to the poverty and vulnerability witnessed among the local inhabitants. Biodiversity loss in Taita Taveta is a serious ecological deficit since it directly affects the rare endangered bird species, moles, turtles, and the unique tree species which are endemic to the region.

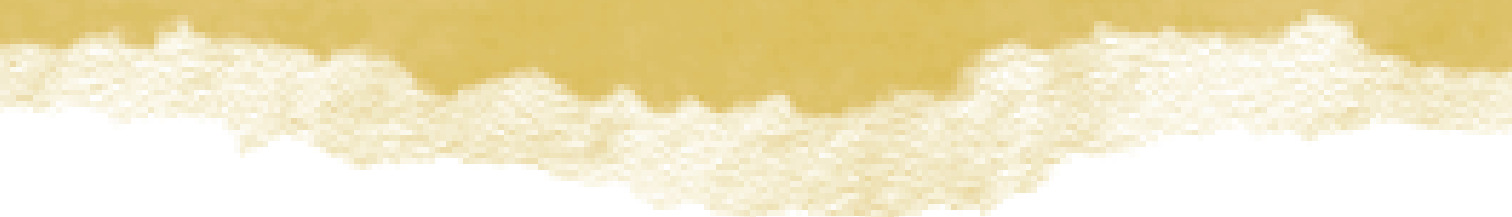
Recommendations on Environmental Rights Violations

The County Commissioner, Madam Josephine Onunga, appealed to residents to stop cutting down trees. Similar recommendations look into the suitable mitigation measures to counter adverse environmental impacts. The recommendations are as follows.

- a) **There should be a well-designed health and safety programme for miners and the investors, including mining safety plans, especially underground.** There is a need to come up with a strategic environmental management plan that stipulates the activities that need to be carried out on project de-commission to minimise hazards to humans and wildlife. People also need to be educated on the importance of using the protective gear and given skills on their use. The miners need to be skilled in response to emergencies in the mining pit. It is suggested that training on Mine Environment and Safety in Mines be organised regularly by a competent training body and holders of certificates from this body be given added advantage when seeking mining jobs. After a sufficient pool of such skilled miners has been created, investors should then be encouraged to employ certified workers only.

Responsible: Ministry of Mining, Ministry of Environment, NEMA, Ministry of Industrialisation, Ministry of Labour, and mining companies.

- b) **There should be strict implementation of policy and laws on rehabilitation of mine sites after mining activity has stopped.** Mining should therefore go hand in hand with land reclamation. One suggestion is to plant trees that can adapt



to the environmental conditions in the dry areas where mining is taking place. This will provide surface cover, reduce soil erosion and water pollution, and also help restore biodiversity.

The Mining Act 2016, which came into effect on 27th May 2016, has introduced strict environmental protection, rehabilitation and restoration requirements on holders of a Prospecting Licence (PL), a Retention Licence (RL) or a Mining Licence (ML). Accordingly, the applicant for a PL must submit an Environmental Rehabilitation and Restoration Plan (S72 (3) (c)), the applicant for a RL must have obtained an Environmental and Social Impact Assessment Licence and an Environmental Management Plan (S88 (3) (c)), and the applicant for a ML must provide proof of submission and approval of an Environmental & Social Impact Assessment Report and an Environmental Management Plan (S101 (2) (a) (i)). All applicants for a PL, a RL or a ML must provide an Environmental Protection Bond sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations (S181(1)).

Responsible: Ministry of Mining, Kenya Forest Service, Ministry of Environment, NEMA, Ministry of Land, and mining companies.

- c) **There is a need to come up with an environmental management plan (EMP) for the mines.** This will help ascertain whether the investor is complying with the EMP and NEMA regulations. An immediate environmental audit needs to be carried out in cases where the initial EIA studies were not carried out in the mine areas. This is because mining is a high potential environmental impact activity that requires an EIA study report as it is an activity with high possibility of environmental impacts. Strategic and health environmental impact assessments (SEIA and HEIA) should be carried out in the mining areas.

Responsible: Forest Department, Ministry of Environment, NEMA, Ministry of Land, and mining companies.

- d) **Since some mines could be having radioactive materials, it is important to establish the nature of minerals in a mining area before embarking on mining.** Periodic screening/testing of mine workers is necessary to ascertain their levels of exposure and or other related diseases.

Responsible: Ministry of Environment, NEMA, Ministries of Health, Lands and Labour, and the mining companies.

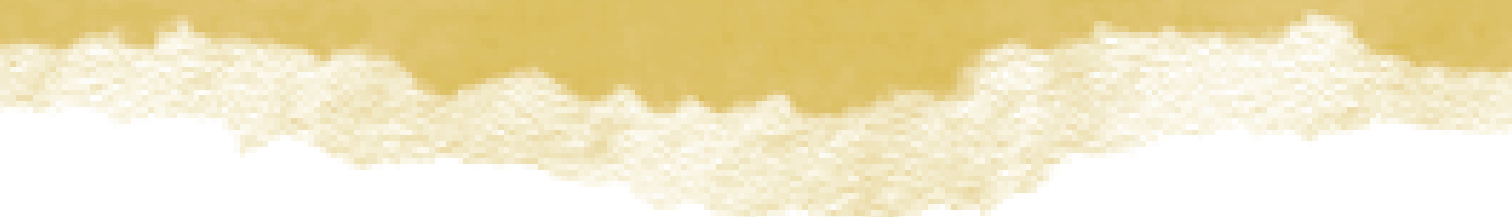
- e) **The investors should consider improved mining technologies such as mechanisation of mining activities.** This would reduce exposure levels to the miners at deep levels. Facilitating adoption of best practices, suitable technologies and modern mine management techniques is key. The Government should operationalize the enabling provisions under EMCA (Section 57) designed to provide a framework to encourage manufacturers to adopt environmental friendly technologies.

Responsible: Ministry of Environment, NEMA, and KNCHR.

- f) **Establish a framework for corporate environmental reporting for the mining sector.** Although there are general guidelines on environmental audit reporting structures, there are no EA reports prepared by the mining companies to show the current state of the mines and any mitigation measures.

Responsible: Ministry of Environment, NEMA, County Environment Committee and KNCHR.

- g) **Strengthen the capacity of Taita Taveta County's Environment Committee and Community-Based Organisations in dealing with environment at the grassroots.** Many of the issues that led to the environmental degradation as discussed by the Inquiry relate to poor governance or the need to build the capacity to cope with the dynamics of increasingly complex and interdependent activities. Through strengthening the Taita Taveta County Environment



Committee and CBOs, they will be able to act as a watchdog for any human rights violations, including environmental degradation.

Responsible: Ministry of Environment, NEMA, KNCHR, CSOs, and other interested parties.

- h) **Develop and implement appropriate Rehabilitation and Decommissioning Action Plans (RDAP), especially for systematic rehabilitation of degraded areas.** To ensure that appropriate measures are systematically taken to rehabilitate environmentally degraded areas, it is imperative that the mining companies put in place RDAP designed to ensure that:

- Environmental resources are not subject to physical and chemical deterioration;
- The use of the sites after the projects are beneficial and sustainable in the long term; and
- Any adverse socio-economic impacts are minimised.

Responsible: Salt companies, Ministry of Environment, NEMA, and the County Government of Taita Taveta.

- i) **Establish a Mining Restoration Fund.** To support the rehabilitation of degraded areas and other environmental issues, it is imperative that in the long term the companies should create a foundation or fund with an independent Board of Trustees, to be financed by them and other well-wishers. The aim of this fund will be to improve the environmental conditions of the area and its environs. This fund should have local communities participate in the decision making and in the implementation of various activities.

Section 25 of EMCA establishes the National Environment Restoration Fund

and further states under Section 25(2) and (5) as follows:

“The Restoration Fund shall consist of (a) such proportion of fees or deposit bonds as may be determined by the Authority from time to time; (b) such sums as may be donated or levied from industries and other projects proponents as a contribution towards the Restoration Fund. (5) The Minister may, by notice in the Gazette, issue orders for the levying of funds from project proponents towards the Restoration Fund.”

S181(3) of the Mining Act 2016 obliges the Cabinet Secretary in charge of Mining to take into account this provision of EMCA when requiring licensees to provide an Environmental Protection Bond.

Responsible: Ministry of Mining, Ministry of Environment, NEMA and the County Government of Taita Taveta.

1.20 Violation of Labour Rights

Taita Taveta County is representative of the socioeconomic dimensions of mining, where the mines astride the great Tsavo conservation zone complicate the solution matrix. Various stakeholders seek common ground as questions on socioeconomic development are juxtaposed with questions on conservation. Mining is a capital-intensive venture, anywhere in the world. Low return on capital investments in the mining sector has been a common outcry among investors. The management of taxes accruing from mining in a way that benefits local communities is also a major challenge. The sustainability of mining as an economic activity has received much attention as a topic of research, with some analysts ascribing the paradox of poverty amidst plenty of mineral wealth endowments to poor strategy, short-sighted choices of investment models, and utter mismanagement. Under labour rights, the key question was:



How should mining business in the County be managed to ensure the workers can enjoy their labour rights and the local communities can achieve net benefits in the long term?



The following direct violations of labour rights were identified.

a) **Subjection of mine employees to sub-optimal pay and violation of employee rights under labour law:** Poor salaries were reported such as 7,000 Kenya Shillings per month for watchmen while other miners earn between 3,500 and 6,000 Kenya Shillings per month. The employees were reported to be having their rights violated by being subjected to the following:

- No medical insurance or accident cover;
- No salary increments;
- No leave entitlement;
- No letter of employment;
- No NHIF or NSSF entitlements;
- No shoes and no night clothes to shield workers from cold nights (reported at the Chawia Minerals CBO in Mkuki);
- No compensation to the mine workers who sustain serious injuries in the course of their work (examples reported at the Chawia Minerals CBO in Mkuki); and
- 12 working hours per day, which is too long for the labour-intensive mining activities.

b) **Subjection of mine employees to poor work environment:** Poor health and sanitation facilities at the mining camps were reported and noticed on the sites, posing danger to the health of the workers and neighbouring communities. It was noticed that the workers put up in temporary dwelling units with hardly any

water supply and sanitation infrastructure. Mine workers reported that they were not fed well, with no balanced diet and sometimes unclean foodstuff cooked in dilapidated drums (reported in the case of Lilian Mercy's mine in Kasigau).


Recommendations on Labour Rights Violations

The flagrant violations of labour rights enumerated above call for urgent and effective corrective measures, as recommended below.

- a) **The welfare of the mine workers should be taken seriously by the employers, observing adherence to labour laws and the relevant provisions for remuneration, written contract, reasonable working hours, safety gear, hygienic and safe working conditions, worker compensation policy, leave days, medical insurance and statutory deductions.** Civil societies are suitably placed to establish partnerships for actively fronting the agenda for favourable changes to benefit workers in the mining sector. Starting a special financing facility targeting small-scale miners is a possible way of helping them to take off faster so that they can offer better services in the County.

Responsible: Ministry of Labour, Micro-finance institutions, Civil Society, Workers Unions.

- b) **The mining companies/investors should prepare and strictly implement plans for CSR activities and skills transfer to their employees.** The mine workers have a right to skills transfer opportunities. The local communities in the mining areas are also entitled to benefits through CSR, according to the Mining Act, 2016. The local community provides a key part of the labour to the mining investors. However, they take little part in decision making. The investors in the County's mining sector can diversify their CSR; simple but suitable suggestions were given during the Inquiry, such as buying books and water tanks for schools and training drillers for technical skills transfer. Introduction of mining courses at certificate and diploma level at Taita Taveta University would help the miners in



having bargaining power from the point of knowledge. The “*zururas*” - artisanal miners who glean minerals from existing pits without getting permission from mine owners, should be a key target of this training. There is need for a name change after attaining civility through education. The Kenya Chamber of Mines (Coast Region) which was set up to educate and listen to the grievances of the miners, needs to conduct short workshops to educate and empower the miners with knowledge, especially on labour rights within the mining sector.

Responsible: Ministry of Labour, Universities/Taita Taveta University, Civil Society, CBOs, and Kenya Chamber of Mines (Coast Region).

1.21 Violation of Children Rights

There were cases of serious violations of children rights to education, childcare services and in general violation of the right to an environment conducive to proper social, mental and physical development of children. The following cases were outstanding.

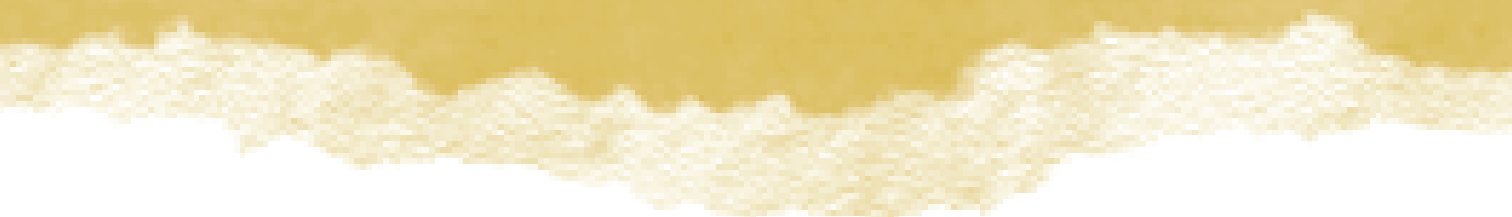
- a) **Violation of the right of children to (quality) education: Cases of child labour in the mines were reported, with an example cited in Kamtonga, where children did not go to school because they went to work in the mines instead.** Going by the reports presented, education is adversely affected in the mining areas, with high school dropout rates. It was reported that some schools in the mining areas did not have teachers and the level of literacy had gone low. Most parents in the mining areas, being illiterate, did not value education. Education standards were observed to be declining with rising child labour in the mines. Mining has therefore been seen as a distractive activity, denying the affected children the right to formal education and compromising their right to a brighter future. Figure 4-4 is representative of the children with high potential walking through the terrain across the mining areas.



Figure 4-4: Children with great potential in the mining areas, need a good education for the future

- b) **Violation of the right of children to sound nurturing, care and respectful treatment:** The Inquiry heard cases where children were sexually abused. It was reported that school-going children were already embracing prostitution in exchange for money from the miners.

Kamtonga was given as an example where there were many bars and where school girls were getting raped. Mining has in this sense contributed to child immorality in the County. The polluted mining environment has also contributed to diseases that acutely affect children, being vulnerable groups. Rising cases of skin diseases resulting from direct exposure of children to the harmful effects of mining (when they work in the mines, or as a result of widespread effects in the environment) were reported. The parents and guardians who stay away for long working in the mines but receive poor compensation in return cannot care for their children adequately – both materially and through parental presence/



guidance. This fact also denies the children the conducive environment for proper upbringing and development that they deserve from parents/guardians.

Recommendations on Children Rights Violations

The cited violations of children rights can be addressed through the following recommended interventions.

- a) **Ensure regular and enhanced monitoring, awareness creation on children rights violations and administration of justice, with particular focus on identifying violations of children rights to education, sound healthcare, parental care and protection against child abuse and sexual harassment.** Awareness creation among the children and their parents/guardians should encourage free reporting of cases of assault and harassment, under protection.


Responsible: Ministry of Education, Government Departments dealing with children rights, Ministry of Labour, FBOs, County Commissioner, local administrators and community leaders.

- b) **Ban all forms of child labour in the mines and close bars and businesses that entertain the abuse of children within their premises.** This intervention will help eradicate distractions to children's education and their abuse by mine workers and other violators.

Responsible: Ministry of Labour, County Government (business licensing arm), NACADA, Government Departments dealing with children rights, County Commissioner, local administrators and community leaders.

1.22 Violation of Gender Rights

Violation of gender rights were identified in the context of the definition of gender. In this case, gender is viewed in terms of the social differences between females and males



throughout the life cycle that are learned and, though deeply rooted in every culture, are changeable over time and have wide variations – both within and between cultures. Though women bore the brunt of mistreatments on the mine sites, men were also not spared according to the evidence presented before the Inquiry. The following violations were identified.

- a) **Violation of rights to non-discrimination through equal opportunities:** It was reported that it had not been easy for women to work in the mining sector because their male counterparts would chase them away.

Witness records on discrimination against women in Kasigau and Kamtonga:

“My male partners turned against me when we struck minerals,” stated one woman in Kasigau.

“Immediately I spotted the mineral, the Chairman of mining in Taita chased me away, built a camp and started mining,” said a woman in Kamtonga.

“I followed up with the Minister, Balala, and later Kazungu, but I have not received any justice,” she lamented.

Widows were reported to be targeted more than men by land grabbers in the mining areas. Some women, it was reported, had their land taken from them by force following mineral discoveries on the pieces of land.

- c) **Sexual abuse and harassment:** Men were not spared the share of sexual abuse and harassment, according to the reported cases of sexual abuse and harassment, including sodomy. There were alarming submissions that men who were found prospecting at a particular mine were stripped naked, then taken naked in a Land Rover to Mwatate town to be publicly embarrassed. In Kamtonga, it was reported that even old women were sexually abused, but they feared reporting such incidences. Representative of the greater violations borne by women, a case was reported in relation to the same mine referred to above

where guards were allegedly ordered by the mine owner to sexually abuse the women who were found in the mining area.

Witness records on rape, intimidation and inhuman treatment in Kamtonga:

“In a mine owned by ... (name withheld), two women (names withheld) were raped by the mine workers...,” testified one man.

“The mine owner ordered his guards to sexually abuse the women and men they found mining in their area...We were undressed and taken to the market naked when found mining at their mine by the guards. I reported the case to the police and the case was taken to court. I was given a lawyer from Mombasa. The lawyer warned me against pursuing the case, saying I might lose my life,” declared one man in Kamtonga.

He added, “When the mine owner found zururas mining in one hole, he started burying them alive!”

A nerve-wracking example was on women workers at a mine in Kasigau, who testified that they were searched in their private parts by the mine owner for allegedly hidden minerals.

Witness records on sexual assault on female mine workers in Kasigau:

“The mine owner called us into her room, undressed us so as to search our private parts while slapping us and pointing a pistol at us...,” testified one woman.

“She used one glove to search our private parts...,” testified two women. “... after this ordeal, I stopped working,” one of the two women affirmed.

“The mine owner inserted her fingers into my private parts to search for minerals...,” declared one woman to the Inquiry panel’s utter astonishment.

“I do not see how minerals can be hidden in the private parts of women. Madini si gololi,” commented Governor John Mruttu on the shocking cases shared at the Inquiry.

The witness account recorded that the said mine owner called them into her room, undressed them, and searched inside their private parts using a glove while slapping them and pointing a pistol at them. The grave ordeal made the women stop working altogether.

- d) **Interference with rights in marriage:** Apart from the reported rampant prostitution encouraged by mining activities, marriages were also reported to be threatened by the prolonged stay of spouses in the mines, especially husbands, hence denying their partners conjugal rights and the right to spousal care. This trend was reported to have forced some women into multiple marriages.

Witness records on marriage problems caused by mining activities:

“Women get married more than once (husbands spending in the mines),” said the headmaster of one primary school in Kasigau.

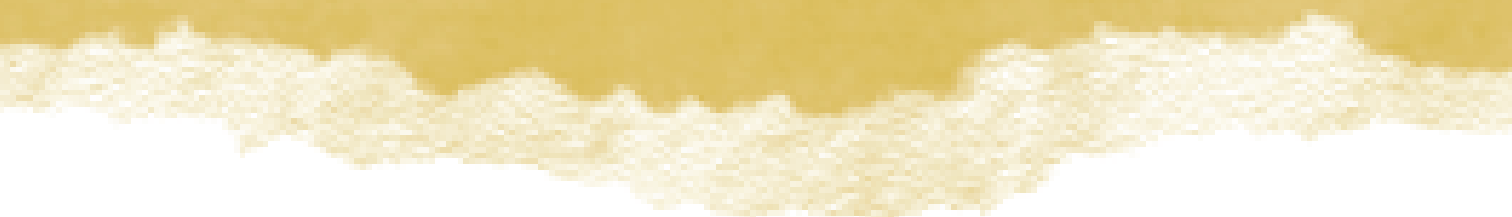
Other socio-culturally indecent sexual behaviours were noted to be commonplace in the mining areas, due to the allure of money from miners and the increase in social centres and activities that encourage drug abuse.

Recommendations on Gender Rights Violations

The following recommendations are preferred in addressing the cited violations of gender rights.

- a) **Ensure regular and enhanced monitoring, awareness creation on gender rights violations, and administration of justice with particular focus on identifying the plights of the assaulted workers and gender discrimination, especially among female workers.**

Responsible: Ministry of Labour, Judiciary/Courts, KNCHR, Government Agencies and Departments dealing with gender rights, County Commissioner, local administrators and community leaders.

- 
- b) **Compensation of the victims of sexual abuse deserves top priority.** The cases of sexually abused workers are grave and need to be heard and resolved speedily to avoid impunity and repeated occurrences.


Responsible: Ministry of Labour, Judiciary/Courts, Advocates of complainants, local administrators and community leaders.

- c) **The employers of mine workers and the workers/workers' unions need to agree on, come up with, and enforce mutually agreed work policies (in addition to the existing labour regulations) and schedules that are friendly to sustainable family re(union).** The forced long stay of workers in the mines undermines family cohesion and conjugal rights. For example, the number of working days in a week can be reduced to balance out the extended working hours in a day (reported to be 12 hours from the Inquiry).

Responsible: Ministry of Labour, mining companies/employers, local administrators and community leaders.

1.23 Synthesis of Findings

The Public Inquiry was able to establish important first-hand information on the gravity and variety of human rights violations in Taita Taveta County's mining sector. The extensive review of the legal and regulatory frameworks established that the protection of human rights in mining is duly recognised in law and policies, not only nationally but also globally. The review consequently positioned transparency in mining activities and the right to adequate information on mineral-market mechanisms as crucial elements, to which the public and communities in mining areas are indiscriminately entitled – across age, gender or social profiles. Inadequate awareness levels on the existing mining and environmental laws and policies in place to help ensure transparency and address violations of mining-related rights came out as one of the major problems assuming varying degrees of severity across age, gender and social profiles. Two key areas that call for dedicated intervention and improvement also emerged. One is the need for inclusive

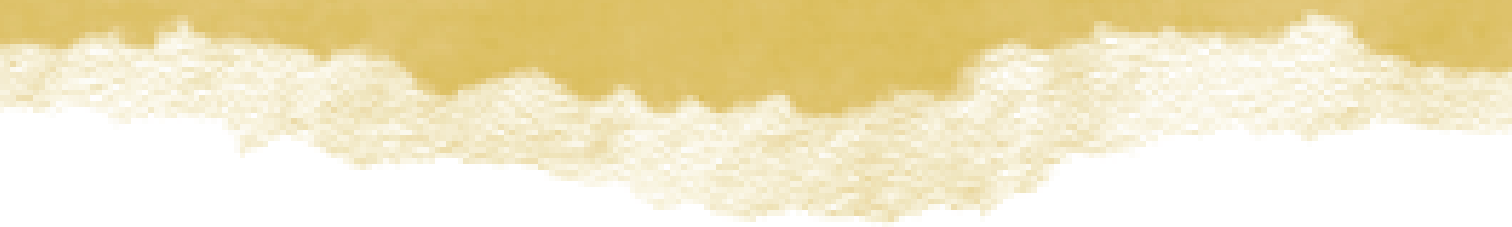


and accurate decision-making on the issues and disputed claims of land ownership in the active or potential mining areas. The other area is timely law enforcement to deliver effective solutions to the violation of the rights of the communities whose welfare continues to be adversely affected by mining activities.

In respect of the key findings, political leadership holds the promise of transforming the mining sector, having come out in the study as an influential instrument in determining decisions on mining and human rights protection in the sector. This is an important opportunity for leaders to work with communities and experts towards developing policies favourable to sustainable development of the County's mining sector. Leaders from both the National Government and the County Government of Taita Taveta need to close the gap in public participation by actively involving the local community in decision-making on the development, management and sharing of the benefits of the County's mineral wealth.

The judiciary has a critical role to play in addressing historical injustices in mining and land rights, and no less have the alternative dispute resolution mechanisms, if effective long-term settlement of mining disputes is to be achieved. Land ownership, the central axis of the reported mining disputes, deserves critical attention. The issuance of Title Deeds in Taita Taveta County needs speeding up. Accurate land surveying meeting the minimum professional standards for cadastral and mining surveys remains the key source of the reliable and objective boundary information required to ensure justice in assigning rights to land ownership, and determining the spatial extent of mining rights. Consequently, local capacity development for proper spatial planning including mining plans and environmental management plans, and for the impartation and competent application of geo-engineering and resource management expertise, is among the top agenda for positively transforming mining sector in Taita Taveta.

Implementing the suggested recommendations provides hope for effectively addressing the key causes of violations of human rights in the mining sector of Taita Taveta County. The lessons derived from this public inquiry should therefore inform the implementation of transformative changes and/or incremental improvements. They also lay a firm



foundation for further collaborative research on the protection of human rights in Kenya's promising mining sector, being a priority sector in the 2013 – 2017 Medium Term Plan of Kenya Vision 2030.

APPENDIX 1:

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RECOMMENDATIONS IMPLEMENTATION MATRIX

Thematic Area	Recommendation	Target Actor	Timelines
Land	Establish policies and systems for accurate land surveying and mapping: use of technology to ensure accuracy of land demarcation and management	Ministry of Land and physical planning- housing and urban development , County Government	2017/2018 financial year
	Engage Community and stakeholders in the spatial planning and land adjudication processes	Ministry of lands physical planning- housing and urban development	Immediate and continuous
	Timely resolution of cases regarding land	Judiciary and Ministry of labour social security and services and County Government	Continuous
Environment	Enforce and Facilitate proper decommissioning of mines. Decommission clauses should be included in the licensing requirements	Ministry of Mining, Kenya Forest Service, Ministry of Environment and natural resources, NEMA, Ministry of Land and physical planning: housing and urban development and mining companies	Immediate and on-going

Thematic Area	Recommendation	Target Actor	Timelines
	Ban/Restrict the cutting of vegetation (deforestation) and charcoal burning in Taita Taveta	Ministry of environment and natural resources NEMA, Kenya Forest Service and County government of Taita Taveta.	Immediate
	Have a well-designed health and safety programme for miners and the investors, including mining safety plans, especially underground	Ministry of Mining, Ministry of Environment, NEMA, Ministry of Industrialisation, Ministry of Labour social security and services and mining companies.	Immediate and continuous
	Establish the nature of minerals in a mining area before embarking on mining.	Ministry of Environment and natural resources, NEMA, Ministry of Health, Ministry of Land and physical planning-housing and urban development Ministry of Labour social security and services , Mining and the mining companies.	Immediate and continuous
	Use improved mining technologies such as mechanisation of mining activities	Ministry of Environment and natural resources, NEMA	Approval of mining technology at the licencing stage

Thematic Area	Recommendation	Target Actor	Timelines
	Establish a framework for corporate environmental reporting for the mining sector	Ministry of Environment and natural resources, NEMA, County Environment Committee	Immediate
	Strengthen the capacity of Taita Taveta County's Environment Committee and Community-Based Organisations in dealing with environment at the grassroots	Ministry of Environment and natural resources, NEMA, KNCHR, CSOs, and other interested parties.	Immediate and continuous
	Establish a Mining Restoration Fund	Ministry of Mining, Ministry of Environment and natural resources, NEMA and the County Government of Taita Taveta.	Immediate
Labour	Enforce the health and safety requirement in the mines	Ministry of labour	Immediate
	Ban child labour and enforce Free Primary Education requirements	Ministry of labour, Ministry of Education	Immediate
	Ensure Non Discrimination in labour practices especially against women. Flexible working schedules should be given to women.	Ministry of Labour social security and services and private businesses	Immediate

Thematic Area	Recommendation	Target Actor	Timelines
Gender and Child Rights	There should be speedy investigations and prosecution of perpetrators of human rights violations against women	DPP, Police and Local Administration	Immediate and continuous
	Ban all forms of child labour, close all bars and businesses that pose danger to children	Ministry of Labour social security and services, County Government, NACADA, Government Departments dealing with children rights, local administrators and community leaders	Immediate and continuous
	Compensation of victims of gender violence	DPP, Department of Gender, Kenya Police, KNCHR	Continuous and on-going
	Enact and enforce work place policies and regulations that promote family values and cohesion	Ministry of Mining, Ministry of Gender, Culture and Sports, Trade Unions, Mining Companies, KNCHR	Immediate

APPENDIX 2

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PANELISTS AND OTHER RESPONDENTS

KNCHR TEAM/PANELISTS	
Kagwiria Mbogori	Chairperson
George Morara	Vice Chairperson
Shatikha Chivusia	Commissioner
Patricia Nyaundi	Secretary to the Commission
Maina Mutuaruhiu	Head of Department – ECOSOC
Jaffar Mohamed	Lead Counsel/Regional Coordinator- Coast

LEADERS	
H.E. John Mruttu:	Governor, Taita Taveta County
H.E. Mary Ndigha Kibuka:	Deputy Governor, and CEC Member for Lands and Mining, Mining Taita Taveta County
Josephine Onunga:	County Commissioner, Taita Taveta County
Hon. Elijah Mwandoe:	CEC Member for Industrialization, Research, Energy and ICT
Hon. Thomas Mwadeghu:	MP, Wundanyi Constituency
Hon. Raymond J. Mwangola:	Chairman, Committee on Mining, Energy & Natural Resources, MCA
Hon. Mary Mghanga Mngola:	MCA, Member of Committee on Mining and Natural Resources; also Member of Committee on Transport and Infrastructure
Hon. Omar Ahmed:	MCA, Member of Committee on Mining and Natural Resources; also Member of Committee on House Rules and Procedures; and other Committees

Hon. Mwandawiro Mghanga:	Former MP (Wundanyi)
Hon. Mercy Mwakera	Nominated MCA, Vice-Chair for Mining in the County Assembly
Madam Shufaa Mwichuma:	Deputy County Commissioner, Mwatate Sub-County
Abida Amisi:	Deputy Sub-County Administrator
Boniface Kimuzi:	Ward Administrator (Chakua Ward)

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Bakari Kalema:	Chairman, Kenya Chambers of Mines, Coast Chapter
Edward Omito:	County Geologist
Kenneth Mwaita Mwagodi:	County Chief Officer, Lands and Mining
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Hon. Mary Mghanga Mngola:	MCA, Member of Committee on Mining and Natural Resources; also Member of Committee on Transport and Infrastructure
Hon. Omar Ahmed:	MCA, Member of Committee on Mining and Natural Resources; also Member of Committee on House Rules and Procedures; and other Committees
Hesborne Mwawaza:	KTN Reporter
Beatrice Mjomba:	Civil Society Organisations

MINE INVESTORS/MINING COMPANIES

• Aqua Mines Ltd
• Bridges Exploration Ltd
• Chawia Minerals CBO
• Davis Mining
• Lillian Mercy
• Wanjala Mining Co Ltd

EXPERTS/CONSULTANTS (Taita Taveta University)	
Prof. Hamadi Boga:	Full Professor (Microbiology)/Team Leader
Dr. Maurice Ogada:	Economist/Research Coordinator
Dr. Justin Maghanga:	Environmental Chemist/Field Coordinator
Mr. Arthur Ndegwa:	Mining Engineer/Inquiry Panellist
Mr. Nashon Adero:	Surveyor/Technical Report Manager
Mrs. Amina Ndinya:	Social Scientist/Research Assistant
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BIBLIOGRAPHY



Akerlof, G. (1970). Market for lemons: Quality Uncertainty and the Market Mechanism. Quart. J. Econom. 84:488-500.

Arnstein, S. R. (1969). A Ladder of Citizen Participation. JAIP 35 (4):216-224.

Bridges, C.R. (1974). Green grossularite garnets (tsavorites) in East Taita Taveta County (TTC). Gems & Gemology, Summer, pp. 290–295. Scale mining and sustainable development within the SADC Region.

Government of Kenya (2009). National Housing and Population Census. Nairobi: Government Printers.

Government of Kenya (2010). The 2010 Constitution of Kenya. Nairobi: Government Printers.

Government of Kenya (2013). Vision 2030: Second Medium Term Plan. Nairobi: Government Printers.

Government of Kenya (2015). Environmental Management and Coordination Act,

2015. Nairobi: Government Printers.

Government of Kenya (2016). The Mining Act 2016. Nairobi: Government Printers.

Mghanga, M. (2011). Mining in Taita Taveta County: Prospects and Problems. Nairobi: Heinrich Böll Stiftung.

Nyaberi, M.D. and Rop, B.K. (2014). Petroleum prospects of Lamu Basin, South-Eastern Kenya. Journal of the Geological Society of India, Volume 83, Issue 4, pp. 414-422.

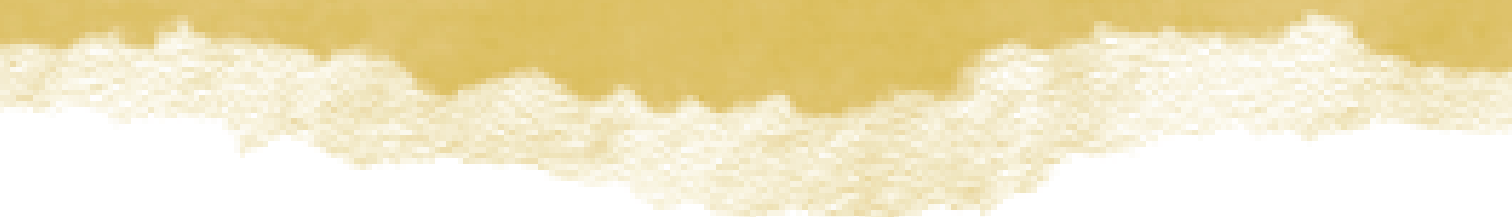
Pohl W. & Horkel, A (1980). Notes on the Geology and Mineral Resources of the Mito Andei – Taita Area (Southern Kenya), Kenya-Austria Mineral Exploration Project.

Rop, K.B. (2014). Economic and Job Creation Potential of Artisanal and Small-Scale Mining In Taita Taveta County, UNDP REPORT.

Saggerson, E.P. (1962). Geology of the Kasigau-Kurase area. Rept. Geol. Surv. Kenya, No.51.

World Commission on Environment and Development (1987). U.N. Doc. A/42/47 (11 Dec. 1987), Reprinted in Our Common Future 43 (1987).

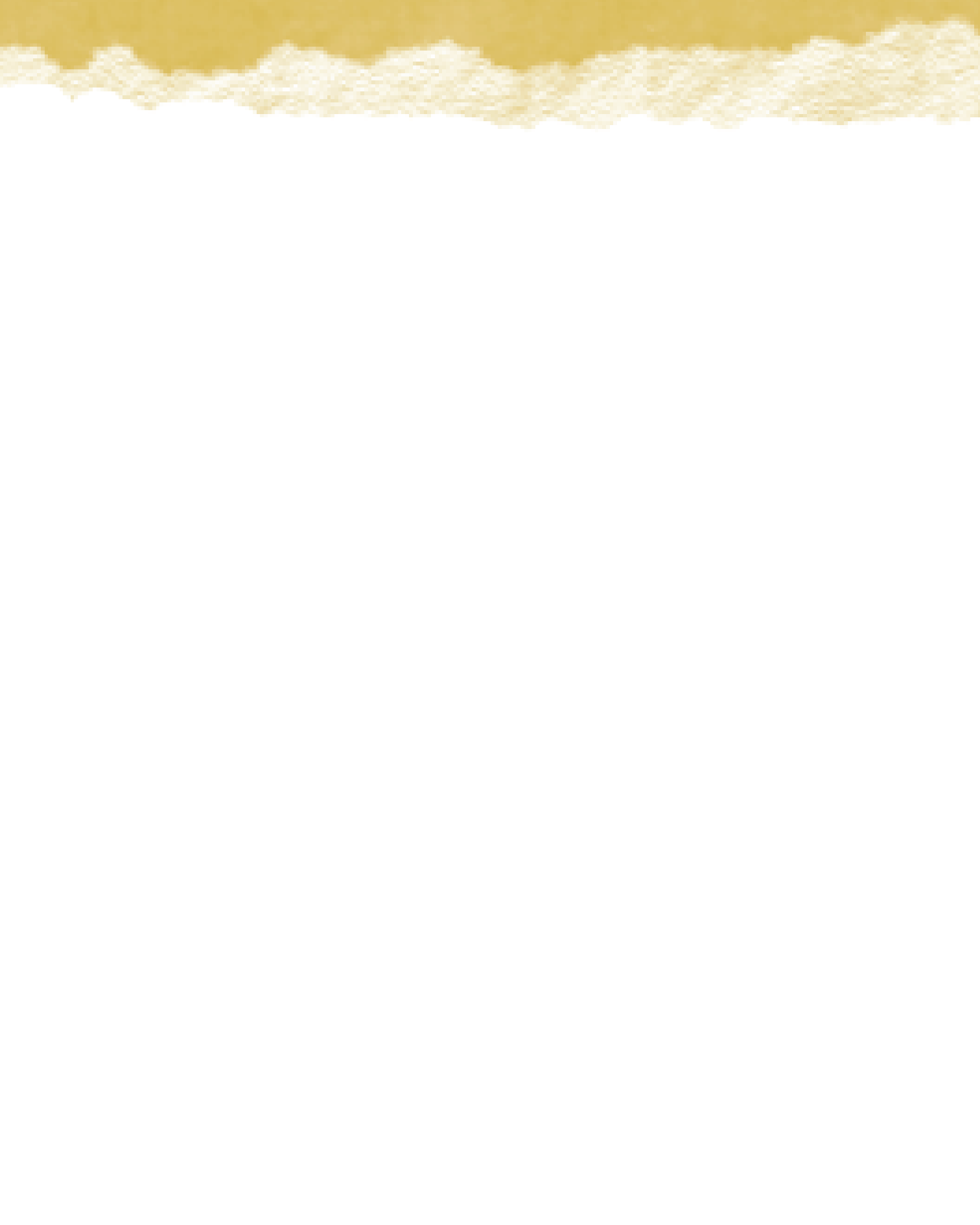
World Resources Institute; Department of Resource Surveys and Remote Sensing,



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Research Institute (2007). Nature's Benefits in Kenya, An Atlas of Ecosystems and Human Well-Being. Washington, DC and Nairobi: World Resources Institute.



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ISBN: 978-9966-040-43-5

