



RAPID ASSESSMENT OF THE EXTRACTIVE INDUSTRY SECTOR IN KITUI COUNTY:
THE CASE OF COAL EXPLORATION AND MINING IN THE MUI BASIN

FINAL REPORT

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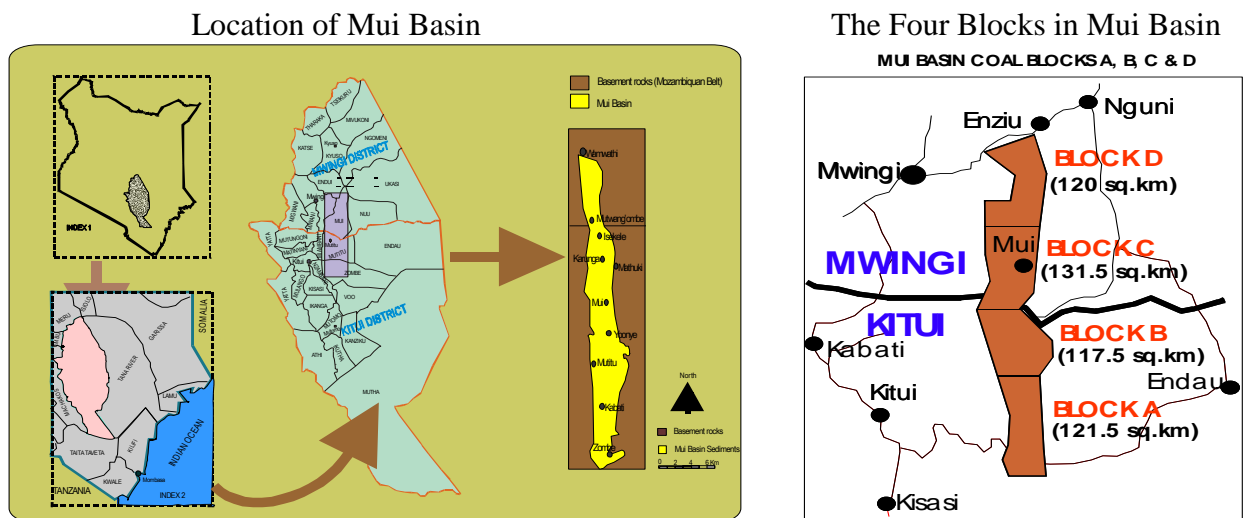
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1.0 INTRODUCTION AND BACKGROUND

Kitui County is located in Eastern Kenya and borders Tana River County to the East and South East, Taita Taveta County to the South, Makueni and Machakos Counties to the West, Embu County to the North West and Tharaka and Meru Counties to the North. It covers an area of approximately 30,496.5 Km². It is a semi-arid region with annual rainfall ranging from 500mm to 1050mm per annum. Its administrative structure consists of eight constituencies namely Mwingi North, Mwingi Central, Mwingi South, Kitui West, Kitui Rural, Kitui Town, Mutitu and Kitui South. The County has a total population of 1,012,709 (52% female, 48%), a population density of 33 people per Km² and a total of 205,491 households. The potential mineralogy of the County is listed as including possible deposits of coal, gypsum, magnesite, gold, asbestos, garnet, tourmaline, vanadium, silimanite, illmenite, iron ore, pyrite, silica, epidote, diatomite, wollastonite, copper and graphite.

The county has proven reserves of coal in Mui Basin which has been subdivided into four blocks namely, A, B, C and D. In 2010 four hundred million tonnes of coal reserves were confirmed in Block C. The coal has been analyzed and found to range in ranking from lignite to sub-bituminous with calorific values ranging from 16 to 27 MJ/kg. Further exploration work is ongoing in Blocks A and B. Blocks C and D are under concession. These details are illustrated below.



Blocks in Mui Basin and the Wells Drilled

Block	Area (km ²)	Drilled Wells	Coal Intercepted
A (Zombe – Kabati)	121.5	8	4 Wells
B (Itiko – Mutito)	117.5	8	4 wells
C (Yoonye – Kateiko)	131.5	56	32 wells
D (Isekele – Karunga)	120.0	4	2 wells

Source: MOEP

1.1 Statement of the Problem

With the emergence of the extractive sector in Kitui County specifically with regards to coal exploration and mining, a number of challenges and opportunities have presented themselves. As an opportunity, the county, which is listed by the Commission for Revenue Allocation's (CRA) County Development Index¹ as among the five most unequal counties in Kenya, has an opportunity to harness this opportunity to improve the welfare of the residents. However, the discovery of mineral resources in Kitui County is taking place against a backdrop of significant challenges to the county's development. These include high rural poverty, insecurity and conflicts and social tensions between communities in Kitui and Tana River Counties, developing coherence and mutual understanding in the devolution structure, climate change and its impact on ecosystem services and infrastructure and poor flow of information on the processes which has led to speculation about the fate of communities in the Mui Basin. If well-managed, these resources, while being within the province of the national government, could provide a firm foundation for the county to address its poverty challenges, improve key infrastructure installations in the county, accelerate growth and development, transform its weak agricultural sector and increase budgetary allocations to key sectors such as health and education.

Likely impacts on the directly affected population include loss of housing and ancillary structures, loss of farmland and grazing land, loss of key infrastructure including schools, churches, cultural sites and commercial buildings, as well as potential loss of access issues. The directly affected population is contained within the Mui Basin including Block A which covers the area between Zombe and Kabati spanning 121.5 km², Block B covering the area between Itiko and Mutito spanning an area of 117 km², Block C covering the area between Yoonye and Kateiko spanning an area of 131.5 km² and Block D which includes the area between Isekele and Karunga which is approximately 120 km².

1.2 Objectives of the Study

The overall goal of the assessment was to **to gain** a better understanding of the institutional context, livelihood systems, stakeholder dynamics and the potential impacts or benefits of extractive operations at the community level in Kitui County. The study was designed to achieve at least five interrelated specific objectives:

1. To have a social baseline for formulating a strategic and scalable extractive governance program for Kitui's extractive sector;
2. To generate community-specific information relating to the concerns around extractives in Kitui county. This will include community expectations and fears on existing exploration and future development and operation activities;
3. To identify the policy, legal and regulatory frameworks that govern the extractives sector and the rights and obligations of stakeholders therewith;
4. To develop recommendations for designing and implementing a situation-sensitive stakeholder engagement and community-informed dialoguing process which allows for participatory impact

¹ The County Development Index identifies a number of issues including the poverty index, life expectancy, access to energy, educational attainment, completion and dropout rates, adult literacy, sanitation and water, the disease burden, aridity index, agriculture or livestock productivity, environmental conditions, demographics based on the ratio of dependent to employed population, political participation and socio-economic and employment opportunities.

identification and mitigation, community development and social investment agreements, and participatory monitoring of development outcomes.

5. To identify and profile the institutional make-up of the study county. This will include local government structures, mining companies, faith-based organizations, and civil society organizations as bases for engaging in synergic collaboration.

1.3 Significance of the Study

This research study directly contributes to the overall realization of Diakonia's vision of a world where all people live in dignified circumstances in a just and sustainable world, free from poverty. It will seek to address issues affecting all stakeholders in the County irrespective of religion, gender, ethnicity, language, ideological or political beliefs, social origin, property, age, birth or any other status. It is hoped that the recommendations developed from this study will go a long way in changing unfair political, economic, social and cultural structures that generate poverty, oppression and violence.

More particularly, the study isolates issues that need particular attention regarding the coal exploration taking place in the Mui Basin and enable Diakonia and its partners develop concrete and targeted interventions that will result into the most optimal outcome for socio-economic development including aspects relating to democracy and public service delivery, transparency and accountability, equity as well as security, peace-building and conflict management. These issues will be tackled against the backdrop of the country's Second Medium Term Plan (MTP) of Vision 2030 titled "*Transforming Kenya: The Pathway to Devolution, Socioeconomic Development, Equity and National Unity*" with issues specific to Kitui County being canvassed.

1.4 Methodology

The survey employed both qualitative and quantitative methods of data collection. For the most part, limited quantitative data was used to support analysis for specific qualitative findings. Qualitative instruments including semi-structured interviews and focus group discussions were used alongside key informant interviews. Additionally, desk study and review of secondary information focused on identifying information gaps which inform primary data collection priorities on social and environmental issues relating to the extractive sector in the County.

The study was carried out in three phases. The first phase entailed field visits to the Mui Basin in each of the identified blocks. A number of key stakeholders were interviewed during this phase. Focus Group Discussions (FGD) were also deployed during this phase to elicit real-time reactions to the issues affecting the communities. The second phase involved interviews with key stakeholders including county government officials, representatives of the national government as well as national-level officials. The third phase involved a validation processes with all the stakeholders where issues that had been addressed were clarified and gaps identified to develop a more comprehensive understanding of issues affecting the Mui Basin with regard to coal exploration.

In deciding on study sample, key informants and focus group interviewees, the study used both random and purposive sampling including stakeholders identified by the partners. Key informants at county administration and communities directly impacted by mining operations were purposively selected. The study team consulted adequately with local partners and communities to ensure that focus groups were widely representative of the community and included legitimate persons of the communities' interest.

1.5 Data Sources and Description

The study was conducted through desk research, key informant interviews and fieldwork in Kitui County. The desk research involved a review of policy, legal and institutional frameworks for mining in the country as well as related literature on the subject matter. This was complemented by interviews with county and national government officials including the Ministry of Energy and Petroleum and the National Environmental Management Authority (NEMA). Other stakeholders with industry experience were also interviewed to get further information.

2.0 POLICY AND LEGAL FRAMEWORKS FOR THE MINING SECTOR IN KENYA

2.1 Background

The legal framework regulating the mining sector is spread in many statutes including the Constitution of Kenya 2010, the Mining Act, the Environmental Management and Coordination Act, the Public Finance Management Act, and the Land Act. There is also an ongoing process aimed at aligning laws in the sector with the Constitution of Kenya 2010. The legal framework is important in establishing a number of issues including the approach to land access and management, establishing rates of compensation, determining eligibility for compensation and resettlement assistance, including livelihood initiatives as well as establishing mechanisms to resolve grievances among affected persons related to compensation and eligibility.

2.2 The Policy Framework for the Mining Sector in Kenya

2.2.1 The Draft Mining and Minerals Policy

The mining sector has had no policy framework to guide the implementation of laws made for the sector. This reality has resulted to incoherent and often unlawful implementation of sector laws in many instances. There is a proposed draft National Mineral and Mining Policies which sets out principles and policies to assist the government in reforming mining sector regulation and promotion of mineral investment to enhance the contribution of the sector to the national economy.

The draft policy identifies, as its guiding principles, the need for transparency, uninhibited access to justice and public participation in the development of policies, project plans and processes for the management of mineral resources. It also provides for consideration of inter-generational equity and sustainable utilization of mineral resources. The policy further makes provision for international cooperation in the management of mineral resources where such resources are shared with other states or where management measures in one state may have adverse or positive consequences in another state.

It seeks to integrate sound environmental protection in mineral resources development as well as promote the observation of the social and cultural values traditionally applied by any community in Kenya for the management of mineral resources in so far as the same are relevant and are not repugnant to justice and morality or with any written law. The draft policy further notes the importance of promoting equitable access to mineral resources and benefit-sharing as well as value addition to raw minerals before export as a way of increasing returns for the people of Kenya.

2.2.2 The Draft Energy Policy

The draft national energy policy deals with many aspects in the energy sector. In the case of the coal sub-sector, the draft policy notes that this is an affordable, competitive, reliable and easily accessible source of energy, especially for electricity generation. It notes the extensive coal exploration undertaken in the Mui Basin of Kitui County as well as other parts of the country. These resources are expected to provide about 1,900MW of electricity generation by 2016 and 4,500MW by 2030.

The draft policy commits the government to promote an intensive coal exploration programme and efficient utilization of coal resources while minimizing the environmental impacts associated with its use. It is to establish data and information on coal resources, intensify promotional campaigns in local and international conferences and exhibitions, as well as create conducive investment

environment for exploration and exploitation of coal by providing fiscal incentives to attract investment in this sector. The national government is also to establish a coal development corporation as a special purpose vehicle to be the lead agency in the development of the coal industry in the country.

The policy proposes the establishment of the National Coal Advisory Committee (NCAC), responsible for coal exploration and development matters. It commits the government to develop mechanisms for sharing of benefits between the national and county governments as well the local communities in accordance with Article 69 of the Constitution, as well as undertake the requisite process leading to compliance with the Extractive Industries Transparency Initiative (EITI).

With regard to land, environment, health and safety, the policy requires that every county, with regard to electricity and gas reticulation and energy regulation, is required to set aside suitable land for energy infrastructure development purposes, including but not limited to projects recommended in the indicative national energy plans. The government commits to facilitate the development of a National Resettlement Action Plan Framework for energy related projects; including livelihood restoration in the event of physical displacement of communities. It further commits to facilitate access to land where exploration blocks fall on private land, community land and cultural heritage areas including game parks or reserves, put in place strategies and mechanisms to eliminate wood fuel, charcoal and kerosene as a household energy source by 2022 and ensure the creation of disaster response units in each county and in relevant energy sector entities.

2.3 The Legal Framework for the Mining Sector in Kenya

The Constitution of Kenya 2010 under Article 69 (1) (a) bestows on the State the responsibility to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits. It is required of the Government to utilize the environment and natural resources for the benefit of the people of Kenya. It further requires equitable sharing of revenues raised nationally among national and county governments, as well as equitable sharing of the burdens and benefits of the use of resources between present and future generations. What is not clear is upon whom the role of managing mineral resources is placed. The National Land Commission (NLC) has the overall mandate to manage public land on behalf of the national and county governments. Mineral resources can also be defined as being part of land. The assigning of these roles to individual Ministries without involvement of the NLC may be open to challenge under the Constitution.

2.3.1 The Mining Act, Cap 306, Laws of Kenya

The mining sector is regulated by the Mining Act, Cap 306 which is an adaptation of the Mining Ordinance of 1933. The Act has been revised in 1972 and 1987. It states that all minerals are vested in the government and may only be issued to any other person subject to processes established under the Act. Any authorization for the exploitation of minerals is granted through the Commissioner of Mines and Geology or an officer duly authorized by him. The nature of rights awarded includes prospecting and mining rights. Prospecting licenses are issued for one year and may be renewed at the discretion of the Commissioner for a further period of one year each up to a maximum of five years each.

The exploitation of minerals requires the issuance of a mining lease. An applicant for a mining lease must carry out a feasibility study and an approved cadastral survey of the deposits of the mineral in question. The applicant must then prepare an Environmental Impact Assessment (EIA) study in accordance with the requirements of the Environmental Management and Coordination Act

(EMCA) No. 8 of 1999. This study has to be approved by the National Environmental Management Authority (NEMA). The EIA report is submitted to public for commentary before final approval. It is then required of an applicant to submit a formal application for a mining lease which must include all information established in the first two steps above as well as any compensation agreements payable to landowners. This must be published in the Kenya Gazette and a local newspaper inviting any objections. The process then moves to registration of the mining lease under the Mining Act and the Registration of Documents Act. The applicable stamp duty must be paid at this point. The Constitution then requires Parliament to ratify any right or concession for the exploitation of natural resources.

The Act does not provide for consultation with local communities before the commencement of exploration and mining operations. There is no express requirement that mining companies engage in public consultation with regard to exploration rights, mineral rights and environmental impacts. Acquisition of land under the Act is done through compulsory acquisition by the government, payment of compensation is required. The settlement of disputes is done through the Commissioner of Mines and appeals can be made to the High Court. The Act also lacks provisions relating to the issue of transparency and access to information and documents registered are not generally available to the public.

2.3.2 The Environmental Management and Coordination Act (EMCA) No. 8 of 1999

The EMCA law establishes a framework for the management of the environment. It establishes NEMA to exercise general supervision and coordination over all matters relating to the environment. The EMCA law is further supported by the Environmental (Impact Assessment and Audit) Regulations of 2003. EMCA further establishes the Standards Enforcement and Review Committee whose principal function is to set standards for water quality, air quality, classification of waste for purposes of proper handling, pesticide residues in raw agricultural commodities, noise emissions, noxious smells, and ionizing radiation. The law lays down the procedure for conducting EIAs and states that all new projects that are likely to affect the environment in any way must undertake an EIA after which the EIA report should be submitted to NEMA for review and approval.

One fundamental weakness of the EMCA law is that does not specifically address the mining and oil and gas sector activities. It also does not have specific provisions for conducting Environmental and Social Impact Assessments (ESIAs) in the extractives sector. The second Schedule of the Act only lists the nature of projects that require an EIA. It includes mining, mineral processing, reduction of ores and minerals, smelting and refining of ores and minerals, as well as the exploitation of the production of petroleum in any form.

2.3.3 Land Management Laws in Kenya

There are also a number of laws developed to manage issues relating to land in Kenya. These laws include the National Land Commission Act, the Land Act and the Environment and Land Court Act. These laws were enacted in 2012 with the aim of revising, consolidating and rationalizing land laws in the country. They were passed to give effect to the Constitution of Kenya 2010 and provide for the sustainable administration and management of land and land-based resources. They apply to public, private or community land. The National Land Commission has authority under the Land Act in the management and administration of public, private and community land. It also has powers to reserve public land located within the surface of the earth and the subsurface rock, marine waters in the territorial sea and exclusive economic zone; and natural resources completely contained on or under the surface. This is to be done in consultation with the national government and the

county governments, by order in the Gazette. The Commission is required to undertake an inventory of all land-based natural resources. It is also required to make rules and regulations for the sustainable conservation of land-based natural resources, and put in place measures to ensure benefit-sharing to the affected communities.

2.3.4 The Public Finance Management Act

The Public Finance Management (PFM) Act was enacted to replace the Government Financial Management Act and align the management of public funds in line with the new principles of financial management enunciated in Article 201 of the Constitution of Kenya 2010, which gives effect to the principles of public finance. It emphasizes openness, accountability and public participation in public finance management, equitable sharing of revenues, equitable sharing of burdens and benefits of public borrowing and the observance of fiscal discipline. Revenues from the extractives sector are collected in an account at treasury and such payments are regulated by the Kenya Revenue Authority which assesses the amounts due to the exchequer. Such revenues are considered as public funds and are therefore regulated under the mechanism established by the PFM Act as well as the principles of public finance under the Constitution.

The PFM Act has as its objectives the need to ensure that public finances are managed at both the national and the county levels of government in accordance with the principles set out in the Constitution, and public officers who are given responsibility for managing the finances are accountable to the public for the management of those finances through Parliament and County Assemblies. It seeks to promote good financial management at the national and county levels to facilitate effective and efficient use of resources. The core areas addressed under the Act include macro-fiscal policy making, budgeting, treasury management, and budget execution as well as accounting, reporting and audit issues. The Act takes precedence over any other law on matters relating to preparation and submission of budget estimates, preparation and submission of accounts for audit, borrowing, lending and loan guarantees, raising of revenue and making of expenditures, banking arrangements, including opening of bank accounts and investment of moneys, establishment and dissolution of state corporations as well as establishment and management of public funds.

The PFM law assigns roles to various entities charged with the management of public funds. Parliament is responsible for the general oversight of national finances. At the national level, these institutions include Parliament (which entails the National Assembly, Senate and the Public Budget Office), the Cabinet, the National Treasury, the Cabinet Secretary in charge of finance, accounting officers of the national government, receivers and collectors of revenue for the national government, the Public Debt Management Office (PDMO), the Accounting Standards Board (ASB), the Controller of Budget, the Auditor General and the Commission for Revenue Allocation. 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.

With regard to macro-fiscal policy making, the Act requires the national government to prepare a medium-term fiscal strategy (budget policy statement), progress reports on fiscal strategy through the budget review & outlook paper, a pre-election and post-election report as well as observe the fiscal responsibility principles covering debt, spending, wage bill, borrowing, fiscal risks and tax rates and bases. The county governments, on the other hand, are required to prepare county fiscal strategy

papers (CFSP), prepare progress reports on CFSP through County Budget Review & Outlook Papers (CBROP) and observe the fiscal responsibility principles.

On issues relating to the budgeting process, the obligations placed on the national government include a process for issuance of the budget circular, the budget review and outlook paper and the budget policy statement, preparation of the Division of Revenue Bill and County Allocation of Revenue Bill, preparation of budget estimates, development of the Appropriation Bill, submission of the national debt management strategy, the public pronouncement of budget policy highlights and revenue raising measures by the cabinet secretary, as well as approval of Finance Bill. County governments, on the other hand, have a budget process that entails issuance of the budget circular, preparation of the CBROP and CFSP, the county government development plan, budget estimates, the Appropriation Bill, submission of the county debt management strategy, making public pronouncements of revenue raising measures and approval of county Finance Bills.

The PFM Act also makes provision for treasury management and budget execution. At the national level, it provides for the operationalisation of the Consolidated Fund, the Equalization Fund and the Contingencies Fund. It also provides for the establishment of other national public funds, establishes a single treasury account for the national government and requires each national government entity to prepare an annual cash flow plan and forecast. It also provides for the process of budget reallocations and supplementary estimates. At the county level, it provides for the operationalisation of the County Revenue Fund, authorizes each county government to open a County Emergency Fund and provides for the establishment of other county public funds. Each County Treasury is required to establish a Treasury Single Account for the county government. The Act requires each county government to prepare an annual cash flow plan and forecast, as well as prepare a consolidated annual cash flow projection by 15th June of every year which shall be the basis for the preparation of the national treasury schedule of disbursement to county governments. It also provides for process of budget reallocations and supplementary estimates

The Act sets provisions for accounting, reporting and audit at national and county levels. At the national level, it requires preparation of consolidated annual financial statement of national government, its annual financial statement, quarterly report, annual report of revenue received and collected, report of waivers and variations in taxes, fees and charges, an annual financial statement of a national public fund, a quarterly report of a national public fund, separate reports by State Corporations as well as pre- and post-election reports. These are also required at the county level. The Act has elaborate provisions to promote public participation, including provisions requiring the formulation of the Budget Policy Statement, County Fiscal Strategy Paper and the Budget Estimates; the preparation of Division of Revenue Bill and County Allocation of Revenue Bill; and the County Budget and Economic Forum which provides a platform for public participation in county planning and budgeting.

2.3.5 The Proposed Mining Bill

The Mining Bill, which seeks to align the mining sector legislation to the Constitution of Kenya 2010, has proposed a number of changes to the legal framework that significantly improve the regulation of the mining sector. The Mining Bill seeks to give effect to Articles 60, 62 (1)(f), 66 (2) and 69 of the Constitution in so far as they apply to minerals as well as provide for prospecting, mining, processing, refining, treatment, transportation, and any dealings in minerals and for related purposes. The Bill sets up an administrative structure comprising the Mineral Rights Board, the Cabinet Secretary, the Principal Secretary, the Directorate of Mines, the Mining Tribunal, and the Directorate of Geological Survey.

Mineral rights are categorized between large-scale and small-scale operations and the Bill also addresses the issues relating to artisanal mining. Large-scale operations have a category of rights, including prospecting licenses, retention licenses, and mining licenses. Small-scale operations, on the other hand, have prospecting and mining permits. Institutions proposed to be established under the Bill include the National Mining Corporation, the Minerals and Metals Commodity Exchange, and a Mining Tribunal. It also provides for the setting up of a Minerals Sovereign Wealth Fund.

The award of mineral rights is to be done through competitive bidding. The Bill also requires that the award be done by the Minister upon recommendation by the Mineral Rights Board. Upon receipt of an application for a prospecting, reconnaissance or mining license, the Cabinet Secretary is required to give notice, in writing, of the pending application for the grant of a mineral right to the land owner or lawful occupier of the land where the mineral is located, the community and the relevant county government. The Cabinet Secretary is also required to publish notice of pending application in a newspaper of wide circulation. Such notice must include a statement of the proposed boundaries of the land in relation to which an application for a mineral right is made. It should also be published, for twenty-one days in the Kenya Gazette and in the offices of the County Government within which county the land is situated. The applicant is required to submit plans on the employment and training of Kenyan citizens. If the license is granted, the grantee (in licenses issued to large-scale license holders) is required to enter into community development agreements.

The concept of strategic minerals is introduced in the Bill and the Mineral Rights Board has powers to recommend certain minerals to be categorized as strategic minerals. The state also has a right of pre-emption on all strategic minerals raised, won or obtained within the territory of Kenya before they are sold. The Bill makes provision for local equity participation. The Mineral Rights Board is to prescribe the limits of capital expenditure for the purpose of this section. With regard to the issue of Free Carried Interest, the Bill states that where a mineral right is for a large-scale mining, the State will acquire 10 per cent Free Carried Interest in the share capital of the right in respect of which financial contribution shall not be paid by the State. This applies to large-scale mining operations and to mining operations relating to strategic minerals.

The Bill creates a sharing formula, where revenues obtained from the sector are to be shared between the national and county governments, as well as communities affected by the mining project. The revenue is to be apportioned with the national government getting 70 per cent of the total government revenue, the county government getting 20 per cent while the local community gets 10 per cent. The Bill precludes the granting of mineral rights over private land, save with the express consent of the owner. It further precludes granting of rights to community land without the consent of the authority obligated by the law relating to administration and management of community land to administer community land or the National Land Commission in the case of un-alienated community land. It also makes provision for compulsory acquisition of land or rights or interests in land to vest the land or area in question, or rights or interests in such land or area, in the government or on behalf of the government, where the consent is required. Consent deemed to include existence of a compensation agreement.

The Mining Bill requires holders of permits and license to use the land in question in accordance with the terms of the permits and ensure sustainable land use through restoration of abandoned mines and quarries, avoid seepage of toxic waste in water bodies, ensure that blasting and related activities are kept at reasonable and permissible levels and land is restored after the end period of mining. It precludes the issuance of any license, save for the case where the applicant has submitted site rehabilitation and mine-closure plans for approval. Applicants of any licenses under this law are

required to provide a bond or some other form of financial security sufficient to cover for costs associated with the implementation of the environmental and rehabilitation obligations.

The Cabinet Secretary may enter into mineral agreements. This is the final form of agreement that requires ratification by Parliament before execution under Article 71 of the Constitution in the case of large-scale operations. It contains the terms and conditions relating to rights and obligations of the holder of one or more prospecting licenses, retention licences or mining licenses, or any combination of such mineral rights. These agreements are to be made public under Article 35 of the Constitution and the Cabinet Secretary is to ensure that mineral agreements and the status therefore is available on the official website of the Ministry. However, a law to effect Article 35 of the Constitution has not been passed by Parliament.

2.3.6 The Proposed Energy Bill

The Energy Bill 2014 is proposed to replace the Energy Act of 2006 and consolidate the laws relating to energy so as to bring the sector laws and institutions in consonance with the Constitution of Kenya 2010. It provides for national and county government functions in relation to energy, the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of coal and geothermal energy; regulation of midstream and downstream petroleum activities; and the production, supply and use of all energy forms; and for connected purposes. With regard to the extractive sector, the Bill specifically provides a mechanism for the exploration of coal resources. It vests all coal resources in the national government. It gives the Cabinet Secretary the discretion to adopt acceptable international standards in the management of coal resources, provided that such standards are not inconsistent with the laws of Kenya.

The award of rights for exploration and development of coal resources is to be done through issuance of either an exploration and appraisal license or a production and development license. Applications are made to the Cabinet Secretary who then refers the application to the National Coal Advisory Committee. The Bill, however, does not provide clarity on who comprises the Committee. The functions of the Committee include negotiating with a potential investor on the terms of the coal agreement on behalf of the National Government so as to secure the most favourable conditions for the Government, submitting a report to the Cabinet Secretary on the terms negotiated with the investor, advising the Cabinet Secretary on all matters relating to coal operations; and performing such other functions and duties as may be provided under the law.

Upon receipt of the report from the Committee, and after approval by the Cabinet and ratification by Parliament, the Cabinet Secretary may, on behalf of the National Government, enter into and sign coal agreements with a Contractor in the prescribed form. The Bill proceeds to give the Cabinet Secretary wide discretionary powers, for the sake of obtaining geological information, powers to grant non-exclusive exploration permits, in respect of areas specified therein, under which a person may enter upon an area and prospect and carry out geological and geophysical surveys. In so doing, the Cabinet Secretary is to request for a proposal from potential contractors as a basis for the negotiation for coal block concessions, cause any investigations, due diligence or consultations to be made or carried out as he considers necessary before entering into a coal agreement and may, upon advice from the Committee, reject any application made by a potential investor if satisfied that the rejection is in the best interest of Government. The Cabinet Secretary also supervises coal operations carried out under a coal concession and may take any action, decision, or give any permission or consent or exercise any other control as may be necessary or desirable for the

purposes of this law or the regulations made thereunder. This provision gives wide latitude of authority that may be subjected to abuse.

The exploration, appraisal, production and development license issued under this law is valid for a term of twenty-one years from the date of its issue and may be renewed for another term. If a licensee has complied with the terms of the license, the Cabinet Secretary may extend the term of the license with parliamentary approval for such a period as the Cabinet Secretary may determine. Such application must be made at least twelve months before the license expires. The constitution of blocks is to be done by the Cabinet Secretary who, by a notice in the Kenya Gazette, may zone the country into numbered blocks. The Cabinet Secretary may reserve blocks to be exploited by the National Government. The Bill further gives power to the Cabinet Secretary to require a Contractor to relinquish portions of a block to which a coal agreement relates in the manner specified in the agreement. The Energy Bill proceeds to set requirements on persons who may enter into coal agreements with the Government, stating that this is to be done only with Contractors who have the financial ability, technical competence, and professional skills necessary to fulfill the obligations under the coal agreement.

2.3.7 The Natural Resources (Benefit Sharing) Bill

This is a Bill proposed by the Senate to establish a system of benefit-sharing in resource exploitation between resource exploiters, the National Government, County Governments, and local communities. It is stated to apply to petroleum, natural gas, minerals, forest resources, water resources, wildlife resources, and fisheries resources. The Bill lists its guiding principles as including transparency and inclusivity, revenue maximization and adequacy, efficiency and equity, accountability and participation of the people, as well as the rule of law and respect for human rights of the people.

The Bill establishes a Benefit Sharing Authority (BSA), with various functions including coordinating the preparation of benefit-sharing agreements between local communities and affected organizations; reviewing, and where appropriate, determining the royalties payable by an affected organization; engaged in natural resource exploitation; identifying counties that require to enter into a benefit-sharing agreement for the commercial exploitation of natural resources; and monitoring the implementation of any benefit-sharing agreement entered into between a county government and an affected organization, among other functions.

Membership of the authority includes a Chairperson appointed by President, Principal Secretaries for the Ministries of environment, finance and mining, three persons representing communities nominated by the Council of Governors, three persons representing communities nominated by County Assembly Speakers, the Kenya Association of Manufacturers, as well as a Director General appointed by the Board. The authority shall have the power to determine and review the amount of royalties and fees payable by affected organizations in each year in respect of a particular sector in cases where a written law does not prescribe the royalties or fees. This effectively means that, where the mining and petroleum sector laws already provide for a benefit-sharing mechanism, this law does not apply. In making a determination, the Authority shall take into account the overall capital investment of the affected organization, the prevailing international market value of the commodity from which royalty is payable, as well as the commercial viability of the natural resource that is being exploited in any region. .

The Bill then proposes a revenue-sharing mechanism for the collected revenues. Under the stated formula, 20 per cent of the revenue collected shall go to the Sovereign Wealth Fund established by

the National Government. Of this amount, 60 per cent is stated to go to the Futures Fund while 40 per cent is slated for what the Bill terms the Natural Resources Fund. Additionally, 80 per cent of the revenue collected is to be shared between the National Government and the respective County Government. Of this amount, 60 per cent goes to the National Government while 40 per cent goes to the County Government. The Bill further provides for sharing of the county-level funds, with 60 per cent of the funds going to the entire county while 40 per cent goes to the local community. One of the fundamental weaknesses of the Bill is its provision that it does not apply in cases where 'any other written law exists'. This in essence makes it inapplicable to the extractives sector particularly the coal sub-sector in this respect.

2.3.8 Incoherences and Overlaps in the Policy and Legal Framework

The fundamental challenge with the policy and legislative framework is its inability to promote coherences and a clear mechanism by which the governance of natural resources is to be done. First, the laws have been developed without any robust policy framework to guide the formulation of laws. This is a dangerous process that may undermine the coherence of the laws and their ability to provide a clear responsibility guideline on management of natural resources in the sector. Further, the laws on the extractive sector seem to assume the role of the National Land Commission as the overall body tasked with oversight of land use which inevitably includes the management of natural resources found on any land.

Furthermore, there is a latent conflict between the Energy Bill and the Mining Bill with regards to the regulation of the coal sub-sector. While the Mining Bill envisages that coal resources fall under its domain, the Energy Bill also dedicates a chapter on coal exploration and development albeit with a much weaker framework of stakeholder consultation and engagement of communities as compared to the Mining Bill. Finally, the Natural Resources (Benefit Sharing) Bill, while attempting to establish a framework for sharing of the benefits accrued from the sector, by the stroke of one clause, excludes oil, gas and mining from falling within its domain. This basically will result to duplication of institutions without any functional mandate.

3.0 BASIC DEMOGRAPHIC AND ETHNOGRAPHIC PROFILE OF KITUI COUNTY

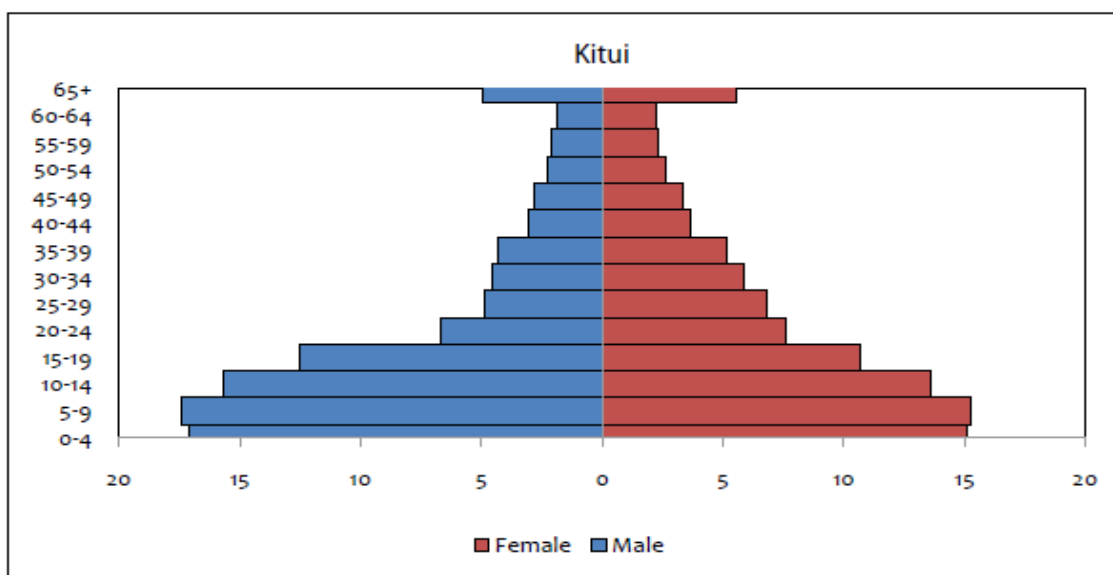
3.1 Background

This chapter seeks to give a cursory glance at key demographic and ethnographic profiles in Kitui County. These will include county communities, population, growth rate, gender-ratio, ethnicity, religion among other things; the socio-economic profile including health, education and economic infrastructure; livelihoods and local economic development activities and systems; traditional governance structure of the communities, social structure of the communities (including faith-based organizations, youth groups, and women groups).

3.2 Profile of Kitui County

Kitui County covers an area of approximately 30,496.5 Km². Its administrative structure consists of eight constituencies including Mwingi North, Mwingi Central, Mwingi South, Kitui West, Kitui Rural, Kitui Town, Mutitu and Kitui South. It has a total population of 1,012,709 (52% female, 48%), a population density of 33 people per Km² and a total of 205,491 households according to the 2009 census statistics. A large part of the county's population consists of children aged between 0 – 14 years who make up 47 per cent of the total population. This is largely due to a high fertility rate of 5.1 percent children per woman against a national average of 4.6 percent. The County has a growth rate of 2.12 against a national average of 3.14. The figure below shows the age distribution within the County. The County has a high poverty rate with a poverty gap of 22.2 against a national average of 19 according to the Commission for Revenue Allocation figures.

Figure 1.1: Kitui Population Pyramid



Source: Kenya National Bureau of Statistics and Society for International Development (2013)
Exploring Kenya's Inequality: Pulling Apart or Pooling Together?

The County is largely inhabited by the Akamba speaking community although the nomadic Somali ethnic group is to be found within its border with Tana River County and deeper within the county during dry seasons in search of pasture. Christianity is the dominant religion in the County although Islam as well as Animism are also practiced within the County. The health and education indices in Kitui County suggest that the county has a higher population that is immunized compared to the national average. However, it has a greater malaria and tuberculosis burden. The infant mortality rate in the County 63 per 1000 live births against a national average of 49 per 1000 births. The mortality rate of children under five years of age is 86 per 1000 births against a national average of 73 per 1000 births. The population of persons with primary school education is 74.8 percent which is above the national average of 66.6 percent. However, transition rates are low with only about 10 percent of the population having secondary education while the national average is at 12.7 percent. The following figure summarizes the health and education indices for Kitui County.

Figure 1.2: Health and Education Outcomes – Kitui County

Health and Education Outcomes	Kitui	Rank ^a	Kenya ^b
Fully-Immunized pop<1yr (% ,2012/13)	66.4	27	64.0
Malaria burden (% ,2012)	238.8	34	27.7
TB Cases In every 100,000 people (2012)	222	20	39.0
HIV Prevalence in 2011 (%)	4.8	24	6.2
People Living with HIV (2011)	27,700	28	34,338
New HIV Infections (2011)	1,830	29	2,217
Population with primary education (%)	74.8	2	66.6
Population with secondary education (%)	10.0	33	12.7

Source: Commission for Revenue Allocation, *Kenya: County Fact Sheet*. June 2013

Kitui county has 210.2 km of bitumen roads, 1564.9 km of gravel surface and 1846.7 km of earth surface roads most of which are in poor condition and are impassable during the rainy season. There are three airstrips in the county; Ithookwe, Tseikuru and Mutomo airstrips. Access to telecommunication services is covered by major telecommunication companies while many financial institutions are also found in the County.

Figure 1.3: Access to Infrastructure – Kitui County

Access to Infrastructure	Kitui	Rank ^a	Kenya ^b
Improved water (% households 2009)	50.8	38	66.5
Improved sanitation (% households 2009)	69.1	33	87.8
Electricity (% households 2009)	4.8	37	22.7
Paved roads (% of total roads 2012)	0.3	37	9.4

Source: Commission for Revenue Allocation, *Kenya: County Fact Sheet*. June 2013

Although the county's total area is 30,496.5 Km², about 6,369 km² of the County land consists of the Tsavo East National Park and is not available for agriculture. Approximately 14,137.2 km² is arable agricultural land and 6,364.4 km² non-arable land. Over 85% of the County's population lives in rural areas. The average size of land holding in the County is 0.12 km² per person (12 ha per person). Over 46% of the County land falls in the arable category with 83% of the inhabitants lacking title deeds because most of the land has not been adjudicated. Only about 17% of land owners in the County have title deeds.

In terms of livelihoods and local economic development activities and systems, most of the county largely relies on agriculture as a source of livelihood. Other livelihood and economic sustenance activities include work for pay and family businesses. Based on 2009 statistics by KNBS, the following table indicates the livelihood patterns in the County.

Figure 1.4: Overall Employment by Education Level in Kitui County

Education Level	Work for pay	Family Business	Family Agricultural Holding	Intern/ Volunteer	Retired/ Home-maker	Fulltime Student	Incapacitated	No work	Number of Individuals
Total	21.3	12.8	27.2	1.0	14.0	14.9	0.8	7.9	475,754
None	18.3	13.4	34.1	1.6	20.7	0.3	2.9	8.6	59,857
Primary	19.8	12.9	28.8	0.9	14.3	15.0	0.5	8.0	298,478
Secondary+	26.8	12.5	19.8	1.1	9.7	22.3	0.3	7.5	117,419

Source: Kenya National Bureau of Statistics and Society for International Development (2013)
Exploring Kenya's Inequality: Pulling Apart or Pooling Together?

The administrative structures in the County include structures established by the County Government as well as the National Government in the restructured provincial administration. In the Mui Basin particularly, the presence of the national government representatives (including the Deputy County Commissioner and ward administrators) is particularly influential. The Kamba Council of Elders also exists to provide leadership to the community. This entity (atumia maathome) has increasingly gained prominence in the entire region and is being seen as residents as a fair arbiter in dispute resolution matters involving the community. It even has representation from the entire Kamba community nationally as well as those in the diaspora.

The social structure of the community is represented by faith-based organizations, youth groups and women groups among other self-help groups. The most prominent faith-based organizations include the umbrella of churches under the National Council of Churches of Kenya (NCCCK) as well as the Catholic Church which are well spread within the region including the Mui Basin. The County has 161 women groups and 312 youth groups with a total of around 10,000 members. It also has approximately 1000 persons registered under Medium, Small and Micro-Enterprises.

4.0 STAKEHOLDER ENGAGEMENT ISSUES AROUND COAL EXPLORATION AND MINING IN THE MUI BASIN OF KITUI COUNTY

4.1 Background

The concession agreement for Blocks C and D of the Mui Basin was signed on 23rd December 2013 between Fen Xi limited together with its local consortium partner Great Lakes Ltd together with the Ministry of Energy, Ministry of Mining, National Treasury and Kitui county government. Upon signing of this agreement, it was noted by local stakeholders that there was no agreement stipulating how communities were going to benefit from the project. It was therefore proposed that a Benefit Sharing Agreement (BSA) be drafted to include mechanisms of how the community was going to benefit. The developed document was initially rejected by local leaders but they were persuaded by promises that a coal plant would be established. However, upon signing of the BSA, a committee of experts proposed the inclusion of 28 issues which had not been canvassed in the BSA that was signed. An addendum to the BSA was therefore proposed and is slated to be signed on 10th December 2014.

4.2 Institutional Setting in the Mui Basin Coal Project

The framework that was established to address issues related to the Mui Basin is important in establishing an entry point for the project. The Government gazetted Liaison Committees for Blocks A and B as well as Blocks C and D. These committees were elected by communities living in the basin with the mandate to represent them on matters relating to the coal project in the Mui Basin. They work closely with the Ministry of Energy and Petroleum (MoE&P) which is the parent Ministry controlling the exploration and development of coal in the country.

Although the project is located in the Mui Basin that is within Kitui County, the level of engagement with the Kitui County Government, according to some respondents, has been minimalist and it is felt that the national government is bypassing the local government in decision-making processes. This is likely to undermine the ability of the company to obtain a Social License to Operate. The failure to also involve other social actors in the region including faith-based organizations as well as other civil society organizations has undermined the ability of communities to access information. It is also felt by some members of the community that the Liaison Committees have lost their legitimacy and do not necessarily represent the community interests anymore. This is especially given that the two committees which went to China for a study tour came back with conflicting report about the company awarded the concession.

4.3 Community Fears and Expectations on the Mui Basin Coal Project

In the stakeholder engagement process that was undertaken under this project, a number of key issues came up that indicate the perception of the community towards the coal exploration and mining project. First, it would be important to point out the impacts the project is likely to have on the community. These include loss of dwellings; farm buildings, and other structures (including wells, boreholes, animal pens); loss of institutional buildings or public facilities as well as access to agricultural land; loss of trees and standing crops, impeded or lost access to community resources including forest and woodland; loss of business income during transition as well as reduced income resulting from these losses.

4.3.1 The Land Adjudication Process in the Mui Basin

It has been observed before that over 83 per cent of the inhabitants in Kitui County lack title deeds because most of the land has not been adjudicated. This reality necessitated the process of land adjudication as residents insisted they could not commence any discussions about compensation through the Liaison Committees until proper land adjudication had been made. The community has high expectations that with the discovery of coal resources, the value of the land has inevitably gone up and there are now family-level contests with children insisting that ancestral land be subdivided by their parents and given to them.

One key observation from the community dialogue is the overall feeling that the ongoing land adjudication process is fraudulent. This is because the teams carrying out the surveys do not actually do an actual estimate of the size of the land but provide a rough estimate without taking time to actually survey the size of the land. Furthermore, the residents are being forced to move 10 feet to create space for feeder roads on all sides of their land without any compensation being offered. Refusal to give the space results to their being denied a number to be used in issuing title deeds. Furthermore, errors that are made on their names in the titles can only be corrected upon payment of Ksh. 5,500 to the surveyors. There is also a gender aspect to this issue. The titles will most probably be issued in the name of the males of the households. The women respondents felt that this could risk their livelihoods as some men may squander the moneys compensated and leave their families destitute without proper resettlement.

4.3.2 Compensation Mechanisms for Project Affected Persons

Compensation is usually given for a number of impacts identified in the project including loss of landholdings, loss of crops and trees, loss of livelihoods as well as the loss of structures. Project-affected households are eligible for compensation and other assistance if they have a “legitimate interest” in respect of “immoveable assets” in the project area that are in place (i.e. established, in the case of crops or constructed, in the case of buildings). Immoveable assets comprise landholdings and crops; immoveable structures including structures used for living, sleeping, cooking and storage, and other structures such as latrines and wells; institutional structures such as churches, shrines schools and administrative offices; business structures such as restaurants and kiosks as well as other structures including animal pens. All government recognized roads are also eligible for compensation under the project.

In the case of the Mui Basin, there is a complaint from the residents that there is no clear information from the Liaison Committees and the Government on what plans are for compensation. Although this may be deemed to be premature, the information lacuna serves to pervade suspicion on the project. A company that had been sent by the concessionaire to conduct an Environmental and Social Impact Assessment (ESIA) could not collect information because of the mistrust and bypassing of County Government structures.

There are various proposals coming from the community on what they deem compensation to be. Some members are asking for monetary compensation, others for land compensation while others proposed a mixed system. The issue of transfer of graves and shrines has also featured prominently in the compensation discussions by the community. The expectations from the compensation process are high with the community expecting compensation for an acre of land to even top Ksh. 3 million. While this may be termed to be unrealistic, the lack of information could also be blamed as a key contributor to this narrative because in the absence of free flow of information, such incidents occur. Finally, there is a proposal in the Addendum to the effect that 70 per cent of the money due

for compensation will be paid in cash while the remainder (30%) will go towards purchase of equity to be owned by the community through a Savings and Cooperative (Sacco) Society. This proposal, however, is being viewed with suspicion as community members were never given feedback by the Liaison Committee members on these proposals. Given the past history of collective investment vehicles in the County, it is felt that the decision should have been made after proper consultation with the community.

4.3.3 Resettlement and Livelihoods

In the case of resettlement and livelihoods, the biggest challenge is that there is no clear information flowing from the government on what the plans are for resettlement. This has led to speculation that there are plans to resettle communities in Sosoma, an arid region located between the Kitui and Tana River borders which is occupied by Somalis who have had long-running conflicts with the Kamba Community. The land identified for possible relocation has been presumably bought by a prominent figure in the region. Other regions proposed near the same area are Engamba and Wimanzi. The community fears being relocated in a region that has traditionally had conflicts and also fears the possibility of the erosion of the culture of the Kamba if they are taken outside their region. The issue is also complicated by those who want graves and shrines relocated.

The resettlement of Project Affected Persons (PAP) and communities is usually a delicate matter that requires consideration of many factors at play. In the case of residential structures which are deemed to be primary or principal residences, compensation often includes the provision of a replacement residential structure, where possible, in a resettlement community located close to PAPs original residence. Owners of eligible structures who will be physically displaced by the project will usually be eligible for resettlement. In extractive sector projects, three possibilities can be explored when selecting a resettlement site. First, is the option of relocation of displaced households close to their current villages where feasible and where land can be identified in cooperation with the affected households. Second, is the relocation of displaced households to established villages through infill development where this is possible. Finally, there is the possibility of selection of new undeveloped sites some distance away from the project area. In cases where PAPs prefer relocation to provision of a resettlement house, proof of availability of alternative residence is required. In all these options, however, no resettlement programme should make the community worse off that it was before relocation.

With regard to livelihoods, it is important for extractive sector projects to consider all project decisions in the context of a mainstreaming of livelihood considerations. In this sense, all aspects of the land access, resettlement and mine development are considered in terms of livelihood implications, to ensure all key project decisions promote livelihood restoration and development. This requires, for example, a detailed analysis of potential resettlement host lands in terms of livelihood factors, and this will influence and inform the site selection decision-making process.

The assessment of needs on a household basis is usually based initially on baseline data gathered from various sources including consultation with government, households and key informants; asset survey (including survey of structures, farm and crops); as well as a socio-economic survey. This information usually allows an initial assessment of each household's requirement in terms of livelihood restoration programs. The livelihood program components which are usually included in extractive sector projects include:

- Agriculture Program (to restore and improve farming practices)
- Skills Training (linked with mine through local employment and procurement policies)

- Financial Management Training (to help people manage and utilize cash compensation)
- Micro-Finance Program (to help households access financial resources to undertake income generation activities).

4.3.3.1 Temporary Hardship and Vulnerability

Vulnerability may be viewed in the context of two stages; pre-existing vulnerability as well as transitional hardship vulnerability, caused by project related physical and economic displacement. Pre-existing vulnerability is vulnerability that occurs, with or without the project development, whilst transitional hardship vulnerability occurs as a result of those directly affected by the project being unable to adjust to new conditions due to shock or stress related to project activities.

The most prominent categories of vulnerable persons in the project area are likely to include sharecroppers with no buildings or fields of their own, or those who are losing the land they work on, poor female headed households without extended family support, elderly poor, especially those without extended family support, unemployed youth and youth-headed households as well as households experiencing food shortages. If this descriptive analysis is used, then the Mui Basin community entails PAPs who are facing both pre-existing and transitional hardship.

A full assessment of potentially vulnerable households can be made on the basis of the socio-economic and asset surveys being undertaken in a full baseline study. Livelihood program components, particularly those related to farming will be the primary mechanism to address issues of landlessness, homelessness and joblessness as a result of resettlement activities. However, temporary hardship assistance measures must also be developed to target those households identified as requiring additional supports for a time as the transition of resettlement occurs.

4.3.3.2 Protection of Cultural Heritage

Changes to the landscape resulting from the proposed project development could result in damage or destruction of non-renewable cultural heritage resources, including the displacement of artifacts and the de-contextualization of the socio-cultural and archaeological records. Site specific inspections to identify areas of potential concern and appropriate mitigation strategies can help minimize these impacts. The Mui Basin coal project must therefore implement cultural and heritage resources mitigation measures to address known and potential impacts on cultural and religious heritage arising from the project. This can be done through the development of a Cultural Heritage Management Plan.

A key impact of the project that can be identified through the culture and heritage study is related to cemeteries and graves found within the mining Area. Wherever graves are found, the general principle is that the exhumation and re-burial of individual graves within the areas to be acquired for mining should only commence following the resettlement of associated families and churches. This therefore requires the development of a comprehensive approach to addressing relocation of graves and cemeteries. The Mui Basin should also developed and implement an operating procedure including a method statement addressing “chance finds” of archaeological resources unearthed during the construction phase of the mining.

4.3.3.3 Grievance Procedures

The Mui Basin project does not yet have an existing grievance procedure that seeks to manage complaints in a planned and systematic manner. This is important to ensure that all complaints from stakeholders are received by a designated representative of the company, are dealt with

appropriately, with corrective actions being implemented and the complainants being informed of the outcome in a timely manner. All complaints are required to be handled in accordance with this procedure and treated without prejudice.

The Liaison Committee may be an entry point in establishing a Mui Basin Grievance Mechanism which should be considered a first order resolution mechanism in relation to administrative issues and impacts directly related to company activities. There is a proposed establishment of a resettlement committee. This should be complemented by a grievance committee established within the Mui Basin to address grievances related to land access, resettlement and compensation issues. Such mechanism should enjoy legitimacy at the local level and could include the local council of elders as a meditative body linking the community and the committees established.

4.3.4 Benefit Sharing Mechanism: Analysis of the Addendum to the BSA

The Mui Basin Benefit Sharing Agreement, as earlier stated, was signed in December 2013. However, a number of key issues were identified by a committee that proposed their inclusion in an addendum that is slated to be signed in 10th December 2014. The addendum provides that its provisions shall take precedent over the BSA in so far as the amended clauses are concerned. In case of any conflict, then the provisions of the addendum are supposed to prevail.

The concessionaire is required to prioritize the recruitment of qualified, skilled and unskilled from the local community, County, the country and elsewhere in that order. However, no thresholds have been set for any kind of incremental recruitment or training opportunities to equip the local community with the necessary skills to be absorbed into the coal project. It also provides that upon issuance of a Mining License to an assignee and execution of a Parties of Deed of Novation transferring obligations to the assignee, then all obligations “*shall be extinguished and transferred to the assignee*”. This in essence means that such obligations as have been placed in the BSA will be terminated and the concession will be transferred without the pre-existing obligations and communities have to negotiate anew with the holder of the concession.

The draft addendum further proposes that the anticipated financing agreement between the concessionaire and its financiers shall secure a clause to the effect that in the event the financier steps in to conduct the coal operations, then the obligations under the BSA shall be passed to the financier. It also states that the land under concession shall be held in trust by the County Government and upon completion of the mining project, it shall revert back to the County to be held in trust for the local community. However, there is no provision relating to the reclamation of land that will revert back to the County Government. This is a lacuna that could see the land become inhabitable and the costs of rehabilitation being beyond the ability to the County Government. International best practice requires the issue of environmental bonds to have some financial resources available to reclaim the land.

The compensation framework proposed in the addendum calls for 70 per cent payment to be made in the form of cash while 30 per cent be made in kind through purchase of equity in the coal project. This equity is to be held by an entity owned by the local community. This, however, has not been communicated to the community and has resulted into unnecessary anxiety. The coordination to the agreement, the development requirements, development programmes, development phase 1 works and purchase of option shares is to done in consultation with the County Government. The compensation framework proposed in the addendum is stated to take into account the market value of the property and the economic and social values for pastoralists amenities, cash and food crop farming. This inevitably leaves out the international best practices discussed under 4.3.2 as well as

issues relating to temporary hardship. As part of a post-mining economy, the addendum proposes setting aside one per cent of the gross revenues into a fund to develop alternative economic activities. This fund is to be managed by a committee comprising of the concessionaire, the government, the county and the local community. This provision goes against the spirit of the Public Finance Management Act which sets mechanisms by which any funds to be established at national or county levels are to be managed.

4.3.5 International Standards and Guidance

4.3.5.1 IFC Performance Standards

International best practice for private sector related resettlement is now guided by the IFC's Performance Standards on Social and Environmental Sustainability, and particularly defined by the IFC's Performance Standard 5: Land Acquisition & Involuntary Resettlement. The Performance Standards were revised in 2012. A series of IFC Performance Standards, designed to improve social and environmental outcomes, consist of the following:

- Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts
- Performance Standard 2: Labor and Working Conditions
- Performance Standard 3: Resource Efficiency and Pollution Prevention
- Performance Standard 4: Community Health, Safety and Security
- Performance Standard 5: Land Acquisition and Involuntary Resettlement
- Performance Standard 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources
- Performance Standard 7: Indigenous Peoples
- Performance Standard 8: Cultural Heritage.

Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts

Performance Standard 1 applies to all projects that have environmental and social risks and impacts. It establishes the importance of:

- (i) Integrated assessment to identify the environmental and social impacts, risks, and opportunities of projects;
- (ii) Effective community engagement through disclosure of project-related information and consultation with local communities on matters that directly affect them; and,
- (iii) The client's management of environmental and social performance throughout the life of the project.

Therefore while Performance Standard 1 outlines how all relevant environmental and social risks and potential impacts should be considered and managed through an effective Environmental and Social Management System (ESMS), Performance Standards 2 through 8 describe potential environmental and social risks and impacts that require particular attention.

Performance Standard 5: Land Acquisition & Involuntary Resettlement

Performance Standard 5 recognizes that project-related land acquisition and restrictions on land use can have adverse impacts on communities and persons that use the land. Where involuntary

resettlement is unavoidable, it should be minimized and appropriate measures to mitigate adverse impacts on displaced persons and host communities should be carefully planned and implemented.

The Standard notes that government often plays a central role in the land acquisition and resettlement process, including the determination of compensation, and is therefore an important party in many situations. This is particularly important in the case of Kenya where land access and resettlement activities are government-led. The Standard further notes that experience demonstrates that the direct involvement of the client in resettlement activities can result in more cost-effective, efficient, and timely implementation of those activities, as well as in the introduction of innovative approaches to improving the livelihoods of those affected by resettlement.

The Objectives of Performance Standard 5 are:

- To avoid, and when avoidance is not possible, minimize displacement by exploring alternative project designs
- To avoid forced eviction
- To anticipate and avoid, or where avoidance is not possible, minimize adverse social and economic impacts from land acquisition or restrictions on land use by (i) providing compensation for loss of assets at replacement cost and (ii) ensuring that resettlement activities are implemented with appropriate disclosure of information, consultation, and the informed participation of those affected.
- To improve, or restore, the livelihoods and standards of living of displaced persons
- To improve living conditions among physically displaced persons through the provision of adequate housing with security of tenure at resettlement sites

Performance Standard 5 requires that:

- The client consider feasible alternative project designs to **avoid or minimize physical and/or economic displacement**, while balancing environmental, social, and financial costs and benefits, paying particular attention to impacts on the poor and vulnerable
- The client **engages** with Affected Communities, including host communities. Decision-making processes related to resettlement and livelihood restoration should include options and alternatives, where applicable.
- A census is carried out to collect appropriate socioeconomic **baseline data** to identify the persons who will be displaced by the project, determine who will be eligible for compensation and assistance, and discourage ineligible persons, such as opportunistic settlers, from claiming benefits. Information regarding the entitlement cut-off date will be well documented and disseminated throughout the project area.
- Displaced communities and persons are offered **compensation** for loss of assets at full replacement cost and other assistance to help them improve or restore their standards of living or livelihoods. Where livelihoods of displaced persons are land-based, or where land is collectively owned, the client will, where feasible, offer the displaced land-based compensation. The client will take possession of acquired land and related assets only after compensation has been made available and, where applicable, resettlement sites and moving allowances have been provided

- The client establish a **grievance mechanism** as early as possible in the project development phase
- The client establishes procedures to **monitor and evaluate** the implementation of a Resettlement Action Plan and take corrective action as necessary.

Performance Standard 5 specifically notes that where land acquisition and resettlement are the responsibility of the government, the client will collaborate with the responsible government agency, to the extent permitted by the agency, to achieve outcomes that are consistent with the Performance Standard. In addition, where government capacity is limited, the client will play an active role during resettlement planning, implementation, and monitoring.

4.3.5.2 Equator Principles

The Equator Principles are a financial industry benchmark for determining, assessing and managing social & environmental risk in project financing. The Principles were adopted in June 2003 by ten of the world's leading financial institutions. As of November 2012, 76 financial institutions had adopted the Principles, covering over 70 percent of international Project Finance debt in emerging markets.

The Principles were updated in 2006 to align them with the IFC Performance Standards. Adopting institutions undertake not to loan to projects in which the borrower will not, or is unable to, comply with the environmental and social policies and processes outlined in the Principles. The Principles are currently undergoing further revision, with revised principles expected in 2013 following the current consultation and review period.

5.0 CONCLUSION AND RECOMMENDATIONS

This work set out to investigate the process the extractive sector in Kitui County with a specific focus on coal exploration in the Mui Basin. It also sought to generate community-specific information relating to the concerns around extractives in Kitui County including community expectations and fears on existing exploration and future development and operation activities. Furthermore, the study extended to identify the policy, legal and regulatory frameworks that govern the extractive sector and the rights and obligations of stakeholders. It was also to identify and profile the institutional make-up of the study county. This included local government structures, mining companies, faith-based organizations, and civil society organizations as bases for engaging in synergic collaboration. Finally, the study was supposed to develop recommendations for designing and implementing a situation-sensitive stakeholder engagement and community-informed dialoguing process which allows for participatory impact identification and mitigation, community development and social investment agreements, and participatory monitoring of development outcomes.

What conclusions and recommendations can we draw from the study? This chapter sets out what emerges as a summary of the conclusions drawn from the entire study together with the recommendations that will contribute to the understanding of the dynamics in the Mui Basin and the potential impacts of coal exploration and mining. The study will make a contribution to ongoing processes by contributing more knowledge that can give more light to the issues at hand. It is hoped that when the mining process finally kicks off, it will reflect a balance between the needs of the investor to make profits, the need of national and county governments to generate revenue and beneficiation as well as the need of the community for sustainability in their livelihoods.

5.1 Summary and Conclusion

This study adduces evidence that clearly demonstrates that the engagement process within the Mui Basin, although seemingly well intended, has not fully engaged the community to understand what is going on and make informed decisions. This is clearly demonstrable with the limited level of civic education conducted by the Liaison Committees which have indicated budgetary constraints despite money being supposedly allocated for the same purposes by the central government.

It is also clear that there is fear and suspicion within the community that has limited the ability of other actors to generate and share information on the processes going on within the basin. This is clearly illustrated by the fact that a Non-Governmental Organization that went into the basin to conduct civic education was ejected by Government authorities on the pretext that they were going to incite residents of the Mui Basin.

In terms of the policy, legal and institutional framework, the study notes that laws are being proposed in the absence of a solid policy framework which could then provide a basis upon which laws are anchored. This is a dangerous trend that can lead to incoherence and conflict by the very laws proposed to govern the extractive sector. In fact, there is a conflict already between the proposed Mining Bill and the Energy Bill as both of them propose to regulate the coal sub-sector. It must be pointed out that between the two Bills, the Mining Bill seems to be having a more robust framework for stakeholder engagement.

The study also adduces evidence of gaps in the addendum to the BSA which may impair the ability of the community to secure its interests. While it requires the concessionaire to prioritize the

recruitment of qualified, skilled and unskilled from the local community, county, the country and elsewhere in that order, no thresholds have been set for any kind of incremental recruitment, upward mobility or training opportunities to equip the local community with the necessary skills to be absorbed into the coal project.

It further provides that upon issuance of a Mining License to an assignee and execution of a Parties of Deed of Novation transferring obligations to the assignee, then all obligations “shall be extinguished and transferred to the assignee”. The use of the term extinguished may defeat the purpose of the agreement as this in essence will transfer no obligations to the other party. The addendum also seeks to have the land revert back to the County Government to be held in trust for the community. However, no provision is made for environmental bonds to secure funds for the rehabilitation of the land after the mining process is done. This may leave the County Government with a costly process of rehabilitating the land and even minimizing the adverse effects on human health within the surrounding environs.

Finally, the compensation framework proposed in the addendum which includes taking up equity in the project fails to capture the essence of international best practices in compensation. This usually includes compensation for impacts identified in the project including loss of landholdings, loss of crops and trees, loss of livelihoods as well as the loss of structures and particularly immovable assets. Immoveable assets comprise landholdings and crops; immovable structures including structures used for living, sleeping, cooking and storage, and other structures such as latrines and wells; institutional structures such as churches, shrines schools and administrative offices; business structures such as restaurants and kiosks as well as other structures including animal pens. All government recognized roads are also eligible for compensation under the project.

5.2 Recommendations

In light of the foregoing conclusions on the exploration and future mining of coal resources in the Mui Basin of Kitui County, the following specific recommendations are suggested;

1. There is a serious gap in terms of civic education that needs to be filled. Therefore, any intervention should prioritize civic education of the residents of the Mui Basin on issues that are related to the coal development project. To avoid conflicting messaging and discordance, the partners should work closely with the Liaison Committees and authorities to develop manuals that can then be used to conduct proper civic education.
2. The political economy environment in the country demands a strategic entry point for any intervention. The most prudent entry-point would be through ecumenical structures. This is because the religious institutions enjoy the advantage of being in touch with the grassroots populations and are also able to engage at the highest political level. Involving the structure of the NCKK as well as the Catholic Church will provide this distinct advantage to the project. Furthermore, the Council of Elders (*atumia maathome*) structures should be involved as they also command respect and influence within the community and can be able to bridge the gap between various actors to the process.
3. To be able to develop a critical mass of actors to address issues within the Mui Basin, there is need to identify champions who will be able to articulate issues surrounding the coal development project. The partners should therefore identify champions among women, youth,

faith leaders and other opinion leaders to drive key messages. These stakeholders should be inducted and trained on the salient issues at play and should be able to then build knowledge and understanding amongst their peers.

4. There is a serious need to amplify the voices of communities up to the national level. However, this cannot be done by just picking one County case study as is the case with Kitui County. Effort must be made to reach out to other counties and develop human interest stories which should then galvanize communities with shared challenges to be able to develop synergy and be able to address issues collectively.
5. The partners should consider building a national platform that will bring communities affected by extractive sector projects to be able to plan and strategize on how best to engage the challenges they face. The distinct advantage with a national platform is that it provides a direct interface with all stakeholders and forms a vehicle through which collective action can be made.
6. The partners should make an effort to reach out to other movements that work on the social aspects of the extractives sector. This will be important in further developing a critical mass to engage with companies and the government in addressing issues concerning the extractive sector in all affected regions. Specifically, there is the Kenya Oil and Gas Working Group, the Kenya Civil Society Platform on Oil and Gas as well as the Kenya Natural Resources Alliance that have been working on these issues in various parts of the country.
7. While this study provides the most basic information that can be used as an entry-level intervention, effort should be made to conduct a comprehensive baseline survey that will give a more detailed analysis of issues at play and make concrete and targeted recommendations with the full appreciation of the complete set of dynamics at play within the Mui Basin.

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