

**Maximising the Right to Free, Prior, and Informed Consent for
Enhanced Environmental Justice in Kenya**

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1. Introduction

Conservation and development activities can potentially affect the lives of indigenous communities living in a targeted area, whether implemented in small scale or large scale.¹

It has been argued that indigenous peoples around the world typically have higher rates of poverty, food insecurity and malnutrition than non-indigenous populations.² In addition, their rights, territories and livelihoods are seriously threatened by the world's demographic pressure, compounded by the extractive industries' appetite for resources.³ A widespread lack of respect of their cultures and rights is also believed to have resulted in many communities being decimated, dispossessed of their lands and forcibly relocated.⁴

Despite the international recognition of the rights of these communities to be consulted and involved in decision-making processes that directly affect their livelihoods, countries around the world continue to disregard such rights with adverse effects on the ability of the affected communities to fight poverty and realise the right to self-determination. The global call for application of Free, Prior, And Informed Consent (FPIC) in mining is generally meant to address the abuse of the rights of indigenous peoples worldwide including: indigenous land rights, recognition of and respect for culture, the right to economic participation, to a livelihood and to a clean environment, among others.⁵

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¹ See Mckeehan, A. and Buppert, T., "Free, Prior and Informed Consent: Empowering Communities for People-Focused Conservation," *Harvard International Review*, Vol. 35, no. 3 (2014): 48.

² FAO, *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities*, Manual for Project Practitioners, 2016, p. 4. Available at <http://www.fao.org/3/a-i6190e.pdf> [Accessed on 15/3/2019].

³ Ibid, p. 4.

⁴ Ibid, p.4.

⁵ Owen, J.R. and Kemp, D., "'Free Prior and Informed Consent', Social Complexity and the Mining Industry: Establishing A Knowledge Base," *Resources Policy*, Vol.41 (2014): 91-100., at p. 92.

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It is for this reason that this paper explores some of the ways that Kenyan communities that find themselves in similar circumstances can effectively exercise their FPIC as far as exploitation of their lands and the underlying resources is concerned. However, while FPIC is mostly associated with obtaining consent from indigenous communities, the discussion in this paper goes beyond indigenous peoples and towards broad-based community consent, at least in the Kenyan context.

2. Right to Free, Prior, And Informed Consent: Meaning and Scope

Notably, there is currently no singular or universally accepted definition of FPIC, no agreement on what a FPIC process must entail, and no functional clarity about what constitutes ‘consent’, with authors arguing that consent and associated processes should be determined locally.⁶ As such, there exist a number of definitions. For instance, some authors suggest that an FPIC process should be grounded in the degree to which livelihood and culture are dependent on customary lands, rather than application being strictly tied to indigeneity.⁷

Free, Prior, And Informed Consent (FPIC) has been defined by some as ‘the principle that indigenous peoples and local communities must be adequately informed about projects in a timely manner and given the opportunity to approve (or reject) a project before operations begin’. This includes participation in setting the terms and conditions that address the economic, social, and environmental impacts of all phases of extraction and post-extraction operations.⁸ It is also contended that communities should have the right to continue to provide informed consent, or alternatively to withdraw consent, during the implementation of the project, in line with agreed procedures.⁹

FPIC is a right for indigenous peoples and it is also viewed as a principle of best practice for sustainable development, used to reduce social conflict as well as to increase the legitimacy of a

⁶ Owen, J.R. and Kemp, D., “‘Free Prior And Informed Consent’, Social Complexity And The Mining Industry: Establishing A Knowledge Base,” *op cit.*, at p. 92.

⁷ *Ibid.*, p.92.

⁸ Oxfam International, “Securing Communities’ Right to ‘Free Prior and Informed’ Consent in Kenya’s Extractive Sector,” Wednesday, November 8, 2017. Available at https://kenya.oxfam.org/press_release/securing-communities%E2%80%99-right-%E2%80%98free-prior-and-informed%E2%80%99-consent-kenya%E2%80%99s-extractive [Accessed on 15/3/2019]; Mullins, D. and Wambayi, J., , “Testing Community Consent:Tullow Oil project in Kenya,” *Oxfam Briefing Paper*, Oxfam International, November 2017, available at https://cng-cdn.oxfam.org/kenya.oxfam.org/s3fs-public/file_attachments/FPIC%20Report-November%202017.pdf [Accessed on 15/3/2019].

⁹ *Ibid.*

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project in the eyes of all stakeholders and rights holders.¹⁰ It is also seen as a requirement, prerequisite and manifestation of the fundamental, inherent right of indigenous peoples to self-determination.¹¹

From the foregoing definition, it is thus arguable that FPIC broadly falls within public participation but from an informed point of view and without any coercion either from the State or the investor or developer.

Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples guarantees that indigenous people should not be forcibly removed from their lands or territories. No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 28 of the Declaration further provides that Indigenous peoples have the right to redress, by means that can include restitution or when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Some scholars regard FPIC as an aspect of environmental justice and a tool for poverty alleviation.¹² In the context of environmental justice, FPIC is believed to empower indigenous communities by providing them access to environmental justice, which concept mandates that all people, regardless of their race, origin or income, have the ability to “enjoy equally high levels of

¹⁰ Mullins, D. and Wambayi, J., “Testing Community Consent:Tullow Oil project in Kenya,” op cit., p.10.

¹¹ Sena, K., Operationalizing Free, Prior and Informed Consent within REDD+ Projects in Kenya,’ Case study, 2014, p.3. Available at https://communitylegalresources.files.wordpress.com/2014/12/ci_fpic-case-study_kenya.pdf [Accessed on 15/3/2019].

¹² Zvobgo, T., "Free, Prior, and Informed Consent: Implications for Transnational Enterprises," *Sustainable Development Law & Policy* 13, no. 1 (2013): 8.

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environmental protection.¹³ FPIC also gives the most vulnerable members of society a platform from which they can express their rights.¹⁴

Within the context of the rights of indigenous peoples, FPIC requires that consent must be freely given and that the decision must be made after indigenous peoples have been educated about the project.¹⁵

Principle 10 of the Rio Declaration provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. It further provides for access to information by the public. At the national level, each individual must 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 must facilitate and encourage public awareness and participation by making information widely available.¹⁶ Effective access to judicial and administrative proceedings, including redress and remedy, must also be provided. Public participation is, therefore, an essential principle in natural resources management. However, public participation is hampered by factors such as financial cost of engaging the public, time constraints, fear that participants may not be truly representative and belief that citizens lack knowledge of complex technical issues.¹⁷

In determining who falls within the category of the people to be consulted seeking FPIC, the ‘public’ in public participation is used to refer to individuals acting both in their roles as citizens, as formal representatives of collective interest or affected parties that may experience benefit or harm or that otherwise choose to become informed or involved in the process.¹⁸ The label ‘public’ is often used to refer to individual citizens or relatively unorganized groups of

¹³ Zvobgo, T., "Free, Prior, and Informed Consent: Implications for Transnational Enterprises," op. cit., p. 37; Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015; Muigua, K. and Kariuki, F., ‘Towards Environmental Justice in Kenya,’ *Journal of Conflict Management and Sustainable Development*, Volume 1, No 1, (2017).

¹⁴ Zvobgo, T., "Free, Prior, and Informed Consent: Implications for Transnational Enterprises," op. cit., p. 37.

¹⁵ *Ibid*, p. 38.

¹⁶ Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

¹⁷ Senach, S.L., ‘The Trinity of Voice: The Role of Practical Theory in Planning and Evaluating the Effectiveness of Environmental Participatory Process,’ in Depoe, S.D. *et al*, (eds), *Communication and Public Participation in Environmental Decision Making* (SUNY Press Ltd., 2004) 13, p.16.

¹⁸ Dietz t. & Stern, P.C., (eds), *Public Participation in Environmental Assessment and Decision Making*, (National Academies Press, 2008), p.15.

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individuals but should be expanded to include the full range of interested and affected parties including corporations, civil society groups, technocrats and even the media.¹⁹

Four categories of the public must be considered when deciding whether or not the ‘public’ has been involved. These are: stakeholders who are organized groups that are or will be affected by or that have a strong interest in the outcome of the decision; the directly affected public who will experience positive or negative effects from the environmental decision; the observing public which includes the media and opinion leaders who may comment on the issue or influence public opinion; and the general public who are all individuals not directly affected by the environmental issue but may choose to be part of the decision making process.²⁰

Courts have rightly pointed out that public participation is an established right in Kenya; a justiciable one – indeed one of the corner stones of our new democracy. In addition, Kenya’s jurisprudence has firmly established that Courts will firmly strike down any laws or public acts or projects that do not meet the public participation threshold.²¹

In *Hassan and 4 others v KWS*²² the court described the public as “those entitled to the fruits of the earth on which the animals live” when stating that there was no express consent from the community allowing KWS to translocate the rare hirola antelope from their land. Further, in *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok*,²³ the court gave a much wider description of the public by stating that it is “the individual who has sufficient interest in the issue over which the public body is exercising discretion, or where the exercise of that discretion is likely to adversely affect the interests of the individual or even where it is shown that the individual has a legitimate expectation to be consulted before the discretionary power is exercised.”

FPIC requires that during the negotiation process, indigenous groups are made aware of their rights over their ancestral lands, the risks associated with the project, and the relationship between their rights and their access to natural resources, which the community may be

¹⁹ *Ibid.*

²⁰ *Ibid.*, p.15.

²¹ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

²² [1996] 1KLR (E&L) 214, p.215.

²³ HC Judicial Review No. 122 of 2011, [2012] eKLR.

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dependent upon for sustenance.²⁴ It has been observed FPIC is not just a result of a process to obtain consent to a particular project; it is also a process in itself, and one by which Indigenous Peoples are able to conduct their own independent and collective discussions and decision-making.²⁵ This is to be achieved in an environment where they do not feel intimidated, and where they have sufficient time to discuss in their own language, and in a culturally appropriate way, on matters affecting their rights, lands, natural resources, territories, livelihoods, knowledge, social fabric, traditions, governance systems, and culture or heritage (tangible and intangible).²⁶

3. Right to Free, Prior, And Informed Consent under Kenyan Law: Prospects and Challenges

While the concept of FPIC has been universally recognised, it has not always come easy for some of the Kenyan communities, if at all. Despite the continued development in the policy and legal framework on public participation and inclusive decision-making processes, the level of openness of the government to citizen engagement in policy and development decision making broadly may be insufficient and sometimes completely missing.

There have been cases where communities and groups of persons in Kenya have sought court intervention, both locally and regionally, to have their right to participation in decision-making processes affecting their lands. For instance, in 2009, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, the African Commission on Human and Peoples' Rights held that by forcibly removing the Endorois people from their ancestral lands around Lake Bogoria to create a game reserve, the government of Kenya violated the Endorois' right to property (Article 14); natural resources (Article 21); development (Article 22); religion (Article 8); and culture (Article 17). The Commission noted in particular that the Endorois are "an indigenous community" and a "people," and that for "any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but

²⁴ Zvobgo, T., "Free, Prior, and Informed Consent: Implications for Transnational Enterprises," op. cit., p. 38.

²⁵ FAO, *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities*, Manual for Project Practitioners, 2016, op cit., p. 13.

²⁶ Ibid, p.13.

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also to obtain their free, prior, and informed consent, according to their customs and traditions.”²⁷

There are instances where either consent is inappropriately obtained or the government invokes its powers on compulsory acquisition of land with or without adequate compensation.

3.1 Communities’ Consent in Extractives Industry in Kenya

Extractive industry projects place intense pressure on land.²⁸ It has been observed that FPIC introduces heightened social performance requirements at a time where many mining companies are still grappling with the fundamentals of their corporate social responsibilities (CSR).²⁹

The *Mining Act 2016*³⁰ stipulates that prospecting and mining rights should not be granted under the Act with respect to private land without the express consent of the registered owner, and such consent should not be unreasonably withheld.³¹ In such a case, consent shall be deemed to be given for the purposes of the Act where the owner of private land has entered into -a legally binding arrangement with the applicant for the prospecting and mining rights or with the Government, which allows for the conduct of prospecting or mining operations; or an agreement with the applicant for the prospecting and mining rights concerning the payment of adequate compensation.³²

The Mining Act also provides that prospecting and mining rights should not be granted under the Act or any other written law over 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 relation to community land that is

²⁷ African Commission on Human and Peoples’ Rights, 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya; Greenspan, Emily. "Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects," *Oxfam American Research Background series* (2014): 1-56, p.13. Available at <https://www.oxfamamerica.org/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF> [Accessed on 20/3/2019].

²⁸ Emily Greenspan, Michelle Katz, Julie Kim, Serena Lillywhite, and Chris Madden, “Community Consent Index 2015: Oil, gas, and mining company public positions on Free, Prior, and Informed Consent,” Oxfam International July 2015, p.7. Available at https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp207-community-consent-index-230715-en_0.pdf [Accessed on 20/3/2019].

²⁹ Owen, J.R. and Kemp, D., "‘Free Prior and Informed Consent’, Social Complexity and the Mining Industry: Establishing a Knowledge Base," *op cit.*, at p.91.

³⁰ *Mining Act 2016*, No. 12 of 2016, Laws of Kenya.

³¹ Sec. 37(1), Mining Act, 2016.

³² Sec. 37(2), Mining Act, 2016.

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unregistered.³³ For the purpose of the foregoing subsection, consent should be deemed to be given for the purposes of the Act where the registered owners of community land have entered into - a legally binding arrangement with the applicant for the prospecting and mining rights or with the Government, which allows the conduct of prospecting or mining operations; or an agreement with the applicant for the prospecting and mining rights concerning the payment of adequate compensation.³⁴

It is however worth pointing out that the Cabinet Secretary may take steps under 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 required under sections 36, 37 or 38 of the Mining Act 2016 is—unreasonably withheld; or the Cabinet Secretary considers that withholding of consent is contrary to the national interest.³⁵

Courts in Kenya have demonstrated willingness to uphold the requirement for seeking community consent where the same was not sought. For instance, in the case of *Mohamed Hussein Haji v Issa Kuno & 4 others [2018] eKLR*³⁶, the petitioner sought a declaration that the Petitioner was entitled to information from the Respondents to verify and confirm whether constitutional and statutory regulatory requirements were complied with before the 1st and 2nd Respondents began their mining activities in the Ali Jibril area, within Wabari Ward in Garissa County, amongst other reliefs. The Court, ruling in favour of the petitioner, observed as follows: in a community land which falls within the ambit of customary law ownership which is neither public nor private, before any interest is acquired by any individual, the persons who ordinarily use that particular land must be consulted.³⁷

Development that threatens life is not suitable development and it must be halted. In environmental law, intergenerational equity involves the application of equity within the present

³³ Sec. 38(1), Mining Act 2016.

³⁴ Sec. 38(2), Mining Act 2016.

³⁵ Sec. 40, Mining Act 2016.

³⁶ *Mohamed Hussein Haji v Issa Kuno & 4 others [2018] eKLR*, Environment and Land Petition 1 of 2018.

³⁷ Para. 31.

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and future generation such that each member has an equal right to access the earth's natural and cultural resources.³⁸

The land in question had not been acquired by the government from the community concerned by way of compulsory acquisition. The land belonged to the community and held by the County Government of Garissa in trust for the affected community. There was no indication that consent was sought and obtained from the said County Government of Garissa.³⁹

The land in question was an unregistered community land held in trust by the County Government of Garissa on behalf of the communities and as seen from the decision above, the consent of the county government must be obtained on behalf of the community. While the foregoing case is a step in the right direction by Kenyan courts to protect the interests of communities, there is still the risk of investors directly seeking the consent of county governments who then ignore communities and purport to grant consent on behalf of such communities. This may be done without the County government in question first engaging the communities to help them appreciate the whole project and the process in question and how the same might affect their livelihoods.

The question of consent has not only been arisen in the Kenyan context only. In South Africa's case of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*⁴⁰, the Constitutional Court overruled an eviction order, issued by a lower court to a mining company, permitting it to evict 13 families from a farm in the Lesetlheng Community, North West Province, where the company had mining rights.⁴¹ Significantly, the court upheld a provision in the Interim Protection of Informal Land Rights Act, a law enacted to protect land rights after apartheid, which says that no person may be deprived of any informal right to land without his or her consent. The mining company had secured consent to the granting of the right from the minister who held the land in a trust and the traditional council but those living on the

³⁸ Para. 34.

³⁹ Para. 36.

⁴⁰ *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (Dlamini and Land Access Movement of South Africa as Amici Curiae)*, CCT265/17.

⁴¹ Mavhinga, D., "South Africa's Constitutional Court Protects Land Rights: Landmark Rulings Protect Women and Communities Affected by Mining Companies," *Human Rights Watch*, November 6, 2018. Available at <https://www.hrw.org/news/2018/11/06/south-africas-constitutional-court-protects-land-rights> [Accessed on 19/3/2019].

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land were not consulted, as the Interim Protection of Informal Land Rights Act and the Mineral and Petroleum Resources Development Act required. The Constitutional Court ruled they could not be evicted because they had not been consulted and consented, nor were mechanisms for resolving disputes under the Mineral and Petroleum Resources Development Act exhausted.⁴²

This issue was also canvassed before the Pretoria High Court, where court has ruled that companies must first seek permission from local communities if they plan to mine on their ancestral land (Xolobeni judgment).⁴³ There are, however, those who have challenged the High Court decision as one that would make it practically impossible to get mining rights on traditional land because of the numbers of people affected.⁴⁴ The critics of the South African High Court's decision did not however see any problem with the Constitutional Court's decision which is seen as one with two sides of the requirement for consent of the occupiers: The first is the consent of the traditional authority as the lawful representative of the community; and the second is the consent of those directly affected, both of which do not require the consent of every single occupier and makes a provision for majority consent under common law.⁴⁵

The problem with requiring consent of every person living within an area, even those not directly affected by any proposed development project is that one faction of the community in question may be in favour of the mine because of the potential economic benefits as a result of compensation and the other would be opposed because it would affect their traditional way of life.⁴⁶

The Court, in the case of *Patrick Musimba v National Land Commission & 4 others [2016] eKLR*, opined that it had no doubt that the State under Article 69 of the Constitution is enjoined to ensure sustainable development: see also the Preamble to the Constitution. The State is also to ensure that every person has a right to a clean and healthy environment. However, physical

⁴² Booyesen, M., 'Mining Rights and Communities – Does The Xolobeni Judgment Take South Africa Forwards Or Backwards?' iAfrica, February, 4, 2019. Available at <https://www.iafrica.com/mining-rights-and-communities-does-the-xolobeni-judgment-take-south-africa-forwards-or-backwards/> [Accessed on 19/3/2019].

⁴³ United Nations Environmental Programme, "South African indigenous community win environmental rights case over mining company," December 7, 2018. Available at <https://www.unenvironment.org/news-and-stories/story/south-african-indigenous-community-win-environmental-rights-case-over-mining> [19/3/2019].

⁴⁴ Booyesen, M., 'Mining Rights and Communities – Does The Xolobeni Judgment Take South Africa Forwards Or Backwards?' iAfrica, February, 4, 2019.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

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development must also be allowed to foster to ensure that the other guaranteed rights and freedoms are also achieved. Such physical development must however be undertaken within a constitutional and statutory framework to ensure that the environment thrives and survives. It is for such reason that the Constitution provides for public participation in the management, protection and conservation of the environment. It is for the same reason too that the Environmental Management and Coordination Act (“the EMCA”) has laid out certain statutory safe guards to be observed when a person or the State initiates any physical development.⁴⁷

The Court went on to state that at the core is the Environmental Impact Assessment and Study which is undertaken under Section 58 of the EMCA and the regulations thereunder. Under Regulation 17, the Environmental Impact Assessment Study must involve the public. The inhabitants of any area affected by a physical development must be given an opportunity to air their views on the effects of any such development. After the Environmental Impact Assessment Study report is compiled, the same report must be circulated to the affected persons.⁴⁸

The challenge is thus balancing the interests of both groups while ensuring that the ensuing court battles do not affect the country’s development agenda. Some scholars have rightly observed that States, in addition to securing a balance between corporate and citizen rights, face the challenge of creating and fostering conditions for sustainable and diversified economic growth if they are to avoid the so-called ‘resource curse’.⁴⁹

3.2 Right to Free, Prior, And Informed Consent and Compulsory Acquisition of Land

As already pointed out, the Cabinet Secretary in charge of mining may take steps under 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 required under sections 36, 37 or 38 of the Mining Act 2016 is—unreasonably withheld; or the Cabinet Secretary considers that withholding of consent is contrary to the national interest.⁵⁰

⁴⁷ *Patrick Musimba v National Land Commission & 4 others [2016] eKLR*, para. 140.

⁴⁸ *Ibid.*, para. 141.

⁴⁹ Owen, J.R. and Kemp, D., “‘Free Prior and Informed Consent’, Social Complexity and the Mining Industry: Establishing A Knowledge Base,” *op cit.*, p. 91.

⁵⁰ Sec. 40, Mining Act 2016.

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The Constitution of Kenya also provides that:- the State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation- results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that- requires prompt payment in full, of just compensation⁵¹ to the person; and allows any person who has an interest in, or right over, that property a right of access to a court of law.”⁵²

The statutory framework for compulsory acquisition is comprehensively founded under Part VIII of the Land Act, 2016⁵³. Courts have observed that with a view to ensuring that there was a real, rather than a fanciful or remote connection between the compulsory acquisition and the State’s developmental needs, Part VIII was drafted in detail. History in the practice of compulsory acquisition prompted such detail. Not only was the State to keep its right to compulsorily acquire but the citizen too was to be protected from wanton and unnecessary deprivation of his private property.⁵⁴ The Judge, in the *Patrick Musimba case*, further observed that the power to expropriate private property as donated to the State by both the Constitution and statute law (the Land Act) leaves the private land owner with no alternative. The power involves the taking of a person’s land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the state does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized.⁵⁵

⁵¹ The law allows compensation to take the form of either an alternative parcel of land or cash in lieu: see Section 114(2) of the Land Act (see also *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR, Petition 613 of 2014, para. 116.

⁵² Article 40 (3), Constitution of Kenya.

⁵³ Land Act, No 6 of 2012, Laws of Kenya.

⁵⁴ *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR, Petition 613 of 2014, para. 84.

⁵⁵ *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR, para. 114.

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It is for the court consequently to ensure that the process is free from any rebuke and in this regard; the statutory provisions must be followed and be adhered to strictly.⁵⁶

The question of compulsory acquisition of land and when the same should be considered as necessary due to ‘unreasonable withholding’ of consent is a potential hurdle when it comes to achieving FPIC in Kenya. As held by courts, there is a need for continued supervision of the way this power is exercised to avoid any abuse of the same to the disadvantage of communities.

4. Maximising the Right to Free, Prior, And Informed Consent in Kenya

The current constitutional dispensation is geared towards ensuring that there is a greater level of meaningful participation of the general public and specific groups of persons in matters of national development and all issues directly affecting their lives. While this section is not conclusive on how to achieve FPIC in the context of Kenya, the same raises some of the most important issues that ought to be first addressed. The policymakers and the judiciary must grapple with some of these questions when they arise. They must address the question on the methods or mechanisms for achieving or obtaining FPIC.

4.1 Enhanced Public Participation as a Tool for Obtaining FPIC

In *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*⁵⁷ the Court, in its finding, stated that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles: **First**, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities; **Second**, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single

⁵⁶ Ibid., para. 115.

⁵⁷ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

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regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus: “*The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))*”; *Third*, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. *See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012)*. In relevant portion, the Court stated: “*Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.*”; ***Fourth***, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account; ***Fifth***, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box;

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Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.⁵⁸

These tools, if taken into account when coming up with legal and policy frameworks, can potentially help in making FPIC in development projects in Kenya a reality. The existing framework should be geared towards promoting these principles.⁵⁹ The existing tools for public participation include but are not limited to Environmental Impact Assessment among other environmental assessment and audit tools.⁶⁰

4.2 Access to Information for Effective FPIC

Public participation requires the right of access to appropriate, comprehensible and timely information held by public institutions.⁶¹ This is a constitutional requirement as well as a statutory one under the *Access to Information Act, 2016*⁶² whose object and purpose is to—give effect to the right of access to information by citizens as provided under Article 35 of the Constitution; provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles; provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law; promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information; provide for the protection of persons who disclose information of public interest in

⁵⁸ Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR.

⁵⁹ See Muigua, K., "Towards Meaningful Public Participation in Natural Resource Management in Kenya," (2014). Available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf> [Accessed on 23/3/2019].

⁶⁰ Muigua, K., *Legal Aspects of Strategic Environmental Assessment and Environmental Management*, available at <http://www.kmco.co.ke/index.php/publications/182-legal-aspects-of-strategic-environmental-assessment-and-environmental-management> [accessed on 23/3/2019].

⁶¹ UNEP, *Training Manual on International Environmental Law*, *op cit*, p.193.

⁶² Access to Information Act, 2016, No. 31 of 2016, Laws of Kenya.

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good faith; and provide a framework to facilitate public education on the right to access information under the Act.⁶³

The Community Land Act, 2016⁶⁴ provides that an agreement relating to investment in community land shall only be made between the investor and the community.⁶⁵ In addition, no agreement between an investor and the community shall be valid unless it is approved by two thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of two thirds of the adult members of that community is represented.⁶⁶ Also relevant is the provision that the community may request the guidance and assistance of the county government or any other relevant stakeholders in considering the offer of investment.⁶⁷ These provisions are meant to ensure that the community members fully and meaningfully participate and where their consent is required, the same is freely obtained from an informed point.

In *Meza Galana and 3 others v AG and 2 others*,⁶⁸ community representatives from Tana River District filed a suit against the defendants seeking, *inter alia*, a declaration that the legal notice declaring Tana Primate Reserve to be a national reserve to be quashed as it was not a valid notice. The court held that the legal notice was indeed not valid as the community had not been made aware of the decision to gazette the area as a national reserve and their views had not been sought before the decision was made.

In the case of *John Muraya Mwangi & 495 Others & 6 Others v Minister For State For Provincial Administration & Internal Security & 4 Others [2014]*, the Court stated that although the concept of public participation enshrined in Articles 10 and 12 of the Constitution of Kenya 2010, is a difficult one, it needs to be given effect both before and after legislative enactment. This may take several forms:- the concept envisages political participation in the conduct of public affairs, such as the right to vote, and to be elected or appointed to public office; the right to be engaged in public debate and dialogue with elected representatives at public hearings; the duty to facilitate public participation in the conduct of public affairs; ensuring that ordinary citizens the “hoi polloi,” the “lala hoi” have the necessary information and are given opportunity

⁶³ Ibid, sec. 3.

⁶⁴ Community Land Act, No. 27 of 2016, Laws of Kenya.

⁶⁵ Ibid, sec. 36(2).

⁶⁶ Ibid, sec. 36(3).

⁶⁷ Community Land Act, sec. 36(4).

⁶⁸ HCCC No. 341 of 1993, [2007] eKLR.

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to exercise their say not merely in election and appointment to political office but also economic participation, and conduct of their affairs.⁶⁹

While this case may not be directly relevant to the concept of FPIC, as far as public participation which is a conduit for achieving FPIC is concerned, the case demonstrates the need for public participation in different affairs which impact on social, economic and political life of communities. The provision for access to information is not enough. It must be adequately provided for as far as the quality and forms of getting such information are concerned. The language of the information ought to be favourable. The information can be translated into local languages to enable the target audience appreciate the same and also facilitate meaningful engagement with the relevant stakeholders. Different channels and community leaders can be used to facilitate this and ensure that any decisions that affect the communities consider and take on board the views of such community members.

4.3 Balancing Community Rights to Self Determination and the National Development Agenda

While the communities' right to FPIC ought to be fully implemented for their own good and as part of the recognised human rights, this concept raises a number of issues that must delicately be tackled at least within the context of Kenya. For instance, while the various sectoral laws on exploitation and exploration of natural resources recognise the right of communities to give their consent in projects that potentially affect their lives and for the investors' (local and foreign) obligation to meaningfully engage these communities to obtain such consent, the Cabinet Secretary in charge still retains the power to invoke state's power of compulsory acquisition albeit with adequate compensation. The questions that arise are: under particular circumstances, who decides that the consent obtained was informed? Who determines that consent was unreasonably withheld? Where community or public meetings are held, who determines or establishes the number of people who attended such meetings, how the meetings were convened and the quality of the agenda for the meetings especially where the rapporteurs are the potential beneficiaries? Where the land in question is held by a County government in trust for an unregistered community, what safeguards will ensure that the decision-makers in that county are

⁶⁹ *John Muraya Mwangi & 495 others & 6 Others V Minister for State for Provincial Administration & Internal Security & 4 others [2014 eKLR.*

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not driven by their selfish interests to grant such consent? Would representatives of the said unregistered community challenge the county government's decision in court on grounds of lack of participation or would the participation of 'non-community members' suffice in meeting the requirements of public participation? What measures will ensure that the consent from members who stand to get monetary benefits from any compensation and those seeking to protect the traditional heritage or interests of the community is balanced?

These are some of the questions that may require to be thought through in the long-term, especially in the current era when Kenya is at a stage where the government is seeking rapid infrastructural development in a bid to meet the Vision 2030 goals.

5. Conclusion

The right of communities to give their free, prior and informed consent to authorities when projects that adversely affect their normal life is now part of the international bill of human rights. The requirement for FPIC is an acknowledgement of the fact that the state's decision-making processes must bring on board those people who are either to benefit or are likely to suffer from implementation of certain projects. It is also worth pointing out that FPIC is not only applicable to extractives industries but must also be applied in other projects in various sectors such as water, energy, and other natural resources exploration projects. Environmental decisions that are meant to pave way for infrastructural development must also consider the interests of communities.

This paper suggests some of the ways that FPIC can be obtained from local communities and also highlights some of the issues that are likely to affect this process. It is important for the same to be addressed for effective participation of communities in the national development agenda.

Maximising the right to free, prior and informed consent is certainly vital for enhanced environmental justice in Kenya.

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