Journal of Conflict Management & Sustainable Development

Volume 8 **Issue 5** **2022** ISBN 978-9966-046-15-4

A Review of Dispute Resolution Mechanisms for Communities in the Mining Sector in Kenya

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Abstract

Mineral extraction in Africa has been synonymous with community protests, acts of sabotage and armed conflict. At the centre of these conflicts are local communities contesting for resources. Kenya is increasingly focusing on the mining sector for its economic development. This article undertakes a review of the dispute resolution mechanisms available to communities in the sector.

Introduction

The intersection of conflict and mining in Africa is well documented[1]. Conflict[2] is identified as one of the drivers and manifestations of the

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[1] From Conflict to Peace building: The Role of Natural Resources and the Environment, UNEP, 2009, accessed at *https://wedocs.unep.org/handle/20.500.11822/7867*

[2] Conflict is defined as 'a dispute or incompatibility caused by the actual or perceived opposition of needs, values and interests. In political terms, conflict refers to wars or other struggles that involve the use of force.' Refer to *ibid, p.*7. Dispute is defined as 'A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other, refer to *Black's Law Dictionary, Rev. 4th Ed., St Paul, Minn, West Publishing Co., 1968, p. 558*; Disputes can be categorized as being over material/physical resources such as land and originate from conflicts based on human needs and aspirations such as identity, freedom, justice, equality, security etc. Refer to *John W. Burton, Conflict Resolution: The Human Dimension, The International Journal of Peace Studies, January 1998, Vol.3, No.1.* Conflict is defined as `interactions of interdependent people who see their goals as incompatible, and who believe the `other' people are interfering with their efforts to satisfy their interests or values'. Unresolved conflicts escalate into disputes.' Refer to *Belynda Hoffman, Pioneering New Approaches in Support of Sustainable Development in the Extractive Sector: Guidelines and methodologies for Conflict management, World Bank, ICCM & ESMAP, 16th November, 2003.*

'resource curse' phenomenon. Poverty, corruption and inequitable governance systems have the potential to fuel conflict and possibly wars and civil strife in resource rich areas. This flammability is enhanced by the conflicting interests of the main protagonists in a mining project namely, local communities, foreign mining companies and government. The points of friction from the standpoint of communities include access to land, access to mineral resources, ownership of land and mineral resources, impacts of displacement, cultural differences, access to water, environmental impacts, sharing of benefits such as revenues, jobs and business opportunities, access to information, revenue mismanagement, amongst others.

The African Mining Vision[3] identifies the elimination of human rights abuses and conflict connected to natural resources as an important objective for the region. Globally, there is an influx of international and regional initiatives that are aimed at managing conflicts in the mining sector in Africa in response to the 'conflict minerals'[4] problem.[5]

Domestically, the gap analysis of the Kenya Country Mining Vision[6] identifies conflict between communities and mining rights holders, and lack

[3] Accessed at https://www-cdn.oxfam.org/s3fs-public/bp-africa-mining-vision-090317-en.pdf on 24th November, 2021

[4] This term is defined by section 1502, US Dodd- Frank Wall Street Reform and Consumer Protection Act 2010 to refer to minerals identified by the Secretary of Finance that are financing conflict in the DRC and adjoining countries. This term associates the extraction of minerals to civil war, armed groups, forced labour, gender violence, money laundering, smuggling, amongst other illegal activities which have been experienced in Africa and South America, notably in DRC, the Great Lakes Region, Colombia, Liberia, Angola and Sierra Leone.

[5] IRP (2020). Mineral Resource Governance in the 21st Century: Gearing extractive industries towards sustainable development. Ayuk, E. T., Pedro, A. M., Ekins, P., Gatune, J., Milligan, B., Oberle B., Christmann, P., Ali, S., Kumar, S. V, Bringezu, S., Acquatella, J., Bernaudat, L., Bodouroglou, C., Brooks, S., Buergi Bonanomi, E., Clement, J., Collins, N., Davis, K., Davy, A., Dawkins, K., Dom, A., Eslamishoar, F., Franks, D., Hamor, T., Jensen, D., Lahiri-Dutt, K., Mancini, L., Nuss, P., Petersen, I., Sanders, A. R. D. A Report by the International Resource Panel. United Nations Environment Programme, Nairobi, Kenya, p. 203

[6] Ministry of Mining, Kenya Country Mining Vision gap analysis report, March 2017, P. 20 accessed at

of knowledge of dispute resolution mechanisms to deal with them as some of the impediments to the sustainable development of the sector. The linkage between conflict management and sustainable development is amplified by Sustainable Development Goal 16[7] which aims to *'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'*. There is no doubt that when conflicts escalate to disputes, an effective resolution mechanism prevents further escalation and ensures sustainability in the mining sector. This article examines the dispute resolution mechanisms in the mining sector available to communities with a focus on the role of the Cabinet Secretary in light of emerging legal issues.

Methods of Conflict Resolution in the Mining Sector

The World Bank in 2003 provided guidelines for conflict resolution in the extractives sector.[8] These guidelines identify four approaches to conflict resolution[9]. The avoidance approach where one or both parties ignore the conflict resulting in a 'take it or leave it' situation, the power approach which employs the threat of coercion and dominance tactics to impose a one-sided solution, the rights approach based on legally recognized rights and consensus approach which focuses on compromising the interests of the contesting parties.

Section 154 of the Mining Act, 2016 establishes four mechanisms for dispute resolution for matters concerning a mineral right, namely:

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https://www.ke.undp.org/content/kenya/en/home/library/poverty/Mining-Vision-Gap-Report.html on 24th November, 2021

[7] SDG 16, Peace Justice and Strong Institutions, accessed at https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-16 on 24th November, 2021

[8] Belynda Hoffman, Pioneering New Approaches in Support of Sustainable Development in the Extractive Sector: Guidelines and methodologies for Conflict management, World Bank, ICCM & ESMAP, 16th November, 2003

[9] Ibid, p.4, For purposes of this article conflict is defined as *`interactions of interdependent people who see their goals as incompatible, and who believe the `other' people are interfering with their efforts to satisfy their interests or values'. Unresolved conflicts escalate into disputes.'*

1. The Cabinet Secretary;
2. Mediation or Arbitration as per the agreement of the parties; and
3. Courts of law.

In addition to the above, project grievance resolution mechanisms[10] together with accountability mechanisms provided by international financiers are growing in their influence in dispute resolution in the extractives industries.[11] The Community Development Agreement (CDA) Committees[12] which are established to negotiate the community development agreements between large scale mining licensees and local communities, have a mandate of dispute resolution. This includes disputes arising from the implementation of the CDA[13] as well as other grievances and complaints not related to the CDA raised by the mining company or the community.[14] The Kwale CDA Committees have established a Grievance Resolution Sub- Committee which employs good faith negotiation methods, it can advise parties to refer disputes that do not relate to the CDA to formal mechanisms or escalate disputes to the Committee.

The Community Land Act[15] also specifically recognises alternative dispute resolution methods including mediation, arbitration and traditional dispute/conflict resolution methods where community land is involved. The said Act encourages courts to apply customary law subject to constitutional

[10] These are internal grievance mechanisms established and managed by mining companies sometimes in liaison with community representatives.
[11] For example World Bank Inspection Panel investigation of the Ol Karia geothermal project, accessed at *https://www.inspectionpanel.org/panel-cases/electricity-expansion-project* on 24th November, 2021 and complaints made to European investment Bank Complaints Mechanism accessed at *https://www.eib.org/attachments/complaints/sg-e-2014-07-sg-e-2017-08-mediation-agreement_redacted-additional-protection-applied.pdf*
[12] S. 7 Mining (Community Development Agreements) Regulations, 2017
[13] These are agreements between local communities and large scale miners on projects financed by at least 1% of the gross revenues earned per year.
[14] Section 7 (4) Mining (Community Development Agreements) Regulations, 2017
[15] Part VIII, Community Land Act no. 27 of 2016

safeguards. The National Environment Tribunal [16] and water agencies [17] resolve environmental disputes including those connected to mining.

The Mining and Minerals Policy 2016[18] recognises the potential of conflict between communities and mining companies on access to land, it states:

'The *Constitution of Kenya vests minerals on the National Government in trust for the people. At the same time, it sanctifies rights to property including land. Mineral operations are undertaken on, in and or under land surface. However, it is not clear between the Land Act and the Mining Act which one supersedes the other in case there is a dispute between mineral rights and surface rights. This hampers exploration and mineral development in some areas and discourages investments in mining.* '[19]

To address this grave issue, the policy proposes to deploy liaison officers to communities and ensure that communities' human rights are respected during displacement and that they are compensated [20]. The Mining and Minerals Policy 2016 considers dispute resolution in the sector perfunctorily and fails to establish clear principles, objectives, options or structures for this important function.

Challenges of Dispute resolution mechanisms under the Mining Act

A brief overview of the dispute resolution mechanisms under the Mining Act discloses the following:

Arbitration and Mediation

Most of the dispute resolution mechanisms prescribed by the Mining Act are alternative dispute resolution methods. Arbitration and mediation are confidential processes, therefore there are few published cases. Arbitration in the mining sector focuses on commercial and investment disputes. For

[16] Section 125, Environmental Management and Coordination Act, No. 8 of 1999
[17] Water Act, Cap 372 Laws of Kenya
[18] Republic of Kenya, Sessional Paper No. 7 of 2016
[19] Ibid, p. 3
[20] Ibid, P.9

example, the Cortec case [21] which was resolved through international investment arbitration. The Nairobi Centre for International Arbitration [22] reports that it handles commercial matters under the rubric of energy and resources but does not disaggregate the cases concerning the mining sector. Compared to arbitration, there is a great opportunity for community based mediation in the extractives sector. The Sessional Paper No. 5 of 2014 on National Policy for Peace Building and Conflict Management [23] established a peace building and conflict resolution structure of peace fora and peace committees comprising of community members. Although these peace platforms are hosted in the national security docket, their mandate includes resource based conflicts. Their membership is drawn from faith based organisations, community elders, civil society, representatives of women and youth, county government officials and national government administration officials as patrons. The Ministry of Interior and National Coordination has developed guidelines for mediators and mediation as an inclusive, consensual and non-coercive process. Several successful interventions have been undertaken but funding and capacity constraints have limited the impact of these peace platforms. [24] Court annexed mediation [25] provides another avenue for consensual resolution of disputes filed in court.

Litigation

The Environment and Land Court Act No. 19 of 2011, vests the Environment and Land Court with jurisdiction over mining disputes[26]. Section 157 of the Mining Act mandates the said court to hear appeals from and review the decisions of the Cabinet Secretary. Magistrate courts have the jurisdiction to hear criminal proceedings for offences under the Mining Act.

[21] *Cortec Mining & 2 others vs The Republic of Kenya*, ICSID ARB No. 15/29
[22] https://ncia.or.ke/
[23] Ministry of Interior and National Coordination, Guidelines for Mediation and Mediators, p.4, accessed at https://nscpeace.go.ke/resources/item/download/6_487289a54d054a46a54ab356b659f3c1
[24] Directorate of Peace building and Conflict Management, Capacity Building Forum for Peace Committees, September 2020, accessed at https://www.nscpeace.go.ke/
[25] Section 59 B, Civil Procedure Act, Cap 21 Laws of Kenya
[26] Section 13 (2)

Out of the four mechanisms espoused by section 154 of the Mining Act 2016, only the courts have institutionalised the public reporting of disputes, albeit decisions of the Superior courts. A random survey of 35 civil mining cases on the *kenyalaw* website [27] reveals that most litigation filed after the promulgation of the Constitution of Kenya 2010 relate to resource allocation in terms of licensing and land access.

Subject matter	**NO. /35**
Land	12
Licencing	18
Taxation	5
Total	35

The above figures indicate that half the disputes involve licencing (18/35). Most of these disputes relate to revocation of licences and double allocations. The land disputes are about a third (12/35), more than a third of these disputes involve local communities' interest in land (8/12).

These statistics cohere with the findings of the World Bank Extractives Industries (EI) Value Chain Prevention of Conflict[28] paper which identifies the first stage in the EI value chain, namely the award of contract and licences stage, as raising most of the triggers to conflict from issues of lack of consultation and inclusion of local communities, land, local content and corruption. If one estimates that only about 10% of disputes are filed in court,[29] this indicates that a majority of disputes are unresolved or employ alternative dispute resolution methods.

The Doctrine of Exhaustion

The Judiciary has developed and published the Alternative Justice System (AJS) framework policy. This is founded on Article 159 (2) (c) of the Constitution which requires the Judiciary to promote alternative, traditional

[27] http://kenyalaw.org/caselaw/
[28] Prevention of Conflict in Resource Rich Countries, World Bank SEGOM, 2015, p.6
[29] Alternative Justice Systems Framework Policy, Judiciary of Kenya, 2020,p. iv

and other dispute resolution mechanisms. The AJS is founded on philosophical and constitutional precepts of freedom, human dignity and equality. It adopts a human rights approach which is expected to be infused in traditional, informal and other dispute resolution mechanisms.

Sections 9 (2) & (3) of the Fair Administrative Action Act No. 4 of 2015 espouse the doctrine of exhaustion which requires statutory dispute resolution mechanisms to be utilised and completed before a party accesses the courts[30]. This principle requires courts to only take up matters where statutory ADR mechanisms have been exhausted. This principle is controversial as it may appear as though the courts are abdicating their responsibility and yet it is aligned to Article 159 (2) (c) of the Constitution and provides an important tool for managing case backlog.

This doctrine has been applied in constitutional matters as in the recent case of *Peter Nzeki & 14 others v Base Titanium Limited & 4 others [2021] eKLR,* which involved a constitutional petition seeking conservatory and declaratory orders against a mining company and government officials for land compensation claims for persons under the threat of displacement, the court held that the Petitioners had approached the Court prematurely and ought to have filed their claim with the Cabinet Secretary and dismissed the Petition.[31]

[30] Section 9 (4) provides for exceptions to this rule

[31] Excerpt from **Peter Nzeki & 14 others v Base Titanium Limited & 4 others [2021] eKLR**, *'13. From the above provisions of the law, it is clear that a clear and elaborate procedure for redress of any grievance exists and outlined under the Mining Act. Under the Act, disputes are referred to the Cabinet Secretary in the first instance. It is also clear that any person who is aggrieved by any decree, order or decision made or given under the powers vested in the Cabinet Secretary may appeal to this court within thirty days. The question then becomes whether an aggrieved party can ignore the elaborate provisions in the Mining Act and resort to this court, not in an appeal as provided, but in the first instance…. I find no difficulty in concluding that the petitioners herein failed to apply or follow the procedure provided for under the Mining Act and have therefore come to this court prematurely and on that ground alone, this petition fails.'*

The doctrine has been invoked against the High Court's supervisory jurisdiction of judicial review. Therefore not only should a party have the dispute determined by the Cabinet Secretary but any appeal to the High Court[32] must be exhausted before the supervisory jurisdiction is invoked. In the *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR***,** the Court of Appeal upheld the High Court's decision to that effect and dismissed the judicial review application.[33] This suit ended up in international arbitration.

It is clear from the above cases that the Judiciary in accordance with Article 156 (2) (c) of the Constitution has given judicial recognition to the Cabinet Secretary as an alternative dispute resolution mechanism established by the Mining Act, 2016. Although section 154 of the Act appears to confer a concurrent jurisdiction in both the court and the Cabinet Secretary, the application of the doctrine of exhaustion in the above – mentioned cases confers an exclusive jurisdiction in the first instance on the Cabinet Secretary.

Below we carry out an assessment of the current statutory mechanism that places dispute resolution responsibilities on the Cabinet Secretary to determine whether it promotes or hampers access to justice for local communities. The assessment considers a normative criteria where Independence, Impartiality and Competence[34] are evaluated.

[32] Section 157 Mining Act 2016 refers to appeals to the High Court although by virtue of the Environment and Land Court Act No. 19 of 2011, the appellate jurisdiction is vested in the Environment and Land Court.

[33] Excerpt from **Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR** *'35. That was an alternative remedy which the appellant ought to have disclosed and explained why it was not efficacious, thus resorting to judicial review. The appeal process, unlike judicial review, would afford the parties an opportunity to explore the merits of the decision. We think in the circumstances, the trial court did not misdirect itself in the exercise of its discretion as it accorded with the law. That finding would be sufficient to dispose of this appeal.'*

[34] Bangalore Principles of Judicial Conduct, UNODC, Vienna, 2018

Jurisdiction of the Cabinet Secretary for Mining

Under the Mining Act, the Cabinet Secretary has the function of resolving specific disputes between mineral right holders and communities regarding the assessment and payment of compensation for interference with property, land rights, agricultural livelihoods and water.[35] In addition, the Cabinet Secretary has powers to determine disputes on access to roads, electricity and water for mining; boundaries of mining areas [36] and operational infractions.[37]

Under the Mining (Community Development Agreement) Regulations, 2017, the Cabinet Secretary is mandated to resolve impasses in the negotiation of the CDA and disputes regarding the identification of the affected community.

The Cabinet Secretary's jurisdiction under the Mining Act indicates the pivotal role the Cabinet Secretary plays in disputes concerning communities. It is surprising to note that the role of the Cabinet Secretary in the mining sector is not captured in the Mining and Minerals Policy 2016.

The provisions regarding the Cabinet Secretary's powers on compensation in Kenya's Mining Act 2016 borrow heavily from the Minerals and Mining Act 2006 of Ghana[38]. The Ghanaian law is fundamentally different from the Kenyan law in one significant aspect, the conferment of a mineral right in Ghana simultaneously grants access to land rights[39].

[35] S. 153 i.e. deprivation or disturbance of land rights, destruction to buildings and immoveable property, loss of sustenance and earnings from agricultural activities arising from the damage or loss caused by the mineral right holder, damage to water levels and water supply; determining the boundaries of mining areas; water access rights for mining purposes; claims for access to utilities and other infrastructure for mining purposes;

[36] Disputes between mineral right holders concerning mining area boundaries are still vested in the Director of Mines. Reg. 22 Mining (Licence and Permits) Regulations 2017

[37] S. 155, i.e. operational wrongful acts and omissions.

[38] Sections 72, 73 and 74

[39] Sections 2-4, 13 (9) and 72 (1)

'13 (9) Subject to sections 73 and 74, a mineral right granted by the Minister under this section is sufficient authority for the holder over the land and entitles the holder to enter the land in respect of which the right is granted.' Therefore, the discussion between a mineral right holder and a land owner in Ghana under the said law is one of compensation. The Kenyan scenario is different, the Mining and Minerals Policy 2016[40] highlights the issue as follows:

Mineral right holders are required toobtain consents from owner or lawful occupier of land in which their operations are to be undertaken. However, government plays no role in the negotiations of these consents between land owners and exploration entities. Nonetheless, due to the high priority given to the mining and extractive industry as a whole, the government intends to deploy liaison officers to facilitate such negotiations and address other community related issues for purposes of achieving and maintaining harmony in the industry.

For mining purposes, access to land may entail compensation, relocation and resettlement of the affected land owners and occupiers. As a result, the government shall ensure prompt, just and adequate compensation to the affected.[41]

The consent of landowners is required by sections 36, 37 and 38 of the Mining Act 2016. In *Titus Musau Ndome vs CS Mining and Anor JR 51 of 2016* Ogola J stated thus:

'….it is important to observe that under the Constitution of Kenya a person's right to property is protected and so, the Applicant cannot purport to have the rights to carry out mining or prospecting activities on the Interested Party's land without consent of the owner of the land in perpetuity. The Applicant's claim to have that right is clearly illusionary, for Sections 37 and 38 of the Mining Act 2016 have made it clear that persons applying for a prospecting and/or mining right must obtain consent of the land owner in

[40] Sessional Paper No. 7 of 2016, p. 3
[41] Ibid, p.9

case of private land and or the County Government in case of trust land before they can be issued with a prospecting or mining licence.'

Therefore, if the negotiations for access to land fail, under the Kenyan mining law, land owners have the right to refuse to pave way for a mining project. Therefore, when a land owner's rights to land are deprived or disturbed by a mineral right holder, the dispute may not be a compensation issue. The Cabinet Secretary's powers are therefore limited to voluntary resettlement and a case involving the refusal of a landowner to leave their land including involuntary resettlement[42] are outside the Cabinet Secretary's remit.

Section 153 (4) of the Mining Act 2016 provides as follows:

'A person shall not demand or claim compensation whether under this Act or otherwise—

(a) in consideration for permitting entry to the land connected with the enjoyment of rights conferred under a mineral right;'

This provision fetters property rights for example lease arrangements which enable the land to revert back to the landowners once mining operations end, where this is feasible. The Cabinet Secretary's role in this regard may be construed as providing an avenue for arbitrary deprivation of land and threatening Article 40 rights.

Independence and Impartiality

The Cabinet Secretary (CS) is a member of the Executive arm of government[43]. The Cabinet Secretary is vested with a wide mandate by the Mining Act which includes to negotiate mineral agreements, select mining

[42] '*Resettlement is considered involuntary when affected persons or communities do not have the right to refuse land acquisition or restrictions on land use that result in displacement.* "World Bank Environmental and Social Framework." World Bank, Washington, DC, 2016, p.53

[43] Article 130 of the Constitution of Kenya

investors, identify strategic minerals, licensing, designate mining areas, enact regulations, resolve disputes and general administration of the sector. The Cabinet Secretary in the mining sector wears many hats, he/she is the agent of the owner of the mineral resource, the policy maker, the administrator, the regulator and the judge.

The mining sector has adopted a unique governance structure as compared to other sectoral laws in Kenya which have separated administrative from adjudicatory functions e.g. water, energy, environment, wildlife, petroleum, fisheries, amongst others. Most of these sectors have institutionalized these roles through boards, authorities, tribunals among others thereby ensuring some level of independence, continuity, transparency and accountability. In the mining sector, many of these functions are bundled in the office and person of the Cabinet Secretary[44]. This creates a vulnerability in the sector for example when the Cabinet Secretary is removed or resigns.

The paper argues that this multiplicity of roles poses a challenge for impartiality which is a pre-requisite for dispute resolution. Article 50 (1) of the Constitution of Kenya guarantees the right to every person to have any legal dispute resolved through a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.

Black's Law Dictionary defines the word impartial as *'Favoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just.'*[45]

The impartiality may be caused by the influence of government policy, international commitments or foreign investment promotion and protection. The design of the extractives sector places governments at the centre of every mining investment, agreement or transaction, fundamentally because, firstly, the natural resources are vested in the government. Secondly, government

[44] It is acknowledged that various institutions and departments have been established by the Mining Act 2016 but these are subordinate to the Cabinet Secretary (e.g. Directors of Mines and Geology) or play an advisory role (e.g. Mineral Rights Board)

[45] Black's Law Dictionary, Rev. 4th Ed., St Paul, Minn, West Publishing Co., 1968, p. 886

has an enormous interest in the financial benefits such as royalties and taxes. Finally, most mining companies are foreign due to insufficient domestic capital, expertise and trading networks and therefore the government plays an important role as a host country to promote the attractiveness of the country as an investment destination, meet its commitments under bilateral investment treaties with the home countries and investment agreements with the mining company. The Cabinet Secretary is the person charged with negotiating and protecting these government interests. It is therefore logical to question whether the Cabinet Secretary can act as a disinterested, neutral and independent umpire in a dispute touching on these interests? It is a fundamental tenet of natural justice that one cannot be a judge in their own cause.

Competence

The Mining Act dispute resolution provisions require the Cabinet Secretary to apply 'relevant rules and principles'[46]. The regulation of the extractives sector usually involve technical, economic and legal rules.[47] The dispute resolution mandate is vested in the Cabinet Secretary personally, there is no provision for coopting experts. The Cabinet Secretary is a political appointee and there is no framework to ascertain whether the office bearer has the qualifications to discharge dispute resolution responsibilities.

Comparative Jurisdictions

A short review of other jurisdictions highlights how other countries have treated the overlap of administrative and adjudicatory functions.

South Africa

The main sectoral mining law is the Mineral and Petroleum Resources Development Act, 2002. In terms of claims for compensation by land owners and occupiers it provides that these will be determined by the Regional Manager at the first instance through a form of mediation and if the parties are unable to agree, the dispute is referred to arbitration or the courts[48]. The

[46] Section 156 (3), MA 2016
[47] Section 153 (4) (e), MA 2016
[48] Section 54 (3) & (4)

Regional Manager is a public officer in charge of a mining region. In addition, the Act provides for a Minerals and Mining Development Board which advises the Minister on dispute resolution at the strategic level.

Tanzania

The Mining Act 2010 has empowered the Mining Commission which is the regulator of the sector to decide on some disputes such as compensation cases. The Tanzanian Mining (Disputes Resolution) Rules[49] strengthen the independence and impartiality of the Commission. Resort to the Commission is optional and not mandatory. The Commission cannot handle disputes involving the government. The Rules prescribe clear timelines. Appeals lie with the High Court.

Western Australia

The governing law is the Mining Act, 1978. It establishes a warden's court which is presided by a magistrate. The magistrate is a qualified lawyer and doubles up as the warden with various administrative functions under the said Act. The warden's court has territorial jurisdiction to determine disputes arising from a prescribed mining area[50] and a subject jurisdiction including ownership and title, trespass, land compensation, water access, mining operations, mining area boundaries and commercial disputes[51]. It has wide powers to grant injunctions, declaratory orders, award of damages or compensation, interlocutory orders, appointment of receivers, amongst others[52]. Appeals lie to the Environment, Resources and Development Court. The warden's court can reserve a question of law to be determined by the equivalent of the High Court in the form of a special case.

[49] (the **Rules**) which are made under section 122 of the Mining Act Cap 123 Revised Edition 2019 (the **Mining Act**), were published in the Government Gazette dated 16 April 2021
[50] Section 132 (2)
[51] Section 132 (1)
[52] Section 134 (1)

Ghana

The Minerals and Mining Act 2006[53] of Ghana provides a tiered dispute resolution mechanism for disputes between government and mineral right holders commencing with amicable settlement by mutual discussion or ADR and after 30 days to arbitration and in the case of non- citizens to international arbitration. The Minister[54] has the mandate for determining compensation claims between mineral right holder and a land owner, where good faith negotiations fail, with the assistance of a government land valuer. The High Court retains its supervisory oversight over the Minister's decision.

The models above indicate that in South Africa a regional administrative officer may mediate compensation claims but does not oust the court's concurrent jurisdiction. In Tanzania the regulator determines compensation disputes and the court's retain a concurrent jurisdiction. In Australia, a warden's court is part of the formal justice system with appeals lying in a higher court. In Ghana and Kenya, the Minister determines compensation claims and in Ghana, the court's jurisdiction is expressly ousted by the Act. Therefore, there are hybrid models. Kenya and Ghana stand out in that the minister/Cabinet Secretary undertakes the role of dispute resolution in the prescribed matters and the court's jurisdiction is ousted expressly or by implication.

Conclusion

The history of conflict and mining in Africa behooves a critical examination of the dispute resolution mechanism. A modern and robust dispute resolution mechanism in the mining sector should adopt a human rights approach, be impartial, competent, independent, fast, measurable, transparent and deliver benefits to the sector and local communities. The gaps in law, weak policy framework, the mandate of the Cabinet Secretary, lack of monitoring framework are some of the factors contributing to a problematic dispute resolution structure in the mining sector. The reforms of Kenya's mining

[53] Section 27
[54] Sections 73, 74 and 75

sector in 2016 heralded a positive transformation, as we enter a new dispensation, it is time to review the dispute resolution mechanisms.

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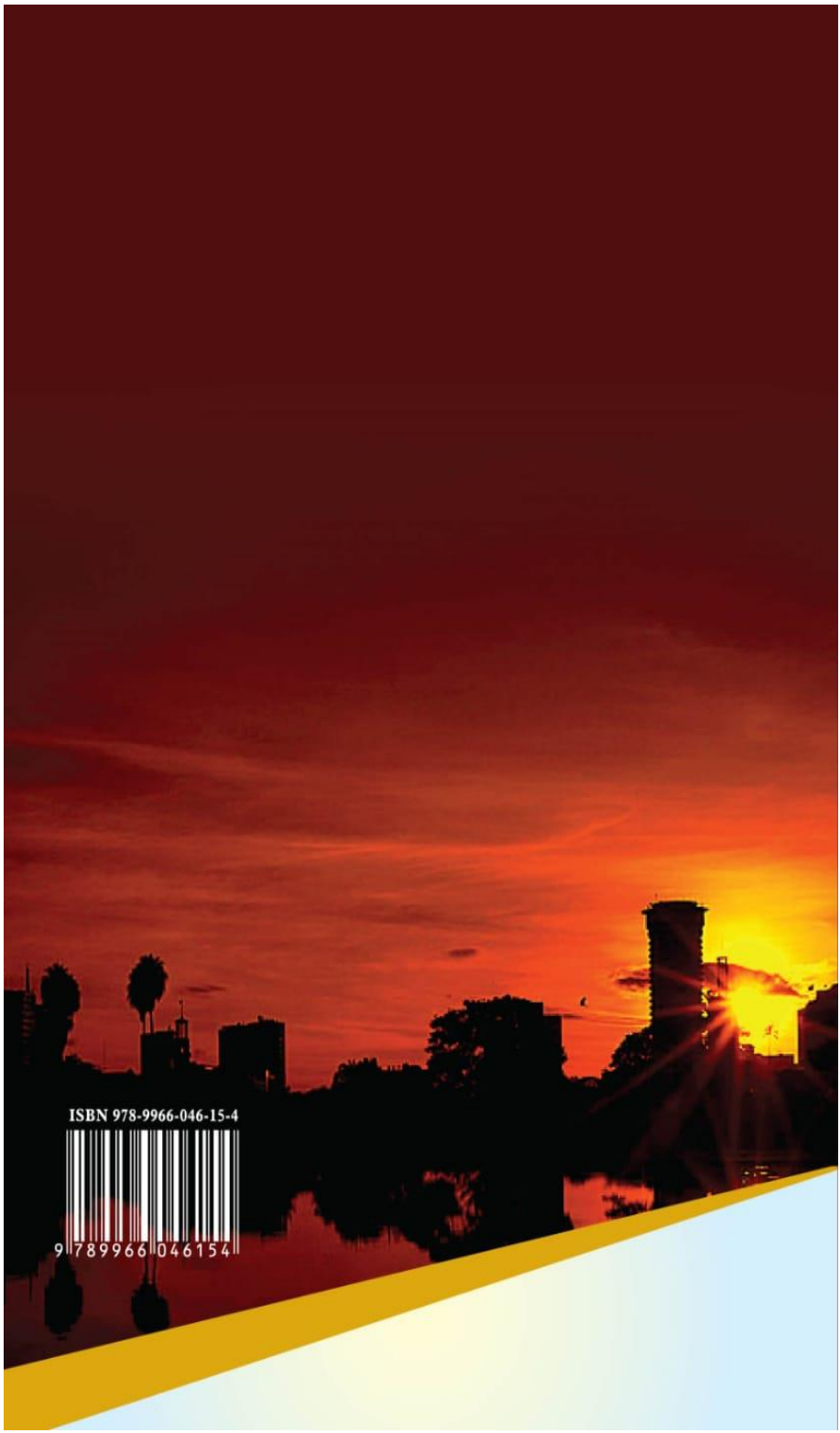

ISBN 978-9966-046-15-4