Titanium mining benefit sharing in Kwale County: A comprehensive analysis of the law and practice in the context of Nguluku and Bwiti
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Acknowledgement

This is our most recent initiative “Titanium Mining Benefit Sharing in Kwale County: A comprehensive analysis of the law and practice in the context of Nguluku and Bwiti” (2017). It is hoped that this report will serve as the basis for open and candid discussion and negotiation between the different mining stakeholders in Kwale County with a view to ensuring that the burdens and benefits of the titanium-mining project is equitably shared by all stakeholders. Such an engagement will require good will amongst all stakeholders, with all willing to compromise their hard stance on mining and accept a compromise that is beneficial to all the stakeholders.

Foremost, we deeply appreciate the work of all individuals, organizations, corporation and government whose invaluable contributions, knowledge and insights helped shape the report. Specifically, we would like to thank Dr. Nicholas Orago for his support through conscience guidance and expertise, without his hard work, the research would not have materialized.

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We are also very grateful to Ford Foundation for their generous support. Thank you for giving us the opportunity not only to explore and learn but also continue with our work on social justice and service to marginalized communities.

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Pauline Vata
Executive Director, Hakijamii
Executive summary

Mineral resources are important national resources that can enhance national socio-economic development if well managed. Historically, Kenya has not been a major player in the extractive sector, with the industry only contributing 1% to the country’s gross domestic product and less than 3% of total export earnings. However, with the discovery and exploitation of minerals such as titanium in Kwale County and oil in Turkana, Kenya is aiming to become a major player in the extractive industry. Questions abound though as to how the exploitation of these minerals is to benefit local populations in the areas where the extractive activities are taking place. Experience from other jurisdictions that have mineral deposits show that the impact of exploitation of mineral resources on the socio-economic development of a people depends on the governance structure that has been put in place to sustainably manage the resources for the benefit of the people. A proper management of mineral resources, termed the “Norwegian Model”, generates shared prosperity for all the mining stakeholders, with equitable sharing of the benefits and burdens of mineral resource exploitation. On the other hand, poor management of mineral resources, termed the “Nigerian Model”, generates the dreaded “resource curse”, leading to conflict and underdevelopment for the majority of the mineral resource shareholders, especially the mining host communities.

Kenya is currently in the process of developing a legal framework for the management of the extractive sector, with the governance of the sector bound to determine whether mineral resource exploitation leads to general prosperity or generates the resource curse. The Constitution has created an elaborate framework for the management of natural resources, mineral resources included. It demands that these resources are managed sustainably for the benefit of the Kenyan people. It demands equity in the sharing of benefits from the exploitation of natural resources with all the stakeholders, especially the mining host communities. Further, it calls on those charged with the responsibility of managing these resources to do so in a transparent and accountable manner, with the full, active and informed participation of all the stakeholders.

The Constitutional framework for the management of natural resources is bolstered by the Mining Act 2016, which further elaborates on the framework for the management of minerals. The Mining Act has elaborate provisions for benefit sharing, entrenching several mechanisms for the sharing the proceeds of mining projects that include the following:
• The payment of mineral taxes and royalties, and the sharing of the same between all mining stakeholders;
• Compensation for loss of land and other production resources as a result of mining-based displacements;
• Adoption of mitigation mechanisms to minimize the harmful social, economic and environmental impact of mining activities;
• Training and employment of members of mining host communities as staff in an affirmative employment quota,
• Local procurement of goods and services; and,
• The development of socio-economic infrastructure such as roads, hospitals, schools, water points and access to electricity for the benefit of the mining host communities.

The Local Content Bill 2016 and the Natural Resources (Benefit Sharing) Bill 2014, when enacted, will further bolster these benefit sharing mechanisms, ensuring that local communities benefit from mining projects within their localities.

However, despite the elaborate legal framework on benefit sharing, the reality on the ground is different. This report undertook a survey of mining benefit sharing in Nguluku and Bwiti in the context of titanium mining in Maumba, Kwale County. The study found out that there is no equitable benefit sharing in that context, with the mining host communities in Nguluku and Bwiti still experiencing dire socio-economic conditions despite the mining project minting billions from titanium exploitation in their backyards. A myriad of reasons account for the current situation. The major impediment to benefit sharing has been the poor negotiation leading to the award of the mining licence, a process that did not take into account the needs and interest of Kenyans. The result of these negotiations is a skewed contract for the benefit of the mining operator, but to the detriment of the Country of Kenya in general and the mining host communities in particular. Other impediments include: failure of the mining operator to substantively involve and engage the local population in the design and implementation of community development projects; failure of the mining operator to effectively mitigate the adverse environmental, social and economic consequences of mining; failure of the National Government to remit the percentage of royalties accruing to the County Government and the mining host communities in accordance with the Mining Act, among others.

If titanium mining is to be beneficial to the mining host communities in Nguluku and Bwiti, the governance structure created by the mining legal framework must be effectively and efficiently enforced. The mining host communities must be substantively and effectively involved in
decision-making on all aspects of mining and the development of structures of benefit sharing. This report proposes the creation of a Community Mining Trust Fund (CMTF) as a benefit sharing mechanism to manage mining resources for and on behalf of the local communities so as to generate shared socio-economic development and ensure shared prosperity for the mining host communities. The success of such a venture will, however, depend on the good faith support and participation of all the mining stakeholders, especially the mining host communities, the mining right holder and the County Government of Kwale. These stakeholders must work together to improve the socio-economic situation of the mining host communities in Nguluku and Bwiti.

It is hoped that this report will serve as the basis for open and candid discussion and negotiation between the different mining stakeholders in Kwale County with a view to ensuring that the burdens and benefits of the titanium-mining project is equitably shared by all stakeholders. Such an engagement will require good will amongst all stakeholders, with all willing to compromise their hard stance on mining and accept a compromise that is beneficial to all the stakeholders.
Introduction

The sustainable management of natural resources, especially mineral resources, has the potential to enhance sustainable development and uplift the standard of living of mining host communities. Some of the major benefits that have been known to flow from a properly managed extractive industry include: creation of employment and skills acquisition for mining host communities; local procurement and use of local products in mining operations; growth of mining-induced alternative small and large-scale businesses; development of socio-economic services such as roads, schools, vocational training institutions, healthcare infrastructure, water infrastructure, and other socio-cultural facilities; generation of revenue and foreign exchange for the Government through taxes and royalties, among others. Achieving these benefits, however, require a comprehensive legal framework and efficient governance structures that ensure transparent, accountable and sustainable management of these resources. These legal and governance structures must also put in place effective and equitable mechanisms for the sharing of the benefits and burdens of natural resource exploitation among all the relevant natural resource stakeholders, with a focus on the mining host communities.

1 See International Financial Corporation (IFC) ‘Sustainable and responsible mining in Africa: A getting started guide’ (January 2014) 8, available at: https://www.ifc.org/wps/wcm/connect/dfaac38043fea19b8f90b869243d457/Sustainable+Mining+in+Africa.pdf?MOD=AJPERES (accessed on 14 May 2017), which defines sustainable mining to entail the balancing of social, environmental and economic factors to generate success for the mining company while ensuring sustainable livelihoods for the mining host communities. This requires community engagement and investments; respecting human rights; protecting the environment; being transparent; and, acting with integrity.

2 See International Financial Corporation (IFC) Discussion Paper ‘The art and science of benefit sharing in the natural resources sector’ (February 2015) 7, available at https://commdev.org/wp-content/uploads/2015/07/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf (accessed on 13 May 2017). See also P Soderholm & N Svahn ‘Mining, regional development and benefit sharing in developed countries’ (2015) 45 Resources Policy Journal 80, who define some of these benefits as follows: backward linkages (local procurement of goods and services); forward linkages (opportunities created in downstream value chains such as processing, transport and value addition); final demand linkages (income spent by employee households in the local economy); and fiscal linkages (mining taxes and royalties for the development of local communities.


4 IFC Discussion Paper – The art and science of benefit sharing, 7; World Bank ‘The context of benefit sharing in the mining industry’ in E Wall & R Peloni (eds.) Sharing Mining Benefits in Developing Countries (2011) 6.
However, most mining operations occur in areas with several structural and governance challenges such as weak legal and regulatory frameworks, weak governmental capacity to deliver on public goods, unmitigated social and environmental imprints of mining activities as well as heightened expectation for employment and economic development by the mining host community. Due to these challenges, rather than stimulate broad-based socio-economic development, mineral resource extraction mostly generate the dreaded “mineral curse”. This “curse” is exemplified by the following characteristics: concentration of wealth and power in the hands of a few; environmental degradation and pollution; increased poverty and inequality; as well as the exacerbation of corruption and other unethical practices by public officers. These disparities - the lack of employment opportunities and the failure to equitably share the benefits of extractive operations - have generated tensions, leading to varying degrees of conflict from community protests to actual armed struggle for the control of mineral resources.

Kenya has historically not been a significant mineral producer or exporter. The legal regime governing the extractive industry has, thus not transformed considerable in comparative perspective. Until 2016, the extractive industry in Kenya was governed for 76 years by the colonial-era mining Act of 1940. Due to the weak legislative, policy and regulatory framework; the mining sector had been beset with extractive practices that were detrimental to mining host populations. These included: lack of popular participation in the design, implementation and management of the mining operations; loss of community production factors such as land, water, pasture and communal cultural sites; environmental degradation that negatively impacted on food production and detrimentally affected human and animal health; inequitable sharing of the benefits of mining, which saw mining multi-national corporations hugely benefit from natural resource exploitation to the detriment of mining host communities, among other challenges.

In the last eight years, however, the extractive industry has grown in Kenya. It is currently contributing 1% of the GDP as well as about 2% of Kenya’s export earnings, which is anticipated to rise to 10% by the year 2030. In 2014/2015, the total production from the extractive industry

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5 World Bank - The context of benefit sharing in the mining industry, 6.
6 IFC Discussion Paper – The art and science of benefit sharing, 7.
8 M Brown 'Mining in Kenya – the start of a new era?' (2013) 1 available at: https://www.mayerbrown.com/files/uploads/Documents/PDFs/Mining_in_Kenya2.pdf (accessed 5 May 2017), who states that Kenya's mining export was historically less than 1% of the GDP.
9 M Ayisi 'The legal character of mining rights under the new mining law of Kenya' (2017) 35(1) Journal of Energy and Natural Resources Law 28. He notes that before the law reforms resulting in the Mining Act 2016, Kenyan mining law and policy had not transformed as compared to mining codes in other African countries.
Titanium mining benefit sharing in Kwale County was Kshs. 20.9 billion, with the government collecting Kshs.1.25 billion as taxes, royalties and other payments. The growing importance of the mining industry has seen the development of a comprehensive and holistic legal and regulatory framework for the extractive industry to limit the negative impacts of mining, ensure sustainable mining practices and ensure the equitable sharing of mining benefits. This in part was achieved with the promulgation of the Constitution of Kenya in 2010 as well as the subsequent enactment of the Mining Act of 2016 and the development of the Local Content Bill 2016 as well as the Natural Resources (Benefit Sharing) Bill 2014 to create the necessary legal framework for benefit sharing.

This research report aims to undertake an analysis of the new mining regime in relation to benefit sharing, with a focus on titanium mining in Nguluku and Bwiti in Kwale County. It is divided into five sections. After this introductory section, the report details the methodology used in the research in section two. Section three undertakes an analysis of the socio-economic situation of Kwale County, with a focus on Bwiti and Nguluku. It affirms that despite the titanium-mining project, the socio-economic situation of the mining host communities in Nguluku and Bwiti has not changed for the better, and in many instances has actually become worse as a result of the adverse unmitigated impacts of the mining project. Section four, the core of the study, analyses the concept of benefit sharing. It defines benefit sharing and elaborates on the legal framework for benefit sharing in Kenya. It then analyses the practice of benefit sharing in the context of titanium mining in Kwale County, finding that there has not been a fair and equitable sharing of the benefits and burdens of titanium mining in Kwale. Building on the discussion in section four, section five proposes the establishment of a Community Mining Trust Fund to manage all aspects of benefit sharing for and on behalf of the mining host communities in Nguluku and Bwiti. Section six contains the conclusion and recommendations.


13 See Local Content Bill 2016, Statement of Objects and Reasons, paras. 3-4, which affirms that discovery of minerals has not led to socio-economic development of local communities and entrenched equitable benefit sharing because of the following reasons: lack of capacity of local communities to participate in the extractive industry; lack of technology and technical know-how; lack of public participation; and importantly, lack of a legal framework for the exploitation of natural resources in a manner that ensures that accruing benefits are equitably shared with the mining host communities. The Bill aims to change the narrative and ensure mining host communities effectively participate in the mining industry and benefit from the profits accruing from the industry.
## 1.1 Methodology

<table>
<thead>
<tr>
<th>Method</th>
<th>Description</th>
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<tbody>
<tr>
<td>Study method</td>
<td>Study method was broadly qualitative with the objective of undertaking an in-depth analysis of the following:</td>
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<tr>
<td></td>
<td>• Mining benefit sharing in Nguluku and Bwiti in the context of titanium mining by Base Titanium.</td>
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<td></td>
<td>• Budgeting processes by Kwale County Government and whether these have been geared towards the realisation of priority socio-economic rights of the mining host communities in Nguluku and Bwiti.</td>
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<tr>
<td>Study approach</td>
<td>A mixed method approach was adopted, combining document/literature review and field survey to collect primary:</td>
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<td></td>
<td>• Document review: Entailed qualitative content analysis of available literature, legal instruments and budgeting documents. The essence of the review was to determine the socio-economic situation of Kwale County; legal provisions on mining benefit sharing; legal provisions on budgeting and resource distribution; as well as the budgeting prioritisation and practice of Kwale County Government.</td>
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<td></td>
<td>• Field survey: Entailed face-to-face interview of 39 household heads in Nguluku and Bwiti (22 Nguluku, 17 Bwiti); 10 face-to-face key informant interviews; and 4 focus group discussions with different mining stakeholders. Random sampling approach was used to select the 39 household heads for the household interviews, while purposive sampling approach was adopted in selecting the key informant interview respondents. The essence of the field survey was to collect data affirming the socio-economic situation of households in Nguluku and Bwiti; to determine the perceptions of mining host communities on benefit and burden sharing in the context of titanium mining in Kwale; and to determine mining community perceptions on the County Government budgeting processes and whether that process has responded to their priority needs and aspirations.</td>
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**Data collection instrument**  
Semi-structured questionnaires. Two sets of questionnaires was developed: one for key informant interviewees on the benefit sharing and budgeting processes; and the second one for host community households on their perceptions on benefit sharing and service delivery in Kwale County.

The key informant interviews were done by the Consultant while the household surveys were done by 10 Data Enumerators. The focus group discussions were done jointly by the Hakijamii staff and the Consultant. Data was collected in the week of the 22-26 May 2017.

<table>
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<tr>
<th>Recruitment</th>
<th>Voluntary and confidential.</th>
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<tr>
<td>Duration</td>
<td>50 to 90 minutes.</td>
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<tr>
<td>Recording</td>
<td>Short hand and audio recording, with verbatim transcriptions.</td>
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<tr>
<td>Analysis</td>
<td>Thematic coding with main themes and sub-themes.</td>
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Titanium mining and its impact on the mining host communities in Nguluku and Bwiti

2.1 The political and socio-economic situation of Kwale County

Kwale County is one of the six counties in the Coastal Region. It is situated in the Southeastern corner of Kenya, lying between latitudes 3° 3’ and 4° 45’ South and Longitudes 38° 31’ and 39° 31’ East. It covers an area of 8270.2 KM² and borders the Indian Ocean to the East with a coastline of approximately 250 km, making it an attractive tourist and investment destination. It has four major topographical features - the Coastal Plains, the Foot Plateau, the Coastal Uplands and the Nyika Plateau – making it ideal for different types of economic activities from agricultural production, livestock rearing, wildlife conservation, fishing, tourism and mining. It has a monsoon type of climate, which is hot and dry from January to May and cool from June to August. It experiences long rains from March to July and short rains from October to December.

16 15% of the land has medium potential for rain-fed agriculture, while 18% is marginal with 67% being arid and semi-arid. Main subsistence crops grown are maize, cassava, beans, peas, coconuts and mangoes; while the main commercial crops are cashew nuts, bixa, sugar cane, cotton, simsim and tobacco. There is, however, potential for growth in irrigation agriculture as exemplified by the existence of seven rivers traversing the County, that is, Ramisi, Marere, Pemba, Mkurumuji, Umba, Mwachema and Mwachi. See Kwale County Integrated Development Plan 2013-2017, 10-12.
17 Official conservation areas are Shimba Hills National Reserve, Mwaluganje Elephant Sanctuary and the Kisite Mpunguti Marine Reserve. There also exist private ranches with wildlife in Kinango and Samburu Divisions.
The County is divided into three administrative sub-counties, being: Matuga, Kinango and Msambweni. These are further divided into four political constituencies, 9 administrative divisions, 20 county assembly wards, 37 administrative locations and 84 administrative sub-locations. It is populated mainly by the Digo and Duruma natives, though it has experienced immigrations from other Kenyan and foreign communities. According to the 2009 population census, the population was 649,931, consisting of 315,997 males and 333,934 females. This population, which grows at an average rate of 3.1% per annum, was projected to have grown to 713,488 (346,898 males and 366,589 females) in 2012 and 833,527 (405,262 male and 428,266 female) in 2017. The population is generally youthful, with those under 15yrs constituting 47.23% of the population while those over 60yrs only accounting for 4.95% of the population in 2012. This population projection is set to grow in 2017, with the population under 13yrs increasing to approximately 57% of the population. This denotes a high level of dependency, with household resources being directed mainly at consumption with very little left for capital investment to grow the household resource base. The result of this is the high levels of poverty and destitution, with households finding it difficult to break out of poverty. This is affirmed by the high poverty incidences in Kwale County approximated at 74.9% of the households living below the poverty line. This is made worse by the lack of economic opportunities, with subsistence farming contributing over 80.6% of household income and wage labour accounting for only 8.6% of household income. Though the active labour population (15-64) constitute about 49% of the total population, they are mostly semi-skilled or unskilled, severely limiting labour productivity. 30% of this labour force is unemployed or underemployed, with the youth being the most affected.

21 The four constituencies are: Matuga, Msambweni, Lunga Lunga and Kinango.
26 Kwale County Integrated Development Plan 2013-2017, 16. See also Institute of Economic Affairs – Child Budgeting analysis, 2, which affirms that 56.09% of the population in 2009 was children.
27 Calculations from data in table 6 of the CIDP that details the total population of children below 13yrs to 464,923. If multiplied by 100 and divided by the total population projection of 2017 at 833,527, the percentage is 56.91% of the population below 13yrs.
30 Kwale County Treasury ‘County Budget Review and Outlook Paper 2015 (2015) 1. The challenges leading to the high levels of poverty according to the C-BROP 2015 are: low productivity, poor education standards, poor management of land, low investments in trade, industry and tourism, poor infrastructure, rising insecurity and poor governance.
In comparative perspective, Kwale County has poor infrastructural network, especially transport and communication networks. It has 1,483.1 km of roads, of which 187.7km are tarmacked, 425.2km is graveled and 872.1km has earth surface.³⁴ It has 4km of railway line and four airstrips (Ukunda/Diani, Shimba Hills National Reserve, Msambweni and Kinango), though only one is operational, the Ukunda airstrip.³⁵ Though it has a coastline, water transport in Kwale is majorly unexploited, with only two small ports at Shimoni and Vanga for boat transport.³⁶ Though mobile phone network is good (75% coverage) in the major towns of Kwale like Ukunda, Msambweni and Kinango, the hinterlands are either completely uncovered or experience difficulty in accessing mobile phone networks.³⁷ Internet access is also poor, with very few Internet cafes only found in the major towns.³⁸

The educational infrastructure is poor in comparative perspective, with the County only having 820 early childhood centers, 415 primary schools (363 public and 52 private), 55 secondary schools and six tertiary institutions (Kenya School of Government, Kenya Medical Training College and 4 Youth Polytechnics).³⁹ These schools further suffer from challenges such as inadequate classrooms, desks, toilets, dilapidated infrastructure and lack of adequate teachers.⁴⁰ These challenges have led to poor performance in national examinations over the years. The housing and sanitation situation is poor, with many houses having no piped water or sanitation facilities.⁴¹ The main roofing material is makuti (coconut tree leaves) at 48.8% while corrugated iron roofing accounts for 37.1% of the houses.⁴² Walls are majorly constructed of mud and wood (56.9%), stoned walls account for 15.2% while mud and cement walls account for 9.8%.⁴³ Common sources of energy for cooking is mainly wood fuel (80.2%), charcoal (11.5%) and paraffin (5.7%); while common energy source for lighting is paraffin (95.5%).⁴⁴

The main sources of water are rivers, boreholes, springs, dams, rivers, water pans and rock catchments with the average distance to a water source being about 2kms, a far cry from the 5m

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³⁴ Kwale County Integrated Development Plan 2013-2017, 21. See Controller of Budgets – Kwale County, which further states that the County has poor access infrastructure, with 29% of roads having gravel surface & 58% having earth surface.
³⁷ Kwale County Integrated Development Plan 2013-2017, 22. The most affected areas include Kubo, Vanga, Samburu, Davanya and parts of Lunga Lunga.
³⁸ Kwale County Integrated Development Plan 2013-2017, 22, which indicates that there are only 8 cyber cafes and all are found in Ukunda/Diani.
⁴⁴ Kwale County Integrated Development Plan 2013-2017, 23. See Controller of Budgets – Kwale County, which states that only 3.6% of households in Kwale have access to electricity.
distance required by international standards. Sanitation is equally poor, with the main toilet facility being pit latrines that cover only 41.4% of the households, a far cry from the national target of 90%. Access to health is also an issue, with the County having only 3 government hospitals, eight health centers, sixty-four dispensaries and two private hospitals. The ration of doctor to population is at 1:76,741, while that of nurse to population is at 1:3,133. The average distance to hospital is 7km, which compares adversely to the required standard of 3km. The poor health infrastructure is affirmed by poor child health and nutrition indicators which show that 30% of children in the County are facing stunting, 4% are wasting, 12% are underweight, and 2659 are living with HIV, with only 11% under anti-retroviral therapy.

Kwale County has historically faced a land issue, with the majority of the land held by absentee landlords. As a result, there are high incidences of landlessness, with many families with no access to land having to live as squatters in public or private land. The land situation is further complicated by the lack of land adjudication and the issuance of title deeds, making it precarious and difficult to invest in the development of land. In the arid and semi arid areas of the Nyika Plateau, land is held in common under group ranches, with community members only having a right of use and not individual ownership. This makes it difficult for them to develop the land or access financing using land title deeds as collateral. Land has been one of the sticking points in mining operations, with communities struggling to affirm rights over land in the context of land compensation in mining areas.

In the context of this generally difficult socio-economic situation, Kwale County has deposit of diverse minerals, with those already discovered and being exploited including titanium (rutile, ilmenite and zircon) in Nguluku and Shimba Hills, gemstone at Kuranze, among others. It would be expected that this huge tapestry of mineral resources has generated broad-based development in Kwale, however, the situation is the contrary as has been demonstrated above.

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50 Institute of Economic Affairs – Child Budgeting analysis, 2. This numbers might actually be higher at the moment taking into account the continuing drought and its impact on household food security.
54 Some of the other mineral resources are silica sands, zinc, lead, copper, coal, sandstones, limestone and coral rocks. See Kwale County Integrated Development Plan 2013-2017, 27.
2.2 Titanium mining in Maumba and its impact on the socio-economic situation of the mining host communities in Nguluku and Bwiti

Base Titanium, a subsidiary of Base Resources Company of Australia, is the company undertaking titanium mining in Nguluku.\(^5^5\) It bought the mines from Tiomin in 2011 and spent the first two years (2011-2013) on infrastructure development to operationalise the mine reaching full-scale operational capacity in 2015.\(^5^6\) It estimates having spent Kshs.26.4 billion (Kshs. 21.2 billion to construct and outfit the mine and Kshs. 5.2 billion for the flagship projects) in the operationalisation of the mines and anticipates the sustenance of the mine in full operation for ten years until its closure in 2026.\(^5^7\) Base Titanium has become the seventh largest producer of ilmenite and third largest producer of rutile in the world with the operationalisation of the mine.\(^5^8\)

Base Titanium projects that in its 10 years of operations; it will directly contribute Kshs. 7.6 billion worth of revenue annually to the GDP, which would translate to 75.6 billion in the 10 years.\(^5^9\) It intends to employ 642 workers, 94% (602 employees) of them being Kenyan nationals, who will earn an average annual wage of 927, 400 that is 40% higher than the national average.\(^6^0\) The employment provided by Base Titanium in Kwale is intended to stabilise at 640 employees as the operations stabilise,\(^6^1\) with Kenyans being trained to take over management responsibilities.\(^6^2\) Base Titanium projects that it and its employees will contribute approximately Kshs. 1.4 billion in taxes annually, including Kshs. 601 million of mineral royalties.\(^6^3\) Based on this approximation, Base Titanium projects that from 2013 to 2026; it will pay approximately Kshs. 23.8 billion in Kenyan taxes, including Kshs. 11.7 billion in royalties.\(^6^4\)


\(^{56}\) Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 2.

\(^{57}\) Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 2.

\(^{58}\) Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 4-5.

\(^{59}\) Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 2.

\(^{60}\) Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 2 & 7-8. According to base titanium, this wages are 1.5 times higher than the Kenyan average; 1.6 times higher than the average wage for the Coastal Region; and, 2.6 times higher than the average wage in the Kenyan mining sector in general.

\(^{61}\) In the validation workshop, a representative of Base Titanium, however, asserted that the number of employees is currently 642, the majority of whom are Kenyans, though it was not clear from his feedback how many of these were actually from the mining host communities of Bwiti and Nguluku.

\(^{62}\) Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 7. Base Titanium indicates that it has put in place an employee succession plan to replace expatriates with qualified Kenyans and has set aside funds to train such employees.

\(^{63}\) Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 3.

\(^{64}\) Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 3 & 9.
Base Titanium intends to grow the local economy through the procurement of local products and local services. It also intends to invest in the development of the local community through its Community Development Management Plan (CDMP), which focuses on education, health, livelihoods and infrastructure. It plans to invest a total of 2.6 billion in the local mining communities in the 12-year lifespan of the mine, with Kshs. 301.3 million being invested in the year 2016. The community infrastructure it intends to build includes boreholes, water pumps, health facilities and school facilities, all to the tune of Kshs. 435 million. On community projects, the intention of Base is to undertake community livelihood development through agricultural research and extension, small and medium size business development and provision of education and training, which are to account for 31% of the total Kshs. 2.6 billion CDMP fund. It also intends to award scholarships for secondary and tertiary education, with over 950 students already benefiting from the scholarships.

The above projections by Base Titanium look extremely good on paper, but the reality on the ground has been different. Titanium mining by Base Titanium in Nguluku has faced the same challenges faced by other mining operations, with mining host communities raising concerns in relation to the loss of land, displacements as well as environmental degradation that has been detrimental to human and animal health. The project has further not enhanced access to basic services such as clean water, electricity, education and healthcare; services that were promised to the mining host community during the inception of the project. The failure of the mining project to benefit the mining host communities and the County Government is affirmed in a key informant interview with one of the Kwale County Official who states as follows:

**Mining is a major economic activity in Kwale, but benefits of the mining operations is not really visible, be it at the local mining communities or in relation to resources to the County Government for development purposes. The mining companies like Base Titanium are reaping billions of shillings from local natural resources, while giving very little back.**

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65 Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 11.
66 Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 11.
67 Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 11. It reports the completion of the Magaoni Health Centre that is serving 9 villages and catering to over 3,000 residents. It intends to undertake a second phase of the project to include surgical and maternity wards.
68 Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 11.
69 Earnest & Young - Base Titanium total economic and tax contribution in Kenya, 12.
70 Displacement has dire social impacts as it dislodges families from their homes, leading to separation of families and the disintegration of familial social support structures. It also separates farmers from their fields and businesses from their neighbourhoods, with adverse impact on food security and stability of livelihoods.
72 Ange - Challenges and prospects of equitable benefit sharing in the mining sector, 2.
73 Key informant interview N-2 conducted at the County Government Offices on the 22nd of May 2017.
to the communities and to the County Government. It also takes the raw minerals without undertaking value addition at source, which could develop local industries to provide direct and indirect services in the value addition process, thus creating employment and business opportunities for local populations. This would generate inclusive prosperity for the mining rights companies, the County Government and the mining host communities.

The Kwale County Government made efforts to negotiate a 5% share of the mining profits from the titanium project, but were unsuccessful with the mining company threatening to sue the County Government for its efforts to acquire benefits from the mining project. Attempts by the County Government to introduce Cess was also rebuffed, leaving the County Government with no revenue from the mining project in its own County apart from the meager single business permit. This is a clear indicator that the County Government is currently not sharing in the benefits from the mining project; limiting resources it has to improve the lives and livelihoods of the mining host communities in Nguluku and Bwiti.

This sad situation is further affirmed by the Household survey conducted in the context of this research, which indicates that despite mining being operational in Maumba since 2015, the benefit to the local mining communities in Nguluku and Bwiti has been negligible. From the household survey, 81% of the Respondents interviewed state that they have not seen any benefits from the mining operation. One Respondent states the lack of benefit from titanium mining as follows: “there have been no benefits, titanium mining has only brought destruction. Local people in Nguluku have not been able to benefit because there are no development projects by Base in Nguluku”. Another respondent echoes this by stating as follows: “they drive past us and have no time to listen to us. Our leaders are given “something small” so they keep quite as we are oppressed”.

As a result of the failure to equitably share the benefits of the mining project, these mining host communities continue living in extreme poverty, with their socio-economic situation actually worse than that of the general population of Kwale County. The biggest indicator of the multidimensional nature of this poverty is reflected in the dire food insecurity situation in Nguluku and Bwiti. In Nguluku, of the households interviewed, only 18.2% have three meals a day, with the majority 68.2% having two meals a day and the other 13.6% having only one meal.

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74 Key informant interview N-2 conducted at the County Government Offices on the 22nd of May 2017.
75 Key informant interview N-1 conducted at the County Government Offices on the 22nd of May 2017.
76 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
77 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
78 Household Interview of the Respondent J-3 in Nguluku on the 23rd of May 2017.
79 “Something small” connotes a bribe or some form of inducement for the community leaders not to raise issues with the different forms of violations of the fundamental rights of the mining host communities.
80 Household Interview of the Respondent M-4 in Nguluku on the 23rd of May 2017.
a day.\textsuperscript{81} Of these, 95.5\% reported their households going to bed hungry sometimes as compared to only 4.5\% whose households do not go to bed hungry.\textsuperscript{82} The food insecurity situation is the same for Bwiti, where 5.9\% have three meals a day, 82.4\% have two meals a day and 11.8\% only have one meal a day.\textsuperscript{83} Of those interviewed, all (100\%) reported their households going to bed hungry sometimes.\textsuperscript{84}

The multidimensional nature of poverty is further reflected using other socio-economic indicators. On health, the mining host communities have continued to suffer from poor access to health facilities. The situation is better in Bwiti, where Base Titanium constructed a Dispensary,\textsuperscript{85} but the same has not been sufficiently equipped with qualified health personnel and medicines, with only one nurse and two community health volunteers serving the over 1, 500 people in Bwiti.\textsuperscript{86} The poor health situation in Nguluku is far greater, with the mining community experiencing increased diseases as a result of the mining operation at Maumba. Major diseases reported are malaria due to the forest and dam that breeds mosquitoes; skin diseases due to mining; coughing due to dust from mining; diarrhea and typhoid from contaminated river water and eye problems due to dust.\textsuperscript{87} The Nguluku population struggle to access healthcare due to the poor health infrastructure around them, with the majority having to travel between 10-15KM to access health services at Msambweni Sub District Hospital (34.6\% of the population), Shimba Hills Dispensary (9.1\% of the population) or Mivumoni Health Centre (54.5\% of the population).\textsuperscript{88} The two government health facilities suffer from poor infrastructure and lack of medication, with the majority deciding to go to Mivumoni Health Centre that is run by the Catholic Church, though they are required to pay consultation fee of around Kshs. 600 to get health services as compared to more affordable services in the government facilities. Little has been done to improve the health infrastructure for the mining host community in Nguluku by either Base Titanium or the County Government despite the fact that they are on the frontline of the mining operation and bear the health burdens of the mining project.

Access to water for domestic consumption is critical to human wellbeing. The mining community in Bwiti are again faring better on access to water as a result of borehole that was drilled in the village by Base Titanium. On average, approximately 82.4\% of the community in Bwiti gets

\textsuperscript{81} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti. The meals mostly contain starch and vegetables, with fish and other protein foods being rare.
\textsuperscript{82} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\textsuperscript{83} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\textsuperscript{84} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\textsuperscript{85} The dispensary is approximately between 0.5-1km for the majority of the population in Bwiti and is thus reasonably accessible for most.
\textsuperscript{86} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\textsuperscript{87} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\textsuperscript{88} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
their water from a borehole that is clean with water safe for household domestic use, with only 17.6% drawing water from streams.\(^8^9\) As a result, there are fewer waterborne diseases reported in Bwiti. Nguluku, however, still struggles with access to water, as there has been no commensurate drilling of boreholes for the mining host community. 63.6% of the population draws their water from open wells, 13.6% from rivers and 22.7% from water tanks provided by Base Titanium.\(^9^0\) The Base Titanium water tanks are approximately 0.5-3km away for most families in Nguluku, who are unable to make the distance and thus rely on open wells and river water that are not so clean, leading to many instances of waterborne diseases such as cholera and typhoid.\(^9^1\) The water situation has not improved despite complaints of river water contamination resulting from the mining operation.

Education infrastructure is also lacking in the two mining communities of Bwiti and Nguluku, though in comparative perspective, Bwiti seems to be better off than Nguluku. There are two schools in Bwiti, Bwiti Primary School built by Base Titanium that is approximately 0.5KM from most households and that has absorbed 82.4% of the pupil population.\(^9^2\) The other school is Mshihu Primary School that has absorbed 17.6% of the pupil population. The infrastructure and personnel at the two schools is average, with 3 students sharing a desk and teachers being few compared to the pupil population (8 teachers in Bwiti Primary and 11 teachers in Mshihu Primary).\(^9^3\) On average, the performance in both schools has improved due to cooperation between teachers and parents. However, school dropout is still a challenge due to poverty and early pregnancies, with school dropouts getting married early or engaging in odd jobs like motorcycle transport.\(^9^4\) In Nguluku, however, the two schools – Mwadogo Primary (50% of pupil population) and Duncan Ndegwa Primary (50% of pupil population) are far from most households, approximately 3-6km.\(^9^5\) The two schools have generally recorded deteriorating performances due to long distances that pupils have to make to school coupled with the threat of wild animals.\(^9^6\) As a result, the dropout levels are high, with poverty, early pregnancy and poor learning environments being the major causes of dropouts. School dropouts get married early or engage in odd jobs like motorcycle transportation or farming.\(^9^7\)

\(^8^9\) Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\(^9^0\) Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\(^9^1\) Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\(^9^2\) Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\(^9^3\) Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\(^9^4\) Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\(^9^5\) Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\(^9^6\) Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
\(^9^7\) Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
Lastly, the multidimensional nature of the poverty of the mining population in Nguluku and Bwiti is reflected in the nature of housing and sanitation. In Bwiti, 64.7% are traditional houses constructed of makuti and mud; 17.6% are semi-permanent constructed of iron sheets and mud; and only 5.9% are permanent houses constructed of iron sheets and cement. Of these, 53% have title deeds for their land; 35.2% have no title deeds for their land; and 11.8% are renting their houses. All the interviewed households (100%) have access to pit latrines that are not shared, though they have no proper systems for the disposal of kitchen waste. The situation is not any better in Nguluku, with 81.8% of households living in traditional houses of makuti and mud; 13.6% in semi-permanent houses of iron sheets and mud; and only 4.5% living in permanent houses of iron sheets and cement. Of these, only 13.6% have title deeds for their land, while 86.4% have no title deeds for their land. Like in Bwiti, all the households in Nguluku have access to a pit latrine that is not shared, though they have no proper system for the disposal of kitchen waste.

The data above indicates that despite the promise to uplift the living standards of the mining communities in Bwiti and Nguluku, the mining project has not substantively achieved this purpose, with these mining host communities still living in poverty and destitution. Apart from the poverty, the mining operation has created further difficulties for these communities due to the adverse economic, social, environmental, health and other negative outcomes of mining. This, thus, raises the question of equity and fairness in the sharing of the benefits and burdens of mining, as discussed more elaborately in the next section of this report.

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98 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
99 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
100 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
101 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
102 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
103 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
Titanium mining benefit sharing in Kwale County

3.1 Understanding the concept of benefit sharing

Since the year 2000, mining has boomed in the world due to the increasing prices of mineral resources, a fact that has attracted more investors. The mining boom has, however, created challenges for local mining communities - social, environmental, economic and cultural. In order to mitigate these challenges, mining companies have been required to put in place measures to equitably balance the benefits and burdens of mining amongst all stakeholders. This enables the mining company to engage and manage their relationships with key stakeholder groups, share development benefits and protect their business interests. The process of achieving this has been termed as a process of acquiring a “social license to operate”. This social license is achieved when a mining operation enjoys a broad and ongoing approval and acceptance from the local community where it operates. It is based on the acknowledgment of the mining company's responsibility to the local community and the need to ensure that the benefits generated from mining activities are shared equitably among all stakeholders.

104 Soderholm & Svahn - Mining, regional development and benefit sharing, 78-79.
105 See Muigua – Reflection on managing natural resources, 2-3, who mentions some of the social challenges to include: physical and economic displacements, weakening of traditional social structures, new conflicts and impoverishment.
106 See J Prno & D Slocombe 'Exploring the origins of social license to operate' in the mining sector: Perspectives from governance and sustainability theories' (2012) 37 Resources Policy Journal 346, who notes that the challenges of adverse environmental impacts, social and cultural interruption and local economic instability result from conventional mining approaches that do not take into account local communities as important players in the mining project.
107 See D Kemp & J Owen 'Community relations and mining: Core to business but not “core business”' (2013) 38 Resources Policy Journal 523, who assert that this has to be done as part of the company's community relations and development function under the rubric of sustainable development and corporate social responsibility.
108 Kemp & Owen 'Community relations and mining, 523. See also Muigua – Reflections on managing natural resources, 1, who affirms that investors who engage in projects beneficial to the local communities are least likely to face risks such as disruption, renegotiation or expropriation.
109 Soderholm & Svahn - Mining, regional development and benefit sharing, 78. Though an important goal to strive for by both company and local community, a social licence to operate might not be attainable if the mining company-local community expectations are beyond reconciliation.
110 Soderholm & Svahn - Mining, regional development and benefit sharing, 79; Prno & Slocombe - Exploring the origins of social license to operate, 346. Local mining communities are the key players due to their proximity to the mining operation and their sensitivity to the impact of mining.
that mining companies are not strictly commercial ventures whose sole mandate is creation of revenue and profits for their shareholders; they are also social institutions with responsibility to progressively improve the general welfare of their host communities.\textsuperscript{111} This has been further bolstered by the increased recognition of the rights of project-affected communities as well as the requirement for direct community participation and decision-making in mining processes.\textsuperscript{112} Failure to adopt these measures may lead to tensions and conflict, creating business risks to the mining company.\textsuperscript{113}

But what is required of a company to achieve this social license? First, in its operations, the company must avoid or mitigate the effects of activities that the local community considers as unacceptable,\textsuperscript{114} to the point where the community is convinced that the social, economical and environmental benefits of the project outweigh its negative impacts.\textsuperscript{115} Secondly, the company should adopt an inclusive and participatory community development plan and implement it in a way that meets the societal expectations of the local community, whether this is legally required of it or not.\textsuperscript{116} Thirdly, the company must put in place effective and culturally appropriate mechanisms of communication, participation and decision-making;\textsuperscript{117} ensure transparent disclosure of information; and develop an effective conflict resolution mechanism.\textsuperscript{118} It means, therefore, that there must have been free, prior and informed consent to the mining project at its commencement for it to subsequently acquire a social license to operate.\textsuperscript{119}

Benefit sharing is thus a critical component in enhancing company-community harmony and enabling a company to achieve the social license to operate.\textsuperscript{120} According to Soderholm and Svahn, benefit sharing ‘refers to the distribution of the monetary and non-monetary benefits

\begin{thebibliography}{99}
\item Ange - Challenges and prospects of equitable benefit sharing in the mining sector, 17.
\item Soderholm & Svahn - Mining, regional development and benefit sharing, 79 & 83; Prno & Slocombe - Exploring the origins of social license to operate, 346, who argue that the new desire for increased benefit sharing and decision-making in mining projects by local communities is due to the growth of the sustainable development paradigm. They affirm that mineral right holders have to acquire “social license to operate” in order to avoid potentially costly conflicts and exposure to social risks.
\item Soderholm & Svahn - Mining, regional development and benefit sharing, 79 & 83. See also IFC Discussion Paper – The art and science of benefit sharing, 8 & 11, who assert that mining investments are likely to run into trouble if there are imbalances in the sharing of fiscal, economic, environmental and social costs and benefits.
\item The company must undertake comprehensive environmental and social impact assessment with the substantive participation of the people and put in place the necessary mitigation measures to ensure community safety and well being.
\item Prno & Slocombe - Exploring the origins of social license to operate, 346.
\item Prno & Slocombe - Exploring the origins of social license to operate, 346-347.
\item See Prno & Slocombe - Exploring the origins of social license to operate, 348-349, who detail the benefits of effective community participation in mining decision-making as follows: first, it leads to substantively better and more equitable solutions. Secondly, it enables the community to learn about the potential impact and benefits of mining operations; voice their concerns, needs and aspirations/expectations; and discuss potential challenges and opportunities. Meaningful participation, therefore, enhances sustainability of development.
\item Prno & Slocombe - Exploring the origins of social license to operate, 347.
\item Prno & Slocombe - Exploring the origins of social license to operate, 349, consent must be voluntary, must be sought from the local community before authorisation is given to the company to operate, and the process of seeking consent must be transparent with sufficient information being given to local communities about their rights and the entirety of the proposed project, to allow negotiations on the basis of equality of information.
\item Soderholm & Svahn - Mining, regional development and benefit sharing, 79; IFC - Sustainable and responsible mining in Africa, 4.
\end{thebibliography}
that are generated through the implementation of a mining project’.121 The objective of benefit sharing is to ensure that a significant portion of the benefits generated from mining in a particular area is retained in that area for the benefit of local mining populations.122 Benefit sharing as a right was formalised in international law in the context of the protection of biodiversity in the Convention on Biological Diversity.123 It is buttressed by attendant community rights such as the right to socio-economic self-determination,124 the right of a people to freely dispose of wealth and natural resources as well as the right to development, which are contained in the African Charter on Human and People’s Rights.125 Natural resources must thus be shared equitably to ensure that local mining communities are effectively catered for in the context of socio-economic development and enhanced livelihoods.126

Benefit sharing mechanisms can be voluntary based on the companies CSR activities, or can be based on a governmental legislation. The essence of these mechanisms is the generation of broad-based socio-economic development that uplifts the standards of living of the mining host communities. Some of these mechanisms include:127

- The payment of mineral taxes and royalties for local community development;
- Compensation for loss of land and other production resources as a result of mining-based displacements;
- Adoption of mitigation mechanisms to minimize the harmful social and environmental impact of mining activities;
- Training and employment of locals as staff in an affirmative employment quota,
- Local procurement of goods and services; and,
- The development of socio-economic infrastructure such as roads, hospitals, schools, water points and access to electricity for the benefit of the mining host communities.

Equitable sharing of mining benefits enhances harmony and collegiality between the mining

121 Soderholm & Svahn - Mining, regional development and benefit sharing, 83.
122 Soderholm & Svahn - Mining, regional development and benefit sharing, 83.
124 See International Covenant on Economic Social and Cultural Rights, Article 1, which affirms self-determination, including the right of a people to pursue their own economic, social and cultural goals as well as to manage and dispose of their natural resources.
125 African Charter on Human and People’s Rights (Banjul Charter), Article 20(1), which details the right to existence and the right to pursue economic and social development based on freely chosen policies; Article 21, which details the right of a people to freely dispose of their natural resources in the exclusive interest of the people and in a way that eliminates all forms of foreign exploitation; and Article 22, which details the right to economic, social and cultural development. These aspects form part of the Kenyan law as per Article 2(6) of the Constitution.
126 Muigua – Reflection on managing natural resources, 6-7.
127 Soderholm & Svahn - Mining, regional development and benefit sharing, 83.
right holder and the mining host communities, which enhances the productivity of mining operations. Because of the positive outcomes of equitable benefit sharing, Kenya has entrenched these requirements in the Constitution as well as in legislation, as is discussed more elaborately in section 4.2 below.

### 3.2 Constitutional, legislative and regulatory framework on natural resource-benefit sharing

Benefit sharing must be contained in a substantive and elaborate legal, policy or regulatory framework to enhance certainty and to ensure its effective implementation for the benefit of mining host communities. In Kenya, however, large-scale extraction of mineral resources has not been a prominent feature; with the effect that the legal and regulatory regime governing the mining sector has generally been underdeveloped. The primary legislation that guided the mining sector for a long time was the 1940 Mining Act. It, however, had no provisions governing the sharing of mining benefits among the mining stakeholders, especially in relation to mining host communities. Due to this lacuna, mining host communities have continued to suffer the burdens of mineral extraction, without enjoying commensurate benefits from the profits generated by the extractive sector. Legal reforms have been undertaken in Kenya to ensure a fairer system of sharing of the benefits and burdens of exploitation of mineral resources, with the main documents being the Constitution and the Mining Act of 2016.

#### 3.2.1 The Constitution of Kenya 2010 and benefit sharing in the extractive industry

As the supreme law of the land, the Constitution lays the basis for the management of resources in an expansive Bill of Rights, which is the framework for all economic, social and cultural policies. The essence of the Bill of Rights is the preservation of the human dignity of individuals and communities, the promotion of social justice and the realisation of the potential of all human beings. The Bill of Rights entrenches the right to property and more specifically the right to land, which are critical factors in the mining process. Despite minerals resources being

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128 See Soderholm & Svahn - Mining, regional development and benefit sharing, 79, which affirms that mineral projects that fail to recognise the importance of benefit sharing are bound to work in an environment of tension and conflicts with the mining host communities, affecting production and profitability.
vesting in the National Government to be held in trust for all Kenyans,\(^{134}\) the surface land and the properties appurtenant thereon is the property of mining host communities. These individuals and communities must thus give free, prior and informed consent for mining to take place, with the full knowledge of the benefits and burdens to be imposed on them by the mining operation. They must be allowed to negotiate a fair price with the mining company and must be adequately compensated for the land and all the production resources they lose as a result of mining. They must also be relocated in a manner that enables them sustain their livelihoods.

In the context where the State decides to expropriate private or community land for the purposes of mining, it must do so in accordance with Article 40(3) of the Constitution. The State must elaborate on the public purpose justifying expropriation; must pay prompt, full and just compensation for the expropriation; and must allow the affected individuals and communities to challenge the expropriation in Court.\(^{135}\) Compensation is thus an important aspect of benefit sharing as it offsets the burden of loss of land and other production factors for the individuals and communities who are displaced as a result of the mining project.

The Constitution, in Article 62(1)(f) as read with Article 62(3), vests mineral resources on the National Government as trustees for the people of Kenya. This means that the National Government, as a trustee, must ensure that the mineral resources are used for the benefit of the beneficiaries, the primary ones being the mining host communities.\(^{136}\) In the exploitation of the natural resources, inclusive of minerals, the Constitution in Article 69(1)(a) requires the National Government to ensure that these resources are exploited, utilised, managed and conserved in a sustainable manner.\(^{137}\) In the context of benefit sharing, the Constitution in Article 69(1)(a) requires the National Government to ensure the equitable sharing of the benefits accruing from the use of natural resources, inclusive of minerals. This is further affirmed by Article 69(1)(h), which requires natural resources to be used for the benefit of the people of Kenya.

Efficient benefit sharing cannot happen without a proper understanding of the rights, needs, priorities, interests and expectations of the mining resource community. The granting of concessions for mining must thus be undertaken with the substantive engagement and determinative participation of the mining host communities.\(^{138}\) The Constitution further

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\(^{134}\) The Constitution of Kenya 2010, Article 62(1)(f) as read with 62(3), which classifies minerals and mineral oils as being part of public land that vests in, and is to be held by, the National Government in trust for the people of Kenya and be administered by the National Land Commission on behalf of Kenyans.


\(^{136}\) See The Constitution of Kenya 2010, Article 69(1)(h), which requires natural resources to be used for the benefit of the people of Kenya.

\(^{137}\) See The Constitution of Kenya 2010, Article 69(2), which places a duty on every person, including mining corporations, to cooperate with State organs in ensuring ecologically sustainable development and use of natural resources.

provides for popular oversight over natural resources by requiring that transactions for the grant of mineral rights or concessions must be ratified by Parliament. This enables Parliament to assess and scrutinise such agreements to ensure that they are beneficial to the local populations. This process of Parliamentary assessment further encompasses the participation of the people due to the provisions of Article 118 of the Constitution, which requires Parliament to facilitate public participation and involvement in legislative and other business of parliament and its committees.

One of the challenges to equitable benefit sharing has been poor governance in the extractive industry that has seen self-interest and corruption lead to skewed concessions to mining corporations. The Constitution seeks to entrench good governance in public service by elaborating the national values and principles which bind all State organs, State Officers, public officers and all persons in the making, interpretation and application of laws and policies. Some of the good governance values include integrity, transparency, accountability, sustainable development and the participation of the people. These values, in relation to public officials, are further entrenched in Chapter six of the Constitution on leadership and integrity. It affirms that authority assigned to a public officer is public trust to be exercised in service of, and for the benefit of, the people and not for the personal benefit of the relevant officer. It requires public officers to provide self-less services based solely on the public interest and to be accountable to the public for their decisions and actions. It further requires their decisions to be objective and impartial and not be influenced by improper considerations or corrupt practices. It provides a penalty for conduct contrary to Chapter six, which includes disciplinary procedures leading to dismissal or removal from public office as well as subsequent disbarment from holding any other public office.

These good governance provisions are important in holding government officers, especially the Cabinet Secretary who has expansive powers over the management of the mining industry.
accountable at all levels of the mining process. They were intended to ensure that selfish and corrupt practices of government officials did not unfairly jeopardize the rights of mining host communities to equitably share the benefits of mining activities. They also provided mechanisms for holding public officers accountable for mining concession decisions, with the affected groups having a constitutional process to vindicate their rights and hold public officers accountable for decisions with detrimental impact to the public. The importance of these values have been affirmed in the Mining Act 2016 itself, which requires the Cabinet Secretary, the Principal Secretary and all other persons administering the Act to be guided by these values. If effectively and scrupulously implemented, these provisions are bound to ensure that decisions by public officers in the extractive industry take into account the public interest and are geared towards ensuring the mining host communities equitably benefit from the proceeds of mining activities.

3.2.2 Legislative and regulatory framework on benefit sharing in the extractive industry

Apart from entrenching these important provisions on sustainable and beneficial exploitation of natural resources, the Constitution further requires Parliament to enact legislation to govern the exploitation of these natural resources. This requirement has led to the enactment of the Mining Act 2016 as well as the development of the Local Content Bill 2016 and the Natural Resources (Benefit Sharing) Bill 2014, which seek to enhance equitable benefit sharing.

i) The Mining Act 2016

The Mining Act 2016, which replaced the 1940 Mining Act, has several provisions that can be used to enhance benefit sharing in the extractive industry. It affirms that even though mineral resources are the property of the Republic that vests in the National Government, they are held in trust for the Kenyan people. The duties of a trustee are fiduciary in

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149 See Ange - Challenges and prospects of equitable benefit sharing in the mining sector, 44, who state that these good governance values are considered as pillars of an equitable benefit-sharing regime as they facilitate dialogue, enhance transparency and accountability in the extractive industry and encompass remedial mechanisms capable of preventing the resource curse in the extractive industry.

150 Mining Act 2016, section 5.


152 See Mining Act 2016, Preamble, which indicates that it is a law aimed at giving effect to Articles 60, 62(1)(f ), 66(2), 69 and 71 of the Constitution in relation to mineral resources.

153 Mining Act 2016, section 6(1). Though the State's property rights over minerals override all other adverse interests in land, the Act requires that the State's mineral property rights must be exercised in accordance with the Constitution and the Act, which basically means that landowners and mining host communities must be duly compensated for loss of their land and other amenities occasioned by mining operations, see sections 6(2)-(3) of the Act.
nature, which means that the trustee must scrupulously undertake its responsibilities for the sole benefit of the beneficiaries, who are the Kenyan people individually, communally and nationally. In negotiating mining agreements and issuing mining licenses, the National Government, through the Cabinet Secretary, must thus ensure that the needs, priorities and interests of the Kenyan people is paramount. One such interest of the Kenyan people, especially mining host communities, would be to ensure that the benefits and burdens of mining operations are equitable shared in a manner that uplifts the socio-economic well-being of mining host communities.

On the management of the mining sector, the Act gives authority to the Cabinet Secretary for Mining, but requires the CS to respect and uphold the principles and values enshrined in Articles 201(c)-(d) and 69(1)(a) and (h) of the Constitution. The essence of these fetters on the power of the CS in administering the Act is to ensure that mineral resources are exploited in a sustainable manner for the benefit of the Kenyan people and that the proceeds from mining operations are shared equitably to achieve intra- and inter-generational equity. Further, in considering an application for mining-based licence or permit, the Act requires the CS to give written notice to landowners or lawful occupiers of the relevant piece of land; the host community and the relevant County Government as well as to publish a notice of the pending licence application in a newspaper with wide circulation. The Act also requires the notice to be published for 21 days in the Kenya Gazette and in the County Offices of the relevant County.

The essence of the above provisions is to generate popular oversight of the licensing process and ensure transparency, create awareness and enhance public participation in the process. This ensures that the affected landowners, the host communities and the relevant County Government are able to substantively engage in the process with the aim of ensuring that their needs, interests, aspirations and concerns are taken into account before a prospection or mining licence is issued. The critical role of these actors is affirmed by the Act, in allowing any individual or community to object to the grant of a prospecting or mining licence if there is inequitable sharing of the burdens and benefits of prospecting or mining.

154 This authority - in relation to the grant, suspension or revocation of mining licenses as well as in relation to fees, charges and royalties payable for mineral rights – is to be exercised on advise and recommendations of the Mineral Rights Board, who are equally bound by the good governance values of the Constitution, see Mining Act, sections 31-32.
155 Mining Act 2016, section 12(2).
156 Mining Act 2016, sections 34(1)-(2).
157 Mining Act 2016, section 34(3).
158 Objections for prospecting licence must be made within 21 days after the notice.
159 Objections for mining licence must be made within 42 days after the notice.
Further safeguards, in relation to Executive oversight of the mining sector, is entrenched in section 55 of the Act that requires the CS to submit an annual report to the Cabinet indicating all mineral right applications made, licenses granted or rejected as well as the justifications for the granting or rejection of each mining licence application. These levels of scrutiny ensures that the issuance of prospecting and mining licenses are done in accordance with the Constitution and the law, with the interests of Kenyans being paramount.

The Act requires that before reconnaissance, prospecting or mining licence is issued for operations on private or community land, the express consent of the landowner or community of owners must be sought. This is done through a legally binding agreement with the licence Applicant or the Government, and must entail the payment of just and adequate compensation. If consent is withheld unreasonably or the CS feels that the withholding of consent is contrary to national interests, the land may be subjected to compulsory acquisition. Compulsory acquisition must, however, follow the laid down Constitutional procedure with the entrenched safeguard such as the payment of prompt, just and adequate compensation and the opportunity of the landowner to challenge the acquisition in a court.

The Act further provides for the payment of compensation to landowners or lawful users of land affected by mining projects if mining operations: disturb or deprive owners or lawful users of land; cause loss or damage to immovable property; cause damage to water table or deprive landowners of water supply; or, cause loss of earnings in relation to land used for cultivation or livestock rearing. Compensation can be in the form of resettlement or through monetary compensation. In relation to monetary compensation, the mineral right holder is expected to pay prompt, fair and adequate compensation to such affected landowner of lawful occupier of land. To ensure compensation is provided,
the mining right holder is required by the Act to deposit a compensation guarantee bond with the Ministry. The Act guarantees that mining operations cannot commence until compensation is paid, which cushions landowners and users against forced evictions.

Before mining project is licensed, the Applicant must show that it has adequate financial resources and technical competence to undertake the operation. It must provide a programme detailing proposals on the recruitment and training of Kenyans, to enhance skills transfer and capacity building for the local population. The mining right-holder is also required to give preference in employment to mining host communities and citizens of Kenya. In order to achieve this, the mining operator must undertake capacity building and develop training programmes for its employees; replace expatriates with citizens after a prescribed period of time; create linkages with local universities for research and environmental management; undertake social responsibility investments for the mining host communities; and implement a community development agreement. The mining licence holder is also required to give preference, to the maximum extent possible, to materials and products made in Kenya; to services offered by mining host communities or other Kenyan citizens; as well as to companies or businesses owned by Kenyans in the entire process of its mining operations. These are critical conditions for the grant

168 Mining Act 2016, section 153(2).
169 Mining Act 2016, section 153(7).
170 Mining Act 2016, sections 11(1)(d), 11(3). Necessary expertise, capacity and resources are critical in benefit sharing as it ensures that mining is done in a competent, efficient and effective manner that does not negatively affect the mining host communities, and also generates the optimum yields from the mining operation to be shared with the host communities. The need for expertise, capacity and resources is further affirmed in sections 61(3)(b) for reconnaissance licence; 72(3)(b) for prospecting licence; 86(2)(e) and 86(3)(b) for retention licence; as well as 101(2)(f) and 103(b) for mining licence.
171 Mining Act 2016, section 46(1). To ensure this is done, the Mining Act empowers the CS to make regulations on the replacement of expatriates with local professionals after a stated number of years, at section 46(3). The requirement for local employment and training plan is further affirmed for reconnaissance licence in section 61(3)(d) and 68(1)(c) of the Mining Act; for prospecting licenses in sections 72(3)(e) and 78(c) of the Mining Act; for retention licence in sections 86(2)(f) and 86(3)(e); as well as for mining licence in section 101(2)(g), 103(e) and 106(h) of the Mining Act. The Ministry of Mining has drafted the Mining (Employment and Training) Regulation, 2017 to complement these provisions.
172 Mining Act 2016, section 47(1).
173 Mining Act 2016, section 47(2).
174 See Mining Act 2016, sections 61(2)(d) relating to reconnaissance licence that requires the licence applicant to provide a plan for the procurement of local goods and services; section 61(3)(c), which provides that the CS, on the recommendation of the Mineral Rights Board, can only issue a reconnaissance licence if the applicant's local product plan in respect of procurement of local products and services is acceptable; and section 68(1)(b), which requires that issued reconnaissance licence must include an approved plan for the procurement of local goods and services. This provisions are similarly provided for prospecting licences in sections 72(3)(e) and 78(b); for retention licence in sections 86(2)(g) and 86(3)(d); as well for mining licence in sections 101(2)(h), 103(d) and 106(f) of the Mining Act.
175 See Ministry of Mining (Use of Goods and Services) Regulation, 2016, 1-2 which, in giving effect to section 50 of the Mining Act, affirms this as important in creating jobs, facilitating knowledge transfer and building competitive local suppliers of goods and services. The Regulation requires the mining operator to prepare a procurement plan (Cabinet Secretary is required not to grant a licence unless the plan is provided as per clause 6), implement it and provide quarterly as well as annual plans of its implementation at the pains of a fine or imprisonment for non-compliance. The Regulation further requires old large-scale minors like Base Titanium to, within 90 days after the coming into force of the Regulation to submit to the Cabinet Secretary a detailed procurement plan for local goods and services.
176 Mining Act 2016, section 50.
of a mining licence,\textsuperscript{177} and the CS can only grant or renew a mining licence where the Applicant has complied with all these provisions of the Act.\textsuperscript{178}

Further, in the issuance of mineral rights, the Act empowers the CS to impose conditions on the mining licence.\textsuperscript{179} These conditions include: the protection of the mineral interests, environmental protection,\textsuperscript{180} community development,\textsuperscript{181} health and safety of workers,\textsuperscript{182} safety of mining operations, restoration and rehabilitation plans at the end of mining operations,\textsuperscript{183} among others.\textsuperscript{184} In the context of host community development, the mining licensee is required, as a condition of the licence, to sign a community development agreement with the mining host community.\textsuperscript{185} This is to ensure that the extraction of mineral resources does not only benefit the licensee, but that the socio-economic needs, interests and priorities of mining host communities are taken into account. The Act gives the CS the power to enforce these conditions as if compliance with them is a substantive contractual term as between the State and the licence holder.\textsuperscript{186}

The above conditions equally apply in relation to large-scale mining operations commenced before the Act came into effect. The Act requires these mining right holders to update their mine plan within 18 months of the coming into effect of the Act in relation to conditions of employment, health, safety, environmental management and community social investment.\textsuperscript{187} These conditions are critical to benefit sharing, as they ensure that mining operations mitigate health, environment and safety concerns of the mining host community as well as undertake investments in the community to ensure socio-economic development and the general well

\begin{itemize}
    \item \textsuperscript{177} Mining Act 2016, section 46(2).
    \item \textsuperscript{178} Mining Act 2016, section 58.
    \item \textsuperscript{179} Mining Act 2016, section 42(1).
    \item \textsuperscript{180} See Mining Act 2016, section 72(3)(c) that requires an applicant for a prospecting licence to provide an environmental rehabilitation and restoration plan; section 78(d), which provides that the approved environmental impact assessment report, a social heritage impact assessment report and an environmental management plan are critical documents that form a part of the prospecting licence issued to a prospecting licensee; and section 77(1)(d) that requires the prospection licensee to comply with the terms and conditions of the environmental rehabilitation and restoration plan. Similarly provisions are made for a retention licence in sections 86(3)(c) and 89(d) as well as for a mining licence in sections 101(2)(i), 103(c), 106(i), 109(c), 115(c) and 176 of the Mining Act. The Act in section 181 requires a licence applicant to provide an environment protection bond sufficient to cover environmental and rehabilitation obligations of the applicant.
    \item \textsuperscript{181} See Mining Act 2016, sections 101(2)(j) and 103(g), which requires an applicant for a mining licence to provide a plan indicating their proposal for socially responsible investments for the local communities that are aimed at raising the mining host communities socio-economic development.
    \item \textsuperscript{182} Mining Act 2016, section 178.
    \item \textsuperscript{183} See Mining Act 2016, sections 179(d), which requires mining right holder to restore land to its original status or to an acceptable and reasonable condition upon completion of mining operations. The Act in section 180 further prohibits the CS from granting prospecting, retention or mining licenses until an applicant has submitted site mitigation and rehabilitation plans for approval.
    \item \textsuperscript{184} Mining Act 2016, section 42(1).
    \item \textsuperscript{185} Mining Act 2016, section 109(i).
    \item \textsuperscript{186} Mining Act 2016, section 42(2). See also section 104(b) of the Mining Act, which provides that the CS can only issue a mining licence if all the conditions prescribed in the Act are satisfied; and section 147(1)(b), which gives the CS the power to suspend or revoke a mineral right if the holder fails to comply with conditions placed upon it by the Act.
    \item \textsuperscript{187} Mining Act 2016, section 225(5).
\end{itemize}
being of the mining host community. Failure on the part of the mining licence holder to uphold these conditions can be remedied by the mining host community petitioning the CS to enforce the conditions for the benefit of the host community.

In the context of mineral rights ownership, the Act accords the State 10% free interest in the share capital of the right in relation to large-scale mining operations and mining operations relating to strategic minerals.\(^{188}\) This gives the National Government the opportunity to participate in the management and decision-making of the mining corporation as a shareholder by agreement with the holder at arm’s length, and thus an opportunity to influence decision-making to enhance the protection of the public interest. This opportunity can be utilised effectively by the Government, as a trustee of the interest of the people of Kenya, to enhance equitable benefit sharing and to ensure that mining is undertaken in a sustainable manner that does not negatively affect mining host communities.\(^{189}\)

In the context of large-scale mineral operations of investment exceeding 500 million US Dollars, the Act empowers the CS, in consultation with National Treasury, to enter into a mineral agreement with holders of mineral licenses.\(^{190}\) Some of the terms to be contained in the agreement are: the payment of royalties, taxes,\(^{191}\) cess and other fiscal requirements; environmental obligations and liabilities; domestic processing of minerals; community development plans; and the procedure of settlement of disputes.\(^{192}\) This agreement, which is a public document,\(^{193}\) is to be submitted to the National Assembly and the Senate for approval, a popular oversight safeguard to ensure that the agreement is in the best interest of Kenyan people, especially mining host communities.\(^{194}\)

Further, in the context of royalties, the Act requires mineral royalties to be paid to the Government at a rate to be prescribed by the CS.\(^{195}\) Once these royalties have been paid by the mineral right holder, they are to be distributed with 70% going to the National Government, 20% to the County Government and only 10% to the mining host community.\(^{196}\) There are two challenges

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188 Mining Act 2016, section 48.
189 See Mining Act 2016, section 48(4), which requires regulation to enhance governmental participation in this context. As a result, the Mining (State Participation) Regulations 2017 have been drafted, and in clause 6 gives the State the power to attend, speak and vote in the company’s shareholders forum; appoint a director to the board of the local subsidiary of the company; and participate in the day to day management of the company.
190 Mining Act 2016, sections 117(1) and 118. In entering these agreements, the Act in section 120 requires the CS to be guided by Article 71 of the Constitution and must thus be ratified by the National Assembly and the Senate before execution. This ensures that these agreements are protective of Kenyan interests, especially the interest of local communities.
191 Mining taxes are contained in Ninth Schedule of the Income Tax Act titled “Taxation of Extractive Industries” which was given effect by the Kenya Finance Act of 2015.
192 Mining Act 2016, section 117(2).
193 Mining Act 2016, section 119.
194 Mining Act 2016, section 117(5).
195 Mining Act 2016, section 183(1) & (2).
196 Mining Act 2016, section 183(5).
with the royalty provision of the Act in the context of benefit sharing. First, the Act gives the CS discretion that is not expressly fettered in relation to determining the rate of royalties to be paid.\textsuperscript{197} This gap is not filled by the draft Mining (Royalty) Regulations of 2017, which in clause 8(2) on royalty rate states that “[t]he royalty rates shall be the percentages or unit based rates as prescribed by the Cabinet Secretary for mineral classes won by virtue of a mineral right”.\textsuperscript{198} This is a leeway that can be exploited through underhand means to allow mining right holders to pay very little royalties as compared to profits being made by the mining operation.\textsuperscript{199} A case in point is Base Titanium, which only pays 2.5\% of its profits to the National Government to be shared among all the other mining stakeholders, a percentage that is not justifiable in the context of the high poverty incidences around the mining area.\textsuperscript{200} It would have been advisable to provide expressly in the Act what percentage of the profit of a mining operation will be paid as royalties, without allowing discretion to the CS, a discretion that can be abused to the detriment of the country generally and the mining host communities specifically.

The second concern is the skewed distribution of the royalties, with mining host population only being allocated a paltry 10\% of the royalties while they suffer the majority of the adverse consequences of the mining operation in their locality. Further, the Act fails to expressly provide for the manner of transmission of the 10\% royalty to the host community, with no express requirement for any form of regulation to be developed to ensure certainty on this.\textsuperscript{201} This lack of legal certainty means that the resources meant for the mining host communities can be re-allocated for other purposes without the knowledge of the mining host communities. It would be prudent that a clear system of transmission of the paltry 10\% royalty to the mining host community is developed in a way that allows the resources to be managed by the host community directly for their benefit and for the socio-economic development of their society. One such system can be through the creation of a Community Mining Trust Fund (CMTF) as elaborated in section 5 below.

\textsuperscript{197} See Mining Act 2016, section 185(3), which only provides that CS may designate a qualified person to inspect and examine samples, books, records and accounts of the mining right holder to determine quantity, quality, grade or value of minerals for the purposes of ascertaining or verifying the amount of any royalty payable.
\textsuperscript{198} Ministry of Mining – The Mining (Royalty) Regulation 2017, clause 8(2).
\textsuperscript{199} See Mining Act 2016, sections 223(1) & (2) that gives the CS general powers to make regulations in relation to fees, royalties, rents and other charges payable and the manner of their calculation. Though an important provision, it places the discretion on regulation for calculation of royalties in the hands of the CS, who may fail to put in place such regulation if they want to continue enjoying unfettered discretion in relation to rate of royalties.
\textsuperscript{200} Key informant interview N-6 conducted in Kwale on the 24th of May 2017, where a National Government administrator affirms that the agreement to accord the mining operator 97.5\% of profits in relation to the payment of royalties was heavily skewed and in comparative perspective was not equitable in the sharing of the benefits and burdens of the mining operation.
\textsuperscript{201} See, however, Mining Act 2016, section 223(2)(m), a general provision giving the CS powers to make regulation in relation to anything that may be prescribed under the Act and for the better carrying into effect of the provisions of the Act. This can be used to request the CS to develop regulations creating a system for the transmission of the 10\% royalty to the mining host communities and the development of community structures to manage the royalty on behalf of, and for the benefit of, the mining host community.
ii) The Local Content Bill 2016

The Bill is based on Article 69(1) of the Constitution that imposes obligations on the State to ensure sustainable management of natural resources and the equitable sharing of the accruing benefits.\(^{202}\) It is further predicated on Article 66(2) of the Constitution that requires Parliament to enact legislation ensuring that investments in property benefit local communities and their economies.\(^{203}\) The objective of the Bill is the maximisation of value addition to minerals within Kenya; the creation of employment in the extractive industry value chain by use of local expertise, goods, services, businesses and financing; the enhancement of the participation of Kenyans in the extractive industry value chain, among others.\(^{204}\) These are important provisions supportive of the provisions already contained in the Mining Act 2016 as discussed above. Similar to the Mining Act 2016, the Bill requires persons exercising authority under it to be guided by the Constitution, especially Articles 10, 62, 69 as well as the principle of public participation in the formulation of policies and plans in the extractive industry. This is an affirmation that mineral resources are owned by the National Government as a trustee for the Kenyan people, and must be exploited sustainably with their participation and for their benefit.

The Bill requires the National Government in collaboration with the County Governments to put in place measures to ensure that mining operators develop and adopt local content in the entire mining value chain.\(^{205}\) Further, it establishes the Local Content Development Committee with the following responsibilities: oversight, coordination and development of local content; issue advise in the formulation and development of policies and strategies on local content; recommend minimum standard requirements on local content; appraise, evaluate and approve local content plans of mining operators;\(^{206}\) undertake capacity building in collaboration with County Governments to develop local skills and capacities in the extractive sector, among others.\(^{207}\)

The Bill empowers the Cabinet Secretary, in consultation with the Committee, to set the minimum local content required for each mining operator, which must be complied with in

\(^{202}\) Local Content Bill 2016, Statement of Objects and Reasons, para. 2.
\(^{203}\) Local Content Bill 2016, Statement of Objects and Reasons, para. 2.
\(^{204}\) Local Content Bill 2016, clause 4. The Bill aims to facilitate the development of an effective local labour force, enhance local ownership and the procurement for local assets and services as well as the maximisation of value addition local content development and local participation in the extractive industry.
\(^{205}\) Local Content Bill 2016, clause 6.
\(^{206}\) See Mining (Use of Goods and Services) Regulation, 2016, clause 6, which requires mining operators to develop procurement plans for local goods and services, which is bound to serve the same purpose as the local content plan. This plan is to form part of the obligations or conditions under a mining licence, and can thus be enforced by the Cabinet Secretary.
\(^{207}\) Local Content Bill 2016, clauses 7-18.
mining operations. Based on this minimum local content requirement set by the CS, each mining right holder must submit a long-term local content plan as well as an employment and skills development plan when making an application for a licence. Subsequent to the issuance of the mining licence, the mining right holder would further be expected to submit annual local content plan for approval by the Local Content Development Committee. The operator will also be required to submit quarterly report of the employment and training undertaken during the reporting period and specify the number of new local persons employed within the reporting period.

In the context of training and employment, the Bill requires the mining operator to build local capacity and expertise through training. The operator is further required to give first consideration to local persons when vacancies occur and only employ foreigners when there is no suitable Kenyan available to take up the employment. Priority in this context should be given to local persons from the mining host community, who must be reasonably represented in the operator’s workforce. On procurement of local products, the Bill requires the operator to maintain a bidding process that accords fair opportunities for local persons to supply goods and services in the extractive value chain. The operator must give priority to local goods and service providers even if their bids are higher, provided that price differentials do not exceed 10% of the price quoted by a foreign bidder.

**iii) The Natural Resources (Benefit Sharing) Bill 2014**

The Senate Bill seeks to establish a system of natural resource benefit sharing between all the natural resource stakeholders – National Government, County Government, mining host communities and investors. It mandates the sharing of natural resources benefits – gains, proceeds or profits from the exploitation of natural resources – in a fair and equitable manner through Benefit Sharing Agreements. It elaborates on the principles for the management of natural resources benefits, which include: transparency and inclusivity;

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208 Local Content Bill 2016, clause 19.
209 Local Content Bill 2016, clause 20 & 24-. The employment and skills development plan is to ensure the mining operator is developing skills of local populations to enable them take up employment opportunities and responsibilities in the management of the extractive process.
210 Local Content Bill 2016, clauses 20 & 21.
211 Local Content Bill 2016, clauses 24(3) & (4).
212 Local Content Bill 2016, clause 25.
213 Local Content Bill 2016, clause 26.
214 Local Content Bill 2016, clause 26(2)(a).
215 Local Content Bill 2016, clauses 39-42.
216 Local Content Bill 2016, clauses 39(3)(c) & 39(4).
217 Natural Resources (Benefit Sharing) Bill 2014, preamble.
218 Natural Resources (Benefit Sharing) Bill 2014, clause 2. The Bill envisages County and Community Benefit-Sharing Agreements; see clauses 27-32.
revenue maximisation; efficiency and equity; accountability and the participation of the people; as well as adherence to the rule of law and the protection of the rights of the people.\footnote{219} The Bill aims to create a Natural Resources Benefit Sharing Authority with the responsibility to manage benefit-sharing agreements between mining companies and local communities, determine payable royalties\footnote{220} as well as manage royalties from all natural resources exploitation in Kenya.\footnote{221} It envisages the establishment of a Natural Resource Royalties Fund to be managed by the Authority, where all royalties and fees relating to natural resources are to be deposited.\footnote{222} Further, the Bill creates a different formula for the sharing of royalties. It envisages 20% of the royalty revenue to be deposited in a sovereign wealth fund\footnote{223} to serve future generations; while the remaining 80% to be shared between the National Government and the County Governments in the ratio of 60:40.\footnote{224} Of the 40% to the Counties, 60% is to be used for the general development of the relevant county, while 40% is to be strictly utilised for local community projects.\footnote{225} As drafted, the Natural Resource (Benefit Sharing) Bill 2014 is bound to generate conflict as its provisions conflict with the provisions of the Mining Act. This is in relation to the functions of the Authority vis-à-vis the Cabinet Secretary for Mining and the other institutions created under the Mining Act, as well as in relation to the formula for mining royalty sharing. As a result, it is unlikely that the Bill will be enacted into law as drafted.

The above analysis indicates that with the growth of the extractive sector in Kenya, legal reforms have been undertaken to ensure that the natural resources are managed sustainably for the benefit of Kenyans, especially mining host communities. The Constitution in Articles 10, 40, 66(2), 69 and 71 create the basic framework for the transformation, leading
Titanium mining benefit sharing in Kwale County

to the enactment of the Mining Act 2016 and the development of the Local Content Bill 2016. These legislation have created a comprehensive framework for benefit sharing, ranging from compensation for loss of natural resources such as land, water, pasture to the employment of local persons as well as the use of local goods and services in the mining value chain. Further, the framework has called on mining operators to minimize adverse environmental and social impact on local communities as well as adopt development plans to improve the socio-economic situation of the local populations. The other aspect of benefit sharing created is the payment of royalties, with the funds accruing from the royalties being shared on a 70/20/10 formula between the National Government, County Government and mining host community respectively. What we need to find out, therefore, in the context of Nguluku and Bwiti is how Base Titanium has undertaken its responsibilities in relation to the legal framework on benefit sharing.

3.2.3 The reality of titanium mining benefit sharing in Nguluku and Bwiti, Kwale County

It has been stated in section 4.1 above that a mining operator must gain a social licence to operate if it is to avoid conflict and receive broad acceptance and support from the local community in which it operates. In order for a company to gain this social licence, it must adopt a sustainable development approach to mining. This would require the company to allow meaningful community participation in the mining processes and decision-making as well as equitably share the benefits and burdens of mining with the mining host communities. Some of the benefits that can be shared with the mining host communities include: adequate compensation and relocation of project affected populations; development projects to uplift the socio-economic standards, employment opportunities, the use of local goods and services in the mining operations and the payment of royalties that directly benefit the local communities. In determining whether Base Titanium has acquired social licence, it is critical that we undertake an analysis of the survey data within these parameters of benefit sharing.

3.2.4 Community involvement in decision-making on mining project

Mining host communities are important stakeholders in the mining venture. This is because they mostly bare the burdens of mining such as loss of land and its attendant displacement and relocations; the environmental impacts of mining such as dust, noise, pollutions and changes in

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226 Prno & Slocombe – Exploring the origins of social license to operate, 346.
227 Prno & Slocombe - Exploring the origins of social license to operate, 348.
microclimates; competition for water and other resources with the mines; as well as social costs such as diseases and destruction of social fabric, among others. It is, therefore, important that they are involved in all the processes of mining from the point of prospecting to the point of actual mining operations. The starting point for public participation should be the requirement for free, prior and informed consent (FPIC) – where the community as a whole is given all the necessary information on the benefits and burdens of mining and are allowed to make an informed decision on whether mining should occur in their land or not. As was stated previously FPIC is critical if a mining project is to attain a social licence to operate.

Participation, however, should not end at the initial point of consent, it should continue at all levels of mining, with the community having the capacity to be a collaborative partner to the mine in equitably sharing the burdens and benefits of mining. The need to involve local communities in decision-making on resource exploitation and development is a Constitutional requirement as discussed elaborately in section 4.2.1 above. Further, as affirmed by the Constitution, public participation in decision-making is required of both public and private bodies, as the Constitution and its Bill of Rights bind public institutions, private institutions and private individuals. The Supreme Court of Kenya in an Advisory Opinion affirmed the importance of local community participation in decision-making on the management of natural resources (land) as follows.

Public participation [...] is the community-based process, where people organise themselves and their goals at the grassroots level and work together through governmental and non-governmental community organisations to influence decision making processes in policy, legislation, service delivery, oversight and development matters. It is a two way interactive process where the duty bearer communicates information in a transparent and timely manner; engages the public in decision-making and is responsive and accountable to their needs.

In order for local communities to participate effectively in the governance and decision-making in the mining processes, they must have access to all the relevant information, starting with the projects environmental and social risks and mitigation measures; project costs and expected benefits; expected community development undertakings, among others. There must also be full contract and revenue disclosure to enhance transparency and accountability in benefit and burden sharing. Enhanced information sharing and open dialogue builds trust, helps manage societal expectations and creates a conducive environment for community-investor harmony.

228 Constitution of Kenya 2010, Articles 2(1) and 20(1).
230 IFC Discussion Paper – The art and science of benefit sharing, 12.
which is critical for productive mining operations.\textsuperscript{231} This is affirmed by IFC, which states as follows: \textsuperscript{232}

\begin{quote}
Resilient agreements are those that are supported by affected stakeholders who have meaningfully participated and can influence decisions about project aspects that affect them. This may relate to land access, water management, in-migration, and infrastructure development. Broad community support is central to managing project risks over time.
\end{quote}

Question then is, have the mining communities in Nguluku and Bwiti been involved in substantive decision-making on mining processes, especially in relation to the benefit sharing? Data from the field indicates that public participation has not been substantive and determinative, especially in relation to the choice of development projects by Base Titanium. In Bwiti, 70.6\% of interviewed Respondents stated that the community was not involved in decision-making on the development projects undertaken by Base Titanium.\textsuperscript{233} 23.5\% stated that a few elders were involved in decision-making on the projects, with only 5.9\% acknowledging involvement in decision-making on the projects.\textsuperscript{234} Due to the lack of substantive participation in decision-making, 70.6\% of the Respondents were of the view that the projects had not met the needs and aspirations of the Bwiti people. 5.9\% stated that the projects had partly met the needs and aspirations of the Bwiti people, with no Respondent (0\%) stating that the projects had fully met the needs and aspirations of the Bwiti community.\textsuperscript{235}

The same scenario is replicated in Nguluku, with 37.5\% of the Respondents stating that no one they know was involved in decision-making on development projects by Base Titanium; 50\% stating that some community elders and local leaders were involved in decision-making; and only 12.5\% acknowledging individual participation in decision-making.\textsuperscript{236} Resulting from this, only 12.5\% of the Respondents were of the view that the projects had partly met the needs of the Nguluku community, with 87.5\% feeling that the projects had not met the needs and aspirations of the community.\textsuperscript{237} The lack of participation in decision-making has created a very negative perception of titanium mining in the communities in Bwiti and Nguluku, with most of the Respondents unsupportive of the mining operation. The communities have asserted their right to

\textsuperscript{231} See IFC Discussion Paper – The art and science of benefit sharing, 12, who affirm that if reality and perceptions are at a divergence, a project will be at risk. They exalt the virtue of sharing all the relevant fiscal, economic, social and environmental data and information so as to manage expectations and perceptions, as these matters to the success of the mining project. They assert that imbalance of information coupled with poor stakeholder engagement has the potential to derail any mining project, at 18.

\textsuperscript{232} IFC Discussion Paper – The art and science of benefit sharing, 19.

\textsuperscript{233} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.

\textsuperscript{234} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.

\textsuperscript{235} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.

\textsuperscript{236} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.

\textsuperscript{237} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
be involved in decision-making on the conception, design and implementation of development projects, with one Respondent stating this as follows: 238

None involvement of locals in choice of policies and projects is the reason why projects have not satisfied the needs of local communities. There is need for a comprehensive involvement of the local communities before projects are initiated to ensure that projects serve local communities.

Others affirm this by stating that Base Titanium has to engage and find the priority needs of the Nguluku and Bwiti communities and respond to these needs through the design of projects that are capable of responding to these needs and priorities. One Respondent states this as follows: 239

Local leaders and I were involved in the choice of projects by Base for the local communities in Nguluku. However, these projects have not met the needs and priorities of locals because they were fake promises. In order for Base to improve the impact of its projects, it must go down to the ground and ask for views of local populations.

The perceptions of the mining host community varies markedly from Base Titanium’s assertion that it developed and has been implementing its community development management plan with the active participation of 70% of the mining host populations. 240 Due to the failure to adequately involve the local population in developmental decision-making, it becomes extremely difficult for Base Titanium to acquire the necessary “social licence to operate”. The lack of participation and its attendant perception of benefit deficiency is bound to generate tension, resentment and conflict, creating operational and production risks for Base Titanium. This is already being experienced with Base Titanium finding it difficult to access new land for titanium exploration, with local communities refusing to allow further explorations in their land. 241

The Mining Act provides a critical window for Base Titanium to correct the lack of substantive participation in its requirement for old mining operations to develop Community Development Agreements. Base Titanium should grasp the opportunity and allow substantive participation of the local mining population in the choice, design and implementation of development projects aimed to benefit these local communities. The draft Mining (Community Development Agreement) Regulation 2017 requires expansive consultations with the mining host communities in a physical forum where all the affected populations are allowed to engage in dialogue and

240 Key informant interview N-9 with Base Titanium conducted at the mines on 26th May 2017.
241 Key informant interview N-6 conducted in Kwale on 24th May 2017.
discussions that are meaningful and respectful of the local communities. The draft regulation specifically states that any consultations held with a few political or opinion leaders do not qualify as proper consultation in the context of the development of the community development agreements. Base Titanium must thus take this opportunity and work hand in hand with the mining host communities to craft a development plan capable of meeting the needs and priorities of the local mining populations. This should be done in the context of the creation and operationalisation of the Community Mining Trust Fund (CMTF) that is elaborated in section 5 below.

### 3.2.5 Adequate compensation for loss of land and other production resources as a result of mining-based displacements

In order for mining to take place, involuntary displacement of populations on the land in which the mineral resource exists is inevitable. The World Bank, in its Operational Directive on Involuntary Resettlements, notes that these displacements generate severe social, economic and environmental problems for the displaced communities. The adverse impacts of these displacements include: the dismantling of production systems and assets; loss of income sources; displacement to environments where household survival skills are less effective and competition for production resources is greater; the dismantling of families, community structures and social networks, among other challenges. If these adverse impacts are to be effectively managed to prevent long-term hardship and the impoverishment of the displaced community, sufficient planning has to be undertaken. The World Bank requires that a substantive resettlement plan be developed, which must contain the following features:

- Substantive community participation in the planning and implementation of the resettlement;
- Compensation for land, housing, infrastructure and other factors of production in full;
- Payment of full resettlement costs for all the loses prior to resettlement;

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242 Ministry of Mining – The Mining (Community Development Agreement) Regulation 2017, clause 2.
243 Ministry of Mining – The Mining (Community Development Agreement) Regulation 2017, clause 2.
244 IFC - Sustainable and responsible mining in Africa, 19.
246 See IFC - Sustainable and responsible mining in Africa, 18, which affirms that loss of arable land to mining impacts negatively on agriculture, which is a key economic and livelihood activity for rural populations. This has the potential to adverse impact on household as well as community food security.
• Support in the movement of the relocated community and continued assistance during the resettlement and transition period;
• Assistance to improve on former living standards, income earning capacity and production levels to enhance household wellbeing;
• Provision of sufficient investment resources and opportunities to share in the benefits of the mining operations.

The question is, was an effective relocation plan developed in the titanium-mining project and did it contain all these important elements? Based on the perception of the Respondents, the relocation process was not effectively done, as members of the community were not sufficiently given all the necessary information to make informed choices. They were also not adequately empowered to negotiate freely and independently determine the value of their land and other production assets. Due to their impoverished and disempowered state and the lack of independence in determining the value of their production assets at the time of displacement, the displaced mining host community now believes that the compensation that was paid to them by Tiomin and Base Titanium was not fair and adequate, taking into account the huge benefits Base Titanium is generating from titanium mining in their land.

Further, in the context of acquisition of alternative pieces of land, there was no concrete plan to assist the relocating population. A Respondent states this as follows:

They were taken to Bwiti and shown parcels of land and were expected to negotiate with landowners to acquire the same. The rates were higher than the compensation and most could not afford bigger or equivalent parcels.

The perceived inadequacy of compensation is affirmed by a Respondent in Nguluku, who in responding to a question whether titanium mining has been beneficial to mining host community stated as follows:

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249 Household interview of the Respondent G-5 in Nguluku on the 23rd of May 2017, where the Respondent states that the displaced community were not have adequate knowledge to negotiate good prices for their land and were paid poor compensation as they did not know the true value of their land.
250 Focus Group Discussion with local community elders in Nguluku on the 22nd of May 2017. The participants in the FGD were categorical that titanium discovery in Kwale occurred when the local community was naïve and lacked the relevant information and capacity to negotiate better deals and efficiently value their land, resulting in compensation that was inadequate and did not reflect the real value of the land and assets that were being sold to Tiomin and Base.
251 Focus Group Discussion with local community elders in Nguluku on the 22nd of May 2017, where the participants stated that the Kshs. 80,000 per hectar that was paid to the relocating population was not sufficient to cover the entire costs of relocation – the purchase of alternative land, reconstruction of housing, relocation of families and the development of alternative sources of livelihood to cover for fruit crops that were left behind in the former homes. As a result, most of the relocated families are worse off than they were before relocation.
It is important going forward that the National Government should come up with a clear compensation structure entrenched in law to govern and guide compensation in the context of involuntary displacements. This is to ensure that there is uniformity in the handling of compensation, and to ensure that local communities are adequately protected and compensated if their lands are taken up for large-scale investments, be they public or private. One Respondent states this proposal as follows: 254

The government needs to put a standard compensation rate for all government projects e.g. SGR or compensate based on the expected revenues/ profits to be generated from the activity. Some plants, animals, lands were lowly priced.

This is affirmed by the Focus Group participants in Nguluku, who suggest that in the context of impoverished and disempowered communities, the National and County Governments must act for and on behalf of such communities to ensure that their rights are effectively protected and they receive prompt, fair and adequate compensation in the context of large-scale mining operations. 255 Compensation and relocation should, however, not only be for those families whose land is utilised for mining; but must also include project affected whose land is in the buffer zone of the mining project and whose means of survival are threatened by the mining project. These households should be relocated, even temporarily to ensure that they do not suffer the direct impact of the mining project, and they must be adequately compensated and provided for during the period of their temporary relocation. This will ensure that they are not unduly exposed to the negative consequences of mining.

3.2.6 Adoption of mitigation measures to minimize the harmful social and environmental impacts of mining activities

Extractive activities in most instances generate adverse social and environmental impacts that have to be effectively mitigated so as not to jeopardise the health and socio-economic welfare of the mining host communities. Titanium mining in Maumba has not been any different. The operationalisation of the mining project led to relocation of households, breaking family and

255 Focus Group Discussion with local community elders in Nguluku on the 22nd of May 2017.
community structures as well as social networks. The relocation has had adverse impact on the remaining communities as it was accompanied with the relocation of basic amenities like schools and shops, markets. The result of the relocation has been the isolation of households and the need for these households to travel long distances for services and amenities. This has adversely impacted on the lives and livelihoods of the remaining household.

Secondly, the relocation resulting from mining has led to the regrowth of forests in places that were previously inhabited by the relocated population. The forest has attracted wild animals such as buffaloes that have damaged crop fields, destroying the livelihoods of the local population who are mostly farmers. The wild animals have also generated concerns for security for the local population, especially children who are unable to attend schools due to fear of attack by wild animals. The forest, coupled with the dam that has been built by Base Titanium has seen the increase in mosquito breeding, spreading malaria and other mosquito-based ailments that have adversely impacted on the health of the local populations. Apart from being a breeding place for mosquitoes, the dam has also attracted crocodiles that have become a menace to the local community members in Nguluku and their livestock.

Thirdly, concerns have been raised about the level of noise and dust that is being generated by the mining operation. The noise and dust have become a health hazard on the local population, with concerns being raised in relation to eye and skin infections as well as dust-based ailments such as respiratory infections. These have been detrimental to the health and well-being of the local population. Further, it has been argued by the local community that the mining operation and the damming of the rivers by Base Titanium has changed the micro-climate around Nguluku, with the result that farms have become less productive, coconut and mango trees produce lesser fruits and the fish population in the rivers have diminished. Concerns have also been raised about river water quality, with the locals complaining that Base Titanium has contaminated the river water. Base Titanium has refuted these concerns, indicating that the mining process is purely mechanical, with no use of chemicals that might contain the rivers. Base Titanium is

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256 Key informant interview N-4 conducted in Kwale on the 23rd of May 2017.
257 Key informant interview N-5 conducted in Kwale on the 23rd of May 2017.
258 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
259 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
260 Key informant interview N-5 conducted in Kwale on the 23rd of May 2017.
261 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
262 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
263 Key informant interview with NEMA at NEMA Offices in Kwale conducted on the 23rd May 2017 confirms that several complaints have been submitted to NEMA in relation to noise, dust, water quality, wild animals menace especially in relation to crocodiles, among others.
264 Key informant interview with NEMA at NEMA Offices in Kwale conducted on the 23rd May 2017.
265 Key informant interview with NEMA at NEMA Offices in Kwale conducted on the 23rd May 2017. Complaints have been that due to the change in microclimate, domestic animal have been equally affected leading to the birth of deformed calves.
266 Key informant interview conducted at Base Titanium on 26th May 2017.
open to a joint testing of the river water to determine contamination, provided that assessment is done using properly calibrated equipment.\textsuperscript{267}

Responsible and sustainable mining requires that these concerns be effectively addressed through the adoption of social and environmental mitigation plans that can effectively address the concerns. These mitigation plan must be developed using all the relevant expertise, but with the substantive involvement and participation of the affected local communities. The Mining Act in sections 101(2)(i), 103(c), 106(i), 109(c), 115(c) and 176 provide an opportune moment for this to be undertaken in the context of the development by the company of an environmental management plan (EMP) as is mandated by the Act. The development of the EMP, by Base Titanium with the participation of the County Government and the local mining population will provide an open and accountable structure for the mitigation of the adverse social and environment impacts of titanium mining in Maumba. Such an open process will create trust between the mining company and the local population, as it will ensure a more equitable balance between the benefits and burdens of mining, creating a more conducive environment for the mining operation to thrive. In undertaking this process, Base Titanium will be well on its way to achieving the “social licence to operate” that will reduce risks to production and enhance profitability.

3.2.7 Employment and other opportunities for local communities

The mining venture has universally become more capital intensive and technologically advanced, with weak links to the local economy.\textsuperscript{268} This has resulted in mining projects being “enclave projects” generating minimal opportunities for employment,\textsuperscript{269} especially for semi-skilled and unskilled labour.\textsuperscript{270} This has been reflected in the titanium mining operation by Base Titanium, which has only been able to directly employ about 400 workers.\textsuperscript{271} The perception by the local communities is that they have not been accorded fair opportunities at Base Titanium, with an overwhelming majority of households interviewed (100%) stating that the local community personnel are the minority at Base Titanium.\textsuperscript{272} This may be due to a lack of relevant mining expertise, with the local community personnel being either unskilled or semi-skilled in mining

\textsuperscript{267} Key Informant Interview conducted at Base Titanium on 26th May 2017.
\textsuperscript{268} IFC Discussion Paper – The art and science of benefit sharing, 43.
\textsuperscript{269} See IFC - Sustainable and responsible mining in Africa, 15, which affirms the inability of mining projects to create broad-based employment opportunities, creating only about 1-2% of employment.
\textsuperscript{270} Soderholm & Svahn - Mining, regional development and benefit sharing, 79.
\textsuperscript{271} Key informant interview N-4 conducted in Kwale on the 23rd of May 2017, where the Respondent affirmed that even though some jobs have been given to people in the local mining communities, they are mostly unskilled and semi-skilled work that does not earn much as compared to the more technical and managerial positions.
\textsuperscript{272} Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
and related operations. The Draft Mining (Employment and Training) Regulation of 2017 intends to plug this gap by ensuring that large-scale mining companies like Base Titanium develop and submit to the Cabinet Secretary a detailed employment, training and succession plan that ensures that local mining host communities are trained and employed in mining operations.\footnote{Mining (Employment and Training) Regulation, 2017, clauses 5-7. Mining companies are expected to submit reports of their implementation of their employment, training and succession plans for assessment by the Director of Mines and failure to do so is an offence punishable by a fine or a term of imprisonment or both as per clauses 10-12.}

The interview respondents also affirm that there has been in-migration into Kwale County, which has had the impact of limiting the employment opportunities of the local mining communities in Nguluku and Bwiti.\footnote{Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.} This has caused frustration and dissatisfaction among locals, though the situation has not deteriorated into tensions or violence.\footnote{Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.} Efforts by the Nguluku Community to raise the issue of employment of locals at Base Titanium have gone unanswered by Base Titanium, creating a feeling among the population that Base Titanium does not care for the well being of the local population.\footnote{Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.} One Respondent states this as follows: ‘they drive past us and have no time to listen to us, our leaders are given “something small” so they keep quite as we are oppressed’.\footnote{Household interview of the Respondent M-4 in Nguluku on the 23rd of May 2017.} Clearly, the titanium mining operation has not given a fair chance of employment to the local mining population of Nguluku and Bwiti contrary to the Mining Act that requires prioritisation in employment of local mining communities as discussed in section 4.2.2 above.

The next question here is, has the in-migration indirectly benefited the people of Bwiti and Nguluku though multiplier effects? From observations, this does not appear to be the case, as the majority of the immigrants live in Ukunda and Msambweni towns and not in the villages of Bwiti and Nguluku. There is, thus, no indirect benefit to these mining host communities in relation to rentals, accommodation, provision of food items and other supportive services. The mining venture has also not created the expected cluster of economic activities around the mine that would have created alternative socio-economic benefits and engendered economic diversification for the mining host communities. A key informant Respondent affirms this as follows:\footnote{Key informant interview N-4 conducted in Kwale on the 23rd of May 2017.}

*The mining project was expected to create derivative industry through the value chain, but this has not happened. Base Titanium keeps its staff within the mine and makes provision for them, leaving the local community with no opportunities for small businesses. Further, there is no value addition of the titanium mineral at source, with the result that the expected market for local services and goods in that process has not been*
This has raised despondency amongst the local mining communities in Bwiti and Nguluku, though the resulting tensions have not yet resulted in open conflict between the two communities and the company.

Research indicates that the ability of mining to economically impact a particular region depends on the specific characteristics of the particular area.\(^{279}\) In developed mining areas of Western Australia, Northern Sweden and British Columbia in Canada, the multiplier effect of 2 - that is one direct employment in a mining operation indirectly creating two job opportunities in the areas surrounding the mining operation – has been realised.\(^{280}\) Taking into account the level of development of these regions and comparing them to Nguluku and Bwiti – which are remote villages without the necessary infrastructure and facilities – it can be said that the employment multiplier for these specific mining communities would be negligible. This is because the communities of Nguluku and Bwiti are unable to contain consumer spending resulting from titanium mining, with indirect employment opportunities, if any, being created in the larger towns of Msambweni and Ukunda.\(^{281}\) Due to this inability of the mining host communities in Nguluku and Bwiti to benefit directly or indirectly from employment as a result of mining, it is thus critical that other mechanisms of benefit sharing are adopted to uplift their living standards. This could be the development of relevant infrastructure and service provision facilities such as schools, roads, health facilities, and water infrastructure as well as adoption of livelihood enhancing mechanisms such as agricultural support systems. This can be done through the Community Mining Trust Fund (CMTF) elaborated in section 5 below.

### 3.2.8 Procurement of local goods and services in the mining operation

In relation to the use of local goods and services in the mining project, the reality is that mining operations require materials that satisfy high technological standards.\(^{282}\) In the context of Nguluku and Bwiti, the capacity to provide such goods and services is limited, with the result that the local elite and political class have dominated the tendering process for products and services.\(^{283}\)

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279 Soderholm & Svahn - Mining, regional development and benefit sharing, 81.

280 Soderholm & Svahn - Mining, regional development and benefit sharing, 81.

281 This is mainly through transportation, rentals and accommodation, investments that require resources not available to the poor populations in the mining communities of Nguluku and Bwiti.

282 See IFC - Sustainable and responsible mining in Africa, 14, who affirm the challenge of mining companies in finding local firms with the capacity to supply the needed mining goods and services.

283 Key informant interview N-5 conducted in Kwale on the 23rd of May 2017.
has further marginalised local communities, creating inequalities and generating resentment to the mining operations. There is need to build the capacity and financial ability of the mining host communities to be able to compete in tendering for the supply of goods and services to Base Titanium. This can be done through the Community Mining Trust Fund (CMTF) proposed in section 5 below, which can empower small and medium sized community businesses to supply goods and services to Base Titanium by developing their capacity and according them financial support through a revolving fund. This will enable these local SMEs to provide goods and services to Base Titanium, ensuring that the local communities benefit this way from the mining operation.

The involvement of the local communities in the mining procurement process is contained in Local Content Bill discussed in section 4.2.2 above, which requires local involvement in the mining value chain. The Bill empowers the Cabinet Secretary to determine the minimum local content for each large-scale mining operator;\(^{284}\) and seeks to establish a Local Content Committee to monitor and oversight the implementation of local content for each mining operator.\(^{285}\) The Bill further requires the mining operator to maintain a bidding process that accords fair opportunities for local persons to supply goods and services in the extractive value chain.\(^{286}\) The operator must give priority to local goods and service providers even if their bids are higher, provided that price differentials do not exceed 10% of the price quoted by a foreign bidder.\(^{287}\) The Bill is further complemented by the Draft Mining (Use of Local Goods and Services) Regulation of 2016, which similarly requires mining operators to develop and submit to the Cabinet Secretary procurement plans for local goods and services.\(^{288}\) The Bill and the Regulation, when they become law, will thus improve the capacity of local communities to effectively participate in the procurement of goods and services in mining projects such as Base Titanium mining project in Maumba. This has the potential to generate shared value, not only for the mining company, but also for the local mining communities.

### 3.2.9 Socio-economic development projects through community development agreements

One of the ways in which a company can share benefits with local communities is through the adoption of an inclusive community development agreement. The agreement must be developed

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\(^{284}\) Local Content Bill 2016, clause 19.  
\(^{285}\) Local Content Bill 2016, clauses 7-18.  
\(^{286}\) Local Content Bill 2016, clauses 39-42.  
\(^{287}\) Local Content Bill 2016, clauses 39(3)(c) & 39(4).  
\(^{288}\) Mining (Use of Goods and Services) Regulation, 2016, clauses 6-7. The plan is required to include: particulars of goods and services to be procured; proposed expenditure under the plan; particulars on gender inclusivity; and the timeframe within which the plan is to be implemented.
in a tripartite process with the active, substantive and determinative participation of the local mining communities. This is to ensure that the ensuing projects meet the needs and aspirations of the local mining populations. The agreement must detail the legacy projects that the mining company intends to undertake to uplift the living standards of the local mining populations. It must also indicate the responsibilities for the different projects, their costs and how the costs are to be offset and the intended benefits to the local mining communities. Though the adoption of a community development agreement was previously voluntary, based on the companies corporate social responsibilities, many jurisdictions now demand it as a legal requirement. Kenya is such a jurisdiction, with the Mining Act 2016, section 109 placing it as a condition for the grant of a mining licence.

Even though Base Titanium had adopted a Community Development Management Plan (CDMP), the household survey indicates that the local mining community in Nguluku and Bwiti feel that they were not sufficiently involved in the development of the plan and that it does not reflect their needs and aspirations. Of those interviewed in Bwiti, only 5.9% confirm participating in the creation of the CDMP, with 70.6% having not participated in the process of developing the CDMP. The situation is similar in Nguluku, with 12.5% confirming individual participation in the process, while 87.5% were not individually involved in the development of the CDMP. As a result, 87.5% of those interviewed in Nguluku and 70.6% of those interviewed in Bwiti do not feel that the CDMP captures their needs and aspirations.

The Mining Act, which requires mining companies to adopt an expansive community development agreement within 18 months after the Act comes into force, therefore, presents a good opportunity for a review of the CDMP. Though the CDMP was a voluntary document, the Mining Act expects community development agreement to be a legally biding document, prepared with the active and substantive participation of the mining host communities. The essence of the required agreement is contained in the draft Mining (Community Development Agreement) Regulation, 2017, which details its purpose as ensuring that mining activities:

- Equitably benefit both the mining operator and the mining host communities in an accountable and transparent manner;

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289 The tripartite process of development includes the mining host communities, the mining company and the County Government. The essence of participation of the County Government is to enhance the protection of the interests of the local communities and to ensure that the intended projects are in line with the development plans of the County Government, to ensure continuity and sustainability of the projects even after the mine closes.

290 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
291 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
292 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
293 See Ministry of Mining – The Mining (Community Development Agreement) Regulation 2017, clauses 4.
294 Ministry of Mining – The Mining (Community Development Agreement) Regulation 2017, clause 3(1).
• Are consistent with the continuing economic, social and cultural viability of the mining host communities;
• Contribute significantly to the economic, social and cultural welfare of the mining host communities.

The Draft Regulations detail all the important issues that should be covered in a community development agreement and requires the creation of a Community Development Committee to monitor compliance with the agreement and provide structures for community participation as well as dispute resolution. One of the requirements in the Draft Regulation is a mechanism for the transparent and accountable management of development funds, for which the Community Development Trust Fund (CMTF) elaborated in section 5 below perfectly fits. This is further acknowledged in clause 11(2) of the Draft Regulation that contemplates the establishment of trusts or foundations as part of the organisational structure for the implementation of the community development agreement.

3.2.10 Payment of taxes, royalties and other levies

i) Mandate of levying, collecting and distributing taxes

The payment of levies, taxes and royalties are some the most prominent mechanisms for the distribution of the benefits of mining. According to the law, since mining is a National Government function, most of these resources go directly to the National Government, with the County Government only levying fees for a single business permit. Both the County Government and the mining communities perceive this as an unfair arrangement, recommending that mining should be a shared function between the National Government and the relevant County Government that is hosting the mines. This issue is not a strangely Kenyan problem, as other jurisdictions also face this challenge. The argument for this practice has been that sub-national governments have weak capacity to manage volatility in revenue flows; have limited

295 Ministry of Mining – The Mining (Community Development Agreement) Regulation 2017, clauses 8 & 11.
296 Ministry of Mining – The Mining (Community Development Agreement) Regulation 2017, clause 7.
297 Ministry of Mining – The Mining (Community Development Agreement) Regulation 2017, clause 8(4)(n).
299 Key informant interviews with the Chief Officer for Finance and Economic Planning, Kwale County; the Budget Coordinator Kwale County and the former Co-Chair of the Kwale County Budget Forum.
300 Of the household respondents interviewed, 52.9% in Bwiti and 81.8% in Nguluku affirmed that the County Government should have a role in decision-making on mining because the County Government is closer to the people and is able to understand the needs, priorities and interests of the local populations and effectively protect these interests in the process of the issuance of prospecting and mining licenses. It is also easier for the local mining communities to then hold the County Government accountable for the mining operations, especially if the operation is creating adverse social and environmental impacts on the local mining communities.
capacity for public finance management, planning and investment; have fragile systems of financial controls and weak accountability structures.\textsuperscript{301} Proponents of fiscal decentralisation of mining resources, however, argue that social justice requires that substantive amounts of mining revenue be decentralised. This is due to the following reasons: local mining communities bear the burden of adverse impacts of mining; local mining communities consider the mining resource as “their own” and should thus be compensated for its extraction; and that sub-national governments are better able to understand local needs and priorities, and are thus able to effectively invest mining revenue for the betterment of the lives of local mining communities.\textsuperscript{302}

In enhancing equity, fairness and social justice; some mining countries have devolved mining ownership to sub-national governments, with Australia, Canada and Argentina leading the way.\textsuperscript{303} In these countries, the sub-national governments levy taxes such as land taxes, transaction taxes, payroll taxes, excise duties and royalties.\textsuperscript{304} In jurisdictions where mineral resources are owned by the National Government on behalf of the people,\textsuperscript{305} revenue redistribution varies, depending on political processes, power dynamics as well as economic and social contexts.\textsuperscript{306} On one extreme, all the revenue is collected by the National Government, is pooled together and shared between National Government and sub-national governments using an agreed formula, as is the case with oil revenue in Nigeria.\textsuperscript{307} On the other extreme, the National Government collects all the mining revenue, but only shares a small percentage of the royalty with the mining sub-national governments and the local populations, the prevailing situation in Kenya and Ghana.\textsuperscript{308} Median practices have, however, seen sub-national governments having the authority to levy royalties, collect land-use fees and administrative charges directly upon the mining company, boosting sub-national government revenue for local development for mining communities.\textsuperscript{309} Outliers like Peru, however, allocate 50% of the total mining taxes to the producing area sub-national governments.\textsuperscript{310} Kenya should consider adopting the median practice, allowing the

\textsuperscript{301} IFC Discussion Paper – The art and science of benefit sharing, 33.
\textsuperscript{302} IFC Discussion Paper – The art and science of benefit sharing, 33.
\textsuperscript{303} IFC Discussion Paper – The art and science of benefit sharing, 34.
\textsuperscript{304} IFC Discussion Paper – The art and science of benefit sharing, 34.
\textsuperscript{305} In these countries, the National Government is the main authority that sets the terms for natural resource projects, collects tax revenue and determines their redistribution to the different functions of government.
\textsuperscript{306} IFC Discussion Paper – The art and science of benefit sharing, 33.
\textsuperscript{307} See IFC Discussion Paper – The art and science of benefit sharing, 35, which indicates that in Nigeria, 13\% of the total oil revenue is returned to producing states. The remainder is divided between the National Government and sub-regional states using an agreed formula. As a result, 46\% of oil revenue is retained by the National Government, 22\% is distributed amongst the oil producing states, and 33\% is distributed among the non-oil producing states.
\textsuperscript{308} See IFC Discussion Paper – The art and science of benefit sharing, 35, which indicates that in Ghana, the National Government collects all the mining taxes, including the royalties. It retains 80\% of the royalties, with remaining 10\% going to the Country's Mineral Development Fund, and the last 10\% going to the Office of the Administrator of Stool Lands that then subdivides it to the mining districts. Taxes on mining profits are not redistributed. The same situation obtains in Kenya, where only royalties are redistributed at the in the formula of 70\% to the National Government, 20\% to the County Government and 10\% to the local communities.
\textsuperscript{309} IFC Discussion Paper – The art and science of benefit sharing, 34. Examples are Canada and the United States of America.
\textsuperscript{310} IFC Discussion Paper – The art and science of benefit sharing, 35.
County Government to levy royalties and land-use fees directly to the mining company so as to boost local revenue for developmental purposes.

ii) Determination and management of royalties

On the sharing of royalties, the practice varies from country to country, taking into account the legal regime subsisting in the relevant county. In Kenya, the royalties to be paid by a mining company is to be determined by the Mining Cabinet Secretary as per section 185(3) as read with section 186 of the Mining Act. This section provides as follows in relation to the calculation of royalties:

*The Cabinet Secretary may designate a qualified person to inspect and examine any samples, books, records and accounts to ascertain the quantity, quality, grade or value of minerals or mineral products for the purpose of ascertaining or verifying the amount of any royalty payable.*

Further, the Act does not detail what happens to royalty agreements that had been agreed previously between the National Government and mining operators before the coming into effect of the Act. This is a lacuna, which opens up the process of royalty calculation to abuse, to the detriment of the general welfare of the Country in general, and mining host communities in particular.

This flexible approach has been extolled by IFC due the uncertain and varying nature of mining projects, but they insist that this approach is only viable in a society with strong governance structures.\(^{311}\) This may perfectly reflect the Kenyan situation, where the Cabinet Secretary is given much power - without proper checks and balances - in the determination of the payable royalties. As a result of these opaque discretionary powers of the Cabinet Secretary to determine royalties, the Cabinet Secretary has set the percentage of royalties to be paid by Base Titanium at only 2.5% per month.\(^{312}\) This compares adversely to the royalties paid in other countries, with 5% being paid in Ghana and Mongolia, 7% in South Africa and up to 14% in Chile.\(^{313}\) There is need for more honesty, openness, transparency and accountability in the development of criteria for the determination of the amount of royalty to be paid in a manner that fairly and equitably

\(^{311}\) See IFC Discussion Paper – The art and science of benefit sharing, 17-18.

\(^{312}\) Base Titanium affirmed this during an interview held at the mine by the Consultant. The low percentage of royalty payment also raises concerns about the equity of actual benefit sharing, as the mining industry due to weak corporate governance and oversight mechanisms habitually underreport output value while over-reporting expenses, thus even paying lower actual royalties than the 2.5% agreed. See R Mendoza & T Canare ‘Revenue sharing in mining: Insights from the Philippine case’ (2013) 4 Modern Economy Journal 521. See also IFC - Sustainable and responsible mining in Africa, 12, which affirms that most mining companies avoid paying taxes they are legally required to pay, with Africa losing over US$38 billion as a result.

\(^{313}\) IFC Discussion Paper – The art and science of benefit sharing, 22.
balances the needs, aspirations and expectations of all the mining stakeholders. If this is not done, there is bound to be risks that may end up in the renegotiation of the entire mining contract, as has been the case in the Tanzanian situation of the Acacia Gold Mines.

iii) Percentage share and redistribution of royalties to the mining host communities

The Mining Act provides that royalties are to be collected by the National Government and distributed to the other stakeholders using the formula of 70% to the National Government, 20% to the County Government and 10% to the mining host communities. This is contested by the mining host communities in Nguluku and Bwiti, who were not involved at all in the process of developing the Mining Act despite the fact that they are the most affected population in relation to the legislation. The household survey in Nguluku and Bwiti indicates a unanimous consensus of lack of knowledge and participation in the development of the Mining Legislation, with all the households interviewed indicating that they were not involved at any point in the process of development and enactment of the Mining Act 2016. This is contrary to the Constitution, which requires the participation of the people in the legislative process, especially the communities to be directly affected by the legislation as is discussed more elaborately in section 4.2 above.

Despite the lack of involvement in the legislative process, the mining host community in Nguluku and Bwiti are equally unanimous that local mining communities should benefit from the mining project, especially in relation to the payment of royalties. Their recommendation on the percentage of royalties that should be given to local communities despite the provision of the Mining Act is as follows.

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314 See IFC Discussion Paper – The art and science of benefit sharing, 29, who state that if mining licence negotiation processes are clear and transparent, there is more likelihood that benefits will be shared equitably between the different stakeholders. They thus call for the development of clear laws and regulatory frameworks that subject such processes to public oversight, scrutiny and vetting.

315 See IFC Discussion Paper – The art and science of benefit sharing, 29, which affirms that several countries, including Peru and Chile, have re-negotiated mining contract terms to recover larger shares of benefits through engagement and dialogue with investors.

316 Mining Act 2016, section 183(5).

317 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.

318 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
Based on the views of the Respondents, it is thus clear that most mining communities feel that the Mining Act’s allocation of only 10% to local communities is not a fair allocation taking into account the mining burdens shouldered by these communities. For most of them, a more equitable sharing of benefits should entail the redistribution of between 30-35% of the paid royalties to the local mining communities. It is thus important that mining host communities and mining stakeholders effectively engage the National Government to ensure a fairer redistribution of mining royalties in a manner that is equitable and beneficial to mining host communities.

### iv) Determination of local communities in the context of mining royalties

The next challenge in relation to mining royalties is the determination of who should be considered as part of the local community to benefit from 10% royalty. According to the Mining Act 2016, section 2, a “community” in the context of mining is:

a) a group of people living around an exploration and mining operations area; or

b) a group of people who may be displaced from land intended for exploration and mining operations.

In the different Focus Group Discussions held with different mining stakeholders in Kwale, opinions vary in this context, based on differing sectarian interests. There are four conceptions...

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319 Mining Stakeholders Forum held in Tiwi on the 25th of May 2017, where the issue of the definition of “local community” was discussed at length. The suggestion was that in the definition of what local community is in the context of mining benefit sharing, there must be clear demarcations and boundaries, to ensure that only those suffering the direct consequences of mining benefit from the 10% mining royalty.
of community: those moved from the mining site in Maumba; those still living around the mining site in Nguluku; those originally in Bwiti who welcomed and have to compete for resources with those resettled from Maumba; and the entire population of Kwale County as they are in one way or another affected by the titanium mining by Base Titanium through the mining chain. The discussions at the County Government favour the fourth conception of community as including the entirety of Kwale County, a conception that is disputed by the other mining stakeholders. In a Focus Group Discussion with community elders in Nguluku, the participants were categorical that the 20% royalty allocated to the County Government was aimed at benefiting the entire Kwale County, while the 10% for local communities was intended specifically for the mining host communities directly affected by the mining operation, which is not the entirety of Kwale County. The resulting discussions from the Focus Group Discussions detailed a definition of “local community” in the context of titanium mining in Maumba to include the following:

- Those displaced from Maumba to pave way for the mining project;
- Those who are still living within the precincts of the mine in Nguluku and who face the major adverse environmental, health, economic and other effects of the mining operation; and,
- The host community in Bwiti who hosted the relocatees from Maumba, and who had to compete for scarce resources and facilities with the new arrivals.

The above conception of “local community” is in line with the definition of “community” provided by the Mining Act, and should be considered as the intended beneficiaries of the 10% royalty allocated for local communities under the Mining Act 2016. It is also in line with the definition adopted in the draft Mining (Community Development Agreement) Regulations 2017 as developed by the Ministry of Mining. All mining stakeholders should thus adopt this restricted definition of local community in the context of the 10% royalty.

v) Management and utilisation of the 10% mining royalty allocated to local communities

The last issue for determination in relation to the 10% royalty is how it is to be managed for the benefit of the local mining communities. In determining the distribution of royalties between the National Government, County Government and local communities, the Mining Act does not provide a framework for the management of the potion of royalty that is the entitlement of local communities as is discussed more elaborately in section 4.2.2 above. In the context of

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320 Focus Group Discussion with local community elders in Nguluku on the 22nd of May 2017.
321 Ministry of Mining – The Mining (Community Development Agreement) Regulations 2017, clause 2.
this research, the issue ignited a passionate debate among the Respondents. In Bwiti, 76.5% of the Respondents were of the view that it should be managed by the County Government; 5.9% supported management by a community committee; and 17.6% were not certain how it should be managed. In Nguluku, 54.5% were supportive of County Government management of the royalty; 31.8% were supportive of a community committee management; and 13.6% were uncertain. This indicates a strong leaning by the general community population towards the County Government management of the 10% royalty for and on behalf of the mining host communities. However, in the Focus Group Discussions, the preference was the management of the funds by the local communities themselves through a committee to be set up for that purpose. This indicates a delink between the community elite, who want to manage the royalty themselves; and the general population who want the royalty to be managed by the County Government. The report collates the two views and suggests a tripartite system of management of the royalty through a Community Mining Trust Fund (CMTF) as elaborated in section 5 below.

On the type of use for which the 10% royalty should be placed, the majority of the Respondents were of the view that it should be directed towards development projects that benefit the mining host communities generally. In Nguluku, 81.8% supported the use of the royalty for the construction of socio-economic infrastructure such as schools, health facilities, water facilities, roads and other community infrastructure. 13.6% were supportive of cash transfers to individuals, while 4.5% were not certain. Similarly in Bwiti, 70.6% supported the utilisation of the royalty for general community infrastructure development, while 29.4% were not sure. Among the Respondents in Bwiti, there was no support for the utilisation of the funds as cash transfers to individuals. The Mining Stakeholders Forum also supported the developmental utilisation of the 10% royalty, stating as follows:

If people are given money individually, there will be no benefit to the people. It should be targeted towards projects such as health, roads, water and other infrastructure – this will be more beneficial in the long term for the local communities. It should be used for development purposes. This should be done for all the mining host communities – community close to the mining area, the resettled communities and the communities hosting the resettled communities.

322 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
323 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
324 Focus Group Discussion with local community elders in Nguluku on the 22nd of May 2017.
325 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
326 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
327 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
328 Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.
329 Mining Stakeholders Forum held in Tiwi on the 25th of May 2017.
The use of local community royalties for general community development and not for individual cash transfers is supported by comparative practice in other jurisdictions, where individual cash transfers have been abandoned for failing to generate broad-based societal socio-economic development. In many contexts, royalty is used for general mining community infrastructural development to ensure intra- and inter-generational equity and bolster general development of the mining area. This research thus proposes the utilisation of the royalties for general community development in the context of the Community Mining Trust Fund (CMTF) elaborated in section 5 below.
Way forward in managing mining resources for the benefit of mining host communities in Nguluku and Bwiti: The Community Mining Trust Fund

Management of mining resources at the local level has raised concerns of institutional capacity to effectively manage funds in a manner that ensures sustainable development. In comparative perspective, the better way to manage community development in mining areas has been through the establishment of a Community Mining Trust Fund (CMTF). The World Bank states the necessity of such a mechanism as follows.

With high mineral prices generating windfall profits and focusing growing attention on compensation payments and the necessity of earning and retaining their “social license to operate,” many governments and companies have been considering the use of foundations, trusts, and funds (FTFs) as vehicles for sharing the benefits of mining operations with the surrounding communities. If conceived as independent entities they can provide opportunities for shared governance that can be sustained long into the future.

330 See Muigua – Reflections on managing natural resources, 2 & 25, who asserts that one of the challenges for benefit sharing for local communities has been lack of effective management. The CMFT addresses this challenge by creating a collaborative framework of natural resource management that is formal, systematic, professional, transparent and accountable.

331 World Bank - The context of benefit sharing in the mining industry, 10; IFC Discussion Paper – The art and science of benefit sharing, 345.

The choice of a dedicated instrument, such as an FTF, can bring particular value where local capacities are limited, public services are absent or weak, and there is a need to demonstrate continued benefit from mining after operations have closed. FTFs can be used to deliver community investment programs for companies, facilitate the use of government payments derived from mining for development, and manage compensation funds.

This is affirmed by the International Financial Corporation, which states as follows:\(^{333}\)

To the extent that foundations [or trusts] can manage social services and public infrastructure better than local governments and municipalities, this approach may be useful for dealing with the lack of capacity at the local level in remote and poor communities.

The possibility of establishing a trust fund or foundation to manage mining-based community development in Kenya is already acknowledged in the Draft Mining (Community Development Agreement) Regulation, 2017. One of the requirements in the Draft Regulation is a mechanism for the transparent and accountable management of development funds,\(^{334}\) for which the CMTF perfectly fits. This is further acknowledged in clause 11(2) of the Draft Regulation that contemplates the establishment of trusts or foundations as part of the organisational structure for the implementation of the community development agreement.

But what is a CMTF and how does it work? The CMTF will be a tripartite collaborative investment vehicle comprising of community representatives, representatives of the County Government and representatives of Base Titanium.\(^{335}\) Its mandate would be to receive and invest the 10% royalty that accrues to the local mining communities as well as the annual development allocations by Base Titanium in the context of its CSR activities.\(^{336}\) In order to create an effective CMTF, the following must be taken into account:\(^{337}\)

- The vision, mission and objectives of the CMFT must be properly defined, with its main role being a key development actor in the local environment.\(^{338}\)

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333 IFC Discussion Paper – The art and science of benefit sharing, 345.
334 Ministry of Mining – The Mining (Community Development Agreement) Regulation 2017, clause 8(4)(n).
335 Development Trust Funds are a formalised framework for benefit sharing that ensures certainty and sustainability in the development of the local mining communities and is an improvement from CSR activities that are strictly based on the goodwill of the mining company. The involvement of the County Government ensures that the Trust Fund is entirely dependent on the mining company for its funding and success.
336 In the Mining Stakeholders Forum held in Tiwi on the 25th of May 2017, it was stated that Base Titanium has earmarked around 300 million annually for development. This should form part of the Trust to be managed for and on behalf of the mining host communities to ensure coordinated development.
337 Soderholm & Svahn - Mining, regional development and benefit sharing, 83-84.
338 See Wall & Pelon - Sharing mining benefits in developing countries, 2 & 36-38, who state the importance of appropriately
• Its mandate should be clear from the beginning: receiving the 10% mining revenue from the National Government; annual development funds from Base Titanium (1% or at a rate to be agreed through negotiations between Base Titanium, County Government and Local Communities); and annual contribution to the Fund by the County Government. The Fund’s governing body should then channel these resources towards the sustainable socio-economic development of the local mining communities in Nguluku and Bwiti.

It should have a representative multi-stakeholder governing body that will act as trustees for the local mining communities. A suggestion is 9 trustees to sit in the governing body (Board of Trustees): 4 elected representatives of mining communities, 2 representatives of the County Government; 2 representatives of Base Titanium; and a representative of the civil society organisations. The governing body, with the help of a small secretariat (Fund manager, accountant/finance officer, community liaison officer and secretary), will be charged with the day-to-day management of the fund for and on behalf of the local mining communities. A general oversight of these structures can further be undertaken by the Community Development Committee envisaged by the draft Mining (Community Development Agreement) Regulation of 2017.

339 The new mining law in South Africa that requires mining companies to use 1% of their gross profits annually for community development. For the practice of the mining company contributing 1% of revenue to the trust fund, see Wall & Pelon - Sharing mining benefits in developing countries, 26, where they document this practice in relation to Freeport Partnership Fund for Community Development (LPMAP) of Indonesia; Minera Escondida Foundation of Chile; and, Ahafo Community Foundation of Ghana. They also document the policy of BHP Billiton Company, which has a corporate policy to establish a foundation or a trust for the sustainable development of locations where they operate, and to contribute 1% of their pre-tax profits to fund the operations of the trust fund. Based on this practice, they established the Mozul Community Development Trust Fund (MCDT) in Mozambique, which receives approximately US$ 2.5 million per year from the mine for its development operations, at 33-34.

340 It is in the interest of Base Titanium to channel its development resources through the Trust Fund in a fair manner as development investments that are reasonable and beneficial to the local communities are more likely to be durable and the mining operation is less likely to be disrupted by risks of community uprising, see IFC Discussion Paper – The art and science of benefit sharing, 7.

341 Annual development contribution by the County Government is aimed at diversifying sources of income for the Fund and creating better opportunities to promote local community development. The legal basis for this contribution is for the County Government to respond to the urgent needs of vulnerable populations as is entrenched in Articles 20(5)(b) and 21(3) of the Constitution, which imposes a duty on all State organs and officers to prioritise resource allocations having regard to prevailing circumstances so as to address the needs of vulnerable groups.

342 See Wall & Pelon - Sharing mining benefits in developing countries, 2 & 29-30, who state that high level stakeholder participation is the key to achieving grounded and sustainable socio-economic benefits through the trust mechanism.

343 The Board of Trustees must be constituted taking into account the constitutional requirements on representation, especially the two-thirds gender rule and the need to include representatives of persons with disability and the youth.

344 The Board of Trustees has a fiduciary duty to manage the trust strictly for the benefit of the beneficiaries and must not allow a conflict of interest. Trustees can be held personally accountable for the mismanagement of the trust fund, with a clear legal mechanism provided for in the Trustees Act, Cap 167 of the Laws of Kenya.

345 See Wall & Pelon - Sharing mining benefits in developing countries, 2, who affirm the importance of a proper governance structure and clear management of responsibilities as key to better performance of a trust and its ability to raise external finances for socio-economic development. They, however, state that management expenses must be restricted to only about 10-15% of total expenditure of the trust fund, at 28.

346 Ministry of Mining – The Mining (Community Development Agreement) Regulation 2017, clause 7.
• The CMTF must have a high level of co-financing, with funds constituting of the 10% royalty from the national government, annual development funds from Base Titanium as well as development contributions from the County Government.

• The CMTF must have very clear and stringent transparency and accountability mechanisms to ensure that the funds are only used for their intended purposes. A recommendation for utilisation is for the Fund money to be invested wisely with a long-term developmental perspective, rather than being squandered in short-term consumption purposes. This will ensure fair inter-generational distribution of the benefits of mining, with the mining legacy projects being available for use by subsequent generations.

• On the utilisation of the monies of the Fund, the governing body must undertake participatory budgeting, allowing the local community to determine the development projects to be undertaken in an inclusive, participatory and determinative manner. This will enable local communities to collectively determine priority development projects that meet their priority needs and that will empower the mining communities towards a path of sustainable socio-economic development even after the mine closes. Some of the priority projects that had been recommended by the mining communities of Bwiti and Nguluku are: projects to advance education, enhance access to healthcare, ensure access to clean water for domestic use, develop road and other infrastructure, and

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347 In the Mining Stakeholders Forum held in Tiwi on the 25th of May 2017, it was stated that Base Titanium has earmarked around 300 million annually for development. This should form part of the Trust to be managed for and on behalf of the mining host communities to ensure coordinated development.

348 See Wall & Pelon - Sharing mining benefits in developing countries, 24 & 27-28, who affirm that co-financing is key to the success of a trust fund. They suggest that payment by the company to the trust fund should be set as a percentage of revenue, a system which guarantees financial contribution independent of the company’s profits.

349 See World Bank - The context of benefit sharing in the mining industry, 10, which extols the virtues of a dedicated development vehicle like the CMTF, stating that it has great value in the following situations: where decentralised governance units lack capacity to ensure accountability in the management of development resources; where governmental capacity to deliver socio-economic services is weak; and where there is need to manage developmental benefits of mining subsequent to the mine's closure.

350 Soderholm & Svahn - Mining, regional development and benefit sharing, 84. They suggest investment in public infrastructure, education and health to set a foundation for long-term economic development.

351 Muigua – Reflection on managing natural resources, 2, who asserts that since extractive resources are non-renewable, investment choices must be durable so as to serve both the present and future generations. See also S Rustad ‘Wealth sharing, benefit sharing and the extractive industry’ (November 2015) 5, available at http://www.undp.org/content/dam/undp/library/Democratic%20Governance/OGC/Siri%20Aas%20UNDP_nov15.pdf (accessed on 13 May 2017), who similar affirms that mining resources are non-renewable and can only be spend once, so they should be spent wisely to benefit the current and future generations. The suggested investments are: education, health and infrastructure.

352 Key informant interview conducted in Likoni with the Outgoing Co-Chair of the Kwale Budget Forum on the 25th of May 2017.

353 See Wall & Pelon - Sharing mining benefits in developing countries, 2, who advise that the development planning by the trust must be integrated to the County Government development plans so as to ensure congruence and continuity.

354 See Wall & Pelon - Sharing mining benefits in developing countries, 23, who affirm that trust fund program choices must be based on a deep understanding of the needs of the beneficiaries, the developmental priorities of the mining stakeholders and the existing developmental gaps. They suggest some viable developmental programs to include: local economic and business development; health and wellness; education and vocational training; basic infrastructure development; employment and income generation; environmental protection, among others.
create opportunities for employment and livelihoods such as investment in agricultural production, processing and marketing.\footnote{Hakijamii Household Survey conducted between 22-26 May 2017 in Nguluku and Bwiti.}

- In ensuring sustainability, the CMTF should grow the monies of the Fund by undertaking investments such as tendering for the procurement of goods and services to the mines. It should also create a revolving fund to support the growth of small and medium sized local community businesses, with the beneficiaries returning monies borrowed with a small interest as a way to generate income and grow the Fund.
- The CMTF must have efficient administrative structures to enable it maximise development delivery to the local mining communities.
- The CMTF’s design must be flexible enough to changing development needs and practices as well as operating conditions, which for example might allow a new mining player to become a part of the Fund.\footnote{See Wall & Pelon - Sharing mining benefits in developing countries, 23, who affirm the need for constant monitoring and evaluation of the impact of the trust fund so as to recognise changing needs and conditions, and to effectively respond to those changes to ensure continued success of the fund.}

As compared to the in-house management of community development projects that is being undertaken by Base Titanium, the choice of a CMTF has benefits not only to the mining host community but also to Base Titanium. First, agreement to such a professional development vehicle signals the commitment and good will of the company to community development, creating trust that is important to the overall attainment of a social licence to operate.\footnote{World Bank - The context of benefit sharing in the mining industry, 11.} Secondly, a dedicated development vehicle provides a sustainable system of joint action, with the participation of all mining stakeholders, which engenders collective responsibility for the delivery of development projects.\footnote{World Bank - The context of benefit sharing in the mining industry, 11.} Thirdly, Creation of trust-based development vehicle can generate tax advantages for the company, enhancing its net profits.\footnote{World Bank - The context of benefit sharing in the mining industry, 12.} Lastly, a dedicated development mechanism frees the mining company time and staff, enabling it to dedicate itself fully on mining without worries about risks arising from direct management of community development projects.\footnote{World Bank - The context of benefit sharing in the mining industry, 12.} Overall, therefore, it is in the best interest of the company to support and fund the development of such a dedicated investment vehicle to undertake community development for the mining host communities.
4 Conclusion and recommendations

4.1 Conclusion

The extractive industry has the potential to enhance development and improve the socio-economic conditions of mining host communities when well managed. The proper management of mining projects require a comprehensive legislative and regulatory framework that ensures that mining is undertaken in a responsible and sustainable manner, with the burdens and benefits of mining being shared equitably among the mining stakeholders. One of the major stakeholders who suffer the major burdens of mining projects is the mining host community. These communities are subjected to involuntary displacement that affect their socio-economic well-being, are exposed to adverse environmental and health consequences of mining, and in most instances are left worse off than they were before the commencement of the mining project. It is, therefore, critical that there is an equitable balance of these burdens of mining and the benefits that accrue from the mining process. These benefits can be shared in many different ways, which include: active involvement of these communities in decision-making at all levels of the mining process; full, adequate and prompt compensation for land, infrastructure and other assets of production lost as a result of the mining project; access to employment opportunities in the mining project; local procurement of goods and services; socio-economic development of the mining host communities through infrastructure and other socio-economic empowerment projects; mitigation of adverse social, environmental and health consequences of mining; as well as the payment of taxes and royalties that benefit these local mining communities.

Mining has for a long time not been a major source of revenue for Kenya. But this has changed in the last 10 years with the discovery and exploitation of different minerals, with titanium being one of the major discoveries. The discovery and exploitation of minerals has necessitated the development of the mining legal framework to provide effectively for the management of this industry, with the Constitution of 2010, the Mining Act of 2016 and the Local Content Bill...
being the major legal instruments that have been or are being put in place for this purpose. As discussed in section 4.2, the legislative framework has provided broadly for the management of extractive resources to ensure that this is done sustainably and for the benefit of the Kenyan people, including mining host communities.

Despite the elaborate legal framework on mineral resource management, the reality is that the precepts are not reflective of the practice on the ground, as exemplified by the titanium-mining project in Kwale County. The household survey, key informant interviews and focus group discussions undertaken in the context of this study show that the socio-economic situation of the mining host community in Nguluku and Bwiti has not improved much as a result of the mining project, as elaborated in sections 3.2 and 4.3 above. Instead, these mining host communities feel that their situation has worsened considerably as a result of the mining project. Some of the challenges that have been faced by these communities in as a result of the mining project include: failure to empower and substantively involve the local communities in decision-making on the mining project; failure to undertake fair valuation of land and other factors of production and pay adequate compensation to the displaced populations; failure to put in place effective mitigation measures to cushion the mining communities from adverse social, environmental and health impacts of the mining operation; failure to undertake socio-economic development projects that meet the needs and priorities of the mining host communities; failure to provide employment and local procurement opportunities for the mining host communities; and failure to adequately share the profits of the mining project through the fair payment of taxes and royalties to the County Government and the local mining communities.

The above concerns have led to mistrust between the mining company and the local communities, with the communities feeling that the benefits and burdens of the mining project have not been equitably shared. In addressing this challenge, the report proposes the creation of a tripartite mechanism – the Community Mining Trust Fund – to manage all the mining resources accruing to the mining local communities and to utilise the same for the socio-economic development in these communities as elaborated in section 5 above. This is in line with other jurisdictions that have faced the same situation and have established such mechanism, which have enhanced the effective and accountable management of mining resources and achieved broad-based socio-economic development of mining host communities.
4.2 Recommendations

The above conclusion leads to the following recommendations to the different mining stakeholders in Kwale County:

i) National Government

- Effectively involve Kenyans in the law making process, especially those communities who are affected directly by the prospective legislation. Failure of public participation and involvement in the legislative process is reflected in the Mining Act 2016, which did not effectively engage the mining host communities in Nguluku and Bwiti despite the reality that they were being directly affected by the titanium-mining project in Maumba. This failure persists in the development of the relevant regulations mandated in the Mining Act, with the Ministry of Mining failing to engage the local mining communities on these regulations;

- Ensure transparency and accountability in the issuance of prospecting and mining licenses and substantively engage relevant County Governments and local communities in decision-making on the issuance of these licenses. This is to avoid instances of inequitable and poorly negotiated mining contracts that have little beneficial value to the nation, and which accord mining companies the majority of the profits from mining operations;

- Develop clear and substantive policy guidelines to form the basis for the negotiation of mining contracts with investors so as to safeguard the interest of the country and the mining host communities;

- Consider making mining a shared function between the National Government and the County Governments to ensure more effective management of mining operations in a manner that meets the expectations of local mining communities;

- Develop effective compensation legal framework to ensure that mining host communities are effectively protected from exploitation by unscrupulous mining companies. In the context of specific mining operations, the National Government must take steps to ensure that the local population have sufficient information and are sufficiently empowered to make free and informed decisions on all aspects of the mining project, with a special focus on the valuation of property, the adequacy of compensation and the expected impacts of relocation;

361 Key informant interview N-6 conducted in Kwale on the 24th of May 2017.
• Issue title deeds to households in Kwale County, especially those around the mining area to enable them protect their lands and undertake effective negotiations in the context of land acquisition of mining and other developments;

• Reconsider the 10% share of royalties to the local communities, with a view to increasing the percentage of resources being sent back to enhance the socio-economic development for the benefit of mining host communities;

• Remit the royalties that the County Government of Kwale and the mining host communities in Nguluku and Bwiti are entitled to in accordance with the Mining Act 2016. Since the Mining Act details that mining companies have to pay royalties quarterly, the National Government should also remit the share of royalties to the Counties and mining communities quarterly, to ensure that the money is not kept in the National Government coffers where it can be reassigned to other unrelated projects. The suggestion here is that there should be a strict timeline for the National Government to remit the money, which is suggested to be by the 15th day of the month of each quarter;

• Publish and provide information on regular basis on royalties received by the government from respective mining activities for transparency and accountability purposes;

• National Government institutions such as NEMA and WARMA should empower their regional offices to undertake their work in the context of monitoring environmental integrity and water abstractions in the context of large-scale mining operations like the titanium-mining project. Mining operators should be required to engage the regional NEMA and WARMA offices in undertaking their annual environmental audits and water licensing to ensure that the concerns of local mining communities are effectively addressed in these processes. The current process of Base submitting their environmental audits and water abstraction permit applications directly to NEMA and WARMA headquarters in Nairobi is opaque and lacks accountability. This practice should be reformed to ensure the participation of the NEMA and WARMA County/Regional Offices in these processes to ensure transparency and openness;

• Support Kenya Revenue Authority Officials to gain skills on transfer pricing because this is a loophole that mining companies use to evade paying proper amount of taxes.\(^{362}\)

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ii) **County Government of Kwale**

- In concert with other County Governments within the auspices of the Inter-Governmental Relations Committee, lobby the National Government to declare mining as a shared function to ensure more effective management of mining projects at the County level for the benefit of local communities;
- Engage more robustly with the National Government to ensure that mining royalties are remitted for the benefit of Kwale County Government and the mining host communities in Nguluku and Bwiti;
- Reconsider its inclination towards defining “local community” in the context of 10% royalty to encompass the entire Kwale population; and instead adopt the definition detailed in the Mining Act 2016, which details local community as those displaced from the mining site or those in close proximity with the mines and suffering the direct impact of the mining project as detailed in section 4.3 above.
- Adopt the tripartite development mechanism – the Community Mining Trust Fund – as elaborated in section 5 above and work together with Base Titanium and the local mining communities to ensure that the mechanism is established and is supported to effectively undertake its functions of socio-economic development in the mining host communities;
- Provide temporary/mobile basic services for mining host communities awaiting relocation in the different phases of relocation.

iii) **Base Titanium**

- Engage openly and transparently with the County Government and the local mining communities in the establishment of the tripartite Community Mining Trust Fund elaborated in section 5 above to ensure the socio-economic development in the mining host communities of Nguluku and Bwiti;
- In the context of the Community Mining Trust Fund, update the Community Development Management Plan and transform it into a legally biding community development agreement in accordance with the Mining Act. This must be done with the active and substantive participation of the Kwale County Government and the local mining population, to ensure that intended projects are in line with the County Government planning and also meet the needs and aspirations of the mining host communities;
- Make financial and technical contributions to ensure that the Community Mining Trust
Fund effectively implements the community development agreement for the benefit of the local mining communities;

- Increase employment opportunities for local mining populations in Nguluku and Bwiti. In this context, Base Titanium should provide opportunities for training and capacity building for locals to ensure that they take over the more technical and managerial levels jobs as required by the Mining Act 2016;

- Effectively address the environmental, social and health concerns of the mining host communities by updating the environmental management plan with the active and substantive participation of the local population as required by the Mining Act 2016;

- In preparing its annual water and environmental audits, Base Titanium should involve the local NEMA and WARMA offices, the County Government and all other relevant stakeholders to ensure transparency and openness. Further, in submitting reports of these audits to NEMA and WARMA headquarters in Nairobi, Base Titanium should also share copies with NEMA and WARMA County Offices, the County Government and other relevant stakeholders to ensure continuous monitoring for the benefit of local mining communities;

- Within the context of its adherence to the principles of the Extractive Industry Transparency Initiative, Base Titanium should not only detail all the payments made to the National Government, but also all the relevant contracts, permits and other documents on which those payments are premised to enhance popular scrutiny and ensure transparency and accountability.

iv) Mining host communities

- Engage actively and substantively with the County Government and Base Titanium in the context of the Community Mining Trust Fund to ensure socio-economic development in their communities;

- Effectively participate in the county budget and governance process to better advocate for provision on basic services to further mitigate effects of mining activities.

v) Civil society

- Educate the mining host communities on the mining laws, especially the Constitution and the Mining Act 2016. This should detail the rights of these communities and how they can use the law to protect their rights vis-à-vis the mining companies. The education
should also elaborate on the entitlements of the mining communities and how they can equitably share in the benefits of the mining operations in their localities;

• In the context of new large-scale mining operations that are bound to displace many poor communities, the civil society must engage effectively from the very beginning to ensure that these companies give free, prior and informed consent. They should ensure that the communities are efficiently empowered and capacitated to negotiate fair and adequate compensation and relocation support before the actual relocation is undertaken. They should also educate the relevant households and equip them with the necessary financial skills and resources to effectively manage their compensation money to avoid wastage that might destroy family livelihoods and plunge the household into poverty;

• Actively monitor the activities of the different mining stakeholders to ensure transparency and accountability in the management of resources for the benefit of local mining populations;

• Engage actively in the update of the community development agreement and the environmental management plan by Base Titanium to ensure that the titanium-mining project does not adversely harm the local mining communities and that the benefits and burdens of the mining project are equitably shared;

• Share and provided available information and suggestion to the local communities and all levels of governments for informed decision and policy discussion.
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