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Eastern and Southern African
Pastoralists Network

Triggering the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) in the Context of Oil Extraction in Kenya's Turkana County

A Case Study

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Introduction and Backdrop

Tucked away in Kenya's north-western tip, Turkana County is home to an estimated 1,122,2017 people in 2017, derived from the 2009 population census, as well as a large refugee population. The county is hot, dry and windy and is classified under Kenya's agro-climatic zones as arid and semi-arid land (ASAL) with dismal and erratically distributed rainfall of 200mm mean average annually. About 80% of the Turkana people identify as mobile pastoralists, and keep camels, goats, sheep, cattle and donkeys as a source of livelihood as well as an ecological management strategy.

Since the colonial era, Turkana County has epitomized historical marginalization due to perceived lack of agriculture and investment potential. Bordered by South Sudan, Uganda and Ethiopia, the county has witnessed proliferation of small arms many decades of under-development, cattle rustling, insecurity and poverty, with an estimated 87.5% (Society for International Development et al, 2013) of the population living below the poverty line. This marginalization and perceptions of backwardness and violence has nurtured a sense of alienation of the Turkana community by the rest of Kenya. Since Kenya's independence in 1963 land in Turkana has been designated as trust land (communal land held in trust by local authorities/County councils) which transitioned to unregistered community land in 2010 in accordance with article 60 of the Constitution of Kenya, 2010 and held in trust by the county government.

In 2012, the Anglo-Irish company, Tullow Oil Plc, announced the first discovery of crude oil in Turkana County. Tullow Oil Plc

began its operations in Turkana in 2010 after signing farm-in agreement with African Oil (of Canada) and Centric Energy-USA. They now operate 5 off-shore blocks, of which four, are located in pastoral areas. Since 2012 Tullow has drilled more than 21 wells in Lokichar basin, with an estimated 600 million barrels of recoverable crude oil. Currently, oil and gas extraction is in the appraisal stage, which is a precursor to full field oil development. All these were undertaken in the absence of community land law that would regulate negotiations with communities for compensation mechanisms for lands carved off their territories, securing of important seasonal grazing areas, migratory routes, ceremonial sites, important livestock resource sites (salt licks, water) and negotiated or participatory planning for operations of extractive activities such as oil exploration, drilling, storage, transportation and waste disposal. Due to these omissions the Turkana pastoralists feel that they have been left to play catch up in seeking security of community tenure rights in the whole scope of oil extraction in Turkana County.



Oil Extraction in Turkana

The history of oil exploration in Kenya dates back to 1950. In this year, oil exploration was

“The discovery of oil in Turkana has brought a flurry of issues to a part of Kenya that has been forgotten from the first time the white man set foot in East Africa. Turkana people have from the 1900’s viewed people from southern Kenya with suspicion because of the deliberate neglect they have subjected Turkana region. Oil appears to have raised the profile of Turkana in Kenya and globally, but we (Turkana community) are fearful that our rights are being trampled on because we are taken as second class citizens. For instance, the carving out of land parcels for exploration and subsequent drilling of oil was done without our knowledge, we were not prepared for the flurry of activities that are happening now. We also do not know how we shall be compensated for the takeover of our lands, destruction of sensitive and important ecological areas and the benefits that pastoralists will get from extraction of oil from our land.”

conducted in Tertiary Rift Valley (which included Lokichar), but the wells drilled were dry. To accelerate the search for oil, Kenya formed the National Oil Corporation of Kenya (NOCK) in 1981 and subsequently passed the Petroleum (Exploration and Production) Act of 1984, which was revised in 1986 and in which Production Sharing Contract was introduced to replace royalties. In 2012 the Petroleum (Exploration and Production) Act of 1986 was further revised. The technical environmental social impact assessment (ESIA) was conducted to guide the full field development and construction design.

One of the major issues of concern to the Turkana community and civil society organizations regarding the ESIA report was the recommendation for establishment of a hazardous waste dump site at Kang’ipetain. This area is a strategic grazing zone with good

pasture and springs. It is an important dry season refuge for pastoralists.

The second cause of concern is the issue of trucking trial - two trucks ferrying tanktainers’ with the carrying capacity of 300 barrels each, from Turkana to the Port city of Mombasa on the Kenyan Coast. Trucking trial is the first step towards learning about the integrity of the oil when transported under different temperatures and how it behaves while in storage in Mombasa. The community and civil society were concerned about the lands to be carved out to create the roads for trucking the oil from Turkana, what processes are in place to consult and map out appropriate areas with the least impacts on the general wellbeing of the community and the environment.

Thirdly, front end engineering design (FEED) is now being carried out to inform the specifications of the pipeline as well as how much it will cost the country to pipe the oil from Turkana County to other parts of Kenya. The community and civil society are concerned about the level of information, participation and inclusion that has been undertaken in making these determinations. The full field development and commercial production is expected to start in 2021. Other than Tullow Oil Plc other companies that have joined the oil extraction fray in Turkana include Adamantine Energy Limited (USA) in Turkana North and CEPESA (Spanish Petroleum Company) in Turkana West.



The Challenges at a Glance

The major challenge confronting Turkana pastoralists in the context of extraction of oil and gas in the county is loss of land and lack of information regarding the development of their area. Open and communally managed land constitutes one of the main pillars of pastoralist livelihood and production and it is feared that the takeover and subsequent extensive modification of this landscape will have unprecedented impacts on the whole of Turkana peoples existence. The current take-

"From the time we were created we have been depending on our land to sustain us as pastoralists. When land is taken away from the equation that forms pastoralism, then the death knell for pastoralism is sounded. This is what is happening here in Turkana, where people sat somewhere in Nairobi, curved out our land and allocated it to strangers without our knowledge. This is a total violation of the rights of pastoralists as provided in the constitution of Kenya, the rights of indigenous peoples and international best practices by government and investors. If these issues are not ironed out in a participatory manner, the global oil curse will likely befall Kenya".

28 year old Edward Eregae

over of Turkana land for oil production activities forms one of the key factors contributing to insecurity of pastoral tenure rights in the county. From the onset of the exploration and subsequent extraction of oil and gas in Turkana, pastoralist communities have lost ownership, access and control of the basis of their pastoral livelihood and economic production. Additionally, they haven't been included in decision-making processes regarding further development of the area.

An Oxfam briefing paper, released in November 2017, showed that Tullow Oil's community engagement had improved since 2015, but they were still not achieving their full Free Prior and Informed Consent (FPIC) obliga-

tions. The company will pay a 5% revenue share for local communities (despite demands for 10%) and 20% for the county government besides other benefits through the national revenue share and corporate social responsibility. Despite this, the local community still suffers from the negative impacts of the extractive industry. In a drought-prone and marginalized region such as Turkana, the pastoralists face severe pressures from the appropriation of resources by large industries such as Tullow Oil.

Currently, a total of 700 square kilometers of land has been hived off from community land for extraction of oil and gas. These are areas with good pastures and form the drought reserves. Moreover, they also hold cultural value as traditional ceremonial sites such as for traditional prayers (ekimwomor), and initiation ceremonies (asapan).

It is important to note that although the "footprint" of specific oil exploration and production facilities (including well pads, camp sites) is generally small,

"By the time we learnt of the whole scheme of hiving off of our land for oil exploration and drilling, the government had already deployed security forces to guard the operations of the company and to ensure that we (Turkana) were sealed off from the areas under operation. The questions that are yet to be adequately answered are; whose land is this and what is the relationship between government, Turkana people and investors and who gave consent and who was compensated for the land? Secondly, what are the direct and indirect benefits to Turkana pastoralists and what are the negative impacts to the Turkana people as a result of extraction of gas and oil".

there are associated facilities (residential, educational, market and recreational), as well as access roads for those working on the oil exploration/production sites, which take up much larger areas of land. Additionally the local communities must grapple with lack of water, waste generation and disposal, pollution, migration and growing urbanization.. Urban and peri-urban trading centres have mushroomed, thus increasing further encroachment into pastoralists' land and thereby endangering pastoralism as a viable system of utilizing arid lands, ecologies and resources.

With a burgeoning population, influx of migrant communities and takeovers by state and corporate entities; the land in Turkana has been on a steady shrinkage and, therefore, Turkana pastoralists are systematically being displaced from pastoralism, which has been their traditional means of livelihood and production for centuries, and the only viable means of livelihood that can be supported by the fragile ecosystem of Turkana County.

The problems of pastoralists' land have social and political/administrative dimensions, created both naturally and man-made. While such natural factors such as climate change have dispossessed Turkana pastoralists of their land, human activities have exacerbated the problem.

Current Initiatives to Overcome the Challenges

There are limited efforts to address the problem of pastoralists land tenure rights in the context of extraction of oil and gas in Turkana. Since initiating their activities, Tullow Oil has faced some backlash from the local pastoralist community for interfering with pastureland and for in-

sufficient rehabilitation and compensation. For example, in 2013, the elders of the community prevented oil exploration at the Twiga 2 site in Lokichar basin because of the damage done to pastureland. Later in the year, the community staged demonstrations demanding jobs and other benefits from the industry – drilling was resumed only after peace talks concluded with local leaders. In June 2017, the community blocked Tullow's employees from initiating the transport of oil barrels to Mombasa. Eventually, the President Uhuru Kenyatta flagged off the first trucks to carry oil from Lokichar in June 2018.

Besides the pastoral resistance, the Turkana Natural Resources Hub which brings together all Non State Actors is attempting to address this problem. Land tenure insecurity was identified when the Hub carried out an assessment of community perceptions on the impact of oil and gas extraction in Turkana East and South. The problems highlighted before form some of the findings of the assessment. The summary of the findings is that many factors related to oil and gas extractions have dispossessed pastoralists of their land.

These factors include land committed to well-pads or well-fields and oil camps, land grabbing by unscrupulous businessmen, degradation, environmental pollution and lack of safeguards for drought refuges, migratory routes, sacred and ceremonial sites. The Hub has conducted community dialogues to sensitize them on land issues and demand for their rights over their land as enshrined in the Kenyan constitution, and further engagement with Tullow Oil Plc on hazardous waste management. However, the Hub faces the challenge of limited resources.

Moving Forward: Introducing the Food and Agriculture Organization's Voluntary Guidelines on the Responsible Governance of Tenure of Land (VGGT)

The Voluntary guidelines on the responsible governance of tenure of land (VGGT) is an internationally negotiated soft law or a set of guidelines on tenure of land that has managed to balance the global web of interests on land and striking a rare consensus among such international processes as the G20, Rio+ 20 and institutions as

of tenure governance.

the United Nations General Assembly, and the Francophone Assembly of Parliamentarians. Further the VGGT has received endorsement by the Committee on World Food Security (CFS), based at the Food and Agriculture Organization of the United Nations (FAO) in Rome, Italy.

The VGGT aim to serve as a reference and to provide guidance to improve the governance of tenure of land, fisheries and forests. The overarching goal of the VGGT is achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security. The VGGT are rights based in the sense that they operate within the principles of:

Further, the VGGT are gradually emerging as a true global norm of reference in the governance of (land) tenure and thereby pioneering the outlining clear principles and practices that governments can refer to when making laws, decisions and administering land, fisheries, and forests rights. Ultimately, the VGGT aim to promote food security and

sustainable development by improving secure access to land, fisheries, and forests, as well as protecting the rights of millions of often very poor people like pastoralists.

1. Human Dignity,
2. Non Discrimination,
3. Equity and Justice,
4. Gender Equality,
5. Holistic and sustainable,
6. Consultations and Participation,
7. Rule of Law,
8. Transparency,
9. Accountability and;
10. Continuous improvement and analysis

The VGGT resonate with 70 year old-Turkana – elder - Ekutan Lokadio observation that: "The process of acquiring community land must be guided by the principles of mutual respect among all those involved, fair and transparent negotiations, participation of all members of the community including youth, women and the disable, compensation and provision of safeguards to prevent adverse impacts of the project on people, livestock, wildlife, land and environment".



Triggering the VGGT in Securing Pastoralist Tenure Rights in Turkana

Considering that the main thrust of the VGGT is to ensure responsible governance of tenure, when juxtaposed against the takeovers of parcels of community land for extraction of oil in Turkana, it is irrefutable that the VGGT context provides a unique and strategic paradigm for further advancing and advocating for implementation of the requisite safeguards for pastoral land tenure in the ongoing extraction of oil in pastoralist community lands. Using the VGGT as a global soft law instrument for ensuring obligatory best practices for duty bearers in securing tenure of land for such communities as the Turkana resonates with Kenya's principles of National Values and Governance that include;

1. Human Rights and Fundamental Freedoms.
2. Right to Property.
3. Sustainable Land Policy
4. Trust in the Ownership of Communal Land.

Further, the VGGT are in consonance with the African Union guidelines on land governance and large-scale land-based invest-

ments (LSLBI) and also resonate with the Global Goals or Sustainable Development Goals (SDGs) thereby providing multi-level legitimacy of utilizing the VGGT as a tool for securing pastoral land tenure in the context of oil extraction in Turkana County for the realization of:

1. Recognition and respect for pastoral (community) land tenure right holders and their rights;
2. Protection of pastoral/Community land tenure right holders against the arbitrary loss of their tenure rights; and
3. Guaranteeing equal pastoral women and girls land tenure rights and access to community land.

All these rights and entitlements are recognized and guaranteed in Kenya's Community Land Act of 2016 however, a VGGT dimension in advocating for pastoral tenure rights especially in the perspective of the ongoing extraction of oil in Turkana County infuses new energy and vigor and hinges the advocacy on an internationally accepted set of principles of recognition and respect for land tenure rights of such groups as pastoralists as part of the duty bearers obligation of ensuring food security for a community that has continuously suffered chronic food insecurity in Kenya.

Recommendations

As the government of Kenya and policy makers design mechanisms for the implementation of the Community Land Act 2016, infusing the VGGT will prove useful in the furtherance of pastoralist rights to collective tenure. Therefore, National and County Governments and other agencies should consider supporting this initiative to enable:

1. Civil Society Organizations to utilise the VGGT, especially its technical guide on

Improving governance of pastoral lands, as a tool to advocate secure collective land tenure for Turkana pastoralists as part of advocating for safeguards for their production and livelihood system

2. The Government of Kenya through the national assembly, senate and county assemblies to adopt the VGGT technical guide for investors to form part of Kenya's best practise

guide for investors such as those exploring and extracting oil in pastoralist areas.

3. Institutions such as Kenya National Commission on Human Rights, National Gender and Equality Commission, the Law Society of Kenya and Kituo Cha Sheria/ The Centre for Legal Empowerment among others to utilize the VGGT technical guide for lawyers and other legal service providers as well as the guide for securing land tenure for men and women to ensure gender equality in tenure rights

4. Land Actors such as the Kenya Land Alliance, National Land Commission, Kenya Human Rights Commission and Pastoralist Parliamentary Group to trigger the VGGT to complement advocacy on the implementation of the Community Land Act 2016 to further reinforce the efforts of enabling Turkana pastoralists realize security of one of the key pillars of their existence.

5. The VGGT to be utilised by the Turkana County Government and Assembly to plan and invest in securing the collective tenure of land for Turkana pastoralists in liaison with the Ministry for Lands, County Land Management Board and the National Land Commission.

6. The VGGT to be widely disseminated among pastoralist communities as they provide an ideal platform for civil society, community representatives, County Gov-

ernments and Assemblies to create a critical mass to take forward the usage of the VGGT in securing pastoral tenure in Kenya.

7. Further engagement by CSOs, CBOs with National Government/Ministry of Petroleum and Companies that are exploring and extracting oil in Turkana County to ensure that the activities adhere to VGGT's principles in their operations.

8. Use of the VGGT as an additional yardstick for the National Environment Management Authority (NEMA) , Senate and Parliamentary Committees on Land and Natural Resources and the Pastoralist Parliamentary Group to seek responsive extraction of oil in Turkana County and other pastoralist areas.

9. To present the VGGT as an additional avenue for the Kenya National Commission on Human Rights, National Gender and Equality Commission and development actors within pastoralist Counties to advocate rights based approaches in extraction of oil with emphasis on adherence to the principles of the VGGT.

10. Ensure that VGGT, especially the technical guide on improving governance of pastoral lands, are used by Non State Actors and County Governments to inform pastoral tenure rights in the context of implementation of the Community Land Act 2016 as they have similar objectives and safeguards for pastoralists' rights to land tenure.