WHOSE SIDE ARE YOU: A RAPID ASSESSMENT ON LIMESTONE MINING ACTIVITIES IN NGAIE AND KANZIKO - KITUI COUNTY

Kitui County
2017
Executive Summary

Caritas Kitui, Social and Development arm of the Catholic Diocese of Kitui, commissioned this rapid assessment to understand the context of Ngaaie and Kanziku Wards in bid to have an informed and context specific intervention. Caritas Kitui through the Justice and Peace Program- CJPC in collaboration with Haki Madini Kenya need to comprehend ways and means of addressing the plights of the local communities to be affected by the mining project in Ngaaie.

This assessment adopted participatory qualitative research method using both primary and secondary data. Target population was stakeholders in the sector including the National Government, County Government, Community, Investors; and relevant Civil Society and Faith Based Organizations who were purposively sampled and engaged as key informants or focus group participants. Data was analyzed using content analysis by help of Atlas TI software that uses thematic analysis and findings presented.

Ngaaie Ward

Kitui County has eight Sub-Counties and the governance structures include those established by both the National Government and County Government. Ngaaie Location in Ngaaie Ward, Kyuso Division and Kyuso Sub-County, it hosts the mineral-rich-hill that is of interest in this assessment. Ngaaie Location has three sub locations and twenty villages. The total population is 6,242 characterized by a high rate of unemployment and poverty. Land ownership in Ngaaie is widely communal and individual community members have no title deeds.

Limestone and Klinger deposits are spread within Ngaaie hill in Ngaaie sub-location (Central, Katiliku and Kang’ong’o villages) and in Kanghui sub-location (Kyanguithya, Kanana and Ngomano villages).

Athi River Mining Limited (ARM) was the only private firm carrying out prospecting activities in the area from August 2013 to February 2015 after having been introduced by Kyuso Deputy County Commissioner (DCC). There was no enough information to ascertain the validity of ARM license.
In October 2013 ARM meetings with Community Liaison committee (CLC), it was agreed that ARM as part of CSR to (i) build eight classrooms (in Kaithango and Kianguithya Primary schools) estimated at a cost of 1.2 million each; (ii) start drilling while at the same time gathering the stones (Limestone) on the surface and (iii) to carry 1000 tones of the limestone in the name of “samples”. ARM offered CLC tour to ARM-Kaloleni in October 2014.

As at January 2015 when Ngaaie community members petitioned ARM operations, ARM had drilled more than thirty holes, extracted and transported more than five thousand tones. 

ARM engaged a private surveyor in March 2014 who marked the main areas rich in minerals and of interest to ARM referred to as “cutline” in absentia of household representatives. A number of community facilities including schools; water dam; church and road were marked within cutline which implied limited access to the services if mining began. The surveyor issued community members with inaccurate land parcel numbers (readings on the parcels did not indicate actual land sizes according to community members) and adjudication started. Some community members petitioned the parcel numbers in May 2015 in Kyuso Law Courts and ruling is still pending. ARM picked Kinyua Mwaniki Advocate as Community Lawyer without community involvement in 2014. According to Land Sale Agreement Addendum (LSAA)(Appendix V) community members were also represented by Wainaina Advocates. Community members committed to transfer their land ownership rights through land sale by signing the Land Rights Transfer/ Sale Agreement (LTR/SA) (see Appendix I); drawn by Nyamu & Nyamu Co. Advocates. The agreement was signed between ARM, Kitui County Government (KCG) and Ngaaie community represented by CLC officials (Chairman, Vice Chairman and Secretary) on 10th-17th July, 2015 before the adjudication process was completed. ARM effort to acquire a consolidated title deed in respect of the Ngaaie Hill plots was petitioned by the community through Ngaaie Focus Community Based Organization (NFCBO) in September 2015. The petition ruling is still pending at the Lands office in Kyuso. ARM did not undertake to manage the environment after
prospecting. Moreover, ARM did not remedy disturbances caused to community members in Ngaaie Ward area occasioned by their activities during prospecting.

The National Government participated in the Ngaaie limestone prospecting activities through the Kyuso DCC and Mwingi North Member of National Assembly (MNA). The DCC and MNA spearheaded the formation of the CLC in October 2013 that is reported to have been marred with a lot of irregularities and "solemnly" constituted to fight for the success of ARM. The MNA involved Nyamu and Nyamu Co. Advocates as the ARM Lawyer and an individual to conduct the Environmental Impact Assessment (EIA) who are his relatives. National Environment Management Authority (NEMA) also purported to have done EIA in 2012; however the findings were not accessible.

KCG was represented in the mining activities by the County Minister of Environment, Energy and Mineral Investment Development (CMEEMID) and Member of County Assembly (MCA) - Kyuso who were members of the CLC. The MCA was however sidelined from CLC due to conflicting interests with ARM on community compensation and resettlement. KCG conducted a survey of the mineral-rich-hill in August 2014 as a control for the contentious survey done by ARM Surveyor. The survey findings were not accessible. According to LRT/SA, KCG represented by CMEEMID committed to facilitate the process of obtaining a title deed or lease over the land and issue necessary licenses and permits for the project; and co-operate with ARM in meeting any statutory requirement from the National Government.

The Ngaaie community had never been sensitized on prospecting/mining protocols and their rights in the mining process before and after ARM began prospecting activities. Civic education was first introduced among the community members in 2015 when there was clear conflict as a result of compensation process. Community members were sensitized and educated on land ownership rights and; compensation, displacement processes and mining procedures by civil society organizations including Kenya National Commission on Human Rights (KNCHR) and; Action Aid/ Centre for Human Rights and Civic Education (CHRCE). NFCBO had started engagements with CHRCE and KNCHR in since November 2014. There was poor coordination among the
CSOs and relevant government offices in carrying out the human rights agenda in limestone prospecting, which was likely to create confusion among community members as reported by KNCHR.

Community involvement in the prospecting activities was mainly through CLC. According to LRT/SA; LSAA; and Agreement for Compensation (AC) (Appendix VI) all matters pertaining to the project would only be executed with engagement of the – CLC (representing community); KCG and ARM. Barazas organized by DCC, CLC, KCG and ARM were attended by the community members within the cutline area. Community members offered temporary cheap labour (stone-crashing); artisan jobs and supply of water to ARM during the prospecting period.

Negotiation on compensation and resettlement of community members began in November 2013. This pioneers of the process included DCC, CLC, CMEEMID and ARM representatives. Irrespective of pending petition on parcel land-size readings; the compensation pioneers pushed and threatened the community members through barazas held in June 2014 and door-to-door campaigns to sell land to ARM. Schools within cut-line were “removed” after the administration raised their concern on compensation. The pioneers’ agreed on Ksh. 150,000 per acre as the compensation and the information was communicated to the community members in July 2014 by CMEEMID. The DCC headed the voting process of the compensation rate. Voting process involved raising hands by community members who were in support of Ksh. 150,000/acre. Emerging concerns from community members on the exploitive price were termed as inconsequential. A section of land owners signed the presumed LSA in July-August 2014 to accept down payment of Ksh. 100,000 to curb hunger as indicated in LSAA (Appendix V). The compensation payments through bank transfer began in September 2014 blemished with a lot of irregularities including payments to some community members who had not signed the agreement. Land owners (referred to as vendors- persons authorized to execute Agreement for Sale on behalf of family members) were required to sign the AC. Signing AC meant that vendors were in agreement with the ‘disputed’ particulars in adjudication record held by the Land Adjudication Office in Kyuso (LAOK); and that vendors had authorized LAOK to transfer
land interests in the parcel number to ARM, and declared that they would have no further claim over the plot against ARM; the vendors would ensure ARM’s proprietary interest in the land is legitimized through issue of title by government of Kenya; and that the land rights would be saved under tripartite agreement between ARM, CLC and KCG. The compensation balance would be executed using bank transfer upon confirmation of transfer of interests through signing confirmation letter at LAOK authorizing transfer of absolute interest to ARM. Only CLC members and a section of those who signed received their full compensation in September and November 2015. Irregularities in payment brought about misunderstanding among community members who had signed the agreement. No documents had ever been issued to the community members by ARM as proof of compensation done. According to LRT/SA and AC the community members would undertake to give vacant possession of the land in 180 days upon completion of compensation; failure to which ARM would be at liberty to evict the vendors. Vacant possession has not been the case as at time of this study.

The LRT/SA signed in July 2015 highlighted provision of transport, iron sheets and cement worth Ksh. 50,000; and compensation on evaluated property. According to AC, property valuation was conducted by Ultimate Valuers Ltd appointed jointly by ARM, CLC and KCG on 5th-10th July 2015 to form basis for compensation against crops, developments and trees to each land owner. Valuation was conducted among households that had signed the LSA. The evaluation report was never produced and was not accessible during the study period. According to LRT/SA, the Ngaaie community was to benefit from construction of a cement firm in five years; establishment and registration of a Trust Fund upon acquisition of single title deed by ARM; and land set aside for market place, girl’s secondary school, play ground and health centre in consultation with County Government. The LRT/SA also provided for an ambiguous dispute resolution process with CLC expected to settle all family and community land disputes. The AC only highlighted that the vendor (land owner) would be the de jure beneficiary representing the family members in the Trust Fund.
The community members were not sensitized about the agreements they signed and were not aware of terms of agreements that were negotiated on their behalf. Additionally, they were not issued with copies of signed agreement documents.

On the contrary, some community members declined to sign the agreement because they considered the Ksh. 150,000 per acre compensation as exploitative.

In Ngaaie Ward, men are the family heads and core decision makers. Women are considered not to own land in the Ngaaie community and were rarely involved in the negotiations and compensation processes. Most women were neglected in compensation process which led to formation of NFCBO in October 2014 to fight for women land rights. Women within cutline expressed more fear of their family welfare upon full compensation and in the event that mining began.

A Chinese investor and Bamburi Cement Ltd. also visited Ngaaie but did not apply for prospecting rights.

**Kanziku Ward**

Bamburi Cement Ltd (BCL), East Africa Portland (EAP), Athi River Mining and Dangote are the companies mainly interested in limestone mining for cement production that exist in Kanziku Ward. Currently these companies are not undertaking any activities in Kanziku Ward. The companies did not have any plans or agreements with the community at the prospecting stage. It is purported that EAP and Dangote dishonored their promise of Ksh. 20,000 as disturbance allowance to the community members. These companies involved the community in temporary employment (manual jobs and security jobs) during the prospecting period.

BCL and EAP dug bore holes at Kaaki and Kassivuni (Vwulu) respectively. BCL moreover gave text books to Kanziku primary school, 200 bags of cement to Kanziku Secondary school and paid a hospital bill for two of undisclosed value to Mutomo hospital. Only BCL reported to have plans to go back to Kanziku.
An evaluation of cases in Kanziku established that conflict of interest to access the limestone deposits in Kanziko and Mathima areas led to court cases on the validity and legality of the Common Mineral license issued to BCL and the lease agreement made between ARM and County Council of Kitui (CCK). After the case was ruled in favour of BCL’s Common Mineral license; ARM proceeded and obtained stay order. Consequently ARM lodged an appeal in the Court of Appeal which is still pending irrespective of BCL instituting a suit during the pendency of the substantive appeal against the orders ruled. This is reason why BCL has not proceeded with its activities in Kanziku.
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**Abbreviations**

- AC: Agreement for Compensation
- ACC: Assistant County Commissioner
- ARM: Athi River Mining Limited
- BCL: Bamburi Cement Ltd
- CCK: County Council of Kitui
- CHRCE: Centre for Human Rights and Civic Education
- CJPC: Caritas Kitui Justice and Peace Program
- CLC: Community Liaison committee
- CMEEMID: County Minister of Environment, Energy and Mineral Investment Development
- CMG: Commissioner of Mines and Geology
- CSO: Civil Society Organization
- CSR: Corporate social responsibility
- DCC: Deputy County Commissioner
- EAP: East Africa Portland
- ECDE: Early Childhood Development Education
- EIA: Environmental Impact Assessment
- FBO: Faith Based Organizations
- FGD: Focus Group Discussion
- FIDA: Federation of Women Lawyers
- FY: Financial year
- HMK: Haki Madini Kenya
- KCB: Kenya Commercial Bank
- KCG: Kitui County Government
- KII: Key Informant Interview
- LAOK: Land Adjudication Office in Kyuso
- LAPSSSET: Lamu Port and Lamu-Southern Sudan-Ethiopia Transport
- LRT/SA: Land Rights Transfer/ Sale Agreement
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tr>
<td>LSAA</td>
<td>Land Sale Agreement Addendum</td>
</tr>
<tr>
<td>MCA</td>
<td>Member of County Assembly</td>
</tr>
<tr>
<td>MCA</td>
<td>Member of County Assembly</td>
</tr>
<tr>
<td>MNA</td>
<td>Member of National Assembly</td>
</tr>
<tr>
<td>MP</td>
<td>Member of Parliament</td>
</tr>
<tr>
<td>NEMA</td>
<td>National Environment Management Authority</td>
</tr>
<tr>
<td>NFCBO</td>
<td>Ngaaie Focus Community Based Organization</td>
</tr>
<tr>
<td>NGAO</td>
<td>National Government Administration officer</td>
</tr>
<tr>
<td>NLC</td>
<td>National Land Commission</td>
</tr>
<tr>
<td>SEA</td>
<td>Strategic Environment Assessment</td>
</tr>
<tr>
<td>SEKU</td>
<td>South Eastern Kenya University</td>
</tr>
<tr>
<td>ToR</td>
<td>Terms of Reference</td>
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Chapter One: Introduction

1.1 Background

Caritas Kitui is the Social and Development arm of the Catholic Diocese of Kitui and is charged with the mandate of charitable action. It aims at integral human development and social transformation advocating for a more just society with participation of those affected and whose actions are geared towards Sustenance, Innovation and Transformation.

1.2 Project Background

From Christian mission for environmental stewardship, mandate for Justice and Peace, and from the realization that Kitui County has great mineral potential, Catholic Diocese of Kitui commissioned through a baseline study to examine the environment, social and economic impacts extractives learnt that there were grave concerns about extractives including loss of livelihoods of about 32,000 households, environmental impacts, viability and sustainability of the mining projects to transform both local and national economy, issues of compensation and sharing of benefits from these projects, and rehabilitation of the mining sites for future generations.

Based on the foregoing, Caritas Kitui through the Justice and Peace Program- CJPC was compelled to look for ways and means of addressing the plights of the local communities to be affected by the mining projects. It is on this realization that Caritas Kitui entered into a partnership with other institutions and established Haki Madini Kenya (HMK), a National Coalition of communities in mining areas, ecumenical bodies and civil society organizations. The coalition has developed a five year Strategic Plan for the period 2016 – 2020, which now informs the interventions the coalition will be undertaking. In Kitui, the project scope is Mui Basin, Ngaaie and Kanziku. CJPC therefore commissioned a rapid assessment to understand the context of Ngaaie and Kanziku in bid to have an informed and context specific intervention in a manner specified in the terms outlined below.
1.3 Purpose of the assessment

Being cognizant of the fact that extractive industry comes with different impacts that if not well addressed could portend a negative outcome for the communities. These include and not limited to environmental impacts, community displacements, human rights violations and gender issues. The purpose of this assessment was to provide contextual analysis of the extractive sector in Kitui County. The assessment was two-pronged for Ngaaie and Kanziku and would serve to comprehensively answer the following questions:

The assessment sought to answer the following questions:

a. Ngaaie

1. What are the minerals that are due (or being extracted) in Ngaaie and what stage of development are they?
2. In which specific areas/locations are these minerals located?
3. Who are the private sector players (the companies) and what is their level of engagement? How are they engaging the community? Name all of them and where they are operating and their relationship with community?
4. What is the role / involvement of the County Government if at all and who in the County Government is involved in the issues?
5. What is the level of community awareness on the mining processes and what are the community mechanisms being used to engage their participation? What are the community awareness concerns that they feel need be addressed and how? i.e. specific areas/topics of training
6. What are the gender specific dimensions that need to be understood and how are women involved in the negotiations and conversations regarding the sector?
7. Where displacement is likely to happen/happened, how is/was compensation planned/done and with whom? What are the issues related to compensation, who is negotiating? Are the women involved and where is the negotiating power playing
8. What is the role of the national Government in respect of the County Extractive sector
9. Are there civil society organizations involved /working with the extractive sector in these counties, who are they and what roles are they playing? (as specific as possible)

10. Is the faith community in the County engaged in any way in the extractive sector, and if they are interested and involved, which of the faith actors is active in the extractive sector?

11. What are gaps and challenges that Civil Society should pay attention to in respect of the extractive sector in these counties?

12. What specific issues are important to address urgently for Civil Society in this area? What issues require a more long term approach?

13. What other researches/studies/appraisals etc have been conducted in the area? By who and is it possible to access them? Where? How?

14. Any other observations and basic contextual information.

b. Kanziku

1. Examine the private companies that exist in the area either prospecting/prospected or mining (Bamburi, E.A Portland and Athi River Mining and any others)

2. Trace their history, activities they are undertaking, court cases and other related issues. Clearly find out the details and progress of any cases these companies in court.

3. Find out how the companies engage with communities; the plans, agreements with community
Chapter Two: Proposed Methodology

2.1 Research Design

This assessment used cross sectional descriptive design to provide contextual analysis of the extractive sector in Kitui County. The research design enabled comparison between and among assessment variables within a specific point in time; and did not attempt to control or manipulate variables but determine current status of phenomena. Qualitative research methods were adopted based on participatory research methodology with target populations to ensure validity and reliability of findings. The methodology was customized to ensure statistically representative samples and all inclusive research tools.

2.2 Research Population and Sample

The assessment targeted relevant stakeholders in the sector under different categories including the National Government, Kitui County Government (KCG), Community, The Companies involved, the Council of elders, Relevant Civil Society Organizations (CSOs), Faith Based Organizations (FBOs), Women Groups, Youth groups, other private sector representatives in the area. This assessment sample was drawn from the community through multiple sampling techniques. Samples were stratified according to categories and selected using purposive sampling technique.

2.3 Development of Data Collection Tools

Secondary data was obtained through review and analysis of relevant published documents/ reports and other literature. Primary data was collected using Key Informant Interview (KII) guide and Focus Group Discussion (FGD) guide with closed and open ended questions to ensure quality of captured data. To ensure reliability and validity of data collected, development of these data tools was based on the review of documentation, and the Terms of Reference (ToR); design of draft tools; consultation and review of the tools by CJPC representatives; and updating of final data tools.
Data Collection

Qualitative data collection involved participatory research among sampled community members in each stratum. Research ethics code, consent and principles were applied throughout the design and data collection phases of the project. Method triangulation (using different methods to get information about the same issue) and cross-category triangulation (asking different people the same question) were used to guarantee evidence supporting any conclusion made.

Focus group discussions and key informant interviews involved diversified groups and individuals including Religious leaders; Community Liaison Committee (CLC) members; Community members; Women groups; Chief; Sub-chiefs; Kyuso Sub-County Administrator; Kyuso Ward Administrator; Ngaaie Member of County Assembly (MCA); Kitui County Director in the Ministry of Environment, Energy and Minerals Investment Development (CMEEMID); Civil Society Representatives from Action Aid, Ngaaie Community Based Organization (NFCBO), Centre for Human Rights and Civic Education (CHRCE), Kenya National Commission on Human Rights (KNCHR); Legal officers from Bamburi Cement Ltd (BCL), Athi-River Mining Ltd (ARM) and East African Portland Ltd (EAP). However, some key personnel including the Kyuso Assistant County Commissioner (ACC) and Sub-County Administrator declined to participate in the assessment.

Efforts were made to ensure that women were equally represented in discussions and had the opportunity to express themselves in safe surroundings. The research team was also conscious that “the community” did not always speak with one opinion, and discussions and interviews were held using an all-participative approach to ensure that marginalized community members were also able to voice their opinion and talk about their experiences, and that more powerful community members could not dominate the discussions. Field visits were conducted in Ngaaie Location.
2.5 Data Analysis

Qualitative data was analyzed using content/thematic analysis by help of Atlas Ti software. The study findings were compiled in this report to answer the research questions and propose actionable recommendations.
Chapter Three: Assessment Findings

3.1 Introduction

This section seeks to briefly highlight some demographic dynamics and administrative information of Ngaaie Location, in Mwingi North Sub-County, Kitui County. The segment further presents the assessment findings structured in four focal themes; minerals in Ngaaie; stakeholders and their involvement; and previous studies conducted in the area.

3.2 Kitui County

Kitui County has eight Sub-Counties and is divided into six economic zones based on various economic potentials and resource availability. These zones include (1) Mui Coal Basin, whose main potential is the coal mining and associated coal power generation and livestock farming; (2) Ikutha – Mutomo – Kanziko, whose main potential is mining of limestone, iron ore and other precious stones; (3) Kitui Town and its environs, whose main potential is commercial and financial hub for the surrounding zones; (4) Kwa Vonza – Kanyoonyoo belt, whose potential is also commerce, and education hub and a research and development zone; (5) Mwingi town and its environs, whose potential is mainly commercial and financial center, being the largest town next to the Lamu Port and Lamu-Southern Sudan-Ethiopia Transport (LAPSSET) corridor. It has potential for tourism development also as the town of upper circuit of the county; and (6) Kyuso which has potential in irrigated farming, mining of limestone and other precious stones.

The governance structures include those established by both the National Government and County Government. The National Government through its new coordination structure is organized with the County Commissioner at County level, Deputy County Commissioner (DCC) at the Sub-County level, the Chief at location level, Assistant Chiefs at the sub-location level and village elders/nyumba kumi at the village level. On the other hand County Government structure has the governor at the county level, sub-county administrators at sub-county level, ward administrator and ward representative
at ward level and village administrators at the village level. The county is currently in the process of recruiting village administrators. The Kamba Council of Elders (Atumia ma thome) also exists.

### 3.3 Ngaaie Location

Ngaaie Location in Ngaaie Ward, Kyuso Division, and Kyuso Sub-County hosts a mineral-rich-hill. Ngaaie location covers an area of approximately 897 square kilometers. Ngaaie Location, headed by a Chief, administrative structure consists of three sub-locations namely Ngaaie, Kanghui and Nzalani Sub-Locations each headed Sub-Chief. Ngaaie sub-location has seven villages namely Central, Katiliku, Kang’ong’o, Mbu, Mwalikanzi, Kaithango and Mataani; Nzalani sub-location has four villages namely Munyenze, Ilelambyu, Kasyathya and Matili; and Kanghui sub-location has nine villages namely Kanghui, Kyanguithya, Katuuni, Kyambanwa, Itulu, Kavali, Kavuta, Kanana and Ngomano.
It has a total population of 6,242 with majority females (52.5%) and 1,214 households. The youth take the greatest proportion of the population in the Location. Ngaaie location is characterized by a high rate of unemployment and poverty. Population distribution per village is as indicated in Table below.
Table 1. Population and Household distribution in Ngaaie Location

<table>
<thead>
<tr>
<th>Sublocation</th>
<th>Village</th>
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<td></td>
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<td>Central</td>
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<td>Katiliku</td>
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<td>Kang’ong’o</td>
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<td>Mbui</td>
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<td>Ngomano</td>
<td>361</td>
<td>69</td>
</tr>
<tr>
<td>Total</td>
<td></td>
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<td>1214</td>
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</table>

Source, Office of Ngaaie Location Chief, 2016

Subsistence farming of indigenous crops (sorghum, millet, green grams) and animals rearing (donkeys, cows, goats, sheep, chicken) are the main sources of sustenance. A small proportion of the population is in jua kali business, agribusiness, retail business and formal employment. Ngaaie Location population comprises mainly of Protestants and a few Catholics. There is only one Catholic Church and twenty five other churches in the location that is mainly inhabited by the Akamba people and a few other people from other tribes temporarily there working in schools.

The population is served by one health facility- Ngaaie Dispensary. There are nine public and one Faith based primary schools; one Early Childhood Development Education (ECDE) Center; and one Secondary school. The main sources of household water are seasonal and include Thunguthu River, Kanghui River and Kanita stream. Four Shallow wells and other six boreholes are main sources of water for livestock. The location is also
characterized by poor roads; rare rains and illiteracy as indicated in Kitui County “First County Integrated Development Plan 2013-2017”\(^1\).

A number of community facilities including schools (Ngaaie primary, Kanana ECD, Kalonzo secondary); water dam (Athi); church (Baptist) and road (Kwamwee-Musyoka Mutisya, Kwa Mwenze towards Mwingi East) have been marked to be within the cutline (areas rich in minerals that investors are mainly interested in). This implies that upon protecting the marked region and or commencement of mining activities, the community members would lose access to very vital public facilities, services and resources.

### 3.4 Minerals and where they exist

Ngaaie ward, precisely Ngaaie Location, is endowed with various mineral deposits. Limestone locally known as “Ivia ya simiti” and Klinger deposits are spread within a stretch of 4 Km of which about 75% is in Ngaaie sub-location (within Central, Katiliku and Kang’ong’o villages) and the rest in Kanghui sub-location (Kyanguithya, Kanana and Ngomano villages). One community member (Jospha) tested a mineral sample in a school lab (Kimangao Girls Secondary School) and confirmed it was 98% pure Calcium Carbonate. A prospective study, “Geology of the South Kitui area”, done by Saggerson, E. in October 1957 indicated that Ngaaie is rich in Limestone and Klinger\(^2\).

There was uncertainty on existence of other minerals including Red granite & Green granite that some community members testified having seen however didn’t properly comprehend.

> “Tuko gizani juu ya madini; na kutuelimisha kuhusu madini ingesaidia sana (We are in blackout in relation to minerals; education on minerals would be of paramount help to us)”- Community Member

According to the community, a prospecting company- Athi River Mining Ltd (ARM) did not issue the prospective report detailing the available minerals however a National

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\(^2\) E Saggerson, *Geology of the South Kitui area* ([n.p]: [n.pub.], 1957).
Government representative reported that ARM was comfortable with the undisclosed minerals.

“ARM reported that the limestone was okay”- Chief

These minerals are yet to be extracted though there was prolonged drilling of more than 30 holes, extraction and transportation of more than 5000 tones of the mineral for the period between August 2013 and February 2015 by the prospecting company ARM locally identified as “Muindi” or “Rhino”. The pro-longed prospecting with heavy transportation of minerals raw materials raised red-flags among community members who blocked road used by ARM and called for engagement. On 17th December 2014- the chairman and the Secretary of NFCBO took their written petitions to the chairman National Land Commission (NLC) with copies to the Governor Kitui County, Kenya KNCHR and other government Agencies. The researcher deduces that the community members were not supported by both the National and County Governments in this process.

“ARM had paid Ksh. 100,000 for 1000 tones of stone to Mwingi County Council”- Chief

The “mining” (extrapolated prospecting) process has since halted though Drilling machine and offices used by ARM are still available at the site mineral-rich-hill. ARM is perceived to proceed with its activities in Ngaaie however they didn’t disclose when.

“Muindi (ARM) says it is better he dies than fail to get the Klinger because it is only available in South Africa.”- Community member.

3.5 Stakeholders and their involvement

In the Kenyan extractive sector, the National and County Governments, Private sector players (Prospective Investors) and Community through CLC, are the core stakeholders with varied mandates and interests. This assessment keenly looks at participation of each of the core stakeholders and Civil Society in Ngaaie Ward.
3.5.1 The Kenya National Government

As at the time of the study, the National Government participated in the limestone prospecting activities through Commissioner of Mines and Geology (CMG) and Provincial Administration according to Mining Act 1987 CAP 306). Efforts to obtain ARM license information from the CMG were not fruitful. It remains unclear whether ARM was issued the prospecting license. This is due to the fact that all ARM prospecting rights applications should have been published in the Kenya Gazette. Available records in Kenya Gazette did not include Ngaaie Sub location. According to Kenya Gazette (12th September, 2008), ARM made applications on areas that included Ngomeni and Nguni in one application and Chuka in a different application. Moreover, firms applying for prospecting rights should obtain consent from land owners. ARM did not obtain consent from Ngaaie ward community members. However, according to the Ministry of Mining Cadastre Portal, ARM was granted prospecting license on 2nd February 2010 and license expired on 21st February 2016.

Efforts to verify the validity and legality of the Common Mineral License that should have been issued by DCC of Kyuso District in his Legal capacity under the provisions of the Trust Land Act, Chapter 288 Laws of Kenya as the Licensing Officer of the County Council of Mwingi to ARM were not successful due lack of cooperation from the ACC-Kyuso.

The National Government is represented at the community level (Ngaaie Location) by the National Government Administration officer (NGAO) including Kitui County Commissioner, Kyuso DCC, Kyuso ACC, Ngaaie Chief, three Assistants Chiefs (Ngaaie, Kanghui and Nzalani Sub-Locations) and Village elders. Other locally elected leaders including Mwingi North Member of National Assembly (MNA) (commonly known as Member of Parliament (MP)) - John Munuve should also play vital roles in representing constituents’ interests.

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The DCC and MNA-Mwingi North with support from the Chief and Sub-Chiefs were the main actors from National Government actively involved in the Ngaaie mining process. The DCC and the MNA spearheaded the formation of the Community Liaison Committee (CLC). The formation of the CLC took place from September 2013 and on 7th October 2013 the first thirteen members CLC was established. The DCC in collaboration with the MNA took charge and convened all barazas on formation of CLC and negotiation on compensation.

DCC office was used to “forcefully” push for the ARM interests especially on purchase of the land within “cut-line” - (Area surveyed and marked to be rich in minerals) without regard to community interests. Some of the forceful tactics used included threat to security of persons as observed by KNCHR and death threats from CLC members to those who failed to sell land to ARM. The DCC informed the community members that the Government would re-posses and gazette unsold land in a baraza.

The Chief and Sub-Chiefs worked with specific instructions from the DCC office and hosted ARM representatives within Ngaaie market. However, the Chief and Sub-Chiefs were on 31st July 2014 sidelined from the process, arrested and threatened of being fired by the DCC. The reason behind the Chief’s and Sub-Chiefs’ arrest was alleged to be working with the community members and brokers of an interested Chinese investor who had been introduced by former MNA- Hon. Kalonzo Musyoka.

The area MCA communicated with the Kitui County Commissioner at the time who ordered for their release. This was viewed as a contributing factor to minimal information given to research team by Chief and Sub-Chiefs on the general progress of mining activities within Ngaaie location. The DCC (Mr. Maina) worked closely with ARM until his transfer that was triggered by “community conflict” as reported by one the local government leaders. The Chief’s and Sub-Chiefs’ offices are negatively viewed by some community members (especially those who never signed agreements to sell their

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4 Community members “not willing to sell land” at the “low price” received death threats and warning by area DCC at the time that the Government would re-posses and gazette unsold land in the presence of Mwingi North MP. CLC members like Kimanzi Maluki openly disclosed plans and willingness to kill those against ARM in the presence of D.C.C. On 31st July 2014, D.C.C called a community security meeting that was attended by O.C.P.D; Deputy OCS, A.P commander, DCIO and other security officers.
land to ARM; and looking forward to sell their land at higher prices). The negative perception has incapacitated the Chief and Sub-Chiefs to solve the eminent interest-conflict among community members and re-unite them. Further, the Chief and the Assistants have only been able to record family conflict cases (including siblings not receiving share of land and or compensation; either husband or wife receive compensation and neglect the family) emanating from payments done by ARM but not able to solve any. Other than being negatively perceived by some community members, the Chief and Sub-Chiefs have varied opinions on individual property ownership rights especially among women.

“Wanawake hawana shamba; Mali ni ya mwanaume; Kila kitu ni ya mwanaume; Bibi yangu ni mali yangu” Ngaaie Chief

Currently as reported by the Chief, the Chief and Sub-Chiefs have been instructed by the DCC office to stop and arrest any community member (whether with or without pieces of land) visiting the “Mineral-rich-hill”. The Chief and Sub-Chiefs called the “Mineral-rich-hill” “Mali ya Mwenyewe” and in this case “Property of ARM”.

Village elders were reported to majorly involve themselves with politics and failed in other essential community affairs like community welfare e.g. prospecting/ mining activities and to arbitrate in dispute resolution matters.

The MNA was reported to have involved Nyamu and Nyamu Co. Advocates (a relative) in the process as the ARM Lawyer. ARM picked Kinyua Mwaniki Advocate as community lawyer and adviser without community involvement. According to Land Sale Agreement Addendum (LSAA)(Appendix V) community members were also represented by Wainaina Advocates. Kinyua Mwaniki Advocate worked closely with the CLC and ARM. The Lawyer never engaged the community members in any matters and was leaning towards ARM interests in relation to community compensation for land and re-settlement plan since ARM was the employer. Kinyua Mwaniki Advocate (who is from the Tharaka tribe and not fluent in Kamba), read the LRT/SA (see Appendix I) to the community and translated it to Kikamba. Further, the MNA brought on board his sister to conduct the Environmental Impact Assessment (EIA) whose findings could not
be traced from NEMA, County Government and National Government offices; and community members.

Former MNA (Hon. Kalonzo Musyoka) was against ARM’s “exploitive” buying price of Ksh. 150,000 per acre. Hon. Kalonzo Musyoka held meetings to sensitize the community on pricing and introduce a Chinese investor who would buy land at Ksh. 200,000. The meetings had minimal local support and were poorly attended. The poor attendance was associated to threats from CLC and the DCC that “attendees would not receive their payment from ARM”. Chief and Sub-Chiefs who attended the meeting were arrested. All this was to safeguard ARM’s deal of acquiring the community land.

The National government, especially at the sub county level, has neglected the community concerns on the land issue. There was clear conflict of interest between the roles of National and County Governments in the limestone prospecting within Ngaaie Ward. The County Governor was candidly and disgracefully dismissed by the area MNA from indulging with community members on the land issues. ARM managed to identify and work with specific national and county offices in the process to acquire land cheaply; and neglect community concerns. Leaders like MCA who did not buy ARM’s proposal were excluded from the process.

### 3.5.2 County Government

According to the Mining Act 1987 the Council (defunct) was mandated to issue prospecting/ mining license under authority from the District Commissioner. According to the LRT/SA signed in July 2015, ARM purports to have been issued with mining license for the exploration of limestone deposits in Ngaaie Location in 2007 by County Council of Mwingi. The researcher construes that ARM did not have a license to proceed with the prospecting activities in Ngaaie. This is due to the fact that an investigation conducted by NFCBO in May 2015 on validity of ARM license to carry out mining in Ngaaie indicated two issues. First, a special license to prospect and explore all minerals had been granted to M/s Sumamuto Enterprises Ltd. This license was subsequently assigned to M/s Sukam Development Company Ltd and would expire in February 2015. Second, it appeared ARM may have been granted a similar license or assigned the
same license. This is because the ARM license was missing but there were documents indicating that they were prospecting and mining limestone within Ngaaie area (See Appendix II).

The County Government is composed of leaders who are voted for and who should lead and represent the interests of the electorates. The County Governments is currently a key stakeholder on issues of prospecting and mining, and the exploitation and use of other natural resources in the county especially through management of trust of land within the county and issuance of prospecting/ mining business license.

According to an agreement on land rights transfer drawn by Nyamu & Nyamu Co. Advocates and signed between ARM, KCG and Ngaaie community through CLC on 10th-17th July, 2015, KCG committed to facilitate the process of obtaining a title deed or lease over the land; issue necessary licenses and permits for the project; and cooperate with ARM in meeting any statutory requirement from the National Government.

KCG was represented in the mining activities taking place in Ngaaie Ward by the County Minister of Environment, Energy and Mineral Investment Development (CMEEMID) and Member of County Assembly (MCA)-Kyuso who were members of the CLC. CMEEMID initially supported the community members by lobbying for title deeds that would be the basis for commendable, fair and transparent compensation. Moreover, CMEEMID together with some community members spearheaded an initiative to obtain a copy of EIA report. For no well established reasons, CMEEMID went silent on the community-well-being initiatives and halted community contact. The MCA held a baraza in Ngaaie market in January 2014 and informed community members (in-attendance) of a study conducted in October 1957 by colonialists that established presence of minerals (white marble) in the mineral-rich-hill. The MCA advised community members to exercise patience, acquire title deeds and work with the best bidder. MCA made community empowerment initiatives including mobilizing community for women empowerment through formation of a Community Based organization; and engaging lawyers to assist community members get fair compensation for their land and assets. The MCA was sidelined from ARM/ CLC
meetings on proposing fair compensation and resettlement plan for the community members.

The County Government conducted a survey of the mineral-rich-hill in August 2014 after community members expressed dissatisfaction with survey by an independent ARM Surveyor. The process was not participatory and the KCG Surveyor is purported to have worked with the independent surveyor hired by ARM. The survey report from the KCG including Title deeds has not yet been received by the community members.

The Governor KCG advised the community on clear consultation before land transactions were effected however this was met with resistance from the Mwingi North MNA on grounds that the Governor had no land in the area. CLC came out to defend the MNA and advised ARM to continue with payments “siasa baadaye” (politics on payment would come later).

In 2014, KCG developed Kitui County (Ministry of Environment, Energy and Mineral Investment Development- Guidelines for the Establishment of Liaison Committees for Mineral and other Natural Resources) to champion for community interests however the implementation is yet to be effected to date. The guidelines were identified to have are yet to inform the formation of liaison committee in Ngaie. There is need to review the Guidelines in line with the Mining Act 2016.

The guidelines provide the County Government officials including CMEEMID and Sub-County administrator to spearhead the formation of the CLC. The processes in formation include mobilize communities and hold consultative meetings for effective participation in governance issues and transparent elections. The County should budget and facilitate its officials to sensitise the community on the mining rights and involve them in mining processes and formation of an inclusive CLC. The County should further train CLC on educating/sensitizing the community on their rights with respect to prospecting and mining; and negotiating with investors on the rights and benefits to accrue to the community.

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3.5.2.1 Environmental issues

There is merit to carry out a Strategic Environment Assessment (SEA) and Environmental Impact Assessment (EIA). These findings are critical in decision making especially on displacement and resettlement of displaced community members.

Two parties were reported to have conducted the EIA independently- An individual Martha Mati (a secondary school teacher) and NEMA.

Martha is reported to have conducted the study in unspecified date. According to ARM in the LRT/SA signed between 10th and 17th July 2015, the EIA was still in progress then. Efforts to obtain a copy of the EIA report from ARM were fruitless.

NEMA reported to have conducted EIA in 2012 in favor of KCG who owned the Ngaaie mineral rich hill and who had licensed ARM. The business license was reported to have been issued in 2012 and would be valid for two years. According to the Chief, NEMA worked closely with ARM who brought them to the site and verified the mineral rich area. Efforts to obtain a copy of the EIA report from NEMA were fruitless. Kitui-NEMA representative indicated to have seen the report but couldn’t trace it and if found, the findings would be invalid.

“The EIA report cannot be traced and if found the recommendations are not viable because they are aged more than two years. As we speak, the license is invalid. In Ngaaie the land was discovered after the prospecting has begun. The piece of land assessed belonged to the County Government of Kitui and not any individual person. It is therefore now owned by the mining company (ARM).” - NEMA representative in Kitui County

Study respondents including community members, KCG and National government representatives interviewed indicated to have never seen either of the reports. Inconsistent information on EIA process and unavailable EIA reports may lead to conclusion that EIA was not done in a professional manner. Moreover, community
members reported that no risk assessment was carried out and no agreements aimed at minimizing disturbances and damages were done.

### 3.5.3 Community

The community is set to benefit from any extractive activities implemented within their ecosystem. The community should be educated and made aware on matters pertaining to activities of prospecting/mining; negotiate on mutually benefiting terms; make proposals on activities required as part of Community Social Responsibility (CSR) by the investor.

According to the Kitui guidelines (2014) on formation of CLC, community involvement in the mining process is mainly through the CLC with constant consultation to safeguard the community members' interests.

#### 3.5.3.1 Community Liaison Committee

The formation of CLC was spearheaded by the DCC in collaboration with Mwingi North MNA in September – October, 2013. No known legal instrument was used to guide the formation of the committee. As a requirement, community members had to possess piece of land on the mineral-rich-hill in order to be part of the CLC and attend barazas on progress of prospecting activities in Ngaaie.

"Watu wa Mlima peke yake (Strictly only land owners) should attend barazas" - DCC

According to the community members, the process of CLC formation was not transparent. CLC was reported as not representative of the community; and to have neglected community members concerns regarding compensation and resettlement plan.
3.5.3.2 Community awareness

When the prospecting activities began in Ngaaie, the community had never been sensitized on prospecting/mining protocols and their rights in the mining process.

“At the time when Athi River Mining came to the ground, we were not aware of the mining process”- Community Member

“Muindi (ARM) came through in Liaison committee and we were forced to follow what the committee proposed”- Community Member

“Signing of agreement forms with ARM had mixed and different reactions due to community illiteracy”- Chief

Civic education was first introduced among the community members by KNCHR and her referral partners through a public forum in Ngaaie market in 2015. The forum was held after prospecting activities began and there was clear conflict on land compensation between community “members working with the CLC” and “those against CLC. The KNCHR forum covered issues on knowing their rights, responsibilities, how to claim their rights and different mechanisms to use in order to report any human rights violation.

Currently, community members have been sensitized and educated on land ownership rights and; compensation, displacement processes and mining procedures by civil society organizations including KNCHR and Action Aid/CHRCE. As noted by KNCHR, there is still need to disseminate the Mining Act 2016 and clarify on human rights agenda in the extractive sector with particular focus on empowering the community to make right decisions while also promoting development.

The sensitization process has not been effective due to the conflict among community members and continued displeasure for the training by CLC. Since civic education was rolled out in Ngaaie in 2015, CLC members campaigned door-to-door against such
trainings and lured community members not to attend the trainings otherwise they risked not being paid “for the land they had sold”. A CLC supporter (who had been fully compensated) was used by ARM to distort community meetings.

“ARM used a well known resident to distort community meetings because he was already paid his money.”- Deacon, Independent Faith Baptist Church

Lack of civic education among community members on natural resources and extractives, constitutionalism, governance, human rights and responsibilities among other related activities made it easy for ARM to drive its agenda.

### 3.5.3.3 Community involvement

There had been minimal community engagement in Ngaaie prospecting activities. The LRT/SA signed 10th-17th July, 2015, LSAA, and AC indicated that all matters pertaining to the project would only be executed with engagement of the – CLC (representing community); KCG and ARM. The CLC was expected to represent community interests. According to community members, formation of the CLC was marred with a lot of irregularities; was “solemnly” constituted to fight for the success of ARM; openly neglected community members’ land concerns and contributed to rise of a conflict.

CLC began working with “co-operating” community members who were within the cut-line. Interests and concerns of community members (not co-operating with CLC) were neglected by the CLC. The “non co-operating members” through the KCG proposed for dissolution of the CLC. Efforts to dissolve the CLC were blocked by “co-operating community members” who recommended retention of the committee and addition of women. This broadened the conflict and “hatred” between the “co-operating” and “non-co-operating” community members.

During the prospecting period, CLC together with ARM and CMEEMID continuously used baraza held within Ngaaie Market to update community members (within cut-line and willing to sell) mostly on how compensation and land sale agreement would be effected. These meetings were however poorly attended due to the then growing
conflict among “willing sellers” and “non-willing sellers” and worsening attitude towards CLC.

Community members offered temporary cheap labour (stone-crashing); artisan jobs and supply of water to ARM during the prospecting period. Community members were blocked from accessing the sites during the prospecting period. However, CLC members were allowed into the sites.

3.5.3.4 Land ownership

Land ownership in Ngaaie is widely communal. Community members have no title deeds to claim ownership of their land and effectively seek compensation. The MCA advocated for demarcation and issuance of title deeds through barazas and the County Land Ministry. ARM in the LRT/SA and AC acknowledge the fact that the community members have capacity and authority to transfer ownership rights on the basis of which they have received purchase price. Community members committed to transfer their land ownership rights by signing the LRT/SA in 10th-17th July 2015 even before the adjudication process was completed. Persons authorized to execute Agreement for Sale on behalf of family members were required to sign confirmation letter at LAOK authorizing transfer of absolute land interest to ARM; declared that they would have no further claim over the plot against ARM; and that they would ensure ARM’s proprietary interest in the land is legitimized through issue of title by government of Kenya.

ARM through the LRT/SA proposed that it was critical for ARM to acquire a consolidated title deed in respect of the Ngaaie Hill plots in order to raise the necessary capital funding for the cement plant. However, majority community members objected the idea citing existing graves as one of the reasons for individual ownership. The community through NFCBO sent a petition letter to the Minister-Ministry of Lands, Housing and Urban Development in September 2015 through the Office of the Ombudsman (See Appendix III). The DCC on 30th September 2015 launched land adjudication objection of a period of 60 days. On 27th November 2015, ARM through its Ngaaie agent went to the land office in Kyuso and launched objection on about 270
individual/family land parcel numbers within the cutline as earlier allocated by the private surveyor. The petition is still pending ruling at the LAOK.

“ARM did the same in Kanziku. Tricked people to sign documents upon payment of first installment, acquired a single title deed, fenced the land and failed to complete the payments. Community members have no documents to claim for the land and payment” - MCA

ARM engaged a private surveyor in March 2014 who marked the main areas rich in minerals (cutline) in absentia of community members/ household representatives. The surveyor issued community members with “faulty” parcel numbers i.e. land size reading that did not match exact number of acres. The community members were not satisfied with the survey process and insisted that another independent surveyor be brought. As a result, some conflict emerged and the community members began to avoid barazas organized by CLC. KCG brought its surveyor in August 2014. KCG surveyor did not engage the community in the process and was alleged to have been accompanied by the independent surveyor hired by ARM. Leaders including MCA have not been able to raise petition on the compromised survey due to lack of evidence. The LRT/SA indicated that the adjudication process of the land was partially done; identification numbers were already issued; and registration process pending. By signing the LRT/SA and AC the community committed to surrender parcels of the ancestral land they occupy. ARM would then offer compensation after vendors had signed the confirmation letter of transfer of interest at LAOK having overlooked the ‘disputed’ particulars in adjudication record. Upon signing the confirmation letter, the vendors authorized LAOK to transfer land interests in the parcel number to ARM, and declared that they would have no further claim over the plot against ARM; and they would ensure ARM’s proprietary interest in the land is legitimized through issue of title by government of Kenya; and that the land rights would be saved under tripartite agreement between ARM, CLC and KCG.
Both governments failed to supervise an independent survey. Community members are faced with uncertainty on the disputed adjudication records. There is an aspect of hopelessness among some of the community members who signed LRT/SA and have not been fully paid; and the fact that the land is already termed as ARM’s property and protected by the DCC office through the Chief’s office.

“Mlima ina mwenyewe” (The mineral rich hill has its owner) - Chief

Lack of community understanding of land rights and prospecting/ mining processes was presumed to be rampant in the Ngaaie community.

3.5.3.5 Compensation

Negotiation on compensation of land began around November 2013. Negotiation process was carried out by ARM and CLC headed by DCC. ARM through CLC made lofty promises that community members perceived would develop the area and change households’ livelihood. CLC was used to convince the community members to sell land to ARM irrespective of pending case in Kyuso lands office. Schools within cut-line were no longer considered to be within the cutline after the schools’ administrations raised their concern on compensation. According to the school authorities, the schools were removed as their compensation process would involve more logistics and would create “unnecessary” attention that may attract more national authority like the Ministry of education.

In June 2014 the D.C.C held several meetings and advised Ngaaie community members to sell the land to the ARM immediately before the government could reclaim and gazette the land. In July 2014, the DCC, CLC and ARM representatives informed the community members at Ngaaie market that the finally agreed compensation price was Ksh. 150,000 per acre. A voting process was conducted to assess community support for the CLC/ARM agreed price. The DCC headed the voting process where community members in support of the price were required to raise hands. Some community members claimed that the amount was low and had no base. The claims were dismissed by the DCC and CLC chairman as inconsequential.
Within July 2014, the DCC and CLC called for another meeting where the group that was against the agreed price was issued with threats of being burnt to ashes by some of CLC members. On 31st July 2014, D.C.C called a community security meeting that was attended by O.C.P.D; Deputy OCS, A.P commander, DCIO and other security officers. The agenda of the meeting was not clearly understood. In the meeting, some CLC members are alleged to have openly disclosed plans and willingness to kill those against ARM however it was considered a non-issue.

It was alleged that CLC members were paid Ksh. 1,000 daily by ARM as an inducement to carryout door-to-door campaign to convince community members to accept agreed price. It was also alleged that ARM promised CLC members Ksh. 100,000 if community members agreed to the proposed compensation rate.

ARM in conjunction with CLC developed two agreement documents and addendums that were signed by community members at different times.

**First agreement**

The first agreement was signed in July – August 2014. The agreement is alleged to contain information on down payment of Ksh. 100,000 to willing land sellers to curb hunger (kuthaa nzaa) as indicated in LSAA (Appendix V). Efforts to obtain a copy of the agreement from community members and ARM were fruitless. This was because community members had been promised by ARM that they would get their copies later. ARM legal officer reported that all documents pertaining Ngaaie prospecting/ mining activities would not be availed as there were pending issues and the documents were sensitive. The researcher presumes that the first agreement contained information on land transaction, land size and total amount payable to the land owner. This is because ARM representatives orally promised community members who had signed
the agreement that the remaining amount (total land value less down payment) would be paid in installments and cleared by 30/08/2015. To facilitate the compensation transactions, the land sellers were required to open bank accounts where payments would be deposited/wired. ARM initially invited Kenya Commercial Bank (KCB) and later Equity Bank; Cooperative Bank of Kenya; and Post Bank to assist “land owners” open bank accounts.

ARM started compensation down-payments in September 2014. There were a lot of irregularities in executing the payments. Some of the community members opened bank accounts and had not signed the agreement with ARM but found money deposited in their accounts. Moreover, some community members only received down payment and some received their total amount (full compensation). ARM through the National Government immediately stopped access to the mineral-rich-hill upon processing down payment to some of the land owners. Pending payments were only processed after a land owner individually raised “serious” demands to CLC. CLC members identified individual land owners who raised alarm on delayed agreement copies and delayed payments. Funds would then be transferred to the individuals' accounts secretly.

Twelve persons inclusive of CLC members received their full compensation in September and November 2015. Compensation processed did not cover crops, developments (house sizes) and trees that had been evaluated on 5th-10th July 2015. According to AC, property valuation was conducted by Ultimate Valuers Ltd appointed jointly by ARM, CLC and KCG on 5th-10th July 2015 to form basis for compensation against crops, developments and trees to each land owner. Valuation was conducted among households that had signed the LSA. The evaluation report was never produced and was not accessible during this study. The compensation balance would be executed using bank transfer upon confirmation of transfer of land interests through signing of AC and confirmation letter at LAOK authorizing transfer of absolute land interest to ARM.

Interviewed community members reported that they had not been issued with transaction documents e.g. receipts by ARM as proof of compensation done.
The compensation procedure was undefined and sparked off doubt and resentment among those who were not paid. This led to a series of meetings by the “unpaid” and culminated to a meeting that was attended by the Mwingi North MNA on 10th October 2015. The objectives of the meeting were to express dissatisfaction with the ARM compensation process and coordination between ARM and CLC; upward revision of compensation rate per acre; and mediate between CLC members already compensated and those still pending. The meeting resolved that all complaints should be hand written and handed to the MNA, DCC and the Governor Kitui County.

According to LRT/SA and AC the community members would undertake to give vacant possession of the land in 180 days upon completion of compensation; failure to which ARM would be at liberty to evict the vendors. However, compensated community members had not vacated from the land as at the time of this study. Some compensated community members had purchased land within; constructed houses; and started businesses.

**Second agreement**

The second agreement document was on land rights transfer (see Appendix I) between ARM, KCG and Ngaaie community through CLC officials (Chairman- Eng. Paul Musyimi Nzengu; Vice Chairman- Joseph Mutambuki Muthisya; and Secretary- Jacob Wambua Mwova). The LRT/SA was drawn by Nyamu & Nyamu Co. Advocate and signed between 10th-17th July 2015. The LRT/SA was brought to Ngaaie by CMEEMID accompanied by ARM Officials. The community members were not educated on the LRT/SA terms that were alleged to have been negotiated on their behalf. Most of the community members signed the LRT/SA. An agent from ARM had promised community members that they would produce copies of signed LRT/SA documents. Copies of LRT/SA had not been given to community members as at the time of this study.

“Community is illiterate but agreement was made in English. The Tharaka man (Community lawyer brought on board by ARM) translated the document into Kikamba. I personally tried to raise alarm with other community members since
we couldn’t understand but the Liaison Committee members made noise to dismiss our concern”- Church Deacon

According to the LRT/SA, compensation price negotiated had been increased so that vendors would have enough funds to procure alternate land for occupation and to settle with dependants. Moreover, CLC would serve as the community umbrella in settling all land disputes between individual members and within families.

The agreement highlighted a number of compensation aspects that the researcher has classified as below:

**Individual family**
- Provide transport to all families relocating from the land sold to ARM subject to assessment of the same by ARM as a result of the project. ARM will provide vehicles at their own expense to ferry the affected vendors to their alternate domicile
- Provide building material (iron sheets and cement) or an equivalent of Ksh. 50,000 to all families relocating as a result of the project
- Compensate all developments on the land to be acquired upon valuation undertaken by a valuer identified by ARM

**Ngaaie community**
- Construction of a cement firm in Ngaaie in five years upon acquisition to single title deed of the Ngaaie mineral rich hill
- Set aside land for market place, girl’s secondary school, play ground and health centre in consultation with County Government
- ARM shall facilitate the establishment and registration of a Trust Fund to be called Ngaaie Community Trust Fund (NCTF) upon obtaining the title deed. NCTF will be composed of members within cutline and regulated by Trust Deed developed by ARM. ARM shall annually contribute five million shillings until factory is built after which the contribution will increase to ten million shillings for thirty years as long as company continues to operate. These annual contributions will be utilized for the benefit of the community.
The AC only highlighted that the vendor (land owner) would be the de jure beneficiary representing the family members in the Trust Fund.

The LRT/SA also provided a dispute resolution process for its three main signatories. All disputes between parties related to the agreement would be referred to arbitration and no party would initiate court proceedings until they have first exhausted the remedy of arbitration.

The dispute resolution process was vague on representation of the three parties. The LRT/SA stated that “In the event that they do not agree on an arbitrator, each one of them shall appoint their own arbitrator within a limit of thirty days and the two arbitrators so appointed shall appoint one arbitrator and the three arbitrators shall hear and determine the matter.”

Some community members considered the Ksh. 150,000 per acre compensation as inadequate or exploitive and declined to sign the LRT/SA. Community members “not willing to sell land” at the “low price” were warned by DCC in the presence of Mwingi North MNA that the Government would re-posses and gazette unsold land. Some of the community members allege to have received death threats from CLC members. The community members alleged to have reported the threats to Police station; however, the police officers failed to record the concerns in the Occurrence Book and dismissed the complainants. Some of the land owners who declined to sign the agreement were alleged to have secretly signed the compensation documents from the ARM offices in Nairobi. Some of the nonconforming community members have been secretly (in non-disclosed meetings as reported by MCA) offered larger compensation to the tune Ksh.450, 000 per acre but have declined. This implied that ARM is determined to own the peace of land using different methods at different costs.

The compensation and resettlement procedures are not clear to all community members and are not documented. Both National and County Government representatives indicated that issues on resettlement would be of agenda after compensation was completed.
3.5.3.6 Women involvement in compensation

Women were considered not to own land in the Ngaaie community. Women were rarely involved in the negotiations and conversations regarding the mining sector in Ngaaie. MCA advocated for women to accompany husbands in all mining activities and processes. CLC is said to have insisted that land owners to involve their spouses “wives” in the compensation process (knowing the total amount, how and when the payment would be effected) and signing agreement documents. The process of including spouses in the process was not monitored or fully implemented. Some men never involved their wives in the process.

“You would pick anyone to sign for you in your spouse’s slot provided they have ID card”- Community Member (woman)

Generally, women have suffered since they were sidelined from the process of negotiation and compensation.

“Women have suffered and witnessed money being wasted”- area Member of County Assembly (MCA)

Women mobilized by MCA came together to get educated and push for their rights. They formed the Ngaaie Focus Community Based Organization (NFCBO) and called for men to join the group as it didn’t get community support and it would easily collapse since women had no power in the community.

3.5.3.7 Community conflict

The Ngaaie community strongly expected to benefit from the limestone mining. However, their expectation was marred with uncertainty and hopelessness due to community and family conflicts; family breakups; property they deem lost as a result of selling other than leasing land; insecurity issues; and affected health implication.

“If Caritas came early before investors, they would have been of more and better help” – Community member
There was deep rooted conflict among community members. The issue behind the conflict was mainly the compensation process. The ARM/CLC agreed compensation price of Ksh. 150,000 per acre led to emergence of two rival teams- “team in agreement with the price inclusive of CLC members (CLC/supporters)” and “team not in agreement” who were about 20%.

“I was isolated by CLC and CLC supporters who are my neighbours and relatives because I refused the money”- Independent Presbyterian Church Reverent

Team not in agreement with the agreed price did not sign the agreement documents and became part of the NFCBO. Some of the land owners who had signed the agreement documents and had not been paid also joined NFCBO. NFCBO had been formed in October 2014 with the aim of demanding for the rights of women.

Community sensitization and civic education on land rights by Action Aid/ CHRCE/ National Land Commission (NLC) was believed to have intensified the conflict. It was alleged that “CLC/supporters” were made by CLC to believe that NFCBO members were agents for other interested investors and were being trained to fight against compensation from ARM and development in the area. Community members shifting sides from either of the two groups were either viewed as betrayers or spies. CLC/supporters supported the idea that the civic education was of no benefit and that ARM was already offering them financial benefit which was more essential in their context. They further believed that no other investor can purchase the land since it belongs to ARM.

“Kavaa kutwawa ni muundu ume wene ena kindu kiukutethya onetha ni kinini vandu va kwithukiiasya andu me ukusomethya yiule wa aume angi me mbesa na kukwatha syindu nene weteetele ukanoa (It is better to get married to the man you see is of benefit to you and has little money, than listen to people to educate you on other rich men with lofty promises that you are tired of waiting for)”- CLC member
CLC is alleged to have advised land owners to share land with siblings (those with National Identity Cards). Some of the land owners shared land to siblings and indicated on the agreement documents (LSAA) so that payments would be made in the siblings’ accounts. Family conflicts were reported to emerge in households where land owners did not share land to siblings. According to the Chief, some family land conflicts have been reported to his office and others are still pending in court.

There was no clear conflict resolution process to restore community cohesion and peace. According to the LRT/SA, ARM and KCG expected CLC to ensure all land disputes between individual members and within families are settled. This was not achievable as CLC was partisan to the conflict and could not amicably settle the conflict.

3.5.3.8 Gender specific dimensions

In Ngaaie Ward, men were the family heads and core decision makers. According to the Chief and community members, women and youth were rarely involved in decision making in the community. Most villages were headed by men irrespective of women being the majority. However, women were still considered in some of the leadership positions like one sub-chief and heads of Nyumba Kumi groups as observed during data collection. Most families were nuclear, headed by the man. The man was mostly the central decision maker with control over all the family property. Women were not involved in the land inheritance process and majority of them in the area only inherited land from spouses and not their parents as reported by women and Chief. The Ngaaie community perceives that women have no right to own land.

“İveti siyie nthi” (Women have no land) - Community Member

“According to Kamba culture, Mali ni ya mwanaume (property belongs to man)”- Chief
In very few occasions, women and siblings were reported to have been beneficiaries of payments made by ARM. Women in charge of women headed household signed the agreements.

According to the Chief, family conflicts on women’ and siblings’ share of payments done by ARM were not addressed due to the community conflict that existed and lack of clear understanding of property rights. Men insisted that all property belonged to them and they had control.

“Wanawake hawana shamba; Mali ni ya mwanaume; Kila kitu ni ya mwanaume; Bibi yangu ni mali yangu” Ngaaie Chief

Women within cutline expressed more fear and lack of peace due to lack of clarity on environmental management; compensation and resettlement; and also increased probability of family break ups compared to those without.

“Mbesa syooka aume mayiwanaa kana kwithukiisya iveti syoo”(Coming of money makes husbands not listen to their wives and create diversity between them”- Woman

Some of the fears included failed family reproduction; increased sexual immorality; children falling sick as a result of exposure to the mining environment when mining begins in Ngaaie. Moreover, women indicated their concern on safety of water and high illiteracy of future generation due to possible underage employment. However, women were optimistic on employment brought about and were prepared to be empowered and fight as a team for the community well being.

Lack of government and community support for women property ownership rights and decision making are some of major predicament for women empowerment in the region.
3.5.4 Private sector players

Private sector player refers to prospective investors interested in prospecting and mining activities in Ngaaie Ward. According to the Mining Act 1987 Cap 306 all prospective investors obtain prospecting rights from the Commissioner of Mines and Geology; obtain single business permit from County Council; implement Environmental and Social Impacts Assessment recommendations; report back to government; carry out Community Social Responsibility (CSR); undertake management of the environment after prospecting/mining and; minimize and remedy disturbances and damages in area occasioned by their activities in prospecting/mining. ARM was the only prospective investor exercising the prospecting rights in Ngaaie Ward.

3.5.4.1 Athi River Mining Ltd (ARM)

The only prospecting private sector player in Ngaaie was ARM locally referred to as “Muindi” or “Rhino”. ARM is a cement, fertilizers, quicklime, hydrated lime, sodium silicate and other industrial minerals manufacturing firm founded in 1974 headquartered in Nairobi.

ARM officially arrived at Ngaaie in August 2013 and was introduced by the DCC to the Ngaaie community. The DCC informed people that ARM had come to carry out mineral prospecting. In a week, ARM had their machinery working on the western side of the mineral rich hill. ARM officials severally met the CLC that had been formed in September 2013. In the meetings, it was deliberated that ARM would build eight classrooms estimated at a cost of 1.2 million each as CSR; start drilling while at the same time gathering the stones (Limestone) on the surface and to carry 1000 tones of the limestone as “samples”. ARM offered CLC tour to ARM-Kaloleni on October 2014. According to the MCA, the trip was meant to make the team see what kind of development awaited Ngaaie if a company was started there. The essence and value of the tour was never communicated to the community members. According to area MCA, the agenda discussed during the tour was not for the benefit of the community. CLC members including MCA with different opinions from those of ARM on community compensation and resettlement plan were sidelined in pre-engagements. ARM carried
out CSR that involved construction of three classrooms between January 2014 and May 2014 in Kaithango and five classrooms in Kianguithya Primary schools which were not fully completed.

ARM was yet to begin mining though there was prolonged drilling of more than 30 holes within a stretch of four kilometers, extraction and transportation of approximated more than 5,000 tones of the mineral between August 2013 and February 2015. The prolonged prospecting with heavy transportation of minerals raw materials was halted after community members raised red-flags and called for engagement with ARM. Community members blocked the road used by ARM to the mineral-rich-hill in 2014.

ARM engaged a private surveyor in March 2014 who marked the main areas rich in minerals and of interest to ARM. ARM filed a case to have one title deed after the survey which got community resistance through petition letter in September 2015. On 27th November 2015, ARM through its agent in Ngaaie went to the land office in Kyuso and launched objection on about 270 individual/family land parcel numbers within the cutline as earlier allocated by the private surveyor. The ruling is still pending. However, ARM proceeded and developed an addendum for the LSA with a condition that for vendors to be fully compensated, they had to agree with the ‘disputed’ particulars in adjudication record held by the LAOK; sign AC and confirmation letter at LAOK authorizing transfer of absolute land interest to ARM.

ARM was alleged to have contracted Mwingi North MNA under unknown circumstances and paid two million for EIA.

ARM did not undertake to manage the environment after prospecting. Moreover, ARM did not remedy disturbances caused to community members in Ngaaie Ward area occasioned by their activities in the prolonged prospecting as required in Mining Act Revised Edition 2012 (1987).

ARM legal officer reported that ARM would still undertake to mining upon completion of pending issues, especially issue on single title deed. The ARM was still interested in
Ngaaie mineral rich hill since the hill was guarded by the Chief and there were structures and machines that were also guarded (see Figures below).

ARM had managed to roll out its activities in Ngaaie and initiated procedures to cheaply purchase the community land contrary to the recommended leasing of land as proposed by the county government according to the Director of Ministry of Environment, Energy and Mineral Investment Development. Poverty and lack of civic awareness among community members increased the odds of the community being easily preyed.

3.5.4.2 Other interested parties

It was alleged that there was an interested investor locally termed as “Chinese” introduced to Ngaaie by Hon. Kalonzo Musyoka (former MNA). The Chinese worked closely with the Mwingi Central MNA- Joe Mutambu and had promised to purchase community land at Ksh. 200,000/acre higher than the Ksh. 150,000/acre bid by ARM. The Chinese received resistance from the CLC and DCC. The Chinese investor has since not engaged in any further negotiation activities in Ngaaie Ward. Other interested investor who visited Ngaaie Ward was Bamburi Cement Ltd (BCL). BCL only visited the hill and there were no activities initiated. The Chinese investor and BCL did not have prospecting rights.
3.5.5 **Civil Society organizations (CSO)**

There was no presence of CSOs in Ngaaie Ward until there emerged conflict between community members in 2015.

3.5.5.1 **Ngaaie Focus Community Based Organization (NFCBO)**

NFCBO was formed in October 2014 by thirty community members who were not willing to sell their land to ARM. Community members who signed the ARM agreements and were not paid also joined NFCBO. At the time of conducting this study, NFCBO was alleged to have grown to over three hundred members. The main reason behind the fast growth was the growing conflict and community enlightenment through “civic education”.

NFCBO mandate was to foster development in the area and conflict resolution through mediation as well as fight social injustices and for the rights of women and land owners in the area. NFCBO was funded by the community members and business men in the community. NFCBO had been educating and creating civic awareness about mining, rights, community health in regard to mining process and strengthening family relationships.

Since its formation, members of NFCBO held several seminars, workshops with officials of KNCHR and CHRCE at Ngaaie, Mwingi and other parts of the county since November 2014.

However, NFCBO had not been able to solve the conflicts due to increased anti-civic education campaign by CLC members and supporters. The anti-civic education campaign led to members' withdrawal from NFCBO and scared away interested community members from joining.

3.5.5.2 **Kenya National Commission on Human Rights (KNCHR) and others**

The KNCHR had been working in Ngaaie to ensure realization of the rights of the community members in the wake of mining activities since financial year (FY) 2014.
KNCHR conducted fact finding missions between FY2014 and FY2015. KNCHR audited alleged violations of human rights in limestone exploration activities by ARM in Ngaaie area. KNCHR identified land rights violations as a result of skewed land adjudication processes; lack of public participation in the pre and post prospective mining processes that led to division between investor, government and community; abuse of public office to influence decisions that seemed to take away community power to decide; and lack of transparency by the CLC that resulted to strife and division among the community members. KNCHR came to Ngaaie ground on 03/06/2015 to intervene on the growing community conflict that led to chaos; and educate them on land issues and slightly on the process of mining and human rights. Conflict resolution and civic education on rights had been recommended by Ombudsman in a study conducted on behalf of NLC.

On 22nd June 2015, KNCHR conducted a legal aid forum in Ngaaie market supported by other humanitarian organizations including: Transparency International (Kenya), Witness Protection Agency, Independent Medico-Legal Unit, Federation of Women Lawyers (FIDA)- Kenya, Advocates Complaints commission, Probation and Aftercare services, international Justice Mission, Water Services Regulatory Board, Judiciary Ombudsperson, retirement benefits Authority, Nairobi City Water and Sewerage Company, Commission on Administrative Justice, National Police Service – Internal Affairs Unit, Independent Policing Oversight Authority, Office of the Director of Public Prosecutions, Ethics and Anti-Corruption Commission, East Africa Centre for Law and Justice. The activities addressed had helped to build the capacity of both rights holders and duty bearers. Around 500 people in attendance from Ngaaie and its environs were enlightened on knowing their rights, their responsibilities, how to claim their rights and different mechanisms to use in order to report any human rights violations.

After the KNCHR training, CLC supporters who attended were crowned insulting names and advised not to attend such trainings by fellow CLC supporters. The NLC reported to have deployed task force to Ngaaie in February 2015 to educate the community.

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members on land rights; leasing land and compensation negotiated by government. The NLC team met resistance from CLC and CLC supporters. NLC withdrew their activities as confirmed by the MCA. KNCHR had ongoing partnership with key CSOs on the ground (CHRECE and Action AID) as well as KCG in order to ensure that the policy and guidelines put in place addressed the needs of all stakeholders by adhering to business and human rights principles.

KNCHR indicated that the Mining Act 2016 addressed the policy gap and recommended need for coordination among CSOs and government offices in disseminating the Mining Act 2016 to avoid duplication. Moreover, KNCHR proposed use of experts like geologists to explain to the community on mining processes.

3.5.5.3 Action Aid

Action Aid partnered with Centre for Human Rights and Civic Education (CHRCE) in their activities in Ngaaie Ward from 2014. The partnership had seen Action Aid offer financial assistance to CHRCE whose main agenda was carry out women empowerment and fight for land rights in Ngaaie.

3.5.5.4 Centre for Human Rights and Civic Education (CHRCE)

CHRCE had been working for four years with Action Aid to empower women; involve them in mining processes and fight for land rights. CHRCE opted to carry out community mobilization to sensitize the community about the Mining Act (which is now revised); better compensation terms; good migration/ resettlement processes, handling of future generations; and community empowerment against oppression.

CHRCE had trained mainly the NFCBO members on land ownership and title deeds. CHRCE was in the process of reviewing its strategic focus in Ngaaie having made several achievements including getting the government to agree for demarcation; staged an appeal with the CMEEMID; and issuance of land parcels to community members. To guide in development of the strategic focus in Ngaaie, CHRCE intended
to carry out research on the community’s level of information and what they had gained or lost from the prospecting activities in Ngaaiie.

3.5.6 Faith community

Caritas Kitui is the only Faith Based Organization (FBO) that had shown interest in the impacts of prospecting/ mining activities on the community within the county and in particular Ngaaiie Ward by carrying out this study.

Some of the local Churches were engaged through inviting community members to training by Action Aid/CHRCE. One of the major challenges to involvement of different churches (Independent Faith Baptist Church and Independent Presbyterian Church) in the limestone prospecting activities in the region was existence of non-believers and the tension in the community.

3.5.6.1 Caritas Kitui

Caritas Kitui had shown interest in contextual analysis of the impacts of the limestone prospecting in Ngaaiie Ward, Kitui County with an aim of empowering the community. Caritas Kitui in its other interventions had been carrying out projects that provided beneficiaries with agricultural skills; farm inputs; and cash for assets for livelihood sustenance. Previously Caritas Kitui hadn’t indulged in any activities related to limestone prospecting in Ngaaiie.
3.5.7 Studies conducted in the area

- ARM is said to have conducted prospecting study and survey of the land however the reports were inaccessible.
- EIA was said to have been conducted by NEMA and ARM however none of the reports was accessible.
- Ombudsman conducted a study on behalf of NLC on land issues in Ngaaie. The report established the community conflict; lack of civic education; irregular prospecting process; undefined compensation process and security issues which called for KNCHR intervention. The report was not accessed. (See Appendix III)
- KNCHR audited alleged violations of human rights in limestone exploration activities by Athi River Mining Limited (ARM) in Ngaaie area of Kitui County (See Appendix IV). The report was not accessible.\(^7\)
- County Government in collaboration with South Eastern Kenya University (SEKU) was mapping all the mineral rich sites in Kitui County.
- County government was alleged to have conducted a study in February 2015 on community welfare and mining activities; and investigate alleged land grabbing in Ngaaie. However, the report was not accessible.

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3.5.8 Kanziku Ward

3.5.8.1 Private companies

Bamburi, East Africa Portland (EAP), Athi River Mining and Dangote are the companies that had showed interest in Kanziku Ward. These companies were interested in limestone mining for cement production.

3.5.8.1.1 Bamburi Cement Ltd (BCL)

Bamburi Cement Ltd (BCL) began their operations in Kanziku in 2007 with the aim of mining. BCL is currently not undertaking any activities in Kanziku Ward.

BCL had dug a borehole at Kaaki and provided temporary employment (manual jobs and security jobs) during the prospecting period to the community members. BCL moreover gave text books of undisclosed value to Kanziku primary school, 200 bags of cement to Kanziku secondary school and paid a hospital bill for two of undisclosed value to Mutomo hospital. Bamburi did not have any plans or agreements with the community at the prospecting stage.

The BCL Legal Officer reported that BCL had plans to go back to Kanziku and carry out mining.

3.5.8.1.2 East Africa Portland (EAP)

EAP is currently not undertaking any prospecting/ mining activities in Kanziku Ward. There was no enough evidence to indicate that EAP had been issued with prospecting rights. EAP respondent who declined to be mentioned reported that EAP promised to buy land from a community group (that was never disclosed) once the group had obtained a title deed. On trust and commitment grounds, EAP dug a borehole in Kasirumi and provided cement to a church after which they were allowed to construct offices that are currently protected by employed guards. The payment for the piece of land is yet to be effected. However, according to a community member, the piece of
land belonged to an individual who had shifted from his homestead and sold the land to EAP. EAP shifted its activities from Kanziku Sub-location to Simisi Sub-location.

### 3.5.8.1.3  Athi River Mining (ARM)

Athi River Mining Limited (ARM) made lease agreement on 18/10/2007 with the County Council of Kitui. ARM prospected in 2007/2008 for 6 months. However, ARM proceeded to blackmail the community and purchased land.

> “In Mathima, ARM bought land with "ukora" (lack of morals). They gave 20,000 KES to families and to anyone with National identity card as disturbance allowance. Later this allowance translated to be land payments. The land was fenced and was said to be bought by ARM and to be under the ownership of the company.” - Community member

ARM involved the community in temporary employment (manual jobs and security jobs) during the prospecting period.

During the study, there were no prospecting / mining activities in the Ward. ARM Logistics/ Project Manager reported that ARM did not intend to go back to Kanziku Ward terming the area as politicized; not conducive for business environment; volatile community members and CLC; and unfair competition with BCL stirred by KCG.

### 3.5.8.1.4  Dangote

Dangote prospected in Kanziko in 2015. Dangote worked with brokers other than CLC and also brought on board a surveyor who surveyed the land and gave land owners parcel numbers.

Dangote involved the community members in temporary jobs (manual jobs and security jobs) during the prospecting period. Dangote was alleged to have dishonored the agreement on paying the land owners Ksh. 20,000 as disturbance allowance which contributed to their rejection by community members. Dangote had further promised
the community that they would construct the main road and would offer a good resettlement plan.

3.5.8.1.5 Other

The Director in the Ministry of Environment, Energy and Minerals Investment Development mentioned a South African firm that was interested in Kanziku/ Simisi-Itumba mining. The Director did not however wish to disclose the firm and more details on the firm’s activities.

3.5.8.2 Court cases analysis

Bamburi Cement Company Limited (BCL) was issued with Common Mineral License on 6/3/2008 by District Commissioner of Mutomo District in his Legal capacity under the provisions of the Trust Land Act, Chapter 288 Laws of Kenya as the Licensing Officer of the County Council of Kitui (CCK) to mine, take and process the limestone deposits in Kanziko and Mathima areas in the District of Mutomo in Kitui South land unit. Conflict of interest to access the limestone deposits in Kanziko and Mathima areas between ARM and BCL led to court cases on the validity and legality of the Common Mineral license and the agreement. The Table below shows the details on applications and rulings.
<table>
<thead>
<tr>
<th>Date</th>
<th>Applicant</th>
<th>Respondent</th>
<th>Court &amp; Case No.</th>
<th>Case Details</th>
<th>Date, Judge &amp; Ruling</th>
</tr>
</thead>
<tbody>
<tr>
<td>29/11/07</td>
<td>BCL</td>
<td>- DC, Mutomo - CCK - ARM (Interested Party)</td>
<td>H.C. Misc. 49/2007</td>
<td>Orders sought were;</td>
<td>25/2/2008 Judge Ang’awa J.</td>
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<td>a. An order of mandamus to compel the D.C. Mutomo to “issue a common Minerals License to the BCL to mine, take and process limestone deposits in Kanziko and Mathima areas within the jurisdiction of CCK.</td>
<td>“I do not therefore believe that the Interested Party had held a lawful lease and would agree with the ex parte applicant that this procedure as required had not been followed.”</td>
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<td>b. An order of prohibition directed to DC and CCK “from granting a Common Minerals License or any other license or right to any other party, authorizing such party to deal with or in limestone deposits located in Kanziko and Mathima areas of Mutomo District”.</td>
<td>“I have been informed through the submissions that the interested party had deponed and made false declarations. These are that the interested party said that they had been granted a lease when in fact they had not been granted a lease as required. They had not been granted a license to deal with limestone simply because they the interested party applied under the wrong law.”</td>
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<tr>
<td>14/1/08</td>
<td>ARM</td>
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<td>Supplementary Affidavit sworn by David Njoroge;</td>
<td>27/2/2008 Justice Asike Makandia</td>
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<td>- ARM’s interest in the dispute is highlighted and termed illegal and unprocedural</td>
<td>Orders of Ang’awa J were stayed</td>
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<td>- the validity of its leasehold interest is challenged in the same language as BCL 16/1/2009 Application.</td>
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<tr>
<td>27/2/08</td>
<td>ARM</td>
<td></td>
<td>Court of Appeal</td>
<td>Application for stay of those orders in C.A. Civil Application No. NAI 27/2008</td>
<td>27/2/2008</td>
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<td>Justice Asike Makandia</td>
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<td>Orders of Ang’awa J were stayed</td>
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<tr>
<td>16/1/09</td>
<td>BCL</td>
<td>ARM</td>
<td>Machakos Civil Case 6 of 2009</td>
<td>Lease agreement between ARM and CCK dated 18/10/2007 be declared null and void and other resultant orders are also sought</td>
<td>9/10/2009 Judge Isaac Lenaola</td>
</tr>
<tr>
<td>5/2/09</td>
<td>ARM</td>
<td>BCL</td>
<td></td>
<td>Supporting Affidavit sworn on 26/2/2009 by one Betty Kanyagia that the:</td>
<td>“The only issue in this suit, I repeat, is the lease and I have said that Ang’awa J dealt substantively with it and it would be erroneous and unprocedural if this court, with concurrent jurisdiction, waddled into the matter with a view to either agreeing or disagreeing with her decision. My views on the subject, and I obviously have something to say, are mine to keep for those reasons.”</td>
</tr>
<tr>
<td>26/2/09</td>
<td>BCL</td>
<td>ARM</td>
<td></td>
<td>a. Lease was purportedly made pursuant to section 37 of the Trust Land Act</td>
<td>“In submissions, the advocate for the Defendant asked me to either stay the present proceedings until the Court of Appeal matter is heard and determined or fix its Application dated 6/4/2009 for hearing.”</td>
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<td>b. BCL’s interest in the land is based on a single business permit issued on 1/11/2006 in 2006 and 1/11/2007 in 2007; BCL was to engage in “prospecting mining” for the period 1/1/2006 to 31/12/2006. The fee paid was Kshs 32,000/=</td>
<td>“My approach in the interests of justice would be this; I see no reason to hear the Application dated 6/4/2009 because I have indirectly said that there may be merit in some of the issues it raises. Further, I have said that I have no jurisdiction to reopen issues already determined and that is</td>
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<tr>
<td>2/3/09</td>
<td>BCL</td>
<td>ARM</td>
<td></td>
<td>Deletion of paragraphs 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the ARM Defense dated 4/2/2009 and judgment be entered for the BCL against the ARM because</td>
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<td>a. Grounds of defense pleaded in the paragraphs (above) are unsustainable.</td>
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<td>b. CCK has no powers to grant a lease of the said trust land in contravention of the Constitution of Kenya and/or Trust Land Act, Chapter 288 Laws of Kenya.</td>
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<td>c. Section 37 of the Trust Land Act confers no such rights as were purportedly conferred by the lease. Lease is therefore predicated on no known legal process, is void and is bad, faulty and must collapse</td>
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<td>d. In sworn affidavit-</td>
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<td>- specific area where the “business” was to be conducted is missing from the permit;</td>
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<td>- date of issue of permit for 2006 and 2007 was backdated to 1/1/2006 and 1/1/2007</td>
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</table>

The reality is BCL applied for an exclusive prospecting license:

- received on 1/3/2007 by the CMG;
- specific area to prospect was "Kanziko locality of the Mutomo District - 26 sq. km.;
- CMG granted the license on 2/5/2007 upon payment of Kshs.8,205/= as gazettment fee.
- By a letter dated 9/7/2007 addressed to the ARM, the CMG ordered the ARM to cease all and any activities in the area in view of the license already granted to the BCL.

Ruling

- the Application dated 26/2/2009 is incompetent and is struck out with costs to the Defendant and the Interested Party;
- the suit herein is stayed pending the hearing and determination of C.A. 17/2009.

<table>
<thead>
<tr>
<th>Date</th>
<th>ARM</th>
<th>BCL</th>
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<tbody>
<tr>
<td></td>
<td>a.</td>
<td>Application is misguided and incompetent because:</td>
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<td></td>
<td>b.</td>
<td>The court has no jurisdiction to determine the BCL Application and the suit in view of the decision in No. 48/2007 aforesaid and that Section 6 and 7 of the Civil Procedure Act can be properly invoked to stay the present proceedings until C.A 17/2009 is heard and determined.</td>
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<td>c.</td>
<td>There are triable issues raised in the Defense and it would be fair and just that all the issues be placed before the court for a sound decision to be made on the merits.</td>
</tr>
<tr>
<td>20/4/09</td>
<td>ARM</td>
<td>BCL Supporting Affidavit of Surendra Bhatia sworn;</td>
</tr>
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<td>- lease agreement was entered into in a procedural manner;</td>
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<td>- validity of lease cannot in any event be determined through a summary procedure as the BCL purports to do.</td>
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<tr>
<td>22/4/09</td>
<td>ARM</td>
<td>BCL Response to BCL Application dated 26/2/2009;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Defense raises triable issues and it is neither scandalous nor vexatious as claimed,</td>
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<tr>
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<td></td>
<td>- issues raised in the pleadings are serious and ought to be determined at the full trial.</td>
</tr>
</tbody>
</table>

CMG- Commissioner of Mines and Geology
CCK- County Council of Kitui
DC- District Commissioner
BCL- Bamburi Cement Company Limited
ARM- Athi River Mining Limited
Immediately after case was ruled in favour of BCL’s Common Mineral license; ARM proceeded and obtained stay order. Consequently ARM lodged an appeal in the Court of Appeal which is still pending irrespective of BCL instituting a suit during the pendency of the substantive appeal against the orders ruled. This is reason why BCL has not proceeded with its activities in Kanziku.
3.6 Conclusions and Recommendations

3.6.1 Conclusion

Ngaaie Ward had deposits of limestone and clinger in parts of Ngaaie and Kanghui sub-locations.

Athi River Mining Ltd (ARM) was the only private investor purported to have been issued with prospecting rights by Mwingi County Council in 2007. ARM began prospecting activities in August 2013 which were halted by community members through petitions on January 2015. ARM had managed to drill over 30 holes and transported more than 5,000 tones of limestone by February 2015. There were no prospecting activities in progress however the mineral rich hill was protected as property of ARM.

The compensation process by ARM created a conflict in the community. The community conflict was escalating with introduction of civic education and delayed payments by ARM.

ARM created close relationship with the DCC; CMEEMID compromised community concerns and rolled out its activities without community involvement. The DCC-and-area MNA formed CLC which worked in favor of ARM by campaigning to ensure that ARM acquired community land cheaply.

The KCG participated through CMEEMID in negotiating for compensation together with DCC, ARM and CLC. KCG supported proposals on land purchase by ARM and promised in the LRT/SA to work with ARM in acquiring single title deed. The compensation and resettlement procedures were not clear; not documented; and had been executed with a lot of irregularities. Both governments’ representatives indicated that issues on resettlement would be of agenda after compensation is completed which insinuates little attention on community welfare.

The surveys carried out by ARM and KCG surveyors were not transparent and participatory which led to the pending petitions by community members on parcel numbers. Community members were faced with uncertainty on the mis-match
between the exact land sizes and size readings on parcel number issued; fate of already signed LRT/SA; the fact that compensation is partially effected through bank deposits; and the land is already termed as ARM’s property and protected by National Government officials.

There were no accessible EIA reports and there was no consistent information to ascertain that an assessment was done. The researcher thus concludes that the EIA was not done in a professional manner. No risk assessment was carried out and no agreements aimed at minimizing disturbances and damages were done.

Provision of civic education on land rights and women empowerment by NFCBO, Action Aid/ CHRCE, KNCHR and other humanitarian organizations faced great resistance from CLC and increased the context of the conflict.

Men were the core decision makers in the area with little or no involvement of women and youth. Women did not have rights to own or inherit land. Lack of government and community support for women property ownership rights and decision making were some of major predicament in women empowerment in the region.

ARM had expressed interest in the exploration of limestone but at the cost of local community well-being. ARM was committed to purchase other than lease the land. Community members have been lured into signing land rights transfer agreements despite the disputed adjudication records in order to receive compensation balance.

ARM won both the national and county government to their side and almost managed to cheaply acquire the community land with no clear compensation and resettlement plan. The governments failed in provision of civic education to the community; conducted non-transparent land survey; created and nurtured community and family conflicts; neglected community land and individual human rights; not developed an all-accepted and clear compensation and resettlement plan; unprofessional EIA; and condoned corruption and nepotism.
Poverty and lack of civic education among community members on natural resources and extractives, constitutionalism, governance, human rights and responsibilities among other related activities made it easy for ARM to drive its agenda.

**Kanziku Ward**

Bamburi, East Africa Portland (EAP), Athi River Mining and Dangote are the companies mainly interested in limestone mining for cement production that exist in Kanziku Ward. These companies were not undertaking any prospecting or mining activities in Kanziku Ward. The companies did not have any plans or agreements with the community at the prospecting stage. These companies involved the community in temporary employment during the prospecting period. Only BCL reported to have plans to go back to Kanziku.

An evaluation of cases in Kanziku established that conflict of interest to access the limestone deposits in Kanziko and Mathima areas led to court cases on the validity and legality of the Common Mineral license issued to BCL and the lease agreement made between ARM and County Council of Kitui. After the case was ruled in favour of BCL’s Common Mineral license; ARM proceeded and obtained stay order. Consequently ARM lodged an appeal in the Court of Appeal which is still pending irrespective of BCL instituting a suit during the pendency of the substantive appeal against the orders ruled. This is reason why BCL has not proceeded with its activities in Kanziku.
3.6.2 Recommendations

There is extreme necessity for peace restoration approach; civic education and community empowerment interventions that are mutually benefiting to all stakeholders in Ngaaie area. The Consultant recommends the following in efforts to achieve the above mentioned.

- Joining hands together with Civil Organizations and NFCBO already working/ or worked in Ngaaie to establish gaps in provision of civic education to all community members especially on:
  - Mining Act 2016
  - Land rights
  - Human rights
  - Rights of all stakeholders in mining processes
  - Mining processes
  - Governance
  - Procedures of advocating violated rights
  - Women empowerment
  - Available minerals in the area and their value
  - Land rights transfer; sale; lease methods.
  - Formation and functions of Community Liaison Committee
  - Management of natural resources and environmental conservation.
  - How to evade politicization of the mining process
  - Importance of monitoring and reporting on the implementation of the recommendations of EIA
  - Negotiation skills; resettlement process; value and use of money

- Establish collaboration with other CBOs; NFCBO; National and County Governments to offer civic education and restore community cohesion.

- Efforts to empower the community and restore peace will require involvement of CBOs; National and County Governments to:
- Find a possible way to dissolve the current CLC and halting all its operations to create a point of entry for peace nurturing in the already torn community. A lot of civic education has been offered however, the conflict is on the rise. It is recommended that local leadership be trained as ToT (Trainer of Trainers) to train and preach peace in the community.

- There is need to carry out transparent land survey and issue community members with title deeds

- EIA needs to be done professionally afresh by licensed EIA consultants. The EIA generates baseline data for monitoring and evaluating impacts during the project cycle as well as highlighting environmental issues with a view to guiding policy makers, planners, stakeholders and government agencies to make environmentally and economically sustainable decisions.\(^8\)

- Participatory review of the guidelines for the establishment of community liaison committee developed by county government to align it with the Mining Act 2016 and have it secure community interest more effectively.

\(^8\) Olive Leaf Foundation, 'Baseline survey for the mining and minerals sector in Kitui County' (2012).
Appendix

Appendix I: Agreement on Land Rights Transfer/Sale (LRTA/S)

AGREEMENT

THIS AGREEMENT is made on this .................. day of .................................. 2015

by and between:

(A) ARM CEMENT LIMITED (Formerly ATHI RIVER MINING LIMITED) a
limited liability company duly incorporated under the Companies Act, Cap 486 of the
Laws of Kenya (hereinafter referred to as “the Investor”) which expression shall
where the context so admits include its successors and permitted assigns) of the
FIRST PART

AND

(B) THE COUNTY GOVERNMENT OF KITUI, of P. O. Box .........................
KITUI (hereinafter referred to as “the County”) of the SECOND PART

AND

(C) NGAAIE COMMUNITY THROUGH ITS LIASON COMMITTEE, of P. O. Box
......................... (hereinafter referred to as “the Community” which
expression shall where the context so admits to include its Liason Committee which
represents only those individuals and families who have agreed to transfer their rights
to land to the Investor for purposes of excavation of limestone and setting up of a
cement factory, in Ngaacie area of Kyuso Sub-County, Kitui County, its
representatives and permitted assigns) of the THIRD PART

The parties herein above are collectively referred to as “the Parties” and individually referred
to as “the Party”.

WHEREAS

(1) In the year 2007 the Investor obtained a mining license from the County Council of
Mwingi (now defunct) for the exploration of limestone deposits within Ngaacie
Location (hereinafter called “the Land”) of Kyuso District (now defunct).

(2) The Mwingi County Council was dissolved upon the promulgation of the Constitution
of Kenya, 2010 and now all trust land became by virtue of Article 63 of the
Constitution of Kenya, 2010 held by the County Governments on behalf of the people
resident on the same.
(3) Upon the establishment of the County and election of the Governor for the County, the role of the Local Governments over trust lands was taken over by the County Governments.

(4) The land being trust land is inhabited by the families resident therein holding the same on the basis of ancestral inheritance among grounds.

(5) At the commencement of the exploration and preparation for excavations, adjudication had not been started, now the whole land has been declared an adjudication section, the process is ongoing with an aerial map already in place.

(6) The Adjudication process is partially completed, identification numbers have already been issued and the process of registration is pending.

(7) The parties herein do acknowledge the fact that there exists commercially viable limestone deposit within the Ngaacic Hill area of Kyuso Sub-County in Kitui County.

(8) The Investor herein, a leading company in the manufacture of cement in East Africa has confirmed its willingness and commitment to invest in cement manufacture within the designated parcel of land.

(9) The excavation of limestone and setting up of cement manufacturing factory is likely to affect the lives of the people resident within the designated land and its environs and environmental impact assessment is ongoing wherein mitigating factors shall be addressed in accordance with statutes and Environmental Management Coordination Act (EMCA) and other regulatory requirements.

(10) The Community has formed a Liaison Committee, through which it shall engage with the Investor and the County Government on matters relating to the subject matter of this Agreement.
(11) The Liaison Community Committee is duly elected by these members and the Chairman (Eng. Paul Musyimi Nzengu), Vice Chairman (Joseph Mutambuki Muthisya) and Secretary (Jacob Wambua Mwova) thereof are mandated to execute these Agreement on the Community’s behalf.

NOW IT IS HEREBY AGREED:-

A. THE INVESTOR shall:-

1) As a gesture of good neighbourhood, the Investor shall undertake welfare related programmes for the benefit of the people resident within the designated area.

2) Operate within the confines of the law with due regard to the social welfare of the community living around the designated area.

3) The Community shall surrender parcels of land they occupy as ancestral land and in consideration the Investor shall offer compensation against the voluntary acquisition of land.

4) Set up a cement manufacturing plant within the land within five (5) years of receiving title by utilizing the limestone mined in the land, subject to legal statutory approvals, financial closure and other pre-conditions as may be applicable.

5) In consultation with the County Government, set aside land for Market place, girls’ secondary school, playground and a health center.

6) Provide transport to all families relocating from the land sold to the Investor subject to assessment of the same by the Investor as a result of the project.

7) Provide building material (iron sheets & cement) or an equivalent of Kshs. 50,000/= to all families relocating as a result of the project.
8) Compensate for all developments on the land to be acquired upon valuation undertaken by a valuer identified by the investor.

9) Work in co-operation with the liaison committee formed by the community and the technical committees set up by the County Government of Kitui.

B. THE COMMUNITY:-

1. Shall under the umbrella of the liaison committee, ensure all land disputes between individual members and within families are settled.

2. Undertakes to give vacant possession of the land for the project immediately upon completion of compensation.

3. Shall ensure a favourable/conducive environment for the project in terms of peace and free from internal aggression and do all in their capacity to facilitate peaceful and structured transition and do undertake to keep peace, provide mutual support and security.

4. Shall form a Development Trust whose operations shall be governed by a Trust Deed registered for that purpose under the Trustees Act Cap 167 of the Laws of Kenya.

5. They undertake that they have capacity and authority to transfer ownership rights on the basis of which they have received purchase price.

C. COUNTY GOVERNMENT shall:-

1) Facilitate the process of obtaining a title deed or Lease over the land and issue the necessary licenses and permits as may be required for the project.

2) In considering the economic and social importance of the investment is to ensure that infrastructural demands such as roads, electricity and water are incorporated in the County Integrated Development Plans and/or annual development plans.

3) Take all the necessary statutory steps to ensure that the Investor is issued with all relevant licenses and clearances to implement their investment plans.

4) Ensure that the Investor is updated on any regulation or statutory changes/obligations.
5) Assist and co-operate with the Investor in meeting any statutory requirement and/or obligations from the National Government.

SPECIAL CONDITIONS

1. LAND ADJUDICATION & TITLE

It is critical for the Investor to acquire a consolidated title deed in respect of the Ngaia Hill plots as well as mining licenses in order to raise the necessary capital funding for the cement plant. The County Government’s support is critical in obtaining the title deed as well as the mining license.

2. The support of the Kitui County Government, the vendors and the community liaison committee is necessary in the realization of the Cement Project.

3. NGAAIE TRUST FUND & OBJECTIVES

The Objectives of Ngaie Community Trust Fund (NCTF) will be;

a) The Investor shall facilitate the establishment and registration of a Trust Fund to be called NGAAIE COMMUNITY TRUST FUND (NCTF) whose membership shall include all the vendors within the defined survey area and whose operation shall be regulated by a Trust Deed.

b) The Investor will contribute Kshs.5 million (Kenya Shillings Five million) per annum to NCTF until factory is built and operational and thereafter increase the contribution to 10 Million (Ten Million) per annum for as long as the factory continues its operations for a period of 30 years.

c) The Trust Fund shall receive funds on an annual basis to be utilized for the benefit of the community.

d) Rights obligations and other details shall be as per the Trust Deed.

e) The Trust Fund shall become operational from the date of obtaining of title deeds by the Investor.

4. RELOCATION/TRANSPORTATION BENEFICIAL OWNERS/VENDORS

The Investor avers that they will provide vehicles at their own expense to ferry/move the affected vendors to their alternate domicile.

The vendor affirms the price negotiated was increased in consideration of the vendors having enough funds to procure alternate land for occupation.

The vendor therefore affirms;

a) He has alternate land on which he is to settle on.

b) Albeit to (a) above the vendor will arrange/procure alternate land for him/herself and the dependants.
5. DISPUTE RESOLUTION

a) All disputes between parties related to this engagement shall be referred to arbitration and no party shall initiate court proceedings until they have first exhausted the remedy of arbitration.

b) The Parties shall be free to agree on the arbitrators.

c) In the event that they do not agree on an arbitrator, each one of them shall appoint their own arbitrator within limit thirty (30) days and the two arbitrators so appointed shall appoint one arbitrator and the three arbitrators shall hear and determine the matter.

IN WITNESS WHEREOF the parties hereto have hereunto set their respective hands to this Agreement in the presence of the attesting witnesses the day and year first hereinafore written.

SEALED with the COMMON SEAL of

ARM CEMENT LIMITED (formerly ATHI)

RIVER MINING LIMITED) "The Investor" hereina

In the presence of;

Director

Director/Secretary

I certify that I was present and saw the Directors of the Investor Sign and seal this Agreement for sale.

Signature of Witness:
Name:
Address:
Occupation:
SIGNED by

........................................................................................................................................
On behalf of the COUNTY GOVERNMENT
OF KITUI “The County” herein
In the presence of;

.................................................................

ADVOCATE

I certify that I was present and saw the County’s representative
Sign this Agreement for sale.

Signature of Witness: ......................................
Name: ..........................................................
Address ................................................................
Occupation: ..................................................

SIGNED by the Chairman, Vice Chairman & Secretary
of the NGAIE COMMUNITY’S LIASON
COMMITTEE on behalf of “The Community” herein

Chairman (ENG. PAUL MUSYIMI NZENGU)

Vice Chairman (JOSEPH MUTAMBUKI MUTHISYA)

Secretary (JACOB WAMBUA MWOMA)

In the presence of;

.................................................................

ADVOCATE
NB: All copies availed by ARM in Ngaaie for community members to sign had not been signed by any other party. Community members were required to sign and they would receive fully signed copies on a later date. The attached copy was sneaked out and thus not signed. Three similar copies were from different individuals including MCA.
Appendix II: ARM License Letter

[Letter content]

1. It appears that there are two issues around the mining project(s) within Ngaie area.
   - A Special Licence (to prospect and explore for all minerals) granted to M/s Sumamato Enterprises Ltd. This licence was subsequently assigned to M/s Sulam Development Company Ltd. This licence was to expire in February 2015.
   - It appears Athi River Mining Cement Company Ltd may have been granted a similar licence or assigned the same licence. I did not see any licence or assignment to it but there are documents indicating that they are prospecting and mining limestone within the same area.

2. This opinion is in form of a discussion on legal position of three interest groups namely: the National Government, County Government and the Local Community (Land Owners). We shall address the rights, duties and interests of each of the stakeholder in the context of the ongoing mining at Ngaie.
Appendix III: Letter to the Minister-Ministry of Lands, Housing and Urban Development

Our Ref. CAJ/M.LAN/022/1199/15-NK
Your Ref: TBA

30th July 2015

Principal Secretary
Ministry of Lands, Housing and Urban Development
Ardhi House,
1st Ngong Avenue off Ngong Road
P.o Box 30450-00100
NAIROBI

Dear Sir/Madam

RE: COMPLAINT BY JOSPHAT MUTINDA KITHEKA AGAINST THE MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman). The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The Commission has a mandate, inter-alia, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public. Issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

The Commission is in receipt of a complaint from Josphat Mutinda Kitheka on behalf of members of Ngaie Focus Community Based Organization (NFCBO) who alleges as follows:

a) That Athi River Mining Company (ARM), a private company, has been irregularly extracting minerals from their land in Ngaie Location, Kyuso Sub Location in Kitui County since June 2013.
b) That ARM conducted a private survey of their land in the absence of the land owners and without independent verification for purpose of acquiring the identified parcels of land for mining purposes.

c) That although a government survey was later conducted, it was not fair since the process was influenced by the private surveyor appointed by ARM.

d) That the said survey and land acquisition by ARM was undertaken before the process of the land adjudication could be completed and titles issued to the rightful owners.

e) That the current purchase price of Ksh 150,000 per acre offered to land owners by ARM is manifest low and exploitative.

f) That the residents of Kyuso were not sensitized and civic education offered on the mining process by ARM prior to the commencement of the exercise.

By means of this letter, you are requested to investigate this complaint and revert to us soonest, clearly indicating your position on the same, steps taken if any, or intended actions and time-frames in the event for resolution thereof.

Kindly find herewith enclosed a copy of the petition by the said organization.

We thank you for your co-operation and assure you of our highest regards.

Yours sincerely,

[Signature]

M.M.R. SAADIA A. MOHAMED, OGW, MBS
MEMBER OF THE COMMISSION

C.C
1. County Secretary
   The Kitui County Government
   Tana Athi Water Services Board Building, Ground Floor
   P.O. Box 33 - 90200,
   KITUI

Josaphat Mutinda Kitheka
P.O Box 17-90401
KYUSO
Our Ref: KNCHR/CID/GEN/STAT/VOL.X/2016 (KNCHR/2014/060)
19th October, 2016

Abdushakur Ndolo
(Caritas project-Catholic Diocese of Kitui)
Research and Strategy Associate
Exactitude Research Consultants Ltd.
Njengi House, 2nd Floor, Tom Mboya Street
P. O. Box 29944-00100, Nairobi

Dear Sir,

RE: KNCHR’S FEEDBACK ON WORK DONE IN NGAAIE AND KANZIKU

Receive greetings from the Kenya National Commission on Human Rights (KNCHR).

The KNCHR is a National Human Rights Institution (NHRI) established by Article 59 of the Constitution (2010) as well as the KNCHR Act of 2011. The Commission is mandated to ensure promotion and protection of human rights in Kenya, by *inter alia*, receiving and investigating complaints of human rights violation with a view of recommending appropriate redress.

In response to your email, find attached a duly filled questionnaire for your further action.

Thank you for your continued collaboration.

Yours Sincerely,

Veronica Mwangi
Senior Human Rights Officer/ Advocate
Complaints and Investigations Department.
1. Are there institutions or civil society organizations involved / working with the extractive sector in these counties, who are they and what roles are they playing? (as specific as possible)

The Kenya National Commission on Human Rights (KNCHR) is an independent Constitutional commission that has been working in Ngaia in order to ensure realization of the rights of the community members in the wake of mining activities in the area. A number of fact finding missions were undertaken between FY 2014 and FY2015 where several key milestones were made as follows:

a. Identifying the key challenges facing the communities and the mining sector in the area; key issues being land rights violation as a result of skewed land adjudication processes, lack of public participation in the pre and post prospective mining processes that resulted to divisions among the investor, the duty bearers and the community, abuse of public office to influence decisions that seemed to take away community power to decide, lack of transparency by the Ngaia liaison community members that resulted to strife and division among the communities, conflict of interest in the conduct of the Liaison committee as well as the Athi river mining (the investor) as well as non-disclosure (EIA, legal undertakings among others) on the part of the investor and the Government (duty bearers) contrary to the principles of business and human rights provided for in the UN guidelines on the subject matter.

b. Addressing the human rights violations reported such as land right violations, threat to security of person through investigations as well as follow up with relevant government agencies which brought about a stop gap measure to the security threats while the land office took up the matter of addressing complaints arising from the adjudication processes.

c. Held public forums in the Ngaia market where other stakeholders from the KNCHR’s referral partners network (drawn from ministry, CSOs and NGOs) were present and the meeting was attended by 500 people all who were sensitized on the importance of knowing their rights, their responsibilities, how to claim their rights and the different mechanisms to use in order to report any human rights violations.

d. In FY 2016 there has been ongoing partnership with key stakeholder on the ground (CHRICE and Action AID) as well as the Kitui County Government in order to ensure that the policy’s and guidelines put in place address the needs of all stakeholders by adhering to business and human rights principles.
e. A number of meetings have also been held with key duty bearers from both the national and County Government and this enabled the Commission to give critical input in the Mining Act, 2015 during its enactment process but also has continued to partner with the Kitui County to boost their capacity on adherence to human rights in exercise of their Governance and also legislative mandates.

f. As for Kanziku, the Commission undertook a fact finding mission in the Area this year (2016) and established the conflict that is existing in the communities due to the implementation of the guidelines for appointment of the liaison members as well as other factors. The KNCHR has already taken up the matter with a view to recommending appropriate redress and ensure resolution of the conflict.

2. What are gaps and challenges that Civil Society should pay attention to in respect of the extractive sector in these counties?
   a. There was policy gap which has been addressed largely by the new mining Act.
   b. Poor coordination among the CSOs's and the relevant Government offices in carrying out the human rights agenda in extractive sector is likely to create more confusion in the community and hence need for concerted efforts to avoid giving conflicting information.
   c. There is need for clarity on the human rights agenda in the extractive sector in particular more focus is needed to empower the community to make the right decision while also promoting the development agenda since it does also promote realization of human rights by the state.

3. What specific issues are important to address urgently for Civil Society in this area?
   What issues require a more long term approach?
   a. Dissemination of the new mining Act but this will also require concerted efforts to avoid duplication.
   b. The need to involve experts in the processes, (for instance details about the mining processes, procedures a geologist will be better placed to educate the community rather than a community mobiliser saying this should be done and not this yet the facts on the ground are totally different) that require expertise as this will mollify the confusion brought about by persons commenting on matters which they lack expertise.
   c. Create adequate networks for collaborations by strengthening the CSOs network and also loop in the KNCHR since this is the oversight body that has been given the mandate to ensure adherence to human rights in Kenya but also has a responsibility to report on Kenya’s compliance on her human rights obligation both at the International and Regional bodies.
Republic of Kenya

Addendum Agreement

This Addendum Agreement made further to the Agreement for compensation signed between .................................................. of National Identity Card Number ..................... and of Post Office Box Number ........................................ in the Republic of Kenya (hereinafter described as the “Vendor”) which expression shall where the context so admit include their personal representatives, successors, heirs assigns or any other person claiming under them) of one part and Arm Cement Limited (formerly Athi River Mining Limited) a limited liability company duly registered under the Companies Act, Cap 486 of the Laws of Kenya and of Post Office Box Number 41908-00 NAIROBI in the Republic of Kenya (hereinafter called the “investor”) which expression shall where the context so admits include its representatives, directors and assigns) of the second part and dated this ................... day of ................................... 2015.

Whereas

1. The parties herein have already executed an Agreement for compensation of land at the rate of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000/=) per acre.

2. The investor has paid a deposit of Kenya Shillings One Hundred Thousand (Kshs. 100,000/=) per plot as a deposit towards the compensation price and the Vendor acknowledges receipt thereof.

3. The Vendor has confirmed and acknowledged that the outfit known as Ngaie Community Liaison Committee has their mandate to deal with the investor and the County Government of Kitui and execute a tripartite Agreement.

4. The Ngaie Community Liaison Committee has entered into a tripartite Agreement with both the investor and the County Government of Kitui, which Agreement binds the Vendor herein.

5. The Vendor is the proprietor / the authorized person to execute the Agreement for compensation on behalf of its members of his family members namely;

   1) ................................................ holder of National Identity Card No. .........................
NOW THIS ADDENDUM WITNESSETH AS FOLLOWS:-

1. The Vendor hereby confirms that the particulars contained in adjudication record held by the land adjudication officer, Kyuso are correct.

2. The investor shall pay to the Vendor the balance of compensation price being Kenya Shillings .................................................. (Kshs. ......................) upon execution of this Addendum, vide Bank transfer.

3. Save for the rights under the tripatile Agreement referred to in clause (4) hereinabove, the Vendor undertakes that they shall not raise any demands, monetary or otherwise against the investor.

4. The Vendor undertakes to avail themselves and to do all that may be required to ensure that the investor’s proprietary interest in the parcel of land hereinbefore referred is legitimized.

IN WITNESS WHEREOF the parties hereto have hereunto set their respective hands to this Addendum in the presence of the attesting witnesses the day and year first hereinbefore written.

SIGNED by the said

..................................................                      ..................................................

"The Vendor" herein in the presence of;

..................................................
ADVOCATE

I certify that I was present and saw the Vendor
Sign this Agreement for compensation.

Signature of Witness: ........................................
Name: ..................................................
Address ..................................................
Occupation: ............................................

SEATED with the COMMON SEAL of
ARM CEMENT LIMITED (formerly ATHI
RIVER MINING LIMITED)
"The investor" herein in the presence of:

Director ..................................................

Director/Secretary ..................................

I certify that I was present and saw the Directors of the investor
Sign and seal this Agreement for compensation.

Signature of Witness: ........................................
Name: ..................................................
Address ..................................................
Occupation: ............................................

DRAWN BY:–
NYAMU & NYAMU CO.
ADVOCATES
MAYFAIR CENTRE
APPENDIX VI: Agreement of Compensation (AC) for one of the Ngaie families

REPUBLI5 OF KENYA

ADDENDUM AGREEMENT

This ADDENDUM AGREEMENT made further to the Agreement for Sale signed

Post Office Box Number 17 Kyuso in the Republic of Kenya (hereinafter described as the “Vendor”) which expression shall where the context so admit include their personal representatives, successors, heirs assigns or any other person claiming under them) of one part

AND ARM CEMENT LIMITED (formerly ATHI RIVER MINING LIMITED) a limited liability company duly registered under the Companies Act, Cap 486 of the Laws of Kenya and of Post Office Box Number 41908-00100 NAIROBI in the Republic of Kenya (hereinafter called the “Purchaser”) which expression shall where the context so admits include its representatives, directors and assigns) of the second part and dated this 12th day of August 2015.

WHEREAS

1. The parties herein have already executed an Agreement for Sale of land at the rate of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000/=) per acre.

2. The Purchaser has paid a deposit of Kenya Shillings Two Million, One Hundred and Eighty Five Thousand (Kshs. 2,185,000/=) per plot as a deposit towards the purchase price and the Vendor acknowledges receipt thereof.

3. The Vendor has confirmed and acknowledged that the outfit known as Ngaie Community Liaison Committee has their mandate to deal with the Purchaser and the County Government of Kitui and execute a tripartite Agreement.

4. The Ngaie Community Liaison Committee has entered into a tripartite Agreement with both the Purchaser and the County Government of Kitui, which Agreement binds the Vendor herein.

5. The Vendor is the proprietor / the authorized person to execute the Agreement for Sale on behalf of his members of his family members namely:
in respect of parcel Number 286 as per the adjudication records.

NOW THIS ADDENDUM WITNESSETH AS FOLLOWS:-

6. The Vendor hereby confirms that the particulars contained in adjudication record held by the land adjudication officer, Kyuso are correct.

7. The Vendor shall upon execution of this Addendum authorise the land adjudication officer, Kyuso to transfer their interests in the parcel Number 286 measuring 76.48 acres to the Purchaser and declare that they shall have no further claim over the plot aforesaid against the Purchaser.
8. The Purchaser shall pay to the Vendor the balance of purchase price being Kenya Shillings Nine Million, Nine Hundred and Fifty Thousand Only (Kshs. 9,950,000) upon execution of this Addendum, vide Bank transfer upon confirmation of transfer of interest as stated in clause (2) hereinabove by the land adjudication office receipt whereof the Vendor hereby acknowledges.

9. Save for the rights under the tripartite Agreement referred to in clause (4) hereinabove, the Vendor undertakes that they shall not raise any demands, monetary or otherwise, against the Purchaser.

10. The Vendor undertakes to avail themselves and to do all that may be required to ensure that the Purchaser’s proprietary interest in the parcel of land hereinbefore referred is legitimized through issue of title by the Government of Kenya.

11. The Vendor shall prior to payment of the purchase price sign an undertaking and/or confirmation letter at the Land Adjudication Office at Kyuso, authorizing transfer of absolute interest in their parcel/s of land to the Purchaser.

12. The Vendor shall give vacant possession to the Purchaser within One hundred and Eighty (1800) days of receipt of full purchase price of land as per clause (8) above as well as developments.

13. The Vendor accepts that the valuation report compiled by the firm known as ULTIMATE VALUERS LTD, appointed jointly by The Ngaia Community Liaison Committee and the County Government of Kitui technical committee on Ngaia Project, shall form basis for compensation against crops, development and trees, and such compensation is to be made to each land owner and vacate the plot within One hundred and Eighty (180) days

14. The Purchaser shall be at liberty to deposit the compensation against crops, development and trees and evict the vendor from the plot after the period of one hundred and eighty days should this be necessitated by undue delays by the Vendor.

15. Purchase price and compensation referred to in clauses 3, 6 and 8 above shall be paid into the Vendor’s and/or family members’ respective bank accounts whose details have been provided under a separate sheet reflecting particulars thereof.
16. The Vendor shall for all intents and purposes be the de jure beneficiary of the Ngaacie Community Trust Fund, as regulated by its Trust Deed.

17. Where the Vendor is a representative of a family affected by this sale, the other family members shall exercise their beneficial rights and interests under the Trust Fund through the Vendor herein who undertakes to faithfully represent their family’s interests therein and whose decision, act, omission and participation shall be binding upon the members of the family he/she represents.

18. The terms of this Addendum shall apply mutatis mutandis with the Agreement for Sale entered between the Vendor and the Purchaser on 12th August 2015.
IN WITNESS WHEREOF the parties hereto have hereunto set their respective hands to this Agreement in the presence of the attesting witnesses the day and year first hereinbefore written.
SIGNED by the said

"The Vendor" herein in the presence of:

JOEL KINYUA
ADVOCATE
COMMISSIONER FOR OATHS
P.O. Box 673 MWINI
I certify that I was present and saw the Vendor Sign this Agreement for sale.
Signature of Witness: 
Name: Peter Muliombi
Address: Box 17 Kuiru
Relation: Cousin

SEALED with the COMMON SEAL of
ARM CEMENT LIMITED (formerly ATHI RIVER MINING LIMITED)
"The Purchaser" herein in the presence of:

PRADIPKUMAR.H.PAUNRANA
Director

SURENDRA L.BHATIA
Director
I certify that I was present and saw the Directors of the Purchaser
Sign and seal this Agreement for sale.

Signature of Witness:

Name: [Signature]

Address: [Signature]

Occupation: [Signature]

DRAWN BY:--
NYAMU & NYAMU CO.
ADVOCATES
MAYFAIR CENTRE
1ST FLOOR WING A
RALPH BUNCHE ROAD
P.O. BOX 75928-00200
NAIROBI
## Appendix VII: Study respondents

| Key informant interview respondents | National government representatives  
- Chief and Sub-chiefs;  
- NEMA  
- Commissioner of Mines and Geology  
County government representatives  
- Kyuso Sub-County Administrator;  
- Kyuso Ward Administrator;  
- Ngaae Member of County Assembly;  
- Kitui County Director in the Ministry of Environment, Energy and Minerals Investment Development;  
Community members  
- Religious leaders;  
- Liaison Committee members;  
Civil Society Representatives from  
- Action Aid,  
- Ngaae Community Based Organization,  
- Centre for Human Rights and Civic Education (CHRCE),  
- Kenya National Commission on Human Rights (KNCHR);  
Legal officers from  
- Bamburi Cement Ltd,  
- Athi-River Mining Ltd  
- East African Portland Ltd |
| Focus group discussion participants | - Community members  
- Women groups |
| Target respondents that declined to participate | - Kyuso Assistant County Commissioner (ACC) (Declined to meet the consultant and respond to calls and messages)  
- Sub-County Administrator (Reported to be on leave and would not respond to subject issue in his capacity via call) |
| Participants declined to give specific information of interest | - Kitui County Government representatives  
- ARM officers- (Verbally reported that there was a pending case in court and would not provide information related to that)  
- NEMA (Declined to give EIA report) |