

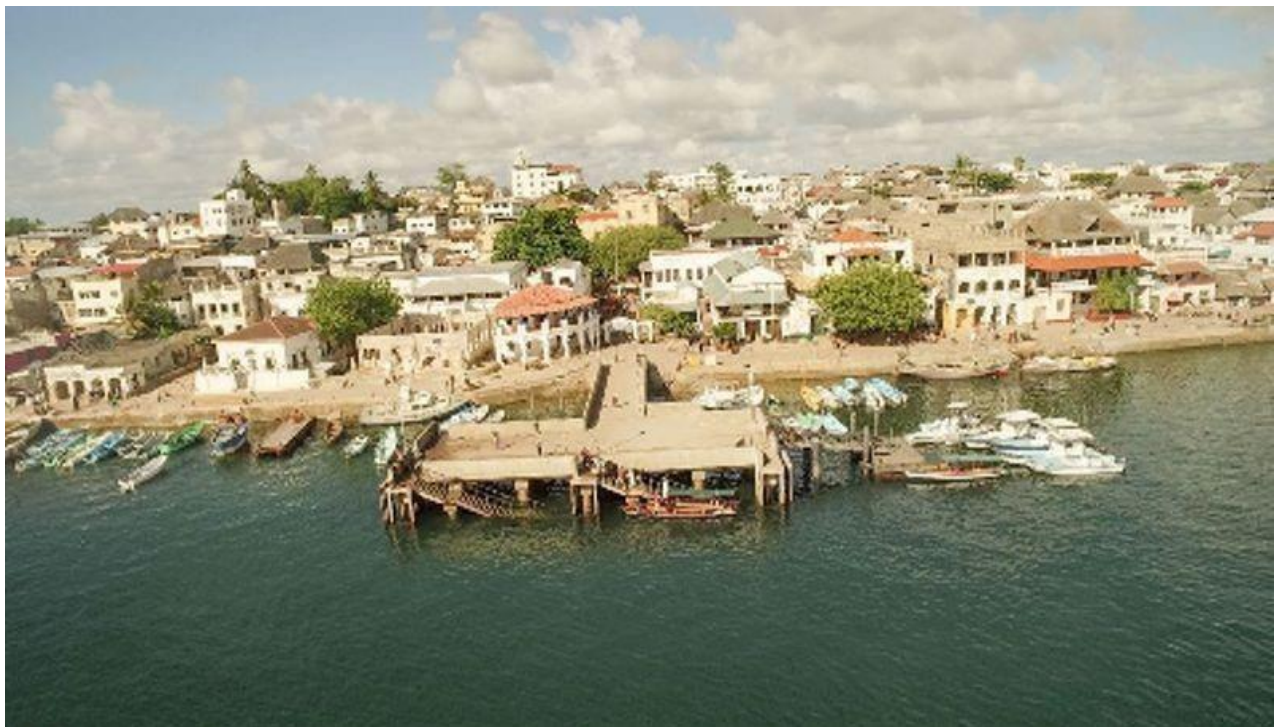


BIOCULTURAL COMMUNITY PROTOCOL FOR LAMU COUNTY

**The Lamu Indigenous Community and their Rights to the Preservation of their
Natural Resources, Cultures, Heritage and Management of Biodiversity**



THE LAMU COUNTY BIOCULTURAL COMMUNITY PROTOCOL



THE LAMU INDIGENOUS COMMUNITY AND THEIR RIGHTS TO THE
PRESERVATION OF THEIR NATURAL RESOURCES, CULTURES, HERITAGE,
AND MANAGEMENT OF BIODIVERSITY



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STATEMENT FROM SAVE LAMU CHAIRMAN



Abubakar Mohamed Ali
Chairman - Save Lamu

The biocultural protocol (BCP) tool has been proven globally to be a very instrumental in guiding state actors and communities on best traditional and indigenous good practices in natural resource management and sustainable utilization to up keep the socio-economic well-being of every creature within the ecosystem.

The concept is often framed in the context of conservation as retention versus loss model by emphasizing the religious and spiritual values of the natural environment and the positive interactions between traditional indigenous people and conservation of natural ecosystems and indigenous species. The biocultural values and practices are subject to various dynamics in relation to socio-economic change. Some lose their importance as a result of modernization, but others endure even in urban conditions.

Since the 1990s, the need for biodiversity conservation has received much attention from governmental and international environmental policymakers and legislators. Ethnobotanical research has played a significant role in recognizing that **biodiversity “[cannot] exist without the practices and knowledge developed by the societies that create it, and maintain or reduce it”** (Bernard and Marchenay 2006:111).

The Convention on Biological Diversity formally recognize the need and value of biodiversity for indigenous peoples and local communities. It acknowledges that the knowledge, innovations, and practices of indigenous and local people regarding biodiversity should be **r espected, preserved, and maintained and that the benefits derived from this should be equitably shared** (Posey 1999; McNeely 2000). The concept of biocultural diversity protocol has therefore become interpreted as not only recognizing the relevance of local environmental use and perceptions, but also as a vital component in the conservation of biodiversity.

The Lamu biocultural protocol (BCP) was made possible through community initiative and partner support. Our partner, Natural Justice organization, brought in the idea. After fruitful trainings of Save Lamu members and awareness creation to the public, it was accepted by indigenous communities in Lamu County. Great efforts were made by different stakeholders to mobilize key resources such as manpower and logistics in the making of the BCP tool. We are very proud to announce that we have that tool with us today. It took us eight years to accomplish our mission.

I take this opportunity to thank everyone for the support they initiated during the whole process.

In Lamu the emerging mega infrastructure of LAPSSET projects, the ongoing exploration for oil and gas, and government plans to have a coal power plant are among the biggest threats facing our biocultural diversity, which needs proper measures and tools in place to mitigate the situations. According to sources, the Kenyan government is to invest heavily in both infrastructures to boost GDP. Lamu basin is said to have exploratory oil blocks that extends offshore into the Indian Ocean and be in a unique position to build a second port. This major infrastructure development, such as that of the Lamu Port-Southern Sudan-Ethiopia Transport (LAPSSET) Corridor Project, is likely to pass through socio-economically, culturally, and environmentally sensitive areas of Lamu County, impacting the coastal, terrestrial, and marine resources; the communities; and the general public.

The provision of biocultural protocol tool in Lamu is paramount. The tool can guide everyone to identify environmental risks, identify indigenous communities, establish protection areas, prioritize and identify responses required, and to put in place mitigation strategies especially in the event of negative impacts. The BCP tool will enable the National and County Government to monitor their environmental resources and the activities of the investing companies and other development partners, to incorporate environmental considerations into their development activities.

The BCP also provides information on biological resources, the rich cultural heritage of Lamu as a historical site, community sacred sites, and water resources. It will enhance knowledge on the need to safeguard these resources using instruments such as the Constitution of Kenya 2010, which entrenches protection of environment; the Petroleum Exploration and Production Act Chapter 308; the Income Act Chapter 470; and the Environmental Management and Coordination Act (EMCA) 1999. The use of this BCP tool will be a milestone towards sustainable management of natural resources and improvement of livelihoods in Lamu County.

Thank you all,



Abubakar Mohamed Ali Almoudy Chairman,
Save Lamu

ACKNOWLEDGEMENTS

This biocultural community protocol (BCP) was developed with community participation and carried out by Lamu Environmental Protection and Conservation and later Save Lamu. Both groups are community-based organizations who worked with community volunteers to record, document and consolidate the information collected here from local communities in over 46 villages in Lamu County. The process began in 2010 and continues to date.

LIST OF ACRONYMS AND ABBREVIATIONS

BCP	Biocultural Community Protocol
BMU	Beach Management Unit
EIA	Environmental Impact Assessment
EPR	Environmental Project Report
ERC	Energy Regulatory Commission
ESIA	Environmental and Social Impact Assessment
GIZ	German Development Agency
GoK	Government of Kenya
LAPSSET	Lamu Port Southern Sudan and Ethiopia Transport Corridor
MUHURI	Muslim Human Rights
NEMA	National Environment Management Authority
NET	National Environment Tribunal
RAP	Resettlement Action Plan
UNDP	United Nations Development Programme

SAVE LAMU



Picture 1: Save Lamu management committee and staff members

BOARD MEMBERS

1. Abubakar Mohamed Ali - Chairman
2. Mohamed Mbwana Shee - Vice Chairman
3. Mohamed Athman Bakari - Member
4. Walid Ahmed Ali - Secretary
5. Somo M. Somo - Member
6. Ishaq Abubakar Khatib - Member
7. Adam Lali Kombo - Member
8. Hussein Soud El-maawy - Member
9. Hadija Ernst Luseno - Treasurer
10. Raya Famau Ahmed - Member
11. Ummul-kheir Ahmed Salim - Member

STAFF

1. Khadija Shekuwe Famau - Coordinator
2. Alwiya Ahmed Sagaff - Administration and Finance Officer
3. Khadija Abdillahi Roba - Assistant Administrator
4. Khadija Juma Saad - Media and Communication Officer
5. Swaleh Ahmed El-busaidy – Community Environmental Legal Officer

DATA COLLECTION

The following groups were involved in the data collection for the BCP, and Save Lamu would like to acknowledge the tremendous work played by them:

Association of Wildlife and Environmental Resources (AWER)
Faza Youth Action Group
Lamu Council of Elders
Lamu Conservation and Development Network
Lamu Environmental Protection and Conservation
Lamu Marine Forum
Lamu Youth Alliance
Muslim for Human Rights (MUHURI), Lamu
Sauti Ya Wanawake
Shungwaya Welfare Association
Wanaharakati Okoa Lamu
Beach Management Unit (BMU), Lamu
Lamu-Coastal Indigenous People's Rights for Developments (LCIPRD) Shimo
la Tewa creek Conservation and Awareness Initiatives

SUPPORT

Save Lamu would like to appreciate the support received from the following organizations towards the compilation of this BCP:

Natural Justice
UNDP Small Grants Program
Kenya SECURE Project (Aweer Data Collection) GIZ

CONTACT

info@savelamu.org / savelamu@gmail.com www.savelamu.org

1.0 EXECUTIVE SUMMARY

Lamu County lies on the coast of Kenya and is home to a number of indigenous communities who have carved out distinctive livelihoods over the centuries from their rich and diverse environment, including a coast and marine ecology, forests, grass and agricultural lands.

Our land has abundant animals and animal-products, marine resources, forest, and mineral resources. Lamu County has a long coastline that is highly suitable for harvesting marine resources, transport, and tourism. Our mainland has rich soils that have been highly suitable for agriculture and continues to maintain rich indigenous forests that we depend on.

According to the 2009 Census, Lamu County has a total population of 101,539¹ people, of which those who are considered to be indigenous to the County are about 56,000. We the indigenous communities of Lamu County are highly multiracial and include the Bajun, Swahili, Sanye, Aweer (more commonly known as the Boni), and the Orma.

More recently, other Bantu communities including the Pokomo, Giriama, and other Mijikenda sub-tribes have also migrated into the area. Other communities from around Kenya have also recently immigrated to Lamu as part of a pursuit of the richness of opportunities that Lamu has to offer, which has turned the old Lamu port city into the cosmopolitan place we know of today.

The Bajun community is fisherfolk, farmers, and mangrove cutters who have lived on the mainland and on the islands of the Lamu Archipelago for centuries. The Bajun are complimented by their hunter and gatherer neighbours, the Sanye and the Aweer (more well known by the name Boni), who have inhabited the forest area and foraged in the mangrove creeks since ancient days. The Orma, another indigenous community, are pastoralists. Their rangeland covers three counties including Lamu, Tana River, and Garissa as they follow pastureland for grazing their cattle, goats, sheep and camel, an important aspect of the regional economy. There are also communities that identify themselves as members of old city-states that held great political sway in the geopolitics and international trade of the area in the 15th to 19th centuries. These inhabitants call themselves: Wa-Siyu, Wa-Pate, and Wa-Amu (the people of Siyu, Pate and Lamu). The Wa-Siyu and Wa-Pate are predominantly farmers and the Wa-Amu, living in the largest town in the county are traders, farmers, and fishermen.

The indigenous communities of Lamu County have adapted to wisely utilize the natural resources of their habitat. These economic niches are highly connected to the balance in biodiversity in the Lamu region and Kenya as a whole. These connections are strengthened by shared religious practices, intermarriage, and trade amongst these communities.

¹ <https://www.knbs.or.ke/category/census-2009/>

These communities have participated in managing these resources over the centuries, conserving them until the present day. Yet, today their livelihoods, which depend upon the fragile environment, are threatened by numerous development projects in the region including the Kenya Government's LAPSSET project (the Lamu Port, South Sudan, Ethiopia Transport corridor), the planned Amu coal power plant and oil and gas exploration in the region as part of the state's Vision 2030.

The LAPSSET Project will consist of a standard gauge railway line, a 32-berth port, a superhighway, a regional international airport, an ultra-modern tourist resort city, a fiber-optic cable and an oil refinery and an oil pipeline constructed to link Lamu to Juba and Addis Ababa as well as Special Economic Zone for industries. Through the media, we found out about the Government of Kenya's (GoK's) push for building the project despite our lack of knowledge of the proposed plans, project feasibility, or adequate measures to offset the negative environmental and social impacts.

The GoK, through the Ministry of Energy, has also embarked on an ambitious plan to generate 5,000 MW of electricity to boost its 2030 development goals. This will include 1050 MW generated from coal power. The proposed site for the coal plant is at Kwasasi in Hindi Division, Lamu County. The site is located north of Lamu Island on the western shore of the Pate Channel bordering the Dodori and Ndununi Creeks. It is 21 km from Lamu Town and a mere few kilometers from Pate Island. Lamu town ranks as the oldest permanent Swahili settlement on the East African coast and a UNESCO World Heritage Site. Pate Island is a buffer zone to the World Heritage Site and has many archaeological sites administered by the National Museums of Kenya.

We, the community of Lamu are against the construction of a coal plant in Lamu County, or for that matter, anywhere else in Kenya. We understand that there are other means of generating electricity, some of which are clean and from renewable sources, like the power from the wind, the sun, and ocean waves.

The coal plant directly threatens three main economic activities. These are fishing, farming and tourism, as well as other minor economic activities, including mangrove harvesting, boat building, construction of houses and other buildings and furniture for our homes. These industries have injected billions of shillings into the Kenyan economy, boosting her revenue.

We understand that the Lamu coal plant presents a serious threat to our environment and local communities because of its ash waste, air pollution, and cooling system that will pour hot water into our bays and channels. We know that the coal plant will have a long-term negative impact on our natural resources, which help us to sustain our cultural and economic activities in the entire Lamu Archipelago.

To address our concerns about development without adequate consultation and consent, we developed this Lamu County Biocultural Community Protocol (BCP), a document that sets out traditional mechanisms for decision-making, for sustainably utilizing our natural resources and our concerns of the LAPSSET, coal plant and oil and gas exploration in our County. The BCP was developed through community participation and carried out by Lamu Environmental Protection and Conservation and later Save Lamu. Both groups are community-based

organizations who worked with community volunteers who recorded, documented, and consolidated the information collected here from the Bajun, Aweer, Sanye, Orma, and Swahili communities in over 46 villages in Lamu County. The process began in 2010 and continues to date.

2.0 INTRODUCTION TO THE BIOCULTURAL COMMUNITY PROTOCOL

The Lamu County Biocultural Community Protocol (Lamu BCP) is the work of many hands and minds. It is a communal document that lays out the traditional knowledge and indigenous methods of natural resource management of the diverse communities who claim Lamu as their ancestral home, the communities include the Orma, Sanye, Aweer, Bajun and the 'Swahili'. While the Bajun are usually considered to be a part of the Bantu Swahili ethnic group, as the largest subset of the Swahili. The BCP is based on self-identification of the communities rather than academic definitions. In Lamu, the Bajun, compared to other ethnic group have more distinct livelihoods from other Swahili groups, especially in Lamu and Manda Islands and for the purposes of distinction. The Bajun are described separately in this BCP and identified as a distinct ethnic group for the ease of differentiation.

We, the indigenous communities of Lamu County, are proud that we have conserved Lamu's environment and cultural identity for centuries—a fact acknowledged by the Government of Kenya by way of recognizing our historical sites and monuments, forests and marine reserves and UNESCO by designating Lamu as a World Heritage Site, worthy of preservation in 2001.

The communal knowledge that this document provides is a work of love and pride in our identity. Our Lamu BCP also illustrates our historical attachment to our home, which is comprised of both land and sea. Our environment has provided our communities with resources over the centuries. We are the guardians of our environment. We have utilized and conserved our natural resources acknowledging their importance for future generations. Indeed, our cultural identity depends on it.

This document has been produced to provide a roadmap for grasping the social contours of our lives and the traditional mechanisms that have guided our sustainable use of natural resources. Regrettably, the signposts that have guided our way and that of our forefathers and mothers before us are being forcefully uprooted in the wake of development projects that are executed without our consultation and consent.

On the basis of the importance of our natural resources, the BCP also raises concerns we have with some mega projects being undertaken in Lamu. Our livelihoods, which depend upon the fragile environment, are threatened by numerous development projects in the region including the Kenya Government's LAPSET project, the planned Amu coal power plant and oil and gas exploration as part of the state's Vision 2030.

Our concerns were first set out in the Fort Zahidi Mngumi Declaration of 2009 following announcement of the development of a new transport corridor in the hope that the Lamu BCP would help to guide the planning of development projects and the use of natural resources in order

to maintain our cultures and traditions and sustain the environment that we have protected for centuries. Realistically, this is the only way to profit from development, create economic stability for our local communities to provide benefits to the national society while also maintaining the historical importance attached to the resources by our communities.



Picture 2: Community members pay attention during one of the BCP meetings

3.0 BACKGROUND

Lamu County lies on the coast of Kenya and is home to a number of indigenous communities who have carved out distinctive livelihoods over the centuries from their rich and diverse environment, including a coast and marine ecology, forests, grass and agricultural lands.

Our land has abundant animals and animal-products, marine resources, forest, and mineral resources. Lamu County has a long coastline that is highly suitable for harvesting marine resources, transport, and tourism. Our mainland has rich soils that have been highly suitable for agriculture and continues to maintain rich indigenous forests that we depend on.

The indigenous communities of Lamu County have adapted to wisely utilize the natural resources of their habitat. These economic niches are highly connected to the balance in biodiversity in the Lamu region and Kenya as a whole. Shared religious practices, intermarriage, and trade amongst these communities strengthen these connections.

We, the indigenous communities of Lamu County are highly multi-ethnic and include the Bantu Swahili, Bajun, and Cushitic Orma, Sanye, and Aweer. Each of us has different yet

overlapping and complementary economic activities and we share the natural resources of our home, which we depend upon for our livelihoods and wellbeing.

Although today, the Bajun are academically defined as being part of the Bantu “Swahili” community, in Lamu, most of the Bajun distinguish themselves from the Swahili according to the administrative boundaries on Lamu East Constituency and Lamu West Constituency. Swahili communities that are indigenous to islands in Lamu East mostly refer to themselves as Bajun, while those from Lamu West mostly refer to themselves as “Swahili”. The name Swahili, which roots from the Arabic word “Sawahel”, meaning the coast, was given by the Arabs to the indigenous community they found living along the East African Coast from Somalia to Mozambique.

Arabs and Asians migrated to Lamu over hundreds of years ago and turned Lamu into a rich trading community and natural port, which made it a trading hub for the East African Coast, thereby influencing the cultural diversity of the region through intermarriage with many of the indigenous communities.

Other Bantu communities including the Pokomo, Giriama, other Mijikenda sub-tribes, and Cushitic Somali have also migrated into the area from neighbouring counties as part of a pursuit of the richness of opportunities that Lamu has to offer. Most recently, post-independence, communities from outside the Coast of Kenya also migrated to Lamu following government-funded settlement schemes, as well as changes of Provincial administration. These communities include the Kikuyu, Luo, Kamba, Maasai and many others, mainly inhabiting Lamu West Constituency.

We, the indigenous communities of Lamu County, have drafted the Lamu BCP that describes our traditional knowledge, conservation methods and decision-making structures. Our collective voices are from five indigenous communities that live within the political boundaries of Lamu County, namely, the Swahili, Bajun, Orma, Sanye, and Aweer.²

Our county is the northernmost county on the coast of Kenya. Its borders are the Indian Ocean to the south, the Republic of Somalia to the northeast, Garissa County to the north, Tana River County to the southwest and the Indian Ocean to the south. Our collective area has a land surface of 6,471.7 sq. km.³

This includes the mainland of Lamu County and over 65 islands, which form the Lamu Archipelago. The total length of our coastline is 130 km but with its numerous inlets and islands, the coastline length reaches 650 km.³ Among our islands in the Lamu Archipelago, the ones with permanent villages are Lamu, Pate, Manda, Kiwayu, and Ndau.

The geographical features of our county include coastline, terrestrial coastal forests, marshlands, grasslands, savannah, and immense baobab trees. Our coastline features

² We acknowledge that these groups of Indigenous peoples live beyond the borders of Lamu County; however, the Lamu BCP focuses only on those within its boundaries. ³ <http://lamu.go.ke/about/>

³ DDP and Consultancy for construction of the first three berths at the new Lamu port and associated infrastructure

sheltering mangrove forests, creeks, and estuaries, fringing coral reefs sheltered and exposed sandy beaches, rocky coast and sand dunes.

To us, the Indian Ocean is not perceived as a border, but rather an extension of our land in the water and an additional resource to the terrestrial natural resources of our area. The dozens of islands, channels, and creeks that make up the Lamu Archipelago straddle the length of the coastline. Dense mangrove forests hem the County's coastal border, the best preserved in East Africa. These mangrove-lined waterways are the highways for traditional sailing dhows of the Bajun and the Swahili. Apart from forming unique coastal landscapes, these various features also support rich biological communities and ecosystems, including wildlife, plant life and marine species.⁵

Our county's northern border with Garissa County has some of the last remnants of a coastal forest known as Boni and Lungi Forest and further west the Witu Forest. At one time, the forest spread from Somalia to Mozambique. Now only patches remain including the ones in Lamu County. Our County joins the Tana River Delta on its western border, a wetland area that we value for its rich natural ecology.

Areas of our County are internationally recognized and protected as valuable biospheres. One is the Doodori National Reserve, gazetted in 1976; the second is the Kiunga Marine National Reserve, gazetted in 1979, a designated UNESCO Biosphere Reserve⁶; and the third is our wetland areas in the western parts of our county, which are protected under the Ramsar convention.⁷ The Kiunga Marine National Reserve consists of shoreline and about 50 islands and coral reef in the Lamu Archipelago.⁸ The Doodori National Reserve covers 877 sq. km of indigenous coastal forest vibrant with wildlife and endemic plants.

Our climate is punctuated by two distinct monsoon periods. From November/December to March, the weather is dominated by the northeast monsoon winds, bringing dry weather. Between May to August, the south-easterly monsoon winds set in. Long rains are experienced between the months of April and June and shorter rains in October and November.⁹

According to the 2009 population census, we have an average family size of 4.6. While in the past we were organized in our respective villages, we are now administratively divided into two constituencies—Lamu East having 3 wards (Faza, Kiunga and Basuba), and Lamu West having seven wards (Hindi, Mkunumbi, Hongwe, Witu, Bahari, Shela and Mkomani).

⁵ National Environmental Management Authority, *Kenya Shoreline Management Strategy*, 2010.

Biosphere reserves are sites established by countries and recognized under UNESCO's Man and the Biosphere (MAB) Programme to promote sustainable development based on local community efforts and sound Science: <http://www.unesco.org/new/en/natural-sciences/environment/ecologicalsciences/biosphere-reserves/>

⁷

http://www.ramsar.org/cda/en/ramsar-news-archives-2012-Kenya-Tana/main/Ramsar/1-26-45-520%5E25948_4000_0_
The Tana Delta Wetlands cover an area of 163,600 hectares.

⁸ http://www.kws.org/parks/parks_reserves/KMNR.html

⁹ National Environmental Management Authority, *Integrated Coastal Zone Management Action Plan for Kenya*, 2011-1215, 2010.

4.0 WHO WE ARE

We have different groups of people that call Lamu their home including the Bajun, Sanye, Aweer (more commonly known as the Boni), and the Orma, all of whom practice the Islamic faith. The Sanye and the Aweer (more well known by the name Boni) have inhabited the forest area and foraged in the mangrove creeks since ancient days. The Orma, another indigenous community, are pastoralists. Their rangeland covers three counties including Lamu, Tana River, and Garissa as they follow pastureland for grazing their cattle, goats, sheep and camel, an important aspect of the regional economy.

The Bajun are fisherfolk, farmers and mangrove cutters that have lived on the mainland and on the islands of the Lamu Archipelago for centuries. As mentioned earlier, in our BCP, we will describe separately the Bajun, from other Swahili groups in accordance to their self-identity from our meetings and consultations. This is no surprise considering that the Bajun have unique in livelihoods, administrative areas, and history from other Swahili groups in Lamu. This is especially considering that most Bajun villages were not administered by Omani rule until the 19th Century, compared to Lamu Island which fell under foreign rule much earlier and thereby making the Bajun less culturally influenced by Arabs.

Lamu communities that identify themselves as “Swahili” are members of old city-states had greater political sway in the geopolitics and international trade of the area in the 15th to 19th centuries. These inhabitants call themselves: Wa-Siyu, Wa-Pate, and Wa-Amu (the people of Siyu, Pate and Lamu). The Wa-Siyu and Wa-Pate are predominantly farmers and the Wa-Amu, living in the largest town in the county are traders, farmers, and fishermen.

Our communities have long been interdependent with each capitalizing on the natural resources within which they have lived. As Bajun from the Islands seasonally live on the mainland neighbouring the Aweer, the trading between farm products, honey, and handicrafts amongst them has been commonplace. Being the boat makers in the region, many of the local communities have depended on the Bajun seafarers for transport. Whilst our differences remain, we have long been influencing each other’s cultures and traditions as intermarriage increases across generations.

The Swahili of Lamu County have a history of trade and for a long time provided international markets for mangrove, ivory, spices, and farm products produced by the Bajun, as well as cattle from the Orma to the Arab and Asian States. The Bajun, Aweer, and Orma consequently frequented the town centers to trade these farm and livestock products and purchase household goods, thus creating a strong interdependence amongst the communities.

The unfortunate part of history also tells of trading of family members by local indigenous communities as slaves to Arab merchants as part of the slave trade. Since the elimination of slavery, the trading with Arab states reduced in the county, but the remnants of the rich culture that developed in the Lamu town, the centre of the trade, as a result of the historical activities remains to date and has made it what it is known as today, a UNESCO World Heritage Site. Today, the Bajun’s major item of trade is fish to sell to Swahili traders who in

turn sell them to hotel owners housing tourists, and Orma continue to bring their livestock products into the town, maintaining what it has best become known for: trade and diversity.

For many centuries, we have had peaceful interactions with our neighbours and coexisted amicably with one another. A traditional Swahili story that aptly illustrates the cooperation of the different ethnic communities in Lamu County is on the chronicles of Fumo Liongo, a writer and legendary hero of the Swahili and Bajun. This story involves the Bajun, Orma, and Aweer as shown below:

Our story's hero Fumo Liongo was born in Shanga on Pate Island to a ruling family. One day, he was driven out of Shanga to the forests where he joins the Aweer and learns to hunt, becoming an accomplished hunter. Later, he marries an Orma woman, where he learns about herding and becomes an able livestock keeper. Liongo's Orma wife bears him children of dual heritage—Orma and Bajun—and as a father, he is able to teach them respect for his brothers the Aweer, who saved him from starvation when he initially left home. Liongo's fluid movements among different ethnic groups highlight the elements of difference between them but also illustrate their connections and links that create a single regional system that both adapts and accommodates.



Picture 3: BCP meeting in Bori village

4.1. THE BAJUN (BAJUNI)

We, the Bajun, are the largest ethnic group in Lamu East, numbering about 55,000. We live in the coastal area of Lamu County from its southernmost tip bordering Tana River County, including Kipini in Tana River County, to its northernmost part bordering Somalia. We are farmers, livestock keepers, fisherfolk, mangrove cutters and boat builders. Traditionally, we farm on the mainland and larger islands using shifting cultivation methods. We build boats

for fishing and trade and provide fish and mangrove poles for the local markets in Lamu Town and Mokowe, where they will be transported to larger markets like Mombasa. Our fishing methods and areas are harmonized with the cycles of the monsoon winds and the phases of the moon. Thus, when the monsoon winds blow, we use the inner channels and creeks and when the monsoon is over, we fish in the open sea. We also harvest trees from our marine and terrestrial forests. We use the timber for making houses, building boats, furniture and firewood. We discourage the use of a power saw to help preserve our forests.

Our mainland farms were at one time the bread basket for the whole area. We grew grains including millet, green grams and sim sim (sesame) stretching from Kililana to Mkokoni and stretching inland into the Dodori creek. Farther north, we farmed from Simambaya to Kiunga, kept livestock like camel, cattle, goats and donkeys. We, from the island communities like Kizingitini, Kiwayu, and Faza rely on fishing for our livelihood and those of us living inland on the islands, like the village of Tchundwa, are farmers and livestock keepers.



Picture 4: Bajuni farmer in Pate Island

We inhabit the islands of the Lamu Archipelago, including the northern reaches of Pate Island and more recently in the southwest of the island, a village known as Mtangawanda. We also live on the mainland, from Mkunumbi in the south to Kiunga in the north. We are farmers, fisherfolk, artisans, livestock keepers, mangrove cutters and tourism operators. Each of the areas we inhabit provides us with natural resources for our livelihoods. Our Bajun villages known for fishing are Kizingitini and Faza on Pate Island, Chandani, and Chanjee on Kiwayu Island, Mkokoni on the mainland and Kiunga on the border with Somalia. While fishing is our main activity in these villages, we also farm and keep livestock. Those of us from Tchundwa and Yabogi, further inland on Pate Island are farmers and livestock keepers.

For those of us bold enough to face the wildlife on the mainland, some of us who live on the islands also have communal farming areas on the mainland where we live seasonally. During

the planting season, we travel to the mainland and plant maize, sesame and millet, among other crops. This has been our way for generations upon generations.

Each community has farming areas that are recognized by us and we share this land with our neighbours, the Aweer.

We, the Bajun on the mainland in the south, like Mkunumbi, rely on farming and shell-fishing in the channels. Those of us from Ndau Island and the village of Mbujumwali on Pate Island are predominantly mangrove cutters, but we also farm and fish.

We once inhabited the entire coastal area north of Mkokoni. In the 1960s, however, insecurity in the area forced us to flee our homes.

We fled to Pate Island, Lamu, Malindi, Mombasa and even Tanga in Tanzania. The Kenya government had assured us that the area would be made safe so that we could return to our traditional homelands, but there was no safety for decades. We still consider this area our home and we want to go back if the government would assist us.

We from Kiwayu have a beautiful island. However, in the 1970s, our island was gazetted as a marine reserve without our consent. The Kenya Wildlife Service now has jurisdiction over our traditional homeland and has prohibited us from owning our land and managing our resources. We are marginalized in our own home.

We, the Bajun fisherfolk, have managed our natural resources in the Lamu Archipelago, including the mangrove forests, inland creeks and the channels between the islands. These are our fishing grounds during the monsoon periods that occur twice a year. We venture further out to sea when the winds are calm.

4.2 THE ORMA

We, the Orma, number about 20,000 people. We are livestock keepers living in permanent villages located in the western part of Lamu County including the Tana Delta wetlands. We also live in the neighbouring Tana River and Garissa Counties. Our traditional villages in Lamu County include Moa, Chalaluma, Didewaride, and Onido. The Tana Delta is our most important natural resource. This wetland area provides us with the natural resources that we need to survive as animal keepers. These marsh grasslands also provide us with grass for our houses, water for domestic use, fish in season, and a range of natural medicines that we use for our health and the health of our herds. The wetlands are important also because they provide our cattle with water and grazing land in the dry seasons. For us, the delta is our 'umbilical cord'; it provides the necessary resources for continuing our lives and cultural activities. We build our homes with the doors facing eastwards. Similarly, when we construct structures for our cattle, the doors must face east. This shows a connection that we have with our cattle.

Our cattle are our main source of pride, income and are valued in our community. The young men in our villages herd our cattle communally. They spend months away from home in the

rainy season, seeking grazing lands for our cattle. They travel on traditional grazing corridors and move with our cattle as far away as Voi, located in Taita Taveta county in the southern part of Kenya, about 125 kilometers from our villages. In the dry season, they bring them back to the Tana Delta where the grass is abundant. These yearly movements of cattle have been part of our way of life for generations upon generations. Women are also engaged in cattle activities. We help support our families by selling the milk from our cows and making milk products like *kirori* (sour milk), *samli* (purified butter) and *labania* (milk fudge), which are sold locally. We also are involved in farming activities on community land in our villages.

We, the Orma, live in permanent villages. We move our cattle looking for good pasture. We identify the wetlands and grasslands in the western part of the county as our traditional pastoral lands. From Witu we move both north towards the forest areas and south to the Tana Delta. In the dry seasons, we bring our herds to the Tana Delta and after the rains, we move them to the savannah areas as far as Voi.

In earlier times, we would move our herds as far as Somalia and Sudan. Our cattle trade was so large that ships full of cattle would leave the Lamu port to destinations in the Gulf. Evidence of this trade is witnessed by the rusted unused cattle ramps on Lamu Island near Matondoni. We also use the byproducts of our cattle. These products are sold to our Swahili neighbours in Lamu and other market areas.



Picture 5: Orma farmers on the way to grazing areas

4.3 THE SANYE

We the Sanye are traditionally hunters and gatherers and live in Lamu County. We traditionally hunt animals and gather fruits, tubers, and nuts. We also gather honey in the

forest areas of our home. We are helped by a special bird we call *havati*. It is this bird that directs us to know where the bees can be found. We are also farmers. We plant *simsim* (sesame seeds), millet, cassava, and maize for our own consumption.

Traditionally, we live in the southern forests and grasslands of Lamu between Lamu Island and Witu town on the mainland. It is a diverse ecology of grasslands, coastal forests and the area around Kunguya, which is now known as Lake Kenyatta. In the 1970s, we were forcibly moved from our ancestral lands to pave the way for government settlement schemes, which President Kenyatta initiated to provide land to the Kikuyu. We were forced to move to a place near Hindi called Marmaraa. Instead, we left that area and returned to live on the fringes of our ancestral land. The government used our traditional territory as the site of government settlement schemes including Kenyatta Settlement Scheme Phase 1 & 2.

Today, we are scattered in urban areas and small villages and have lost our traditional livelihood resources and many of our cultural values because we have no home. We, the Sanye, speak a click language, which is said to be one of the oldest languages on the African continent. We are a proud people who have been forcibly removed from our traditional territory where our sacred sites and our natural resources have sustained us from the time of our ancient ancestors. Today we live in five villages: Bahati Kilale, Mwembedai, Shekale, Kwawaje and Mwakanda. We use the forests to gather honey, fruits, and roots. We are also small-scale farmers planting maize, sesame seeds and cassava.

We don't have land security. Our lands are continually being grabbed from us by wealthy elites and government agencies. We want our community lands recognized so that our people have a future and our rights to preserve our culture and way of life are upheld.



Picture 6: Sanye community member explaining how they used to hunt in the past

4.4 THE AWEER

We are often called Boni people, which is to us a derogatory term and therefore prefer to be called Aweer. We number about 3,500–4,000. We are hunter and gatherers whose traditional

territory is located in the northeastern area of Lamu County. Our territory consists of coastal forests, grasslands, and mangrove creeks. This area has been our home from time immemorial. Over the years, we have been sustainable hunters of small mammals and survived on wild fruits, tubers and collecting honey from the forests. We also hold the forests with high regard as we have numerous sacred sites protected within. However, with the intrusion from poachers and insurgents from Somalia in the 1960s, our lives changed drastically.

In the 1960s, we were forcibly removed from our homeland as a result of the Shifta War and forced to settle permanently in villages, where we live now. The Kenya government created villages along the corridor between the Boni and Dodori National Reserve including Milimani, Basuba, Mangai, Mararani, Sankuri, and Kiangwe on the Dodori Creek. Our traditional forests were gazetted into the Boni and Dodori National Reserves in 1976 and the Lungi forest in 2016¹⁰. These government decrees significantly limited our access to our livelihoods and sacred sites. This forced us to reduce our hunting practices, which were exacerbated by the ban on the practice and thereby limiting our sources of protein. As a means of survival, we started small-scale farming of maize, sesame, cassava, beans, and other subsistence crops. More recently, we have also begun keeping livestock.

More recently, we have faced many threats from Alshabab extremists from Somalia and consequently been caught up between the Kenyan army, and the terrorists who hide in our forests by being restricted from travelling through our forests.

This condition of being barred from our traditional lands hinders us from practicing our cultural ways, which help to sustain us as a people. The forests are our lifeline and define our way of life. Our name Aweer itself means hunter in our language. Although we are limited from using our traditional territories, we are critically aware that outsiders are arriving and grabbing land within these forests. Also, outsiders are illegally entering the forest and felling trees, which we have always conserved.

We have no land security even in these villages since our community land is neither recognised nor protected.

¹⁰ Kenya_Gazette_Vol._CXVIII_-_No_.22_.pdf



Picture 7: Aweer elder showing how they used to use arrows to hunt for wild animals

4.5 THE SWAHILI

The most well-known communities in Lamu County in the national and international context are the town residents of the historical city-states of Lamu, Pate, and Siyu. We, the inhabitants of these once powerful international entry points, call ourselves using local idioms, for instance, we are called Wa-Amu, when we are from Lamu, Wa-Siyu, when we are from Siyu and Wa-Pate, when we are from Pate. These distinctions also hold true for our languages. We have the languages known as Ki-Amu, Ki-Pate, and Ki-Siyu—all of which are dialects of Kiswahili, the language of the Swahili. The use of local names as an indicator of where we belong and which dialect we speak enables our communities to be identified with our powerful and glorious past. In our BCP, we have grouped the Wa-Siyu, the Wa-Pate, and the Wa-Amu together under the category “Swahili”.

We, the people known as the Swahili inhabit the town of Lamu on Lamu Island, the town of Pate on Pate Island and the village of Siyu on Pate Island. There are distinctions between us in the three groups mentioned above and when appropriate we will introduce the differences for the purposes of the BCP. In other cases, we will discuss ourselves as a single unit for we have many similarities, which we hold in common. We, the Swahili, are traders and artisans. We are also farmers and livestock keepers. Our religious education centers are well known, and we produce respected Islamic scholars. All our Swahili towns, at one time or another, were known for excellence in Islamic education.

For centuries, we have been involved in trade. We made strategic alliances with our trading partners in the Indian Ocean, where the monsoon winds brought ships to our ports and took our boats to distant trading centers. These successful alliances brought great wealth to our

towns. Our wealth in the 15th to 19th centuries was as a result of our success in this mercantile system. We traded with partners from the Arab Peninsula, India, and China. We exported raw materials like tortoise shells, ivory and myrrh and imported goods like textiles, porcelain, and beads.

Our Swahili history is important to the nation. The Lamu archipelago is dotted with stone ruins that symbolize our golden past. These areas are monuments gazetted by the National Museum of Kenya. Since 2001 Lamu has been recognized as a UNESCO World Heritage Site for its preservation of Swahili culture and architecture. We are proud of our heritage.

We have also depended on our farming skills, which involved fruit and nut trees including coconuts, mangoes, cashews, and limes. We also raised livestock like cows, goats, and chicken on our farms. We also traded for agricultural and livestock products from our neighbours, most notably the Bajun and Orma and marketed their products in our regional and international trade circles. The Bajun have traded with us their excess grains from their farmlands on the mainland and the Orma have sold their cattle to us, which we have sold to the Arab Gulf states. We also depend on the fisher folk and mangrove cutters from the Bajun Islands for our marine resources and building supplies and for trading purposes in our regional markets. The hunter and gatherers of the forest also play a role in our regional economy by supplying honey and mats for our urban populations.

5.0 THE TERRAINS OF OUR TERRITORIES

Settlement patterns in our home, Lamu County, vary and are determined by many factors. Some of these factors include access to economic activities in agriculture, livestock keeping, mangrove cutting, fishing, hunting and gathering, artisanal practices, and trade. More recent factors include government settlement scheme programs and insecurity in the area.

Our areas in Lamu County can be divided into two livelihood zones, namely the rich agricultural and livestock zones in the mainland (mainly settlement schemes), and the fishing and marine zones (the islands) both with varying economic diversities.¹¹

Lamu County has a long irregular coastline that is highly suitable for harvesting marine resources, transport, and tourism. Our mainland has rich soils that have been highly suitable for agriculture and continue to maintain rich indigenous forests that we depend on.

There are three major types of soil in Lamu County i.e. red loamy soil, sandy soil, and rocky soil. The red loamy soils have high fertility and are found mainly along the low land of Witu, Mpeketoni, and some parts of Amu and Kiunga Division, these soil support food and cash crops such as maize, beans, cassava, and cowpeas. The sandy soils, which have moderate fertility are found in the Divisions of Amu, Faza, and they support the cultivation of coconut palms, maize, and cassava.

6.0 OUR RELATIONSHIP WITH NATURAL RESOURCES

We, the community of Lamu, rely on our natural resources to survive – for nourishment, shelter, healthcare, to worship in our sacred spaces, and to continue our cultural traditions. Our environment is our wealth – when our environment is healthy, we are healthy. When our environment suffers, we suffer.

Many of us in Lamu are able to rely on our nature-based livelihoods for our survival. Our ancestors before us also relied on the areas' natural resources for their livelihoods. It has been our most reliable service provider. Within our community in Lamu, we have a number of different livelihood groups that are linked and intertwined. The ethnic groups within Lamu often share livelihoods – and because of this, communities live in peace as they are intertwined with an interdependency that has been crucial for survival.

6.1 MARINE-BASED LIVELIHOODS

Traditionally, we the Bajun and the Swahili are fisherfolk, though the Sanye, Aweer, and Orma are also now more involved in local fishing, in both fresh and salt water, to supplement their livelihoods. We are involved in fishing, or *u vuvi* in Kiswahili, prawn fishing and crabbing, and diving for lobsters, sea cucumbers and other marine animals.

We rely on a variety of land and water-based natural resources for our livelihoods. We fish a variety of species for food and to sell, including mostly fish such as mullet, rabbitfish, groupers, parrot fish, snapper, cavalla jacks, tuna and rock cod.¹³ We also catch crab, lobster, shrimp, prawns, calamari and octopus and various types of sting rays. We further go fishing for sharks, using the whole body of the fish for various uses including food and its oil as a wood preserver for our dhows. The oil helps to keep insects from boring into the wood and to make the boat more buoyant in the water. We used to harvest salt from the sea to preserve the fish that we catch before we depended on retail shops.

Over the generations we have conserved our fish stocks in different ways, depending on the season. During the “*kaskazi*” (summer) season, we use “*mishipi*” (hand fishing lines), “*maema*” or “*towi*” (traditional fishing traps, that are made from *marara*, a part of the coconut tree), “*j arife*” or commercial, large-holed *n yavu* (nets) so that fingerlings can escape) and “*yasi*” (made from the *m godha* tree). We also fish with long lines in our traditional dhows made of wood for deep sea fishing. In order to preserve the coral, which is abundant with different types of fish we use line fishing and restrain from dropping anchor on the reef. We also conserve fish by selecting different zones to fish at different times.

We used to know how to make dhow boats well, but the knowledge is being lost as those with this traditional knowledge become fewer and the youth become less interested.

¹² The district (Lamu County) reportedly produces over 1500 metric tons of fish annually, valued as ksh 111.8 million, 75% of which comes from marine fishing. See Office of the Prime Minister, Ministry of State for Planning, National Development and Vision 2030, 13.

¹³ See Office of the Prime Minister, Ministry of State for Planning, National Development and Vision 2030, 21.

We currently experience a number of issues that affect our livelihoods. These issues include: decreasing fish stocks; increased competition for fish and other food sources (not just from locals but also from commercial trawlers and fisherman from other places, such as Tanzania, who do not use sustainable fishing methods), increased insecurity in the Lamu archipelago making it difficult to fish at times that are good for fishing that impacts our livelihoods; and very little support from the government for our fishing industry even though there is huge potential. Local fisher folk work with small wooden sailboats mostly and we do not have modern fishing gear or equipment. This limits the size of our catches and, because of a lack of a structured market, middlemen exploit the poverty of local fisherfolk by making a large profit from the fish caught.



Picture 8: Bajuni fishermen on a boat going to fish

The port and coal projects are going to affect our fishing grounds, including the areas in the vicinity of Manda Bay and in the creeks off the Manda Bay channel including Dotori and Ndununi Creek. These areas are important to us for fishing and shellfish of all kinds. While it may increase our access to international markets, the port project will also make it difficult for our community to sustain their livelihood and it is likely pollution will also have an impact on the quality of the mangroves that provide the fish breeding grounds in the Lamu Archipelago, especially in the area of the port and its infrastructure. We fear that their environment will no longer support the fish breeding sites as they are now. We also fear the emptying of dirty bilge water from the ships that will come into the port. This waste product has chemicals in it that make it harmful to the mangroves that grow along the coast. The mangroves protect our shores from erosion and tsunami waves as well as nourish the marine life that lives in its habitat.

The port will also affect the number of predator fish who come into the channels where we do our fishing during the monsoon winds known as kusi. With the dredging of Manda Bay to

allow for larger ships and the refuse that is normally tossed from these large vessels, the number of predator varieties of sharks will increase. This will cause increased attacks with lobster divers, fishermen and in the tourism sector as well. We fear that their numbers will create dangerous shark-infested waters like the ones in Mombasa. They will also deplete the fish in those areas.

The Amu coal power plant will endanger the marine life as a result of volumes of water being sucked in from the bay to cool their machinery and returned to the bay as heated water. This cooling system will cause death to countless marine animals by vacuum pressure pulling water in and taking with it large numbers of fish, shellfish, and their eggs which will kill them through heat, physical stress, or by chemicals used to clean the cooling system. We understand that larger marine life may be killed or injured when they are trapped against screens at the intake point.

6.2 MANGROVES AND TIMBER HARVESTING

We, who are involved in mangrove and timber harvesting, rely on these natural resources for our livelihoods. Our County is rich in mangrove and terrestrial hardwood forests. We are traditionally from the Bajun and Swahili communities and we have used these resources to build our houses and mosques, to construct dhows, to make furniture and to export to other areas on the coast for building materials. Before Kenya criminalized the trade of mangroves in 1982,¹⁴ we used to be one of the largest traders of mangrove wood to the Middle East.

There are several types of mangroves in our area: These include “*mkoko*”, “*mwia*”, “*mkandaa*”, “*mlilana*”, “*mutu*”, “*ntu*”, “*kikandaa*”, and “*mkomafi*”. Each of these varieties has a purpose and a time for cutting them. Our mangrove forests in the County are healthy and well preserved spanning 37,350 hectares, which makes up almost 61% of the mangrove in Kenyan, 3% of forest cover¹⁵, and more than half of the total forest coverage in the County.

¹⁶

These forests are the best preserved and healthiest on the whole coastline of Kenya.

Our terrestrial forests have hardwoods such as ‘*bambakofi*’, ‘*nguvi*’ and ‘*n agambo*’. Each of these types of wood has their own special use. Today, these woods have been overexploited by the growing demand and population increase of outsiders who use power machines to cut these indigenous hardwood trees.

Over the generations, we have traditionally conserved and sustainably used these resources by selectively cutting these trees (harvesting only straight trees), by shifting harvest areas to allow for regrowth, by mangrove planting and by only using traditional hand tools such as “*solu*”, “*msumeno*”, “*shoka*” and “*kipande*”, not power saws, which increases the rate of harvesting and places damage on the undergrowth.

^{1,45} Spalding, Mark. *World Atlas of Mangroves*, 2010

Ministry of Environment, Natural Resources and Regional Development Authorities (2007). *National Mangrove*

*Ecosystem Management Plan*¹⁶ 2017 – 2027.

Lamu District Development Plan, 2008-2012, pg. 39



Picture 9: Lamu County has the highest mangrove concentration in Kenya

During colonial times, mangroves were divided into zones, which helped to conserve them by limiting their harvest to particular zones and allowing other zones to grow and mature. We wish for this to be reintroduced. We also wish to enforce laws to stop the cutting of indigenous trees such as *bambakofi*, *n guvi*, and *n gambo*. Instead, there should be places where fast-growing timber sources such as casuarina trees can be harvested, that will not have negative consequences on the environment.

We also understand that the cooling system from Amu power coal plant will endanger our mangrove forests as they will be subjected to the thermal effluent (heated wastewater). We are aggrieved that our coastal ecology will be tremendously affected and we will lose our natural resources, which we use for our livelihoods.

The increase in population from the building of the port and other infrastructure will result in great destruction of our natural resources like mangroves, which are used for building houses and this too will impact the marine environment like fish breeding grounds and protecting the coast against natural flooding. Terrestrial forests too will be under duress from the increase in population and the other LAPSET components and coal-powered plant that need large

tracts of land for development. We fear that our resources will be depleted and we will lose our livelihood and heritage.

6.3 LIVESTOCK KEEPERS

We, livestock keepers, have traditionally come from the Orma, Bajun and Swahili communities¹⁷ though there are Somali and Korre within Lamu County who also rely on livestock keeping for their livelihoods.

As livestock keepers, we rely heavily on traditionally shared lands to graze our animals. We tend to animals like cows, goats, sheep and chicken. These animals provide us with meat, hides, bones, eggs and milk for eating and drinking and for selling. We also use our animals for religious and cultural ceremonies.

Our local breed of cattle is called “Boran” and we also have the “Somali” breed¹⁸. The women in our communities travel to places like Lamu Town within Lamu County to sell our milk and other milk products like *kirori* (soured milk), *s amlisafi* (*ghee*), and *I abania* to the community. We also use leather in the form of hides – sometimes to make accessories like shoes and belts or straps for our milk gourds and we use hides to make traditional mats for our homes. We use dung for fertilizer and mosquito repellent. Horns are made into musical instruments and are symbols of our lineages. We use traditional methods to take care of our animals, for instance, we use seawater for de-worming as well as for transport. We have cultural celebrations and traditional songs based on our livestock.

While the Bajun and Swahili slaughter cows for their meat occasionally, we the Orma only slaughter our cows on specific religious or cultural occasions, like during the month of *Dhul-Hijah*. We also slaughter when we are faced with serious disasters. The Orma ceremonies for weddings and births involve rituals that connect us to our cows. For instance, before a female marries, four cows are chosen for the marriage ceremony. The bride anoints the chosen cows with her hair oil, and then the cows are slaughtered before the community’s elders. This is known as *c hirfa* and the ritual finalizes her marriage. We also have particular rites for the birth of a child. The umbilical cord of the newborn is kept and after seven days it is placed on a cow. When this cow has a calf, the calf is given to the newborn. This, we call *churo*. These examples illustrate how important our cows are to the healthy functioning of our community.

We, the Orma, traditionally conserve our natural resources, such as lands, by shifting our animals when the grasses are low, so as to allow time for regeneration. We move our livestock seasonally and travel as far as Voi in Taita Taveta County to graze our animals. During droughts, we have access to a place known as Boko, where the water table is close to the surface. There, we dig shallow wells using wooden tools. The well is called El-Boko or the well of Boko. We are prohibited from using iron tools to dig because it is believed that the metal will cause the well to dry fast. Our concern is that we will lose access to Boko because of land grabbing and this will affect our ability to sustain our community during drought.

¹⁷ Livestock keeping provides livelihoods for about 30% of the population. See Office of the Prime Minister, Ministry of State for Planning, National Development and Vision 2030, 13.

¹⁸ The cows are given particular names based on their behaviour and colour. These names include Sorka, Bulle, Shiera, Haigi, Dima, Uruba, Hadi, Arabi, Jeleta, Sarba, Kareta, Churo, Waldei and Sahal.

We have a number of concerns as livestock keepers. The massive land grabbing that is taking place in the region means that the lands we have traditionally utilized to graze our animals are becoming less accessible. Our traditional grazing lands are being lost to small-scale and corporate farmers, sprawling private ranches and sugar cane production. We of the Orma community believe that the Tana Delta is our most important resource for our livelihoods, culture and traditional ways of life. We regard the Delta as our umbilical cord and need constant access to it in order for our cattle (and our families) to survive. We also play a role in the conservation of the delta by respecting its rhythms of flooding and drying, by integrating our cattle with the wildlife in the area, including birds, fish, hippo, and other wildlife, by not interfering with the natural delta patterns like disturbing its banks, fencing, or farming near its flood waters. This is not respected by newcomers.

Ranches have been established, but sometimes these are not managed well. Squatters are invading these ranches and felling trees, putting up fences and disturbing the natural ecology.

We hope to establish our own ranches, or at least have sizeable grazing areas available that will protect our interests. We also want communal title over our lands and support from the government for local infrastructure (such as roads), health services and security.

The LAPSSET and coal projects will result in large population growth with needs for water and electricity. We hear that the Government of Kenya plans to place a dam for water and hydropower on the Tana River upstream from where we live and raise our cattle. We fear that construction of dams along the river will negatively affect the delta, drying up its seasonal waters, destroying the habitat of wildlife as well as our resource on which we are dependent. We have not been consulted about this large infrastructure project and this makes us very anxious and fearful.

6.4 HUNTER-GATHERERS

We, hunter-gatherers, use natural resources within our traditionally owned and utilized forests, including animals, in order to survive. We are traditionally of the Aweer (Boni) and Sanye ethnicity and we divide our shared traditionally owned lands into three types – sacred sites that are used for special occasions and meetings and are otherwise untouched; areas where we harvest natural resources like herbs for traditional medicines, and; areas where we gather honey and hunt for food. Specific clans use specific areas to hunt and there is a system of worshipping at the sacred sites of other clans if you hunt on their land. We, Aweer people, have traditionally lived in the Boni forest which lies within the Boni and Dodori National Reserves and have been mobile communities – communities that have survived by moving to different parts of our forests. We categorize our natural resources into three areas: the ocean, the forest and the lands for cultivating. Each of these areas has specific uses for the survival of our community.

We use grass thatch for building huts, fronds for weaving, wood for timber to construct our buildings and make combs and drums. We also use the forest for gathering herbs, natural medicines, wild fruits, tubers, “*kama*” (like dates), “*mengo*” (like passion), “*mariga*” (like potatoes) and other edible nuts and roots for food, and honey as well as gathering materials for making household goods such as walking sticks, mats, kitchenware etc. We traditionally harvest honey using the wood of a tree called “*mgodha*”, which produces a smoke that makes the bees sleep as we harvest their honey resources. We have traditional knowledge of birds such as the *m evis*, *deero*, and *andkabi* to guide us to bees and honey. The Sanye also have a honey bird called “*havat*”. We use the soil to make mud for our buildings.



Picture 10: Sanye woman weaving mat in front of her traditional hut

We eat, sell and trade our honey, as with the fish that some of us catch. Traditionally, before the gazettment of our lands into National Reserves, we have also hunted animals for food such as small antelope, buffalo, and bushbuck with equipment such as the *bodhana* and *ukondo* (arrow) by the Sanye and the “*mshale*”, *mkukinachembe* and *shoka* by the Aweer.

We use water from wells, rivers, and lakes for our own consumption. Before the advent of table salt, we use to use salt harvested from salt beds to flavour and preserve our food. We sometimes have our own small farms to supplement our lifestyles. We plant sesame, millet, and cassava. We also live in harmony with farmers of other ethnicities, trading honey and other natural resources for food.

We have a spiritual connection with our lands – we believe the bones of *H uhu*, *sunilavana* (owl), are spiritual talismans and we revere them. We have several sacred sites and we maintain them because they are important to us, the way that we function and govern ourselves. For example, traditional worship for the Aweer previously occurred under the

sacred tree, '*unkupa*', and '*um*'. We pray at sacred trees for rains and for good health. These traditions continue and are incorporated into our belief in Islam. Men and women have separate sacred sites, and neither is allowed to visit the others. The women's site is known as '*Gedhi*' and lie close to their villages, while the men's sacred site '*Duri*' is found outside the villages.

We (the Sanye) consider the mongo tree as a special tree where we pray and make sacrifices when faced with disasters of any kind. We have already lost some of our ancestral burial grounds and we have a real worry that we will continue to lose more. We naturally conserve our resources and we are committed to looking after our resources so that we can preserve them for our children and their children. We follow cultural traditions and rules that allow the conservation of our resources such as: only cutting trees outside our forest, and only certain ones traditionally hunting only weak animals, not pregnant or young animals, so as to make sure that these resources regenerate, only harvesting honey seasonally and only traditionally by the use of smoke, not by fire, which causes more destruction than is needed, selecting fronds for weaving only from matured trees, keeping river zones for washing and drinking uses, and we protect sacred sites within the forest.

We are currently facing issues with our land. We find that our lands are given away to outsiders. Our traditionally owned and utilised land where we practiced shifting cultivation, has either been grabbed without our consultation, is being illegally logged without our knowledge or permission, or is used as part of settlement schemes. We have been offered very little compensation (and only if we have trees on our land), even though these lands are vital to our cultural and spiritual survival. We are suffering, as our lands and trees are taken away from us. We no longer have access to some of our sacred sites. Some of us (the Sanye) are now involved in subsistence farming of crops like maize, banana, cassava, and mango as an alternative livelihood, in order to survive.

We are vulnerable when we speak of development projects because we (the Sanye) lack any political representation in the county, let alone nationally. We of the Aweer community have one elected representative in the County Assembly, but this is not enough to protect our vulnerability against developers who take our lands away from us. Generally speaking, we have very little formal education. Many of us have not completed primary education and we struggle to send our children to schools. Because of our literacy levels, business people, developers and government officers take advantage of us. We, the Sanye, have not one title deed among all our community members. And we, the Aweer, are also facing problems with land security.

We fear that with the increasing numbers of newcomers moving to Lamu to look for jobs, we will be forced to move to make room for them. Our traditional way of life will forever disappear as we move to towns and villages seeking shelter. We will lose our way of life and the natural resources that we use for our livelihood will be lost forever.

6.5 FARMERS

We, the farmers of Lamu County, are traditionally of Bajuni, and Swahili, though the Aweer, Sanye, and Orma are also involved in farming, often to supplement our traditional livelihoods.

We have traditionally farmed crops such as banana (*migomba*), tobacco (*tumbaku*), maize (*buru*), millet (*n chama*), beans, sesame (*simsim*), sorghum (*mtamawabishee*), cow peas, cassava, Other crops have included green grams, coconut, mangoes, cotton, cashews, limes, and bixa. Our farming supports a large part of the Lamu population.

As farmers, we use natural resources such as the soil, water and traditional fertilisers (and some of us use synthetic fertilizer). We use tools such as “*jembe*”, “*shembee*”, “*kishoka*”, *panga* and “*soli*” to farm. We use the crops that we farm to eat, to sell and sometimes for medicinal purposes (like the coconut). *Mgodha* is also used to create fire for slash and burning. We, farmers, sometimes have problems when wildlife comes on to our farms and destroys our crops (as some of our farms border forests).

Farming is not simply our livelihood – we have cultural and spiritual traditions that are integrated into our farming practices. We, the Bajun, have traditional songs that we sing during the preparation of the ground for planting and for harvesting. We have someone who leads the farming who is selected amongst ourselves because of their knowledge, experience, and responsibility. We are given advice on where best to farm, including soil fertility, by a traditional astrologer, otherwise termed as ‘*mwalimu*’, in a tradition called “*kushikamwitu*.”

A ritual “*sadaka*” offering is also made to prepare for farming, with the *m walimu* deciding the best type of goat and time and day for the offering (called the “*k uvuwadha*”). Other community rituals to prepare the land for farming include the “*Kusonga*” and a reciting of the Holy Quran (Chapter Yasin) and prayers to encourage success, as well as offerings to God in recognition of the blessings of a good harvest (called the “*Kudarawa*”).

We traditionally conserve and sustainably use our natural resources by shifting cultivation of our farms, to make sure that the nutrients in the soil are replenished. We are also involved in perennial, seasonal and settled cultivation of crops. We often farm as a group and when clearing bush for farm use, we selectively cut trees – for example, we do not clear trees such as “*nchakwi*”, “*nsisi*” or “*msisi*”, “*mkwayu*” and “*mbuyu*” as these trees provide shelter. We also clear forests by burning, but this is done systematically by clearing the boundary of the farm before initiating a fire. When starting a fire we take into consideration the direction of the wind and create firebreaks. There are also many people that assist in this process, to help control the fire. Burnt pieces of wood are sold as charcoal.

We have two types of wind: *kusi* and *kaskazi*. *Kusi* is the wind that blows from south to north during the rainy season, and *kaskazi* is the wind that blows from north to south. Before the colonial period, our farms produced enough food to feed the County, but since the insecurity of the 1960s, many of us have left our villages seeking security in other areas. Now we are dependent on food sources from outside the county. Also, political elites and outsiders have taken much of our farmland away from us. This has made us feel insecure and increased our poverty. Those of us who have lost their farmland have turned to fishing to eke out a living.

As farmers, we are vulnerable because most of us do not have documentation to show ownership of our land. We are also concerned because we are not allowed to enter the forest to retrieve the wild fruits that grow there like *dhichakwi*, *pepeta*, *mabungo*, *tundukuwa*, *kungu*, *makoma*, *maganda ya kamwa*, *kunazi*, *matonga*, and *ukwaju*. The Lamu Port and other LAPSET infrastructure are a great concern to us. We are concerned that our traditional farming lands will be grabbed, that our natural resources will be decimated by the number of people living in the county and that our traditional conservation methods will not be respected.

We also have problems of drug abuse among our youth populations. This problem may be caused by the anxiety of the future and what it holds for them. We fear that the problem will escalate as resources become scarce and more outsiders arrive looking for jobs.

6.6 ARTISANS, DHOW MAKERS, OTHER NATURE-BASED LIVELIHOODS

Many members of our community in Lamu County gain a livelihood through using their creativity, their connections with their spiritual ancestors or their traditional knowledge. We are the Swahili, Bajun, Orma and Aweer communities, and we use our natural resources to make our shelters, construct our homes and other buildings. We cut stone (dead coral) from the ground for building blocks to construct our homes, mosques and old tombs and we use mud for constructing walls and mangrove poles for the structural elements of the building, for building special ovens, known as *tanu*, for our traditional bread we call *mofa*, and a special pot known as *waya* used to make traditional crepe only found on Pate Island known as *hoho*.

We use our hardwood to make fine furniture, the famous Lamu doors, and sailing dhows. We use clay soils to make pots, which traditionally held such things as water and vinegar made from the sap of the coconut tree. We use the materials of the coconut tree for many purposes including making rope, palm fronds for thatching roofs, for stuffing mattresses, medicines for bladder ailments, for cooking fuel, for seedling wrappers, for making sieves and baskets, and for food. We also use reeds for making mats and baskets.

Our natural resources are also a mode of transport for us. The sea channels provide protective highways between the islands. We use the stars to travel on the sea. These resources are also a magnet for tourism. We have visitors who come to Lamu to experience traditional Swahili culture and admire our fine craftsmanship of furniture making and our traditional Lamu doors. They also come to experience our beaches, swim in our pristine waters and sail on our traditional dhows. We also weave mats, baskets and make handicrafts to sell. What we create is a source of pride for us, as it is through the skills of our ancestors and our ingenuity that helps us to create.

We naturally conserve and we are committed to continually looking after our natural resources. We follow these cultural traditions and rules: We only harvest matured trees; we protect and feed our animals well; we use natural stones for building; we plant trees; we use alternative livelihoods, for example, beekeeping; we protect our water sources and conserve water catchment areas; we build communal rainwater catchments and we preserve the *kizao*, the branches of the coconut tree by not cutting fronds, protecting its growth.

With the influx of the population with people seeking land in Lamu County, our natural resources are threatened. Areas that we have always utilized are being encroached upon and fences are built to keep us out. Also, the land is coming under cultivation of cash crops, which destroy the natural ecology and uproot the resources that we have used from time immemorial. Illegal logging is also a threat to our wellbeing. Loggers are using modern equipment to fell trees and disregarding selective cutting. They cut all in their path. Our rights to land have not been recognized, and thus we are insecure and fear for our survival.

Through our ancestors and cultural traditions, we have learned how to live on our lands and waters sustainably, so that we can make sure that these resources are available for our neighbours and for our children. We acknowledge and are committed to following these conservation rules so that we can continue to live in harmony with our environment. We are committed to teaching our children our ways and methods of conservation so that these traditions that are important to our culture are passed down through the generations and protect the environment that is important for our survival.

We have our own personal commitments to conservation – but this will be difficult to follow if we have no information about the various development projects that come our way, including LAPSET and the coal plant, and how they will affect our communities and livelihoods.



Picture 11: An artisan making fishing nets in Siu

7.0 EXISTING DECISION-MAKING STRUCTURES

All the indigenous peoples in Lamu are Muslims, and Islamic law underpins the decisions regarding inheritance, marriage, and divorce, which is overseen by the Kadhi system, which is recognized by the Kenyan Constitution. In some communities, traditional pre-Islamic values remain strongly intact and Islamic law is less potent. This can be seen in practice of traditions that waver from Islamic Sharia law among different groups. For instance, among the Orma,

males are sole inheritors and among the many Bajun and Swahili, the male typically inherits dhows and farms while females inherit houses.

Among the indigenous peoples of Lamu, traditionally a council of elders made decisions. In each town or area, a council of elders made the decisions concerning the welfare of the community, including land usage, security, and trade. They also governed civil cases amongst neighbours and oversaw annual religious rituals some of which are connected with economic activities like farming, livestock, and fishing.

Among the Swahili and Bajun, the Council of Elders is very similar. At the head of the decision-making system is the “*mzee wamu*” or “*mwenyemu*”, meaning the village elder or owner of the village. His council is made up of neighbourhood or location elders called “*wazee wamitaa*” or “*wazee wamu*”. These elders also represent the various livelihood groups in the area like farmers, fisherfolk, artisans, and traders. The council has authority in the area and is given respect by the inhabitants. Bajun and Swahili women have their own council called “*m akungwi*”, and they have the right to make application to the council in community matters.

The Sanye have a slightly different system, however. The council is three-tiered, with the council leader at the top of the structure known as “*k itzo*”, then senior elders known as “*mwanangeza*” and lastly junior elders called “*m kushee*”. They handle disputes and are responsible for the well-being of the group. Sanye women have their own system known as “*avoo*”, and the council is responsible for acculturating young girls into the ways of the Sanye.

The Aweer also use a council for making decisions organized under a clan system. Their council or “*gume*” is made up of elders from the clan, with the clan leader as the head or “*hajo*”. The hajo is consulted for any issues that arise in the community. Aweer women have their own council known as “*aba*”. They meet under the women’s sacred tree to discuss important matters for them.

Like the Aweer, the Orma are also organized under the clan system. Their council is made up of clan elders, and the head of the council is the clan leader known as “*m atedtha*”. The council of elders enforces the rules and regulations and provides leadership for the Orma community.

However, today, the administrative structure of government with the presence of the provincial administration has taken precedence, where chiefs, sub-chiefs and headmen handle most of the disputes, which has replaced our cultural methods for dispute resolution. The Council of Elders powers have been usurped by the government structure. Our sense of prior, informed, consent has been eroded as the government appointed local leaders have been appointed as our representatives, but some of our communities have a poor relationship with these leaders and they do not consult us.

7.1 CUSTOMARY LAWS

We are a very large, diverse community in Lamu County. We consist of different ethnic groups, different livelihoods, cultures, and traditions. Our traditional laws include laws that

govern land allocation, marriage, divorce, inheritance, conflict resolution, regulation on use of natural resources, grazing areas utilization for the livestock keepers, access to the sacred sites for the hunter-gather community, and much more.

If people from outside would like to discuss projects or development with us, they need to approach our community elders who will discuss it with the community separately to make sure that we are all informed and we all agree.

Generally (and this varies according to the community) we have traditional governance structures and our traditional authorities discuss decisions with the community to share views and get an agreement. It is very important that the elders of each of our villages are approached first by any outsiders. Once our traditional authorities are consulted and all the information is shared, they will then involve community members in discussing and making decisions, as no decision can be made without community involvement. The traditional leaders can then communicate to outsiders the decisions of the community. Among the urban towns, a council of elders exists. This council has always provided guidance and governance for the community.

7.2 TRADITIONAL KNOWLEDGE

Each of our ethnic communities and livelihood groups holds centuries of traditional knowledge about our natural (genetic) resources that we have used for generations. This traditional knowledge includes knowledge of the location and importance of sacred sites and the wisdom of traditional doctors, traditional healers and spiritual guides, including the properties and location of herbs and plants, fruits and other natural resources that are used as traditional medicines (the names of these vary from community to community). These traditional medicines help with the healing of bacteria, wounds, snake bites, eye problems, cholera, stomach pains, bladder ailments, headaches, heart problems, fevers, skin ailments, bruising and other ailments. Our healers also have knowledge about mental ailments, which are often used together with Quran verses.



Picture 12: A traditional doctor in Pate Island

We have traditional knowledge of navigation on the seas, which are passed down from generation to generation. This knowledge includes understanding the winds, the ocean currents, the stars and an intimate knowledge of marine life habits. This knowledge has guided us from time immemorial and assisted us to prosper.

We also preserve traditional knowledge about making ink, soap, crafts (as described above) including mats, baskets, boats, unique Lamu doors, furniture such as traditional beds and chairs and Swahili architecture – knowledge that is important for our culture and should be preserved for future generations.

External parties that wish to use our traditional knowledge must first seek the community's permission, after first telling us what research is being done, what for and giving us access to results or findings. Any benefit that comes from the use of our traditional knowledge or genetic resources must flow to the communities, based on an agreement that has been made with us.

8.0 THE LAPSET PROJECT

Since 2009, the Government of Kenya (GoK) has expressed plans to undertake a multipurpose transport and communication corridor known as the 'Lamu Port-South Sudan-

Ethiopia Transport (LAPSSET) Corridor. LAPSSET will consist of a standard gauge railway line, a port, a superhighway, a regional international airport, an ultra-modern tourist resort city, a fiber-optic cable and an oil pipeline, and be constructed to link Lamu to Juba in Southern Sudan and Addis Ababa in Ethiopia. Through the media, we have found out about the GoK's push for building the project despite our lack of knowledge of the proposed plans, project feasibility, or environmental impacts.

While we commend the GoK for looking at efforts to modernize our nation, up to today, efforts have not been made to consult us as community members nor have there been efforts to inform us about the port plans and its Environmental Impact Assessment (EIA). Consultations have been limited to the national government (Provincial Administration) and select community leaders and high-level government officers in Lamu and Nairobi.

Despite the project's demographic and socio-economic implications, the Government of Kenya and the other partner governments have displayed a marked reluctance to engage the stakeholders whom the project will affect. Their selected briefings have left out affected communities in Lamu County including five indigenous groups: Bajun, Swahili, Orma, Sanye, and Aweer. This has created a situation placing a number of marginalized minority communities in direct conflict with a partnership of regional states and international capital.



Picture 13: LAPSSET development Lamu County, LAPSSET Authority

8.1 ISSUES OF CONCERN

Our concerns about the Lamu port project were first laid out in the Fort Zahidi Mngumi Declaration of 2009, which raised issues about the impacts of the port and laid out mitigation measures deemed necessary for the survival of the Lamu County communities. Following this initiative, the community began documenting the biocultural community

protocol.



Picture 14: BCP feedback meeting in Kiunga

We filed a petition in 2012 against the project and won the landmark case on April 30, 2018. The case was successful on all grounds including:

1. There is a violation on public participation
2. There is a violation by not involving the county government of Lamu in the project
3. There is a violation on the right to information
4. There is a violation on the right to clean and healthy environment
5. The government has been ordered to report on external costs from the project
6. Traditional fishing rights recognized not just as a right but that it also amounts to property
7. There is a violation on right to culture

The High Court has ordered for the amendment of the environmental and social impact assessment (ESIA) and ordered the state to compensate 4,600 fishermen in Lamu Sh1.76 billion for losses occasioned by the ongoing construction of the project. But the issues remain to be addressed, as the court orders have not yet been followed by the government. We, the indigenous community members of Lamu, across 46 villages that participated in the BCP process, aired the following concerns, which informed the petition.

8.1.1 LACK OF INFORMATION TO, CONSULTATION AND CONSENT FROM THE LOCAL COMMUNITY

From the time the GoK announced plans to undertake the LAPSSSET infrastructure project in 2009, it has failed to adequately involve us in the decision-making process.

Despite the significant impacts expected from the port and the scale of the project, information has been restricted to the provincial administration and select community leaders and government officers in Lamu and Nairobi high offices.

Four weeks prior to the launch of the port, the GoK ploughed through farms to make roads and other infrastructure for the port project. This occurred prior to the creation of the Lamu Port Steering Committee, holding of community meetings, or distribution of any printed material about the plans of the port.

8.1.2 ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT REPORT AND NEMA LICENSING OF LAMU PORT PROJECT

We acknowledge that an ESIA has been completed for the first three berths of the Lamu Port and its associated infrastructure. However, the report was seriously flawed, and it was finalized after the construction of the administration offices and decimation of mangroves. It is also after forceful removal of community members from their farms. In light of these unlawful actions, we are concerned that the ESIA lacks the substance to adequately describe the impacts and mitigation measures for the port construction. To date, our concerns about the inadequacy of the ESIA have not been addressed.

8.1.3 LAND INSECURITY

As previously mentioned, the port plans have been held within the inner circles of government for several years. As a result, individuals with access to these plans have been scurrying to obtain land in the area of the proposed port. This land retains the classification of Government Land as is the case for most land in Lamu County. Local communities remain internally displaced without title deeds. The government has, however, further proved its disregard for the land rights of the local communities by tearing through farms in Kililana area in January 2012 to prepare for the port launching site without informing, compensating, or relocating those affected. Only a proportion of those affected by the project have been compensated, while some remain without any compensation up to today.

The community has witnessed the proliferation of land grabbing and this has affected the fisherfolk who have lost landing sites on islands and beach areas. These landing sites were communally owned and provided the fisherfolk a landing place for boats needing mending, for fish drying and for repair of nets. Outsiders claim to have title deeds to these sites, which have from time immemorial belonged to the community.

Furthermore, rushed settlement schemes that are not transparent and have opened more doors for land speculators are being pushed by the provincial administration as a purported solution to the land issues.

8.1.4 POTENTIAL OR ACTUAL ENVIRONMENTAL DEGRADATION AND DESTRUCTION

The potential threat to the environment is not to be taken lightly. Lamu has mangrove and coastal forests that need protection from over exploitation and development. The coastal

forests have endemic plant and animal life that is under threat by human activity and these areas are designated internationally as biodiversity hotspots. The mangrove forests are of incredible ecological and economic value to Lamu. Not only are they the nursery for much of the marine life on coastal waters but they also represent economic value. Unfortunately, the Ministry of Transport destroyed mangrove forests on the port site before an environmental impact assessment was even carried out.

Development that affects the marine waters will have a negative impact on sustaining marine animals. The disturbance and destruction of the coastal ecology will affect the fish and shellfish that depend upon the mangrove for their nutrients and habitat, and thereby our fishing activities.

Dredging the shipping channel will affect the coral, fish, and other animals that inhabit the area. The silt from the dredging will suffocate coral and disturb the ecology of the waters and may create desolate uninhabitable marine areas. Another expected negative impact on the environment is the cleaning of ships as they harbour in the port. The routine procedure releases tons of corrupted water in ship holds into the ocean, which will damage the ecology.



Picture 15: Some of the ongoing destruction of forests by people speculating due to LAPSSET

8.1.5 LOSS OF LIVELIHOODS AND NATURAL RESOURCES

A majority of the communities in Lamu still depend on nature-based livelihoods such as fishing, mangrove cutting, hunting and gathering, pastoral livestock keeping, farming, eco-tourism operators and many others. The failure of the government to put measures in place to preserve the indigenous cultures will threaten the bio-culture of the region and livelihoods of the marginalized communities.

The ESIA of the first three berths of the Lamu Port informs us that we will have limited or no access to areas that are our traditional fishing grounds. It also suggests that we will not be able to use our traditional methods of moving from island to island in order to bring goods and food to the islands and transport people needing government services, healthcare and students for schooling. The ESIA has provided an inadequate and even highly dangerous alternative for our needs. They have recommended that we use the open sea to reach Lamu or to go from Lamu to the islands, which are not acceptable. During the monsoon winds, the high seas are rough and unmanageable for our small boats. Even experienced captains do not venture into the open seas at this time.

We as fisher folk are concerned because the Lamu Port will affect the marine environment negatively and the fish we depend on will be depleted and unable to survive with the effluents drained into the water, the silt from dredging and the loss of mangrove cover. These negative impacts will mean a loss of marine life, which is our source of livelihood and food for our families.

The threat of shark attacks in the area will increase due to the dredging to create a deep channel entry to the port and because of the sharks that normally follow big ships, catching their expelled garbage and waste. This will negatively impact the environment and create a manmade threat to human and marine life.

8.1.6 EXPECTED POPULATION INCREASE AS A RESULT OF LAPSSSET

The Feasibility Study done by Japan Port Consultants and the ESIA by Heztech Engineering Consultants predict that the population in Lamu County will dramatically increase from its current population of approximately 110,000 to over 1.25 million people due to the LAPSSSET project. This exponential increase will have a cumulative effect on many aspects of life in Lamu including

- Social issues such as increased crime, drug and alcohol abuse,
- Environmental degradation including deforestation of terrestrial and marine forests,
- Watering down of indigenous culture,
- The threat to Lamu's status as a World Heritage Site,
- The threat to national monuments,
- Conflict over limited natural resources, and
- Political marginalization of indigenous communities.

9.0 AMU POWER COAL PLANT PROJECT

We understand that the Government of Kenya, through the Ministry of Energy, has embarked on an ambitious plan to generate 5,000 MW of electricity to boost its 2030 development goals. We have been told that this will include 1050 MW generated from coal power.

The proposed site for the coal plant is at Kwasasi in Hindi Division, Lamu County. The site is located north of Lamu Island on the western shore of the Pate Channel bordering the Dotori and Ndununi Creeks. It is 21 km from Lamu Town and a mere few kilometers from Pate Island.

The 1050 MW Lamu coal plant has been approved by the county government of Lamu subject to certain conditions being met that revolve around the county government having a say on issues including the Resettlement Action Plan, land allocation and compensation, the ESIA, and how the corporate social responsibility benefits will be allocated and/or divided.

The developer is a private business consortium -- Amu Power -- and we understand that the power is not for consumption in Lamu but will be sold and transmitted on the national electric grid. There is a separate project to build a 300-kilometre transmission line to Nairobi from Kwasasi. This project is already in progress.

We, the community of Lamu, are against the construction of a coal plant in Lamu County, or for that matter, anywhere else in Kenya. We understand that there are other means of generating electricity, some of which are clean and from renewable sources, like the power from the wind, the sun, and ocean waves.

9.1 ISSUES OF CONCERN

The coal plant directly threatens our three main economic activities. These are fishing, farming, and tourism, as well as other minor economic activities, including mangrove harvesting, boat building, construction of houses and other buildings and furniture for our homes. These industries have injected billions of shillings into the Kenyan economy, boosting its revenue.

We understand that the Lamu coal plant presents a serious threat to our environment and to our local communities because of its ash waste, air pollution, and cooling system, which will pour hot water into our bays and channels. We know that the coal plant will have a long-term negative impact on our natural resources, which help us to sustain our cultural and economic activities in the entire Lamu Archipelago.

We have raised our environmental and social concerns about the proposed coal plant since 2014 when we read about the project in the print media and have filed a case at the National Environmental Tribunal against the issuance of an environmental license to the project by the National Environmental Management Authority (NEMA). The NET has placed a stay order on Amu Power until the Tribunal rules on the case.

We visited over 20 villages engaging with people and providing information about coal plants. We found that most people were neither aware of how coal plants operate nor what waste products are dealt with. They neither knew of the substance 'coal' nor how it was mined from the ground in large excavation pits. Our community was not informed of the planned project and its implications.

From information sessions in Pate, Tchundwa, Siyu, Kizingitini, Kiwayu, Ndau, Mtangawanda, Witu, Baragoni, Lamu, Matondoni, Kipungani, Mbujumwali; fishermen, eco-tourism operators, mangrove harvesters and other natural resource users voiced their concerns about the sustainability of their livelihoods if a coal plant was built in Lamu County. We recorded our issues of concerns and sent letters, memoranda, and petitions to all the relevant institutions including the County Government, the National Environmental Management Authority (NEMA), and the Energy Regulatory Commission (ERC), among others.

We, the residents of Lamu County are opposed to the plant due to the negative economic, environmental, and health impacts we will endure as a result of burning coal for electricity in Lamu.

The following are our issues of concern:

- i. Technical and legal ii. Environmental impacts iii. High economic cost of coal
- iv. Lack of information, consultation and consent
- v. Land insecurity vi. Health impact vii. Loss of livelihoods



Picture 16: Community consultative meeting in Lamu Island

9.1.1 TECHNICAL AND LEGAL ISSUES

While we acknowledge that an ESIA report has been prepared and submitted by the project proponents to NEMA leading them to grant an EIA license, we submit that the ESIA process lacked proper public participation and that NEMA granted an ESIA license for the coal plant merely 8 days after receiving public comments. We believe that this amount of time was not adequate to thoroughly engage and consider the comments submitted by the public, thus

ignoring our concerns. We are also concerned because the Resettlement Action Plan (RAP) is incomplete and landowners are unclear of the process under which land is being obtained. This greatly violated our right to free prior informed consent.

9.1.2 ENVIRONMENTAL ISSUES

We have a rich biodiversity in both marine and terrestrial ecosystems that range from valuable coral reefs to seagrasses and to extensive mangrove forests. We also have sea turtles, dugongs and an incredible diversity of other marine life. The potential threat of the proposed coal power plant at Kwasasi poses a dangerous threat to our ecosystems. We hold the mangrove forests as an incredible ecological and economic value to us. Not only are mangroves the nursery for much of the marine life in our coastal waters but they also protect our shorelines from the havoc of destructive storms and tidal waves that experts report will increase with climate change. We want to protect our natural resources from the potential destruction caused by the harmful byproducts of burning coal.

We understand that burning coal to generate electricity requires millions of litres of water to keep the plant cool. After the water is used in the cooling system, it is hot and is mixed with chemicals, which we learnt is known as thermal effluent. This now-hot water will be released back into the Lamu bay, in an area that is rich in marine life and biodiversity. This area is utilized by many fishermen who depend on the ocean for their daily catch of different marine species, including lobsters, prawns, crab, and fish.

We as fishermen and mangrove cutters understand that the once-through cooling system that is to be used by Amu Power will endanger the marine life as a result of volumes of water being sucked in from the bay to cool their machinery and returned to the bay as heated water. This cooling system will cause death to countless marine animals by vacuum pressure pulling water in and taking with it large numbers of fish, shellfish, and their eggs which will kill them through heat, physical stress, or by chemicals used to clean the cooling system. We understand that larger marine life may be killed or injured when they are trapped against screens at the intake point. We also understand that the cooling system will endanger our mangrove forests as they will be subjected to the heated wastewater. We are aggrieved that our coastal ecology will be tremendously affected and we will lose our natural resources, which we use for our livelihoods.

From our reading of the ESIA, we understand that approximately 30% or 100 hectares of the project site will be utilized to dispose of waste ash. We understand that this is a significant environmental footprint. We are grieved that whatever ecological value the site has now will be permanently lost. We fear the ash will be blown by our monsoon winds and may settle on nearby houses, vegetation, and ocean. There can also be runoff of these pollutants by rain and this will contaminate both our lands and water. Water availability has become a critical issue in most of our villages. Our concern is that little water we have will be contaminated and it will become unfit for human consumption.

We understand that the air pollution is made up of particulate matter with corrosive properties and this will damage our historic town, protected under UNESCO World Heritage Sites. We learnt that coal power plants also produce harmful gases such as carbon dioxide and sulfur

dioxide, and, when these mix with water, they form acid rain, which can damage crops, forests, and soil as well as spoil our water bodies through acid rain. We are aware that investing in a coal plant is inconsistent with Kenya's commitments in international law. As a county and country, we are committed to reducing emissions by 30% by 2030, according to the United Nations Framework Convention on Climate Change (UNFCCC). We understand that this project will increase our emissions significantly by up to 6-10%.

We do not want our environment and local livelihoods at risk since we significantly depend on our natural resources. Therefore, we request that the government examine alternatives in renewable clean energy. Amu Power did not provide an adequate analysis of alternative energy in their ESIA. They seem to use information that is at least 5 years old. We know that many improvements have occurred in that period of time and the cost of alternative energy forms like wind and solar have greatly reduced.

9.1.3 ECONOMIC ISSUES

From reading expert assessments, we understand that a coal plant is not necessary for Kenya's energy security. This is because Kenya's power demand now and over the next decade has been overestimated. According to expert reports, we have more energy than we need currently. We understand that after the construction of the coal plant, it will be in an idle capacity, which will be a burden to the people of Kenya.

We understand that the ESIA stated that it is cheaper to generate electricity by using natural gas and therefore we see no need of investing in coal. In claiming coal is cheap, the government is not considering the economic impact and effects it will have on our livelihoods. We hope the government can take the monetary costs of impacting our livelihoods and health and realize that coal is not cheap.

9.1.4 LACK OF INFORMATION, CONSULTATION, AND CONSENT

We are aggrieved that there was a lack of proper public participation in the development of the ESIA by Amu Power and the energy license provided by the Energy Regulation Commission (ERC). We understand that to be able to actively participate in consultation meetings, we need to be informed, and the information should be provided in the language that our community uses, which is Swahili. There should be graphics in order for us to visualize the project and to understand how it will fit into our community. As such, neither Amu Power, NEMA, nor ERC has informed or consulted us adequately.

Initial scoping consultations for the ESIA were done but these were before the project was fully developed. After these scoping studies, some of the components of the project changed and we were never consulted about these changes. Key members of the community, like the fishermen, were not fully consulted.

We are aware that the public hearing was held during the period given for a public review of the ESIA. We understand this to be contrary to the law. Additionally, we understand that the chair of the public hearing was the county commissioner, an individual who is an outspoken proponent of the project. The chair of a public hearing needs to be impartial so as to provide

a safe and objective space for the public to air their concerns. We are aggrieved because this was not the case.

According to the law, Amu Power requires a license from the Energy Regulatory Commission (ERC) to produce electricity. On 28th September 2016, Amu Power made an application to the ERC. The ERC gave the public up to 27 October 2016 to provide public comments on Amu Power's application. The Amu Power application was highly technical. It was also written in English and many of us do not know English well. We, did, however, review the document to the best of our ability. Because of this, we also asked experts to assist us to analyze the application.

We acknowledge that both ERC and NEMA ordered a public hearing on the coal project at Kwasasi. While Kwasasi is the project site, it is in an area without public transportation and a distance of 21 km from Lamu Town. By deciding to hold the hearing in Kwasasi, most residents of Lamu were unable to raise the money needed to hire boats and motorcycles '*boda boda*' to attend the meeting. We are aware that those who did attend were those whose land is located at the coal plant site and were seeking compensation, who would obviously have a conflict of interest in the project.

Although the ERC did not hear our complaints, on the 24th February 2017 a gazette notice

stated that the ERC heard our complaints on the 6th of December 2016 and that they had rejected them. We are dismayed over the negligence of the ERC to state that they heard our objections, yet the only community members present at the hearing were landowners asking for their compensation.

9.1.5 LAND INSECURITY

Although NEMA has provided a license for Amu Power, there is a failure to provide a Resettlement Action Plan (RAP) for affected communities. The lack of a RAP caused anxiety among community members, particularly because the land is not titled, instead, it is land that has been occupied by community members for generations. Since the coal plant has been in the media for two or more years, people have been coming to Kwasasi and occupying or purchasing land. That means that the original owners are fewer in numbers and many new owners, capitalizing on the proposed project are now holding land and thereby having a conflict of interest over the project. The situation continues to create anxiety among community members. This is due to the lack of transparency of the process and a lack of a RAP for the area.

We have been promised for that a RAP would be forthcoming, and indications had been made that the extreme delay in releasing the ESIA Report was due in part to delays in developing the RAP. Despite this, the ESIA Report includes no RAP, forced resettlement impacts are not assessed anywhere else in the ESIA, and the document does not indicate when a RAP will be released.

Also, we are aware that the land along the coast line of Kwasasi is lined by mangrove forest. This land should not be allocated as it holds the resources for fishermen, mangrove

harvesters and others who have been the caretakers of these resources for generations. According to the Kenyan constitution, these are considered as community lands, which cannot be subdivided to private individuals or corporations.

9.1.6 HEALTH ISSUES

We also understand that burning coal releases heavy metals such as mercury, lead and we were told they affect human health in one way or the other.

In the ESIA they also mentioned on the particulate matter that will be emitted by the plant, we were told that the particulate matter is very harmful as they are fine particles of sulphate, nitrates, ammonia, sodium chloride, carbon and mineral dust, that penetrate deep into the lung. When we breathe these fine particles can decrease lung function, aggravate asthma and contribute to cardiovascular disease. These particles are too small in that they can easily escape the cleaning mechanisms which they have set affecting communities around. They cause thousands of premature deaths. We are also aware that the water discharged from the plant may contain heavy metals that can enter the fish and other living organisms. From fish, it enters into human beings and can cause many illnesses.

9.1.7 LOSS OF LIVELIHOODS

We are vulnerable to climate risks due to our dependency on natural resources for food, fuel, and shelter. Currently, we are one of the areas in Kenya that face drought in what experts believe is aggravated by climate change. We are struggling to cope with this adverse situation. We are therefore against building a coal plant in Lamu because we believe coal will worsen our situation.

We as a community in Lamu are dependent on natural resources for our livelihoods. We fish, farm, keep livestock, gather forest resources and cut mangroves to build houses, boats, and furniture. We are also eco-tourism operators.

The government's plan to construct a coal-burning electrical plant will put pressure on our resources and threaten our livelihoods. We are also concerned about the influx of labourers and their families as well as the coal-plant staff. They too will place a stress on our resources, particularly on our water resources, which are already critically stressed, and our forests and mangroves.

We note that the ESIA for the coal plant recognizes that the local community currently benefits from a range of ecosystem services that could be impacted by the project, including fishing, water abstraction, and medicinal plants. It also notes that fishing is the second largest driver of the Lamu economy¹⁹, and tourism is another key contributor, with tourists drawn to the area in part by our diverse flora and fauna, local national historical monuments and reserves, and sandy beach coastline²⁰.

¹⁹ ESIA 5.11.7.3

²⁰ ESIA at 5.11.3.7

We as fisherfolk and mangrove harvesters are concerned about the cooling system that will be used in the coal plant. From the ESIA, we are informed that the discharged water will heat the ocean water and could cause mass killing of marine life, including mangroves, algae, grasses, and fish. We understand that a sudden thermal shock does affect marine organisms. We depend on these resources as a source of our livelihoods.

A total of nine Beach Management Units (BMUs) rely on the waters near the project site, yet their livelihood interests have not been considered and no mitigation measures are developed in the EIA Report to adequately address the impacts that the project is likely to have on their economic well-being.

We, the farmers in Lamu County, are also aware that coal burning creates air pollution that is a mixture of carbon dioxide and other chemicals. We understand that when it rains, this mixture turns into acid rain and can cause loss of plant life and harm to human health. We are afraid of these negative effects, which we understand will cause loss of our livelihoods and also affect our health.

We understand that the Resettlement Action Plan is supposed to address our concerns of forced evictions, loss of lands and loss of natural assets. This includes fishing grounds, fishermen's landing sites, foraging territories, mangrove harvesting and conservation sites, honey harvesting areas, sacred sites, among others. However, only farmers immediately in the vicinity of the plant are to be compensated. Without engaging in an adequate inventory of the assets of families affected by the coal plant, including farmers outside the plant site, fishermen, mangrove harvesters, farmers, foragers, honey harvesters, etc., a narrow and inequitable compensation will create greater poverty among those who should be the beneficiaries of the project.

We are told that the coal plant will create jobs for us and alleviate poverty. We are aware however that the majority of jobs are unskilled ones.

Amu Power ignores the fact that a local economy exists involving fishing, honey gathering and other traditional methods. The belief that creating low skill temporary jobs at the site will bring about economic development for those who are currently engaged in traditional livelihoods is unjustified. The Bill of Rights (article 42 and 44), as well as Article 70 of the Constitution, guarantees our rights to cultural traditions and practices and a clean environment for our families.

10.0 OTHER ISSUES FACING INDIGENOUS COMMUNITIES IN LAMU COUNTY

10.1 HISTORICAL INJUSTICES

The local population in Lamu County is aggrieved by the historical injustices that they have endured since independence by the GoK and other powerful elites. The Shifta wars in the 1960s are a good example. During this period, many Bajun villages on the mainland were

evacuated by the GoK security forces for the “safety” of the inhabitants. The communities of Lamu County recognize that among them are the first Internally Displaced Persons (IDPs) in Kenya. The IDPs in Lamu County were made homeless when they were forced out of their farmlands by security forces during the Shifta war in the 1960s in twelve villages including: Ishakani, Sendeni, and Mvundeni. These community members were harassed, sexually assaulted, had their houses burned or torn down, forced to move into slums in Lamu or migrate to other areas of Kenya and Tanzania. The lack of government recognition of this fact aggrieves the community and further marginalizes them. To date, no form of compensation has been offered to the IDPs. Instead, the aggrieved have witnessed the fact that their farms and lands have been allocated to political elites.

The Aweer community was forced to settle into villages along the Hindi-Kiunga road ostensibly so that the GoK would protect them easily. This process didn't protect them but instead ended up disenfranchising them from their traditional livelihoods of depending on the forests for food and medicine as their movements became restricted by subsequent government moves.

The same situation occurred with the Orma community who were forcefully moved from their lands in the 1980s only to find out that their lands were taken by powerful elites. The Sanye too have lost their lands. This time it was to settlement schemes set up by President Jomo Kenyatta, to settle the Kikuyu community from Tanzania after repatriation from the country.

Historical injustices have occurred along the Lamu road, more specifically between Garsen and Lamu. For 30 years, the road has been unsafe and many people using public transportation were shot, raped and had their belongings stolen. The community demanded the government to increase security along the road, but no actions were taken to create a secure environment. The lack of adequate security provision in Lamu allowed for recent infiltration by extremist groups from Somalia, known as the “Alshabab”. The lack of a clear and responsible response from the GoK has created mistrust of the GOK in the eyes of the indigenous populations.

10.2 LAND INSECURITY

Prior to the new Kenyan constitution of 2010, land in Lamu County was categorized as Government Land (GL). This nomenclature was greatly abused, as the politically and financially elite were the only beneficiaries to access land, while the local indigenous populations were considered as “squatters” on their ancestral land. Although the new constitution and National Land Policy have finally acknowledged indigenous ownership of land, the government has greatly failed in addressing the historical injustices that have occurred thus far, as well as failed to curtail ongoing fraudulent land procurement in the region. From the outset of independence, Lamu residents were unaware of the extent of Government Land (GL) and were precluded from obtaining land.

10.3 EDUCATION

Lamu County stands out as consistently ranking at the bottom in standardized exams for primary and secondary schools. The cause of this low ranking is because the quality of education is very low and government facilities inadequate. Because Lamu has one of the highest poverty levels in the country, secondary education is not accessible. We demand better quality primary and secondary schools that will enable us to compete with the national average. We also demand institutions of higher learning so as to compete with the national labour force.

10.4 HEALTH

Health services in Lamu are dismal. There are not enough health facilities, and health workers and medical supplies are inadequate. There is poor management of the health facilities. If there is a medical emergency, families spend an exorbitant amount of money to move the patient to Malindi or Lamu Island, where at least a doctor with basic medical supplies can be found.

10.5 SECURITY

Since the 1960s, security issues have affected the stability of Lamu County, its indigenous populations, and their livelihoods, as well as a conducive environment for commerce. There has been insecurity due to the Shifita wars after Kenya's independence and more recent attacks by Alshabab militia coming over the border from Somalia into Lamu County. While the GoK has stepped up security in the area, this has been at the expense of the local community, who have been harassed for fishing in their local fishing grounds and stopped from fishing at night, which is the traditional way of catching fish in deeper waters.

In the past, Lamu has been seen as an undesirable posting for security officers. Many officers were posted here for disciplinary reasons and not out of choice. For those who did want to be here and to carry out their job well, the infrastructural support was lacking, for instance, lack of petrol for cars and boats so that emergencies are not answered quickly.

10.6 DENYING RIGHTS TO NATURAL RESOURCES FOR LIVELIHOODS

There were numerous cases of natural resource rights violations against indigenous communities living around and in gazetted National Reserves in Lamu County. Since the gazettment of the Kiunga Marine National Reserve in 1979, Kenya Wildlife Services (KWS) has continually harassed indigenous communities who wish to develop their land. This is despite the fact that the reserve was gazette after community members were already living on the lands. This constitutes a failure to recognize indigenous land and resource rights, which is a gross violation of the new constitution.

Another case is that of the Aweer community whose members were forcefully removed from Boni and Dodori Forests. The KWS has continually denied resource rights in the gazetted reserves despite these rights being mandated by law. For example, community members that

live and gather fruits and honey in Dodori National Reserve are harassed by KWS while government agencies have implemented state projects including fishponds, and tree nurseries in the same Reserve.

The gazettement of forests and marine reserves has also created increased poverty in the area because traditional Bajun fishing grounds are now off-limits for fishing and the forests where the Aweer gathered wild fruit, nuts, and honey are now restricted from use.

10.7 LOSS OF LIVELIHOODS

The GoK's reluctance to initiate land allocations in Lamu County has created a feeling of discrimination amongst the indigenous populations and a loss of livelihood for them. Government settlement schemes have benefited other Kenyans more than local communities whereas the lands that were allocated for resettlement—Witu, Mpeketoni, and Hindi—were the ancestral lands of the Sanye, Orma, Aweer, Swahili, and Bajun.

With the increased population of settlements in the area, the new residents are using modern machinery to extract natural resources to meet increasing demands. For example, chainsaws are used to cut trees in the coastal forests and mangroves in the marine forest, which is contrary to the traditional harvesting methods utilized by the indigenous people. Local communities use hand methods of harvesting, which is in tandem with their traditional conservation methods for sustainable utilization.

10.8 MARGINALIZATION AND LACK OF POLITICAL REPRESENTATION

The people of Lamu County fear political marginalization as a result of the populations that are expected to come to the county seeking job opportunities in the Lamu Port project and Amu coal power plant. This being the case, the indigenous population will soon be in the minority and lack political representation. The likelihood of this scenario creates fear and dissent among the less privileged populations who feel that they are losing everything—first their land and now their political representation.

The marginalization that the local population has witnessed goes further than the fear of losing their political representation. It also affects equality because of the unequal distribution of resources and government services.

The new towns in the settlement schemes have greater resources than the older towns due to higher population in the newer towns, whereas the rural areas where the majority of the population are indigenous have received fewer resources following the formula use for County Revenue Allocation.

For example, the government hospital in Mpeketoni has better facilities and a greater number of health workers than the one located in Lamu Town. The unequal distribution of resources is a source of anxiety for the local population who feel their votes no longer count in selecting leadership and determining the development agenda.

10.9 CHANGING DEMOGRAPHICS

Because of marginalization, loss of livelihoods and lack of land security, the local population is extremely sensitive about the change in the demographics of the county. They are also sensitive to the fact that the local population is Muslim, and they have a value system that is different from other migrants. For one, liquor, promiscuity and gambling are outlawed under Islam, whereas they may be condoned by other communities. Locals do not want to have businesses such as bars, casinos, or other businesses not permitted in Islam prevalent in the county, yet they know that because of political marginalization there is little recourse with a change in the demographics of the county.

10.10 LACK OF DISASTER MANAGEMENT

One of the concerns of the local population is the lack of disaster management in the county. For example, there is a lack of firefighting equipment that would protect towns from a common disaster—fire. In the last few years, we saw Faza lose more than 100 houses to fire due to the fact that no firefighting equipment exists. Similar incidences have occurred in Lamu Town over the past several decades.

11. WAY FORWARD

We have repeatedly informed the GoK about our concerns and aspirations for Lamu through various forums, memoranda, commissions, and debate in Parliament. Unfortunately, as a minority community in Kenya, little attention has been given to our demands. As part of our attempt to formalize our issues and demands, this BCP serves to highlight our visions and aspirations for Lamu. Through discussion and consensus over a period of three years amongst select community representatives, we the indigenous community members of Lamu would like to formally document our shared vision of Lamu:

“To build a culturally, socio-economically, and politically empowered community, striving to secure our natural resources and sustain a green environment.”



Picture 17: Joint vision created by BCP participants from Lamu County

In order to guide future development projects in Lamu, we hope that the Government of Kenya and institutions can adhere to our vision by addressing our previously mentioned issues and meeting our demands that follow.

11.1 WHAT WE WANT

Although we agree that Kenya will benefit from the LAPSET Corridor, extractive industries, and other development projects in our region, these benefits should not infringe or violate our constitutional rights. Neither should it cause loss of livelihoods through loss of land and environmental degradation, nor loss of traditional decision-making methods.

We, the indigenous people of Lamu, want the GoK and other private developers to recognize our rights to exist and maintain our traditions.

We appeal to the GoK to address the following issues:

1. Sharing of all information on the proposed projects to make information easily accessible and transparent, including their potential benefits and costs to the community, commensurate with the size and importance of the projects.
2. Facilitate consultations with the Lamu community to ensure that community views are considered and that mitigation measures and local development needs are adequately addressed.
3. Respect and utilize traditional cultural knowledge of the environment in the planning and development of the projects.

4. Free, prior, and informed consent with the communities of Lamu throughout all stages of the projects.
5. Support an independent review of the process and substance of the Environmental and Social Impact Assessment Report and support a Strategic Environmental Impact report on the whole LAPSET project, so as to ensure that every effort will be made to mitigate the harmful impacts of the project on the environment, marine economy, and the socio-cultural fabric of local communities; and that World Heritage status will be protected at any cost.
6. Ensure smooth devolution for county government participation in Lamu Port project to enable benefit sharing of port revenue that is distributed in accordance with a formula to be agreed upon in which a specific percentage should be made available to Lamu County government.
7. Establish a collective fund for the benefit of the community to address the following long-standing issues: drug addiction, health, security, education, conservation, and preservation of cultural traditions. The benefits should flow to the entire Lamu community but particularly those most affected by the project including the vulnerable and marginalized groups.
8. Establish a dedicated Human Resources Development Fund to help train young people from Lamu under the supervision of county government so that the individuals in the local community can take positions in the new port.
9. Support affirmative action with respect to employment including the hiring of indigenous Lamu community members in all levels of employment and ensuring that a significant proportion of tender contracts favours local companies.
10. Utilize the new constitution to recognize community land rights and to investigate and address land rights violations against the indigenous Lamu communities before the Lamu port is inaugurated.
11. Avoid forcible removals of people from their lands. Where people must be relocated (with their consent), compensation and redress should be fair and equitable, after consultation with the community under terms that are mutually agreed upon.
12. Revoke illegal and/or un-procedural land allocations of traditional land to private individuals in Lamu County.
13. Expedite long-pending court cases relating to land rights for local people, as highlighted by the *Ndungu Commission* report.
14. Provide civic education on land reforms and land rights under the new Constitution and policies.
15. Infrastructure to support the community's needs including:
 - a. Provide paved, all-weather roads of good quality to service the entire county, with due consideration and respect for the livelihoods of the indigenous people in the county

- b. Increase the number and quality of schools in the county
 - c. Develop universities, colleges, and technical training institutions
 - d. Establish and equip modern health facilities throughout the county
 - e. Provide access to clean water throughout Lamu County, including the islands of the Archipelago
 - f. Develop an improved and environmentally friendly sewer system throughout the county
16. Protection of the environment through the following:
- a. Conservation of water catchment areas
 - b. Conservation of mangrove and hardwood terrestrial forests
 - c. Protection of indigenous and migratory wildlife and birds and their habitats
 - d. Protection of indigenous flora and their ecosystems
 - e. Support the use of natural materials such as traditional baskets (kikapu) for packaging
17. Protection of the cultural traditions of the indigenous communities in Lamu County:
- a. Preservation and respect of the historic monuments in the County
 - b. Ensure the protection of Lamu's status as a World Heritage Site and the Man and Biosphere reserves
 - c. Secure and protect sacred sites
 - d. Preserve and protect traditional plants and, through this, traditional practices such as medicine
18. Mitigate effects of drastic population increase from outside populations drawn to employment opportunities of the Lamu port development and infrastructure:
- a. Ensure security in the county including in population growth areas and on the seas
 - b. Provide adequate health facilities to address the increase of sexually transmitted diseases through population increase
 - c. Ensure the protection of the county's natural resources from the effects of a dramatic population increase
 - d. Support rehabilitation of natural resources and ecosystems that are ravaged by overpopulation
 - e. Initiate and support awareness and rehabilitation programs for drugs and alcohol
 - f. Preserve, maintain, and respect the indigenous cultures of Lamu County
19. Stop the proposed Amu Power coal plant and instead invest in renewable energy like solar and wind.

11.2. ADDRESSING THE SPECIFIC CONCERNS OF LIVELIHOOD GROUPS IN LAMU COUNTY

1. Hunter and Gatherers (Sanye and Aweer)

- a. Establish community land in consideration of the land we have lost through government settlement schemes in Mpeketoni Division and through the gazettement of the Boni and Dodori National Reserves and Lungi forest.
- b. Protect and conserve our traditional forest for our livelihood (for example, wild animals, herbal plants, traditional foods, our spiritual sites) including respect for our natural resource rights.
- c. Provide political representation and serious engagements with the government on our issues.

2. Pastoralists (Orma)

- a. Identify, protect and register community grazing corridors and lands.
- b. Support community pastoralist associations to recognize and protect our traditions and material culture, i.e. such as skins, calabash (gorfo) for milk containers, etc.
- c. Ensure access and development of markets for our livestock products, including the establishment of the Lamu Meat Commission, milk processing facilities, dairy products and other by-products such as manure and hides,

3. Nature-Based Livelihoods — Sanye, Aweer, Bajun, and Swahili

- a. Reduce poverty levels through the promotion of sustainable development and securing of land tenure for both communal and individual land.
- b. Access natural resource rights to ensure sustainability of nature-based livelihoods.
- c. Promote small-scale industry and expand the market for nature-based products.

4. Fisherfolk and Marine-Based Livelihoods

- a. Identify, protect, and register of community fishing landing sites.
- b. Provide adequate cold storage facilities.
- c. Provide access to larger fishing vessels and modern gear to allow access to the deep sea where there is a huge potential for a better catch.
- d. Support the transition from small-scale to larger-scale fishing methods and technology, including the provision of training.
- e. Provide a secure and safe environment for all marine activities.
- f. Develop a community-friendly commercial fishing port.
- g. Enable community participation in legal and regulatory measures affecting marine-based livelihoods.
- h. Provide support for and authority to community Beach Management Units.

5. Farming

- a. Ensure community land tenure to enable income security and to improve livelihoods and living standards through agriculture.
- b. Enable resettlement of the internally displaced and forcibly removed people from the “Shifta Wars” of the 1960s and the 1970s.
- c. Ensure the inclusion of farmers in Lamu County with existing farm extension centers and loan facilities.
- d. Provide an adequate storage facility for harvested products and access to market centers.

6. Mangroves and Timber

- a. Ensure protection and respect for our mangrove and other forests, which we have conserved over generations.
- b. Enable us to continue our traditional livelihood practices.
- c. Provide civic education on our forest rights and programs to mitigate the effects of climate change.

12.0 RELEVANT DOMESTIC, REGIONAL, AND INTERNATIONAL LAWS

The **Constitution of Kenya (2010)** (hereafter “Constitution”) and several other Kenyan legal instruments afford citizens of Kenya a number of rights – regardless of ethnicity. Human and environmental rights found in these domestic laws are set out below and give effect to rights found in international law. This is recognised in the Constitution, which states in Article 2:

“5) The general rules of international law shall form part of the law of Kenya; 6_ Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution.”

As such, in addition to the Bill of Rights found within the Constitution, the Government of Kenya has signed and/or ratified several regional and international legal instruments that support the rights of the Lamu Community and the objectives of this BCP. Many of the human and environmental rights set out in The Declaration on the Rights of Indigenous Peoples are brought into effect by the Constitution. However, some of these rights are not yet enforceable on the local level because the Government of Kenya has not yet incorporated these rights into domestic legislation. One of the purposes of this BCP is to remind and encourage the Government (and external parties) of its regional and international obligations.

The Declaration on the Rights of Indigenous Peoples is referenced here. While it is recognised that the Government of Kenya refused to vote for the Declaration when it was adopted in 2007, the Declaration represents the minimum standards of rights of indigenous peoples. Several provisions of the Declaration are considered customary international law, and most are found within other international conventions that Kenya is a signatory.

A number of Lamu residents have lodged a legal petition in the Constitutional Court about some of the issues set out in this community protocol. The community members won the petition in April 2018, but the court orders are yet to be effected.

12.1 THE RIGHTS TO INFORMATION, PARTICIPATION, AND CONSULTATION

Associated with the right to free, prior and informed consent are the rights to information, participation, and consultation found in a number of domestic, regional and international legal instruments.

12.1.1 THE RIGHT TO INFORMATION

Every person in Lamu has the Constitutional right to information on the LAPSSET and other projects that will affect them. This is set out in Article 35:

“(1) Every citizen has the right of access to –

(a) Information held by the State; and

(b) Information held by another and required for the exercise or protection of any right or fundamental freedom...

(3) The State shall publish and publicize any important information affecting the nation.”

The **Access to Information Act No. 31 of 2016** was enacted to give effect to the provisions of Article 35. It is, therefore, the main legal framework that provides for the right to information in Kenya. This Act imposes a disclosure obligation on public entities to provide all public information unless such information is subject to limitation as expressly provided for in law.

The **County Government Act No. 17 of 2012, under Section 96**, guarantees all citizens' right to access information held by any county government, unit or department. It also states that the county governments should designate an office with a view to implementing the right to information. In exercise of legislative powers granted under section 96, the county governments are required to come up with laws that are meant to guarantee access to information.

Being the primary legal framework for the management of the environment, the **Environmental Management and Coordination Act Cap 387 of 1999** expressly provides for the right to information at section 3A.

Regionally

The right to information is found in Article 9(2) of the **African Charter on Human and Peoples' Rights**, which affirms:

“Every individual shall have the right to receive information.”

12.1.2 THE RIGHT TO PARTICIPATION

The basis of the right to citizen participation is enshrined in **Article 10** of the Constitution, which spells out the national values and principles of governance. Pursuant to this provision, all state organs, state officers, public officers and persons are bound by the principles of public participation and sustainable development.

Article 69 of the Constitution encourages the Lamu community to publicly participate in matters of the environment:

“(1) The State shall... (d) Encourage public participation in the management, protection and conservation of the environment...”

In addition, Article 36 of the Constitution asserts the right of Kenyans to freely associate with others:

“(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.”

Article 37 of the Constitution supports the right for Kenyans in Lamu County to peacefully demonstrate:

“Every person has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.”

Internationally

Lamu Town is a UNESCO protected site, and a large part of its coastal region is a designated UNESCO Man and Biosphere Reserve. The Lamu community’s right to participate in the safeguarding of its intangible cultural heritage is recognized in Article 15 of the **UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage**:

“Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.”

In addition, the right to participate in decision-making in matters affecting indigenous peoples’ rights, using their own representatives and procedures, is set out in Article 18 of the Declaration on the Rights of Indigenous Peoples:

“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves

in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”

12.1.3 THE RIGHT TO CONSULTATION

Along with the right to participate, indigenous peoples have the right to consultation through their own representatives every time legislative or administrative measures (including policies, plans, standards, authorizations, permits, licenses, concessions, developments or projects) are put forward that will impact directly on the community, either positively or negatively. These rights to consultation are in addition to the right to free, prior and informed consent set out above and are supported in the **Declaration and International Law Organization Convention No. 169, Indigenous and Tribal Peoples Convention.**

The right to consultation must meet certain minimum procedural requirements including:

1. States must establish means by which people can freely participate at all decision-making levels with respect to policies and programmes that concern them;²¹
2. Consultation must be carried out in good faith, using appropriate procedures;²²
3. The consultation process must be ‘culturally appropriate,’ so, it must respect the practices, customs, traditions, and laws of the community. This means taking into account traditional decision-making methods and giving communities time for internal reflection and decision making, and consideration of internal regulatory instruments and tools, such as the present Protocol;²³ and
4. Actions to select representatives for consultation and decision making are the sole right of the communities themselves.²⁴

The rights of communities to free, prior and informed consent, information, participation, and consultation are also found in the voluntary guidelines issued by the Conference of Parties to the CBD, including the **AkwéKon Guidelines²⁵ for the Conduct of Cultural, Environmental and Social Impact Assessment** and the **Tkarihwaí:ri Code of Ethical Conduct.**²⁶

12.1.4 FREE, PRIOR AND INFORMED CONSENT

Free, prior and informed consent is consent that is: -

- given freely;
- given without manipulation or intimidation;
- by people who have access to all the information needed to make a decision;
- who are given information about the consequences of their decisions before a decision is made;

- who are given the time and space to make decisions according to their own decision-making processes.

The right to free, prior and informed consent is more than participatory engagement, negotiations or consultation. These are some means by which free, prior and informed consent can be achieved but are not of themselves adequate. The rights to free, prior and informed consent are identified in a number of different regional and international instruments shown below, and these support the Lamu community's demands to protect their environment, particularly in regard to the LAPSET project and related activities.

²¹ ILO Convention 169, Article 6(1) (b).

²² ILO Convention 169, Article 6(2).

²³ ILO Convention 169, Article 6.

²⁴ UNDRIP Article 18.

²⁵ The AkweKon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities (regarding impact assessments and possible impacts on indigenous communities).

²⁶ Tkarhwaíé:ri Code of Ethical Conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant to the conservation and sustainable use of biological diversity.

If indigenous peoples of Lamu that are affected by a project choose to withhold their consent to negotiations on the project or development, then the government or company involved cannot proceed with the project without violating their basic rights.

When dealing with indigenous peoples and local communities within Lamu district, there are international, regional and national legal norms, which must be followed. Free, prior and informed consent must be obtained in the following instances:

1. Before the adoption and implementation of legislative or administrative measures that may affect indigenous peoples, per Article 19 of the Declaration on the Rights of Indigenous Peoples:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

2. Where plans for development, investment, exploration or extraction will significantly impact on a community's right to use and enjoy its ancestral territories and resources, in particular, projects related to the development, use or exploitation of mineral, forest and water resources, per Article 32(2) of the Declaration:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.

Projects or actions planned to take place in or that may affect areas considered sacred or of special biological, intellectual, religious, spiritual or cultural significance for communities, with consequences on States if free, prior and informed consent does not take place, per Article 11(2) of the Declaration:

“States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions, and customs”.²⁷

Actions including development or investment plans or projects that involve the displacement (either temporary or permanent) of communities from their traditional territories, per Article 10 of the Declaration:

²⁷ See also ILO Convention 169, Article 16(2).

“Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return”.

Actions including development or projects that are likely to involve confiscation, occupation, use or damage of traditionally owned lands, territories, and resources, per Article 28(1) of the Declaration:

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

The deposit or storage of hazardous materials in community lands or territories, per Article 29(2) of the Declaration:

“States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent”.

Access to and use of the community’s genetic resources, per Article 6(2) of the Nagoya Protocol²⁸, to which Kenya is a signatory.

“In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant

access to such resources” and, as per Article 6(3)(f), set out relevant “criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources”.

Access to and use of the community’s traditional knowledge, per Article 7 of the Nagoya Protocol:

“In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that are held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.”

²⁸The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol)

In the landmark case of Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya²⁹, the African Commission on Human and Peoples’ Rights found that the Endorois peoples’ rights to free, prior and informed consent had been violated. It confirmed that the obligation of the State to obtain free, prior and informed consent was additional to community consultation and a failure to do so is a violation of the right to property:

“In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent – or to compensate - ultimately results in a violation of the right to property.”³⁰

The African Commission was also of the view, with respect to developments or investment impacts having a major impact on the Endorois territory, that

“The State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”³¹

12.2 ADMINISTRATIVE ACTION AND ACCESS TO JUSTICE

At the outset, every citizen in Lamu County has the right to the efficient administrative action. Article 47 of the Constitution states:

1) *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;*

2) *If a right or fundamental freedom of a person has been or is likely to be adversely affected by the administrative action, the person has the right to be given written reasons for the action.”*

In addition, Article 48 of the Constitution compels the State to ensure access to justice for all Kenyans.

These rights and fundamental freedoms belong to the Lamu community and are not granted to them by the State through choice, and are to be respected by the Government, as set out in Article 21:

“(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights...”

²⁹ Endorois Communication 276/2003

³⁰ Endorois Communication 276 / 2003 at paragraph 226.

³¹ Endorois Communication 276 / 2003 at paragraph 291.

The **Fair Administrative Action Act No. 4 of 2015** gives effect to Article 47 of the Constitution. It provides for the provision of administrative action in an expeditious, efficient, lawful, reasonable and procedurally fair manner.³²

12.3 SELF-DETERMINATION, CUSTOMARY LAWS, TRADITIONAL INSTITUTIONS, AND PRACTICES

12.3.1 SELF-DETERMINATION

The Lamu community consists of a number of different indigenous and ethnic groups, and each have developed their own customary laws and practices relating to leadership, decision-making and natural resource use. Respect for these internal structures, institutions, and laws are linked to the right to self-determination.

The purpose of the United Nations as stated in Article 1(2) of the Charter of the United Nations is

“To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...”

Articles 1(1) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights states:

“All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development”.

Self-determination is a central theme in the Declaration on the Rights of Indigenous Peoples. Almost identical to the Covenants, the Declaration sets out per Article 3:

“Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.”

The right to self-determination is also recognized by the Committee on the Convention on the Elimination of all forms of Racial Discrimination in its General Recommendation XXI on 23 August 1996:

“The right to self-determination of peoples is a fundamental principle of international law.”

Article 20 of the African Charter on Human and Peoples’ Rights:

“All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination...”

³² Section 4 of the Fair Administrative Action Act.

12.3.2 CUSTOMARY LAWS, TRADITIONAL INSTITUTIONS AND PRACTICES

When interacting with indigenous peoples of Lamu, the Government and other actors are obliged to respect the community’s traditional governance structures and customary laws based on the following principles of international and regional law. Indigenous peoples in Lamu have the following rights:

The right to autonomy or self-government, per Article 4 of the Declaration on Indigenous People:

“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

They have a right to maintain and strengthen their own institutions. This means that traditional or community-supported leadership should be respected, as in Article 5 of the Declaration:

“Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”

The right to maintain and develop indigenous decision-making and other institutions per Article 20(1) of the Declaration:

“Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities”.

The promotion, development, and maintenance of institutional structures of the indigenous is featured in Article 34 of the Declaration:

“Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices... and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”

These rights support and complement the right to free, prior and informed consent, consultation and involvement of the community and its locally-recognized governance and decision-making structures, in all legal and administrative decisions likely to affect the indigenous peoples within the Lamu community. This includes, and is not limited to, designing the LAPSET project so as not to jeopardize the social, economic, and cultural development programmes of indigenous peoples and local communities protected under international law.

12.4 THE RIGHT TO A HEALTHY ENVIRONMENT

One of the overarching rights set out in the Kenyan Constitution, relevant not only to the present citizens of Lamu but for its future generations, is set out in Article 42, relating to the right to a healthy environment:

“Every person has the right to a clean and healthy environment, which includes the right– (a) To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) To have obligations relating to the environment fulfilled under Article 70.”

Where a person alleges that the right to a healthy environment has been denied or violated, there is a provision in Article 70 for a remedy in court. An applicant or applicants, such as the Lamu community, does not have to demonstrate they have incurred loss or suffered injury as per Article 70(3) of the Constitution.

12.4.1 ENVIRONMENTAL IMPACT ASSESSMENTS

The importance of environmental impact assessments is recognized in Article 69 of the Constitution : (1) The State shall:

“(f) Establish systems of environmental impact assessment, environmental audit, and monitoring of the environment...”

Where activities are likely to have a harmful effect on ecosystems, Section 4 of the Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access, and Benefit Sharing) Act 1999 states:

- “(1) A person shall not engage in any activity that may*
(a) have an adverse impact on any ecosystem;
(b) lead to the introduction of any exotic species;
(c) lead to unsustainable use of natural resources”

The Environmental Management and Coordination Act (1999) (EMC Act) acknowledges the right for the public to make submissions on an environmental impact assessment and, following community complaints, the public is given 30 days to respond to the impact assessment. This Act should be read together with the new Environmental (Impact Assessment and Audit) (Amendment) Regulations, 2019.

An environmental impact assessment was received by Heztech Consultants for the development of the Lamu Port, part of the LAPSSET project, in March 2013. Many responses were received by NEMA in regard to the EIA. The Lamu community was concerned that their issues with the impact assessment will not be adequately dealt with.

In addition to the EIA, the National Environment Management Authority (NEMA) has an obligation to monitor and audit the environment generally and following the provision of an environmental impact assessment, including mitigating negative effects of projects not considered in the environmental impact assessment. According to the EMC Act section 68:

- “(1) The Authority shall be responsible for carrying out an environmental audit of all activities that are likely to have a significant effect on the environment.”*

The provision of an environmental impact assessment is a serious undertaking and it is an offense to inadequately prepare an assessment, or make fraudulent statements in the preparation of an assessment, as stated in Section 138 of the EMC Act:

- “Any person who;*
(a) fails to submit a project report contrary to the requirements of section 58 of this Act;
(b) fails to prepare an environmental impact assessment report in accordance with the requirements of this Act or regulations made thereunder;
(c) fraudulently makes false statements in an environmental impact assessment report submitted under this Act or regulations made thereunder;”

There are grave concerns about the quality of the impact assessment, given the lack of time and resources of Heztech Consultants to complete this work in an adequate fashion.

Regional and International Law

The Akwe: Kon Guidelines to the Convention on Biological Diversity, to which Kenya is a signatory and has ratified the Convention on Biological Diversity, support the implementation of an environmental, social, and cultural impact assessment before developments and/or projects are implemented, particularly when these are likely to have an impact on the environment and/or communities living in or near these areas.

In particular, paragraph 12 of the Akwe: Kon Guidelines states that:

“In any development proposed to take place on, or likely to have an impact on, sacred sites and lands and waters traditionally occupied or used by them, indigenous and local communities should be invited to participate in and are to be accorded full respect at all stages of the assessment and development process, including planning and implementation.”

In addition, per paragraph 14 of the Akwe: Kon Guidelines states that affected indigenous peoples and local communities should also participate in advising on the screening and scoping phases of developments. Paragraph 15 states that community engagement should involve participatory models of community engagement, therefore being conscious of the way communities make decisions and allowing for adequate time and information for communities to make decisions.

It is recognized that indigenous peoples and local communities have a unique relationship with the environment, such as impacts on culture and society need also be integrated into the assessment. Issues such as cultural heritage, sacred teachings, and places of cultural significance, sacred sites, customary laws and political structures should also be taken into consideration. With respect to a social impact assessment, considerations of gender, housing and accommodation, traditional systems and education (amongst other things) should be taken into account (set out in paragraphs 23, 24 and 39 of the Akwe: Kon Guidelines).

Specifically, assessments should consider whether prior informed consent of indigenous peoples and local communities has been obtained (where this is a local requirement) and should take into account the rights of indigenous peoples and local communities including their own customary laws and intellectual property rights (see Akwe: Kon Guidelines paragraphs 53, 57 and 60).

12.5 LAND, TERRITORY AND NATURAL RESOURCE OWNERSHIP

12.5.1 RIGHTS OVER LANDS AND TERRITORIES

The Constitution sets out in Article 60(1) firm principles about how land in Lamu should be managed:

“Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles:

- (a) equitable access to land;*
- (b) security of land rights;*
- (c) sustainable and productive management of land resources;*
- (d) transparent and cost-effective administration of land;*
- (e) sound conservation and protection of ecologically sensitive areas;*
- (f) elimination of gender discrimination in law, customs and practices related to land and property in land; and*
- (g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.”*

The communal nature of property is identified in Article 61, particularly in the classification of community land in Article 61(2)

“1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities, and as individuals.

2) Land in Kenya is classified as public, community or private.”

Some land in Lamu is regarded as “public land”. Public land is held in trust for the Lamu community, as per Article 62(2):

“Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission...”

This land cannot be used except if this use has been set out in Kenyan law, per Article 62(4):

“Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.”

Much of the land in Lamu County is regarded as “community land”. The Lamu Community have a right to have their land recognized as communal property, or “community land”, to be shared amongst community members for communal use. Currently, the communal land is being grabbed and sold off to investors, at the expense of communities who have traditionally and communally used these lands and natural resources for their livelihoods.

“Community land” is defined in Article 63 of the Constitution:

“1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

2) *Community land consists of— ...*

(d) *Land that is—*

i) *lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;*

ii) *ancestral lands and lands traditionally occupied by hunter-gatherer communities, or*

iii) *lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).*

3) *Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.*

4) *Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.”*

The Land Act No. 6 of 2012 reiterates the definition of “community land” as outlined in the Constitution at Article 63.

Similarly, the Community Land Act No. 27 of 2016, whose purpose is to bring the provisions of Article 63 to life, defines “community land” to include- *“(a) land declared as such under Article 63 (2) of the Constitution;*

(b) land converted into community land under any law;”

Part II of the Community Land Act speaks to the recognition, protection and registration of community land rights. It not only protects communal acquisition and ownership of property³³ but also recognises and protects customary land rights. According to section 4 (1) of the Community Land Act, the ultimate ownership of community land vests in the community. Section 4(2) goes ahead to state that:-

“Subject to the provisions of this Act or any other written law, the State may regulate the use of community land in accordance with Article 66 of the Constitution.”

In this Act, the government plays the following important roles:-

“(1) County governments shall hold in trust all unregistered community land on behalf of the communities for which it is held.

(2) The respective county government shall hold in trust for a community any monies payable as compensation for compulsory acquisition of any unregistered community land.

(3) *Upon registration of community land, the respective county government shall promptly release to the community all such monies payable for compulsory acquisition.*

(4) *Any such monies shall be deposited in a special interest earning account by the county government.*

(5) *The respective county government shall transfer the amount and the interests earned to communities as may be prescribed.*

(6) *Any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of this Act and any other applicable law.*

³³ Section 5 (1) of the Community Land Act.

(7) *Upon the registration of any unregistered community land in accordance with this Act, the respective registered community shall, assume the management and administrative functions provided in this Act and the trustee role of the respective county government in relation to the land shall cease.*

(8) *A county government shall not sell, dispose, transfer, convert for private purposes or in any other way dispose of any unregistered community land that it is holding in trust on behalf of the communities for which it is held."*

In addition to these rights to communal land, Article 40 of the Constitution asserts individual property rights:

"(1) ...every person has the right, either individually or in association with others, to acquire and own property..."

Article 40(3) sets out the only conditions where the government may deprive a person the right to property, and in these circumstances, the public is entitled to prompt, just and full compensation paid:

"The State shall not deprive a person of property of any description, or of any interest in, or right over, the property of any description, unless the deprivation:

- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or*
- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –*
 - (i) requires prompt payment in full, of just compensation to the person; and*

- (ii) *allows any person who has an interest in, or right over, that property a right of access to a court of law.*"

Regional and International Law

A number of international and regional legal instruments strengthen and legitimize the Lamu community's demands for rights over their territories and natural resources, justifying the Lamu community's continuous access to and utilization of its lands and the natural resources conserved in them (such as wildlife, traditional medicines and mangrove) and the right to govern these using their accepted customary laws and practices.

At the regional level, the right to property is supported by Article 14 of the African Charter on Human and People's Rights:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

The right to property generally is a basic human right and one that is grounded in several international legal frameworks. For instance, Article 17 of the Universal Declaration of Human Rights states:

"1) Everyone has the right to own property alone as well as in association with others.

2) No one shall be arbitrarily deprived of his property."

The International Covenant on Civil and Political Rights recognizes the right to property through its recognition of self-determination in Article 1 and in Article 27. Article 1(2) states:

"All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a person be deprived of its own means of subsistence."

Article 27 sets out:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

This is also supported by human rights commentary, through General Comment No. 23 by the Human Rights Committee (1994):

“With regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”

Article 26 of the Declaration states:

“1. Indigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired;

2. Indigenous peoples have the right to own, use, develop and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired;

3. States shall give legal recognition and protection to these lands, territories, and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

An independent and transparent process in recognizing indigenous peoples' rights to lands, territories and natural resources is significant and set out in Article 27 of the Declaration which obliges States to:

“establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.”

This is supported by the African Commission on Human and Peoples' Rights in the case of Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council vs. Kenya³⁴, (hereafter “Endorois” case). The African Commission found the ‘public interest’ test regarding the encroachment of indigenous lands meets a much higher threshold than encroachment on the individual private property,³⁵ so that a limitation on the right to property *“must be proportionate to a legitimate need, and should be the least restrictive measures possible”*.

This right is linked to the right to life, a non-derogable right (that is, a right that cannot be breached) in Article 6 of the International Covenant on Civil and Political Rights

and is in Article 26 of the Kenyan Constitution. The Commission found that dispossession of ancestral lands could amount to a breach of the right to life if alternate living conditions are incompatible with the principles of human dignity³⁷. The Commission asserted that indigenous peoples did not need to provide legal title to gain this right – the fact that they have lived on their ancestral lands is enough to trigger the state obligation to provide legal recognition of their right to property.

The African Commission also stated that a violation of the obligation to consult and seek consent (or compensate) indigenous peoples is also a violation of the right to property,³⁸ consistent with the Inter-American Court on Human Rights.³⁹

³⁴ Case No. 276/2003.

³⁵ Endorois, paragraph 212.

³⁶ Endorois, paragraph 214.

³⁷ Endorois, paragraph 216.

³⁸ Endorois, paragraph 226.

³⁹ See the Case of the Saramaka People v Suriname (Judgment of 28 November 2007)

12.5.2 DISPLACEMENT OR FORCIBLE REMOVAL

An important consideration with respect to the right to land is displacement and forced removals. Displacement without compensation has already taken place in Lamu County, not just through the Lamu Port and larger LAPSSET project, but through historical land injustices. International law prohibits the displacement of persons from traditionally utilized lands and recommends restitution and compensation in instances where displacement has already occurred. Article 10 of the Declaration:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Kenya enacted the **Protection and Assistance to Internally Displaced Persons and Affected Communities No. 56 of 2012** to make provision for the prevention, protection and provision of assistance to internally displaced persons and affected communities. Part V of the Act makes provisions relating to development and displacement. Section 21 provides as follows:

“(1) Subject to the Constitution, the Government shall abstain from displacement and relocation due to development projects or projects to preserve the environment and protect persons from displacement by private actors.

(2) In exceptional cases, displacement and relocation due to development projects to preserve the environment may be - (a) authorized and carried out in accordance with the applicable law; justified by compelling and overriding

public interests in the particular case; and conducted when no feasible alternative exists.”

Section 2(1) of the Act goes further to state that where the decision to give effect to the displacement of people due to development projects or projects to preserve the environment is made, the Government shall seek the free and informed consent of the affected persons and hold public hearings on the project planning.

The right to a remedy is set out in Article 28(1) of the Declaration on the Rights of Indigenous Peoples:

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

The UNHCR’s Guiding Principles on Internal Displacement sets out, in Principle 9, that

“States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.”

12.5.3 THE RIGHT TO NATURAL RESOURCES

Article 69 of the Constitution recognizes the obligations of the State to protect natural resources for the benefit of Kenyans:

“(1) The State shall

(a) Ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits...

(g) Eliminate processes and activities that are likely to endanger the environment; and

(h) Utilize the environment and natural resources for the benefit of the people of Kenya.”

The National Land Policy similarly protects the rights of communities to their natural resources in Section 95:

“To secure access to land-based natural resources the Government shall...

(g) Ensure formal recognition of traditional knowledge related to land-based resources and provide the infrastructure for its development and use...

(j) Recognize and protect the rights of the forest, water-dependent or other natural resources dependent communities and facilitate their access, co-management and derivation of benefits from the resources."

Strengthening this position, Section 99 calls on Government:

"To protect the community and individual interests over land-based resources and facilitate benefit sharing, the Government shall:

(a) Establish legal frameworks to recognize community and private rights over renewable and non-renewable land-based natural resources and incorporate procedures for access to and sustainable use of these resources by communities and private entities;

(b) Devise and implement participatory mechanisms for compensation for:

(i) Loss of land and related non-renewable natural resources;

(ii) Loss of land where this is deemed imperative in the public interest for the sustainable management of renewable natural resources..."

The **Forests Conservation and Management Act No. 34 of 2016** defines "customary rights" as the rights which result from a long series of habitual or customary actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a law within a geographical and sociological unit. Section 52 of the Act sets out the rights of members of forest communities to the customary use of natural resources:

"Nothing in this Act shall be deemed to prevent any member of a forest community from using, subject to such conditions as may be prescribed by this Act or any other written law, such forest produce as it has been the custom of that community to take from such forest otherwise than for the purpose of sale."

However, these rights are only for communities who are "registered" according to Section 48 (1) of the Forest Act. Section 2 of the Forests Act defines a "forest community" as:

"A group of persons who have a traditional association with a forest for the purpose of livelihood, culture or region."

Section 42 acknowledges that indigenous forests and woodlands are to be managed for the benefit of the Lamu community:

"1) All indigenous forests and woodlands shall be managed on a sustainable basis for purposes of

- a. *conservation of water, soil, and biodiversity;*
- b. *riparian and shoreline protection;*
- c. *cultural use and heritage;*
- d. *recreation and tourism;*
- e. *sustainable production of wood and non-wood products;*
- f. *carbon sequestration and other environmental services;*
- g. *education and research purposes; and*
- h. *habitat for wildlife in terrestrial forests and fisheries in mangrove forests.”*

The Forests Act dedicates Part V to community participation with respect to forest management. The law encourages the formation and registration of “community forest associations” under the Societies Act (section 48(1)), then allowing for such groups to participate in the conservation and management of a state forest or local authority forest (section 48(2)). These associations have the right to participate in the management or conservation of a forest through the protection, conservation, and management of the forest in accordance with an approved agreement; formulation and implementation of sustainable forest programmes consistent with traditional forest user rights of the forest community, the protection of sacred groves and protected trees, assisting the Service or any other authority in enforcing the provisions of the Act, entering into partnerships with other persons for the purpose of ensuring the efficient and sustainable management of forests with approval of the Service, informing the Service of any developments, changes and occurrences within the forests, helping in firefighting and doing any other act that is necessary for the efficient conservation and management of the forest (section 49(1)). In addition, a number of rights may be afforded to such communities under section 49(2):

“2) The management agreement between the Service and the community forest association shall confer on the association all or any of the following forest user rights –

- a) *collection of medicinal herbs;*
- b) *harvesting of honey;*
- c) *harvesting of timber or fuelwood;*
- d) *grass harvesting and grazing;*
- e) *collection of forest produce for community-based industries;*
- f) *ecotourism and recreational activities;*
- g) *scientific and education activities;*
- h) *plantation establishment through non-resident cultivation;*
- i) *contracts to assist in carrying out specified silvicultural operations;*
- j) *development of community wood and non-wood forest-based industries; and*
- k) *other benefits which may from time to time be agreed upon between an association and the Service.”*

Note: There are particular limitations for forest use where mining and quarrying operations are proposed to take place, per section 41:

- “a) the area does not contain rare, threatened or endangered species;*
- b) the forest does not have any cultural importance or contain sacred trees or groves;*
- c) an Independent Environmental Impact Assessment has been carried out;*
- d) the miner has undertaken through execution of a bond the value of which will be determined by the Board, to rehabilitate the site upon completion of his operation to a level prescribed by the Board;*
- e) the forest is not an important catchment area or source of springs”*

Similar provisions regarding community participation are found within the **F isheries Management and Development Act No. 35 of 2016**, specifically its Fisheries (Beach Management Unit) Regulations 2007. A “Beach Management Unit” (BMU) is defined under Section 2 as *“a n organization of fishers, fish traders, boat owners, fish processors and other beach stakeholders who traditionally depend on fisheries activities for their livelihoods;”*

Membership of BMUs is set out in regulation 9 as is directed towards community membership and participation:

“1) Membership of a beach management unit shall be open to those persons who:

- a. depend directly or indirectly for their income or livelihoods on fisheries activities undertaken at the beach within the jurisdiction of that beach management unit;*
- b. fall within one of the membership categories specified in regulation to;*
- and*
- c. would be directly adversely affected by the temporary or permanent closure of fisheries activities at that Beach.*

2) A beach management unit may provide in its by-laws that specified activities at the fish landing station over which it has jurisdiction may only be undertaken by its members...”

The Regulations provide for setting up BMUs for each fish landing station, to fulfill a number of objectives relating to management, sustainable development, poverty alleviation and quality control, set out in section 3(3).

These community-controlled BMUs have jurisdiction over established areas for the particular BMU (section 5(1)) and will have the power to issue by-laws (internal administrative rules approved by the assembly and authorized fisheries officer) per

section 5. There are a number of BMUs that have been established in Lamu and are likely to be negatively affected by the Lamu Port and LAPSSET project.

Regional and International Law

Rights regarding natural resource ownership and use are found in a number of different legal instruments. Article 21 of the African Charter on Human and Peoples' Rights details the rights of indigenous peoples to freely dispose of their wealth and natural resources:

- "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*
- 2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.*
- 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.*
- 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.*
- 5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources."*

In addition to the rights to natural resources set out in Articles 26 and 32 of the Declaration set out above, the right to and conservation of traditional medicines and plants is set out in Article 24 of the Declaration:

"Indigenous peoples have the right to their traditional medicines and the conservation of their medicinal plants, animals, and minerals."

12.5.4 RIGHTS TO NEGOTIATE BENEFIT-SHARING AGREEMENTS

In addition, the Lamu community has a general right to the equitable sharing of any benefits that accrue from their traditional knowledge, genetic resources and use of their lands.

Article 15 of ILO Convention 169 addresses the rights of indigenous peoples where the State has reserved property rights over particular natural resources. It states:

“In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands” communities have the right...wherever possible participate in the benefits of such activities” and compensation for damages they may sustain as a result of such activities.

12.5.5 THE RIGHT TO TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES

The Constitution obliges the Government to promote the intellectual property rights of its people, and to enact legislation protecting traditional knowledge, genetic resources and to receive adequate compensation for use of cultural heritage, as set out in Article 11:

“1) The State shall –

(b) recognize the role of science and indigenous technologies in the development of the nation; and

(c) promote the intellectual property rights of the people of Kenya.

2) Parliament shall enact legislation to –

(a) Ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and

(b) Recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.”

The Government also has a responsibility to protect the intellectual property of indigenous peoples over their traditional knowledge and genetic resources. Article 69 of the Constitution states:

“(1) The State shall...

(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities...

(e) protect genetic resources and biological diversity.”

Whilst not directly protecting the interests of the Lamu community with respect to traditional knowledge, the EMC Act 1999 does allow for the sharing of benefits derived from genetic resources of Kenya, as set out in section 53.

Finally, whilst “interested persons” is not defined, regulation 9 of the Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations of 2006 does allow for free, prior, and informed consent in the context of access to genetic resources:

“1) Any person who intends to access genetic resources in Kenya shall apply to the Authority for an access permit in the form set out in the First Schedule, and such application shall be accompanied by the fees prescribed in the Second Schedule to these Regulations.

2) The application shall be accompanied by evidence of Prior Informed Consent from interested persons and relevant lead agencies, and a research clearance certificate from the National Council for Science and Technology.”

Regional and International Law

The Lamu community is also entitled, under international law, to use and conserve the natural resources on their land. Particular regard is paid to the role of traditional knowledge in Article 8(j), where States are obligated, subject to their national legislation, to:

“respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”

Under Articles 5(2) and 5(5) of the Nagoya Protocol, states are obligated to take legislative, administrative or policy measures to ensure benefits arising from the use of genetic resources and the associated traditional knowledge held by indigenous and local communities are shared in a fair and equitable way with the relevant communities, based on mutually agreed terms (in accordance with established rights over the genetic resources). These rights are also protected in Article 31(1) of the Declaration.

12.6 RIGHT TO PROTECT CULTURAL HERITAGE

Indigenous peoples within the Lamu community traditionally share a cultural and spiritual relationship with their territories and natural resources, particularly with respect to sacred sites and cultural heritage in the area. The Lamu community's rights to the preservation of its culture and spiritual beliefs are protected in several instruments below. These instruments generally give the Lamu community the right to take part in their cultural lives, of which appreciation and respect for sacred sites is integral.

Culture and cultural heritage are protected in Kenya and the rights below apply to the Lamu Community. As set out in Article 11 of the Constitution:

“(1) This Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

(2) The State shall –

(a) promote all forms of national and cultural expression...

This is supported by Article 44, which sets out a corresponding right to culture:

“1) Every person has the right to use the language and to participate in the cultural life, of the person’s choice.

2) A person belonging to a cultural or linguistic community has the right, with other members of that community

(a) to enjoy the person’s culture and use the person’s language...”

Article 56 of the Constitution provides special protections to ensure marginalized groups, such as indigenous peoples⁴⁰ in Lamu, have their culture protected.

“The State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups...

(d) develop their cultural values, languages, and practices...”

Section 199 acknowledges that minority communities need protection as they:

“are culturally dependent on specific geographical habitats. Over the years, they have lost access to land and land-based resources that are key to their livelihoods. This follows the gazettement of these habitats as forests or national reserves or their excision and allocation to individuals, who subsequently obtain titles to the land”.

Section 49 (1) (c) of the Forest Act places an obligation on a community forest association to protect sacred groves and protected trees. It states as follows:

⁴⁰ A “marginalised group” is defined in Article 260 to include “...an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy...”

“49(1) Where a community forest association has been granted permission to participate in the management or conservation of a forest in accordance with the provisions of [t]his Act, that association shall...

(c) protect sacred groves and protected trees;”

To further enforce the provisions of the Constitution at Article 11, 40 and 69 (1) (c), Parliament enacted the Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016.

International and Regional Law

Regionally, Article 17(2) of the African Charter on Human and Peoples Rights supports the practice of culture:

“Every individual may freely take part in the cultural life of his community.”

Article 27(1) of the Universal Declaration of Human Rights confirms that:

“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”

Article 18(1) of the International Covenant on Civil and Political Rights states that:

“Everyone shall have the right to freedom of thought, conscience, and religion...”

Internationally, the right to the protection of cultural rights is set out in Article 27 of the International Covenant on Civil and Political Rights:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.

Article 15(1) of the International Covenant on Economic, Social and Cultural Rights obligates State parties to recognize the right of everyone to take part in “cultural life”.

The right to protect cultural traditions and customs (and redress where there is a violation of this right) is found in Article 11 of the Declaration:

“1) Indigenous peoples have the right to practice and revitalize their cultural traditions and custom. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature;

2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions, and customs.”

The right to practice religious traditions, customs and ceremonies and religious and cultural sites of significance are protected in Article 12 of the Declaration:

“Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains; 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.”

The Declaration recognises the spiritual relationship that indigenous peoples have with their lands and the right to protect this relationship in Article 25:

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

The UNESCO World Heritage Convention, of which Kenya is a party, asserts in Article 4, that the State must “do all it can to protect, conserve cultural and natural heritage for future generations”.

The Government of Kenya also has an obligation, under Articles 5 and 6, to ensure that “effective and active measures taken for protection, conservation, and presentation of cultural and natural heritage situated on its territory including policies, services, and studies” etc. and that it “will not take deliberate measures that might damage directly or indirectly the cultural or natural heritage”.

Kenya has ratified the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, which obligates State Parties, in Article 11, to identify (with participation from the community and nongovernmental organizations) and ensure the safeguarding of intangible cultural heritage:

“(a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory; (b) among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non governmental organizations.”

The **UNESCO Universal Declaration on Cultural Diversity** recognizes the importance of preservation of cultural heritage, for the benefit of future generations, in Article 7:

“Creation draws on the roots of cultural tradition but flourishes in contact with other cultures. For this reason, heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures.”

The **Tkarihwaí:ri Code of Ethical Conduct** directly applies to indigenous peoples and the protection and preservation of sacred sites and practices. Paragraph 17 recognizes the relationship between indigenous peoples and their traditional territories:

The principle recognizes the integral connection of indigenous and local communities to their sacred sites, culturally significant sites and lands and waters traditionally occupied or used by them and associated traditional knowledge, and that their cultures, lands, and waters are interrelated. In accordance with national domestic law and international obligations, in this

context, the traditional land tenure of indigenous and local communities should be recognized, as access to traditional lands and waters and sacred sites is fundamental to the retention of traditional knowledge and associated biological diversity. Sparsely populated lands and waters ought not to be presumed to be empty or unoccupied but may be occupied or used by indigenous or local communities.



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Save Lamu



P.O. Box 314-80500,

Lamu, Kenya +254



(0)717-142-394



info@savelamu.org



www.savelamu.org
@savelamu