

Mediation as a Solution to Geothermal Social Safeguard Conflicts in Kenya

¹ Karanja Njoroge and ²Joshua Were

¹P.O. Box 63170 – 00619 Nairobi, Kenya; ²P.O. Box 47936-00100, Nairobi, Kenya

njokaranja@gmail.com; jwere@kengen.co.ke

Keywords: Mediation, conflict resolution, social safeguards, grievance redress mechanism

ABSTRACT

In the spectrum of recognized alternative dispute resolutions platforms, mediation has proved to be a flexible device that allows parties to control both the process and the outcome while preserving the relationships. There is a need for a deeper community engagement with the project promoters to draw their socio-economic expectations of one another in order to try avoid conflicts during the project implementation. It is therefore important that projects do undertake comprehensive social safeguard studies and implement their recommendations in order to ensure that relations between communities and project promoters are harmonious. Even where such efforts have been expended complaints do arise and mediation is one of the best approaches at dealing with them.

KenGen resettled 150 households drawn from four villages in Olkaria in 2014 in order to develop and operate 280MW Olkaria IV and Olkaria I AU 4 & 5 geothermal power plants. In July 2014, the European Investment Bank's Complaints Mechanism (EIB-CM) received complaints touching on the actual resettlement of the four villages, socio-economic livelihoods of the community being irreparably damaged and that the real Project Affected Persons (PAPs) had been left out while those that were being resettled did not belong to either of the four villages. Additional complaints were received stating that the resettled community were suffering from the following negative impacts: Exclusion of some PAPs during the census; Lack of adequate livelihood restoration measures; Quality of the infrastructure in the new settlement areas; and Non-transfer of the resettlement area land titles to the PAPs.

The World Bank Inspection Panel (IP) received similar complaints in October 2014. Therefore, both EIB-CM and World Bank IP worked together to assess the allegations. Their findings were that some of the allegations were founded and that the project had made great effort at meeting the requirements of the Bank's policies, however, they only partially succeeded in doing so. At the appraisal stage the project had failed to identify the Maasai community as indigenous people that, according to EIB's Environmental and Social Handbook and the other lenders social guidelines, required special attention and protection during the involuntary resettlement process. The EIB-CM and the World Bank Inspection Panel (IP) recommended that a mediation process be proposed to the PAPs and KenGen to resolve the issues raised by the PAPs. Both the PAPs and KenGen agreed to engage in a mediated process to resolve the conflict. Two local mediators were identified for the task and joined by one mediator from EIB-CM.

In August 2015 the mediation was launched, and each party selected their representatives at the mediation table and though contentious, it was amicably resolved by identifying representation from the community widely to include all the stakeholders. The scope of the mediation was determined and all the complaints were to be resolved at the mediation table, thereby settling all the complaints. Most complaints were dismissed because they lacked merit and the facts on the ground did not support the complaints. In some cases, the project promoter was found to have neglected certain responsibilities and more resources were committed to support the social safeguards shortfalls and increase community participation in various decision-making processes. Although there were over 200 complainants who claimed to have been among PAPs but were left out of the Resettlement Action Plan, only five were found to have merit for resettlement. Another three were found eligible for some compensation as unaffected persons.

1. BACKGROUND

1.1 Introduction

All developments are people centred. They are undertaken to advance the fundamental social, economic and/or cultural rights and freedoms of people. Subsequently, negative social impacts owing to implementation of interventions are unwarranted. In acknowledgement of this, there are instruments designed for interventions to protect or prevent any undue harm to society. These safeguard instruments are availed by states and international development partners (also commonly referred to as international finance institutions). Their design is normally influenced by internationally agreed standards and guidance, which results in a creation of consistent project or intervention requirements, which either minimises or eliminates negative social consequences. These instruments are commonly referred to as social safeguards.

In this paper we postulate that social safeguards are important ingredients in development. When systematically applied, they are helpful in assessment of social impacts associated with a development project, as well as in defining the measures and processes that would effectively manage the negative and enhance the positive impacts. Their application in Africa has however faced challenges. Promoters of development in the region have flimsily applied them; and, the evidence supporting this is in the quality of the SIAs undertaken and the nature of grievances and concerns that have arisen particularly during and after implementation. The ultimate price for this has been observed in the cost of the intervention. The scale of discontent

between project promoters and affected population escalates. This subsequently negatively impacts on the duration taken, as well as the financial estimates committed, to successfully deliver on the intervention.

1.2 Problem Statement

KenGen successfully resettled 150 households from four villages in Olkaria in August 2014, in order to develop 280MW Olkaria IV and Olkaria I AU 4 & 5. In examining the resettlement, we find that discontent can occur during and after implementation and the available safeguards can adequately assist in defining a mechanism for addressing it. We find that most projects have a Grievance Redress Mechanism (GRM) at the project management level that encompasses all the stakeholders including the project affected persons. In Kenya, for publicly funded interventions, the leadership of GRM is mostly in the hands of local government administrators and, because of their training, they tend to use the command and control method of securing a solution. They act more like arbitrators than mediators in solving intervention related disputes. We examine how GRM should adopt an informal mediation procedure or mechanism in dealing with disputes as opposed to an arbitration procedure. Should the GRM fail to secure a satisfactory resolution, mediation would be a natural next step. A Mediator is engaged to independently conduct mediation for the parties in conflict. If mediation does not solve the dispute, then this level is exhausted and the matter is referred to arbitration. After arbitration is judicial level. This paper encourages exhaustion of the mediation process prior to arbitral and judicial levels; and, this is for three main positive reasons: (i) mediation is less formal and inexpensive; (ii) the solutions achieved are negotiated by the parties themselves, hence the parties would more readily abide; and, (iii) it promotes enduring relationships between the parties.

This paper postulates that social safeguards in a natural resource intervention ensures that discontent and conflicts are dealt with in a manner that builds and protects an enduring relationship between the developer or promoter of the intervention and the community.

2. SOCIAL SAFEGUARDS

A safeguard can be described as a rule, standard, policy, framework, law or measure which, is available to someone or something to protect or prevent it and its interests from undue harm. Alternatively, it can also be described as a rule, standard, policy, framework, law or measure that is available to enhance the quality of an intervention. A safeguard is referred to as a social safeguard when its application is focused on people (i.e. human environment) during the development process. It is an environmental safeguard when its focus is the bio-physical environment.

Noteworthy, safeguards can generally be classified into two, namely: “frameworks and intervention action plans”. These two, nonetheless, have a relationship. The “intervention action plans” are hinged on the “frameworks”; whereby, the “frameworks” are basic and are applicable to all interventions. On the other hand, the “intervention action plans” are detailed and tailored to an intervention; and, are developed in compliance with the “frameworks”. Worth mentioning too, safeguard frameworks can generally be categorised into two, namely: country owned or not.

Examples of Kenyan owned “frameworks” which, were applicable to the Olkaria IV Geothermal Power Plant are:

- a) Chapter Four (bill of rights), Chapter Five (Land and Environment), and Article 159(2)(c) and Article 159(3) in Chapter Ten (Judiciary) of the Constitution of Kenya (2010) are frameworks for the following examples of laws, which themselves are “frameworks” used in the assessment of impacts associated with an intervention as well as, in defining the measures and processes that would effectively manage (i.e. prevent or mitigate) the negative and enhance the positive impacts:
- b) Environmental Management and Coordination Act (EMCA) No 8 of 1999 and its subsidiary legislation;
- c) The land laws and their respective subsidiary legislation;
- d) Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities (IDP) Act No 56 of 2012;
- e) Judiciary Mediation Manual (2016).
- f) Marriage Act No. 4 of 2014 and its subsidiary legislation; and,
- g) Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016.

And examples of non-Kenyan owned “frameworks” which, were applicable to the Olkaria IV Geothermal Power Plant are: a) Environmental and Social Standards (ESS) of the European Investment Bank (EIB); and, b) Environmental and Social Framework (ESF) of the World Bank (WB). The EIB and WB are examples of international development partners that provide financial support to interventions, particularly of developing states such as Kenya. An intervention they support triggers application of their respective safeguard “framework”. These are applied alongside the safeguard frameworks of the recipient country. And, the practice has so far been that, where there is a gap between their framework and of a recipient country’s, their framework prevails. Re, where this gap is observed, the international development partners resolve by providing an intervention specific support to the recipient country to address the shortcomings; and, this is normally by strengthening capacities of relevant staff.

3. INTERVENTIONS AND SOCIAL IMPACTS

Harnessing the geothermal power to improve on the challenges facing Kenya’s power sub-sector, is specified as an intervention. Empirical evidence, however, informs that any intervention has the potential to bring about intended and unintended, both positive and negative, change(s).

The contribution of the Olkaria Geothermal Power Stations to improve upon the challenges facing Kenya's sub-power sector, is an intended positive impact of the intervention. As to negative social impacts, the intervention has caused both the predicted and the unpredicted. Implementation of Olkaria IV Power Station implied and resulted to involuntary displacement of households from four villages, as these were close to the geothermal field. The cumulative noise from the operations of geothermal wells and power plants were way above the National Environmental Management Authority's recommended levels for residential areas with human settlements. In addition, the air quality model predictions indicated ground level concentrations of hydrogen sulphide gas to be above WHO standards. It was not possible to mitigate these levels of noise and hydrogen sulphide gas and therefore, a recommendation for the resettlement of the four villages was made.

The existence of the cultural centre village was in response to economic activities occasioned by the tourist visitation of the Ol Njorowa Gorge near Hell's Gate National Park boundary. This is a protected area and an attraction for both domestic and international tourists. The existence of the other three villages was largely in response to grazing opportunities in nearby Kedong Ranch and economic opportunities due to the construction and commissioning of the first three Olkaria geothermal power stations. This involuntary displacement was an anticipated, therefore intended, negative impact of implementing Olkaria IV geothermal power station.

On September 2009, toward effective implementation of the Olkaria IV geothermal power station, a census survey of persons that would be displaced or disrupted (commonly referred to as Project Affected Person (PAPs) was conducted. The survey was a baseline assessment with part of its overall objective as identifying, assessing, and quantifying the potential adverse economic and social impacts that would result from the involuntary displacement. The results of the survey, however, inform that certain detailed data and information of PAPs, which was critical and would be useful in compensating PAPs, was not collected. This included photos and GPS locations of the PAPs, as well as detailed livelihood (i.e. income sources and earnings) and vulnerability information. This worked against the project. It brought about unintended negative impacts of the project. After the assessment, word spread, and one result was an increase in the number of persons, particularly from the Maasai Community, into the four villages. Subsequently, during implementation of the intervention, complaints were registered from persons claiming to be PAPs that had been excluded from the census survey. Various explanations as to why they may have been excluded were recorded. Other complaints too were recorded, one of which was in relation to disruption and loss of revenue. Following, in the absence of the vital data and information, it became difficult to identify the eligible PAPs, as well as accurately determine the level of disruptions and losses experienced. It was therefore found necessary to start resolving the registered complaints by conducting another census survey, dubbed a comprehensive validation census survey.

These abovementioned examples and other intended and unintended negative impacts, owing to implementation of the Olkaria IV geothermal power plant, were undue and, as is demonstrated, could be effectively managed. Similarly, the positive impacts could be effectively enhanced.

3.1 Social Impact Assessment

Central to the application of social safeguard frameworks is Social Impact Assessment (SIA). According to the International Association for Impact Assessment (IAIA), SIA includes processes of analysing, monitoring and managing social consequences, both positive and negative, of planned interventions (policies, programmes, and projects), as well as the social changes invoked by the interventions. The primary purpose of this is to bring about a more sustainable and equitable bio-physical and human environment (IAIA website). Thus, an SIA can be conducted prior to, during, and after implementation of an intervention.

In the Olkaria IV Geothermal Power Plant project, both Kenyan and development partner owned safeguards "frameworks" were applied alongside each other. Prior to implementation, it was in two baseline assessments, namely: Environmental and Social Impact Assessment (ESIA) and Resettlement Action Plan (RAP) studies. With respect, a RAP study expands on the information in an ESIA report as regards involuntary displacement of persons. Besides identifying, assessing, and quantifying the potential adverse economic and social impacts that would result from the involuntary displacement, it in addition, facilitates identification of most feasible mitigation measures of the adverse impacts observed, and how to enhance the positive impacts. The respective reports produced from the EISA and RAP studies are safeguard instruments adapted to an intervention, what we describe here as "intervention action plans".

ESIA and RAP studies and their respective reports are mandatory, in compliance with both the Kenyan and the development partner owned frameworks. In Kenya, without the studies, the project proponent would commence with implementation in contravention to the law. With respect to the international development partners, funding would be withheld. In Kenya, a license to commence is awarded by the National Environment Management Authority (NEMA), which is a state agency established under the EMCA (1999). Award of a license and access to a fund implies approval as regards the adequacy of the tools. The approval, nonetheless, includes conditions, two of which require conducting SIAs during and after implementation of an intervention, or afresh, i.e.:

- a) Periodic audits during and after implementation. These provide an opportunity for an SIA to analyse, monitor and manage social changes invoked by an intervention.
- b) Submission of fresh impact assessment reports (EMCA No. 8 of 1999, Section 64(1)) where:
 - i. There is a substantial change or modification in the intervention or manner in which the intervention is being operated;
 - ii. The intervention poses threats which could not be reasonably foreseen during the baseline study; or
 - iii. It is established that the information or data given in a baseline study report is inaccurate or intended to mislead.

3.2 Stakeholder Engagement

An important opportunity provided under impact assessment is “stakeholder engagement”. Stakeholder engagement comprises and involves the right people by sensitising and consulting them and making sure their views are well considered. Thus, it is key to successful delivery of interventions. Subsequently, an effective stakeholder engagement plan is significant. It can make the big difference in the success of an intervention. Generally, the overall objective of a stakeholder engagement (plan) is “to increase ownership and enhance the quality of an intervention”. Its specific objectives include (Runji, 2018):

- a) Identification of the right people (i.e. stakeholders) to engage;
- b) Briefing the stakeholders on the background and objectives of the intervention;
- c) Briefing the stakeholders on the proposals of the intervention;
- d) Briefing the stakeholders on the objectives of the impact assessment for the intervention;
- e) Consulting the stakeholders on social (and environmental) issues that matter most to them;
- f) Ensuring views collected from the stakeholders are well considered in the design of the intervention;
- g) Reducing misunderstanding on the impact assessment process of the intervention by providing the right amount of information and in the appropriate detail and at the right time.
- h) Ensuring communication between the intervention and its stakeholders is clear, open, and two-way.
- i) Gaining stakeholder support for the intervention, the key to the intervention’s success.

During the ESIA and 2009 RAP studies of the Olkaria IV geothermal power project, stakeholders were mapped and engaged through Stakeholders Coordination Committee (SCC). The SCC comprised the following; representatives of community villages, relevant national and county government departments, elected political leaders, Non State Actors (NGOs), and the vulnerable and marginalized social groups. The SCC delivered its mandate through four sub-committees; Employment, Economic Opportunities, Environment Health and Safety and Resettlement Action Plan Implementation Committee (RAPIC), which operated outside the SCC framework to minimize interferences from in-directly affected persons. This, although rarely perceived as such, could be the first mediation of the project, when the project promoter engaged the community as stakeholders to overcome the NEMA requirement of involuntary displacement. In this first instance, there was no mediator but the two parties used mediation techniques to work out their conflicts. A document was produced, a RAP report. A gap, however, was observed with the 2009 RAP study. This manifested in complaints which, it was agreed to be resolve by conducting a validation census survey. This validation exercise was conducted in 2012 by GIBB Africa Limited. Thereafter, a Memorandum of Understanding (MoU) between KenGen and PAPs, concerning implementation of the updated RAP report was entered. This was entered on 1st July 2013. During implementation of this updated RAP instrument, a gap was however observed with its stakeholder engagement plan. And this was identified on analysis of the complaints that arose. Specifically, two measures agreed upon in the 2013 MoU were (i) land for land compensation and, (ii) engagement of the already constituted RAP Implementation Committee (RAPIC), whose composition was six number of PAPs from each village, to represent the PAPs during the RAP implementation process. On the later measure, committed through Article 1(B) of the MoU was open and fair engagement through free, prior and informed consultations. Also committed by the MoU was mutual respect, fairness, understanding and truthfulness between KenGen and the PAPs. Following, during implementation, the resettlement land area was identified and purchased and, the RAPIC was engaged to represent the PAPs as per the MoU. Thereafter, two significant concerns were however registered, namely:

- a) The identified and purchased resettlement area was a remote greenfield, located far from nearby town centres and tourist path, and without access roads to and from it. Resettlement into this area, it was reported, resulted to disruptions and losses related to livelihoods. In connection, the main unintended negative impact alleged concerned an increase in the financial burden associated with commuting to and from jobs located at sites relocated from.
- b) The composition of the established RAPIC included representatives from the four villages, but these were from the largest community, the Maasai. Absent was representation of PAPs from the minority tribes. Additionally, subjective decisions of the individuals in the RAPIC dominated as to the resettlement package, implying biased interest governed. Due to this, the following two examples of unanticipated negative social impacts were observed:
 - i. PAPs from the minority tribes were excluded during resettlement. Additionally, there were few PAPs from the major tribe excluded. These later PAPs were identified as mainly from female headed households. What is more, there were certain individuals who were never permanent dwellers of the four villages but were resettled nonetheless.
 - ii. It was indicated that PAPs wanted modern houses. The majority of PAPs were from the Maasai community. Many of these were accustomed to their traditional semi-permanent settlement, which includes semi-permanent dwellings (manyattas) surrounded by a thorn fence, into which enclosure their domestic animals are driven at night. Additionally, they practiced their nomadic lifestyle. Maasai Manyattas are low and round. The walls are built of intertwined branches and sprigs and plastered with mud and cow-dung; while the floor is a mixture of mud and cow-dung. As a result of the construction technology, a Maasai’s manyatta is warm. Conversely a modern house, constructed of stone and concrete walls and cement floors is cold. Award of a modern house implied, among others, purchase of household furniture such as a mattress to lie on, and increased exposure to cold related morbidity such as pneumonia.

3.3 Grievance Redress Mechanism (GRM)

As the above discussion illustrates, dissatisfaction or sense of injustice or unfairness was experienced in connection with implementation of the RAP instrument of the Olkaria IV Geothermal Power project. These was manifested through complaints,

which henceforth we refer to as grievances. Both the Kenyan and international development partner owned safeguard “frameworks” recognise that grievances related to interventions are inevitable. Subsequently, they provide that intervention action plans contain a mechanism for constructively addressing concerns and grievances for the successful delivery of the respective interventions, within the estimated costs. The arrangement of this mechanism should be a project grievance mechanism, incorporating the local/state-owned grievance mechanism and, where applicable, the international development partner grievance mechanism; which, PAPs and other stakeholders will access as is appropriate. Additionally, it should:

- a) Commence with an identified nearest point of service. The identification of the nearest point of service is vital toward facilitating inclusiveness, and efficiency and effectiveness in handling of the grievances.
- b) Be in place for the duration all PAPs are adequately re-installed; and,

Normally “encourage alternative forms of dispute resolution mechanisms”. The framework for this in Kenya is Article 159(2)(c) of the Constitution of Kenya (2010), which states “alternative forms of dispute resolution mechanisms shall be promoted, subject to Clause 3”. Clause 3 provides that “Traditional dispute resolution mechanisms shall not be used in a way that: i) contravenes the Bill of Rights; ii) is repugnant to justice and morality or results to outcomes that are repugnant to justice or morality; or, iii) is inconsistent with the Constitution or any written law”.

The objective of the grievance handling systems and procedure is, thus, to establish for the PAPs and other stakeholders a mechanism for raising complaints, and having such complaints sustainably resolved as inexpensively and amicably as possible through acceptable and binding corrective actions.

3.4 Grievance Redress Structure Observed in Kenya

In Kenya, there exists an official grievance redress arrangement which is normally observed by interventions such as the Olkaria IV Geothermal Power Plant Project; and, this is generally four (4) stage as follows:

- a) **Existing Community Structure:** Normally the first level of grievance or conflict redress, and its structure is as Figure 1 illustrates. PAPs and other stakeholders are allowed to propose slight modifications to it, to constitute the intervention’s committee.

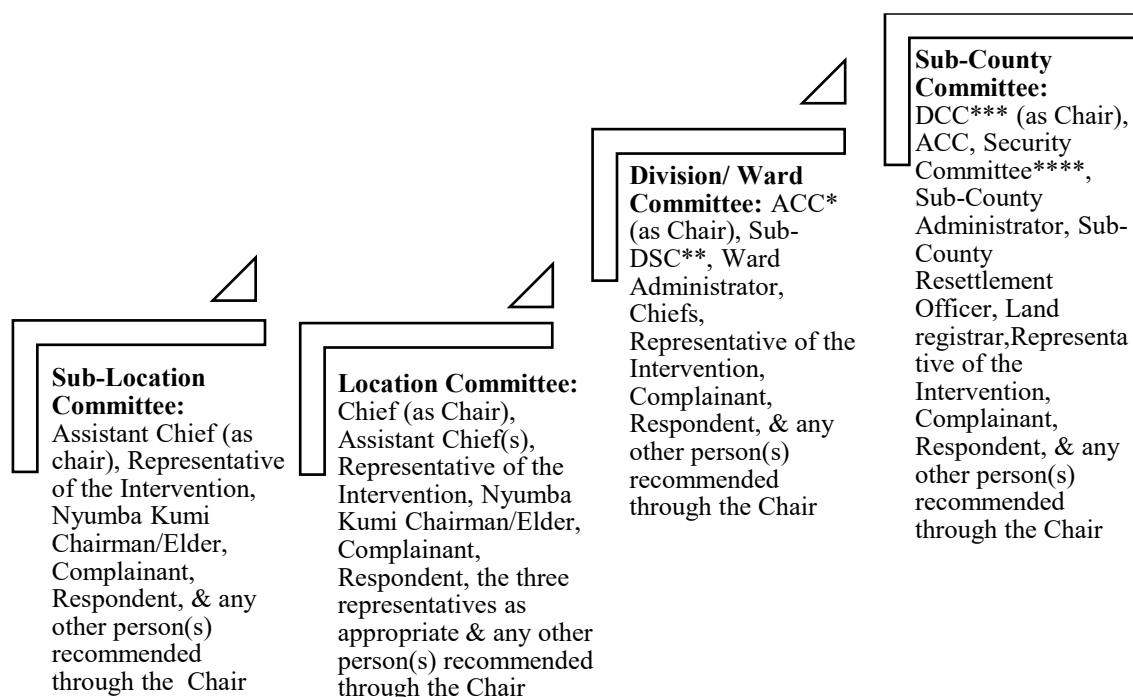


Figure 1: Existing Basic Community Grievance Structure

Notes:

*Assistant County Commissioner | **Division Security Committee | ***Deputy County Commissioner |

****The Security Committee is composed of Officer Commanding a Police Division/District (OCPD), and intelligence Officer (from NIS) | The Ward Administrator is the lowest administrative level of the County Government organisational structure, and its equivalent in the National Government organisational structure is the ACC | The Sub-County Administrator is the next administrative level, after the Ward Administrator; and, its equivalent in the National Government organisational structure is the DCC.

As illustrated, the first forum embraces the office of the County Commissioner of the County the intervention is located. This is not by chance, but a legal requirement. The IDP Act of 2012 provides that the government shall ensure the presence of a government official when displacement and relocation is a necessity for a public purpose good. County Commissioners are under the National Government Administration and Field Services, Ministry of Interior and Coordination of National Government. Their offices are an important link between project promoters and affected persons. With respect to RAP, their importance is in:

- i. Bringing together the affected and other key stakeholders for purposes of official sensitisation, consultations and implementation of the resettlement instrument.
- ii. Official dissemination of factual information on the resettlement instrument at the grass roots level;
- iii. Enabling project promoters to deliver on the functions they are legally mandated to perform at the grass roots level;
- iv. Where project promoters and other National Government agencies have to work together toward successful delivery of a resettlement instrument at the grass roots level, bringing the different agencies into an efficient relationship;
- v. Where grievances or conflicts between project promoters (*including their associated national government agencies*) and the affected arise, or between affected parties arise, redressing the grievances or conflicts using alternative dispute resolution mechanisms, which is with an aim of addressing the grievances or conflicts in an amicable and inexpensive manner; and,
- vi. Facilitating maintenance of public order (i.e. security), which is vital to successful delivery of resettlement instruments.

This level's reporting point is the Chief, and Assistant Chief. If a Village Elder is used, he or she is required to bring the grievance to the attention of either the Chief or Assistant Chief. Thereafter, to redress the grievance or conflict, the Chief or Assistant Chief may constitute a committee, guided by the stakeholder's proposed composition of the Committee.

b) **Project Resettlement Action Plan Implementation Committee (PRAPIC):** The second level. It handles issues that the first forum has been unable to provide a satisfactory solution, and the aggrieved remains dissatisfied. It comprises representative(s) of the project promoter, relevant government agencies and departments, PAPs, non-state actors appointed in collaboration with the PAPs, and other relevant stakeholders as is appropriate.

c) **Arbitration:** The third level, and it handles issues that the second forum has been unable to provide a satisfactory solution and the aggrieved remains dissatisfied. This level involves the intervention, on the recommendation of the PRAPIC, referring the matter (*to the Principal Secretary [PS] of Ministry responsible for the intervention, through the Chief Executive Officer of the proponent*) for arbitration. At this third level, the PS constitutes an arbitration committee to address the issue(s) that have been forwarded.

d) **Court of Law:** The last level, and it is invoked where all the above three avenues are exhausted without arrival of an amicable solution or consensual decision. With respect, the intervention does not restrict recourse being had with the judicial institutions in place, namely the law courts, whose decision is final and binding.



Figure 2: Summary of the Grievance Structure Proposed for Resettlement Instrument

The first two steps are alternative forms of dispute resolution processes and, require application of mediation techniques to settle conflicts, mainly in the social impact arena, as a result of an intervention. However, often observed in the first level is a process similar to arbitration. This may possibly be due to a lack of training or a perception of the chair as a “wise arbitrator” owing to their position or both. The decision of “wise arbitrator” can be based on misinformation and may result in miscarriage of justice. In the worst-case scenario, the “wise arbitrator” may make a judgement that results to an aggrieved person walking away with nothing. In comparison, in the case of a “wise mediator”, the worst-case scenario is a hang jury. Along these lines, it can therefore be argued that, in the absence of training as either mediator or arbitrator, the best option at the first level, as well as the second level, is use of mediation rather than arbitration techniques.

For more on the comparisons, please refer to Tables 1 and 2 below, which give between arbitration and mediation, and between arbitration and litigation respectively.

Table 1: Comparison between Arbitration and Mediation

Arbitration	Mediation
Adjudication	Expedited negotiation
Arbitrators control the outcome.	Parties control the outcome.

Arbitration	Mediation
Arbitrator is given power to decide. Final and binding decision.	Mediator has no power to decide. Settlement only with party approval.
Often extensive discovery is required.	Exchange of information is voluntary and is often limited. Parties exchange information that will assist in reaching a resolution.
Arbitrator listens to facts and evidence and renders an award.	Mediator helps the parties define and understand the issues and each side's interests.
Parties present case, testify under oath.	Parties vent feelings, tell story, engage in creative problem-solving.
Process is formal. Attorneys control party participation.	Process is informal. Parties are active participants.
Evidentiary hearings. No private communication with the arbitrator.	Joint and private meetings between individual parties and their counsel.
Decision based on facts, evidence, and law.	Outcome based on needs of parties.
Result is win/lose award—Relationships are often lost.	Result is mutually satisfactory—A relationship may be maintained or created.
More expensive than mediation, but less expensive than traditional litigation.	Low cost.
Private (but decisions are publicly available).	Private and confidential.

Source: Financial Industry Regulatory Authority (<https://www.finra.org/arbitration-and-mediation/comparison-between-arbitration-mediation>)

Table 2: Comparison between Arbitration and Judicial

Public/Private	Arbitration	Judicial
Type of Proceeding	Private - between the two parties	Public - in a courtroom
Type of Proceeding	Civil - private	Civil and criminal
Evidence allowed	Limited evidentiary process	Rules of evidence allowed
How arbitrator/judge selected	Parties select arbitrator	Court appoints judge - parties have limited input
Formality	Informal	Formal
Appeal available	Usually binding; no appeal possible	Appeal possible
Use of attorneys	At the discretion of parties; limited	Extensive use of attorneys
Waiting time for the case to be heard	As soon as arbitrator is selected; short	Must wait for the case to be scheduled; long
Costs	Fee for the arbitrator, attorneys	Court costs, attorney fees; costly

Source: Murray, 2019

4. CASE STUDY: ADDRESSING GRIEVANCES ARISING FROM OLKARIA IV RESETTLEMENT

The updated 2012 RAP report of the project provided a Grievance and Complaints Handling Mechanism (GCHM) which, through the MoU, the parties agreed to respect. The structure of this GCHM comprised a first level and RAPIC as the lowest reporting point for aggrieved PAPs; and, arbitral and judicial levels as, respectively, the second highest and highest levels which were only triggered on all the lower avenues being exhausted without arrival of an amicable solution or consensual decision. Noteworthy, this GCHM also involved the office of the County Commissioner, through its grassroot units of service. Additionally, it provided PAPs and other stakeholders access to the international development partners grievance redress mechanisms, to be accessed as alternative forms of conflict resolution when all other forms prior to the arbitral and judicial levels respectively, had been exhausted and unable to provide a satisfactory solution and the aggrieved remained dissatisfied.

In the Olkaria IV Geothermal Power Plant project, the international development partners Complaints Mechanism was triggered, implying that the other forms of alternative forms of conflict resolution had been exhausted and the aggrieved remained dissatisfied. In July and August 2014, PAPs aggrieved from the implementation of the updated 2012 RAP instrument, accessed the European Investment Bank's Complaints Mechanism (EIB-CM); and, in October 2014 they accessed the World Bank Inspection Panel (WB-IPN). As a result, the EIB-CM and WB-IPN coordinated their efforts and resources to: a) maximise the interaction with all the parties, b) avoid duplication and overlaps, and c) complement, to the greatest extent possible, each other's activities. Following this, on 13th November 2014, the WB-IPN and the EIB-CM responded by registering a Request for Inspection, IPN Request RQ14/06, concerning the Kenya Electricity Expansion Project (P103037) financed by the International Development Association of the WB. The Request alleged that, as a result of the Olkaria IV Geothermal Power Plant Project related resettlement, the PAPs were facing the following adverse impacts:

- Exclusion of some community member from the resettlement process;
- Irregular provision of cash compensation to some eligible persons;

- c) Lack of furniture in the resettlement houses; and,
- d) Financial burden for commuting to job sites, which is further away.

Therefore, an Action Plan was required. In order to support KenGen in the preparation of this Plan, a technical team was engaged to conduct a post-relocation survey whose objectives were to:

- a) Identify the vulnerable households;
- b) Identify households that may have lost their income because of relocation; and,
- c) Collect data to enable vet the additional PAP list provided by the complainants.

The methodology of the post-relocation survey involved field data collection, validation of collected data, and formulation of an action plan. The Final Action Plan was thereafter to be presented for formal mediation by a Mediation Team which was to be constituted after the survey. The formal mediation was a level prior to the arbitral and judicial levels in the Project's GCHM. The intention of this level was for the Project to achieve: a) A final solution to all outstanding grievances and complaints "with less formality and in an inexpensive manner, through a process agreed between the parties"; and, b) Ultimate results which, are a negotiated solution achieved by the parties themselves, to which the parties would more readily abide, and through which enduring relationships are promoted between the parties" (Mediation Manual, 2016)

In March 2015, after an analysis of the allegations presented to the EIB-CM and WB-IPN, an Initial Assessment Report (IAR) was prepared by the EIB-CM. This Report included proposals on the way forward with two measures: a) a compliance review of the issues identified during the preparation of the IAR, to be carried out together with the WB-IPN and, b) a problem-solving approach, by providing independent facilitation services to foster the dialogue between the complainants and the existing project organisational structures. The proposed way forward, (i.e. mediation process), was accepted by the stakeholders (complainants and promoter).

A formal Mediation Team was thereafter constituted. The parties to this Team were: a) PAP representatives - the Complainants Representatives (Complainants), and the RAP Implementation Committee (RAPIC); b) Project Promoter - KenGen, who is responsible for the implementation of the Project; d) Formally trained and practicing Mediators appointed by the EIB-CM; e) Interpreters appointed by the EIB-CM; and, f) Special Participants comprising Elders from the four villages affected (Community Advisory Council of Elders), PAP Welfare Society, and European Investment Bank Complaints Mechanism (EIB-CM) as a friend of the Mediators. The observers were: a) The Government of Kenya through the ministry responsible for geothermal energy development; and, b) The WB as a financier of the Olkaria IV, and as part of the response to the Inspection Panel report. Next, a Mediation Agreement was entered in July 2015. This was signed by all parties of the Mediation Team.

Noteworthy of the Agreement, as is demonstrated in the abovementioned composition of the Mediation Team, it encouraged deeper inclusiveness as to its stakeholder engagement plan. Additionally, it provided that the mediators were not to adjudicate the dispute, but be impartial persons that were to assist the parties to do any of the following:

- a) Communicate with one another;
- b) Identify the issues in the dispute;
- c) Explore and generate options to solve the dispute; and,
- d) Reach a *negotiated* agreement regarding the resolution of the whole, or part, of the dispute.

Lastly, it provided other rules, which were to be observed by the parties. This included conduct of the parties during and after the Mediation, and the measure(s) that would be taken upon the offending party for failure to observance of any of the rules provide.

At the conclusion of the mediation process, the Mediators prepared a report for each mediation, stating whether or not the parties had reached an agreement. They in addition prepared the settlement agreement. Next, on May 29th 2016, an Agreement on Olkaria IV Resettlement Mediation was entered between KenGen and representatives of the resettled community (i.e. Complainants and RAPIC). This Agreement provided what KenGen was to undertake and what the representatives of the resettled community were to undertake. Worth mentioning, this Agreement, through Article 2(23) and Article 3(4) which are on GRM, acknowledges: (i) implementation of the negotiated agreement will not be without grievances; (ii) alternative forms of dispute resolution mechanism are vital and will be embraced as is appropriate to effectively handle the grievances that may arise; and, (iii) the effective GRM for the intervention is one the project promoter and the PAPs develop together. Additionally, particularly through Article 3 which is on what representatives of the resettled community were to undertake, it acknowledges an effective stakeholder engagement plan is crucial to the successful delivery of the intervention. Lastly, on the whole, by the negotiated measures agreed upon, it demonstrates that both the intended and unintended negative impacts of the intervention could be effectively managed, and the positive could be effectively enhanced.

5. CONCLUSION & RECOMMENDATION

All developments, including the Olkaria IV Geothermal Power Plant project, are people centric. They are undertaken to advance the fundamental social, economic and/or cultural rights and freedoms of people. Subsequently, negative social impacts owing to implementation of interventions are undue. In acknowledgement of this, available to people and interventions are instruments designed to safeguard (i.e. protect or prevent) them and their interests from undue harm. These safeguard instruments are availed by states and international development partners (international finance institution), and their design is

normally influenced by internationally agreed standards and guidance, which results in creation of consistent requirements, which either minimises or eliminates technical barriers. These instruments are commonly referred to as social safeguards.

Subsequently, social safeguards are important ingredients in development. Their application in Africa, as demonstrated through the Olkaria IV Geothermal Power Plant project, has however faced challenges. And, as the above discussion demonstrates, want in their application can escalate the cost of intervention, namely, the scale of discontent between project promoters and affected population (the parties) escalates. This subsequently negatively impacts on the duration taken, as well as the financial estimates committed, to successfully deliver on the intervention.

When this occurs, as the Olkaria IV Geothermal Power Plant project case demonstrates, mediation comes out as a more powerful measure in redressing the discontent, subsequently the project promoters being able to successfully deliver on the intervention.

It is also important that interventions undertake comprehensive social safeguard studies and implement their recommendations in order to ensure that relations between communities and project promoters are harmonious. Even where such efforts have been expended, complaints do arise and mediation, as an alternative form of dispute resolution, is one of the best approaches at dealing with them.

Lastly, the composition of the mediation teams should reflect representation of the project stakeholders. Otherwise, as the Olkaria IV Geothermal Power Plant project case demonstrates, due to the biased composition of their team, all other lower avenues of alternative forms of dispute resolution prior to the formal mediation process, were exhausted and were unable to provide a satisfactory solution. Subsequently, the aggrieved remained dissatisfied. Thereafter, when the formal mediation process was invoked, it resolved this by ensuring the mediation team was inclusive. The formal mediation process was the final alternative form of dispute resolution mechanism embraced by the Project; and, it settled all the complaints.

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ACRONYMS

EIB	European Investment Bank
EIB-CM	European Investment Bank's Complaints Mechanism
EMCA	Environmental Management and Coordination Act
ESF	Environmental and Social Framework
ESIA	Environmental and Social Impact Assessment
ESS	Environmental and Social Standards
GCHM	Grievance and Complaints Handling Mechanism
GoK	Government of Kenya
GPS	Global Positioning System
GRM	Grievance Redress Mechanism
IAIA	International Association for Impact Assessment
IAR	Initial Assessment Report
IDA	International Development Association
IDP Act	Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No 56 of 2012
KEEP	Kenya Electricity Expansion Project
KEEP-AF	KEEP Additional Financing
KenGen	Kenya Electricity Generating Company Plc
MoU	Memorandum of Understanding
MW	Megawatt
NEMA	National Environmental Management Authority
PAP	Project Affected Person
PRAPIC	Project Resettlement Action Plan Implementation Committee

RAP	Resettlement Action Plan
RAPIC	RAP Implementation Committee
RAPLand	Resettlement land
SIA	Social Impact Assessment
WB	World Bank
WB-IPN	World Bank Inspection Panel