

Complaint Letter to the Senate Committee on Lands, Environment and Natural Resources

Senate Committee on Lands, Environment and Natural Resources Republic of Kenya

C/o Sen. Issa Juma Boy
Senator, Kwale County
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30th January 2018

RE: A Letter from Constituents of Msambweni Sub-County, Kwale County, Raising Concerns about the Mining Operations of Base Titanium Ltd. (Kenya) / Base Resources Ltd. (Australia) in Our Ancestral Lands

We, the residents of several villages¹ in Msambweni Sub-county, Kwale County, urgently call upon the *Senate Committee on Lands, Environment and Natural Resources*, to address our concerns regarding the mining-related activities of Base Titanium Ltd. (a wholly owned subsidiary of Base Resources Ltd., Australia) in our ancestral lands.

Questionable Licensing Process

We would like to begin by stating that Base Titanium Limited was issued with a “Special Prospecting Licence” (No. 173) on 26th May 2016 under the *old Mining Act* – *six days after the new Mining Act had been gazetted, and a day before the new Act came into effect* (Ref: Annex 1).

The timing in this licensing process is therefore questionable, and suggests that Base Titanium Limited sought to avoid the requirement of Section 36(2) of the *Mining Act, 2016*, which states that:

The Mineral Rights Board shall, prior to recommending to the Cabinet Secretary the grant of a mineral right, *require the applicant to seek–*

(h) *the approval of any other person who in the opinion of the Cabinet Secretary would otherwise be affected by the grant of a mineral right, who may include the owner of private land or the community in occupation of the land.*

It therefore appears that Base Titanium Limited seeks to conduct exploration activities, contrary to the provisions of the new *Mining Act, 2016*.

Yet, according to the guidelines for “Stakeholder Engagement” on the company’s website, “prior to commencing any further exploratory drilling, a systematic multi-stakeholder engagement programme ha(s) been developed and implemented in order to,” among other

¹ Including the villages of Gazi, Vumbu, Maumba, Magaoni, Fihoni, Majikuko, Mwaloya, Bumamani, Madongoni, Masindeni, Mwandimu, and Zigira.

things, “fully inform the Kwale County Government, the local administration, the political leadership and affected communities” and “provide full details of the planned programme in order to eliminate misunderstandings and misconceptions around exploration and to seek support and informed consent...”²

Base Titanium has further stated that the engagement programme ran from June to October 2016 and covered all areas that were intended to be impacted by drilling activities.³

However, this was not the case. The reality is that residents of Msambweni Sub-County resisted the company’s back-handed tactics to conduct prospecting / exploratory drilling in the area, under the protection of armed state personnel.

Official Misconduct

Furthermore, we would like to point out that the Commissioner of Mines and Geology who issued Base Titanium’s “Special Prospecting Licence” (No. 173) has been adversely mentioned in connection to “regulatory lapses and poor monitoring systems...giving firms which export billions worth of minerals annually the leeway to determine what royalties to pay.”⁴For example, according to the Auditor General, the receipts submitted by Base Titanium “are based on self-declared export quantities. There has been no evidence of subsequent verification of the actual exports vis-à-vis declared quantities to validate their accuracy. It is, therefore, not possible to confirm the completeness and validity of royalties’ income as reported.”⁵

The Auditor General has also faulted the issuance of export permits to mining companies, stating that mining licences are “dished out irregularly” with negative consequences in terms of revenue collection: “information available indicates that export permits with a value of \$18,619,645 (approximately Ksh 1.9 billion) were issued...by an unauthorised officer whose employment contract expired on April 19, 2014. This is contrary to the Mining Act...consequently the validity of the revenue collections on the export permits issued by the officer can be challenged.”⁶

Furthermore, according to a former Minister for Environment and Natural Resources, Mr. Chirau Ali Mwakwere, the agreement between Base Titanium Limited and the Government of Kenya “exempts the company from all taxes, levies or cess by the government or local authorities throughout the company’s operation period.”⁷

The Issue

² www.basetitanium.com (Accessed on 26th March 2017)

³ *Ibid*

⁴ Okoth, E. (2016). *Millions feared lost in mining sector through lax regulations*. The Daily Nation, 31st October 2016 – www.google.com/amp/www.nation.co.ke/business/Millions-feared-lost-in-mining-sector-through-lax-regulations/996-3436114-view-asAMP-nv3t63z/index.html

⁵ *Ibid*

⁶ *Ibid*

⁷ Kirimi, S. (2013). *Mwakwere, Base Titanium clash over 35% share rule*.

www.the-star.co.ke/news/2013/01/16/mwakwere-base-titanium-clash-over-35-share-rule_c762518

Our primary reason for opposing this project is that we do not want to lose our ancestral lands, and especially not if this project will only serve to enrich a few individuals at the expense of our community, our environment, and the larger Kenyan populace.⁸ We are also concerned about the serious health impacts associated with titanium mining, particularly due to the presence of radioactive thorium and uranium, as well as adverse environmental impacts (including the drying up of crucial water sources and the loss of arable land).⁹ Finally, we contend that Base Titanium has brought much more harm than good to the area, and we want the company to wind up its present mining operations and leave.

We also contend that if the license that was issued to Base Titanium is the same one that was issued to Tiomin Resources Inc. in 1997, then simply renewed over the years (Annex 1 – See page 9), the same may apply to Base Titanium’s Environmental Impact Assessment (EIA) report. What makes this all the more likely is that despite official requests to Base Titanium under the *Access to Information Act, 2016* (Annex 2 – See page 11), the company has refused to provide us with copies of their EIA (Annex 3 – See page 14). We consider this lack of co-operation and secretiveness as a sign of “bad faith” on the part of Base Titanium Limited, and that the company can therefore not be trusted.

Pursuant to the above, according to Section 78 of the *Mining Act, 2016*:

A prospecting licence issued in accordance with this Act shall include the following information in addition to the information referred to in Section 72 –

- (d) an approved environmental impact assessment report, a social heritage impact assessment and environmental management plan, where required.

Historical Land Injustice and Our Constitutional Rights

The seriousness of our grievances cannot be fully appreciated unless they are placed in their proper historical context. The loss of ancestral land by the Mijikenda is a well-known historical injustice that was initiated by the Sultanate of Zanzibar, and perpetuated by the British colonial and independent Kenyan governments. This has been conceded by the Kenyan government, which appointed a Parliamentary Select Committee in 1976 to investigate the issue of land ownership within Kenya’s Coastal strip (*Mwambao*). This committee made extensive recommendations, including:

- (a) enfranchisement of actual occupiers/users of land;
- (b) restitution of land where appropriate;
- (c) compensation at market prices or reparations in respect of land lost either to the Arabs or the Government (colonial and Kenyan); and
- (d) facilitation of purchase by local communities of land held by absentee landlords.

Pursuant to this, in many parts of Kenya, land is still communally owned and community members do not have title deeds. Nevertheless, these *customary rights* to land are recognized

⁸ Aired by the Kenya Television Network (KTN) – <https://youtu.be/Z0BVYPZm4A4>

⁹ <https://citizentv.co.ke/news/wakazi-wa-vumba-kaunti-ya-kwale-walalamikia-vumbi-180988/>

under the *Constitution of Kenya (2010)*, the *Community Land Act (2016)*, and the *Land Act (2012)* as stated below –

Articles 63 and 40 of the Constitution of Kenya (2010):

63(2)(i) Community land consists of land that is lawfully held, managed or used by specific communities as community forests, grazing areas, or shrines;

63(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

63(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.

40(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, 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, or just compensation to the person; and
 - (ii) allows any person who has interest in, or right over, that property a right to access to a court of law.

40(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

Sections 4, 5, 6, 35 and 36 of the Community Land Act, 2016:

4(3) Community land shall vest in the community and may be held under any of the following tenure systems –

- (a) customary;
- (b) freehold;
- (c) leasehold; and
- (d) such other tenure system recognized under this Act or other written law.

5(2) Customary land rights shall be recognized, adjudicated for and documented for purposes of registration in accordance with this Act and any other written law.

5(3) Customary land rights, including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer.

5(4) Subject to Article 40(3) of the Constitution and the Land Act, no interest in, or right over community land may be compulsorily acquired by the State except in accordance with the

law, for a public purpose, and upon prompt payment of just compensation to the person or persons, in full or by negotiated settlement.

5(5) Subject to the provisions of section 46 of this Act, any person who immediately before the commencement of this Act had a subsisting customary right to hold or occupy land shall upon commencement of this Act continue to hold such right.

6(1) County governments shall hold in trust all unregistered community land on behalf of the communities for which it is held.

6(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.

6(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.

35. Subject to any other law, natural resources found in community land shall be used and managed -

- (a) sustainably and productively;
- (b) for the benefit of the whole community including future generations;
- (c) with transparency and accountability; and
- (d) on the basis of equitable sharing of accruing benefits.

36(1) Subject to any other relevant written law, an agreement relating to investment in community land shall be made after a free, open consultative process and shall contain provisions on the following aspects –

- (a) an environmental, social, cultural and economic impact assessment;
- (b) stakeholder consultations and involvement of the community;
- (c) continuous monitoring and evaluation of the impact of the investment to the community;
- (d) payment of compensation and royalties;
- (e) requirement to re-habilitate the land upon completion or abandonment of the project;
- (f) measures to be put in place to mitigate any negative effects of the investment;
- (g) capacity building of the community and transfer technology to the community; and
- (h) any other matters necessary for determining how local communities will benefit from investments in their land.

(2) An agreement relating to investment in community land shall only be made between the investor and the community.

(3) No agreement between an investor and the community shall be valid unless it is approved by two thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of two thirds of the adult members of that community is represented.

(4) The community may request the guidance and assistance of the county government or any other relevant stakeholders in considering the offer of investment.

Sections 5 and 111 of the Land Act, 2012:

5(2) There shall be equal recognition and enforcement of land rights arising under all tenure systems and non-discrimination in ownership of, and access to land under all tenure systems.

111(1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

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Honourable Members of the *Senate Committee on Lands, Environment and Natural Resources*, we seek your assistance in addressing this very important matter, according to the laws of the Republic of Kenya, and in the context of the recommendations made by the Parliamentary Select Committee established in 1976, to investigate the issue of land ownership / historical injustices within Kenya's Coastal strip (*Mwambao*). To reiterate, these recommendations included:

- (a) enfranchisement of actual occupiers / users of land;
- (b) restitution of land where appropriate;
- (c) compensation at market prices or reparations in respect of land lost either to the Arabs or the Government (colonial and Kenyan); and
- (d) facilitation of purchase by local communities of land held by absentee landlords.

This matter was also aired recently by the Kenya Television Network (<https://youtu.be/Z0BVYPZm4A4>) and Citizen TV (<https://citizentv.co.ke/news/wakazi-wa-vumba-kaunti-ya-kwale-walalamikia-vumbi-180988/>).

In addition, we wish to share the following video that was taken at one of our meetings: https://m.youtube.com/watch?v=znk_i

Thank you. Most Sincerely,

The communities of *Gazi, Vumbu, Maumba, Magaoni, Fihoni, Majikuko, Mwaloya, Bumamani, Madongoni, Masindeni, Mwandimu, and Zigira*.

Represented by:

Omari Shee Mbega (Chairman, Villages)

Hamadi Said Mnyeto (Chairman, Villages Committee on Mining)

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C.c: Hon. Uhuru M. Kenyatta (President, Republic of Kenya)

Hon. William S. Ruto (Deputy President, Republic of Kenya)

Hon. Salim Mvurya (Governor, Kwale County)

Hon. Fatuma Mohamed Achani (Deputy Governor, Kwale County)
Hon. Issa Juma Boy (Senator, Kwale County)
Hon. John Munyes (Cabinet Secretary, Petroleum and Mining)
Kwale County Commissioner
Msambweni Sub-County Commissioner
Mr. Keith Spence (Non-Executive Chairman, Base Resources Ltd., Australia)
Mr. Tim Carstens (Managing Director, Base Resources Ltd.)
Mr. Colin Bwye (Executive Director, Operations & Development, Base Resources Ltd.)
Mr. Sam Willis (Non-Executive Director, Base Resources Ltd.)
Mr. Michael Anderson (Non-Executive Director, Base Resources Ltd.)
Mr. Michael Stirzaker (Non-Executive Director, Base Resources Ltd.)
Mr. Malcolm Macpherson (Non-Executive Director, Base Resources Ltd.)
Mr. Joe Schwarz (General Manager, External Affairs, Base Resources Ltd.)
Mr. Colin Forbes (General Manager, Base Titanium Ltd., Kenya)