



## Mining Resources Governance in Kenya from a Legal Perspective

Omondi R. Owino<sup>1</sup>, Nelson Otieno<sup>2</sup>

<sup>1</sup>(Private Law Department, JKUAT School of Law, Nairobi, Kenya)

<sup>2</sup>(Munyao Muthama and Kashindi Advocates)

### 1. INTRODUCTION

The Government of Kenya launched the Mining and Minerals policy in April 2016.<sup>1</sup> The policy informs the implementation of the Mining Act 2016 and forms the basis for the sustainable utilization of mineral resources and other principles such as public participation and the wider environmental matters arising from the exploitation of mineral resources in Kenya.<sup>2</sup>

According to KPMG which is a leading global audit firm operating in Kenya, the mining sector contributes approximately 0.4 % to the country's Gross Domestic Product (GDP).<sup>3</sup> Though exploitation of minerals has generally been low, geological surveys in Kenya indicate a huge potential for minerals beyond the traditional soda ash and sand.<sup>4</sup> Exploitation of Kenya's full mineral potential therefore, calls for decisive measures to ensure that the developments and investment in mining operations are efficient and do not compromise sustainability. Simply put, sustainability should not be sacrificed on the altar of development. The approach to regulation of minerals in Kenya has largely been through the establishment of institutional frameworks and the enactment of legislation. The Ministry of Petroleum and Mining is responsible for mining activities in the country and the ministry's main mandate includes among others, the implementation of mining policies.<sup>5</sup> This paper analyzes the regulatory approaches implemented by the Government of Kenya in the mining sector. It tests the approaches against the achievement of constitutional principles; environmental considerations as well as international best practice.

### 2. LEGAL FRAMEWORK

The principal legislation which governs mining activities in Kenya is the Mining Act No. 12 of 2016. The Act provides for prospecting; mining; processing; refining; treatment; transport and any dealings in minerals. The ownership of minerals; administration mineral rights and licensing regime; safety and health concerns; , and other dealings in minerals are regulated under the Act.

Other legislations that are incidental to the Mining Act include the Occupational Safety and Health Act No. 15 2007; the Water Act No. 43 of 2016; the Environmental Management and Coordination Act No. 8 of 1999; the Forest Conservation and Management Act No. 34 of 2016 and; the Wildlife Conservation and Management Act No. 47 of 2013. Legislations that regulate charges and impose financial obligations on mining activities are also important. Notable examples include the Income Tax Act cap 470 Laws of Kenya; the Value Added Tax No. 35 of 2013 and the East African Community Customs Management Act, 2004.. These statutes provide for adoption of diverse Regulations

Regulation of mining activities in Kenya is vested in the Ministry of Petroleum and Mining which is headed by a Cabinet Secretary. The Cabinet Secretary responsible for mining is aided by the Director of Mines. The Director of Mines is responsible for the management and development of mineral resources as well as supervising the prospecting; mining; processing; refining and mineral treatment operations and; compliance.<sup>6</sup> The Office of the Cabinet Secretary is assisted, through its Principal Secretary, by the Director of Geology. The

<sup>1</sup> KPMG, Analysis of the Mining Act 2016, July 2016, p 1.

<sup>2</sup> Mining Act 2016, section 176(1).

<sup>3</sup> KPMG, 'Analysis of the Mining Act 2016' (2016) <<https://assets.kpmg/content/dam/kpmg/ke/pdf/kpmg-mining-act-2016-analysis.pdf>> accessed 22 July 2019

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Mining Act 2016, section 20(1)(a)- (p).

## *Mineral occurrence and its influence on the design of a tailings dam facility; focus on gold*

Director undertakes geological services; data collection; studies; data storage; analysis and; evaluation of geological information.<sup>7</sup> The Act establishes a Mineral Rights Board which renders advisory support to the Cabinet Secretary on mining matters and dealings.<sup>8</sup> Other regulatory bodies such as National Environmental Management Authority (NEMA); Kenya Forest Service (KFS); Kenyan Wildlife Service (KWS) and; Director of Occupational Safety and Health (DOSH) all act in concerted effort to ensure compliance.

### 2.1. Mining Act of 2016

The Kenyan parliament passed Mining Act CAP 306 in 1940. Over seven decades later, the Act was repealed and replaced with the Mining Act 2016. The 2016 Act introduces a new legislative framework for the regulation of the mineral resources in Kenya. Pursuant to section 225 of the Act, it repeals three statutes to wit, the Mining Act (Cap. 306); the Trading in Unwrought Precious Metals Act (Cap. 309) and; the Diamond Industry Protection Act (Cap. 310). Section 225(2) of the Act, however, provides that the Regulations made under the repealed Acts continue to apply to the regulation of mining operations.

#### 2.1.1. Ownership

In Kenyan, every mineral is the property of the Republic of Kenya. Minerals found on land, rivers, streams, water courses or economic zones are exclusively vested in the national government which holds such minerals in trust for the people of Kenya.<sup>9</sup> Minerals vest in the government notwithstanding 'any right or ownership of or by any person in relation to any land in, on or under which any minerals are found'.<sup>10</sup> The national government exercises control over minerals vested in it subject to the provisions of the Mining Act 2016.<sup>11</sup>

#### 2.1.2. Surface Rights

In cases of minerals rights that are owned by persons other than the land owner, it is incumbent upon the holder of such rights to allow the owner the surface right to graze livestock and cultivate land so long as it does not affect mining operations or pose a danger to livestock.<sup>12</sup> The owners also have a right to demand reasonable, adequate and fair compensation in case the exercise of the mineral rights deprives him or her of the right of use; causes damage to buildings or immovable property; and, loss of earnings.<sup>13</sup> In order to effectuate the provision for the right to compensation, the Mining Act requires that a mineral rights holder to deposit a compensation guarantee bond with the relevant ministry.<sup>14</sup>

#### 2.1.3. Mineral Rights

Mineral rights can only be granted to individuals or a company registered in Kenya.<sup>15</sup> An individual holding such a right must be competent adult persons with sound mind and must not be undischarged bankrupts.<sup>16</sup> There is additional requirement for technical capacity, expertise and experience for large scale mining operations.<sup>17</sup> In case of companies, the directors are required to have the technical, experience, expertise and financial capacity.<sup>18</sup> A person must first apply in order to be a holder of mineral rights.<sup>19</sup> The eligible persons for such an application are the landowner; the community and; the relevant County Government.<sup>20</sup> The application for mineral rights can be made in respect of any area except an area that is Gazetted by the Cabinet Secretary as excluded or restricted areas and the areas to which there is a subsisting permit or licence.<sup>21</sup> Where an application for mining right is made in respect to a private land, the applicant is required to first obtain the consent of the registered owner(s) of the land. The consent must be express and cannot be implied.<sup>22</sup> In respect of community land, an express consent of the National Land Commission (NLC) and a community assembly registered in accordance with the provision of the Community Land Act 2016 community land must be obtained.<sup>23</sup> Where the withholding of the consent is contrary to the national interests in the opinion of the

---

<sup>7</sup> Ibid, section 21(1)(a)-(m).

<sup>8</sup> Ibid, section 30 & 31.

<sup>9</sup> Ibid, section 6(1).

<sup>10</sup> Ibid, section 6(2).

<sup>11</sup> Ibid, section 6(3).

<sup>12</sup> Ibid, section 152.

<sup>13</sup> Ibid, section 153

<sup>14</sup> Ibid, section 153(2)

<sup>15</sup> Mining Act 2016, s. 11.

<sup>16</sup> Ibid, section 11(1).

<sup>17</sup> Ibid.

<sup>18</sup> Ibid, section 11(3).

<sup>19</sup> Ibid, section 34(1).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid, sections 36(1)(a) &(b).

<sup>22</sup> Ibid, section 37(1).

<sup>23</sup> Ibid, s. 38.

Cabinet Secretary or unreasonably withheld, the Cabinet Secretary may take steps to ensure compulsory acquisition for prospecting and mining.<sup>24</sup>

The mineral rights can only be exercised upon and be evidenced by the grant of licence or a permit.<sup>25</sup> For large scale mining operations, the project proponent must first obtain reconnaissance licence, prospecting licence, retention licence and mining licences whichever is applicable.<sup>26</sup> For small scale operations, the holders of the mining rights must first apply for and obtain a prospecting permit or mining permit where applicable.<sup>27</sup> Section 173 of the Mining Act provides that the Cabinet Secretary can suspend or revoke licence or a permit for reasons of non-payment of prescribed amounts, non-compliance with licence conditions, false statement of lack of capacity for the individual applicants of the company and its directors. The effect of such a revocation is immediate ceasing in effect of the licence.

Once minerals rights are given, the holder is under an obligation to ensure that certain conditions are met. The rights holder is under a duty to protect mineral interests; the environment; community development; safety and health as well as protect the lawful interests of other holders of mineral rights.<sup>28</sup> The holder is under an obligation to ensure good mining practice and to always act reasonably and responsibly.<sup>29</sup> The person who has the mineral rights is able to transfer the rights provided the transfer is with the consent of the Cabinet Secretary upon recommendation by the Mineral Rights Board.<sup>30</sup> The Cabinet Secretary cannot unreasonably withhold the consent.<sup>31</sup> In case of transfer, the transferee as well as the transferor of a mineral right shall be liable for the payment of all rent and compensation which may have accrued, and the observance of all obligations imposed by the licence up to the date of the transfer in respect of the licence or part thereof so transferred. The transferor is not liable for the payment of any future rents and compensation or the compliance with any obligations so imposed after the date of transfer.<sup>32</sup>

The rights holder can also surrender the right through an application to the Cabinet Secretary.<sup>33</sup> The surrenders take effect upon notification approval of the surrender.<sup>34</sup> The automatic effect of such surrender is the ceasing of the mineral rights in respect to the relevant area.<sup>35</sup> The Cabinet Secretary also has the power to suspend and revoke a mineral right. The mandate is not arbitrary but must be based on the non-compliance with conditions, commission of offence, adjudgment of bankruptcy or making of false statement in the application.<sup>36</sup> Once the right is cancelled, it ceases to have effect.<sup>37</sup> On termination for non-renewal, revocation or surrender, the holder must prepare a statement of immovable and moveable assets. If the holder is under mining licence, the immoveable assets vests in the state.<sup>38</sup>

## 2.2. Mining Act vis a vis the Constitution

The Kenya Constitution was promulgated on 27<sup>th</sup> August 2010. It enshrines sound principles of natural resource exploitation and utilization in Kenya. The Mining Act incorporates guiding principles that flow directly from the Constitution including national values and principles of governance; flow of investment benefits to local communities and their economies; equitable sharing of burdens and benefits of resource use between present and future generations; use of public money in a prudent and responsible manner; and requirements of leadership and integrity in the mining sector. The Mining Act gives effect to diverse constitutional provisions in as far as these apply to minerals to wit, principles of land policy; definition of minerals and mineral oils as public land; obligations in respect of environment; and ratification of natural resource agreements by parliament.

Key among constitutional principles relevant to the mining sector are public participation; sustainability; access to land; conservation of ecological areas; elimination of gender discrimination and; promotion of alternative means of dispute resolution. The achievement of these principles is facilitated by a robust Bill of Rights as well as national values and principle of governance together with other land and environment management obligations set out in Kenya's Constitution. The Constitution is the *grund norm*.<sup>39</sup>

<sup>24</sup> Mining Act 2016, s. 40 (1)(a)-(b).

<sup>25</sup> Ibid, section 35.

<sup>26</sup> Ibid, section 32(3)(a).

<sup>27</sup> Ibid, section 32(3)(b).

<sup>28</sup> Ibid, section 42(1)(a)-(g).

<sup>29</sup> Ibid. sections 43 & 44.

<sup>30</sup> Ibid, section 51(1).

<sup>31</sup> Ibid, section 51(2).

<sup>32</sup> Ibid, section 51(9).

<sup>33</sup> Ibid, section 144.

<sup>34</sup> Ibid, section 145.

<sup>35</sup> Ibid, section 146

<sup>36</sup> Ibid, sections 147 (1)(a)-(e).

<sup>37</sup> Ibid, section 148.

<sup>38</sup> Ibid, section 149 (3).

<sup>39</sup> The Constitution is the supreme law. See Constitution of Kenya, Article 2(1)

## *Mineral occurrence and its influence on the design of a tailings dam facility; focus on gold*

Any activity or conduct that is contrary to it is null and void.<sup>40</sup> Further, it is the duty of each person to respect, uphold and defend the Constitution.<sup>41</sup> The pertinent constitutional principles that relate to the mining sector in Kenya are identified below.

### 2.2.1. Principle of devolution of power and community involvement

The Constitution of Kenya gives prominence to the sovereignty of the people. This sovereignty is exercised at the two levels of government which are the national and county governments.<sup>42</sup> The exercise of power by the people is devolved to 47 semi-autonomous counties which constitute the territory of Kenya.<sup>43</sup> To this end, the Constitution recognizes the devolution of services and access thereto in all parts of the Republic.<sup>44</sup> Chapter 11 of the Constitution recognizes the principle of devolution and provides for access to services by providing for the structures of devolved government. The objects and principles of devolved government include the power of self-governance, recognition of the rights of communities and promotion of accountability and protection of the rights of minorities.<sup>45</sup> The devolved government is concerned with the equitable sharing and utilization of national and local resources throughout Kenya.<sup>46</sup> The utilization of local resources is further provided for under the Mining (Use of Local Goods and Services) Regulations 2017. The Regulations require the tendering process which favors the Kenyan goods and services.<sup>47</sup>

The Mining Act 2016 reflects devolution of power and community involvement through various provisions. For instance, the Mineral Rights Board one of the institutions established under the Act is composed of one person nominated by Council of County Governors with qualification or experience in mining, geology, geophysics.<sup>48</sup> The Cabinet Secretary is required to give notice in writing, to both county government and the community of pending mineral right applications.<sup>49</sup> This approach fosters transparency and good governance in the mining sector. Further where land in respect of which a mineral right application is made is located within a town or municipality, or trading centre, the applicant shall seek consent of the county government before the mineral rights board can make recommendations to the Cabinet Secretary for grant of a mineral right<sup>50</sup>. In respect of reconnaissance, the holder of a valid reconnaissance permit is mandated to continuously inform and consult with national and county government authorities and communities about reconnaissance operations that require the holder to gain physical entry into land located within the jurisdiction of the aforesaid authorities.<sup>51</sup> The Act safeguards artisanal mining activities through the establishment in every county of an Artisanal Mining Committee which advises the Director of Mines in granting renewal or revocation of artisanal mining permits.<sup>52</sup>

The Mining Act apportions royalties payable to the State by reason of a mineral right among the national government at 70%; the county government at 20% and; the community where mining operations take place at 10%.<sup>53</sup> This apportionment ensures equitable sharing of national and local resources in the spirit of devolution as contemplated under the Constitution.<sup>54</sup> It is incumbent upon the Director of Mines to ensure that mining operations consider the local and community values.<sup>55</sup> In respect of prospecting and mineral rights on community land, the consent of the authority managing the community land must be obtained and where the community land in question is unalienated, then the consent of the National Land Commission (NLC) must be secured.<sup>56</sup> The grant of mineral right under the Act may be subject among other conditions, community development.<sup>57</sup>

There is a stringent requirement under the Act for local content. This mandates the holder of a mineral right to give preference in employment to members of the community and the citizens of Kenya.<sup>58</sup> Additionally, the holder of mineral rights shall be required to implement a community development agreement as may be prescribed in regulations.<sup>59</sup> Further, in the conduct of prospecting, mining, processing, refining and treatment operations, transport or any other mineral dealings, the holder of a mineral right is required to give preference to

<sup>40</sup> Constitution of Kenya 2010, Article 2(4)

<sup>41</sup> Constitution of Kenya 2010, Article 3.

<sup>42</sup> Constitution of Kenya, 2010, Article 1(4)(a)(b)

<sup>43</sup> Constitution of Kenya 2010, Article 6(3)

<sup>44</sup> Ibid.

<sup>45</sup> Constitution of Kenya 2010, Article 174(a)-(i)

<sup>46</sup> Constitution of Kenya 2010, Article 174(g).

<sup>47</sup> Mining (Use of Local Goods and Services) Regulations 2017.

<sup>48</sup> Mining Act, section 30(2)(d)

<sup>49</sup> Ibid, section 34(b) and (c)

<sup>50</sup> Ibid, section 36(2)(d)

<sup>51</sup> Ibid, section 67(e); See also section 128 on requirement for consent of county governments and communities in respect of reconnaissance licence or permit and prospecting licence or permit in respect of unalienated community land within a county.

<sup>52</sup> Ibid, section 94(1)

<sup>53</sup> Ibid, section 183(3)

<sup>54</sup> Constitution, Article 174(g)

<sup>55</sup> Mining Act, section 20(o)

<sup>56</sup> Ibid, section 38

<sup>57</sup> Ibid, section 42(c)

<sup>58</sup> Ibid, section 47(1)

<sup>59</sup> Ibid, section 47(2)(g)

the maximum extent possible to services offered by members of the community and Kenyan citizens.<sup>60</sup> Applicants for a mining licence are mandated to give particulars in their proposals of socially responsible investments for the local community.<sup>61</sup> As a condition precedent to the grant of a mining licence, the Cabinet Secretary must be satisfied that the applicant's proposals is socially responsible in as far as engagement in community investments is concerned.<sup>62</sup> At the point of renewal of a mining licence the Act requires the same to be accompanied with among others a community development agreement.<sup>63</sup> Finally, where communities are displaced by mining operations, consultation shall proceed between the Cabinet Secretary and the community and the National Land Commission on the resettlement of inhabitants.<sup>64</sup>

### 2.2.2. Sustainability in land resource management and utilization

Kenya's Constitution represents a remarkable step in the commitment towards environmental sustainability. The preamble to the Constitution underscores respect of the environment as a heritage of Kenya and the need to 'sustain it for the benefit of future generations'. Chapter five of the Constitution is devoted to matters of land and environment and the Constitution lists the principles that should be implemented through Kenya's national land policy.<sup>65</sup> Sustainability, sound conservation and protection of ecologically sensitive areas are recurrent constitutional themes.

The Mining Act 2016 therefore, variously codifies the principle of sustainable land use as one of its central tenets. For instance, the Act requires the holder of a permit or licence under the Act to ensure sustainable land use through restoration of abandoned mines and quarries.<sup>66</sup> Additionally, disposal of toxic waste emanating from mining operations should be done appropriately and potential seepage of toxic wastes into streams, rivers, lakes and wetlands should be avoided.<sup>67</sup> The Mining Act requires restoration of land where mining activities have been undertaken to 'its original status or to an acceptable and reasonable condition as possible to its original state'.<sup>68</sup>

A system of environmental safeguards is in place under the Act to rein in errant applicants of licences or permits. The Act for instance requires applicants for a prospecting, retention, or mining licence to submit a site mitigation and rehabilitation or mine-closure plans as a precondition for approval and grant of requisite the licence.<sup>69</sup> In addition to the site mitigation and rehabilitation or mine closure plans, an applicant desirous of obtaining a prospecting, retention or mining licence should execute an environmental protection bond or an alternative form of financial security.<sup>70</sup> Such bond or security should be sufficient to cover costs associated with implementation of the environmental and rehabilitation obligations of a licence holder under the Act.

In order to foster environmental sustainability, the Mining Act neither supplants nor operates in competition with existing legal framework that regulate various environmental aspects of mining but complements them. To this end, the Act is explicit that a mining licence granted under the Act is subject to compliance with requirements of the Environmental and Management Act (EMCA) 1999 for an Environmental Impact Assessment (EIA); the right to use of water under the Water Act 2002 and the safety of workers and mine operations under the Occupational Safety Health Act (OSHA) 2007.<sup>71</sup>

### 2.2.3. Guiding principles

The Mining Act 2016, incorporates values and guiding principles enshrined in the Constitution that should guide any person administering the Mining Act.<sup>72</sup> Notable constitutional principles amplified by the Mining Act 2016 include National Values and Principles such as the rule of law; participation of the people; social justice; non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development.<sup>73</sup> Another important constitutional requirement, is that burdens

---

<sup>60</sup> Ibid, section 50

<sup>61</sup> Ibid, section 101(j)

<sup>62</sup> Ibid, section 103(g)

<sup>63</sup> Ibid, section 115(c)

<sup>64</sup> Ibid, section 153(8)

<sup>65</sup> Constitution, Article 60

<sup>66</sup> Ibid, section 179(a)

<sup>67</sup> Ibid, section 179(b)

<sup>68</sup> Ibid, section 179(d)

<sup>69</sup> Ibid, section 180(1)

<sup>70</sup> Ibid, section 181(1)

<sup>71</sup> Ibid, section 176(2); section 177; section 178

<sup>72</sup> Ibid, section 5

<sup>73</sup> Constitution, Article 10

and benefits of natural resource use are shared equitably between present and future generations.<sup>74</sup>

Since the public service is largely responsible for administration of the Mining Act, it is incumbent upon public officers to ensure efficient, effective and economic use of resources; involvement of the people in the process of policy making; transparency and provision to the public of timely accurate information; giving adequate and equal opportunities of training and advancement to men and women, members of all ethnic communities and persons with disabilities.<sup>75</sup> These requirements are complemented by chapter six of the Constitution on leadership and integrity.

#### 2.2.4. Additional Issues

##### 2.2.4.1. Strategic Minerals

The Mining Act 2016 creates a distinction between strategic and non-strategic minerals.<sup>76</sup> Minerals that are strategic are radioactive minerals and those minerals that are from time to time declared as such by the Cabinet Secretary in conjunction with the Mineral Rights Board.<sup>77</sup> The State of Kenya has a right of pre-emption over the strategic minerals that are raised, won, or obtained within the territory of Kenya.<sup>78</sup> The government is also accorded a statutory right to participation in large scale operations of mining strategic minerals by acquiring a 10% interests in the share capital.<sup>79</sup> The Cabinet Secretary has promulgated Regulations to further regulate the exploration, mining, processing and export of strategic materials as envisaged under section 8(2) of the Mining Act 2016.<sup>80</sup>

##### 2.2.4.2. Local Equity Participation

The Mining Act 2016 prescribes the local equity participation for holders of mining licences. The Cabinet Secretary for mining has the mandate to prescribe the limits of capital expenditure.<sup>81</sup> Any holder of a mining license whose expenditure exceeds the set maximum is required to set aside at least 20% of its equity on the local stock exchange within three years after it starts the process of production.<sup>82</sup> This adds onto the requirement that holders of licenses under the Act should give preference to Kenyan materials, products, services, companies and businesses.<sup>83</sup> The Mining (Local Equity Participation) Regulations 2012 require that right in respect of which the licence is issued shall have a component of local equity participation amounting to at least thirty-five per cent (35%) of the mineral right.<sup>84</sup>

##### 2.2.4.3. Prospecting and Opening of Land

The prospecting and opening of land for mining purposes can only be carried out by a person who has been granted a licence or a permit under the Mining Act 2016.<sup>85</sup> Such a licence is not general but is limited in terms of the areas.<sup>86</sup> The Applications for the licences are made to the Cabinet Secretary with the application required to speak on the delimitation of activities and areas, experience, financial resources and other particulars on training, employment and procurement of goods.<sup>87</sup> The requirement for employment and training is further provided for in Mining (Employment and Training) Regulations 2017. This Regulation requires the promotion of job creation through the use of local expertise in the mining industry.<sup>88</sup> The cap in terms of the area for the prospecting is one thousand five hundred contiguous blocks. The areas sizes can be relinquished or consolidated by the Cabinet Secretary depending on the circumstances.

The prospecting period in respect of each licence application must also not be in excess of three years<sup>89</sup> with the prospecting mandatorily required to commence within the three months of grant of the licence.<sup>90</sup> The currency of a prospecting licence may be extended for a period not exceeding three years through an application

---

<sup>74</sup> Ibid, Article 201(c)

<sup>75</sup> Ibid, Article 232.

<sup>76</sup> Ibid, section 16(1).

<sup>77</sup> Ibid, section 16(1) & (2). See also s. 31(1)(d).

<sup>78</sup> Ibid, section 8(1).

<sup>79</sup> Ibid, sections 48 (1) & (2).

<sup>80</sup> See Mining (Strategic Minerals) Regulations, 2017 [L.N. 149/2017]

<sup>81</sup> Mining Act, 2016 s. 49

<sup>82</sup> Ibid, section 49(2)

<sup>83</sup> Ibid, section 50.

<sup>84</sup> Mining (Local Equity Participation) Regulations 2012, [L.N. 118/2012] r. 3.

<sup>85</sup> Mining Act 2016, section 10

<sup>86</sup> Ibid, section 132.

<sup>87</sup> Ibid, s.72.

<sup>88</sup> Mining (Employment and Training) Regulation 2017, [L.N. 82/2017] r. 3.

<sup>89</sup> Ibid, section 74.

<sup>90</sup> Ibid, section 77(1)(a).

## *Mineral occurrence and its influence on the design of a tailings dam facility; focus on gold*

for renewal.<sup>91</sup> A person may obtain exclusive rights for prospecting however the minerals discovered during the period belong to the National Government.<sup>92</sup> During the subsistence of prospecting, any discovery of any mineral deposit of potential commercial value and archeology must be reported to the Cabinet Secretary without any untenable delay.<sup>93</sup>

### 2.2.4.4. Establishment of the National Mining Corporation

The Mining (State Participation) Regulations, 2017 entitle the state to a ten percent free carried interest for mining operations to which a licence relates.<sup>94</sup> The National Mining Corporation, a body corporate, is established as an investment arm of the national government in respect of minerals.<sup>95</sup> The Nairobi-based Corporation whose monies are appropriated by the Parliament is tasked with the main role of engaging in prospecting and mining on behalf of the national government.<sup>96</sup> The structure and operations of the Corporations is provided for under the provisions of the Mining (National Mining Corporation) Regulations, 2017.<sup>97</sup>

### 2.2.4.5. Mining tender awards

Not all the mining areas are reserved for tendering. Under the Mining Act, the Cabinet Secretary has the discretion to declare large mining operation areas as designated tendering areas.<sup>98</sup> The invitation to tender on the designated areas can only be done by the Cabinet Secretary.<sup>99</sup> The Cabinet Secretary for mining is mandated to come up with Regulations for tendering in areas that have been designated for tendering of large scale operations in accordance with this Act.<sup>100</sup>

### 2.2.5. Other legal considerations in mining operations

The provisions of the Mining Act 2016 Act do not preclude any person from relying on the water rights laws and the laws on occupational health and safety.<sup>101</sup> Other laws on importation and taxation of minerals are also directly applicable to the mining operations in Kenya.

#### 2.2.5.1. Protection of natural resources

The requirement for protection of natural resources during mining processes is recognized by the Forest Conservation and Management (FCMA) Act No. 34 of 2016. The spirit of the Act dictates that mining activities should not cause unnecessary interference with the forest resources. Specifically, the Act enjoins any mining project proponent who wants to undertake quarrying in a forest to conduct an environmental impact assessment<sup>102</sup> and procure the consent of the Kenya Forest Service (KFS).<sup>103</sup> The provision for consent application enables the Service to first ensure that the quarrying exercise does not lead to damage to the forest resource.<sup>104</sup> The provisions for licensing and environmental impact assessments are compulsory and failure to adhere to them attracts criminal sanctions.<sup>105</sup>

The licensing tools are also applicable in cases of mining activities in areas with wildlife resources. Despite the robust protection of the various categories of the wildlife resources, the Wildlife Conservation and Management Act (WCMA) Act No. 47 of 2013 recognizes that certain mining activities can take place in the national parks.<sup>106</sup> A proponent of such a mining project is required to apply to the Kenyan Wildlife Service for consents and approvals for any mining and quarrying activities in a national park.<sup>107</sup> A project proponents can only succeed if they conduct an environmental impact assessment study, obtain necessary mining approvals and execute a bond promising to conduct rehabilitation of the quarrying site upon completion of mining activities.<sup>108</sup> Additionally, the Act provides that a miner can only obtain consent if they have satisfied the requirement for the execution of a bond.<sup>109</sup> A mining project proponent is however precluded from obtaining licences for parks with

<sup>91</sup> Ibid, sections 81, 82 & 83

<sup>92</sup> Ibid, sections 76.

<sup>93</sup> Ibid, section 77(1)(e) & (f).

<sup>94</sup> Mining (State Participation) Regulations 2017, [L.N. 84/2017] r. 6.

<sup>95</sup> Ibid. section 22(1) & (2).

<sup>96</sup> Mining Act 2016, sections 22, 23 & 24.

<sup>97</sup> Mining (National Mining Corporation) Regulations, 2017 [L.N. 150/2017].

<sup>98</sup> Ibid, sections 14(1).

<sup>99</sup> Ibid, sections 41(1)

<sup>100</sup> Ibid, sections 41(2).

<sup>101</sup> Ibid, sections 176, 177 & 178.

<sup>102</sup> FCMA, section 46 (1).

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> FCMA, section 64 (1)(a) & (f).

<sup>106</sup> WCMA, section 45(1).

<sup>107</sup> Ibid.

<sup>108</sup> WCMA, section 45(2)(f).

<sup>109</sup> Ibid.

#### 2.2.5.2. Environmental Compliance

All the laws cited above provide for the regime of licensing and environmental compliance. Section 176 of the Mining Act 2016 recognizes the pivotal role of environmental compliance in mining regulation. Apart from the constitutional framework, the principal Act that deals with the environmental compliance is the Environmental Management and Coordination Act (EMCA) No. 8 of 1999. It binds the proponents of any mining activity to respect the other people's right to clean and healthy environment.<sup>111</sup> The Act also requires that any exploitation for the mineral resources must be sustainable and the use of natural resources should not degrade other resources such as water so as to render them unable to support natural ecosystems.<sup>112</sup>

One mechanism of achieving the objective of sustainability under the EMCA is the use of Environmental Impact Assessment licensing for mining project proponents.<sup>113</sup> The licence thus takes a pivotal role of a key enabler for environmental project implementation and is granted when the terms and conditions of the licence facilitates sustainable use and management of the environment.<sup>114</sup> All mining activities that are conducted in rivers, lakes, seas, and wetlands are controlled through the requirement for the processing of environmental impact assessments for such projects.<sup>115</sup> The processes and mechanisms for the conduct of the environmental impact assessment study and reporting are provided for under The Environmental (Impact Assessment and Audit) Regulations, 2003. The Regulations require the mining project proponent to conduct self-auditing in the execution of the project after the preparation of the project report.<sup>116</sup>

If the mining process involves the utilization of hillsides, hilltops, mountain areas, and forests, the National Environmental Management Authority is mandated to intervene by taking steps to ensure that mining activities that are taken in such places are sustainable.<sup>117</sup> Mining activities for non-living resources are further regulated by the Orders and Standards that may be set with the Cabinet Secretary responsible for the environment<sup>118</sup> and NEMA to achieve, among other objectives, the prevention of soil erosion and protection of human settlement.<sup>119</sup> It is evident therefore that the Act utilizes the formulation of laws and regulations as well as the licensing tools as means for its enforcement in regulating the mining sector.

The Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 further set out the provisions relating to noise arising from mining operations and activities. NEMA has the regulatory mandate to prescribe the manner of the machinery to be used as well as prescribe the permitted levels of noise from the mining activities.<sup>120</sup> Any person conducting mining or quarrying work is required to ensure that vibration levels do not exceed 0.5 centimeters per second beyond any source property boundary of 30 metres from any moving source.<sup>121</sup> Flowing from this requirement, the Regulations further envisage that a mining project proponent must state in their EIA report details on how the noise will affect the natural resources as well as detailing the plans on how to minimize and eliminates the adverse impacts of the noise.<sup>122</sup>

#### 2.2.5.3. Workplace Obligations

Under the Mining Act 2016, the occupational and health obligations rest with the mining project proponent. The principal Act which prescribes the safety, health and welfare of workers is the Occupational Safety and Health Act No. 15 of 2007. Under the Act, the mining places are defined as workplaces. It is therefore the duty of a mine or a mining company to ensure safety, health and welfare of all persons working in mining places.<sup>123</sup> This duty is also owed to persons other than employees.<sup>124</sup> Specifically, a miner is mandated to ensure maintenance of mining plants and safety systems of handling storage and transport processes, and maintenance of healthy risk-free workplaces and encouraging participation of the workers in the development of work procedures.<sup>125</sup>

---

<sup>110</sup> WCMA, section 45(a)-(c).

<sup>111</sup> Environmental Management and Coordination Act No. 8 of 1999, s. 3.

<sup>112</sup> Ibid, EMCA, section 3(2A).

<sup>113</sup> EMCA, section 58(1).

<sup>114</sup> EMCA, section 68.

<sup>115</sup> EMCA, section 42(1).

<sup>116</sup> Environmental (Impact Assessment & Audit) Regulations 2003, r. 31.

<sup>117</sup> EMCA, section 44.

<sup>118</sup> EMCA, section 42(3)(g).

<sup>119</sup> EMCA, section 44.

<sup>120</sup> Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009, [L.N. 61/2009] r. 14(1).

<sup>121</sup> Ibid, r. 14(3).

<sup>122</sup> Ibid, r. 15(a) & (b).

<sup>123</sup> Occupational Safety and Health Act, section. 5.

<sup>124</sup> OSHA, section 17.

<sup>125</sup> OSHA, section 6(2)(a)-(g).

Mining companies are further required to conduct thorough safety and health audits at least every year through a safety and health advisor.<sup>126</sup> There are other requirements for registration of its mining areas as working places with the Director of Occupational Safety and Health and conducting and reporting on risk assessments to an occupational safety and health officer. The management of the mining firms are also required to take steps to establish safety and health committees<sup>127</sup> and to formulate and pass safety and health policy statements to be displayed at the mining workplaces.<sup>128</sup> The Act further requires that the mining companies that are the most likely to be faced with harmful emissions into the atmosphere should take steps to neutralize such emissions.<sup>129</sup> In case a dangerous incident or an accident occurs at a mining place a mining company is under a duty to report the same to the area safety and health officer.<sup>130</sup>

Factories and Other Places of Work (Hazardous Substances) Rules, 2007 places an obligation on any mining operator to take effective control measures including an annual air quality monitoring<sup>131</sup> to ensure that its employees do not get exposed to the hazardous substances<sup>132</sup> including radioactive and carcinogenic substances.<sup>133</sup> Mining companies are also mandated by the Rules to ensure provision for and effective storage of personal protective equipment to control exposure of employees to hazards during the mining operations.<sup>134</sup> The companies are further enjoined by the Factories and Other Places of Work (Fire Risk Reduction) Rules, 2007 to reduce the risk of fire incidents in the mining areas. The Rules envisage the marking and storage of flammable substances, formation of fire-fighting teams, trainings on fire safety and provision for means so evacuation, as ways that should be put in place by occupiers like mining companies in order to achieve the objective of fire reduction.<sup>135</sup> Other mechanisms are the conduct of fire drills, first aid and notices and assembly points.<sup>136</sup>

When the noise levels from the mining operations exceed the equivalent of eighty five decibels, the mining operator must develop and maintain a programme for the noise control and hearing conversation.<sup>137</sup> Under the Factories and Other Places of Work (Noise Prevention and Control) Rules 2005, the programme is required to encompass the measurement of noise; education and training; posting of notices; hearing tests as well as review of the programme.<sup>138</sup>

#### 2.2.5.4. Mineral dealing

Mining operations are generally divided into large scale and small-scale operations to which different licences apply.<sup>139</sup> Different operations attract different licences and licensing conditions. The holder of permit for dealing in minerals is not required to export minerals but is required to buy and sell the minerals locally.<sup>140</sup> Any disposal of minerals and other mineral dealings can only occur upon the approval either by a permit or licence.<sup>141</sup> Dealership in diamonds requires an independent licensing process with the holder required to keep record of the dealings,<sup>142</sup> and to execute a performance bond for due payment of royalties and fees.<sup>143</sup> The applicants for the diamond dealership licence are further required to go an extra mile and show that they have enough working capital to carry out the business. The licences and the permits that are issued on an annual basis and expire at the end of each year.<sup>144</sup>

#### 2.2.6. Imports and exports

Exports of processed minerals can only be undertaken in Kenya by a holder of an export permit.<sup>145</sup> The licence or a permit may be granted by the Director of Mines to a holder of a mineral right; mineral dealer's licence; or diamond dealer's licence. Further, the exporters of diamonds are required to comply with international best practices.<sup>146</sup> A breach of licence conditions, or individual and corporate incompetence and criminal liability can cause a revocation of a licence. Such revocation will have the effect of the immediate

---

<sup>126</sup> OSHA, section 11

<sup>127</sup> OSHA, section 9.

<sup>128</sup> OSHA, section 7.

<sup>129</sup> OSHA, section 19.

<sup>130</sup> OSHA, section 21(1).

<sup>131</sup> Factories and Other Places of Work (Hazardous Substances) Rules 2007 [L.N. 60/2007], r. 16.

<sup>132</sup> *Ibid.*, r. 7(1) & (2).

<sup>133</sup> *Ibid.*, r. 11.

<sup>134</sup> *Ibid.*, r. 8.

<sup>135</sup> Factories and Other Places of Work (Fire Risk Reduction) Rules 2007 [L.N. 59/2007].

<sup>136</sup> *Ibid.*

<sup>137</sup> Factories and Other Places of Work (Noise Prevention and Control) Rules 2005 [L.N. 25/2005].

<sup>138</sup> *Ibid.*, r. 5(2)(a)-(g).

<sup>139</sup> Mining Act, 2016, section 32.

<sup>140</sup> *Ibid.*, section 164(4)

<sup>141</sup> *Ibid.*, section. 158 & 159.

<sup>142</sup> *Ibid.*, section 168(3).

<sup>143</sup> *Ibid.*, section 166(3).

<sup>144</sup> *Ibid.*, section 161 & 167.

<sup>145</sup> *Ibid.*, section 171(1).

<sup>146</sup> *Ibid.*, section 171(4).

cessation of the mining operations under the licence or permit.<sup>147</sup> For importation of minerals, no licence is required. The law only imposes on the importer an obligation to make a declaration at the point of entry in the prescribed form.<sup>148</sup>

#### 2.2.7. Post-sale requirements

The Act requires the applicants for prospecting licences to have site mitigation and rehabilitation of mine closure plans.<sup>149</sup> The Cabinet Secretary must first approve these plans for any licensee to retain their licences.<sup>150</sup> Therefore howsoever the licence or permit under the Act is terminated, the holders of prospecting, retention and mining licences must put in place plans to restore the mining site. Further, the holders of the licences are under a duty to undertake rehabilitation activities on the mining sites. For instance, under section 181 of the Mining Act 2016, an applicant for a prospecting licence, a retention licence or a mining licence is under an obligation to provide a bond or some other form of financial security called an environmental protection bond sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations. This aids in the implementation of the environmental obligations discussed under this part. The bond deposited can only be released once the holder of the licence takes measures to rehabilitate and ensure environmental compliance.<sup>151</sup>

#### 2.2.8. Tax obligations and charges

The tax obligations for a mineral rights holder with whom the Cabinet Secretary has entered into a Mineral Agreement for a proposed investment exceeding five hundred million United States dollars shall provide for royalties, cess and other fiscal impositions.<sup>152</sup> Further, any holder of a mining permit, mineral right or a dealer's licence is under an obligation to pay fees.<sup>153</sup> The fees may include the application filing fees; report filing fees; fees of access to geological data and public registers.<sup>154</sup> A holder of mineral right is also mandated to pay royalties to the State in respect of various mineral classes won by virtue of the mineral right.<sup>155</sup> Any defaults in the paying the royalties can attract notices and an eventual recovery of the same as a debt owed to the national government and recoverable summarily.<sup>156</sup> It is however open for a holder to make an application for reduction or suspension of royalties.<sup>157</sup>

All the fees, royalties and charges payable by a rights holder to the State under the Mining Act shall be paid by the holder into the designated account of the State department responsible for collecting royalties.<sup>158</sup> Such payments are required to be accompanied by the holder's statement on the mineral product details; point of sale and; the date and amount of royalty to be paid. The Cabinet Secretary has so far promulgated Regulations that set the royalty charges that apply to different mineral products on core drilling;<sup>159</sup> minerals;<sup>160</sup> magadi soda products;<sup>161</sup> cement minerals;<sup>162</sup> fluorspar;<sup>163</sup> carbon dioxide and; gold.<sup>164</sup>

Income from minerals products are taxable income. The Ninth Schedule to the Income Tax Act Cap 470 Laws of Kenya provides for taxation on extractive industries. Licensees for mining operations are chargeable for the income tax at part II of the Schedule. The prospecting and extraction, rehabilitation expenditure are allowable expenses that can be made by the mining operators. Further the processing of the minerals involves the use of goods for which Value Added Tax is chargeable at the rate of 16%.<sup>165</sup> Further, the minerals that are sold are considered as taxable supply and are thus chargeable under the Value Added Tax

---

<sup>147</sup> Ibid, section 173 & 174.

<sup>148</sup> Ibid, section 172.

<sup>149</sup> Ibid, section 180(1).

<sup>150</sup> Ibid.

<sup>151</sup> Mining Act, section 181

<sup>152</sup> Ibid, section 117(2)(k).

<sup>153</sup> Ibid, section 182

<sup>154</sup> Ibid, section 182 (2).

<sup>155</sup> Ibid, section 183(1).

<sup>156</sup> Ibid, section 189.

<sup>157</sup> Ibid, section 188.

<sup>158</sup> Ibid, section 186 (1).

<sup>159</sup> Mining (Prescription of Core Drilling Charges) Regulations 2013 [L.N. 186/2013, L.N. 39/2016.].

<sup>160</sup> Mining (Prescription of Royalties on Minerals) Regulations 2013 [L.N. 187/2013.].

<sup>161</sup> Mining (Prescription of Royalties Rates for Magadi Soda Products) Regulations 2013 [L.N. 221/2013.].

<sup>162</sup> Mining (Prescription of (Cement Minerals Levy) Regulations 2013[L.N. 222/2013].

<sup>163</sup> Mining (Prescription of Royalty Rates for Fluorspar Products) Regulations 2017 [L.N. 220/2013].

<sup>164</sup> Mining (Prescription of Royalties on Minerals) Regulations, 2013 [L.N. 187/2013.]

<sup>165</sup> Value Added Tax Act No. 35 of 2013, section 5(2)(b).

Act.<sup>166</sup> The customs duties on imports is also applicable as relates to mineral imports pursuant to the provision of the East African Community Customs Management Act 2004.

### **3. REDRESS OF GAPS AND REGULATORY OVERLAPS IN THE KENYAN MINING SECTOR**

#### **3.1. Adoption of boundaries system**

Under the repealed Mining Act 1940, it was difficult to determine boundaries of mining operations. As such, there was potential for huge disputes involving the players in the sector. This was a huge regulatory gap under the old system. The current Mining Act has tried to close this gap through the creation of a grid system. Now, a mineral rights application under section 34(3) of the Act provides that a notice of an application for a mineral right must state proposed boundaries of the land in respect of which an application for a mineral right is made.<sup>167</sup> This grid system ensures that the boundaries for the mineral licence operations are determinable. This further entrenches the constitutional right to property under article 40 of the Constitution of Kenya 2010.

#### **3.2. Provision of conditions of revocation**

Section 27 of the Mining Act 29 of 1940 provided for the revocation of prospecting right license in case of any breach. The word 'any breach' was not so clear. The Commissioner had to grapple with the determination of what amounts to any breach to warrant consideration for revocation. Under the previous Act, therefore, it was not clear on what conditions that a licence could be revoked. Section 173 of the Mining Act 2016 now provides for the suspension of mining licences that are granted under the Act. The grounds of the revocation are similar to the grounds of suspension. The grounds are the failure to make prescribed payments on the due date; failure to comply with the licensing conditions; making of a false statement,; death; unsoundness of mind; bankruptcy; financial difficulty and; commission of an offence under the Act.<sup>168</sup> With this clarity on the grounds of revocation, the licencees under the Mining Act 2016 are guaranteed of clear parameters. To such an extent, the clarity of the parameters promotes the provision of article 47 of the Constitution on fair administrative action and prevents abuse of office and power.

#### **3.3. Recognition of the role of devolved units**

The Mining Act 2016 recognizes the principle of devolution of power. The new Act recognizes the role that the county governments play in the regulation of mining activities. In particular, the county governments have the power to issue consents and to grant licenses. The county government structures also take the entire role for the promotion of citizen involvement.<sup>169</sup> The licensing functions of the National Land Commission also complete the functions of the county governments in cases where the mining has to result in the resettlement of the population.<sup>170</sup> The Mining Act 2016, therefore, endorses the principle of devolution of power as well as public participation that is rooted pursuant to the provision of article 6 and 10 of the Constitution respectively. The public participation is further enhanced by the requirement under the Act for the promotion of accountability and operations. In particular, the citizenry is now able to retrieve information on all ongoing mining activities in the Republic of Kenya. The public is allowed more leeway to involve access and interrogate the levels of revenue and production that arises from any mining activity.<sup>171</sup>

#### **3.4. Clarity in the process of revocation**

Section 27 of the Mining Act 1940 provided for the procedure for revocation of prospecting right or exclusive prospecting right. Under the 1940 Act, a Commissioner could call upon the holder of the right or licence to show cause. The timing of the show cause was not provided. The timing was left at the discretion of the Commissioner. The Minister would summarily revoke the licence leading to immediate cessation of the privileges and rights conferred under the licence. Comparatively, section 173(2) of the Mining Act 2016, provides a grace period for non-compliant licencees to comply. The Cabinet Secretary must issue a written notice giving reasonable time to a non-compliant licencee to comply.<sup>172</sup> Only where a licencee fails to comply does the Act allow for the issuance of a notice to show cause why the licence should not be revoked or suspended.<sup>173</sup> Though the effect of the revocation is the immediate cessation of the rights, the Mining Act clarifies that such cessation does not preclude the liabilities under the revoked licence.<sup>174</sup> The entry of the grace period and the remarkable modification of the process are very pivotal in the mineral resource governance in Kenya in order to ensure there are fewer disputes arising from absence of provisions or ambiguity in provisions

<sup>166</sup> Ibid.

<sup>167</sup> Mining Act 2016, section 34(3)(a).

<sup>168</sup> Ibid, section 173(1).

<sup>169</sup> KPMG, Analysis of the Mining Act 2016, July 2016, p 1.

<sup>170</sup> Ibid, p 2.

<sup>171</sup> Ibid, p 1.

<sup>172</sup> Mining Act 2016, section 173(2)(a).

<sup>173</sup> Ibid, section 173(2)(b).

<sup>174</sup> Ibid, section 173(2)(2)

### 3.5. Creation of sub-sector specific institutional arrangement

The Mining Act 2016 has furthered the institutional approach under the repealed Mining Act 1940 by creating specific Directorates to handle salient elements of mining regulation. Section 17 of the Act establishes two Directorates which are Directorates of Mines and the Directorate of Geological Surveys.<sup>175</sup> Each directorate is led by a Director.<sup>176</sup> The Cabinet Secretary responsible for mining is further tasked to ensure that the services of these directorates are reasonably accessible.<sup>177</sup> The Director of Geology is answerable to the Cabinet Secretary responsible for mining through the Principal Secretary. The Director is tasked with the provision of data to the government and conduct of geological surveys; investigations and mapping; monitoring of geo-hazard and conduct of geo-environmental studies.<sup>178</sup> Other tasks involve evaluation of mining prospecting applications.<sup>179</sup> The Directorate also facilitates access to information through the creation of the national repository for compiling, publishing and disseminating information and data concerning geology and mining in Kenya.<sup>180</sup> The Director of Mines has a similar reporting line as the Director of Geological Survey. The Director is responsible for the overall promotion of effective and efficient management of management resources.<sup>181</sup> The Director is also responsible for the monitoring compliance with the provision of the Act, facilitating access to information as well as investigations and inspections and providing advice on the negotiation of the mineral agreements as well as issuing advice on mineral policy.<sup>182</sup>

From the enumeration of the roles of the two Directorates, it is evident that their functions are intertwined and interdependent. The creation of these Directorates represents an advancement from the provision of the Mining Act 1940 which provided for the positions of the officer of Mines and Geological department. The Directorates under the Mining Act 2016 have more robust functions which go to the core of mining regulation and promotion of good mining governance. With substantial powers vested in the Directorates, the ministry responsible for mining is left only with the high-level function of formulation of policy.<sup>183</sup>

### 3.6. Recognition of small players

The previous regime of mining regulation only provided for the regulation of big players in the mining market.<sup>184</sup> Small scale players in the mining sector were not provided for. In fact, the position of the Mining Act No. 29 of 1940 was that the small-scale mining was prohibited. It was therefore difficult under the regime to regulate such small-scale players who operated illegally. The new regime under the Mining Act 2016, however, represents a significant movement away from this traditional approach. Apart from the large-scale mining created by the grant of the reconnaissance licence,<sup>185</sup> prospecting licence,<sup>186</sup> and retention licences<sup>187</sup> for the large operations, sections 94 and 95 of the Act provides for the artisanal mining permits and committee. The Mining Act 2016 now recognizes small-scale mining operators.

## 4. INCORPORATION OF INTERNATIONAL MINING PRINCIPLES AND BEST PRACTICES

International best practices in mining promote equality of players before the law. Best practices advance protection of environmental and social aspects associated with mining activities. Other relevant elements of best practice are the creation of robust fiscal provisions; the establishment of good institutional arrangements as well as the promotion of good governance. The Mining Act 2016 is generally reflective of the foregoing markers of international best practice.

### 4.1. Audits and inspection of mining activities

The Mining Act 2016 is very progressive since it has provisions for the carrying out of audits by the Director of Geology. The Director is mandated to undertake audits of mineral rights holders' geological sampling and assaying process.<sup>188</sup> The Act further makes provision for inspections that can be carried out by the

<sup>175</sup> Ibid, section 17 (1)(a) & (b).

<sup>176</sup> Ibid, section 17(2)

<sup>177</sup> Ibid, section 17(3)

<sup>178</sup> Ibid, section 21.

<sup>179</sup> Ibid, section 21.

<sup>180</sup> Ibid, section 21(1)(g).

<sup>181</sup> Ibid, section 20(1)(b).

<sup>182</sup> Ibid, section 20(1)(a)-

<sup>183</sup> KPMG, Analysis of the Mining Act 2016, July 2016, p 1.

<sup>184</sup> Ibid, p 3.

<sup>185</sup> Mining Act 2016, section 61.

<sup>186</sup> Ibid, section 72.

<sup>187</sup> Ibid, section 85.

<sup>188</sup> Ibid, section 21(1)(l).

Cabinet Secretary or a mines inspector appointed by the Cabinet Secretary.<sup>189</sup> The inspection is a means of monitoring compliance and enforcement since it covers powers of entry and searches into any structure, premises, examine documents, records and to take samples.<sup>190</sup>

#### 4.2. Diversification of decision-making powers

Under the repealed Mining Act 1940, the powers of grant of prospecting rights, the authority to prospect land and to obtain exclusive prospecting licenses were within the mandate of the Commissioner or officers authorized by them.<sup>191</sup> The Minister too had the power to grant prospecting right or exclusive prospecting licence or the right to work a location of the person.<sup>192</sup> However, section 30 of the Mining Act 2016 now creates a body known as the Mineral Rights Board. The Board is mandated to undertake the decision making in as far as regulation and licensing of mining operations is concerned. Under section 31 of the Act, the Board has wide powers including giving recommendations on renewal, rejection, suspension, or variation of mineral Rights Agreements and on cessation, suspension or curtailment of production in respect of the mining licenses.<sup>193</sup> Section 30 as read with section 31 of the Mining Act 2016 is therefore a movement away from the licensing authorities under the 1940 Act. The Mining Act 2016 ensures that the powers to license are taken away from the Government's hands. Possibly, the rationale for this significant shift is to improve governance by ensuring that the Government's commercial interests do not sabotage its regulatory role in the mining sector. This is in line with the international principle and norm of separation of the commercial interests and the regulatory powers in the government structures. This is a pivotal improvement under the Act since it inhibits the porous avenues for compromising the regulation through a conflict of interest.

The separation of government business from regulatory activities is further enhanced under the Mining Act 2016 with the creation of the National Mining Corporation. The corporation is created as the investment arm of the government in respect of the minerals. The Corporation which is to be headquartered in Nairobi,<sup>194</sup> is a body corporate.<sup>195</sup> The Corporation is to carry mining business on behalf of the government and engage in mineral prospecting and investments on behalf of the government.<sup>196</sup> The Government is therefore relieved from the potential risk of the mix between the commercial interest and the regulation of the mining sector.

#### 4.3. Balance of access to land

The Mining Act 2016 has set the maximum number of areas that the various mining licences can have over land at any particular time in recognition of competing land uses such as agriculture and pastoralism.<sup>197</sup> This helps in ensuring that the mining activities in terms of the surface areas are balanced with the means of livelihood and support for plants. The licences are supposed to provide for these areas. The critical balance is aimed at ensuring sustainability in the mining operations in the Republic of Kenya.<sup>198</sup> Though the mining operations in Kenya are still growing,<sup>199</sup> the provision on the spaces save for the artisanal mining permits and reconnaissance permits shall aid in establishing the basis of prohibiting over-exploitation in future.

#### 4.4. Promotion of equality before the law

The Mining Act 2016 provides for the mining licences. The classes of the licences are provided for under the Act. Under section 56 of the Mining Act 2016, the basis of the grant of the licences under the Mining Act is on a first come first served basis. The basis of the grant of the licences, therefore, creates an environment of equality before the law. This criterion of grant of licences promotes the equality principles under the Constitution as well as the international best practices.

#### 4.5. Mining Act and sustainability in the mining sector

Mining Act 2016 establishes the means for environmental management and protection during the mining activities in Kenya. Part XI of the Mining Act provides for the health, safety, and environment. It provides for an omnibus adoption of the environmental laws regarding the protection of the environment as far as the exploitation and utilization of the mineral resources in Kenya is concerned.<sup>200</sup> This adoption has sufficiently been discussed in the first part of this paper. The Act also creates environmental protection bond

<sup>189</sup> Ibid, section 197.

<sup>190</sup> Ibid, section 197(a)-(g)

<sup>191</sup> Mining Act No. 29 of 1940, sections 13, 16 and 18.

<sup>192</sup> Ibid, section 26(5).

<sup>193</sup> Mining Act 2016, section 31(1)a(a) and (e).

<sup>194</sup> Ibid, section 21.

<sup>195</sup> Ibid, section 20.

<sup>196</sup> Ibid, section 24(a) to (e).

<sup>197</sup> KPMG, Analysis of the Mining Act 2016, July 2016, p 3.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Mining Act 2016, section 178.

which is to be provided by the applicants for prospecting license, retention licence or mining licence.<sup>201</sup> The financial security attached to the bond must be such as to cover all costs associated with the implementation of the licensee environmental and rehabilitation obligations.<sup>202</sup> Such a bond may only be withdrawn upon completion of prescribed obligations.<sup>203</sup>

The Mining Act 2016 incorporates the principles of land use policy under the Constitution. Section 179 of the Act establishes the basis of sustainable use of the land, avoidance of seepage of toxic waste in conformity with the Environmental Management and Coordination Act as well as restoration of mining sites to their original status or acceptable and reasonable conditions.<sup>204</sup>

## **5. EXISTING CHALLENGES**

These robust and progressive provisions of the Mining Act show that the new Act makes very significant strides curing various regulatory gaps that existed under the 1940 regulatory regime. In so doing however, it is clear that the Act still has certain regulatory challenges that are likely to impede its efficient implementation and frustrate the realization of certain aspects of international best practices. These challenges are highlighted below.

### **5.1. Potential of inadequate capacity**

The new regime places a significant role in people involvement and the regulation of artisanal miners. County Governments' structures are however inadequately developed and characterized by a workforce lacking in efficiency. The disbursement of monies to the counties and the use of the Integrated Financial Management Information System (IFMIS) platform has presented a constant challenge in the channeling of funds to the counties.<sup>205</sup> Some County Governments have also been reported to operate on recurrent expenditure alone with no expenditure for development.<sup>206</sup> With these constant claims of inadequate disbursement to the counties, the institutional structures that should complement the Mining Act 2016 risk being rendered financially lame. This will inevitably hamper or hinder the achievement of the huge regulatory and implementation roles donated to the devolved structures.

The national government is also not an exception. The budgetary allocation for the necessary skills and workforce to achieve the overall enforcement role of the Mining Act 2016 and the overall achievement of requisite policies is in doubt. This is because the regulation and setting of policies requires contracting of technically and highly skilled people to undertake the activities contemplated under the Mining Act 2016. The Ministry of Petroleum and Mining might not be up to the task.

### **5.2. Non-provision for competitive bidding**

As stated above, section 56 of the Act provides that applications for grant of a mineral right shall be considered, processed and determined on a first-come first-served basis. This provision impliedly precludes competitive bidding. . Whereas it can be reasonably projected that the mining activities shall advance to a state where the procurement shall be competitive, it would be most desirable for the mining companies to engage in competitive bidding where there is an expression of interest, request for quotation and request for proposals.

### **5.3. Higher associated compliance costs**

The scrutiny processes in the application for licences is deep as applications go through different institutions. Any modifications in the licenses are also required to go through the two-pronged test of approvals before the Mineral Rights Board and the Ministry of Mining. While this is remarkable as the advancement of the principles of governance and national values, the same is associated with high operations costs to the players in the mining sector. To an extent therefore, the Mining Act 2016 can be self-defeatist by unwittingly creating barriers to high investments. Small scale players will particularly be disadvantaged by this bureaucratic process.

### **5.4. Potential of overregulation**

The primary provisions of the Mining Act 2016 are supported by Regulations adopted under the Act. Section 221 of the Act grants the Cabinet Secretary discretion to publish and disseminate manuals, codes or guidelines relating to large scale and small scale mining operations including relation to environmental matters.<sup>207</sup> Section 223 of the Act also empowers the Cabinet Secretary to make regulations. Regulations can be

<sup>201</sup> Ibid, section 181.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid, section 181(4).

<sup>204</sup> Ibid, section 179.

<sup>205</sup> Edwin Mutai, "What your county will get in Rotich's Kshs. 2.7 trn budget," Business Daily, <https://www.businessdailyafrica.com/economy/What-your-county-will-get-in-Rotich-s-Sh2-7trn-Budget/3946234-4983114-awaxg/index.html> (Accessed 3rd July 2019).

<sup>206</sup> Ibid.

<sup>207</sup> Mining Act 2016, section 221(1).

made on wide variety of matters including the grant of mineral rights; provision of excluded areas; prospecting programmes; tendering procedures; payment of fees, rents and royalties and; categorization of rights.<sup>208</sup> Other matters are the form of licencing and literally anything which is necessary for the better carrying out of the provision of the Act.

The wide scope of potential regulations is an avenue through which regulations may water down the gains made under the Mining Act 2016 such as those of diversifying and devolving decision-making to other bodies. There is, therefore, a risk of having too many regulations that may then overtake or water down the provisions of the Mining Act 2016. It is, therefore, possible to cause a subversion of the stability of a legal framework which the Act intended when it repealed the Mining Act Cap 306; the Trading in Unwrought Precious Metals Act (Cap. 309); and the Diamond Industry Protection Act (Cap. 310).<sup>209</sup>

#### 5.5. Un-clarity and ambiguity in financial obligations

While the provision of fiscal obligations in respect of mining is one of the international best practices, the tax obligation of the licencees under the Mining Act 2016 is not very clear. Part VII of the Act provides for the Mineral Agreements. These mineral agreements are to be entered into between the Cabinet Secretary of Mining and a licencee in cases where investment exceeds five million US Dollars.<sup>210</sup> Section 117(2) (k) of the Act provides that one term of the agreement would include the payment of royalties and taxes and other fiscal impositions. The terms on the financial obligations of the licencees in such investments are however not clear. It is particularly unclear whether the taxes referred to under this Act are under the traditional tax heads or whether they represent very unique taxes related to mining. With this un-clarity in the Act, investments under the Act may possibly take advantage of the lacuna in order to avoid the payment of the taxes. Further, the creation of the environmental protection bonds by holders of prospecting, retention and mining licence under section 181 of the Mining Act 2016 through progressive is without much flesh. Nothing more is said under the Act on how the bond shall operate other than the fact that the form and amount of the bond shall be determined by the Cabinet Secretary for Mining.<sup>211</sup> Without adequate details, the provisions under the Mining Act 2016 on consequential obligations for environmental rehabilitation and mine-closure may be jeopardized.

## 6. CONCLUSION

This paper has analyzed the Mining Act 2016 in light of its incorporation of principles of the Kenya Constitution 2010; environmental considerations; other legal concerns related to mining and; international best practice. From the foregoing analysis, it is concluded that the Act embraces important constitutional principles such as the principle of devolution and community involvement; sustainability in natural resource management; social justice; non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability as well as; sustainable development.

The Mining Act 2016 is progressive in that it streamlines previously unclear questions of ownership of minerals; access to land; as well as surface and mineral rights. The Act emphasizes the place of local content and local equity participation and decongests decision making competence by vesting it in the Cabinet Secretary responsible for mining; the Mineral Rights Board; and the two directorates established under the Act being the Directorate of Mines; and the Directorate of Geological Survey. It is noteworthy that the national governments regulatory functions and its commercial interests have been separated through the establishment of the National Mining Corporation as the investment arm of the Government.

The provisions of the Mining Act 2016 amplify the spirit of various Acts of Parliament with implications on mining to wit, the Environment Management and Coordination Act No. 8 of 1999; the Forest Conservation and Management (FCMA) Act No. 34 of 2016; the Wildlife Conservation and Management (WCMA) Act No. 47 of 2013; and the Occupational Safety Health Act No. 15 of 2007 among other Acts discussed in this paper.

Whereas the Mining Act 2016 has achieved several milestones and plugged several regulatory gaps and overlaps, this paper underscores several potential challenges in the implementation of the Act that include inadequate implementation capacity; absence of competitive bidding provisions; escalation of compliance costs; the risk of overregulation and ambiguity in mining financial obligations. On a more positive note however, the Act incorporates international mining principles such as the requirement for audits and inspection of mining activities; diversification of decision-making powers; requirements of sustainability in mining operations and promotion of equality before the law.

---

<sup>208</sup> Ibid, section 223(2)(a)-(k).

<sup>209</sup> Ibid, section. 225.

<sup>210</sup> Ibid, section. 117.

<sup>211</sup> Mining Act 2016, section 181(2)



Federal Foreign Office