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Mining Act, 2016

Simplified Version



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The Kenyan Section of the International Commission of Jurists (ICJ Kenya)
ICJ Kenya House, Off Silanga Road, Karen
P. O. Box 59743-00200 | Nairobi-Kenya
Office Tel: 020 208 4836/8 | Office Mobile: +254 720 491 549
Fax: 020 387 5982
Email: info@icj-kenya.org | Website: www.icj-kenya.org
Facebook: [@ICJ.Kenya](https://www.facebook.com/ICJ.Kenya)
Twitter: [@ICJKenya](https://twitter.com/ICJKenya)

Design and layout by:
Silas Kamanza - nsharafa@gmail.com

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This is a simplified version of Kenya's Mining Act of 2016 and related regulations. It highlights key provisions of the Act and regulations for the members of the public to understand and effectively participate in the mining sector. The simplified version is important for community dialogue forums at the grassroots particularly in places that host mining activities in Kenya.

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Mining Act 2016

A Simplified Version



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1. Introduction

The Mining Act of Kenya, 2016 was enacted to align the regulation of the mining sector with the Constitution of Kenya 2010 as well as international and regional best practices. Key constitutional provisions include:

1. Article 62 (1)(f) & (3): Public land includes minerals and mineral oils, which shall vest and be held by the national government in trust for the people of Kenya;
2. Article 66 (2): Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies;
3. Article 69: In respect to the environment, the State shall ensure sustainable exploitation of natural resources and ensure equitable benefit sharing of the accruing benefits; and encourage public participation;
4. Article 71: Agreements relating to exploitation of natural resources in Kenya (whether it is a right or a concession) are subject to approval by Parliament;
5. Article 232: Requires participation by people in policy making.

Prior to the Mining Act, the government had developed the Mining and Minerals Policy (Sessional Paper No. 7 of 2016) to provide a basis for reviewing the sector's outdated legal framework. The Mining Act therefore replaced the previous Mining Act of 1940 to become the main law governing mining in Kenya.¹ The new Act applies to all minerals listed in the First Schedule of the Act (see Appendix I below), but does not apply to oil and gas, which are regulated by the Petroleum Act 2019.

2. Ownership of Minerals

Part II of the Mining Act 2016 entrusts the ownership of minerals in the Republic of Kenya. The Act specifies that every mineral is the property of the Republic and is held by the national government on behalf of the people of Kenya. Therefore, the national government exercises control over the minerals regardless of who owns the land on or under which the mineral is found. However, the national government is only a custodian of the minerals and the people of Kenya remain the primary owners. They are therefore entitled to participate and derive benefits from the exploitation of the minerals. Knowledge of their rights under the Act is also critical in the realisation of sustainable exploitation, utilisation and management mineral resources as provided for in Article 60(1) and 69(1) (a) of the Constitution.

Under the Mining Act, any person has a right to take materials such as soil, clay iron, salt or soda from any land, if it has been the custom of the person's community to take such materials from the land. This right shall be enjoyed in accordance with conditions set by the Cabinet Secretary. It cannot however be exercised on land that is subject to a prospecting or mining licence or permit.

Moreover, the Act requires any person who discovers a mineral for which there is no holder of a license or permit, to report the discovery to the Cabinet Secretary responsible for Mining. The person shall be granted the first right to apply for a prospecting or mining licence or permit over the area of discovery within 90 days from the date of reporting. During such period, the area in and around the discovery should be closed to other applicants.

¹ Mining Act 2016, sections 32(2), 92-100; Mining (Licence and Permit) Regulations 2017, Part IX.

3. Administration of the Act

Part IV and V of the Mining Act 2016 provides for the administrative structure of the Act and different institutions responsible for its implementation. The Act strongly emphasises the importance of the Constitution in the administration of the Act, particularly the principles relating to leadership and integrity (Chapter Six), national values and principles of governance (Article 10), principles of public finance (Article 201(c), and principles of public service (Article 232).

The Cabinet Secretary in charge of mining is responsible for the overall implementation of the Mining Act, and has powers to develop regulations and policies for its implementation. The daily functions of the State Department of Mining are carried out through the office of the Principal Secretary by the Directorate of Mines and the Directorate of Geological Survey. The two directorates manage the activities and information related to mining operations in Kenya including establishing operational linkages between the national and county governments. The Act also establishes the Mineral Rights Board to advice and give recommendations to the Cabinet Secretary

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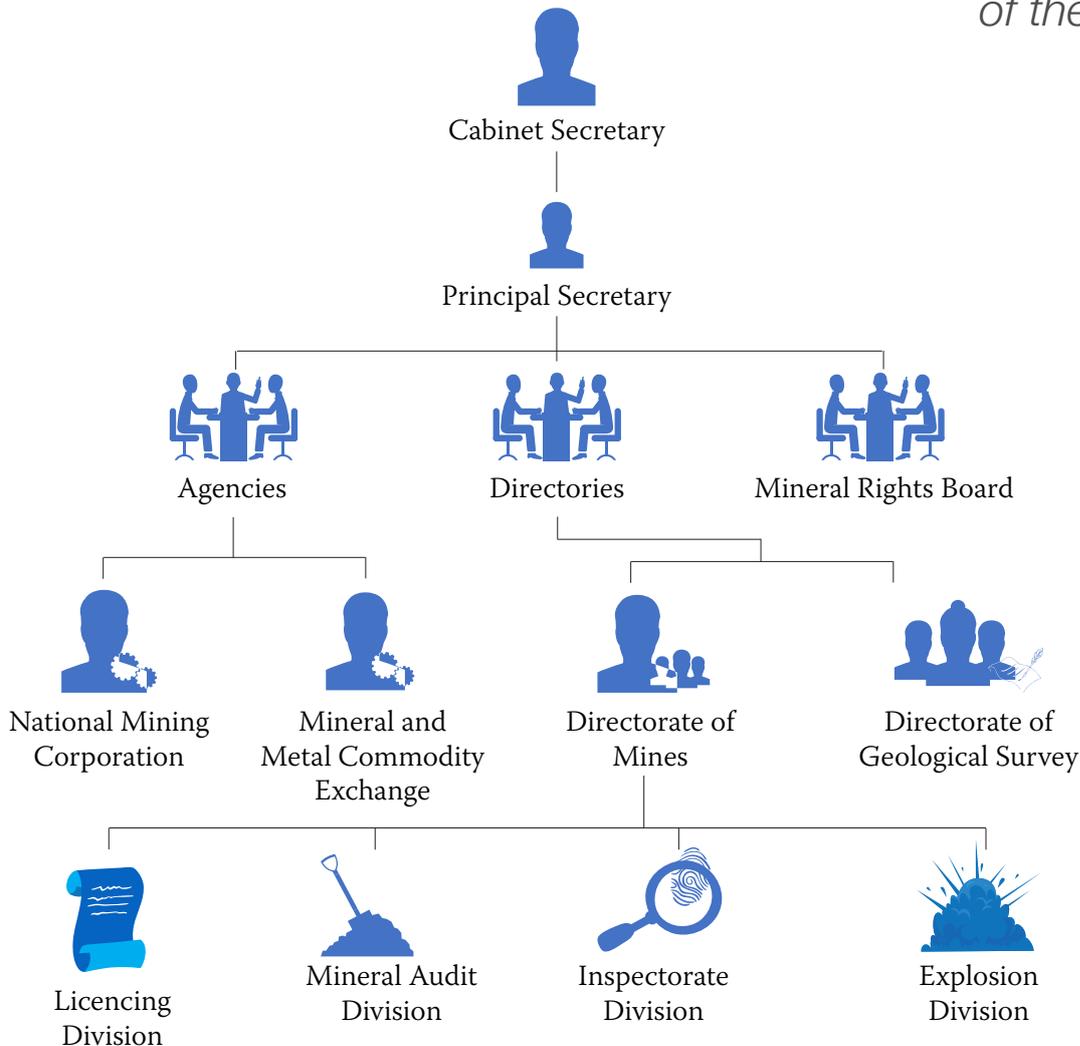


Figure 1: Administrative Structure of the Mining Act 2016

on the management of mineral rights and mineral resources. Other agencies established under the Act include the National Mining Corporation, and the Mineral and Metal Commodity Exchange.

The table below outlines the roles of these institutions and other important bodies established under the Mining Act 2016.

Table 1: Roles of Key Institutions under the Mining Act 2016

Institution	Role
Cabinet Secretary responsible for mining	<p>Responsible for the overall administration of the Mining Act while respecting and upholding the principles and values enshrined in Articles 69(1) (a) and (h) and 201(c) and (d) of the Constitution. Specific roles include:</p> <ul style="list-style-type: none"> § Grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of Mineral Rights Agreements; § Declaring certain minerals or mineral deposits to be strategic by advising and seeking the approval of the Cabinet. All radioactive minerals are strategic minerals; § Declaring areas to be reserved for small-scale mining operations; § Designating any area of land to be an area reserved for applications by tender for large scale operations; § Restricting or excluding areas from operations under a mineral right; § Appoint, by notice in the Gazette, duly qualified public officers to be inspectors of mines; § Developing regulations and policies for the implementation of the Act.
Principal Secretary	The Principal Secretary carries out the daily functions of the State Department for Mining with the help of the Directorate of Mines and the Directorate of Geological Survey.
Directorate of Mines - headed by a director	<p>The Directorate of Mines conducts the day-to-day operations that realise the implementation of the Mining Act. Its functions include:</p> <ul style="list-style-type: none"> (a) Formulation and administration of policies on management of minerals, mining and quarrying; (b) Administration of mining and minerals development through administration of relevant laws; (c) Licensing of exploration and mining concessions; (d) Compilation and management of mining and concessions' data; (e) Management of Mining Cadastre System;

Institution	Role
Directorate of Mines - headed by a director.	<p>(f) Offer technical advice to the Cabinet Secretary in arbitration of mining disputes;</p> <p>(g) Licensing and control of commercial explosives under the Explosives Act No 115 of 1933;</p> <p>(h) Management and monitoring of safety, health and environment in mines; and</p> <p>(i) Promotion of safe and sustainable exploitation of mineral resources.</p> <p>The Directorate of Mines works through appointed inspectors of mines. Technical cadres in the Directorate comprise Inspectors of Mines and Inspectors of Explosives. It has four technical divisions, namely:</p> <p>(a) Licensing Division, which is in-charge of managing mineral rights and dealings through the online Cadastre Mining system.</p> <p>(b) Mineral Audit Division, which deals with the verification of mineral exports, management of mineral royalties and levies.</p> <p>(c) Inspectorate Division responsible for compliance and enforcement of Mining Act 2016, Mining Regulations in regard to work programmes, mine plans, health and safety, license conditions.</p> <p>(d) Explosives Division, which deals with safety and use of commercial explosives (import, manufacture, sale, storage, handling and transportation) under the Explosives Act No 115 of 1933 (Cap 115).</p> <p>The Directorate of Mines has representation in four regional offices: Mombasa, Embu, Eldoret and Migori.</p>
Directorate of Geological Survey – headed by a director	The Directorate of Geological Survey coordinates and carries out mineral exploration, mapping and geo-data management. It participates in various geological surveys including geo-environmental studies; and facilitates promotion of private sector interest and investment in mineral exploration.
Mineral Rights Board	This is an independent Board with membership from government and private sector. Its role is to advice and give recommendations, in writing, to the Cabinet Secretary on:
Mineral Rights Board	(a) grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of Mineral Rights Agreements;



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National
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and
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and future
generations.”

Institution	Role
Mineral Rights Board	<p>(b) the areas suitable for small-scale and artisanal mining;</p> <p>(c) the areas where mining operations may be excluded and restricted;</p> <p>(d) the declaration of certain minerals as strategic minerals.</p> <p>(e) termination, suspension, or curtailment of production in respect of mining licences;</p> <p>(f) fees, charges and royalties payable for a mineral right or mineral; and</p> <p>(g) any matters which under this Act, are required to be referred to the Mineral Rights Board.</p> <p>The power to grant, deny or revoke a mineral right is vested on the Cabinet Secretary. However, such powers can only be exercised after the recommendation of the Mineral Rights Board.</p>
National Mining Corporation	Established under section 22(1) of the Act as an investment arm of the government in respect of minerals – invest on behalf of Government. It has responsibility for ensuring that mineral wealth is protected and harnessed for present and future generations. The Corporation may also engage in mineral prospecting and mining, and hold interests in mining projects. ²
Mineral and Metal Commodity Exchange	Its role is to facilitate efficiency and security in mineral trade transactions, and act as a marketplace for minerals.
County Office of Mining	Established by the Cabinet Secretary and is the representative of the Directorate of Mines in the counties with responsibility for granting, renewing and revoking artisanal mining permits; maintaining a register of artisanal miners; maintaining fair trade; and facilitating the formation of artisanal association groups or cooperatives for the miners. It is headed by an officer who reports to the Director Mines.
County Artisanal Mining Committee	Established under section 94 of the Mining Act to assist the Directorate of Mines in managing artisanal mining activities in counties together with the county office. It advises the county representative of the Director of Mines in the granting, renewal or revocation of artisanal permits.

² See further, Mining (National Mining Corporation) Regulations, 2017.

4. Mineral Rights

A mineral right is granted by the government to empower the holder to discover, explore, and extract minerals from the earth, and to receive royalties and other benefits in respect of the minerals extracted. This right may be granted to or be held by any person or company subject to the requirements outlined in the table below.

Table 2: General requirements in the acquisition of mineral rights

Mineral right holder or applicant	Requirements
A Person	<ul style="list-style-type: none"> (a) Must be of sound mind; (b) Has attained the age of 18 years; (c) Is an undischarged bankrupt; (d) Has the required technical and financial capacity. This requirement does not apply to artisanal and small-scale mining operations wholly owned by Kenyans; (e) Is not otherwise disqualified under any written law; and (f) If it is a holder of a prospecting licence;³ the person has notified the Cabinet Secretary of the discovery of minerals in or terrestrial or marine areas which are the subject of the prospecting licence.
A Company	<ul style="list-style-type: none"> (a) Must be registered and established in Kenya in accordance with the Companies Act of 2015; (b) Must demonstrate the required technical capacity, expertise, experience and financial capacity (not applicable to artisanal miners); (c) Has not commenced voluntary winding up in line with the Companies Act 2015; (d) Is not subject to winding up by a court pursuant to the Companies Act 2015; or (e) Is not in liquidation. (f) If it is a holder of a prospecting licence; the company has notified the Cabinet Secretary of the discovery of minerals in or terrestrial or marine areas which are the subject of the prospecting licence.

Mineral rights in Kenya are granted either through licences or permits as provided for under the Mining Act 2016 and the Mining (Licence and Permit) Regulations 2017. Part III of the Act (General Principles) specifies that a person cannot search for, prospect or mine any mineral, mineral deposit or tailings in Kenya without a valid permit or licence.

³ See section 104 of the Mining Act 2016.

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4.1 Definition and Categories of Mineral Rights

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The Act defines a “mineral right” as consisting of prospecting, retention or mining licences; or prospecting, mining or artisanal permits. The Act differentiates between three major types of operations: large scale operations; small scale operations; and artisanal mining operations.⁴ In general terms, a license is issued to any person or entity for large scale operations, while a permit relates to small scale and artisanal operations.

The various mineral rights (being licences and permits) available in respect of large scale, small scale and artisanal mining operations, as well as the applicable requirements, are explained further below.

(a) Large Scale Mining Operations

These are capital intensive mining operations carried out by large public or private companies using heavy and sophisticated machinery and advanced technology. They involve a higher revenue turnover. The licences required include:

- § Reconnaissance License - grants the holder rights to carry out non-intrusive search for mineral resources by geophysical surveys, geochemical surveys, photogeological surveys or other remote sensing techniques and surface geology but excludes drilling and excavations;
- § Prospecting License – authorizes the holder to carry out a search for a mineral and define the extent of a mineral deposit to determine its economic value;
- § Out for search and define extent of a mineral deposit to determine economic value;
- § Retention License – a holder of a prospecting license, having identified a commercially viable mineral deposit, that cannot be developed immediately due to temporary adverse market conditions, economic factors, may apply for a retention license;
- § Mining License is granted to an applicant who is a holder of a prospecting license, to win a mineral where it occurs, or extract metal or precious minerals. It is granted for a period of 25 years or the forecast life of the mine. The holder of the mining licence enjoys exclusive rights to carry out mining operations. This licence cannot be issued on land which is the subject of a prospecting licence, reconnaissance licence, a retention licence or a mining licence unless;
 - o the applicant is a holder of above licences; or
 - o the applicant, with consent from the above licence holders, is applying for a licence to work a mine dump or mine waste and tailings on the land but not to undertake any other mining operations thereon.

⁴ Mining Act 2016, sections 32(2), 92-100; Mining (Licence and Permit) Regulations 2017, Part IX.

(a) *Small Scale Mining Operations*

These are operations that are labour intensive but with low levels of mechanisation. The required permits include:

- § Reconnaissance Permit – This provides the holder to enjoy non-exclusive rights to conduct preliminary search for minerals in the area specified by the permit.
- § Prospecting Permit – a permit issued in relation to small scale operations authorising its holder to carry out prospecting operations.
- § Mining Permit – this authorizes the holder to carry out small scale mining operations.

(a) *Artisanal Mining Operations*

- § An Artisanal Permit is issued to miners involved in traditional and customary mining operations using traditional or customary ways and means. The holder has the exclusive right to mine a mineral in accordance with the terms and conditions of the permit.
- § Essentially, artisanal mining rights are reserved for citizens of Kenya. Individuals, groups, cooperatives or associations may apply for an artisanal mining permit.
- § The Cabinet Secretary is required to establish offices in the Counties headed by a representative of the Director of Mines. This representative shall have the function of granting, renewing and revoking artisan mining permits amongst other duties.
- § Each county shall have an Artisan Mining Committee whose function shall be to advice the representative of the Director of Mines in the granting, renewal or revocation of the artisanal mining permits.

4.2 Application for Mineral Rights

- § Application for mineral rights must be made to the Cabinet Secretary in charge of mining through the [Online Mining Cadastre](#),⁵ by completing relevant forms outlined in the Mining (Licence and Permit) Regulations 2017, and uploading the required documents, including proof of payment of the application fee.
- § The applicant must first register as a portal user as set out in the Mining (Licence and Permit) Regulations 2017.⁶ User registration is valid for a period of 12 months and is renewable.
- § Cabinet Secretary, upon receipt of the application, shall give written notice to the lawful landowner or occupier, the community and relevant County Government where the mineral is located. The notice is published for 21 days in the Gazette and in the offices of the County Government where the land is located. A person or community

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⁵ Regulation 4(1) of the Mining (Licence and Permit) Regulations 2017.

⁶ See Form OMC1 set out in the Schedule of the Mining (Licence and Permit) Regulations 2017.

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...the applicant must satisfy the requirements outlined in the Mining Act 2016 and the Mining (Licence and Permit) Regulations 2017, for the grant of a licence or permit.”

may challenge the grant of the licence within 21 days in the case of a prospecting licence or 42 days in the case of mining licence. The Cabinet Secretary will hear and determine the objection through the Mineral Rights Board.

- § Cabinet Secretary, upon receipt of the application, is to publish notice of the pending application in a newspaper of wide circulation at the applicant's expense.
- § Review: Applications for a mineral right are considered, processed and determined on a first-come first-served basis. The Cabinet Secretary, in consultation with the Mineral Rights Board, will either approve or reject an application. Approval or rejection notification will be made within 90 days for reconnaissance and prospecting licences and 120 days for Mining licence, first to the Mineral Rights Board and then to the applicant. Notice of intention to reject such application must specify the reasons for rejection as well a period within which the Applicant should submit an amended application. Failure to amend the application within the specified period leads to rejection of the application by the Cabinet Secretary.
- § The applicant may appeal to the High Court against the decision of the Cabinet Secretary, within 30 days of the decision reaching the applicant.
- § Where the application is approved, the applicant should notify the Cabinet Secretary, in writing, of the acceptance or rejection of the offer within 21 days from the date of receipt of notification of the approval, failure to which the application shall expire after the 21 days.
- § An application for an artisanal mining permit should be submitted to the county representative of the Director of Mines, who shall accept or reject the application within 60 days from the date of application. The permit shall be issued digitally.
- § Application for renewal of the artisanal mining permit should be done to the county representative of the Director of Mines, three months prior to the expiry of the permit. This application shall be accepted or rejected within 60 days from the date of application.

In all the above cases, the applicant must satisfy the requirements outlined in the Mining Act 2016 and the Mining (Licence and Permit) Regulations 2017, for the grant of a licence or permit.



Table 1: Summary of the Different Mineral Rights (i.e. Licences and Permits) under the Mining Act 2016

Scale of Operation & Licences/Permits	Block/Size/Area	Standard Requirements	Duration	Processing Time
<p>Large Scale Mining</p> <p>Reconnaissance Licence (RL)</p> <p>a) Prospecting Licence (PL)</p> <p>b) Retention Licence (RTL)</p> <p>c) Mining Licence (ML)</p>	<p>A block is 0.21km² and that is the minimum any applicant for large scale mining may be granted and the maximum is as follows:</p> <p>RL-5000 blocks (1050km²)</p> <p>PL-1500 blocks (315km²)</p> <p>RTL-1500 blocks (315km²)</p> <p>ML- Minimum of 2 and maximum of 300 blocks (63km²)</p>	<p>Open to persons and companies regardless of nationality and must meet the following requirements:</p> <p>a) Free Prior and Informed Consent (FPIC) from the landowner</p> <p>b) Technical and industrial competence</p> <p>c) Financial capabilities</p> <p>d) Proposals on local employment and training</p> <p>e) Proposals on use of local goods and services</p> <p>f) Work programme for RL and PL. Feasibility study in the case of an ML.</p> <p>g) Environmental licence from NEMA.</p>	<p>RL- up to 2 years and not renewable</p> <p>PL-up to 3 years and renewable twice (9 years in total)</p> <p>RTL- up to 2 years and renewable for any period up to two years</p> <p>ML-up to 25 years or forecast life of the mine; and renewable for up to 15 years or for the remaining life of mine base on reserves.</p>	<p>RL – 90 days</p> <p>PL – 90 days</p> <p>ML – 120 days</p>
<p>Small Scale Mining</p> <p>a) Reconnaissance Permit (RP)</p> <p>b) Prospecting Permit (PP)</p> <p>c) Mining Permit (MP)</p> <p>d) No retention permit</p>	<p>RP - covers the entire county</p> <p>PP - 25 blocks (5.25km²)</p> <p>MP - 2 blocks (0.42km²)</p>	<p>Citizens only but if the applicant is a body corporate or company, shareholders must be at least 60% Kenyan citizens.</p> <p>In case of an RP, no further qualification is required but applicants for PP and MP must show proof of experience, financial resources and provide work programme.</p>	<p>RP- 1 year and is not renewable</p> <p>PP - up to 5 years renewable once.</p> <p>MP - 5 years renewable</p>	<p>90 days</p>
<p>Artisanal Mining</p> <p>(a) Artisanal Mining Permit (AMP)</p> <p>(b) RP and PP not applicable</p>	<p>AMP up to one block but fractions of a block may be granted</p>	<p>Citizenship, consent from landowner, and environmental permit are the key qualifications for this permit</p>	<p>Up to 3 years; Renewable once.</p>	<p>60 days</p>

4.3 Records and Registration of Mineral Rights

Part XIII of the Act establishes a computerized mining cadastre and registry system (including a register of mineral rights). The cadastre and registry system include an online transactional facility (Mining Cadastre Portal) to enable applications for granting and renewal of mineral rights to be submitted online. A holder of a mineral dealer's licence is required to keep a register of mineral dealing, which must be uploaded and submitted to the Cabinet Secretary via the online Mining Cadastre Portal.

The online Cadastre is accessible by the public through the Ministry of Mining's online website. It contains details of the country's mineral occurrences, geographical/topographical layout as well as the mineral rights or concessions granted in Kenya. While the data within the cadastre is being constantly updated and reconciled by the Ministry staff, it gives a comparatively accurate view of the types of mineral rights granted or applied for, their distribution within the country and ownership status. The cadastre and register of mineral rights are public documents that are open to inspection by any interested person upon payment of a fee.

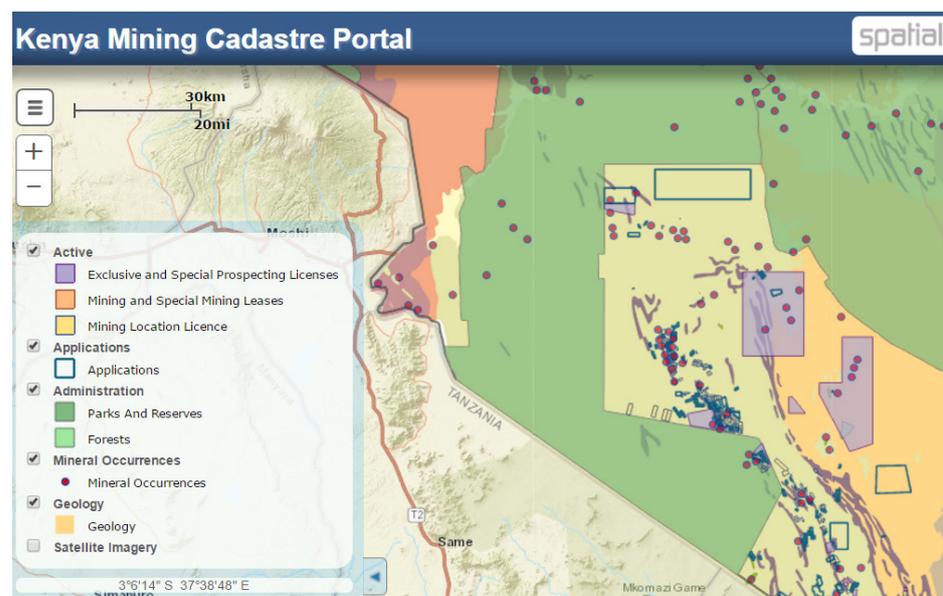


Figure 2: An example of an Overview of Mineral Licencing and Mineral Occurrences in Taita Taveta County

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...The online Cadastre is accessible by the public through the Ministry of Mining's online website.”

4.4 Mineral Agreements

Part VII of the Act provides that the Cabinet Secretary in consultation with the National Treasury may enter into a mineral agreement with the holder of a mining licence where the proposed investment exceeds USD 500 million. The mineral agreement sets out the terms and conditions for minimum activity and minimum expenditure in respect of prospecting and mining operations amongst other provisions. All mineral agreements should be submitted to the National Assembly and the Senate for approval.

4.5 Dealings in Minerals

The Mining Act stipulates that a person cannot engage in mineral dealings without a mineral licence or permit. The application for a mineral dealer's licence or permit along with the application fee is done via the online Mining Cadastre Portal. The holder of the mineral dealer's licence needs to keep a register of mineral dealing, which has to be uploaded and submitted to the Cabinet Secretary, via the online Portal.

An application for renewal of the dealer's licence or permit must be done via the Mining Cadastre Portal. This application should be completed by no later than the 30th November of the licence year.

5. Operating Rights and Obligations

5.1 Access to Land, Compensation and Resettlement

Guidelines on access to land for mining are stipulated under the Mining Act 2016,⁷ as well as the Land Act 2012 and Community Land Act 2016. Under the Act, mining operations may take place on private land, community land or public land in accordance with the relevant provisions on access to land. Section 36 of the Mining Act provides that the Cabinet Secretary shall not grant a mineral right which authorises prospecting or mining operations on any land that has been restricted or excluded from mining by the Cabinet Secretary; or an area that is subject to an existing permit or licence.

The key obligations relating to land and mining are discussed further below.

5.1.1 Free Prior and Informed Consent (FPIC)

Consent of the land owner is mandatory when applying for a mineral right, except for a reconnaissance licence in which the landowner only needs to be informed. Consent is defined under Regulation 23(4) of the Mining (Licence and Permit) Regulations 2017 as the “right of the county government and local communities to be adequately informed about the potential benefits and impacts of any mineral activity or mining operation in a timely manner and be given the opportunity to approve or reject the mineral activity or mining operation before the commencement of any activity or operations”.

Consent should be in the form of a written agreement that clearly indicates the boundaries of the land in relation to the licence or permit area. The applicant for a mineral right should ensure full and prior disclosure of any relevant information to the local communities as part of the consultation process. The process of consultation should be carried out through negotiation and good faith between the applicant and the landowner and/or communities.

It is not a must for all community members to give consent; the consent of the majority of the individuals or groups within the local community may be sufficient. However, the law clearly states that the support of community

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The Mining Act stipulates that a person cannot engage in mineral dealings without a mineral license or permit.”

⁷Section 34, 36, 37, 38, 40, 99, 128, the whole of Part IX (151-157) of the Act covers land access and consent.

leaders cannot substitute the need for community consent.⁸ This emphasises the requirement for communities to participate themselves as opposed to a few leaders who may have personal interests in the process.

Table 4: Different Consents Required under the Mining Act 2016

Type	Description/Classification	Consent/approval obtained from
Private land	Consent of the landowner cannot be unreasonably withheld; otherwise the government will compulsorily acquire the land.	Lawful (registered) landowner or occupier
Community land	Registered under the Community Land Act 2016	Community residing where mining operations shall take place.
	Unregistered community land	National Land Commission (NLC), relevant county government and any other person (or community) who in the opinion of the Cabinet Secretary, may be affected by the grant of the mineral right
Public Land	Public land	NLC
	Public land lawfully held, used or occupied by a state agency, e.g. Kenya Airports Authority	Relevant state agency, provided that the said land is not occupied by the state agency as lessee under a private lease).
	Land situated within a forest area	Director of the Kenya Forest Service
	Wildlife region (national park, marine park or local sanctuary)	Cabinet Secretary, Ministry of Tourism and Wildlife
	Protected area under the Environmental Management and Coordination Act 1999	Cabinet Secretary, Ministry of Environment and Forestry
	Land situated in a town, municipality or trading centre	Governor of the respective county exercising control
	Land dedicated or set aside as a place of burial, religious significance, as a public building, or for any other public purpose	Appropriate Cabinet Secretary or other authority (e.g. county governments are in charge of burial places)
Mining rights	Assignments, transfers, mortgage and trade of mineral rights	Approval of the Cabinet Secretary on recommendation of the Mineral Rights Board. The Cabinet Secretary will grant consent within 30 days as long as the mineral rights holder has informed the Kenya Revenue Authority (KRA) and complied with all relevant tax provisions.

⁸Mining (Licence and Permit) Regulations 2017, regulations 5 and 6.



5.1.2 Surface Rights and Compensation

Part IX of the Mining Act deals with surface rights and compensation. It requires mineral rights holders or their agents or employees to produce evidence of the mineral right, by way of a valid licence or permit, when undertaking mining operations over land that is owned or occupied by some other person or community. It also provides that the landowner or lawful occupier has the right to continue to graze livestock or cultivate the land to the extent that doing so will not interfere with prospecting and mining operations or constitute a hazard to crops and livestock.

The Act provides further that mining operations should not commence if the lawful occupier, owner or user of land has not been compensated. The Cabinet Secretary may make regulations relating to compensation guarantee bonds. The key highlights on compensation are outlined further below.

Table 5: Key highlights on compensation under the Mining Act 2016

Who is entitled to be compensation?	<ul style="list-style-type: none"> § Landowner; § Lawful occupier of land; and § Lawful user of the land.
What rights or interests may be compensated?	<p>Rights and/or interests affected or likely to be affected in any manner by the mining activities, including:</p> <ul style="list-style-type: none"> (a) loss of land use or damage to land; (b) for loss of or damage to buildings and other immovable property (c) damage to water table or depriving the owner of water supply (d) in case of land under cultivation or grazing of domesticated animals, loss of earnings or sustenance suffered by landowner or lawful occupier.
What cannot be compensated?	<ul style="list-style-type: none"> (a) Consideration for permitting entry to the land connected with the enjoyment of rights conferred under a mineral right. This is considered as an easement and therefore not eligible for compensation. (b) In respect of the value of any mineral in, on or under the land that is the subject of a mineral right. By the time a mineral is discovered, it immediately assumes title under Public Land in line with the Constitution. It then belongs to the people of Kenya as opposed to the individual land owner. (c) For any loss or damage for which compensation cannot be assessed according to legal principles.
Where can I channel my claim or demand/claim for compensation to?	<ul style="list-style-type: none"> § The demand/claim may be made to the holder of the mineral right to pay prompt, adequate and fair compensation to the lawful owner, occupier or user of the land in accordance with the Mining Act 2016. § In order to provide for such compensation, the Act requires the mineral right holder to deposit a compensation guarantee bond.



Are there provisions or mechanisms in the law to deal with compensation disputes?	<p>Yes. The Mining Act provides as follows:</p> <ul style="list-style-type: none"> § Where a demand or claim for compensation is disputed, the parties to the dispute shall seek to resolve the dispute amicably by agreement reached through negotiations in good faith. § If the dispute cannot be resolved through negotiation within a reasonable time, it may be referred to the Cabinet Secretary in charge of mining for determination.
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5.1.3 Resettlement

The Mining Act requires the Cabinet Secretary, in consultation with the community and the National Land Commission, to ensure that the inhabitants or communities who prefer to be compensated by way of resettlement as a result of being displaced by a proposed mineral operation, are settled on suitable alternative land. Resettlement should be done in accordance with the relevant physical planning law, taking into consideration the community's economic wellbeing, social and cultural values.⁹ The Act therefore takes into account the socio-economic aspects of the community during resettlement. The Act further stipulates that the cost of resettlement shall be borne by the Mineral right holder.¹⁰

5.2 Health, Safety and Environment

Part XI of the Mining Act provides that mining operations must comply with the laws concerning the protection of the environment,¹¹ use of water,¹² use of land,¹³ as well as the health and safety of workers and mine operations.¹⁴ The Cabinet Secretary responsible for mining is required to make regulations for the safety and health of persons employed in mines and carrying out prospecting and mining operations in safe, proper, sanitary and effectual manner. In addition, upon completion of mining operations, the land should be restored to its original status or to an acceptable and reasonable condition as close as possible to its original state.

Before a person is granted a mining licence, they are expected to obtain an Environmental Impact Assessment, an approved Social Heritage Assessment and an approved Environmental Management Plan. Equally, prospecting, retention and mining licences cannot be granted unless the applicant submits a site mitigation and rehabilitation or mine-closure plans for approval. In this regard, the applicant is required to provide an Environmental Protection Bond (or financial security) sufficient to cover any costs associated with the implementation of the environmental and rehabilitation obligations.

Section 217 of the Act requires operators undertaking prospecting or mining operations to maintain insurance cover in respect of the attached risks especially for health and safety of employees.

⁹ Section 153 (8) Mining Act 2016.

¹⁰ Section 153 (9) Mining Act 2016.

¹¹ Environmental Management and Coordination Act 1999.

¹² Water Act 2016.

¹³ Land Act 2012, Community Land Act 2016 and Registration of Land Act 2012.

¹⁴ Occupational Health and Safety Act, 2007 (No. 15 of 2007).

“

...Resettlement should be done in accordance with the relevant physical planning law, taking into consideration the community's economic wellbeing, social and cultural values.”

5.3 Local Content (Participation) Requirements

The Act seeks to ensure employment opportunities are created for Kenyans, ensure skills transfer and capacity building for the citizens. The mineral right holder should give preference to members of the community and Kenyan citizens when it comes to employment and only engage non-citizen technical experts in accordance with such local standards for registration as may be provided in law. Each mineral right holder is required to submit to the Cabinet Secretary, a program detailing how it shall recruit and train Kenyans.¹⁵ There is a requirement to submit a program for the procurement of local goods and services.¹⁶ The approval of these programs is a condition for the grant of the mineral right.

5.4 Community Development Agreement

The Act makes it mandatory for a holder of a large-scale mining licence to enter into an agreement with the community where the mining operations will be carried out. The purpose of this agreement is to secure socially responsible investment for the affected communities. The structure of the Community Development Agreement is governed by the Mining (Community Development Agreement) Regulations, 2017. The Regulations provide a framework for regulating the way mining companies engage with communities likely to be impacted by their operations. The key defining features of these Regulations are:

- § The outcome (the agreement) is arrived at through fair negotiation;
- § Communities, or community representatives, are directly involved in the negotiations;
- § The outcome is formalized in a written document, which is in effect a legal commitment binding on both parties; and
- § The agreement includes provisions that address broader development objectives, rather than being focused narrowly on financial compensation.

5.5 Fiscal Terms

The Mining Act 2016 outlines various fees, royalties, and taxes that mineral right holders are required to pay to the State. These payments will be prescribed in regulations and gazetted from time to time. The major payments are explained in the following table:



The mineral right holder should give preference to members of the community and Kenyan citizens when it comes to employment and only engage non-citizen technical experts in accordance with such local standards for registration as may be provided in law.”

¹⁵ Mining (Employment and Training) Regulations 2017.

¹⁶ See the Mining (Use of Local Goods and Services) Regulations 2017.

Table 6: Fiscal Terms under the Mining Act 2016

Fees or charges	<p>§ Mineral right holders, dealers and other licence or permit holders are required to pay application fees, report filing fees, fees for access to geological data and public registers. They are also subject to annual licensing or permit fees.</p> <p>§ Holders of reconnaissance licence are required to pay an area-based annual charge.</p> <p>§ All fees and charges are demanded and recovered in the same manner as civil debts.</p> <p>§ The Act makes a general provision for the Cabinet Secretary to publish and gazette other fees detailed in Regulations.</p>
Royalties	<p>§ A mineral right holder shall pay royalties to the State. Royalties payable shall be determined by the gross value of the sales.</p> <p>§ The Mining (Mineral Royalties) Regulations of 2017 provides as follows:</p> <p>(a) The purpose of mineral royalties is to provide monetary compensation to the people of Kenya, as owners of the minerals until they are won, for the loss of Kenya's non-renewable asset.</p> <p>(b) Royalty is due in respect of each period of three months ending 31 March, 30 June, 30 September or 31 December (with conditions).</p> <p>§ Rates that will apply include 5% for gold and silver, 8% for manganese and iron ore, 8% for coal, 10% for titanium ores and rare earths and 12% for diamonds (all applied to the "gross sales value").</p> <p>§ Further royalties may apply, including the current 'exportation royalty' on gold at 2% of the gross value to be exported, and a 'dealership royalty' on gemstones at (a) 5% on the export value of raw gemstones or (b) 1% on the export value of value-added gemstones.</p> <p>§ Failure to pay royalties within 60 days of filing returns leads to revocation of the licence.</p>

5.5.1 Revenue Sharing

Section 183(5) of the Act provides that the revenues collected by the State will be distributed as follows:

- § 70% to national government;
- § 20% to county government; and
- § 10% to the community where the mining operations occur.

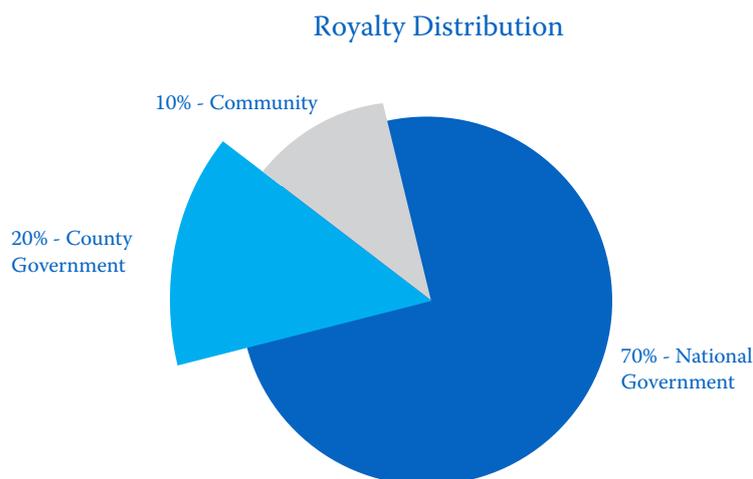


Figure 3: Revenue Share Ratios under the Mining Act 2016

5.6 Government Participation

The Mining Act makes provision in relation to large scale mining operations, for the State to acquire a 10% free carried interest in the share capital of the mineral right. The State may acquire further interest in the mineral right but on an arm's length basis. The acquisition of such interest is made through the National Mining Corporation.

Section 8 of the Act provides that the State has the right of pre-emption over all strategic minerals within the Kenya territory. This means that the National Government enjoys the "first option to buy" such minerals before the holder of the mineral right can offer them to other potential buyers in the market. All radioactive minerals are strategic minerals. The Cabinet Secretary can also declare certain minerals to be strategic minerals but only after seeking the approval of the Cabinet. The Cabinet Secretary may make Regulations to provide for the exploration, mining, processing and export of strategic minerals and strategic mineral deposits.

6. Transparency and Accountability

The Constitution 2010 sets a strong framework for the right to access information, which is a key enabler for transparency and accountability. Section 3 of the Access to Information Act, 2016 emphasises the requirement for public and private entities to disclose information necessary to promote constitutional principles of accountability, transparency and public participation and access to information.

In line with this, the Mining Act requires a range of mining industry information to be made available to the public, such as mining revenues paid to Government, production volumes of mining operations and copies of signed mineral agreements and their status.¹⁷ The Act also requires the Cabinet Secretary to ensure that a database of geoscience and information is kept and maintained, and made available to the public on request.¹⁸

¹⁷ Mining Act 2016, section 119(1) and (2).

¹⁸ Mining Act 2016, section 29.

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The Constitution 2010 sets a strong framework for the right to access information, which is a key enabler for transparency and accountability.”

The Mining Act further requires the Cabinet Secretary to publish and disseminate manuals, codes or guidelines relating to large scale and small-scale mining operations, including in relation to environmental matters. The manuals, codes or guidelines are used to show whether a person has complied with environmental obligations.

The Mining Act also requires the Cabinet Secretary to make separate regulations that stipulate transparency and accountability mechanisms regarding the reporting of mining activities, including revenues collected by the Government and production volumes under each license or permit.¹⁹ Further, in line with Article 71 of the Constitution and the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016, the Cabinet Secretary must submit agreements relating to large scale mining activities occurring on terrestrial or marine areas to Parliament for ratification before execution.

Further, under section of the Act, public officers responsible for the enforcement of this Act are not eligible to apply for a mineral right, mineral dealers' licence, or an export or import permit under the Act. This provision also prohibits public officers from directly or indirectly acquiring or retaining a share or interest in any mining company in Kenya. This prevents conflict of interest and seals potential corruption and rent seeking loopholes.

Table 7: Existing platforms where mining communities can access relevant information in Kenya

Information Platform	Information that can be accessed
Ministry of Petroleum and Mining	Open to the general public and contains relevant information on mining. It also hosts the Online Mining Cadastre Portal as well as other important links.
Mining Cadastre hosted by the Ministry of Petroleum and Mining website.	The Cadastre is the official means of submitting any application or reports relating to mineral rights (licences and permits) and dealings in minerals in Kenya. The Cadastre may be accessed through the website of the Ministry of Petroleum and Mining (State Department of Mining).
National Environment Management Authority (NEMA)	All environmental matters related to mining should be reported to NEMA through the County offices. NEMA website hosts the Licencing Portal where one can submit and licence applications, and check the status of application. One can access EIA reports on the NEMA website.
National Land Commission (NLC) and Ministry of Lands and Physical Planning	Public can submit land claims through the various avenues provided in the NLC website or the Ministry of Lands website.
Presidential Delivery Unit (PDU) Website	The PDU monitors, evaluates and reports on the President's key development priorities, including ongoing development projects.
Kenya Law Reports	Provides universal access to all information on Kenyan laws, regulations and cases, including those relating to mining.

¹⁹ Mining Act 2016, section 119(3).

7. Monitoring, Compliance and Enforcement

The Mining Act requires the Cabinet Secretary to appoint mine inspectors to monitor compliance and take enforcement action within specific jurisdictional units. The inspectors have the power to enter, inspect and examine land, premises or area where mining operations or dealings are being conducted. The Act also empowers the inspectors to arrest, with the assistance of police officers, any person who is reasonably believed to have committed an offence under the Act. In exercising their powers, the inspectors are required to carry an identification document.

The Act empowers any police officer above the rank of Inspector to arrest, without warrant, any person who is reasonably believed to have committed an offence under the Act. Some of the offences under the Act include, among others: unauthorised mining operations; unauthorised possession of minerals; obstruction of authorised mining operations; false or misleading statements; and contravention of the conditions of mining licences or permits. The Cabinet Secretary or any public officer may apply to court for an order to stop mining activities or operations which are reasonably believed to be in contravention of the Act. Equally, where a mineral right holder has committed an offence, the Court may issue an order for the revocation the mineral right, licence or permit.

8. Dispute Resolution

Disputes related to mining may be determined in any of the following ways as outlined in the Mining Act 2016, and other legislation.

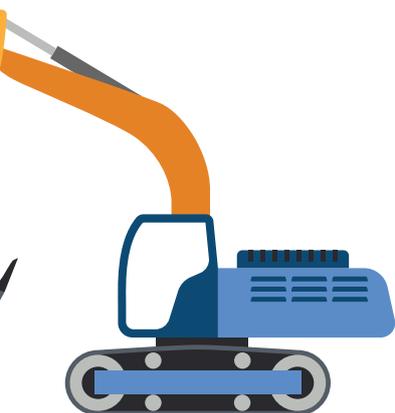
Table 8: Existing channels for resolving mining related disputes²⁰

Channel	Types of Disputes
Cabinet Secretary	Section 154 of the Mining Act empowers the Cabinet Secretary responsible for mining to determine any dispute arising as a result of a mineral right issued under the Act, including: The decision of the Cabinet Secretary is enforceable by Court as if it were a court order. Any person who is not satisfied by the decision of the Cabinet Secretary may appeal to the High Court.
Director of Mines	The Director of Mines has mandate, under the Mining (Licence and Permit) Regulations 2017, disputes relating to demarcation of boundaries, placement of markers or any other boundary matter related to the mineral right area.

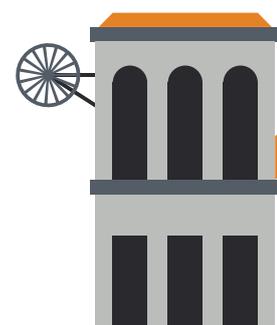
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The Cabinet Secretary or any public officer may apply to court for an order to stop mining activities or operations which are reasonably believed to be in contravention of the Act.”

²⁰ Adopted from, Extractives Baraza, Community Fact Sheet: Handling Extractives Related Grievances in the Mining Sector in Kenya (2020) <http://www.extractives-baraza.com/single-style/community-fact-sheet-handling-extractives-related-grievances-in-the-mining-sector/>.

Channel	Types of Disputes
Alternative Dispute Resolution (ADR) Mechanisms, i.e. Negotiation; Mediation; Conciliation; Arbitration; and Traditional Dispute Resolution	Similarly, section 154 of the Mining Act provides that any mining related dispute may be determined through a mediation or arbitration process as may be agreed upon by the disputing parties or as may be stated in an agreement. The Constitution 2010, under Article 159(2), encourages the use of such mechanisms in the resolution of disputes before parties can approach court. Disputes that can be addressed through ADR may include land, boundary, compensation, public participation, among others. The National Land Commission Act, 2012, for instance encourages the use alternative dispute resolution like mediation, arbitration and traditional dispute resolution mechanisms in resolving grievances relating to land.
National Environmental Management Authority (NEMA)	NEMA has mandate to address matters relating to the grant, suspension, and revocation of Environmental Impact Assessment (EIA) licences to mining operators; and review the adequacy of EIA study reports. Any person may approach NEMA on matters concerning the environment through hotlines that are available.
National Environmental Complaints Committee (NECC)	NECC is a public department of NEMA established with the mandate to investigate allegations and complaints against any person or NEMA in relation to the condition of the environment, or even on its own motion, suspected cases of environmental degradation – appropriate to determine issues relating to the right to clean environment.
National Land Commission (NLC)	<p>§ The NLC has extensive mandate to initiate investigations, on its own motion or on a complaint, into present or historical land injustices, and recommend appropriate redress.</p> <p>§ It compulsorily acquires land on behalf of national and county governments and conducts inquiries to hear issues of claims for compensation for loss of land by interested parties.</p>
Kenya National Commission on Human Rights (KNCHR)	<p>§ Any member of the public, community or civil society, can lodge complaints to KNCHR, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened by mining operations.</p> <p>§ KNCHR has the mandate to investigate and adjudicate on matters relating to human rights; and resolve any matter brought before it by conciliation, mediation or negotiation.</p>
Site-Level Mechanisms established by Mining Companies	Large Scale Mining companies, such as Base Titanium, Tata Chemicals, etc have established site-level mechanisms to address disputes arising from communities. Communities and individuals are encouraged to channel their disputes with companies to such avenues for redress before approaching courts. They should also make use of Liaison Committees established by companies to act as a link between them and communities.



Channel	Types of Disputes
Courts	<p>Any person who has a claim or dispute relating to mining may approach the following Courts, on his/her behalf, on behalf the community or other group, or in the public interest:</p> <ul style="list-style-type: none"> (a) Environment and Land Court (ELC) – Mandated to hear and determine claims relating to: <ul style="list-style-type: none"> § Environmental planning and protection, including violations of, or threats to, the right to a clean and healthy environment. § Land use, administration and management, title (ownership), tenure, boundaries, compulsory acquisition of land, valuations, and any other claims relating to public, private and community land. § Mining, minerals and other natural resources. (b) Employment and Labour Relations Court, which hears and determines all matters relating to employment and labour relations. (c) Magistrates Courts and the High Court, both having jurisdiction to hear and determine human rights related disputes arising from the mining sector. The Mining Act 2016 also provides for a right of appeal to any person aggrieved by the decision of the Cabinet Secretary within 30 days to the High Court.
Tribunals	<p>A person may also approach the following tribunals:</p> <ul style="list-style-type: none"> (a) National Environment Tribunal (NET) – any community member aggrieved by the decision or action of NEMA can appeal to NET for directions or a legal opinion. One cannot bypass NET and appeal against NEMA’s decisions at the High Court or ELC, as the latter would not have jurisdiction. (b) Water Tribunal –may hear and determines appeals against the decision or order of the Cabinet Secretary for water, the Water Resources Authority (WRA) and Water Services Regulatory Board (WSRB) or of any person acting under their authority. This may include decisions relating to the use of water in mining operations to the detriment of community members.



9. Conclusion

The Mining Act 2016 is indeed quite progressive as it provides an important framework for benchmarking. Notably, the Act introduces the aspect of Community Development Agreements outlining how large-scale mining companies should work with communities. The question of environmental protection, which has in the past dominated many court cases relating to mining, has extensively been captured as part of the requirements for the grant of mineral rights, though it may be necessary to put in place specific measures for the protection and rehabilitation of the environment.

The Act specifically requires a mineral right applicant to provide proof of submission and approval of an environmental and social impact assessment report and social heritage and environmental management plans to NEMA. Other important aspects in the Act include local content plans, an assurance that the operator will involve local communities and Kenyans at large particularly regarding employment and business opportunities; and resettlement of communities affected by mining operations.

The Act also introduces amongst others principles, transparency and accountability through use of the Online Mining Cadastre portal for licensing and for management of mineral rights and permits thus creating an enabling environment for requests for information.



10. Appendices

Appendix I: Classification of minerals (See the First Schedule of the Mining Act 2016)

Metallic Minerals		Non-metallic Minerals			
Base & rare metal group	Precious metal group	Precious Stone Group	Construction and Industrial	Fuel Mineral Group	Gaseous Minerals
1. Antimony 2. Arsenic 3. Beryllium 4. Bauxite 5. Bismuth 6. Cadmium 7. Caesium 8. Chromium 9. Cobalt 10. Copper 11. Gallium 12. Geranium 13. Hafnium 14. Indium 15. Iron 16. Lead 17. Magnesium 18. Manganese 19. Mercury 20. Molybdenum 21. Nickel 22. Niobium 23. Rhodium 24. Radium 25. Rare Earths 26. Rhenium 27. Rubidium 28. Selenium 29. Tantalum 30. Thallium 31. Tin 32. Titanium 33. Tungsten 34. Vanadium 35. Zinc or zirconium	1. Gold 2. Osmium 3. Palladium 4. Platinum 5. Iridium 6. Silver 7. Rhodium 8. Ruthenium	Semi-precious stones 1. Agatha 2. Amazonite 3. Amber 4. Amethyst 5. Aquamarine 6. Aventurine 7. Beryl 8. Chrysoberyl 9. Chrysocolla 10. Chrysolite 11. Cordierite 12. Diopside 13. Dumortierite 14. Garnet except green garnet 15. Jade 16. Malachite 17. Opal 18. Quartz 19. Sodalite 20. Topaz 21. Tourmaline 22. Turquoise	1. Alunite 2. Andalusite-Sillimanite Kyanite 3. Anhydrite 4. Aplite 5. Asbestos 6. Barite 7. Ball clay 8. Beryl 9. Boron 10. Calcium carbonate 11. Celestite 12. Corundum 13. Diatomite 14. Dolomite 15. Epsomite 16. Feldspar 17. Fluorite 18. Garnet for industrial purposes 19. Graphite 20. Gypsum 21. Hectorine 22. Halloysite 23. Heavy mineral sands 24. Fossil guano 25. Iodine minerals 26. Kaolin (refractory clay) 27. Leucosene 28. Lithium minerals 29. Limestone and marble 30. Magnesite	1. Coal (Non-Nuclear) 2. Uranium and thorium (Nuclear)	1. Carbon Dioxide 2. Helium 3. Coal seam gas 4. Water



Metallic Minerals		Non-metallic Minerals			
Base & rare metal group	Precious metal group	Precious Stone Group	Construction and Industrial	Fuel Mineral Group	Gaseous Minerals
		Precious stones 1. Diamonds 2. Emeralds 3. Rubies 4. Sapphires 5. Green garnet or Tsavorite	31. Mica 32. Nepheline 33. Nitrate 34. Olivine 35. Perlite 36. Phosphate 37. Picture-stone 38. Potash 39. Pumice 40. Pyrophyllite 41. Quartz for industrial purposes 42. Salt 43. Sepiolite 44. Silica sand 45. Soda-ash and other sodium compounds 46. Strotianite 47. Sulphur and Pyrite 48. Syenite 49. Talc 50. Vermiculite		



11. Appendix II: Definition of Terms

“Community Development Agreement” means an agreement entered into between a large-scale mining licence holder and a community;

“community” means (a) a group of people living around an exploration and mining operations area; or (b) a group of people who may be displaced from land intended for exploration and mining operations;

“Feasibility Study Report” means the advanced exploration of a mineral deposit to determine its size, grade, mining options, environmental and community factors, mineral processing, infrastructure requirements and considerations, and economic modelling in order to establish commercial viability of exploiting that mineral deposit;

“first-come, first-served” means the policy, of considering and approving applications based on the order of receiving the applications;

“holder”, in respect of a mineral right, a licence or permit under this Act, means (a) a person to whom a mineral right is granted; or (b) the person to whom a mineral right is transferred or assigned;

“licence area” means the area or areas of land covered by a prospecting licence, a retention licence or a mining licence under the Mining Act;

“mine waste and tailings” means the residue of mining operations that includes gravel, sand, slime, or other substances that are discarded in the course of mining operations;

“mineral dealer” means any entity or person licenced to carry out mineral dealings;

“mineral dealings” means—(a) buying minerals; (b) selling minerals; (c) bartering minerals; (d) depositing or receiving minerals as a pledge or security; or (e) cutting, polishing, processing, refining and treating minerals;

“mineral deposit” means a mass of naturally occurring minerals of economic value;

“mineral right” means: (a) a prospecting licence; (b) a retention licence; (c) a mining licence; (d) a prospecting permit; (e) a mining permit; or (f) an artisanal permit;

“mineral” means a geological substance whether in solid, liquid or gaseous form occurring naturally in or on the earth, in or under water, in mine waste or tailing and includes the minerals specified in the First Schedule but does not include petroleum, hydrocarbon gases or groundwater;

“mining area” means an area or areas of land that are covered by a mining licence;

“mining bond” means an obligatory payment or cash deposit that may be required of a mineral right holder as guarantee for the due implementation of an approved mining programme;

“mining operations” means an operation carried out in connection with a mine— (a) to win a mineral from where it occurs; (b) to extract metal or precious mineral from a mineral so won, or to beneficiate a mineral so won; or (c) to dispose of a mine waste or tailings resulting from winning, extraction or beneficiation.





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The Kenyan Section of the
International Commission of Jurists (ICJ Kenya)
ICJ Kenya House, Off Silanga Rd, Karen
P.O. Box 59743 – 00200 Nairobi, Kenya
Telephone: +254-20-2084836/8
Mobile: +254 720 491549/+254 733 491549
Fax. +254-20-2625467
Email: info@icj-kenya.org
Website: www.icj-kenya.org