

Regulating Mining: A New Vision for Kenya?

Kariuki Muigua

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Abstract

This paper critically discusses the regulatory framework governing the mining sector in Kenya. It highlights the prospects of the existing laws in enhancing the sector's returns and contribution to the national development agenda. The paper also discusses some of the loopholes that must be addressed by the policy makers and other stakeholders in order to realise the full benefits of the new laws, if any.

1. Introduction

The mining subsector in Kenya can be considered relatively small considering that its current contribution to the national Gross Domestic Product (GDP) is much smaller than the expected potential.¹ However, there have been improved hopes of higher incomes from this sector especially with the discovery of various mineral deposits in various parts of the country.² It is documented that Kenya has four belts of minerals - the gold green stone belt in western Kenya, which extends to Tanzania; the Mozambique belt passing through central Kenya, the source of Kenya's unique gemstones; the Rift belt, which has a variety of resources including soda ash, fluorspar and diatomite; and, the coastal belt, which has titanium.³ These mineral resources come with great hopes of boosting the country's development agenda.⁴

**PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [July, 2019].*

¹ KPMG, "Analysis of Mining Act 2016," July 2016, p. 1. Available at

<https://assets.kpmg/content/dam/kpmg/ke/pdf/kpmg-mining-act-2016-analysis.pdf> [Accessed on 3/7/2019].

² Scola Kamau and Christine Mungai, "Kenya's \$100 billion hidden mineral deposits," *The East African*, Saturday July 20 2013. Available at <https://www.theeastafrican.co.ke/news/Kenya-hits-USD100-billion-rare-earth-jackpot-/2558-1920964-ma895tz/index.html> [Accessed on 3/7/2019].

Mrima Hill, in the coastal county of Kwale, has one of the top five rare earth deposits in the world. The area also has niobium deposits estimated to be worth \$35 billion.

³ East African Community, *Investment in Mining*, available at <https://www.eac.int/investment/why-east-africa/investment-opportunities/mining> [Accessed on 3/7/2019].

⁴ Ndemo, B., "Kenya's mineral resources could pull millions out of poverty," *Daily Nation*, Monday June 24 2019. Available at <https://www.nation.co.ke/oped/blogs/dot9/ndemo/2274486-5169428-990fwj/index.html> [Accessed on 3/7/2019]; Chimboza, R., "More should and can be done to start taking mining sector seriously," *Daily Nation*, Tuesday October 4 2016.

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To realise this vision of hope and growth in the mining sector, the *Mining Act 2016*⁵ was enacted to give effect to Articles 60, 62b (1) (f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes.⁶ Notably, the Cabinet Secretary is empowered under the Act to make Regulations necessary or convenient for the proper administration and implementation of this Act.⁷ As a result of this, the Cabinet Secretary responsible has since made the following Regulations under the Act: *Mining (Dealings in Minerals) Regulations, 2017*; *Mining (Licence and Permit) Regulations, 2017*; *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*; *Mining (State Participation) Regulations, 2017*; *Mining (Use of Local Goods and Services) Regulations, 2017*; *Mining (Employment and Training) Regulations, 2017*; and *Mining (Use Of Assets) Regulations, 2017*.

This paper focuses generally on these Regulations and how the same can help in promotion and realisation of the country's dream of a vibrant mining sector that not only promotes national development but one that also benefits the local communities.

2. Kenya's Mining Industry: The Policy, Legislative and Institutional Framework

The Government of Kenya has a ministry dedicated to the development of the mining sector⁸, as part of the efforts to improve mineral exploitation in the country. The Ministry undertakes various functions aimed at enhancing growth of the mining sector in the country as guided by the *Executive Order No. 2 of 2013*⁹. Its mandate includes: Minerals Exploration and mining policy and Management; Inventory and mapping of mineral resources; Mining and minerals development; Policies on the management of quarrying and mining of rocks and industrial minerals; Management of health and safety in mines; Policy around extractive industry; Resource Surveys and remote sensing; and Maintenance of geological data (research, collection, collation, analysis).¹⁰

⁵ Mining Act, No. 12 of 2016, Laws of Kenya.

⁶ Ibid, preamble.

⁷ Mining Act, 2016, sec. 223.

⁸ Ministry of Mining, <http://www.mining.go.ke/index.php/about-us/about-ministry> [Accessed on 3/7/2019].

⁹ Republic of Kenya, *Executive Order No.2 of 2013 – Organization of the Government of Kenya*, May 2013.

¹⁰ <http://www.mining.go.ke/index.php/about-us/about-ministry> [Accessed on 3/7/2019].

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The Mining sector in Kenya is mainly governed by the Constitution of Kenya 2010, the Mining Act 2016 and numerous Regulations made under the Act to promote proper administration and implementation of the Act.

2.1 Constitution of Kenya 2010

The Constitution of Kenya 2010 makes provisions on “natural resources” which means the physical non-human factors and components, whether renewable or non-renewable, including—*rocks, minerals, fossil fuels and other sources of energy.*¹¹

Article 60 of the Constitution provides for the principles of land policy which include sustainable and productive management of land resources. Under Article 62 (1) (f) of the Constitution “all minerals and mineral oils as defined by law” are classified as public land and by Article 62 (3) they are vested in and are held by the national government in trust for the people of Kenya.

The Constitution also outlines the obligations of the State in respect of the environment which include, inter alia, to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; and utilise the environment and natural resources for the benefit of the people of Kenya.¹² The Constitution further spells out the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.¹³ This includes any decision-making or implementation of any law affecting the mining sector.¹⁴

¹¹ See Article 260; and Chapter Five.

¹² Constitution of Kenya, Art. 69.

¹³ Article 10(1), Constitution of Kenya.

10 (2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

¹⁴ For instance, see *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2017] eKLR, Civil Appeal 105 of 2015:

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The Constitution thus provides some overarching principles that should guide the implementation of any laws governing the mining sector.

2.2 Mining and Minerals Policy, Sessional Paper No. 7 of 2016

The *Mining and Minerals Policy, Sessional Paper No. 7 of 2016* was informed by the lack of predictability and certainty hence low investment in the mining sector, thus necessitating the need for policy framework to provide a clear guidance for sustainable mineral resources development.¹⁵

The Policy was therefore put in place to address gaps that have existed in the mining sector, form the basis for review of the outdated Mining Act of 1940 and align the industry's strategic direction with African Mining Vision, Vision 2030 and Constitutional Provisions. In addition, the Policy was also expected to strengthen the institutional framework and address governance and operational issues, environmental protection, equity, mineral value addition, post-mine closure activities, capacity building and mainstream artisanal and small scale mining. The policy is also meant promote the use of appropriate technology including Geo-spatial technology and airborne geophysical surveying in order to enhance information on the country's mineral potential and increase investment in the mining sector.¹⁶

The overall goal of the Mining and Minerals Policy is to set out frameworks, principles, and strategies to provide for exploration and exploitation of mineral resources for socio-economic development.¹⁷

2.3 Mining Act, 2016

The *Mining Act 2016*¹⁸ was enacted to give effect to Articles 60, 62b (1) (f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing,

The national values and principles of governance under Article 10 (1) of the Constitution apply to and bind all state organs, state officers, public officers and all persons. The Commissioner as such a public officer charged with making or implementing public policy decisions and in issuing the Mining Licence to Cortec without ensuring the law was complied with, was abdicating his duty and obligations entrusted on him to carry out on behalf of the public. The Commissioner acted in breach of the Mining Act and the Constitution and in breach of the trust bestowed upon him.

¹⁵ Republic of Kenya, *Mining and Minerals Policy, Sessional Paper No. 7 of 2016*, p. 1.

¹⁶ Republic of Kenya, *Mining and Minerals Policy, Sessional Paper No. 7 of 2016*, p. 2.

¹⁷ Ibid, p.7.

¹⁸ Mining Act, No. 12 of 2016, Laws of Kenya.

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refining, treatment, transport and any dealings in minerals and for related purposes.¹⁹ The Act also came about as a result and part of implementation of the *Mining and Minerals Policy, Sessional Paper No. 7 of 2016*²⁰.

The Act is to apply to the minerals specified in the First Schedule²¹. Notably, the Act does not apply to petroleum and hydrocarbon gases²².

The Act establishes a state mining corporation which shall be the investment arm of the national government in respect of minerals.²³

The Act also establishes the Mineral Rights Board whose functions include advising and giving recommendations, in writing, to the Cabinet Secretary on: the grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of Mineral Rights Agreements; the areas suitable for small scale and artisanal mining; the areas where mining operations may be excluded and restricted; the declaration of certain minerals as strategic minerals; cessation, suspension, or curtailment of production in respect of mining licences; fees, charges and royalties payable for a mineral right or mineral; and any matters which under this Act, are required to be referred to the Mineral Rights Board.²⁴

In order to ease access to services, there is also established under the Act the Directorate of Mines; and the Directorate of Geological Survey, each directorate headed by a director.²⁵

The Mining Act has provisions covering various mining issues including but not limited to: mineral rights disputes relating to license and permits²⁶; structures for negotiating mineral

¹⁹ Ibid, preamble.

²⁰ See para. **3.4.1 Regulating the Mining Sector**

Strategy 1: Put in place a simple, stable, predictable, transparent, efficient and unified regulatory framework for the mining sector.

The Government is in the process of developing a new mining legislation to replace the Mining Act, Cap.306 of 1940, which is both outdated and ineffective. Under the new mining legislation, rights and interests in minerals of all kinds, including construction and industrial minerals will be regulated.

²¹ The classification of minerals under first schedule includes: A. Construction And Industrial Minerals; B. Precious stones; C. Precious Metal group; D. Semi-precious stones group; E. Base And Rare Metals Group; F. Fuel Mineral Group; and G. Gaseous Minerals.

²² These fall under the domain of the *Energy Act, No. 1 of 2019*, Laws of Kenya; and *Petroleum Act, No. 2 of 2019*, Laws of Kenya.

²³ Mining Act, 2016, Sec. 22(1).

²⁴ Ibid, secs. 30 & 31.

²⁵ Mining Act, 2016, Sec. 17.

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agreements²⁷; terms and conditions for minimum activity and work programs, structure for payments²⁸; and artisanal and small scale mining operations²⁹.

To operationalize some of these provisions, the Cabinet Secretary in charge of mining has since made Regulations covering the areas and matters in question. The next section casts a critical look at these Regulations.

2.4 Mining Regulations and Guidelines

a) *Mining (Dealings in Minerals) Regulations, 2017*

The *Mining (Dealings in Minerals) Regulations, 2017*³⁰ were enacted by the Cabinet Secretary for Mining in exercise of the powers conferred by sections 100 and 223 (1) of the Mining Act, 2016. Section 100 of the Act deals with the sale of minerals won by an artisanal miner. These Regulations are to apply to- the export of a mineral by a holder of a mining right; the removal of minerals by a holder of a mineral right for the purposes of sampling, assay or analysis; the holder of a mineral dealer's licence or dealer's permit; the import of any mineral; and any other person who is not a holder of a mineral right, mineral dealer's licence or dealer's permit but requires the removal of minerals for analysis or testing for purposes other than exploration or mining.³¹ However, these Regulations are not to apply to the export and import of rough diamonds.³² There have been numerous reported and unreported cases of illegal dealings in extraction and/or sale of minerals in the country. These Regulations were meant to curb this illegal business and specifically spells out the duties of the holder of a mineral dealer's licence which include to: commence or engage in the trading of a mineral in accordance with the terms and conditions of the licence within thirty days after the date of the issue of the licence; not trade in any mineral other than the mineral or minerals specified in the licence; not trade in minerals except in accordance with the terms and conditions set out in the licence; not knowingly engage in trading of a mineral with a person who has not acquired the minerals lawfully or is otherwise not

²⁶ Part ix—Surface Rights Compensation and Disputes (sections 151-157).

²⁷ Part VII—Mineral Agreements (sections 117-142).

²⁸ Part XII—Financial Provisions (sections 182-190).

²⁹ Mining Act, 2016, Sections 92-100.

³⁰ Legal Notice No. 88, Kenya Subsidiary Legislation, 2017. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN88_2017.pdf

³¹ *Mining (Dealings in Minerals) Regulations, 2017*, Regulation 3(1).

³² *Ibid*, Regulation 3(2).

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lawfully entitled to deal in minerals; pay all taxes, charges or levies that are required under the terms and conditions of the licence, the Act or any other written law in Kenya; keep complete and accurate records of all activities conducted under the licence at the registered office and submit a true copy to the Cabinet Secretary in the manner as specified in the Act and these Regulations; permit the authorised officer of the Ministry to inspect any documents or records; and submit if any, the sales contract or agreement the holder may sign with a buyer, seller or holder of a mineral right.³³

The Regulations, alongside the Mining Act 2016, were expected to provide more transparency and credibility for investors in solving issues affecting the mining sector in the country.³⁴ These Regulations have however achieved little, if anything, in curbing illegal trading in minerals. This is exemplified by the continued reports of smuggling of gold and other precious stones in and of the country.³⁵ It is estimated that Africa is losing over \$60 billion annually due to the illicit mineral trade.³⁶ This is because, amongst other factors, most minerals and precious stones from the region are exported in raw form to processing centres in Asia, notably Hong Kong.³⁷

It is therefore unlikely that these Regulations alone, without the support of other security institutions across the region, will curb the illegal dealings in trade. There is a need to ensure that the taxation and royalties regime is regularized and that the same is friendly not only to the multinationals but also the artisanal miners in the country as an incentive to discourage them from dealing with illegal traders in and outside the country.

³³ *Mining (Dealings in Minerals) Regulations*, 2017, Regulation 9(5).

³⁴ Ali, S., “Govt to make Nairobi a mineral trade hub,” *Citizen Digital*, September 26, 2016. Available at <https://citizentv.co.ke/business/govt-to-make-nairobi-a-mineral-trade-hub-142856/> [Accessed on 8/7/2019].

³⁵ Otieno, R., “Government red tape killing mining sector, claims lobby,” *Standard Digital*, 17th April, 2019. Available at <https://www.standardmedia.co.ke/business/article/2001321316/government-red-tape-killing-mining-sector-lobby> [Accessed on 8/7/2019]; Mnyamwezi, R., “Petroleum CS Munyes exposes minerals smuggling cartels,” *Standard Digital*, 21st August, 2018. Available at <https://www.standardmedia.co.ke/article/2001292787/kenya-losing-billions-to-minerals-smuggling-cartels> [Accessed on 8/7/2019].

³⁶ Senelwa, K., “Nairobi to process gold and gemstones at value addition centre,” *The East African*, Monday February 20 2017. Available at <https://www.theeastafrican.co.ke/business/Nairobi-to-process-gold-and-gemstones/2560-3820176-n8dw6hz/index.html> [Accessed on 8/7/2019].

³⁷ *Ibid.*

b) *Mining (Licence and Permit) Regulations, 2017*

The *Mining (Licence and Permit) Regulations, 2017*³⁸ were enacted by the Cabinet Secretary for Mining in exercise of the powers conferred by sections 12 (3)³⁹, 153 (3)⁴⁰ and 223 (2), (c), (d), (g), (j), (k) and (1)⁴¹ of the Mining Act, 2016. These Regulations are to apply to all mineral rights.⁴²

The *Mining (license and permit) Regulations 2017* (Clause 4) provides that all applications for mineral rights shall be made through the On Line Mining Cadastre (OMC) in order for them to be considered for grant.⁴³

It is a commendable step that these Regulations seek to regulate, inter alia, small-scale mining or artisanal mining operations in line with the Mining Act 2016, by granting permits.⁴⁴ However, there is a need to ensure that the same are not used as a political tool in awarding permits for corrupt dealings in artisanal mining activities.

In addition, while the artisanal miners may smoothly get licences and permits (which will cost money to apply), there may be a funding challenge. It has been observed that acute cash shortage caused by poor linkages with the financial sectors of the economy is one of the biggest

³⁸ *Mining (Licence and Permit) Regulations, 2017*, Legislative Supplement No. 40, Legal Notice No. 87, Laws of Kenya. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN87_2017.pdf

³⁹ (3) Unless otherwise provided for in this Act, the Cabinet Secretary shall make Regulations to prescribe the procedure for— consideration of the applications made under this Act; and negotiation, grant, revocation, suspension or renewal of mineral rights.

⁴⁰ (3) The Cabinet Secretary may make Regulations relating to compensation guarantee bonds.

⁴¹ (2) Without prejudice to the generality of the foregoing, the Cabinet Secretary may make Regulations prescribing— the fees, royalties, rent and other charges that are payable under this Act or the manner in which they are to be calculated; the royalties that are payable for specific minerals or the manner in which they are to be calculated; the manner in which an area referred to in a mineral right shall be demarcated; the manner in which records, accounts, books and other documents shall be kept, retained and made available for inspection; the procedures to be followed in respect of tendering in areas that have been designated for tendering for large scale operations in accordance with this Act; the measures to be observed in respect of radioactive and other restricted minerals including, the storage and transportation of radioactive and restricted minerals and the sale or supply of such minerals; the measures to be included in programmes for prospecting and mining operations that require the Cabinet Secretary 's approval; the measures to be observed to protect and rehabilitate the environment; procedures for the grant of mineral rights and guidelines for exploration and mining in Kenya's territorial sea, exclusive economic zone and the continental shelf; the areas that are excluded areas under this Act; the categories of mineral rights that are not to be granted in prescribed areas; the form of any licence, permit, form, return or other document to be used for the purposes of this Act; and anything which may be prescribed under this Act and for the better carrying into effect the provisions of this Act.

⁴² *Mining (Licence and Permit) Regulations, 2017*, Regulation 3.

⁴³ *Mining (Licence and Permit) Regulations, 2017*, Regulation 4.

⁴⁴ Part ix — Artisanal Mining Permit.

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impediments to the growth of the artisanal and small-scale mining sector.⁴⁵ This is mainly attributed to the fact that being a nascent, capital intense and high-risk sector, it is difficult for local banks to finance it. However, government intervention can go a long way in addressing the funding challenge.

It is therefore not enough to regulate licencing and permits relating to mining activities in the country, there is a need to create a level playing ground for the artisanal miners by creating a funding kitty to help them competitively carry out these mining activities. Such a kitty would be similar to those in other African countries whose artisanal and small scale mining sectors are doing well such as 2017 Nigeria's Ministry of Solid Minerals and Steel Development and the Bank of Industry of Nigeria's N5 billion fund to provide loans and bring the sector under a structured system; and Zimbabwe's gold fund introduced in 2016 through the Reserve Bank of Zimbabwe.⁴⁶

c) *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*

The *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*⁴⁷ were enacted by the Cabinet Secretary in exercise of the powers conferred by section 221 (1)⁴⁸ of the Mining Act, 2016. These Guidelines -provide guidance to applicants for, and holders of, reconnaissance licences, prospecting licences, prospecting permits and retention licences on how to prepare work programmes and exploration reports; and are to assist the Director of Geological Surveys to review work programmes and exploration reports that shall be submitted by applicants for or holders of mineral rights.⁴⁹

While these reports would go a long way in enhancing the right of access to information for the local people as far as the activities of the mining companies are concerned, there is no evidence of any such reports being made public since 2017 or even any being filed with the government agencies at all. As such, there is a need to ensure that these Regulations are not only enforced but

⁴⁵ Komu, J., "Fund artisanal and small-scale mining," March 26, 2019. Available at <https://www.the-star.co.ke/opinion/columnists/2019-03-26-fund-artisanal-and-small-scale-mining/> [Accessed on 8/7/2019].

⁴⁶ Ibid.

⁴⁷ *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*, Legal Notice No. 85 of 2017, Laws of Kenya. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN85_2017.pdf [Accessed on 7/7/2019].

⁴⁸ 221. (1) The Cabinet Secretary may publish and disseminate manuals, codes or guidelines relating to large scale and small scale operations, including in relation to environmental matters.

⁴⁹ Clause 3, *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*.

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also such reports should be made available to the public in light of the right of access to information as guaranteed under Article 35 of the Constitution of Kenya 2010 and Access to Information Act, 2016⁵⁰.

d) *Mining (State Participation) Regulations, 2017*

The *Mining (State Participation) Regulations, 2017*⁵¹ were enacted by the Cabinet Secretary in exercise of Section 48(4)⁵² of the Mining Act, 2016. The purpose of these Regulations is to provide for State participation in prospecting or mining operations carried out by a holder of a mineral right.⁵³

These Regulations are to apply to all applicants and holders of any mineral right-which entitles the State to a ten percent free carried interest; where the State acquires any additional interest that may be agreed with the holder of a mining licence; and where the State enters into an agreement to participate in prospecting operations or activities under a prospecting licence held by a holder other than the National Mining Corporation.⁵⁴

In line with the Mining Act 2016, the Regulations reiterate that the National Mining Corporation shall on behalf of the State, be the investment arm of the National Government in respect of all prospecting or mining operations.⁵⁵ The National Mining Corporation - shall hold the State's ten percent free equity participation or free carried interest in all mining operations; shall be responsible for engaging in any operations relating to any additional interest that the State may acquire and which may be agreed with the holder of a mining licence at a fair market value: and may acquire any interest in or enter into a joint venture, farm-in agreement or any other arrangement with a holder of a prospecting licence for the purpose of conducting prospecting operations.⁵⁶

The direct interest and participation of the government, albeit through the National Mining Corporation is a positive step towards ensuring that the mining companies declare all the

⁵⁰ Access to Information Act, No. 31 of 2016, Laws of Kenya.

⁵¹ *Mining (State Participation) Regulations, 2017*, Legal Notice No. 84 of 2017, Laws of Kenya.

⁵² (4) The Cabinet Secretary shall make regulations to provide for state participation in mining or prospecting operations between the Government and the holder of a mineral right.

⁵³ *Mining (State Participation) Regulations, 2017*, Regulation 3.

⁵⁴ *Mining (State Participation) Regulations, 2017*, Regulation 4.

⁵⁵ *Mining (State Participation) Regulations, 2017*, Regulation 5 (1).

⁵⁶ *Mining (State Participation) Regulations, 2017*, Regulation 5 (2).

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deposits and profits accrued as well as safeguarding the interests of local communities at all stages of mining activities.

There has been past reported cases of non-disclosure and non-declaration by the mining companies in the country and this requires the government to have its own watchdog on the ground to curb the vice, hence the need for this Corporation.⁵⁷ The Corporation is also useful in promoting capacity building in the sector as far as exploration of minerals in the country is concerned.

e) *Mining (Use of Local Goods and Services) Regulations, 2017*

The *Mining (Use of Local Goods and Services) Regulations, 2017*⁵⁸ were enacted by the Cabinet Secretary in exercise of the powers conferred by section 223(1) of the Mining Act, 2016. The purpose of these Regulations is to- promote job creation through the use of local expertise, goods and services, businesses and financing in the mining industry value chain and their retention in the country; achieve the minimum local level and in-country spend for the provision of the goods and services in the mining industry value chain; increase the capability and international competitiveness of domestic businesses; create mining and mineral related support industries that will provide jobs and sustain economic development; achieve and maintain a degree of participation for Kenyans or companies incorporated in Kenya for the supply of goods and the provision of services; and provide for a robust, transparent monitoring and reporting system in relation to the use of goods and services.⁵⁹

These Regulations shall apply to- (a) all applicants and holders of any licence for - the reconnaissance, prospecting and mining of a mineral; the cutting, polishing, processing, refining and smelting of a mineral; and mine support services; (b) all operators, contractors and other entities involved in any project, operation or activity connected or related to mine support services, mineral activity or operation in Kenya.⁶⁰

⁵⁷ Sanga, B., “Auditor General reveals how mining companies under-declare tax dues,” 25th Aug 2016. Available at <https://www.standardmedia.co.ke/article/2000213275/auditor-general-reveals-how-mining-companies-under-declare-tax-dues> [Accessed on 9/7/2019].

⁵⁸ *Mining (Use of Local Goods and Services) Regulations, 2017*, Legal Notice No. 83 of 2017, Laws of Kenya.

⁵⁹ *Mining (Use of Local Goods and Services) Regulations, 2017*, Regulation 3.

⁶⁰ *Ibid*, Regulation 4.

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The Regulations require that the holder of a licence, its contractors and sub-contractors shall, to the maximum extent possible, when purchasing goods and procuring services required with respect to operations or any-activity to be conducted under a licence, give first priority to materials and goods made in Kenya; and services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans: provided that such goods and services are equal in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.⁶¹

Except as otherwise provided in the Act or under these Regulations, an application for a licence should not be granted unless, the applicant has submitted a procurement plan for the purchase of goods and services in Kenya to the Cabinet Secretary.⁶² The plan, if approved, shall form part of the conditions or obligations under the licence.⁶³

The mining sector in the country is expected to uplift the lives of its people by not only creating employment opportunities but also jobs through creating markets for local goods. One way of alleviating poverty in any mining region would be empowering the local people through creating markets for the locally produced goods and services.⁶⁴ However, there is likely to arise a challenge in getting the mining sector players, both local and foreign, to abide by these rules. They are likely to bypass them on grounds equality in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya. Considering that there are many factors (such as supply and demand, cost of raw materials, machinery, amongst others) that may influence the production cost of goods and services which may ultimately push up the price of these goods and services or worse compromise their quality, it is likely that the companies in question may use such loopholes to source for the same either from their home countries (for foreigners) or other cheaper and better quality goods from foreign countries for the locals.

⁶¹ Ibid, Regulation 5.

⁶² Ibid, Regulation 6(1).

⁶³ Ibid, Regulation 6(4).

⁶⁴ See generally, Musawenkosi, N., "Does mining alleviate or exacerbate poverty: Are local community grievances really 'Much Ado about Nothing'?" PhD diss., University of Cape Town, 2017. Available at https://open.uct.ac.za/bitstream/handle/11427/24930/thesis_com_2017_nxele_musawenkosi.pdf?sequence=1&isAllowed=y [Accessed on 9/7/2019]; Pegg, S., "Mining and poverty reduction: Transforming rhetoric into reality," *Journal of cleaner production*, Vol.14, no. 3-4 (2006): 376-387.

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Implementing these Regulations may therefore call for the Government and other stakeholders to first address these challenges before local traders, service providers and communities can benefit from the legal framework.

f) *Mining (Employment and Training) Regulations, 2017*

The *Mining (Employment and Training) Regulations, 2017*⁶⁵ were enacted by the Cabinet Secretary in exercise of powers conferred by sections 46(3)⁶⁶ and 223(1) of the Mining Act, 2016. The purpose of these Regulations is to- promote job creation through the use of local expertise in the mining industry, the entire mining value chain and to retain the requisite skills within the country; develop local capacities in the mining industry value chain through education, skills and technology transfer, research and development; and achieve the minimum local employment level and in-country spend across the entire mining industry value chain.⁶⁷

These Regulations shall apply to all applicants and holders, of any licence for- reconnaissance, prospecting and mining; cutting, polishing, processing, refining and smelting of a mineral; a large-scale mineral right which is valid after the coming into force of the Act and these Regulations; and mine support services.⁶⁸

An application for any licence shall not be granted by the Cabinet Secretary-unless the applicant has submitted a plan outlining the proposals for the employment and training of Kenyans.⁶⁹

While these Regulations are well meaning and geared towards ensuring that the mining sector creates jobs, employment and results in specialized training for the Kenyan people, it is based on the assumption that locals have some base knowledge that can be built on to achieve the level of expertise required in the execution of the corresponding duties within the industry.

Exclusive reliance on the foreigners to create expertise through technology transfer may not yield the desired results. The Government must work with the local institutions of higher learning through sponsoring courses for specialized training and to gain experience. There is also

⁶⁵ *Mining (Employment and Training) Regulations, 2017*, Legal Notice No. 82, Laws of Kenya.

⁶⁶ (3) The Cabinet Secretary shall make regulations to provide for the replacement of expatriates, the number of years such expatriates shall serve and provide for collaboration and linkage with universities and research institutions to train citizens.

⁶⁷ *Mining (Employment and Training) Regulations, 2017*, Regulation 3.

⁶⁸ *Mining (Employment and Training) Regulations, 2017*, Regulation 4.

⁶⁹ *Mining (Employment and Training) Regulations, 2017*, Regulation 5(1).

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a need to ensure that the jobs offered are not only menial in nature since, left unsupervised, the foreign companies may not be willing to place local experts in critical positions within the entire mining value chain as required by the law. The Government must offer technical and financial support to its people in order to uplift them to levels where they can competitively take up key positions in the mining sector and specifically represent the interests of the Government and the country at large within these companies.

g) *Mining (Use of Assets) Regulations, 2017*

The *Mining (Use of Assets) Regulations, 2017*⁷⁰ were enacted by the Cabinet Secretary in exercise of the powers conferred by Section 149(6)⁷¹ of the Mining Act, 2016. These Regulations shall apply to holders of mining licences requiring them to maintain a complete, up to date and accurate register of all its immovable and movable assets.⁷²

These regulations, if fully enforced, can be a useful tool in fighting corruption and tax evasion by the mining companies as they seek to promote accountability and transparency on the income and expenses incurred by these companies. These Regulations, alongside other transparency and accountability measures and practices are useful for developing countries such as Kenya, where non-declaration or under declaration of profits by the multinationals has been happening. They can however work well where the authorities involved work with different stakeholders such as the revenue collecting agencies to get the actual figures.

3. Regulating the Mining Industry in Kenya: Challenges and Prospects

It is estimated that Africa hosts 30% of the earth's mineral reserves, including 40% of gold, 60% of cobalt, and 70% of platinum deposits, and produce about 30% of the world's gold, 70% of the world's platinum, 28% of the world's palladium, and 16% of the world's bauxite.⁷³ In addition, Africa also produces (yearly, in thousand metric tons) 205,056 of hard coal, 67,308 of nickel-

⁷⁰ *Mining (Use of Assets) Regulations, 2017*, Legal Notice No. 80 of 2017, Laws of Kenya.

⁷¹ The Cabinet Secretary shall prescribe Regulations on the use of the assets.

⁷² *Mining (Use of Assets) Regulations, 2017*, Regulations 3 & 4.

⁷³ Abuya, W.O., "Mining Conflicts and Corporate Social Responsibility in Kenya's Nascent Mining Industry: A Call for Legislation," In *Social Responsibility*, IntechOpen, 2018, pp. 61-81, at p.63. Available at <https://www.intechopen.com/books/social-responsibility/mining-conflicts-and-corporate-social-responsibility-in-kenya-s-nascent-mining-industry-a-call-for-l> [Accessed on 7/7/2019].

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bearing ores, and 29,174 of iron bearing ores, as well as 595,507 kg of gold-bearing ores.⁷⁴ The extractive or mining industries generally have long been touted as key to anchor ‘development’ or ‘economic growth’ to alleviate poverty in developing countries.⁷⁵

Despite this, African countries have largely exhibited low levels of development and poor standards of living.⁷⁶ This has been attributed to various factors including exploitative multinational corporations, lack of expertise and corruption, and African countries negotiating unfavourable mining development agreements, with the result that the Continent has received inadequate returns for its mineral wealth.⁷⁷

At the continental level, the *Africa Mining Vision*⁷⁸ is expected to address most of these challenges if not all.⁷⁹ Despite this Vision document, most of the African countries still struggle with making the mineral resources work for them, in uplifting the lives of their people.⁸⁰

⁷⁴ Ibid, p.63.

⁷⁵ Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.*, 9 (2013): 31, at p.33.

⁷⁶ African Union, *Assessment of the Mining Policies and Regulatory Frameworks in the East African Community for Alignment with the Africa Mining Vision*, p. 2. Available at <https://repository.uneca.org/bitstream/handle/10855/23538/b11580379.pdf?sequence=1> [Accessed on 7/7/2019].

⁷⁷ Ibid, p.2; Ezekwe sili, O.K., "Harnessing Africa's natural resources to fight poverty," *Daily Nation*, Wednesday April 15 2009. Available at <https://www.nation.co.ke/oped/opinion/440808-560566-gnl8o6z/index.html> [Accessed on 7/7/2019].

⁷⁸ African Union, *Africa Mining Vision: "Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development"*, (United Nations Economic Commission for Africa (ECA), February, 2009). Available at https://www.uneca.org/sites/default/files/PublicationFiles/africa_mining_vision_english.pdf [Accessed on 8/7/2019].

⁷⁹ This shared vision will comprise:

- i. A knowledge-driven African mining sector that catalyses & contributes to the broad-based growth & development of, and is fully integrated into, a single African market through:
 - a. Down-stream linkages into mineral beneficiation and manufacturing;
 - b. Up-stream linkages into mining capital goods, consumables & services industries;
 - c. Side-stream linkages into infrastructure (power, logistics);
 - d. communications, water) and skills & technology development (HRD and R&D);
 - e. Mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders; and
 - f. A comprehensive knowledge of its mineral endowment.

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Kenya is no exception as it has a number of mineral deposits albeit in smaller amounts, which, as already pointed out, have not contributed much to the country's GDP as would be expected. The communities are also yet to boast of any significant benefits from the mining activities going on within their regions.⁸¹

Notably, GDP from Mining in Kenya is estimated to have increased to 12527 KES Million in the fourth quarter of 2018 from 12313 KES Million in the third quarter of 2018. GDP from Mining

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- ii. A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities;
 - iii. A mining sector that has become a key component of a diversified, vibrant and globally competitive industrialising African economy;
 - iv. A mining sector that has helped establish a competitive African infrastructure platform, through the maximisation of its propulsive local & regional economic linkages;
 - v. A mining sector that optimises and husbands Africa's finite mineral resource endowments and that is diversified, incorporating both high value metals and lower value industrial minerals at both commercial and small-scale levels;
 - vi. A mining sector that harness the potential of artisanal and small-scale mining to stimulate local/national entrepreneurship, improve livelihoods and advance integrated rural social and economic development; and
 - vii. A mining sector that is a major player in vibrant and competitive national, continental and international capital and commodity markets.

⁸⁰ See generally, Abuya, W.O., "Mining Conflicts and Corporate Social Responsibility in Kenya's Nascent Mining Industry: A Call for Legislation," In *Social Responsibility*, IntechOpen, 2018; African Union, *Assessment of the Mining Policies and Regulatory Frameworks in the East African Community for Alignment with the Africa Mining Vision*, op cit.; Kimani, M., "Mining to profit Africa's people," *Africa Renewal* 23, no. 1 (2009): 4-5; Bush, R., "Conclusion: mining, dispossession, and transformation in Africa," In *Zambia, mining, and neoliberalism*, pp. 237-268. Palgrave Macmillan, New York, 2010. Available at

https://www.sahistory.org.za/sites/default/files/file%20uploads%20alastair_fraser_miles_larmer_zambia_mining_a_nbook4you.pdf#page=260 [Accessed on 8/7/2019]; Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.* 9 (2013): 31.

⁸¹ Ndemo, B., "Kenya's mineral resources could pull millions out of poverty," *Daily Nation*, Monday June 24 2019. Available at <https://www.nation.co.ke/oped/blogs/dot9/ndemo/2274486-5169428-990fwj/index.html> [Accessed on 3/7/2019]; Economic and Social Rights Centre (Hakijamii) (Kenya), *Titanium mining benefit sharing in Kwale County: HAKIJAMIIA comprehensive analysis of the law and practice in the context of Nguluku and Bwiti*, September, 2017. Available at <http://www.hakijamii.com/wp-content/uploads/2017/09/Titanium-mining-benefit-sharing.pdf> [Accessed on 8/7/2019]; cf. Base Titanium, "Response to Hakijamii's Draft Report on Base Titanium's Impacts on the Community," 25th August, 2017. Available at https://www.business-humanrights.org/sites/default/files/documents/Hakijamii%20Base%20Response%20Final%20-%202017%2008%2028_0.pdf [Accessed on 8/7/2019]; see also Masinde, J., "Are Kwale residents expecting too much?" *Daily Nation*, Tuesday February 12 2013. Available at <https://www.nation.co.ke/lifestyle/smartcompany/Are-Kwale-residents-expecting-too-much/1226-1690904-nb7rqyz/index.html> [Accessed on 8/7/2019].

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in Kenya averaged 8963.05 KES Million from 2009 until 2018, reaching an all-time high of 12906 KES Million in the first quarter of 2018 and a record low of 4195 KES Million in the first quarter of 2009.⁸² According to the *Mining and Minerals Policy, Sessional Paper No. 7 of 2016*, as at 2016, the sector was contributing 0.8 percent to gross domestic product (GDP) per annum. The contribution to GDP was expected to increase to three (3) percent by 2017 and ten (10) percent by 2030 according to the Medium Term Plan (MTP) II (2013-2017).⁸³

While these statistics paint a hopeful picture with the figures increasing over the last ten years, there is still a lot of room for not only growth in these figures but also positive contribution of the mining sector to the lives of the ordinary citizens especially those to be found within the localities where such mining takes place. Indeed, the discovery of such minerals as the titanium deposits products in the Coastal region gives hope to the expectation of a brighter future for the sector and country at large.⁸⁴ Reserves for Titanium and Niobium, both found in the Coast region, are projected to be worth Sh9 trillion, and Sh3.8 trillion for the estimated of 750 million barrels, according to Tullow Oil's 2017 projections.⁸⁵

As already stated, there are Regulations that were made by the Cabinet Secretary seeking to ensure that the mining activities do not only go on smoothly but also that they benefit the local communities even as they contribute to the national development agenda. These Regulations include: *Mining (Dealings in Minerals) Regulations, 2017*; *Mining (Licence and Permit) Regulations, 2017*; *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*; *Mining (State Participation) Regulations, 2017*; *Mining (Use of Local Goods and Services) Regulations, 2017*; *Mining (Employment and Training) Regulations, 2017*; and *Mining (Use of Assets) Regulations, 2017*.

The foregoing Regulations are meant to streamline the mining sector in the country by ensuring that some of the main provisions in the Mining Act 2016 are fully and efficiently implemented.

⁸² Trading Economics, "Kenya GDP from Mining," available at <https://tradingeconomics.com/kenya/gdp-from-mining> [Accessed on 3/7/2019].

⁸³ Republic of Kenya, *Mining and Minerals Policy, Sessional Paper No. 7 of 2016*, p. 1. Available at http://www.mining.go.ke/images/PUBLISHED_MINING_POLICY_-_Parliament_final_.pdf [Accessed on 8/7/2019].

⁸⁴ Michira, M., "The billions buried under Kenyan soil," 2nd May, 2017. Available at <https://www.standardmedia.co.ke/business/article/2001238312/the-billions-buried-under-kenyan-soil> [Accessed on 8/7/2019].

⁸⁵ Ibid.

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Notably, some of these Regulations such as the *Mining (Use of Local Goods and Services) Regulations, 2017*; *Mining (Employment and Training) Regulations, 2017* are meant to directly empower the local communities by promoting job creation and market for locally produced goods.

While these Regulations mean well for the local communities and local industries, a lot still needs to be done to ensure that the environment favours the implementation of such Regulations. For instance, the Regulations on use of local goods and services require that the holder of a licence, its contractors and sub-contractors shall, to the maximum extent possible, when purchasing goods and procuring services required with respect to operations or any-activity to be conducted under a licence, give first priority to- materials and goods made in Kenya; and services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans: *provided that such goods and services are equal in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.*⁸⁶ This proviso stands to defeat the purpose of these Regulations because, as it may be proved through statistics, there are many factors of production that may, and have indeed, been making locally produced goods more expensive when compared to imported ones. Thus, as long as investors can prove that they can source such goods and/or services at more competitive prices or those with better quality, they will easily bypass the requirements of these Regulations. The manufacturing sector and other factors affecting the local production of goods and services may thus need to be fixed before these Regulations can effectively be implemented.

As already pointed out elsewhere in this paper, the Regulations on employment and Training assume that locals have some base knowledge that can be built on to achieve the level of expertise required in the execution of the corresponding duties within the industry. Exclusive reliance on the foreigners to create expertise through technology transfer may not yield the desired results. There is need for the government to do much more through the local institutions of higher learning through sponsoring courses to build capacity and even having the students/professionals taking such courses leaving the country for specialized training and to gain experience. Such candidates would then be ripe to learn more through any exchange and

⁸⁶ *Mining (Use of Local Goods and Services) Regulations, 2017*, Regulation 5.

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technology transfer programmes set up under the Mining (*Employment and Training*) Regulations, 2017.

The lack of proper guidelines or failure to implement any existing regulations and guidelines can lead to conflicts as has been witnessed in other African countries such as the Democratic Republic of Congo, where the locals feel sidelined as far as mining benefits sharing is concerned.⁸⁷ For instance, there have been queries on how to manage expectations of the local people living within the mining areas in order to avert possible conflicts in future.⁸⁸ There is a need for ensuring that the constitutional principles of public participation, inclusive decision-making, environmental protection and conservation, respect for human rights and respect for occupational health and safety are taken into account when engaging investors in the mining sector in order to avoid any potential conflicts as well as ensuring that these natural resources benefit communities as well.⁸⁹

These are just few examples of the many challenges that are likely to arise in the implementation of these Regulations and which therefore may need to be addressed before the mining sector can benefit from the well-meaning Regulations as enacted by the Cabinet Secretary.

Unless capacity is built across all stages of mineral extraction right from minerals agreements' negotiations all the way to the actual extraction of these resources, then Africa, including Kenya, will continue to lag behind in development despite its rich deposits in minerals.

⁸⁷ Matthysen, K., Montejano, A. Z., & International Peace Information Service (Antwerp), *'Conflict Minerals' initiatives in DR Congo: Perceptions of local mining communities*. Antwerp: International Peace Information Service, 2013. Available at https://reliefweb.int/sites/reliefweb.int/files/resources/20131112_HU.pdf; Zalan, K., "Tracing conflict gold in the Democratic Republic of the Congo," Public Radio International, June 23, 2017. Available at <https://www.pri.org/stories/2017-06-23/tracing-conflict-gold-democratic-republic-congo>; BSR, "Conflict Minerals and the Democratic Republic of Congo: Responsible Action in Supply Chains, Government Engagement and Capacity Building," May 2010. Available at https://www.bsr.org/reports/BSR_Conflict_Minerals_and_the_DRC.pdf [Accessed on 8/7/2019].

⁸⁸ Masinde, J., "Are Kwale residents expecting too much?" *Daily Nation*, Tuesday February 12 2013. Available at <https://www.nation.co.ke/lifestyle/smartcompany/Are-Kwale-residents-expecting-too-much-1226-1690904-nb7rqyz/index.html> [Accessed on 8/7/2019]; Mulehi, A., "How it looks to live near mining sites – Kwale," (Natural Resources Alliance of Kenya, Oct 17, 2018). Available at <https://kenra.or.ke/how-it-looks-like-to-live-near-mining-sites-kwale/> [Accessed on 8/7/2019].

⁸⁹ *Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited* [2001] eKLR, Civil Case 97 of 2001; *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); *In the Matter of the National Land Commission* [2015] eKLR, Advisory Opinion Reference 2 of 2014.

4. Conclusion

The mining sector in Kenya is relatively young when compared to other countries in the Continent. There are still a lot of challenges that need to be addressed ranging from how the country can safeguard its own interests against foreign investors, how its people can benefit from the accruing benefits and how it can build capacity for future purposes. For a long time, the sector was governed by laws that had been enacted during the colonial times. There have been attempts at modernising the laws to make the country attractive to the foreign investors while safeguarding the country's interests. The Mining Regulations gazetted after the enactment of the Mining Act 2016 are part of these efforts. This paper has highlighted these regulations and how the same can contribute to the vision of making the mining sector a bigger contributor to the country's development agenda.

The legal framework discussed above projects a new vision for Kenya. It reflects an ideal in which Kenya and its people can maximally benefit from the exploitation of minerals. It is an ideal that is achievable.

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