



# ICLG

The International Comparative Legal Guide to:

## **Mining Law 2018**

**5th Edition**

A practical cross-border insight into mining law

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# Kenya

Kieti Advocates LLP

Clarice Wambua



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## 1 Relevant Authorities and Legislation

### 1.1 What regulates mining law?

Kenyan Mining Law is regulated primarily by the Mining Act, 2016 (the “**Mining Act**”). The Mining Act came into force on 27 May 2016 and repealed the 1940 Mining Act (“**Repealed Mining Act**”), the Trading in Unwrought Precious Minerals Act and the Diamond Industry Protection Act. The Mining Act applies to minerals that are specified in the Act and these have been classified into various groups including construction and industrial minerals, precious stones, precious metals, semi-precious stones, bases and rare metals, fuel minerals and gaseous minerals.

### 1.2 Which Government body/ies administer the mining industry?

The mining industry is administered by the Ministry of Mining which is headed by a Cabinet Secretary. The Cabinet Secretary takes over the functions previously vested in the Commissioner of Mines and Geology under the Repealed Mining Act. A key body established under the Mining Act to assist the Cabinet Secretary is the Mineral Right Board and its key function is to advise the Cabinet Secretary in his decisions relating to matters such as issuing and revocation of permits and licences, the demarcation of exploration areas and the categorisation of minerals.

### 1.3 Describe any other sources of law affecting the mining industry.

A person that holds a prospecting or mining licence must observe other laws including those relating to the contract, environment, health and safety, water and land.

## 2 Mechanics of Acquisition of Rights

### 2.1 What rights are required to conduct reconnaissance?

Reconnaissance is defined in the Mining Act as “any operations and words to carry out the non-intrusive search for mineral resources by geophysical surveys, geochemical surveys, photo geological surveys or other remote sensing techniques and surface geology in connection therewith, but excludes drilling and excavations”.

The Mining Act provides for three main types of operations: (a) large-scale operations; (b) small-scale operations; and (c) artisanal mining operations. A small-scale operation is one that, among other things, (i) has a prospecting area that does not exceed 25 contiguous blocks, (ii) does not employ specialised prospecting, mechanised mining technologies or chemicals, or (iii) does not involve an investment or expenditure which exceeds such amount as may be prescribed by the Cabinet Secretary. Artisanal mining is defined as traditional and customary mining operations using traditional or customary ways and means. The operations will be considered large-scale operations if they are not classified as small-scale or artisanal mining operations. There is no requirement for technical capacity, expertise, experience and financial resource by a person that wants to obtain a mineral right in respect of small-scale operations or artisanal mining operations. Unless otherwise indicated, the responses in this guide relate to large-scale operations.

In order to conduct a reconnaissance for a large-scale operation an applicant must apply for a reconnaissance licence to the Cabinet Secretary. The applicant must have adequate financial resources, technical competence and mining industry experience and must have a local product and local employment plan. The licence is granted for a period not exceeding two years and is not renewable. Reconnaissance must commence within three months of granting the licence.

### 2.2 What rights are required to conduct exploration?

The Mining Act defines prospecting operations as operations carried out to search for and define the extent of a mineral deposit and to determine its economic value. In order to conduct prospecting operations in a large-scale operation, an applicant must apply for a prospecting licence to the Cabinet Secretary. The applicant must submit an environmental rehabilitation and restoration plan and have adequate financial resources, technical competence and mining industry experience as well as a local product and local employment plan. The licence is granted for a period not exceeding three years. Prospecting must commence within three months of grant of the licence or period specified in the approved programme for prospecting operations. The holding of a prospecting right gives exclusivity to the holder in an application for a mining right.

### 2.3 What rights are required to conduct mining?

A person wishing to conduct mining operations in a large-scale operation must apply for a mining licence to the Cabinet Secretary. The applicant must satisfy the Cabinet Secretary that it has adequate

financial resources, technical competence and mining industry experience and that the project is feasible based on the feasibility study. In addition, the applicant must have obtained an environmental impact assessment licence and a social heritage assessment and environmental management plan. The Cabinet Secretary must also approve the applicant's plans relating to the procurement of local goods and services and the employment and training of Kenyan citizens. The length of the mining licence is 25 years or the forecast life of the mine, whichever is shorter. The holder of a mining licence whose proposed investment exceeds USD 500 million may further enter into a mineral agreement with the Cabinet Secretary.

#### **2.4 Are different procedures applicable to different minerals and on different types of land?**

Different procedures are applicable to petroleum as explained in question 2.5. There are also different procedures in respect of what are described as strategic minerals. The Mining Act presently only classifies radioactive minerals as strategic and such minerals can only be explored or mined by the State's National Mining Corporation on its own or in association with any other person. As noted in question 2.1 above, different procedures apply depending on the size of the mining operation. There are no different procedures for different types of land.

#### **2.5 Are different procedures applicable to natural oil and gas?**

Yes. Operations relating to the exploration, development, extraction, production, separation and treatment, storage, transportation and sale or disposal of petroleum are regulated under the Petroleum (Exploration and Production) Act (Cap 308).

### **3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions**

#### **3.1 What types of entity can own reconnaissance, exploration and mining rights?**

A person shall not be granted a permit in relation to a small-scale operation unless that person is a citizen of Kenya or a body corporate where no less than 60% of the shareholding is held by citizens of Kenya. Further, a permit for artisanal mining can only be granted to a person who (a) is a citizen of Kenya, (b) has attained the age of majority, and (c) may be a member of an artisanal mining cooperative association or group. In the case of a large-scale operation, the applicant should be a company that is registered and established in Kenya.

#### **3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?**

The entity owning the mineral right cannot be a foreign entity, but it can be owned directly or indirectly by a foreign entity. There are no special rules for foreign applicants.

#### **3.3 Are there any change of control restrictions applicable?**

The Mining Act requires that the prior consent of the Cabinet

Secretary be obtained for a change in shareholding in the mining company exceeding 25%. It is not clear under the Mining Act whether the consent of the Cabinet Secretary will be required in respect of indirect control in ultimate holding companies.

#### **3.4 Are there requirements for ownership by indigenous persons or entities?**

As noted in question 3.1 above, there is a requirement for ownership by Kenyan citizens of at least 60% of a mining company that is engaged in small-scale mining operations. A mining company having a right in respect of a large-scale operation may be required to list within three years after commencement of production at least 20% of its shareholding at a local stock exchange once the Cabinet Secretary prescribes the thresholds for listing. An application can be made by the mining company to the Cabinet Secretary to extend the time or to propose an alternative mechanism that can allow it to achieve local equity participation.

#### **3.5 Does the State have free carry rights or options to acquire shareholdings?**

The State has the right to acquire 10% free carried interest in the share capital of the mining company of a large-scale mining operation or a mining operation relating to strategic minerals without paying any financial contribution. The State also acquires further interests at arm's length prices. The State's right to a free carried interest will not apply to any right that has been granted prior to the commencement of the Mining Act.

### **4 Processing, Refining, Beneficiation and Export**

#### **4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?**

The mining company in the conduct of processing, refining and treatment operations must give preference to materials and products made in Kenya, to services offered by members of the community and Kenyan citizens and to Kenyan owned businesses. Further, the Cabinet Secretary is expected to make regulations to govern the value addition of minerals.

#### **4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?**

No mineral may be exported except in accordance with an export permit granted by the Cabinet Secretary. The application for an export permit is made to the Director of Mines. There are also restrictions on the export of strategic minerals as noted in questions 2.4 and 3.5.

### **5 Transfer and Encumbrance**

#### **5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?**

There are restrictions on the transfer of rights to conduct reconnaissance, exploration and mining rights. The prior consent of the Cabinet Secretary is required where a person seeks to assign, transfer, mortgage or trade such right.

## 5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

It is possible to mortgage the rights to conduct reconnaissance, exploration and mining rights. The prior consent of the Cabinet Secretary is required as noted in question 5.1 above.

## 6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

### 6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

The right to conduct prospecting operations can be subdivided, but the right to conduct mining operations cannot. According to the Mining Act, an agent of the holder of a prospecting licence may exercise the rights of the holder of the licence subject to any limitations on the power of the agent contained in the instrument of appointment.

### 6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

It may be possible to hold an undivided share in the right to prospect and mine by way of a partnership or joint venture arrangement.

### 6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The holder of a right to prospect or mine is not entitled to prospect or mine for secondary minerals. However, such holder may apply to have the newly discovered mineral or minerals included in the prospecting or mining licence. The person that makes the discovery has the first right of refusal to apply for a mineral right in the area of discovery.

### 6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The holder of a prospecting right or mining right does not have any entitlement to residues that existed on the land prior to the holder obtaining a prospecting right or a mining right.

### 6.5 Are there any special rules relating to offshore exploration and mining?

There are no special rules relating to offshore prospecting and mining.

## 7 Rights to Use Surface of Land

### 7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The holder of a right to conduct reconnaissance, prospecting or

mining does not have an automatic right to use the surface of land. If the land is private or community land then consent must be obtained from the landowner or lawful occupier or relevant administrative body. Where the consent is unreasonably withheld or the Cabinet Secretary considers that withholding it is contrary to the public interest, the Cabinet Secretary may take steps to compulsorily acquire the land and vest it in the State.

### 7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The holder of a reconnaissance right, prospecting right or mining right has duties towards the landowner or lawful occupier in terms of producing evidence of such right if required to do so by the landowner or lawful occupier and to compensate that owner or lawful occupier for loss or damage suffered because of the conduct of exploration or mining activities.

### 7.3 What rights of expropriation exist?

Please see our response to question 7.1 above.

## 8 Environmental

### 8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

A person conducting prospecting or mining operations must comply with the requirements of the Environmental Management and Coordination Act, 1999 and this involves undertaking an environmental impact assessment (“EIA”) study and submitting a report to the National Environmental Management Authority (“NEMA”). NEMA issues an EIA licence if it finds the EIA study and report adequate. In addition, the right to use water is governed by the Water Act, 2016.

### 8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

The holder of a prospecting or mining right must comply with its site mitigation and rehabilitation or mine-closure plan that was approved by the Cabinet Secretary prior to being granted an exploration or mining right. Such holder must also ensure that the seepage of toxic waste into streams, rivers, lakes and wetlands is avoided and that disposal of any toxic waste is done in the approved areas only.

### 8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The holder of a mining right must notify the Cabinet Secretary within six months of ceasing the mining operation. Upon ceasing such operation, the land must be restored to its original status or to an acceptable condition as close as possible to its original state.

### 8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Zoning or planning requirements may be applicable based on the

location of the mining area. In some cases, the area may be in a town, municipality, forest or national park and an application to allow for prospecting or mining operations in that area may be required.

## 9 Native Title and Land Rights

### 9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

In the case of community land, the reconnaissance or prospecting operations that involve excavation and drilling must be undertaken with the prior consent of the authority that administers and manages the community land or the county government where the community land is unalienated. Consent is deemed to have been given where the parties enter into an agreement allowing for the conduct of such operations or for the payment of adequate compensation. Further, the holder of a mining licence must sign a community development agreement with the community where the mining operations are to be carried out.

## 10 Health and Safety

### 10.1 What legislation governs health and safety in mining?

Health and safety in mining is governed by the Mining (Safety) Regulations and the Occupational Health and Safety Act, 2007. The Mining (Safety) Regulations were enacted under the Repealed Mining Act, but remain in force to the extent they are consistent with the Mining Act and until specifically revoked by the Cabinet Secretary.

### 10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The applicable legislation imposes extensive obligations upon owners, employers, employees and managers in relation to health and safety including mine construction requirements, handling explosives, establishing committees, records maintenance, and conducting enquiries and compliance assessments.

## 11 Administrative Aspects

### 11.1 Is there a central titles registration office?

There is a registry system in place and the Ministry of Mining is in the process of setting up a computerised mining cadastre. Once in place, the computerised mining cadastre and registry system shall include a transactional facility to enable applications for granting and renewal of mineral rights to be submitted electronically through the website of the Ministry of Mining.

### 11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

A decision or order of the Cabinet Secretary can be appealed within 30 days to the High Court.

## 12 Constitutional Law

### 12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The Kenyan Constitution provides that any transaction involving the grant of a right or concession for the exploitation of minerals must be ratified by Parliament. The enabling legislation is the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016 which requires that a mineral agreement whose value exceeds USD 500 million must be ratified by Parliament.

### 12.2 Are there any State investment treaties which are applicable?

The Kenyan Constitution guarantees the sanctity of private property such that the State cannot appropriate property or investments without promptly paying compensation. The Foreign Investment Protection Act also guarantees against expropriation of private property by the State. Kenya has concluded bilateral investment treaties/investment promotion and protection agreements with countries such as the United Kingdom, France, Finland, Germany, Italy, the Netherlands, Switzerland, China, Libya, the Islamic Republic of Iran and Burundi. These agreements generally prohibit expropriation except for a public purpose and against prompt, adequate, effective, fair compensation.

## 13 Taxes and Royalties

### 13.1 Are there any special rules applicable to taxation of exploration and mining entities?

There are extensive special rules applicable to taxation of prospecting and mining companies including in relation to capital expenditure deductions and these are set out in the Income Tax Act, Cap 470.

### 13.2 Are there royalties payable to the State over and above any taxes?

There are royalties payable to the State over and above the taxes according to prescribed rates set by the Cabinet Secretary. Mineral samples for testing are not subject to royalties.

## 14 Regional and Local Rules and Laws

### 14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

There are local county laws which may need to be complied with by a mining company. For example, these laws could relate to land use restrictions or conditions or consents required in relation to unalienated community land.

### 14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

There are rules relating to the East African Community that govern

rules of origin and custom restrictions that may need to be complied with by a prospecting or mining company.

## 15 Cancellation, Abandonment and Relinquishment

### 15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The holder of a mining licence is entitled to give notice of any intention to cease or suspend mining operations or curtail production. The notice period is six months for cessation of a mining operation, three months for suspension of the operation, or one month for curtailment in production.



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### 15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

There are no obligations upon the holder of a prospecting right or a mining right to relinquish part of the prospecting or mining area after a certain period.

### 15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The State through the Cabinet Secretary can suspend or cancel a prospecting or mining right because of failure to comply with the licence conditions. The holder of the prospecting or mining right must be given an opportunity to make representations prior to suspension or cancellation.



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