

STRATHMORE

MINING LAW

Commentaries on Kenya's framework legislation



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GENDER

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Abstract

The Mining Act has also been heralded as presenting various opportunities for gender equity, especially in comparison to previous legislations which did not consider the exclusion of women and other vulnerable groups in the extractives value chain. This chapter defines gender as the asymmetrical relationship between men and women in the spheres of production and reproduction inside and outside the household, and provides an in-depth review of the Mining Act from a gender perspective. It considers the implications of relevant provisions of the Mining Act on the challenges that women face in the mining sector, as well as opportunities that women can leverage to obtain the sector's full economic benefit. The chapter highlights that the Mining Act and surrounding regulatory framework contain key provisions that if well implemented, would provide numerous entry points for women to get involved in the sector in ways that allow them to overcome challenges and leverage opportunities. This includes entry points for full participation in mining corporations' boardrooms, as well as at the mining field, in mineral production, and through the entire value chain of the industry.

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1 Introduction

It is now widely accepted that human development, if not gendered, is endangered.¹ As such, from the Millennium Development Goals (MDGs) to the Sustainable Development Goals (SDGs), gender equality has been the clarion call of not only the twentieth, but also the twenty-first century. Whereas there have been numerous gains for women in this quest for gender equality, the stark reality is that women still face exclusion, unfairness, denial of equal opportunity, active discrimination and lack of safety in a number of facets of life. The mining sector is among those which still bear the image of being a masculine world, and women have historically been exposed to greater risks and captured fewer of the benefits of their engagement with this sector.² In Kenya, for example, men have been the main beneficiaries of earnings from mining, and though there is a desire amongst women to engage in the sector, women have not historically been empowered to fully exploit and benefit from the sector's high economic potential.³

Ensuring total empowerment, inclusion, equity, and affirmative investment in women in the extractives sector requires an enabling regulatory framework and policy environment at both national and county levels.⁴ On 6 May 2016, President Uhuru Kenyatta assented to the Mining Act (the Mining Act)⁵ in a bold step towards the creation of this enabling environment. The Mining Act repealed Kenya's archaic Mining Act (Repealed Mining Act),⁶ the Trading in Unwrought Precious Metals Act,⁷ and the Diamond Industry Protection Act.⁸ The passing into law of the Mining Act was met with widespread excitement, and the event was described as a watershed moment for Kenya's mining industry. According to its preamble, the Mining Act was passed to give effect to the Constitution of Kenya

¹ United Nations Development Programme (UNDP), *Human development report 1995*.

² Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, *Encyclopedia of gender and mining: Key initiatives, best practices and actors*, 2014.

³ Mwakumanya MA, Maghenda M, and Huma H, 'Socio-economic and environmental impact of mining on women in Kasigau mining zone in Taita Taveta County' *Journal of Sustainable Mining*, 15 (2016), 201; Amutabi M and Lutta-Mukhebi M, 'Gender and mining in Kenya: The case of Mukibira mines in Vihiga District' *Jenda: A Journal of Culture and African Women Studies* (2001).

⁴ UN Women, *Annual report*, 2015 <https://daogewe.org/index.php/publications/reports/79-annual-rep-2015-18-aug-2016-3/file> on 26 June 2018.

⁵ No 12 of 2016.

⁶ Chapter 306, Laws of Kenya (repealed).

⁷ Chapter 309, Laws of Kenya (repealed).

⁸ Chapter 310, Laws of Kenya (repealed).

(2010 Constitution),⁹ and provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes. The Mining Act has been described as among the most progressive mining legislations in Africa and the world, and seeks to achieve the right balance between investor interest and public interest, as well as aligning the country's mining industry with the industry global trends and best practices.¹⁰

The Mining Act has also been heralded as presenting various opportunities for gender equity, especially in comparison to previous legislations which did not consider the exclusion of women and other vulnerable groups in the extractives value chain.¹¹ This chapter defines gender as the asymmetrical relationship between men and women in the spheres of production and reproduction inside and outside the household,¹² and provides an in-depth review of the Mining Act from a gender perspective. It considers the implications of relevant provisions of the Mining Act on the challenges that women face in the mining sector, as well as opportunities that women can leverage to obtain the sector's full economic benefit. The chapter highlights that the Mining Act and surrounding regulatory framework contain key provisions that if well implemented, would provide numerous entry points for women to get involved in the sector in ways that allow them to overcome challenges and leverage opportunities. This includes entry points for full participation in mining corporations' boardrooms, as well as at the mining field, in mineral production, and through the entire value chain of the industry.

2 The role of women in the mining industry

Women interact with the mining sector in a variety of ways. As participants in large-scale mining (LSM) activities, as participants in artisanal and small-scale mining (ASM) activities, and as members of the host communities in which mining activities take place. In the LSM sector, their involvement is low, in comparison to their involvement in the ASM sector. Though women's direct participation in ASM varies throughout the world, the percentage of female artisanal miners is the

⁹ *The Constitution of Kenya* (2010).

¹⁰ Ministry of Mining, *Mining and Minerals Policy: The Popular Version*, 2016, 5.

¹¹ UN Women, *Opportunities for women in the legal and regulatory frameworks on mining*, 2016.

¹² Sigot A, 'Discourse on gender and natural resource management' in Sigot A, Thrupp LA and Green J (eds), *Towards common ground: Gender and natural resource management in Africa*, African Centre for Technology Studies and World Resources Institute, 1995, 2.

highest in Africa. Participation rates here range between 40 and 50 percent,¹³ and in some estimations, between 40 and 100 percent of the workforce in ASM mining operations is female.¹⁴ Despite ASM being characterised by the employment of rudimentary techniques for mineral extraction, often operated under hazardous, labour-intensive, highly disorganised and illegal conditions, it is widely embraced by the participating women as it offers them an opportunity to reduce poverty.¹⁵ ASM is also attractive as it bears the potential for higher earnings compared to other economic activities such as agriculture, and it is viewed as having lower barriers to entry.¹⁶

Whereas ASM communities around the world are diverse, and the women within these communities also vary; the similarity worldwide is that the women tend to be engaged in specific roles throughout the world. Typically, they earn less than their male counterparts and carry out ancillary roles as labourers (for example as panners and ore carriers), as providers of goods and services (such as cooking and marketing), and are often responsible for domestic chores.¹⁷ Further, women are less commonly, concession owners, mine operators, dealers and buying agents, and equipment owners.¹⁸ Men, on the other hand, have tended to dominate employment and income opportunities in ASM. This division of roles caused by patriarchal power structures, discriminatory practices and prevailing concepts of gender roles has been detrimental to women, as the roles they have access to are those more vulnerable to the industry's negative social and environmental externalities.¹⁹

In Kenya, the activities of women in mining have not been thoroughly researched and documented.²⁰ However it is widely acknowledged that the numerous small and isolated deposits of minerals scattered in different parts of the country are often exploited through ASM, and women play a central role in the mining activities.²¹ A 2001 study of women in the Mukibira gold-mines in western

¹³ Hinton J, Veiga M and Beinhoff C, 'Women and artisanal mining: Gender roles and the road ahead' in Hilson G (Ed), *The socio-economic impacts of artisanal and small-scale mining in developing countries*, AA Balkema, Swets Publishers, Netherlands, 2003.

¹⁴ International Labour Organisation (ILO) and International Training Centre (ITC), *Extractive industries - A case study of women in mining in Sierra Leone*.

¹⁵ Hinton J, Veiga M and Beinhoff C, 'Women and artisanal mining'.

¹⁶ Adam Smith International (ASI) and International Women in Mining, *Women in mining: Can a mining law unlock the potential of women?* 2017.

¹⁷ Hinton J, Veiga M and Beinhoff C, 'Women and artisanal mining', 151.

¹⁸ Hinton J, Veiga M and Beinhoff C, 'Women and artisanal mining'.

¹⁹ GIZ, *Encyclopedia of gender and mining: Key initiatives, best practices and actors*, 2015.

²⁰ Amutabi M and Lutta-Mukhebi M, 'Gender and mining in Kenya'.

²¹ UN Women, *Opportunities for women in the legal and regulatory frameworks on mining*.

Kenya indicates that women have been engaged in panning for hundreds of years.²² A more recent study of women in Taita-Taveta observed that women's interest in the industry has not waned as demonstrated by increasing engagement in the sector despite the lack of formal training, equipment or licences to undertake mining activities.²³ These women are driven by low income and high levels of poverty and they work mostly as low paid casual workers in the mining processes and mineral dealers with no legal mining rights (*Zururas*), and as marketing agents or brokers.²⁴ These studies lend credence to the Kenya Mining and Minerals Policy (Mining Policy)²⁵ observation that women are increasingly getting involved in the extractives industry especially at the artisanal level, hence calls for appropriate laws to ensure that women's experience as artisanal miners is more positive.

Unlike in the case of ASM, women worldwide work throughout the entire value chain of LSM - from prospecting to marketing and selling, and in a vast array of positions in LSM corporations. Nonetheless, estimates suggest that women occupy approximately only ten percent of jobs in the LSM sector, and even fewer women work directly in the mines.²⁶ At the helm of leadership in LSM corporations, only 5 percent of board positions in the top 500 globally listed mining corporations are held by women.²⁷ These dismal figures are a by-product of various factors. In many cases, lower levels of female education especially in the technical skills required for mining coupled with gender biased recruitment and employment policies and restricted career development opportunities for women means that formal employment positions in the sector are mainly taken by men.²⁸ In addition to this, physical conditions in the mines are not gender-friendly, making it a difficult work environment for women, and socio-cultural norms and gender stereotypes limit access to land and other productive resources hindering women's equal participation in the sector.²⁹

LSM has been referred to as a 'mixed blessing' for women, as it has the transformative power to generate new economic opportunities. However, without

²² Amutabi M and Lutta-Mukhebi M, 'Gender and mining in Kenya'.

²³ Mwakumanya MA et al, 'Socio-economic and environmental impact of mining on women in Kasigau mining zone in Taita Taveta County', 197 - 204.

²⁴ Mwakumanya MA et al, 'Socio-economic and environmental impact of mining on women in Kasigau mining zone in Taita Taveta County'.

²⁵ Ministry of Mining, *Mining and Minerals Policy*, Sessional Paper No 7 of 2016.

²⁶ ASI et al, *Women in mining*.

²⁷ *Mining for talent: A study of women on boards in the mining industry*, 2013.

²⁸ ASI et al, *Women in mining*.

²⁹ ASI et al, *Women in mining*; ILO and ITC, *Extractive industries*.

proper checks and balances, it may enlarge gender disparities in economic opportunities.³⁰ As the business case for bringing women into the sector becomes more entrenched, both Government and private sector initiatives to address gender inequalities in the industry are increasing in number and importance.³¹ There is, however, a dearth of data in Kenya on the specific involvement of women in LSM in terms of the number of women in the sector, positions held and benefits (if any) received. Instead, the linkage between women and LSM is more widely researched in considerations of women as members of mining host communities. In this case, studies show that women are affected by the deterioration of social, cultural, economic, and physical well-being of local populations due to the building of large-scale mines.³² Studies also show that their voices are not heard in decision-making.³³

From the foregoing, it is clear that women face significant challenges in their various interactions with the mining sector. As appropriate mining laws are amongst key enabling factors with the potential to 'help to unlock the potential of women in mining',³⁴ the next part of this chapter turns to examining the Mining Act and the surrounding policy and regulations thereunder. This analysis highlights the extent to which the Mining Act has the potential to enable a more positive experience for women in the mining industry, whether as members of host communities, or in the ASM or LSM sector.

3 The Mining Act: Gender considerations

3.1 Background to the Mining Act

With regards to gender, the Mining Act is informed by provisions on gender equity set out in the 2010 Constitution. The 2010 Constitution espouses equity,

³⁰ 'Andreas Kotsadam: Why large scale mining in Africa is a mixed blessing for women' *World Economic Forum Blog*, 01 July 2015 <https://www.weforum.org/agenda/2015/07/why-large-scale-mining-in-africa-is-a-mixed-blessing-for-women/> on 26 June 2018.

³¹ See ASI et al, *Women in mining* where it is argued that this is not yet a costed business case which means the financial benefits are not yet globally accepted.

³² See for example, Action Aid et al, *Coal mining disrupts people's livelihoods in Mui Basin, Kenya*, 2015.

³³ Omila DO, *Gender dimensions and implications of coal mining in the Mui Basin of Kitui County, Kenya*, Centre for Governance and Development, 2015, 12.

³⁴ ASI et al, *Women in mining*; Li Zungu, 'Women in the South African mining industry: An occupational health and safety perspective' Inaugural Lecture, 20 October 2011, explains that in South Africa, the history of women in mining has noteworthy legal genesis which has arisen from a number of landmark legal developments highlighting the important role law plays.

social justice, equality, non-discrimination, and protection of marginalised groups as key national values and principles of governance.³⁵ It also places an obligation on the State to enact and implement legislation that protects the fundamental rights and freedoms of citizens in accordance with international obligations, and also ensure that State organs and public officers address the needs of vulnerable groups within society, including women.³⁶ All public bodies and mechanisms established under the Mining Act for the effective and efficient utilisation of mineral resources should, in carrying out their respective mandates, fulfil these constitutional gender equity obligations. Further to this, in the appointment of State officers, the constitutional two-thirds gender rule has to be adhered to.³⁷ Thus, although the Mining Act is gender-neutral on the composition of persons to be appointed in the National Mining Corporation (an entity for Government participation in mining investments), the Minerals and Metal Commodity Exchange (an entity to facilitate mineral trade transactions), and the Mineral Rights Board (an entity instituted to award and supervise mining licences), one-third of the representation in these bodies must be of either gender as stipulated by the 2010 Constitution.³⁸

The Mining Act has also been enacted in a gender-friendly policy environment. The guiding principles of the Mining Policy include a goal of ensuring access to justice, gender equity and inclusiveness, with an objective to provide a framework for gender mainstreaming.³⁹ The Mining Policy recognises that women are disadvantaged in access to, and control over resources, productive assets, participation in decision-making processes and access to information technology and limited knowledge of enterprise development in relation to mining activities.⁴⁰ The Mining Policy also acknowledges that women are often overlooked by initiatives and development programs directed at transforming the mining sector, and commits the Government to further the issues of women in mining by

³⁵ Article 10 (2) (b), *Constitution of Kenya*.

³⁶ Article 21 (3) and (4), *Constitution of Kenya*.

³⁷ According to Article 27 (8), *Constitution of Kenya*, the State is to take measures to ensure that not more than two thirds of the members of elective and appointive bodies shall be of the same gender. The Supreme Court issued an *Advisory Opinion* No 2 of 2012 on the attainment of the two-thirds gender rule, with majority noting that whereas for elective representation what is required is progressive realisation of the gender-equity principle, the rule is immediately achievable in the case of appointive bodies especially where membership is subject to specific and clear gender prescriptions.

³⁸ See Part V, *Mining Act* which sets out these mining institutions and bodies; See also the *Mining (Licence and Permit) Regulations*, Legal Notice No 87 of 2017, that provide more details on the *Mineral Rights Board*, and the *Mining (National Mining Corporation) Regulations*, Legal Notice No 150 of 2017, which provide more details on the National Mining Corporation.

³⁹ Section 3, *Minerals and Mining Policy*.

⁴⁰ Section 2.7, *Minerals and Mining Policy*, 8.

developing and implementing frameworks, structures and mechanisms that ensure equitable participation, ownership and decision-making value chains by women.⁴¹

Various initiatives have been introduced in line with these provisions of the Mining Policy, to enhance the experience of women in the mining sector. These initiatives include the setting up of the offices of gender officers in the Ministry of Mining to ensure gender is mainstreamed in all aspects of the Ministry of Mining's operations. In addition to this, women in mining also stand to benefit from other Government policies such as the 30 percent procurement rule,⁴² and financing initiatives such as the Women Enterprise Fund, through which they can access business opportunities and address financing challenges, respectively.⁴³

3.2 Women in artisanal and small-scale mining

Whereas the Mining Act does not mention women explicitly, it contains numerous provisions that have a bearing on the status of women in the industry and that further the gender-friendly vision of the 2010 Constitution and the Mining Policy. For example, the recognition of ASM miners under the Mining Act means that women, who comprise a large percentage of this group of miners, are no longer classified as illegal miners or operating outside the law.⁴⁴ Similarly, the issuance of mineral dealers permits allow women to buy and sell minerals locally, without being considered illegal dealers.⁴⁵ These provisions are likely to enable women in ASM to receive permits to freely engage in artisanal mining activities. Women are also more likely to be protected from displacement from their mining activities by larger corporations, as the Mining Act now requires the designation of certain areas of land as reserved exclusively for small-scale and artisanal operations.⁴⁶ However,

⁴¹ Section 2.7, *Minerals and Mining Policy*, 8.

⁴² Under the Access of Government Procurement Opportunities (AGPO) Programme, thirty percent of Government tenders and contracts are to be given to the youth, women and persons with disability without competition from established firms.

⁴³ 'UN Women Kenya: Women in mining explore opportunities to grow their businesses' <http://daogewe.org/index.php/blogs-k2/item/611-women-in-mining-explore-opportunities-to-grow-their-businesses> on 26 June 2018.

⁴⁴ Section 92 - 100, *Mining Act* sets out provisions for the ease of operations of artisanal miners such as provisions on the establishment of county offices, the issue of artisanal mining permits, and the establishment of artisanal mining committees; *The Draft Mining (Licensing) Regulations*, 2017.

⁴⁵ Section 164, *Mining Act*; See also the *Mining (Dealings in Minerals) Regulations*, Legal Notice No 88 of 2017.

⁴⁶ Section 13(1), *Mining Act* provides that the Cabinet Secretary shall, upon recommendation of the Mineral Rights Board, and by a Gazette Notice, make such designation. The Second Schedule outlines criteria for determining small scale prospecting and mining operations.

the Ministry of Mining is currently in the process of engaging ASM stakeholders, and is yet to exercise its prerogative to make such designation.

Under the Mining Act, mineral rights are only granted subject to the fulfillment of certain prerequisite conditions, such as having the required technical capacity, expertise, experience and financial resources. However, this is not a requirement for ASM operations wholly owned by Kenyans.⁴⁷ This exemption is likely to ensure that the lack of technical education and financial resources amongst women does not act as a barrier to entry in the ASM sector. The Mining Act also provides for the establishment of a database of geoscience information, which will be made available to the public on request.⁴⁸ Historically, Kenya has suffered from inadequate investment in acquisition, processing and dissemination of geological and mineral data of the country by the Government, leading in turn to obstacles in attracting investments to the sector.⁴⁹ This database is therefore likely to provide open access to information, addressing the challenge of lack of information amongst investors, including women in the ASM sector. The new provisions on the availability of geosciences information therefore portend a game-changer for the industry, depending on the quality, scope and reach of the information contained in the database, once it is established.

Further, the mining regulations proposed to be enacted and those already enacted under the Mining Act have the potential to empower women in ASM in various ways. For example, it is prescribed that the Cabinet Secretary responsible for mining (CS) shall make regulations for the protection, health and safety of artisanal mining operations.⁵⁰ As women in ASM are adversely affected by unsafe conditions in mining, these regulations would be critical in ensuring their health and safety in mining. Secondly, under the Mining Act, 'mines support' has been defined to include contract mining services for small-scale and artisanal mining, and this provision and the regulations on mines support provide an opportunity for women to apply for licensing to participate as mine support service providers in the ASM sector.⁵¹ Thirdly, by providing for transparency and open access in the licensing process through the establishment of an online cadastre system,⁵² gender

⁴⁷ Section 11, *Mining Act*.

⁴⁸ Section 29, *Mining Act*.

⁴⁹ Section 23, *Minerals and Mining Policy*, 3.

⁵⁰ Section 98 (3), *Mining Act*.

⁵¹ Section 4 and 170 (2), *Mining Act*; *Mining (Mine Support Services) Regulations*, Legal Notice No 151 of 2017.

⁵² Part II, *Draft Mining (Licensing) Regulations*.

audits with regards to applications for licences and permits can be carried out with greater ease and action taken to increase the participation of women where gaps in gender equity and inclusiveness are observed.

3.3 Women in large-scale mining

In the case of LSM, the Mining Act is short on explicit provisions that encourage the inclusion of women in the sector. However, as women work throughout the entire value chain of LSM - from prospecting to marketing and selling, and in a vast array of positions in LSM corporations - provisions on health and safety in the mines as well as non-discrimination in employment have a great bearing on the status of women. The Mining Act provides that workers in mines will be covered by the Occupational Health and Safety Act, 2007⁵³ and provides further that the CS shall make regulations for safety and health of persons employed in mines, and the carrying on of prospecting or mining operations in safe, proper, sanitary and effectual manner.⁵⁴ Though not explicitly mentioning women, it is imperative that the regulations are designed and interpreted with a focus on gender as the health, safety, and environmental impacts of mining are well known to adversely affect women.⁵⁵

On employment, the Mining Act provides for the mandatory employment and training of Kenyans.⁵⁶ Under the Mining (Employment and Training Requirement) Regulations,⁵⁷ an applicant for an LSM licence is required to submit to the CS (prior to their application being granted), a plan outlining the proposals for the employment and training of Kenyans, bearing particulars on, among others, the corporation's plan for gender.⁵⁸ The regulations also provide that a holder of a large-scale mineral right shall employ only Kenyans in junior level or middle level positions.⁵⁹ Though there is no mention of gender equity in the selection of citizens for training and employment, the fact that the employment and training plan must consider gender raises the chances for gender balance in this regard. Similarly, an application for a licence shall not be granted unless the applicant has submitted a procurement plan for goods and services in Kenya, ensuring in

⁵³ No 15 of 2007.

⁵⁴ Section 178, *Mining Act*.

⁵⁵ UN Women, *Opportunities for women in the legal and regulatory frameworks on mining*.

⁵⁶ Section 46, *Mining Act*.

⁵⁷ *The Mining (Employment and Training) Regulations*, Legal Notice No 82 of 2017.

⁵⁸ Regulation 5(3)(d), *Mining (Employment and Training) Regulations*.

⁵⁹ Regulation 7(1), *Mining (Employment and Training) Regulations*.

the plan that priority is given to citizens of Kenya or corporations incorporated in Kenya, and also including in the plan particulars on gender.⁶⁰ This denotes that gender considerations are likely to be a crucial component in a LSM corporation's attainment of local content requirements.

Opportunities for women in leadership and management roles in large-scale operations are also influenced by laws surrounding the mining industry with a bearing on employment and corporate governance in Kenya. For example, the Employment Act⁶¹ prohibits employers from discriminating in the process of recruitment, training, promotion, terms and conditions of employment, termination of employment and other matters related to employment, on the basis of sex or pregnancy.⁶² Further, the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015, which are Kenya's corporate governance guidelines for listed corporations with authorisation to issue securities to the public, makes provision regarding gender.⁶³ The Guidelines stipulate that the appointment of members shall be gender-sensitive and shall not be perceived to represent a single or narrow constituency interest.⁶⁴ This is especially relevant for women as under the Mining Act, there is likely to be an increase in the number of mining corporations listing on the Nairobi Stock Exchange (NSE). This is due to the provision requiring mining corporations whose capital expenditure exceeds the prescribed amount to list at least twenty percent of their equity on a local stock exchange within three years after commencement of production.⁶⁵

In South Africa, following the introduction of a legislative requirement for mining corporations to ensure that a percentage of their workforce is female, the country's mining sector now has the best level of female representation on boards.⁶⁶ Thus, though the mining industry has the lowest number of women on boards of any sector in the world, the South African experience bears testament to the efficacy of law as a tool to encourage the involvement of more women in LSM. Kenya's legislative framework for mining is not as explicit as South Africa's, but it does

⁶⁰ Regulation 6(2)(c), *Draft Mining (Use of Local Goods and Services) Regulations*, 2017.

⁶¹ No 1 of 2007.

⁶² Section 5, *Employment Act*.

⁶³ *The Capital Markets, Code of Corporate Governance Practices for Issuers of Securities to the Public*, Gazette Notice No 1420.

⁶⁴ Section 2.1.5, *Code of Corporate Governance Practices*.

⁶⁵ See Section 49, *Mining Act*.

⁶⁶ Women in Mining, *Mining for talent: A study of women on boards in the mining industry*; 'James Wilson: South Africa Mining Sector offers Women Fast-Track Careers' *Financial Times*, 7 March 2014 <https://www.ft.com/content/8c60db16-9d76-11e3-83c5-00144feminingab7de> on 24 June 2018.

provide a starting point for the inclusion of women at various administrative, managerial and board positions in mining corporations.

3.4 Women in host communities

The provisions on health, safety and environment in the Mining Act⁶⁷ have a significant bearing on women from communities that host mining operations, who are most affected by environmental degradation caused by mining activities in their communities. Mineral rights holders under the Mining Act are mandated to strictly conform to Kenya's environmental laws, and prior to grant of a licence, applicants are required to submit a site mitigation, rehabilitation and mine closure plan, and provide environmental protection bonds. Further, the need for the holder of a mining licence to sign a community development agreement (CDA) with the community where mining operations are to be carried out presents women with an opportunity to participate in the decision-making process.⁶⁸ CDAs are for transparency and accountability in the mining sector, as well as to ensure that benefits of the mining operations or activities are shared with the community, mining operations are consistent with the continuing economic, social and cultural viability of the community, and mining operations significantly contribute to the improved economic, cultural, and social welfare of the community.

To this end, the Mining (Community Development Agreement) Regulations, 2017, have been passed to make provision for CDAs in greater detail.⁶⁹ According to the regulations, a community development committee shall be formed, consisting of representatives of the community, who shall serve as the link between the community and the mineral right holder and perform various functions as representatives of the community.⁷⁰ In the appointment of CDA committee members, one elected representative of women and two elected representatives of the youth, at least one of whom is a woman, must be included.⁷¹ Further, any consultations leading to CDAs should include all members of the communities affected or impacted and other interested parties at the village level and should be conducted in a location that is reasonably accessible to all members of the community and other parties for

⁶⁷ Part XI, *Mining Act*.

⁶⁸ Section 109(i), *Mining Act*.

⁶⁹ *The Mining (Community Development Agreement) Regulations*, Legal Notice No 148 of 2017.

⁷⁰ Regulation 7(4), *Community Development Agreement Regulations*.

⁷¹ Regulation 7(1)(d) and (f), *Community Development Agreement Regulations*.

the purposes of coming to an understanding.⁷² The consultations shall be deemed insufficient if held only with a few people or elders of the affected or impacted communities.⁷³

These provisions ensure that the phenomenon of only hearing male voices in consultative processes and in decision-making, is halted. The regulations also specifically require that the community is adequately consulted and represented in all deliberations without isolating any particular individuals, groups or persons.⁷⁴ With regards to content, the issues to be addressed in the CDA shall include details on special programmes that benefit women.⁷⁵ Given that the holder of the mineral right is obliged to spend a minimum of at least one percent of the gross revenue from the sale of minerals in every calendar year to finance the projects under the CDA,⁷⁶ there is potential for significant empowerment of women in communities that prioritise and plan adequately for these special programmes. These provisions tie in with the objective of the Mining Act to vest ownership of natural resources in the people of Kenya.⁷⁷ As such, the negotiations on the sharing of benefits stemming from these resources through instruments such as CDAs must include the representation and views of all members of the community, including women. However, any positive effects of the provisions may not be immediate as holders of mining leases or special mining leases granted prior to the coming into force of the CDA have eighteen months from the coming into force of these regulations within which to comply.⁷⁸

4 Conclusion

The case of Pili Hussein, a Tanzanian woman who dressed up as man for almost a decade in order to pursue opportunities in the tanzanite mining industry, recently made headlines.⁷⁹ Pili's experience, which was spurred by a prohibition against women going down the mines, brought to the forefront the immense barriers facing women in the mining industry. These barriers include the patriarchal power

⁷² Regulation 10(6)(a) *Community Development Agreement Regulations*.

⁷³ Regulation 10(6)(b), *Community Development Agreement Regulations*.

⁷⁴ Regulation 10(3)(d), *Community Development Agreement Regulations*.

⁷⁵ Regulation 8(2)(f), *Community Development Agreement Regulations*.

⁷⁶ Regulation 12(1), *Community Development Agreement Regulations*.

⁷⁷ Part II, *Mining Act*.

⁷⁸ Regulation 19, *Community Development Agreement Regulations*.

⁷⁹ 'I dressed up as a man to work in a Mine' *BBC*, 15 May 2017 <http://www.myjoyonline.com/world/2017/May-15th/i-dressed-as-a-man-to-work-in-a-mine.php> on 21 June 2017.

structures that limit the entry of women into the sector, discriminatory practices around land ownership and access to education opportunities, gender biased attitudes towards mining skills that prevent women from taking up mining opportunities: and the prevailing concepts of gender roles which limit women from engaging in high-return mining activities.⁸⁰ In addition to these, the lack of an enabling legal framework is also a significant barrier facing women in the mining industry. The law could be a barrier by explicitly discouraging women from participating in the sector. For example, in South Africa and Kenya, legal barriers once prevented women from working underground.⁸¹ Alternatively, the law could be a barrier by virtue of its gender neutrality and lack of engagement on gender issues as was the case with the Repealed Mining Act.

As set out in this chapter, the Mining Act and related policy and legislative frameworks are not a barrier to gender inclusivity in the mining sector. The regulatory framework does not explicitly discourage women from mining, nor does it fail to engage on gender issues. Further, as demonstrated in this chapter, even where the Mining Act is silent, other related laws such as those on employment and corporate governance can be relied upon by practitioners to further the cause of gender justice, as mining activities occur in a multidisciplinary environment and are subject to others laws and sectors. Further, the Mining Act is pivotal for women in mining as by differentiating between ASM, LSM and host community matters, it implicitly considers the different roles that women play in the mining sector. It has been argued that for any legislation to be effective and relevant, it must, where appropriate, be tailored and adapted to address the different and specific challenges faced by women in both ASM and LSM sectors.⁸² The Mining Act has, therefore, begun on a right footing towards effectiveness and relevance, and though it does not go as far as to set out gender quotas, or mandate disaggregation of mining data in gender terms, it is a starting point at creating an enabling framework for women's participation in the sector.

⁸⁰ UN Women, *Opportunities for women in the legal and regulatory frameworks on mining*.

⁸¹ The Republic of South Africa, *Minerals Act* (No 50 of 1991) prohibited women from working underground the mines. In 2002, the South African Mining Charter was instituted to address the imbalance that existed in the industry, and the Charter lifted this prohibition, allowing women to work both on the surface of mines and underground. See 'IN ON AFRICA IOA: Women in Mining - Legislation and representation for women in mining' *Polity*, 25 August 2011 <http://www.polity.org.za/article/women-in-mining-legislation-and-representation-for-women-in-mining-2011-08-25> on 26 June 2018. In Kenya, Section 30, *Employment Act*, Chapter 226, Laws of Kenya (Repealed) also restricted women from working in mines save in certain prescribed circumstances. This Act was repealed by the Employment Act 2007, which does not contain similar restrictions for women working in mines.

⁸² ASI et al, *Women in mining*, 32.

This chapter's assessment of the mining regulatory framework in Kenya reveals a forward-looking regime. However, it is not clear what the results will be in practice, and whether all women, whether in heels, boots or helmets, will engage with and play various roles in the mining sector. The implementation of the entire regulatory framework in a manner that encourages gender parity in line with the letter and spirit of the 2010 Constitution, and the removal of those non-legal barriers hindering women's full participation in the sector is of absolute necessity. This is likely to lead to Kenya meeting goals of the African Mining Vision,⁸³ which calls upon all member-states to progress towards gender equity and the empowerment of women in the mining sector. It is then likely that one day the experience of women will be akin to that period in history where mining was not synonymous with male identity, and mine work was considered normal work for women; exposing them to no greater risks and no fewer benefits than their male counter-parts.⁸⁴

⁸³ African Union, *African mining vision*, February 2009, 32 http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf on 11 October 2017.

⁸⁴ Abrahamsson L, Segerstedt E, Nygren M, Johansson J, Johansson B, Edman I and Åkerlund A, *Gender, diversity and work conditions in mining*, Luleå University of Technology, 2014.