



Legal Alert

Overhauling Kenya's mining laws: The Mining (Amendment) Bill, 2023

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Introduction

The Mining Act No. 12 of 2016 (the Act) currently regulates the mining sector. Despite the existence of a regulatory framework and the sector's immense potential, the contribution of the mining sector to the Kenya Gross Domestic Product has generally been below 1% over the years.

The Mining (Amendment) Bill, 2023 (the Bill) was gazetted for introduction in Parliament on 1st September 2023. The principal object of the Bill is to amend the Act. In essence, it provides for separate implementation of the three key functions in the Act, specifically - policy formulation, administrative and dispute resolution functions.

A key stakeholder in the mining sector commissioned the Legal Business Solutions (LBS) team at PwC Kenya to conduct a review of Kenya's mining laws and identify the regulatory challenges. The report identified several issues in Kenya's mining regulatory regime.

Our report recommended significant changes in most of the areas identified as many of the legislative provisions around the identified issues did not match up to one or more best practice principles of effective regulation. We are glad to note that a number of recommendations in the report have been adopted in the Bill.

Highlights of the Bill

Divested role of the Cabinet Secretary

It is widely recognised that the Cabinet Secretary for the Ministry of Petroleum and Mining (the CS) currently wields wide powers in the administration of the mining sector.

The mining sector is one of the only sectors that does not have an independent authority/regulator.

The Bill proposes to elevate the role of the CS to provision of policy direction in the sector. Regulatory and day to day administrative supervision functions have under the Bill been moved to a newly established independent regulator.

The Mineral Rights Authority

The Bill proposes to establish the Mineral Rights Authority (the Authority), an independent regulator whose mandate shall be to administer the Act by providing the day-to-day regulatory role in the mining sector. A Director-General (DG) shall be responsible for the supervision of the Authority.

The Authority shall have the power to, among others:

- (a) Issue, renew, modify, suspend or revoke licenses and permits for all undertakings and activities in the mining sector;
- (b) Set, review, and approve contracts, tariffs and charges for common user mining logistics facilities and mining products;
- (c) Investigate complaints or disputes between parties over mineral rights;

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- (d) Inspect, take soil samples or specimens of rocks, concentrate, tailings or minerals from any licence or permit area; and
- (e) Impose such sanctions and fines not exceeding KES 100,000 per violation per day for a maximum of 30 days.

Under the Bill, the funds to support the operations of the Authority shall consist of levies not exceeding 0.5% on the sales of electricity and petroleum products as well as licence fees.

The Board

The management of the Authority shall vest in a Board of Directors of the Authority (the Board).

To ensure a smooth transition, the Bill provides that the chairperson and the members of the currently existing Mineral Rights Board (the MRB) shall at the commencement of the Bill, be deemed as the chairperson and members of the Authority respectively, for the unexpired period of their term.

The role of the MRB has primarily been to advise and give recommendations to the CS who holds discretionary power. With the new Bill, the management of the Authority now vests in the Board. This is a welcome move as it removes discretionary power from the hands of one individual and allows for a broader range of expertise.

The Tribunal

The Bill proposes to establish a Mining Rights Tribunal (the Tribunal), another welcome move that will streamline the resolution of disputes relating to mineral rights.

Consent requirements

Under the Act, a prospecting right cannot currently be granted with respect to private land or community land without the express consent of the registered owner. For operations like reconnaissance and prospecting that are speculative and not intrusive in nature, this requirement has been notoriously burdensome.

Land is highly fragmented in most areas in Kenya, and it is challenging, particularly for a large-scale miner, to obtain the consents of all the individual landowners whose land is covered by a prospective mineral right.

The Bill has removed the consent requirement for prospecting. It proposes to amend the Act by providing that an applicant for a mining right shall only require consent prior to commencing actual mining operations.

To protect landowners, a mineral right holder shall be required to deposit a compensation guarantee bond with the

Authority to cover demands or claims for compensation for disturbance, deprivation, loss or damage.

Reconnaissance licenses

Currently under the Act, an applicant for a reconnaissance licence is required to provide onerously large amounts of information. Reconnaissance is a broad-based search with low chances of success and the detailed, granular requirements are difficult to establish prior to the commencement of operations. The Bill has done away with certain reconnaissance requirements that were deemed unreasonable.

It proposes for instance, that an applicant will no longer be required to demonstrate adequate financial resources or carry out a proposed reconnaissance programme. They will instead be required to simply demonstrate technical competence and geological expertise.

The term of a reconnaissance licence is two years, non-renewable. The holder of a valid reconnaissance licence shall also no longer be required to commence reconnaissance within 3 months of grant of the licence as currently required under the Act. This allows prospectors more time to plan and structure the activities.

In addition, under the Bill, the reconnaissance licence shall be subject to an annual fee whereas previously it was subject to an area-based annual charge. This creates better certainty.

Artisanal mining

Artisanal mining is an income generating activity benefiting low income and vulnerable groups. Under the Act,

artisanal mining is defined to include 'traditional and customary mining operations using traditional or customary ways and means.'

This definition does not reflect the modern realities of today's artisanal miners who do not necessarily use 'traditional or customary ways and means.'

The Bill has amended the definition of artisanal mining to cover mining operations:

- (a) that are carried out by a person, groups or cooperatives using mostly basic equipment and methods, without necessarily any formal training;
- (b) whose capital investment is not more than KES 1 million; and
- (c) where the vertical depth of exploration or excavation is up to thirty meters deep.

Another weakness of the current Act has been institutional bloat. Under the Act, there is established in every county, an Artisanal Mining Committee, whose responsibility is to advise on the granting, renewal, suspension and revocation of artisanal mining permits.

This means that committees exist in county offices with no mineral resources. The Bill proposes amendments requiring only counties with mineral resources to set up a committee.

Co-existence between large scale and small-scale mining

The concept of large-scale mining in the Act results in the closing off of entire blocks to exploration by large scale





miners. This has in the past resulted in a loss of potential, particularly where the licence holder is not exploiting the entire licence area. There might be other persons willing to conduct mining operations in the unused licence area.

The Bill has introduced a new Section 122A (1) that allows a holder of a mining license to a large-scale operation to sub-contract a segment of a block to a small-scale operator or an artisanal mining operator upon notification to and approval from the Authority.

This sub-licensing system or tribute system is in line with various other mining jurisdictions in the world such as South Africa, Zimbabwe and Australia.

Environment, health and safety

Under the Act, holders of artisanal permits are required to observe 'good mining practices, health and safety rules and pay due regard to the protection of the environment'.

The Bill has raised the threshold higher to 'good mining practices, international best standards, environment and health and safety laws.' This tweak provides regulatory and best practice nexus to the high-risk artisanal mining sector which is highly exposed to environmental health and safety hazards.

In addition, under the Bill, an application for the renewal of a prospecting licence shall be accompanied by proof of submission and approval of an environmental management and rehabilitation plan.

Fiscal provisions

Under the Act, the holder of a mineral right pays royalties in respect of mineral classes won. The royalties payable are distributed as follows:

- (a) Seventy percent (70%) to the National Government;
- (b) Twenty percent (20%) to the County Government; and
- (c) Ten percent (10%) to the community where the mining operations occur.

It has been historically difficult to determine who the 'community where the mining operations occur' refers to. The Bill now proposes that the term 'community' be defined to mean the people living in a sub-county in which a mineral resource is situated and are affected by the exploitation of such resources. This amendment will make it easier to determine the persons to whom the royalty share is due.

The Bill has however retained certain controversial fiscal provisions including 10% free carry interest to government as well as a mandated requirement to list 20% on the local security exchange.

Appropriation of assets on termination

The Act provides for state appropriation of private assets and unused expenditure, a provision that has discouraged significant expenditure in prospecting. The provisions allowing the vesting of assets in the Government upon surrender or termination of a mineral right have been done away with under the Bill.

Mineral agreements

Under Section 117 (1) of the Act, the CS may enter into a mineral agreement with the holder of a mining licence. A mineral agreement among other things, includes terms and conditions relating to prospecting and operations, timetables, minimum expenditure, environment obligations, settlement of disputes, community development plans, payment of royalties, taxes and other fiscal impositions.

Under the Act, the threshold for entering a mineral agreement has been USD 500 million. Very few (if any) operations in Kenya meet this threshold.

The result is that without a mineral agreement for those that do not meet this threshold, there is no stability of fiscal terms. This impacts their ability to develop projects because lenders and investors will not approve development of such projects and will not provide the capital required.

The Bill has lowered the threshold USD 100 million.

Impact of the new regulations if passed into law

The establishment of an independent Authority is an important amendment that is consistent with other regulatory regimes in Kenya such the energy and petroleum sector, the communications sector, the insurance sector and others.

Mining is a fairly technical area. The Bill has established structured institutions with qualified mining experts who will be well suited to guide policy, determine disputes and drive further reforms in the sector.

The Bill is a welcome move in enhancing the exploration of Kenya's mineral endowments. It introduces other important amendments that could shift the policy perception rankings of the Kenyan mining sector and attract deeper investment.

How LBS can help

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- Regulatory market entry advice
- Business licensing and registration support
- Entity governance & compliance
- M&A and corporate restructuring support
- Legal due diligence and reviews
- Commercial contracts and policies
- Employment and immigration support