



**KENYA HUMAN RIGHTS  
COMMISSION**

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***BETWEEN A ROCK AND A  
HARD PLACE***

***THE IMPACT OF KENYA'S MINING REGULATIONS ON  
LOCAL COMMUNITIES***

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**A study commissioned by the Kenya Human Rights Commission to inform and initiate debate on the Impact of Kenya's Mining Regulations on Local Communities living in Mining Areas<sup>1</sup>**

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## **Executive Summary**

The mineral wealth of this country has proved to be one of the least beneficial to the local communities within the areas around which such mineral wealth is found. Part of the reasons for this situation is that Kenya operates with an inadequate legal framework to properly regulate mining activities in Kenya. The existing laws on mining are old and a colonial relic in addition to being obsolete. Currently there is a process underway to enact a new legal and policy framework. Local communities have a right to participate in making decisions on matters that have a significant effect on their environment. To be able to participate effectively, the community must have some knowledge about the subject matter. In this regard, The Kenya Human rights commission, commissioned this research to be used as tool of educating and informing the local communities living in mining areas.

The objective of this research is to examine the substance of mining regulations in Kenya, and the concerns of communities living in mining areas. It is hoped to guide, educate and serve as a source of information. The report is structured into six chapters. Chapter one provides a background, examining the concepts of minerals and mining, Environment and human rights and later explaining the factual and economic context of mineral resources in Kenya.

Chapter two examines the legal framework governing mineral resources in Kenya. It looks into the current framework and the proposed mining act and policy. The chapter highlights the contentious issues in the industry such as, ownership and access rights, acquisition of land, involuntary displacements and benefit sharing. The chapter critically analyses the Draft Mining Bill and Policy, bringing out some innovative provisions intended to enhance sustainability in the sector Furthermore the chapter looks into other legislations related to mining such as the forest act and water act and how they are in synchrony with the proposed mining bill and policy.

Chapter three examines the human rights concerns of communities living in mining areas. While minerals are found in this communities land, more often than not the communities bare the blunt of environmental and social impacts of mining while the mining companies and the central government reap the benefits. Abuse of human rights in this industry is rampant and in the case of small scale mining, research has indicated that the government will put infrastructure and measures (including legal framework) to encourage large scale mining while the small scale miners who are the majority in Kenya struggle with primitive and risky ways to make their ends meet

Chapter four looks into environmental considerations for mining under the mining legal framework. It looks into the provisions of the Environmental and Management Coordination Act (EMCA) 1999 and their application in the mining industry. Chapter five gives two case studies on the best practice and bad practice from Canada and Tanzania.

Chapter 6 examines what needs to happen if investment in mining is going to produce real benefits for the people of Kenya. At the very least, pollution and human rights abuses must be prevented or punished. Local communities must organize themselves to confront the threat to their livelihoods because of the state's failure to act in their interests. Furthermore, the trend towards reviewing the legal framework to attract foreign direct investment should be reversed, and be encouraged to apply sensible conditions to foreign investment in a climate of transparency, stability and fair benefit sharing among the shareholders who include the local community.

## **CHAPTER 1**

### **1.0 BACKGROUND**

#### **1.1. Definitions**

##### **1.1.1 Mining and Minerals**

In a discussion such as this that revolves around mining of mineral resources it's imperative to have clarity of the terms. A working definition of mining could simply be the extraction of resources from the earth. The mining legislation in Kenya construes mining as the intentional winning of minerals<sup>2</sup> The Draft mining bill provides instead, for mining operations. This definition extends to include operations carried out to win a mineral from where it occurs; to extract a mineral from its natural state; or to dispose off a mineral waste substances resulting from such winning or extraction.<sup>3</sup>

The word minerals in this case would cover a wide variety of naturally occurring substances extracted for human use. They are classified in four main groups: Metals; industrial minerals (such as lime or soda ash, valued for certain special properties), construction materials and energy minerals (such as coal, natural gas oil e.t.c.).<sup>4</sup> There is no internationally agreed definition of the term minerals. The Kenyan legal framework, the mining Act, has a different conception of 'Minerals' as 'all minerals and mineral substances other than mineral oil and may be precious metals, precious stones or non- precious minerals'. This excludes clay, murrum, limestone, sand stone or other stone except for purposes of the Mining Safety Regulations<sup>5</sup>. Indeed most definitions from other jurisdictions around Africa address themselves to the nature of a mineral- whether solid, gaseous or liquid.

The draft mining bill on the other hand defines mineral as a substance formed by a geological process whether in solid, liquid or gaseous form occurring in or on the earth including any metalliferous ores, non metalliferous minerals, building minerals, salt, minerals that may be used to improve quality of the soils for agriculture and precious minerals. It excludes petroleum and ground water.<sup>6</sup>

From the above discussion on concepts and definition of minerals, it is agreeable that the scope of this term extends to solid liquid and gaseous substances occurring naturally in the earth and formed by processes. For the purposes of this research, the scope shall extend to minerals as defined by the mining Act of Kenya and the draft mining and minerals and shall include petroleum.

##### **1.1.2. Human Rights**

Human rights are "basic rights and freedoms to which all humans are entitled. Examples of rights and freedoms which have come to be commonly thought of as human rights include civil and political rights, such as the right to life and liberty, freedom of expression and equality before the law; and economic and social cultural right including the right to participate in culture, the right to food, the right to work and right to education.

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<sup>2</sup> Section 2

<sup>3</sup> Section 4

<sup>4</sup> UNEP Industry and Environment- Special issue 2000.

<sup>5</sup> Section 2

<sup>6</sup> Section 4

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood<sup>7</sup>.”

## **Environment**

The word "environment" is most commonly used describing "natural" environment and means the sum of all living and non-living things that surround an organism, or group of organisms. Environment includes all elements, factors, and conditions that have some impact on growth and development of certain organism. Environment includes both biotic and abiotic factors that have influence on an organism. Abiotic factors such as light, temperature, water, atmospheric gases combine with biotic factors (all surrounding living species). Environment often changes after some time and therefore many organisms have ability to adapt to these changes. However tolerance range is not the same with all species and exposure to environmental conditions at the limit of a certain organism's tolerance range represents environmental stress.

### **1.2 Minerals occurrence and production in Kenya.**

Kenya has a total area of about 587,000 square kilometers<sup>8</sup>. The Kenyan mining sector is small and under developed. It represents about 0.5% of the GDP or less. The geology of Kenya may generally be grouped into the following five major geological successions: **Archean** which comprises the Kavirondo and Nyanzian systems; **Proterozoic** which comprises of the Mozambique belt which has a structural unit with meta-sedimentary and Meta igneous rocks with a broad concordance of structural style and metamorphic history. The belt is most extensive in Central Kenya where minerals such as kyanite, corundum graphite wallstone marble asbestos, fluorspar, magnesite, kaolin and a variety of gemstones; **The palaeozoic and Mesozoic** formations which consist of karroo formations of the coastal hinterland, including the basal sedimentary formations in north- eastern Kenya. The local formations are Taru, Maji ya Chumvi, Mariakani and Mazeras west of Mombassa. These rocks are sources and hosts of limestones, gypsum, clays, and manganese and construction materials. In essence, thus, these formations are found near the coast and in north-eastern Kenya. Heavy minerals occur along the coastal beaches and recent discovery of deposits of about 3.2 billion tons of titanium bearing is evidence; **The Tertiary** entail mainly of volcanic rocks covering central parts of the country from south to north, occurring in the floor of the Rift Valley and on the plains west and east of the valley. The quaternary entails fossiliferous deposits containing deposits that bear artifacts and interesting fossils that have been studied extensively. These include the Ologesailie lakebeds, a lacustrine series with much diatomite, mammalian fossils and artifacts; the Kariandusi sediments near Gilgil; and the Kanjera Beds in the Kavirondo Gulf off Lake Victoria. These volcano-sedimentary accumulations have deposits of clays, evaporates, trona, diatomite, natural carbon dioxide, kunkar and gypsum. Geothermal fields are found in the area and have been exploited, currently producing 57MW of power to the national grid; **Quaternary** that consist of soils, alluvial beach sands, fossilcoral reefs, lacustrine sediments of the rift valley and volcanic rocks of the rift valley from younger volcanoes.

The Kenyan mining industry is dominated by non-metallic minerals such as fluorspar, trona, limestone, diatomite, titanium, natural carbon dioxide, gemstones, and various construction materials. However, some quantities of gold are being produced while iron ore is produced from

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<sup>7</sup> Article 1 of the united nations universal declaration of human rights ( UDHR)

<sup>8</sup> 2004 Economic Survey.

localized deposits for use in local manufacture of cement.<sup>9</sup> There is sufficient evidence that some minerals are unexploited. They include gypsum in the El Wak area which is estimated to have more than 2 billion tones, , radioactive minerals at Ruri Hills of Kericho Mrima Hills of Coast Province, and Homa Hills of Nyanza Province and graphite in Ol Donyo Nyiro.<sup>10</sup> Coal exploration in the Mui Basin of Kitui/Mwingi districts has already yielded productive results. There is quarrying and sand harvesting, with the former being used to make ballast, aggregate and building stone.<sup>11</sup>

Despite the fact that about 90 per cent of the country is geologically mapped and mineral occurrence documented.<sup>12</sup> A brief Economic analysis of the performance of the sector shows that there was a moderate improvement in 2005, registering growth of 2.7 per cent up from 2.2 per cent in 2004. This is attributed to a buoyant construction industry, increased production of soda ash and crushed refined soda. Over the same period, over 200 exploration and prospecting licenses were operational including the titanium in Kwale. In 2004-2005, however, mining and quarrying accounted for 0.5 per cent of the national Gross Domestic Product (GDP).<sup>13</sup>

The current legal framework operates principally under the Mining Act, Cap 306 of the Laws of Kenya a statute that was enacted in 1940 to succeed the Mining Ordinance of 1933. The Mining Act has been amended severally; currently there is a process underway to enact a new legal and policy framework.

Administratively, Mining and minerals in Kenya fall within the Department of Mines and Geology at the Ministry of Environment and Natural Resources. The Department is headed by a Commissioner for Mines and Geology, whose office is established by the Mining Act.<sup>14</sup> Their mandate includes development of a legal and policy framework, conducting of geological surveys, mineral exploration and mining.<sup>15</sup>

## **CHAPTER 2**

### **2.0 LEGAL FRAMEWORK FOR DEVELOPMENT AND EXPLOITATION OF MINERAL RESOURCES**

#### **2.1 Introduction**

The current legal and Institutional Framework for the Mining sector is contained in various pieces of legislation i.e. the Mining Act, Chapter 306 of the Laws of Kenya, legislation relating to Mineral Oil Petroleum Exploration and Production Act (Chapter 308 Laws of Kenya.), Trading in Unwrought Precious metals (Chapter 309 laws of Kenya) the Diamond Industry Protection Act (Chapter 310 Laws of Kenya), the Gold Mines Development Loans Act (chapter 311 Laws of Kenya) and the Continental shelf Act (Chapter 312) Laws of Kenya. The Mining Act which is the principal law relating to mining of mineral resources in Kenya was promulgated in 1940 and therefore does not adequately address the current requirements of the industry and required to be reviewed and appropriate laws and policies put in place. . In 2005, the Ministry of Environment and Natural Resources commenced a process of revising the laws relating to the mining sector and to develop a mining policy to match contemporary international mining

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<sup>9</sup> Government of Kenya (GoK), *Mining Investment Opportunities in Kenya*. Ministry of environment and natural resources Department of mines and geology, Nairobi, January 2007

<sup>10</sup> Republic of Kenya, *State of environment report 2003*, Kenya ( National Environment management authority (NEMA), Nairobi, 2004)

<sup>11</sup> *Ibid.*

<sup>12</sup> Republic of Kenya [2002] at 44.

<sup>13</sup> Central Bureau of Statistics, *National Account Statistics – Sectoral shares of GDP*. Available at <[www.cbs.go.ke/sectoral/accounts/national\\_accounts\\_sectoral\\_shares.html](http://www.cbs.go.ke/sectoral/accounts/national_accounts_sectoral_shares.html)> 24 March 2007.

<sup>14</sup> Section 9.

<sup>15</sup> Ministry of Environment and Natural Resources [2007] at 1.

practice. A draft mining bill and a draft version of the National Mineral Resources and Mining Policy have since been developed and a wait tabling in parliament.

## **2.2 Ownership and access rights**

Under the Mining Act, all unextracted minerals on any land are vested in the government subject to any rights the government may have granted any person,<sup>16</sup> making it an offence for any person to deal with minerals without authorization.<sup>17</sup> The Draft Mining Bill marks a major departure from this premise. It vests the entire property in and control of minerals in, on or under any land in Kenya in the government in trust for the people, regardless of any subsisting rights over any land containing minerals. The government is then bound to deal with these minerals only in accordance with this law.<sup>18</sup> It's worth noting that, the Bill introduces the public trust, effectively imposing a fiduciary responsibility on the part of the State.

## **2.3 Conditions for mineral prospecting and extraction**

Prospecting is defined as the search for minerals and testing the mineral bearing qualities on land.<sup>19</sup> The Commissioner as the custodian of the law is empowered to grant prospecting rights.<sup>20</sup> Under the current law prospecting for any minerals is authorized for holders of a prospecting license. However Prospecting for diamonds requires a special endorsement from the Commissioner. A license holder must restrict their work to specified lands. Prospecting in a forest area or protected wildlife area is subject to any lawfully imposed conditions.<sup>21</sup> Any holder of a prospecting right is eligible for Exclusive Prospecting Rights which is usually valid for one year, renewable at the discretion of the Commissioner for one year to a maximum of five years.<sup>22</sup> Further, any holder who has paid the relevant fees has the sole right of alluvial mining and the right to remove and dispose any authorized minerals

Certain lands are excluded by law from prospecting and mining. These lands include cemeteries; urban areas situated within municipalities, townships or trading centers; land subject to a lease, which gives the holder rights to work minerals found thereon; lands subject to subsisting prospecting or mining rights; railway reserves; lands within a hundred metres of any dam or canal belonging to central or local government; public street or road reserve; salt lick; trust lands; land within five hundred meters of a public airfield; and private land except with owners consent. It's important to note in all the above cases that there is provision for the person holding ownership rights to grant consent.<sup>23</sup>

The law also reserves certain customary rights of the people of Kenya. Section 8, provides that nothing in the law shall be construed to prevent any citizen of Kenya from taking, subject to prescribed conditions, salt or soda from lands from which it has been customary for members of that person's community to take the salt or soda. This, however, excludes land within the area of a mining lease or location.

A prospecting right holder, who has pegged a location, is required to seek registration within 30 days. The rights under a pegged location are valid for one year, subject to extension.<sup>24</sup> Small-scale miners are normally granted mining locations with less onerous conditions. The second schedule to the Bill sets out criteria to dichotomize between small scale and large scale mining operations as:

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<sup>16</sup> Section 4.

<sup>17</sup> Section 5.

<sup>18</sup> Section 5.

<sup>19</sup> Mining Act Section 2.

<sup>20</sup> Section 13.

<sup>21</sup> Section 14.

<sup>22</sup> Section 18.

<sup>23</sup>Section 7.

<sup>24</sup> Section 28.

- In case of prospecting operations, the proposed prospecting area does not exceed 5km<sup>2</sup>
- In case of mining operations, the proposed mining area does not exceed 0.05km<sup>2</sup>
- In case of mining, the actual or estimated annual extraction of minerals or ore does not exceed 25,000 m<sup>3</sup>
- The prospecting or mining operations do not or will not employ specialized prospecting or mining technologies
- The proposed prospecting or mining operations do not or will not involve substantial capital investment or expenditure

Any prospecting or mining operations not meeting this criteria are to be classified as large scale operations. A mining location consists an area on 20,000m<sup>2</sup> for precious metals and precious stones, and 50,000m<sup>2</sup> for all other minerals

The Draft Bill proposes to overhaul the licensing system setting up a dichotomy between large scale and small scale operations. For the former, new licenses proposed include reconnaissance license, prospecting license, retention license, and mining license.<sup>25</sup> Granted for a maximum period of two years, pre-conditions for these licenses include, proposals for employment and training of Kenyans, an Environmental Impact Assessment license, and a proposal for procurement of local goods and services. Only after these conditions are met will the Board recommend grant of license<sup>26</sup> The Bill proposes a fetter in the Commissioner's discretion under current law in approval of licenses. Thus, applications are to the Commissioner, but the Minerals Advisory Board undertakes the evaluation and determines which ones to approve or reject. On the other hand, the Bill seeks to reserve mineral rights for small scale operations to Kenyan citizens, natural or corporate. An applicant for a prospecting permit is required to identify the subject minerals and give particulars of proposed operations. The holder of the permit is obligated to operate in line with a plan approved by the Commissioner, and take all measures necessary to protect the environment.<sup>27</sup>

## **2.5 Conditions for acquisition of land.**

The law excludes private land from prospecting and mining, without consent from the owner. However, unextracted mineral resources are vested in the government under Kenyan law.<sup>28</sup> Thus, in theory, where the State finds significant quantities of minerals exploitable for general public benefit, a balance should be sought between the individual property ownership rights and the public interest to guide utilization. Public benefit would justify compulsory acquisition of such private land under Section 75 of the Constitution with payment of full compensation. The procedure for compulsory acquisition is set out in the Land Acquisition Act.<sup>29</sup>

There are situations where consent maybe withheld over private property. Where consent is unreasonably held and/or is contrary to national interest, section 7(3) of Mining Act empowers the Minister to commence compulsory acquisition. Subsequently, the State can issue authority to commence mining operations.<sup>30</sup>

## **2.6 Involuntary displacement and relocation**

Invariably, as a result of acquisition of private land for mining activities, and especially those on a large scale, there is involuntary displacement of people from their homes and farms. Most of

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<sup>25</sup> Section 37.

<sup>26</sup> Section 39-40.

<sup>27</sup> Section 91-104.

<sup>28</sup> Mining Act, section 4.

<sup>29</sup> Cap 295, Laws of Kenya. Part II, section 3-23.

<sup>30</sup> Under section 39 of the Mining Act, a mining lease is issued on land vested in the government while a Special Mining Lease is issued on the same terms but established by section 55.

the programmes causing involuntary displacement of people, however, are essential development components and are likely to be more frequent.<sup>31</sup> Involuntary resettlement involves people evicted against their desires. It should be well planned and executed so that economic growth is enhanced and poverty reduced, especially for such vulnerable people. At the very least, the relocated should not end up worse off than they were before the displacement.

Whether or not compensation is adequate is an important matter since acquisition, in whatever form, is considered an intrusion upon private property. The practice in most African countries is to offer compensation in outright payment of cash for the land taken. Generally, the relevant public agency offers the amount assessed by the government's valuation department. The submissions of the landowner are to be considered but the amount is often rationalized as the current market rate.<sup>32</sup>

In addition to the land and compensation question, involuntary displacement usually has significant adverse socio-economic and environmental impacts. Key among them is abandonment of homes, dismantling of mainly subsistence agricultural production systems and loss of assets and income. Further, people may be relocated to environments where their skills may be less applicable, the competition for resources may be greater, and host populations may be hostile or culturally incompatible.

Under the current legal framework, EMCA presents a practical mechanism to stem these adverse effects through the Environmental Impact Assessment (EIA) process. Regulation 18<sup>33</sup> requires an EIA report to identify environmental impacts of a project, and to propose mitigation measures. Interpreted liberally, this provision empowers NEMA to require a mandatory resettlement plan, where involuntary displacement is identified as an environmental and socio-economic impact. The titanium mining project in Kwale District provides an example of the lack of a proper legal and policy framework to address involuntary displacement in Kenya. It also demonstrates the adverse socio-economic and environment impacts where the process is not handled properly

## **2.7 The Draft Mining Policy**

The Commonwealth Secretariat was requested by the Ministry of Environmental and Natural Resources to develop the bill and the policy. This approach locked out the participation of the people directly affected by the sector as well as the people of Kenya as a whole. The drafters of the policy gave regard to two documents- the Economic Recovery Strategy. Since 1969, Kenya has been undertaking a process of constitutional review that among other things saw the land, environment and natural resources as important issues deserving to be included in the draft constitution of Kenya. Although this constitution was not adopted, it emphasized the importance of matters relating to the environment and natural resources to the governance of the country. These chapters among other things addressed issues of ownership of natural resources, vesting these in the people of Kenya and also the key concern over land ownership, distribution and access, matters which have direct implications on the mining sector.

While the current constitution does not address these matters an attempt to put in place the mining policy will address most of these issues. The draft policy outlines seven principles which include: transparency, access to justice, public participation; inter generational equity; International cooperation in the management of mineral resources, environmental protection, observation of social and cultural values, equitable access to mineral resources and benefit sharing and value addition to raw minerals as a means to increase returns for the people of Kenya.

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<sup>31</sup> C. O. Okidi [1993]

<sup>32</sup> P.Kameri Mbote et al *The Environmental law book* 2008. East African Printers Limited Nairobi

<sup>33</sup> Involuntary Resettlement: Policies and Strategies (ADB, 1995)

The policy largely pays lip service to some of these principles and does not apply them in the substantive provisions of the policy. For example, the principle of public participation should have been applied at the formulation process of the mining policy as well as in the various aspects of the policy in making provision for access to information on mining and mineral resources, grant of rights, and constitution of regulatory bodies among other processes. The objectives need to be tied in with principles and values.

The policy falls short of creating a regime that is accountable, the proposed constitution of the board leaves out small scale miners. People affected by mining operations should be given an equal platform within the policy whether they are small scale miners or large scale miners. The draft policy also addresses the issue of displacement and compensation. The policy says that this is an issue of importance to corporations; it says that the government will provide assurances, including that the issue of compensation will be sorted out. The policy provides no elaborate provision for social security and resettlement of persons. It also provides for dispute resolution tribunal. It provides that the same person, commissioner of mines and geology is the grantor of licenses and also resolves disputes. It creates contradictions between role of NEMA and role of commissioner of mines and geology

## **2.8 The proposed mining law and policy and other resources laws**

This section attempts to analyze how the proposed mining Bill and policy are in synchrony with other laws and policies (in place and proposed) related to mining. They include the Forest Act, Wildlife Act,, Petroleum Act and the water Act. The Environmental management and coordination act is discussed in length in chapter four.

### **2.8.1 Forest Act**

The act provides that a Consent for mining and quarrying. shall only be granted in a forest area where the area does not contain rare, threatened or endangered species; forest does not have any cultural importance or contain sacred trees or groves; an independent Environmental Impact Assessment <sup>34</sup>has been carried out; the miner has undertaken through execution of a bond the value of which will be determined by the Board, to rehabilitate the site upon completion of his operation to a level prescribed by the Board; the forest is not an important catchment area or source of springs. It also provides that the Minister may, on the recommendation of the Board, and in consultation with the Minister responsible for mining, publish rules to regulate and govern mining operations in such forest areas. It also stipulates that a license will not be issued unless the applicant has implemented safety measures to prevent injury to human beings livestock and wildlife traversing the forest. Any contravention of the these provision is liable on conviction to imprisonment for a term of not less than six months, or to a fine of not less than one hundred thousand shillings, or to both such fine and imprisonment.

### **2.8.2 Wildlife Act**

The Wildlife Management Act provides that Subject to any rights lawfully acquired before the relevant date, and notwithstanding anything contained in any other written law, no person shall search for, attempt to win or win any minerals in, or remove any minerals from, a National Park except with the written consent of the Minister given after consultation with the Minister for the time being responsible for mines, and in accordance with any conditions which the Minister may impose in relation to that consent. It goes ahead to provide for aggrieved to appeal to the

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<sup>34</sup> Section 63

High Court within fourteen days of the Minister's decision. The Minister may, in consultation with the Minister for the time being responsible for mines, by notice in the Gazette, prescribe fees chargeable in respect of any consent given under this section and that the giving of a consent under this section shall not be construed as in any manner exempting any person from complying with the provisions of any other written law relating to the searching for, or the mining or winning of, minerals.<sup>35</sup>

### **2.8.3 Petroleum Act**

Exploration of petroleum in Kenya is governed under the Petroleum Act and powers are vested to the Minister of Energy. The act provides that all petroleum existing in its natural condition in strata lying within Kenya and the continental shelf is vested in the Government, subject to any rights in respect thereof which, by or under any other written law, have been or are granted or recognized as being vested, in any other person. The Minister may, on behalf of the Government, negotiate, enter into and sign petroleum agreements with a contractor. He can sign or revoke a contract.<sup>36</sup> The Minister may make regulations for or with respect to the opening of areas for petroleum operations; the terms and conditions applicable to the grant of exploration permits<sup>37</sup>, period of exploration, minimum exploration work and expenditure obligations to be fulfilled by a contractor; the registration of contractors, the procedures of inspection and control of a contractor's operations among other powers<sup>38</sup>

In Order to access private land, a contractor is required to give notice to the owner and give security of compensation. Any destruction of property and disturbance of the rights of the owner or occupier caused by the exploration is liable for compensation by the contractor upon demand. The Act does not specify the amount but provides for a fair and reasonable compensation. If the owner is dissatisfied or the contractor fails to pay, the land owner may take proceedings before a court of competent jurisdiction for the determination and recovery of compensation.

### **2.8.4 Water Act**

Under the Water Act, mining activities are not allowed in water catchments areas, water bodies unless a permit is acquired<sup>39</sup>. No person without authority shall willfully obstruct, interfere with, divert or obstruct water from any watercourse or any water resource, or negligently allow any such obstruction, interference, diversion or abstraction. Dumping of wastes or permitting, water pollution is also prohibited.<sup>40</sup> Most mining activities which make use of a lot of water are likely to obstruct, divert a watercourse or dump wastes in water courses or bodies

### **2.8.5 Foreign investments codes**

Under the foreign investments protection act (FIPA), foreign investors can repatriate capital and profits. To be legible for FIPA guarantees, investors should obtain a certificate of Approved Enterprises form the ministry of finance. The Act also protects foreign investment against expropriation. Kenya is also a member the Multilateral Investment Guarantee Agency. (MIGA)

### **2.8.6 Property and land use laws**

The Kenyan constitution provides a guarantee against expropriation of private property. Expropriation may only occur either for security interest or public purpose, where upon fair and prompt compensation is guaranteed.

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<sup>35</sup> Section 22 Wildlife Management Act Cap

<sup>36</sup> Section 5

<sup>37</sup> section 5

<sup>38</sup> Section 6

<sup>39</sup> Section 25

<sup>40</sup> Section 94

### **2.8.8 Benefits sharing / Royalties**

The law provides that royalties are paid for all minerals. The rates of royalties are negotiable within the commonwealth countries' rates. The proposed legislation unlike the current one has proposed specific rates for different classes of minerals.

## **CHAPTER 3**

### **3.0. HUMAN RIGHTS AND SOCIAL JUSTICE CONCERNS OF COMMUNITIES LIVING IN THE MINING AREAS**

#### **3.1 Introduction**

It is a fundamental principal that human being is at the central of the development process and that any development must respect and contribute to the fulfillment of the fundamental rights of human beings. These include among others the right to be free from discrimination and to access an equitable share of nationally generated wealth, the right to own property or land, the right to access adequate food and clean water, the rights of the indigenous people, the right to self-determination, to participate in and benefit from economic, social and cultural development, the right to work, the right to adequate housing and the right to access. These rights should be observed and protected by any developmental policy, legal framework or programmes. Failing to acknowledge rights as entitlements can clearly contribute to them being relegated, compromised and unrealized.<sup>41</sup>

What then are the qualities and objectives of a rights and justice based legal framework for the mining industry? An analysis that answers this question is not in the scope of this paper but **Box 1** below highlights what the Kenya Human Rights Commission considers to be the good qualities, objects and objectives of a Human rights centered mining legal framework<sup>42</sup>

The mining industry often has a dramatic and highly visual impact on the environment. Perhaps this is why it is one of the economic activities that has generated the most environmental and abuse of human rights controversies. Its impact on the landscape are impossible to miss and where appropriate measures to safeguard the environment and social economic effects to communities living in this mining areas are lacking, the effects to the communities are devastating. This section looks at the various human rights concerns of the communities living in the mining areas.

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<sup>41</sup> Steve Ouma, 'Analyzing the Human Rights Implications in the Draft Mining Legal and Policy Framework', an Unpublished Paper presented during the National Conference on Ethical and Accountable Mining in Kenya, 23<sup>rd</sup> - 24<sup>th</sup>, March 2006-Jacaranda Hotel, Nairobi

<sup>42</sup> KHRC Overview and brief on the draft mining policy and bill March 2007. Unpublished Paper.

***Box 1***

**QUALITIES, OBJECTS AND OBJECTIVES OF HUMAN RIGHTS CENTRED MINING  
LEGAL FRAMEWORK.**

These qualities, objects and objectives underscore both the content and process issues:

- ENVISIONING a society whereby mineral resources among other land based and national resources are managed (explored and utilized) in a sustainable, optimum, equitable, accessible and responsible manner for posterity,
- ACKNOWLEDGING that the citizenry (as individuals, communities and a nation) are the overall owners of minerals among other land based resources,
- NOTING that the Government and Miners are just but mere stewards/ agents and tenants of these resources respectively, on behalf of the citizenry,
- INTEGRATING sound human rights protection in mineral resources development. This includes compliance with the national and international practices and obligations related to human rights and governance of natural and national resources,
- RECOGNIZING the universality, indivisibility, interdependence and equality/ non-discrimination in the enjoyment of rights and benefits accruing from development processes and mining operations in particular,
- ENHANCING substantive participation and involvement of all the concerned state and non state actors both in formulation and implementation of the final Policy and legislation,
- FOSTERING effective consultations and consensus with the host communities on how the local land based resources should be managed and or governed,
- ENSURING gender and inter-generational equity, sensitivity and affirmative action both in the language and established governance and institutional frameworks,
- UPHOLDING the values and practices of transparency, accountability and flexibility within the legal, policy and administrative frameworks governing mining operations,
- PROVIDING fair and just approaches and structures in sharing the benefits accruing from mining operations,
- OBLIGING protection of the environment and national economy including compliance with the existing environmental laws, fiscal policies and national development objectives,
- ENFORCING good corporate governance among the mining companies and individuals, including a corporate social responsibility policy not as a gesture of charity but an act of justice and protection of human rights,
- FACILITATING a logical congruence with the existing good practices and on-going reforms processes ostensibly to streamline governance and safeguard gains on the related systems, sectors and issues. For instance, between the Mining Policy and Bill, between the Policy and Bill and other governance and reforms processes to avoid disharmony and inconsistency,
- CREATING competent, independent, impartial, accessible and judicious mechanisms for dispute resolution, full restitution and reparations in order to ameliorate legal, social and economic injustices,
- MAXIMIZING the potential of and support to the disadvantaged and vulnerable groups and actors in the management of the land based resources. For instance, the unskilled, poor, women, physically challenged, small scale miners among others,
- ENSURING clarity and precision in the provisions and obligations. For instance unambiguous timelines and accountability mechanisms will boost the enforcement of the Policy and Bill,
- PROVIDING for unfettered access and flow of information in order to further the public interest generally, including in particular to promoting-
  - i). public participation in democratic and development processes;
  - ii). greater accountability of public and private authorities,
  - iii). better informed discussions and the free interchange of opinions<sup>1</sup> within the development processes/ and management of national resources.

### **3.2 The Link between Human Rights and the Environment**

Every woman, man, youth and child has the human right to a safe and healthy environment, and to other fundamental human rights linked to and dependent upon a healthy environment. Human Rights relating to the environment are set out in basic human rights treaties and include: The human right to a safe and healthy environment; the human right to the highest attainable standard of health; the human right to ecologically sustainable development; the human right to an adequate standard of living, including access to safe food and water; The human right of the child to live in an environment appropriate for physical and mental development; The human right to full and equal participation for all persons in environmental decision-making and development planning, and in shaping decisions and policies affecting ones community, at the local, national and international levels; The human right to safe working conditions, including adequate safeguards for pregnant and lactating women; The human right to freedom from any type of discrimination; the human right to education and information, including information relating to links between health and the environment and the human right to share in the benefits of scientific progress. Article 22, 25 and 27 of the universal declaration of human rights guarantees everyone the Human Right to a Safe and Healthy Environment.

It is therefore not surprising that the international community is addressing the linkages between human rights and environmental rights. The relationship between the quality of the human environment and the enjoyment of basic human rights was first recognized by the UN General Assembly in the late 1960s. In 1972, the United Nations Conference on the Human Environment (UNCED) made a direct link between the environment and the right to life. Ten years later, the World Charter on Nature explicitly referred to the right of access to information and the right to participate in environmental decision-making.<sup>43</sup> A decade after that, in 1992, the Rio Declaration acknowledged the right to a healthy and productive life in harmony with nature and the right of access to environmental information and of public participation in environmental decision-making.<sup>44</sup> Most recently, however, the 2002 World Summit on Sustainable Development in Johannesburg simply acknowledged the consideration being given to the possible relationship between environment and human rights. The linkage between human rights and environmental concerns embrace at least three dimensions:

- The right to a healthy environment is a fundamental part of the right to life and to personal integrity.
- Environmental destruction can result in discrimination and racism. Thus, socially and economically disadvantaged groups seem to live more often than other groups do in areas where environmental problems pose a real threat to human health.
- Procedural human rights such as access to information, access to justice and participation in political decision-making are often crucial for ensuring policies that respect environmental concerns

In Kenya, the Environmental Management and Coordination Act (EMCA) of 1999<sup>45</sup>, recognizes the right to a clean and healthy environment and obligates every person in Kenya to safeguard and enhance the environment.

### **3.3 Environmental concerns**

Given the scale of mining it is not surprising that they have a wide range of environmental impacts at every stage of operations. Every mineral and mine differs from the next, so are the

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<sup>43</sup>World Charter for Nature, paras 15-16, 23, available at: <http://www.un.org/documents/ga/res>.

<sup>44</sup> *Rio Declaration on Environment and Development*, Principles 1 and 10, *reprinted in*: 31 I.L.M. 876 (1992)

<sup>45</sup> Section 63

environmental impacts. In Kenya, the endowment of the minerals is varied; it includes metallic minerals such as gold, copper lead and silver, non metallic minerals such as diamonds, titanium, gemstones, ruby, sapphire garnet and other hydrocarbons that occur in trace amounts, geothermal energy, petroleum energy, and industrial minerals such as limestone, fluorspar soda ash, gypsum and diatomite. Currently non metallic minerals dominate the mining industry. Mining therefore is increasingly becoming an environmental issue especially as more and more minerals are being discovered in Kenya. Its important to note that environmental concerns of any given mine or mineral differs in extent from one mine to the next but in general the following are some of the potential environmental concerns communities living in mining areas have to deal with.

### **3.3.1 Air pollution**

The main air quality issue is the dust produced by the working of open pits and by crushing and grinding operations. Dust can also be given off by tailing dams. Workers and nearby communities can be affected by dust in the atmosphere. In addition, Particle fall-out around mine sites can contaminate soils and water and damage vegetation. Mines are also a source of green house gases gas emissions that have led to climate change. Poisonous gases such as methane are sometimes released from underground operations. Smelting (the process in which ore is heated for the purpose of separating it from gangue) produces very large amounts of air pollution pollutants. Such as sulphur dioxide which causes severe local environmental damage as well as contribute to more distant or global phenomena such as acid rain and climate change.

### **3.3.2 Water pollution.**

Potential sources of water pollution from mining include drainage from surface and underground mines, wastewater from beneficiation and surface water run off.. Many mining operations especially those extracting ores that contain sulphides may produce acidic and metal metal-bearing solutions resulting from natural oxidation. The combination of acids and metals can have severe effects on the ecology of local water courses and the metals can enter and bio-accumulate up the food chain.

Mineral separation that use make use of dangerous and toxic chemicals like the use of mercury in gold mining ( Practiced in Kenya by small scale miners of gold in Migori and Kakamega) sulphuric acid and cyanide are serious sources of contamination if appropriate control measures are not put in place. Aquatic life will be affected. In addition to causing water pollution, excavations can influence the hydrology around the area. Excavations may lead to more rapid seepage into ground waters causing near by streams or wells to dry up.

### **3.3.3 Solid wastes**

Open pit operations produce far more waste than underground operations. Heaps of mine waste occupy large amounts of land and disfigure the landscape. They are also a source of inert and dust and water pollution. Inert materials carried away in run off water can clog rivers and streams.

### **3.3.4 Other environmental impacts are listed below.**

#### **Environmental impacts**

1. Destruction of natural habitats at the mining site and waste disposal sites
2. Destruction of adjacent habitats as a result of emission and discharges
3. Changes to river regime and ecology due to salutation and flow modification
4. alteration in water tables
5. Destruction of adjacent habitats arising from influx of settlers

6. change in land form
7. Land degradation due to inadequate rehabilitation after closure
8. Land instability
9. Danger from failure of structures and dams
10. Abandoned equipment plant and building

#### **Pollution impacts**

1. Drainage from mining sites including acid mine drainage and pumped mine water
2. sediment run off from mining sites
3. pollution from mining operations in riverbed
4. Effluent from minerals processing operations
5. oil and fuel spills
6. soil contamination from treatment residues and spillage
7. leaching of pollutants from tailings and disposal areas and contaminated soils
8. air emissions from minerals processing operations
9. Dust emissions from sites close to living areas or habitats
10. Release of methane from mines

#### **Occupational health impacts**

1. handling of chemicals residues and products
2. dust inhalation
3. fugitive emissions within plant
4. Air emission in confined spaces from transport blasting and combustion
5. Exposure to heat, noise vibration physical risks at the plant or at the site
6. Unsanitary living conditions

### **3.4 Human Rights and Socio Economic Concerns**

When a large mining operation begins, the area around the ore deposit often sees a sharp boost in economic activity. New roads are built; housing goes up for the miners; smaller businesses set up shop to serve the mine and its workers. And indeed, such operations are typically presented as the ticket to local prosperity. But the economies that grow up around these mines usually suffer from the “company town” syndrome: there is generally little economic activity that is independent of the mine. Local communities usually bear the costs of mining in the form of environmental damage and pollution, loss of traditional livelihoods, long term economic problems and deteriorating public health. The benefits of the mine usually go to investors overseas and the central government, with little of the profit passed back to the community.

#### **3.4.1 Involuntary displacement**

In the developing world and in many indigenous communities in the industrialized world many people lack legal title to the lands they live on, even though they may have occupied the same lands for many generations. Such people are vulnerable to eviction when mining lease is granted, and the eviction may be imposed without prior consultation, meaningful compensation, or the offer of equivalent lands elsewhere. In fluorspar mining in Kerio valley, for example, a 2007 investigation by local NGOs substantiated claims of forced evictions around the area. **Box 2** below gives the details to this case study.

#### **3.4.2 Displacement of livelihood**

Even where there is no direct displacement of the people themselves, there is frequently a displacement of their traditional livelihoods. Large-scale mining is so destructive to the landscape that little in the way of traditional rural life is liable to survive in its vicinity. Industrial mining generally eliminates farming, fishing, small-scale forestry, and even any previous artisanal mining

### **3.4.3 Increased social ills**

A host of subsidiary problems tends to follow the entire initial disruption. The loss of traditional ways of life and an influx of male migrant workers, usually living away from their families in many places, this scenario has led to an increase in alcoholism, drug abuse, prostitution, crime, and domestic violence.

### **3.4.4 Violent suppression by the Mining companies or Government.**

Community opposition to mining may encounter violent suppression by the companies themselves or by government forces working in conjunction with them. Indeed, as a practical matter; it can be difficult to distinguish between these two entities. Especially in parts of Africa and the Pacific region, large-scale mining tends to become “militarized.” In such situations, the actions of the police, the military, or persons unknown have often resulted in the death or disappearance of mining opponents. Sometimes this violence can emanate from the local community, especially in areas where small scale mining is prevalent. For example, Recently in Taita Taveta, Kenya, A British Gem Mine owner was killed and his staff injured by the local community <sup>46</sup>

#### **Box 2**

#### **The fluorspar mining case in Kerio valley**

In the Kenya Fluorspar Company (KFC) case, over 1,400 families whose land was set aside for the mining of fluorspar in Kerio Valley, appealed to the National Environment Management Authority (NEMA) to protect their right to a clean, healthy and sustainable environment in 2005. The community complained that (KFC) had continued to expose them to constant health hazards through its mining activities. Investigations revealed that people still lived within the mining environs although they were to be relocated when the land was earmarked for mining in the 1970s.

A community rights group formed to champion for their rights, Kimarer Sugutek Community Rights Group, accused the mining company of disregarding environmental laws by the level of noise from explosives and discharging harmful effluents into the Kerio River and appealed to NEMA to act against it. The groups secretary, David Seurei and elder, Nehemiah Chepkwony and Martha Keitany in an interview with the Kenya news Agency claimed that three dams the company used to empty its effluents were filled up with fluoride silt claiming the company was now discharging effluents in to River Kerio and on land. Laboratory analysis on water, milk, honey, soils and plants conducted by a lecturer at Egerton University indicated high levels of concentration of fluoride; phosphate and sulphate were way above the WHO recommended levels.

A visit by local NGOs organized by the Institute for Law and Environmental Governance, The Kenya Human Rights Commission and Kenya Land Alliance in June 2007 revealed that human rights injustices were committed to this community. They suffered from poverty and lack of land to farm. Some of them had their relatives graves excavated and remains just buried by the road side. They had been unable to address their grievances because the company that is mining began as a Parastatal and was then operating as a private company. The inhabitants had been promised that they would be given land as compensation but to date this has not happened. Participants also witnessed the fact that after excavation the company does not rehabilitate the area at all. The participants had a chance to interview a few of the members of the community and ask them questions. They said that they had written a letter to their area District Commissioner and the company asking them to address their grievances yet nothing has been done. In their letter they enumerated some of their grievances as; no land to move to, no employment in the mines, and risk of death from effects of mining, no access roads, and environmental degradation among others.

<sup>46</sup> Daily Nation 13<sup>th</sup> August 2009.

### **3.4.5 Inadequate community participation in decision making**

Public participation is where the citizens take part in the process of arriving at decisions about the activities that are proposed to be undertaken. The involvement of local communities living around mining areas enables the community to influence the decisions and bring their perspectives to bear on the decision making process. More often in the mining industry, this has not been the case. The current legal framework did not provide for public participation thus communities had little or no say at all on developments taking place on their land. One of the fundamental ways of ensuring community participation is through the process of Environmental Impact Assessment. The EMCA contains a list of projects for which an EIA must be carried out in the second schedule which includes mining.

### **3.4.6 Lack of Just Transition Programmes**

Eventually the boom goes bust, as ore deposits are exhausted and the jobs generated by the mine disappear. Most large-scale projects have a lifespan of between 10 and 40 years, after which the mining companies close up shop and move on to new projects. Any schools, clinics, and other services established by the companies usually lose their funding. When this happens, the miners and communities are generally left to fend for themselves. Since mining is specialized employment, miners typically do not have few other marketable job skills, nor do many governments or companies make much of an effort to provide those skills. There are few “just transition” programs, in which former mineworkers are retrained for other work. For these reasons, laid-off miners are likely to stay unemployed for long periods. The social effect of these layoffs is often profound, because the miners generally have a large number of dependents (although the majority of them may not be in the mining communities themselves)

### **3.4.7 Land rights**

A Land right is an area where the balance between attracting investment and ensuring that that investment benefits poor people has been significantly altered. In Kenya, surface and subsurface property rights are legally distinct. The central government exercises exclusive control over subsurface resources, while the property that lies above a mineral deposit may be owned privately or by a community. This means that in order to exploit a mineral deposit, a mining company has to gain legal access to the surface property.

### **3.4.8 Economic decay**

Although some benefit from jobs at the mines, most people are still dependent on agriculture. They say that, because of environmental degradation, they are actually poorer today than they would have been if mining had never come to the region. The people that still work in their fields do it as a complementary activity, nothing more – they have to work in the mine, if they can, or as a vendor or in transport. They can no longer work exclusively in their fields like before there was the mining company. Other farmers complain that their animals are also suffering the effects of lead poisoning and other contamination. While the company and the state enjoy the profits of mining, the same cannot be said of local people. In contrast, the communities in the area receive nothing.

### **3.4.9 Harassment by administrative police and/ or company security**

Most Mining companies use the police and company security men to harass community members, workers or the general public. In Most cases where evictions are carried out, the general service, administration police, or company security are used to evict people. They breach fundamental human rights and violate individual and community rights by unnecessarily destroying property while evicting members of the community from an area or land that is in dispute. There are also cases of framed arrests, illegal detentions and assaults of workers by the companies

### **3.4.10 Poor working conditions**

Workers employed in mining companies more often than not work under extremely poor conditions. They are not provided with appropriate work attire and equipment such as gloves, boots, helmets, overcoats, scrapers and basins. Secondly the workers have limited opportunity to participate in collective bargaining processes, and the mining which discourage them from joining trade unions. The situation is exacerbated by the absence of or ineffective recruitment strategies of trade unions. Even though the Mining

### **3.5 Women and Mining**

In the mining communities of the developing world, it is the women, already disadvantaged, who bear some of the most difficult burdens. In many countries, women are not permitted to own land or their land rights are restricted. Lack of title often excludes women from land compensation payments. Even when women have title, they may be excluded from negotiations any way because such matters are frequently seen as a male prerogative. In Papua New Guinea, for example women were excluded from formal compensation negotiations with the Rio Tinto subsidiary that owns the Lihir gold mine. Large-scale mining creates very few employment opportunities for women, and it displaces economical activities, such as agriculture or artisanal mining in which women often play major roles. These changes tend to concentrate economic power in the hands of men, increasing women's dependence on their husbands or male relatives.

Women who do find work in mining companies may face severe discrimination—or worse. The drinking, drug use, and prostitution typical of mining communities also aggravate some health risks that fall especially heavily on women, such as HIV infection. Environmental contamination from mining—especially water pollution—can greatly complicate the traditional role of women as providers of food and water to their families. In drier regions of the developing world, women must often walk considerable distances to collect the day's water. Mine pollution can lengthen that walk, reducing the time for every- thing else. And because it ruins farmland, mine pollution may also strain local food resources.

### **3.6 Benefit sharing**

No single industry has precipitated more disputes over benefit sharing than mining<sup>47</sup>. Intensive mining activity can cause severe community disruption, hinder the development of other potentially profitable industries and cause major environmental complications, which can render land unsuitable for a number of other important industrial applications Disputes over land often occur between mine management and community groups who might have vital interests on how land is used and who makes decisions regarding it.<sup>48</sup> Decision-making on land use requires prior informed consent, negotiations and consultation between all stakeholders. In this respect, decision-making processes must be open to a refusal to mine in circumstances where cultural, environmental or other factors override access to minerals or where mining would bring unacceptable loss in the view of those it is being imposed upon

The schools of thought on mining are divided between those who argue that mineral resources are a curse and those who consider them an endowment that can promote growth and development in developing countries. There is a prevailing view that mining in developing countries is a capital-intensive enclave industry, foreign-owned, operated largely by expatriates and using inputs (especially equipment) purchased abroad. Many scholars have argued that the richer the mineral resources endowment, the greater the likelihood of decelerating economic growth and that the track record of oil and mineral rich States in alleviating poverty is worse

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<sup>47</sup>Gavin Hibon 2002

<sup>48</sup> Ibid

than States with similar levels of income, but little or no oil and mineral wealth. But, other scholars counter that the reported negative outcomes of mineral economies are case-specific; that minerals are not to blame for problems of corruption and rent-seeking, and that economic performance is mixed, heterogeneous and, therefore, should not be generalized. Some contend that, for example, among African mineral economies there are fast growing and well-performing economies like Botswana, and that others, like South Africa, developed on the strength of their mining industry. In Kenya, the law provides that royalties are paid for all minerals. The rates of royalties are negotiable within the commonwealth countries' rates. Though the proposed legislation unlike the current one has proposed specific rates for different classes of minerals, this is not enough. Such an arrangement benefits the exchequer and there is no guarantee that the communities living and affected by the mining companies are benefiting. Most mining companies confuse corporate social responsibility with benefit sharing. A few handouts and assistance here and there are what most companies proudly report to have shared the benefits of the minerals they are mining.

### **The emerging dispensation**

There is now a shift from the traditional focus on benefit allocation between mining investors and the host country like is the practice in Kenya, to increasing attention on the benefits derived by the communities where mining operations take place. The benefits to the local community may come in various forms including property rates and land rents; benefits which are the community's share of central government revenues from mining, and non-income benefits such as employment for local residents; assistance to community health and educational institutions; and access to the use of mine infrastructure by the general public, etc. However, more needs to be done to achieve change; Policies, revenue-improving tools, legal and regulatory frameworks to facilitate equitable participation by local businessmen, communities and other stakeholders in mining activities need to be refined. Transparency and efficiency in the management of revenue paid to various governmental authorities have become an important part of the mineral policy agenda<sup>49</sup> and mechanisms for enhancing these, needs to be implemented. They need to be coupled with efforts to strengthen institutional capacities and competencies at government and other levels for efficient long-term planning, prudent management and smart spending, saving and investment of mineral wealth.

## **CHAPTER 4**

### **4.0 ENVIRONMENTAL CONSIDERATIONS IN MINERAL UTILIZATION**

#### **4.1 Introduction**

The mining sector having operated with a legal framework that was amalgamated in 1940, it is instructive to note that to date it has no clear provisions for environmental considerations prior to commencement, prospecting and or during mining activities. Even after the EMCA was put in place, which has a requirement under section 148 for all sectoral legislation including the Mining Act to be harmonized with the provisions of EMCA. However, a concerted attempt to remedy this position has been made by the Draft Mining Bill.

#### **4.1 Environmental considerations under the Mining Act**

The act requires holders of registered mining locations and exclusive prospecting licenses to abandon the granted area. In such a case, it is mandatory for holders to take measures to prevent persons or stock other than dogs inadvertently entering mining areas by filling them up,

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<sup>49</sup> Pedro, A, opt.cit

or securing all shafts, pits, holes and excavations. Failure to do so is an offence punishable by a fine of up to one thousand shillings or term not exceeding three months in prison. The guilty person is also liable to pay such a sum as the Commissioner may certify the rehabilitation cost. This provision appears noble as it faces value, but it seems the intention is to cover any abandoned mine to prevent injury to people, stock if they inadvertently enter such area. It fails to provide for proper rehabilitation of abandoned mines and prevent accumulation of water, land slides or restore the landscape.

A person or entity with a mining lease has exclusive right to carry out mining activities on the land in question. They may excavate put up structures make watercourses, dams or ponds to divert from a natural watercourse any water on or flowing entirely through the land. They are authorized to return any diverted water to its natural channel provided it does not contain any noxious or poisonous matter.<sup>50</sup> This law does not prescribe minimum standards of water quality re-introduced to the natural watercourses. However, that is not the position under EMCA, which prohibits water pollution with penal sanctions and requires promulgation of water quality standards. Thus, the recently promulgated Environmental Management and Co-ordination (Water Quality) Regulations 2006 set out a comprehensive framework governing water quality, water discharge and minimum chemical compositions of any such water discharges into the environment after industrial, agricultural, mining and related uses.<sup>51</sup>

At the determination of a mining lease, the holder of the lease is required to remove any tailings or ore that is left on the land.<sup>52</sup> Tailings here are mud and slurries containing very high proportions of extremely finely ground material and gravel. The law provides that prior to removal of tailings a lessee whose lease has expired should apply to the commissioner for leave to enter the land in question, If such leave is not applied for within 30 days, or the removal is not completed within the time frame fixed by the Commissioner, any tailings or ore remaining on the land becomes the absolute property of the government

The subsidiary legislation enacted under the act: the mining (safety) Regulation attempt to provide some clarity to this issue. Rule 6 provides that any disused excavations to be filled or otherwise rendered safe to the satisfaction of the commissioner failure to which the commissioner may cause the filling or fencing of those disused excavations at the expense of the owner.

### **4.3 Environmental Impact Assessment**

EMCA provides for a mandatory undertaking of an environmental impact assessment prior to the commencement of any project specified in the Second Schedule. A project proponent must submit a project report to NEMA prior to commencement. If after studying the project report, the authority is convinced that the proposed project is likely to have a significant impact on the environment, the proponent must undertake a complete EIA.<sup>53</sup>

The Second Schedule sets out projects that require an EIA prior to commencement. These include any major changes in land use as well as mining, including quarrying. Regulation 18 of the Environmental Impact Assessment and Audit Regulations<sup>54</sup> sets out the issues that an EIA study should primarily address itself to in order to ensure sustainable development. They include an inquiry into the available technology and alternatives; potentially affected environment; and the environmental effects including socio-cultural impacts. It should also frame an environmental management plan to eliminate or mitigate adverse environmental

<sup>50</sup> Section 47.

<sup>51</sup> Legal Notice No. 120 (Legislative Supplement No. 36, Kenya Gazette Notice No. 68, 29 September 2006).

<sup>52</sup> Section 57

<sup>53</sup> Section 58 of EMCA.

<sup>54</sup> Kenya Gazette Supplement No. 56 (Legislative Supplement No. 31): Legal Notice No. 101 (Nairobi: Government Printer) (13 June 2003).

impacts. They must also address the issue of timeframe, cost and identify who bears the overall responsibility to implement this plan.<sup>55</sup>

EIA is, thus, a mandatory requirement under EMCA, yet the current mining law contains no express requirement of the same. A reading of the Draft Mining Bill shows that EIA license is a pre-condition to the granting of any license. However, there is confusion regarding permits issued for small scale operations as right holders are only required to take all measures to protect the environment. This may create an impression that small scale mining is exempt from conduct of an EIA. Whereas small scale operations provide livelihood to many Kenyans, it also causes serious environmental damage. It is appreciated that the provisions of section 58 of EMCA, and the Second Schedules on projects requiring an EIA are mandatory, and that mining operations are included. Thus, despite the omission, small scale operations should basically undertake an EIA. It would, however, help if the provision is amended to clarify this issue.

#### **4.4 Environmental management and restoration plans**

The current mining law makes no reference to environmental management during mining operations. The EIA regulations, however, require an EIA study to incorporate an Environmental Management Plan defining 'all details of project activities, impacts, mitigation measures, time schedule, costs, responsibilities and commitments proposed to minimize environmental impacts of activities, including monitoring and environmental audits during implementation and decommissioning phases of a project'.<sup>56</sup>

Environmental restoration plans are very important for mining operations, especially action after the mining operations have ceased. Mostly, disused mines are left bare, with open pits which are environmental and public health hazard. To remedy this, project proponents should, under EMCA, be required to identify the kinds of environmental damage their operations are likely to cause, and set out a comprehensive plan of action on how to rehabilitate the destroyed ecosystem and leave the area environmentally better off than it was prior to the mining operations.

The Draft Mining Bill provides that none of its provisions exempts any person from complying with the laws pertaining to environmental protection in Kenya.<sup>57</sup> As a pre-requisite to the grant of any license, an applicant must submit site rehabilitation and mine closure plans for approval by the Commissioner.<sup>58</sup>

#### **4.5 Environmental protection bonds**

Section 28 of EMCA empowers NEMA to register all activities and undertakings with a potential for significant adverse effects on the environment if operated contrary to good environmental practice. This should enable the Finance Minister, with advice from the National Environment Council, to require deposit bonds from these undertakings as sufficient security for good environmental practice. If there is compliance to the satisfaction of NEMA, the deposit bond will be refunded without interest.

Under the Draft Mining Bill a license applicant must avail an environmental protection bond sufficient to cover their potential environmental restoration costs.<sup>59</sup> The bond can be released partially upon satisfactory fulfillment of the obligations. It must be released upon successful completion of all the required obligations.<sup>60</sup> Having similar provisions in two different statutes – EMCA and Mining Law - will result in institutional conflict of this provision.

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<sup>55</sup> Regulation 18(1) (k).

<sup>56</sup> Regulation 2.

<sup>57</sup> Section 146.

<sup>58</sup> Section 149.

<sup>59</sup> Section 150.

<sup>60</sup> *Ibid*, subsection (4).

#### **4.6 Fiscal instruments to procure environmental compliance**

There is a provision for the utilization of governmental tax and other fiscal instruments disincentives or fees to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation. These instruments are ideal for application to mining ventures to procure compliance either sustainable environmental management. These include customs and excise waiver on machinery and other equipments that reduce or protect the environment. Other instruments available for use include tax rebates to industries and undertakings investing in plants, equipment and machines for pollution control, waste recycling conservation or prevention of environmental degradation.

#### **4.7 Environmental Restoration Orders**

Section 108 of EMCA provides for issuance of environmental restoration orders on any person by NEMA or by a court of law. In the latter case, issuance is only where proceedings have been instituted by an aggrieved person. When issued, such an order would, *inter alia*, require restoration of the environment to the condition it was in prior to the degrading action and award compensation to any person harmed by the degrading action. In this case, the perpetrator of the degrading action is liable to meet the full cost. In mineral resource utilization, this provision when enforced effectively has the potential to mitigate the nightmare of non-rehabilitation of disused mining sites.

Possibly, the fiscal instruments discussed above can be used in the first instance, to encourage investors to find ways to restore the environment and make money in the process. A case in point is the restoration work undertaken by La Farge Ecosystems, the Bamburi Cement manufacturer in Mombasa. The company restored their former limestone mine, converting it into the income generating nature trail and wildlife Haller Park

### **CHAPTER 5**

#### **5.0 CASE STUDIES**

##### **5.1 Introduction**

It has been recognized that mines bring rapid change to communities. For local communities mining and mineral exploration can bring opportunities for economic development, jobs and training. On the other hand, it can also bring environmental degradation, change the way people use the land, and make cultural change when people work in wage employment at the mine and are away from their families and the land for long periods of time. The following two case studies show how local communities have responded and reacted to the mining industry in their territory. The first case study illustrates how lack of or inefficient legal framework, community participation and transparency affect both the mining companies and the local community. The second case study is an illustration of good mining practices that respect the need and social cultural values of communities'. While each community is unique, there are broad lessons which other communities may find useful and helpful to apply in their own situation.

##### **5.2 Case study 1: Tanzanite mining in Mererani**

Mererani is situated in Simanjiro District, Manyara Region, about 70 km south of Arusha town and 16 km south of Kilimanjaro International Airport. The population of Simanjiro is only one fifth of Geita District, standing at around 150 000. Simanjiro is part of the Maasai Steppe, an area that has traditionally been dominated by the pastoralist Maasai since it is was not suitable for traditional cultivation. Approximately one third of the Simanjiro population live in Mererani.



Tanzanite mining is concentrated on a six km long belt four kilometers south of Mererani settlement. The mining area is divided into four blocks. Small scale mining for other minerals, such as ruby, green garnet, tourmaline and rodlite take place in 24 of the villages in the district, and open pits are found everywhere. New concessions for explorations for these minerals are currently being given to larger companies.

Mining of Tanzanite on a commercial scale was started soon after its discovery and 1967 saw a virtual mining “rush” to the area. In 1972, the Tanzanite mines were nationalized and operating under Tanzania Gemstone Industries (TGI). As many other state-run enterprises in the socialist era, TGI had extremely low production, officially only 7 kg annually from their open pit mines. Theft from the company is said to have been rife. By 1986, TGI was declared a failure and the site was left vacant. The result was an invasion of artisanal miners who constructed a network of underground tunnels, some of them 60 meters deep. The number of informal miners is said to have been 30 000. The government’s intention, however, was to have private companies take over the site, since they would be easier to control. A major flooding accident in 1998, where at least 200 miners died, was also among the factors which made the government opt for more large scale mining. In 1990, small scale miners were ordered to move from the mining area, and the site was divided into four sections, block A, B, C and D and granted to different private international companies

According to small scale miners, Block C was not active and the site was therefore once again invaded by artisanal miners in 1995. Three years later, in 1998, the block with all its assets was sold to Mererani Mining Ltd., a subsidiary of the South African owned company African Gem Resources (AFGEM). AFGEM started production in 2001. The company has been involved in serious conflicts with artisanal miners as well as its former director. Artisanal miners are upset by what they see as an attempt by AFGEM to monopolies the Tanzanite trade. The conflict also resolves around very different conceptions of mining rights and permit definition

The exact number of small scale miners in Mererani is somewhat unclear. According to the Zonal Mines Office, there are 600 claim holders in the northern zone, of which 200 are active at any given time. Arusha Regional Miners Association (AREMA), on the other hand, operates with a number of 700 mines in Mererani alone, of which 300 currently have production. The Reconciliation Committee of Block B and D represent a group of 170 claim holders, of which the leadership says 88 are active. A small group of Maasai own mining claims, but the great majority of claim holders have their backgrounds in other districts and regions. Some came to the area as civil servants, and took an interest in mining. A critical issue in artisanal mining in Mererani is safety. After the 1988 flooding disaster, where at least 200 miners died, a number of new regulations were imposed on mine owners. Reports one year after revealed that many of the regulations were not adhered to), and 2002 saw yet another major mining accident where 39 small scale miners down deep tunnels suffocated to death

In Mererani, conflicts between large scale and small scale miners have come to a level of conflict. The conflict is centered on two main issues: the question of branding of Tanzanite that AFGEM introduced which in a way gives the company monopoly to sale and export. The small scale miners have had several confrontations with the company where small scale miners threatened AFGEM workers with knives and swords and threw a petrol bomb into the company and so far 12 small scale miners have been short by the company security guard. The second issue is that of different conceptualizations of the where the demarcations of claim titles go: at earth level only or below the ground as well.

Stake holders demand greater involvement from Government in conflict resolution. After the 2001 incidents, when a small scale miner was shot dead and a petrol bomb was used to attack AFGEM, the Minister for Energy and Natural Resources called a special meeting in Mererani to **25**

quell the tensions. In the meeting, the Minister “urged all parties involved in the conflict to refrain from provoking each other by trespassing or using guard dogs which, he said, was reminiscent of apartheid South Africa” Apart from this meeting, however, both small scale and large scale actors feel that the government is shying away from mediating in the conflict.

A recent Participatory Poverty Assessment conducted in Simanjiro concluded that the Maasai of Simanjiro are being marginalized by loosing land to both farmers and mining companies. In the early 1990s, when Graphtan got the concession to start mining, there were a number of Maasai homesteads (bomas) within the Block C area. The Maasai families were ordered to move, some were hurt during the conflict that ensued, and the Maasai were denied any right to compensation: “To them, it looked like the land was occupied by animals, but it was occupied by people”. Since AFGEM took over the mine in 1999, the company has targeted the Maasai community in Nasinyai village specifically for their community development projects. The Maasai of Nasinyai now have a far more harmonious relationship with AFGEM than the “Swahili” population of Mererani town.

Benefit sharing is an issue here. When AFGEM took over Block C from Graphtan, the village government in Mererani requested the company to contribute to social development in the area, particularly the provision of water. AFGEM allegedly argued that it was not their responsibility, and that it was not part of their contract with the government.<sup>61</sup> As discussed above, AFGEMs relations with the small scale miners became increasingly tense. In 2001, AFGEM offered the Mererani village government a US\$ 28 216 donation. The offer was refused, and seen as an attempt to buy off the discontented citizens.

Like the small scale miners, mine workers organized through Tanzania Mines and Construction Workers Union (TAMICO) have also experienced powerlessness in the face of the joint forces of local authorities and a foreign investor

### **Lessons Learnt**

One of the main lessons learned from research conducted in other countries, and of high relevance to Tanzania, is that mining companies need a “social license”. This social license should be the result of a strong trilateral dialogue between the mining company, the local community, and the government at the local, regional, or national level It is exactly this trilateral dialogue that seems to have been missing in Tanzania up to now. Above all, the government and the mining companies have not understood, or not prioritized, the importance of information sharing and openness. Disclosure of contracts, ownership, revenue, donations, and future plans, would do much to help stop the rumor making presently taking place, and above all improve accountability. Improved accountability would in turn encourage local communities to take an active role in benefit sharing management.

Tanzania has revised its laws and policies to liberalize the mining industry and encourage foreign investors in to the industry; however this legal framework lacks enforcement. Coupled with corruption and lack of transparency, the local communities continue to be on the disadvantage as the foreigners and few individuals in the government benefit.

### **5.3 Case Study 2: The Innu Nation and Inco's Voisey's Bay Nickel Mine/Mill in Canada**

In 1994, two diamond-seeking geologists were heading back to the base camp after a day's work when they stumbled across a rusty outcrop on a small hill just north of Voisey's Bay. What they had tripped over turned out to be one of the world's richest nickel, copper and cobalt finds, located only 79km northwest of the Innu community of Utshimassits and in the heart of Innu

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<sup>61</sup> Kulindwa, Kassim, Oswald Mashindano, Fanuel Shechambo, and Hussein Sosovele. 2003. Mining for sustainable development in Tanzania. Dar es Salaam: Dar es Salaam University Press

territory. The find was on land shared by Inuit and Innu people, and was located only 35km from the Inuit community of Nain. The find also kicked off an exploration boom that left its stamp on Innu territory in the form of base camps, cut lines, and fuel caches. In 1995 alone more than 250,000 claims were staked, covering nearly half the vast Innu territory. Today that boom has waned, but its legacy continues in the form of abandoned camps that resemble garbage dumps, and camps that have been sold to outfitting companies to use as satellite camps for sport hunters.

The site of the mine and the staked claims area is a place that has been home to the Innu and Inuit for thousands of years. Archaeological work has found evidence of Maritime Archaic habitation (early ancestors to the present-day Innu) dating back 7,000 years before the present, and more that 125 sites attesting to Innu and Inuit use of the area right up to the present-day. People in Utshimassits were upset by the mineral exploration on their lands, and even more upset at the prospect of a huge mine development going ahead without their consent, in the absence of a land rights agreement, and without an impacts and benefits agreement.

As this was the first time that the Innu had faced these issues, Innu Nation leadership sought a mandate from the communities to take to the mining and exploration companies. A task force was established and the community was provided with a forum to discuss the issues of mining on Innu lands, the potential economic development opportunities, the probable environmental degradation, and the absence of a land rights agreement. The result of the task force, a report titled *Between a Rock and a Hard Place*<sup>62</sup> was a clear mandate to the leaders. This stated that Innu people did not want any mining developments until a land claim agreement was signed. The people also said they would not consent to any mining developments without an impact and benefits agreement with the mining company involved, and finally that in order to weigh these impacts and benefits the project would need to undergo environmental assessment.

At the same time as the task force was going on, the Canadian and Newfoundland governments began discussions about harmonizing their environmental assessment (EA) processes. Shortly thereafter, it was recognized that the location of the project was within an area subject to going land rights negotiations between the Innu Nation and provincial and federal governments, and the Labrador Inuit Association (LIA) and the provincial and federal governments. To ensure that the EIA process would reflect the local political landscape, the four parties entered into negotiations which culminated in the signing of four-party Memorandum of Understanding in 1997

The MOU took local conditions into account in that it involved an expanded definition of environment that forced the proponent to consider these aspects which it might not otherwise have dealt with. It also required that the Panel make its recommendations not only to the responsible Minister, but to the President of the Innu Nation, the President of the LIA, and the Provincial and the Federal Ministers. The MOU was vague as to what will happen in the event that the four parties disagreed about accepting the Panel's recommendations.

An important aspect of the MOU for Innu Nation was that it ensured that the parties to the MOU appointed the Panel members. This was negotiated into the MOU by Innu and Inuit negotiators and was one of the biggest assets of the MOU. It was important for the Innu and Inuit to have a say in the composition of the Panel, so that they would be satisfied that the Panel was credible. During the environmental assessment for the Low Level Military Flight Training Panel in the 1980s, the Innu had seen the impacts of a weak panel with a weak mandate, and were not about to play this game again. Although conducting the environmental assessment took over two years, the Panel was married to a very strict timetable that was prescribed in the MOU. This included only 45 days to complete the public hearings and 90 days to release their

<sup>62</sup> Available on the Innu Nation web page at [www.innu.ca](http://www.innu.ca)

final

report.

But having the MOU in place did not mean that the Innu and Inuit could be certain that the project would undergo comprehensive environmental assessment. While VBNC prepared its Environmental Impact Statement, they also wanted to push ahead with what they called "Advanced Exploration Works" at Voisey's Bay. This included an airstrip, a road and a dock which would be used to support exploration crews undertaking to further delineate the ore body. The Innu and Inuit strongly felt that building a road, an airstrip, and a dock was out of the question. First, the environmental impacts of the so-called advanced exploration works would never be assessed, and the presence of the advanced works would prejudice the environmental assessment; what if the panel recommended putting the airstrip somewhere else? Or not having an airstrip at all? In the end, the Innu and Inuit took the province of Newfoundland, which had issued the permits in the first place, to court. The court agreed with the Innu and Inuit, and the advanced exploration work ground to a halt.

During the public hearings, Innu Nation hammered on three points, namely that Innu would not consent to the project without a land rights agreement in place prior to permitting, secondly that the Innu would not consent to the project without an Impacts and Benefits Agreement in place, and finally that the proponent's failure to explore alternatives to the mine plan made assessment impossible.

The panel's report, released several months after the completion of the hearings, included 107 recommendations. The panel recommended that the project move ahead to permitting, but only after the conclusion of land rights negotiations and after IBAs had been achieved with both the Innu and the Inuit. The Innu were pleased at the panel's recommendations and heralded the report as a major step forward for EA and aboriginal rights in Canada.

Developments since the Panel report's release have been less than encouraging however. In publicly released position papers on the recommendations, both the federal and Newfoundland governments gave the project the green light to go to the permitting stage, in the absence of land rights agreements or IBAs. The Innu and Inuit are left, after 6 years of dealing with the proposed mine, and 2 years of environmental assessment, with little more than they had in 1994, except disappointment and shattered expectations. On September 3, 1999 the Innu Nation filed court action, asking the courts to quash the federal government's decision since proper consultation was not carried out between the four parties, and to rule that the government could require Voisey's Bay Nickel Company to complete impact and benefit agreements with both aboriginal groups as a mitigation measure, prior to permitting the project. In the bigger picture, the Innu are asking the courts to recognize that the public process of environmental assessment is not window dressing for development, but that the government must take very seriously the Panel's recommendations. The Innu are saying that the government does not have the right to make political decisions and ignore the panel's clear recommendations.

As for mineral exploration, the pace has slowed considerably since the boom of the mid-1990s. Innu Nation developed specific guidelines of conduct for companies operating in Innu Territory, and these guidelines can now be enforced due to threats from protests and legal action, and the panel recommendations on land rights and IBAs. An exploration company in the advanced stages of exploration (Donner Minerals Ltd.) was recently evicted from Innu land for failing to recognize Innu rights.

## **Lessons Learned:**

The MOU was worthwhile in making the EA process credible to people in the community. In the future, a legal definition of consultation would be valuable in ensuring that when the four parties came together to discuss the panel's recommendations, the playing field would be more level.

- Taking control of the social and economic baseline studies empowered Innu people and ensured that the communities participated fully in the EA process.
- Political strength gained from dealing with VBNC was used in other areas, such as speeding up negotiations on land rights and programs and services.
- Slowing down the pace of development through protests and legal action helped make fighting the mine more manageable.
- Hiring good experts to present to the panel is key in getting good recommendations.
- Pooling resources with other groups and fund-raising from different sources was time well spent.
- Effective public participation in community hearings is equally important. During the public hearings it was clear to the panel that people understood the project, its potential impacts, and were clear on what different technical experts had recommended to the Innu Nation. This gave credibility to Innu experts, Innu Nation, and to people's concerns in the eyes of the panel.

## **6.0 CONCLUSION AND RECOMMENDATIONS**

For mining activity to contribute to sustainable livelihoods and communities requires changes to policies and practices. Economic issues are related to the sharing of gains from the mines in a more equitable manner and the broader sharing of decision making with those affected. There is no doubt that the proposed legislation should take into account the concerns of the context within which the law is being proposed to be made. More particularly, that law would be more relevant if it were to situate itself to the grass roots. This way, it would be easy to enforce it and it would have equally responded to a need. Law it has been accepted must emanate from within the framework of society. Advocacy must be done at various levels. Related to this advocacy is the need to institute public interest cases on the preservation of environment so that miners of whatever level can observe the environment prior to beginning mining.

One of the key issues raised in the above case studies and which is a concern to the ordinary Kenyan as they seek to participate in the mining, is the whole question of licenses. There are several such licenses in Kenya as provided by the current law, lack of transparency to an extent that foreign and private investors are given licenses to start mining operations oblivion to the local community living in the area, the local authority and sometimes even the National Environment and Management Authority Officers in the area.. Secondly and related to the foregoing in the need for this law to come out strongly on the regulation of the mining sector, and in that regulation to consider the genuine concerns of the ordinary people who seek to venture into mining, especially if their pursuit is to aid in the creation of wealth.

There is need to align the new framework with the requirements of section 148 of EMCA, in order to comply with current law, remove contradictions and ease implementation. However, although this is a good benchmark, it is not sufficient; any new legal framework should address current and emerging issues facing the sector, albeit within the law. Further, the process of developing the framework should be all-inclusive and participatory

## **Recommendations**

- The government should establish a legal framework to specify the rights and obligations of all parties involved in any mining project before it commences
- Compensation should be land for land, pegged at the productive value of the vacated land in addition to the costs of relocation. A comprehensive resettlement plan should be presented to Parliament and adopted prior to commencement of the process.
- Project proponents should be required by law to submit a resettlement plan to the relevant government department prior to issuance of a mining lease. Compliance with the approved plan should be a term of the contract of mining.
- Project financing agencies such as banks and donor agencies should be required by national law to ensure there is an approved EIA report and resettlement plan and financial allocations before approving financial support.
- For mining activity to contribute to sustainable livelihoods and communities requires changes to policies and practices. Special taxation to be provided for in the law so that the community where minerals are found to benefit directly
- There is need to align the new framework with the requirements of section 148 of EMCA, in order to comply with current law, remove contradictions and ease implementation.
- The process of developing the legal framework should be all-inclusive and participatory
- The basic human and civil rights of the communities should be protected, as specified in international conventions
- Countries that are home to transnational companies should enact legislation that will require those companies to operate to the same standards wherever they operate in the world. Mechanisms are required to ensure that communities are able to complain about harm done to them by such companies.