



Community Land Action Now

A Community-Based Network Advocating for Secure Land Tenure Rights

COMMUNITY RIGHTS RELATING TO MINING ON THEIR LANDS SUMMARY OF MAIN POINTS

Liz Alden Wily for CLAN! - January 2020

GENERAL

1. **The Mining Act, 2016** governs mining in Kenya.² The Constitution, and laws enacted or amended to meet its directives, also govern mining relations with communities. Main examples include the Community Land Act, Access to Information Act, Environmental Management and Coordination Act, and Land Values (Amendment) Act.
2. **Communities cannot own minerals on or under the land.** Minerals are vested in Government as trustee for the nation.
3. **Government is always a 10% of large-scale operations.** The **National Mining Corporation (NMC)** represents Government.
4. **Counties** are neither direct beneficiaries of mining revenue, nor involved in regulation and management of even small-scale or artisanal mining. **Local politicians** (Governor, MP, one County Assembly Member) are on the Committee which vets small-scale and artisanal mining and agreements with communities.
5. **Mining may take place on private, community and public land.** The rights of owners and lawful occupiers to surface lands **MUST** be respected. The rights of communities are to be upheld, whether or not they have secured registered title for their properties (none have yet).
6. Where mining is incompatible with local occupation and use Government may **compulsorily acquire the land from the community**. The law guarantees assisted resettlement in the case of mining.
7. Mining applications are subject to the **consent** of the landowner or lawful occupier. **This includes communities**. However, refusal to consent can be overruled in the case of large-scale mining applications.
8. The Cabinet Secretary (Mines) designates areas for **artisanal and small-scale mining** and larger areas for **large-scale mining**. Designation of a small-scale mining area does not, in principle, affect the right of lawful owners or occupied in the area to continue to undertake **non-mining** activities
9. Applications for **large scale mining licences** are the result of invitation to tender in areas set aside as of high potential for mining, and for which the NMC may also tender. Applications for small-scale and artisanal mining are addressed at county level by a Ministry of Mines Officer deployed there.
10. Holders of Licences for large scale mining must sign a **Community Development Agreement** with the community/ies when mining will take place on their lands. It is only **within the context of this Agreement that benefits from mining are directly shared with communities**.³

¹ For details refer full CLAN Brief No. 3: *Mining, Communities & Community Lands. Legal Information and Watchpoints for Communities*, Liz Alden Wily for CLAN, July 2019.

² A key element is the Mining (Community Development Agreement) Regulations, 2017

³ The Natural Resources (Benefit Sharing) Bill, 2018 only applies to sunlight, water, forests, wildlife, industrial fishing.

COMMUNITY RIGHTS

Under the Constitution and reflected in the new Mining law, communities hold these rights –

1. **RIGHT TO INFORMATION**
From notification of mining applications of all types to information during implementation.
2. **RIGHT TO BE CONSULTED AND TO PARTICIPATE IN DECISION MAKING**
Applications for Licences cannot be issued without evidence that the applicant has **consulted with and agreed plans with communities** where large-scale mining is intended.
3. **RIGHT TO RAISE OBJECTIONS**
A person or community may object in writing to grant of a mining right within 21 days, if the application is for a prospecting licence, and within 42 days if the application is for a mining licence.
4. **RIGHT TO COMPENSATION WHEN LAND IS TAKEN FOR MINING**
In the event of compulsory acquisition, the State must promptly and fairly compensate the affected community. The community has the right to appeal to a court of law. Compensation may be paid in cash or in provision of alternative land or a mixture of both.
5. **RIGHT TO WITHHOLD AGREEMENT**
Licences for large scale mining cannot be granted until agreement on compensation is reached with the community. In addition, operations **may not legally begin** until compensation has been paid; this includes all mining including under Artisanal or Small Scale Mining Permits.
6. **RIGHT TO ASSISTED RESETTLEMENT**
Where only part of a community's land is affected, assisted resettlement in a suitable other part of its land may be sought and provided. All costs related to resettlement are to be borne by the Licence Holder. Resettlement must be implemented *"with due regard to their economic wellbeing, social and cultural values"*.
7. **RIGHT TO BE AWARDED DAMAGES**
A community has the right to further compensation where it does not lose its land but loses access to lands, buildings are damaged, water interfered with, or earning limited due to limits on grazing or cultivation. A Holder of a Licence must deposit a compensation guarantee bond with the Ministry to cover such losses under implementation.
8. **RIGHT TO ACCESS A MINING AREA**
Lawful owners and occupiers are permitted **to continue to graze livestock or cultivate** to the extent of not interfering with prospecting or mining operation. They may also maintain **customary extractive rights** for soil, clay iron, salt or soda ash
9. **RIGHT TO WATER**
The Mining Act states that lawful owners and occupiers including communities retain the right to sufficient water, and may protest deprivation of water as a result of mining, and as above, be compensated for losses.
10. **RIGHT TO CULTURE**
In the Mining Act, a **social heritage assessment** must be conducted and as necessary heritage plan developed. Mining cannot proceed until this has been approved.
11. **RIGHT TO EMPLOYMENT IN MINING OPERATIONS**
The Act requires the Mining Right Holder to give preference in employment to members of the community. In the case of large scale mining, it must also conduct training and capacity building for employees.
12. **RIGHT TO ENTER A BINDING AGREEMENT**
Licences for large scale mining are subject to negotiation and signature of a **Community Development Agreement** for (a) benefit sharing; (b) to ensure the social, economic and cultural continuity of the community; and (c) to help improve the lives and livelihoods of the community. An excluded community may petition the Cabinet Secretary for inclusion if it believes it will also be affected by mining

13. RIGHT TO FULL ASSESSMENT OF SOCIO-ECONOMIC INTERESTS PRIOR TO AGREEMENT

Any agreement may lawfully be made only **after a free, open consultation process**, including -

- a. An environmental, social, cultural and economic impact assessment;
- b. Stakeholder consultations and involvement of the community;
- c. Continuous monitoring and evaluation of the impact of the investment to the community;
- d. Payment of compensation and royalties;
- e. Requirements to rehabilitate the land upon completion or abandonment of the project;
- f. Measures to be put in place to mitigate negative effects of the investment;
- g. Capacity building and transfer of technology to the community; and
- h. Any other investigation necessary for determining how local communities will benefit from investments in their land.

14. RIGHT TO BE ASSISTED BY A NEGOTIATING AND OVERSIGHT COMMITTEE

The law establishes a **Community Development Agreement Committee (CDAC)** to –

- 1) negotiate the Agreement between the community and the mining company (Holder); and
- 2) After Agreement, to act as a standing committee to –
 - a. Monitor and evaluate compliance with the terms of the Agreement;
 - b. Provide a platform for the community to debate whether the use of revenues conforms to the development priorities of the community;
 - c. Facilitate continuous engagement between the community and Holder;
 - d. Settle all disputes that may arise between parties; and
 - e. Settle any other matter raised by the community or Holder.

15. RIGHT TO HIRE ITS OWN EXPERTS

The community is entitled to hire its own experts and capacity building, costs of which are to be borne by the Mining Right Holder.

16. RIGHT TO BE REPRESENTED ON THE CDAC

The prescribed composition of the CDAC allows for 43 percent of members to be from the community, as six representatives respectively for women, elders, male youth, female youth, persons with disabilities, and marginalised groups.

17. RIGHT OF ALL COMMUNITY MEMBERS TO PARTICIPATE

The Mining Act requires the mining company to consult with all community members concerning the Agreement. Consultation “shall be insufficient if held only with a few people or elders of the community”.

18. RIGHT OF APPEAL SHOULD NEGOTIATIONS FAIL

If negotiations between the community and holder fail, the CDAC may petition the Cabinet Secretary. If the Secretary fails to determine the matter to the satisfaction of one party the holder may apply to the Environment and Land Court.

19. RIGHT OF THE COMMUNITY TO ESTABLISH ITS OWN COMMITTEE ON MINING

There is nothing to stop a community to create its own Committee to adviser representatives appointed to the CDAC or to manage or hold oversight over activities funded by the Agreement. Where elected, the community may find it sensible to make this a specific role of the Community Land Management Committee.

20. RIGHT OF PROTECTION AGAINST MALFEASANCE BY CDAC MEMBERS

To limit bribery and corruption, the Holder (the Licensed Miner) may not make any payments whatsoever to any CDAC member.

21. RIGHT TO A MINIMUM OF 1% OF GROSS ANNUAL REVENUE OF LARGE-SCALE MINING

This is established in the Community Development Regulation. The community has the right to negotiate a higher share.

22. RIGHT TO EXPEND REVENUE ON DIVERSE BENEFITS

The Agreement may include funds earmarked for:

- a. education, training, scholarships
- b. employment within and outside the community

- c. infrastructure
- d. small-scale and micro enterprise development
- e. agricultural product marketing
- f. special programmes benefiting women, youth and persons with disabilities, protection of the environment, natural resources and ecological systems, cultural heritage and sports, and –
- g. “any other areas as may be agreed between the parties”. The last opens the way for virtually any other activity which the majority of community members support.

23. RIGHT TO EXCLUDE NORMAL SERVICE PROVISION FROM AGREEMENTS

The community may refuse to use its revenue share on any service which is scheduled in national or county plans.

24. RIGHT TO DEMAND REVIEW OF AGREEMENT EARLIER THAN FIVE YEARS

Agreements must be reviewed *at least* every five years; that is, review may be demanded earlier.

25. RIGHT TO PETITION THE COURT ON ANY MATTER OF INJUSTICE OR ILLEGALITY

This includes the process of reaching agreement, the content and application of the agreement.

FIVE KEY WATCHPOINTS FOR COMMUNITIES

1. Communities **need to be proactive** in –
 - a. demanding information for the County Mining Officer, including zoning for artisanal, small scale and large scale mining throughout mining operations;
 - b. demanding the right to be *fully* consulted in all assessments, including those relating to social heritage assessments and mitigation plans;⁴
 - c. the right to equally participate in decision-making, including agreements.
2. The Land Values (Amendment) Act, 2019 **risks under-valuing rangelands, woodlands/forests, special sites and resources**. Rights to assisted resettlement also risk being minimized. The applicant cannot get a licence until compensation is agreed with the community, and paid out. This strengthens the community’s right to demand adequate compensation.
3. It is easy for the Cabinet Secretary to overrule denial of community consent on grounds of ‘public interest’. The community may need to calculate the losses to the community in such detail to increase compensation to a reasonable level.
4. No provision is made for the Chair of the Community Land Management Committee or the elected Chair of the Community Assembly to be made *ex officio* members. Communities should insist that this is remedied, and in the process make representation equal between both parties. There will be a strong inclination for the CDAC even with community representation to make decisions on behalf of the community. Where the matter is significant, community representatives on the CDAC must insist that community members are consulted.
5. The Constitution is clear on the duties of both arms of government to provide services. Communities need to be vigilant against any inclination by local or national government to remove, halt or delay commitments to provide clinics, schools, roads, electricity and water, in hope that the community will develop these itself with mining revenue.

⁴ There is a history of inadequate Environmental Impact Assessments (EIA) and failure to put mitigation measures in place when NEMA reports these are needed